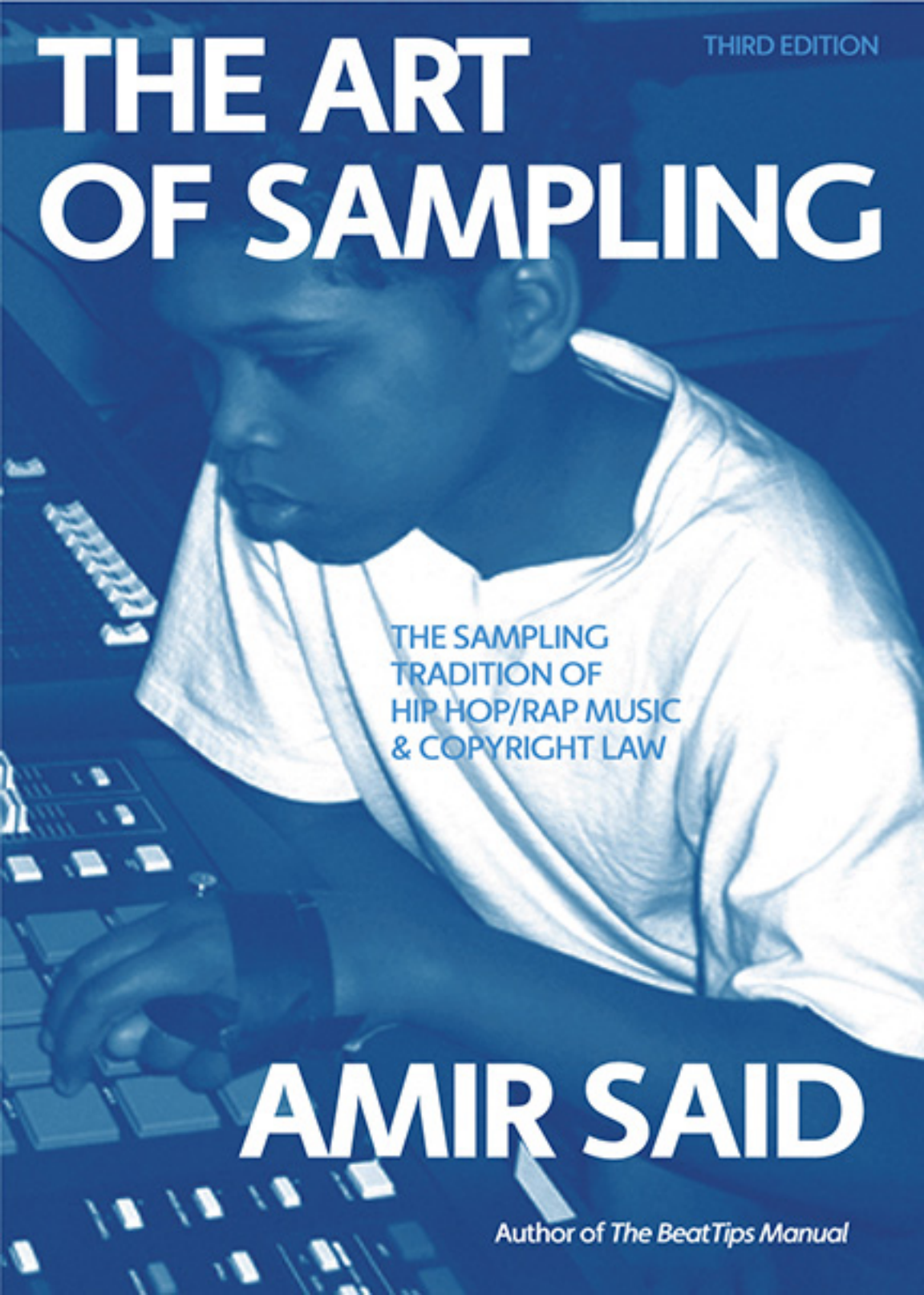
THIRD EDITION

THE ART OF SAMPLING



THE SAMPLING TRADITION OF HIP HOP/RAP MUSIC & COPYRIGHT LAW

AMIR SAID

Author of *The BeatTips Manual*

THE ART OF SAMPLING

THE SAMPLING TRADITION OF HIP HOP/RAP MUSIC & COPYRIGHT LAW

THIRD EDITION

AMIR SAID

Superchamp Books SB

New York

Published by Superchamp Books

Copyright © 2024 by Amir Said.

A Superchamp Books Second Paperback Edition

All rights reserved.
No part of this book may be reproduced in any form by any electronic or mechanical means, including information storage and retrieval systems, without the expressed written permission of the publisher, except by a reviewer, who may quote brief passages in a review. Published by Superchamp Books, Inc.
www.superchampbooks.com.
Portions of this book were previously published in a different form in *The BeatTips Manual: Beatmaking, the Hip Hop/Rap Music Tradition, and the Common Composer, Fifth and Sixth Editions* by Amir Said
(Copyright © 2009, 2013, 2015, 2019 by Amir Said.)

BeatTips™ is a trademark of Superchamp Books, Inc.

Print History:
September 2024: First Printing.

The Art of Sampling: The Sampling Tradition of Hip Hop/Rap Music and Copyright Law — Second Edition / by Amir Said
1. Sampling—Music and Digital. 2. Copyright Law. 3. Beatmaking 4. Hip Hop/Rap—Production 5. Hip Hop—History 6. Rap Music—Performance Practice 7. Rap Music—History 6. Hip Hop—Producers 8. Music—Technology 9. Music—Popular 10. Music—Social Aspects 11. African Americans—Music—History and Criticism 12. Popular Culture—United States 13. Music History I. Title

ISBN 978-1-64404-006-5 (PDF)
ISBN 978-1-64404-007-2 (ePub)
ISBN 978-1-64404-008-9 (Kindle)

Photographs:
Front Cover photo by Amir Said Copyright © 2016 Amir Said
Back Cover photo by Amir Said © 2024 Amir Said
About Author photo by Amir Said © 2024 Amir Said
Cover, Design, and Layout by Amir Said

For my son, Amir Ali Said.
Amir, nobody can be a better you than you.
("When the door opens for opportunity, walk through.")
Insha'Allah…Al-Humdullilah.

DISCLAIMER: This book is designed to provide information on the art of sampling (in particular sample-based hip hop/rap music) and United States copyright law and policy. It is understood that the publisher and the author are not engaged in rendering legal, accounting, or other professional services of the like. If legal or other expert assistance is required, the services of a competent and qualified professional should be sought. The author and Superchamp Books shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information contained in this book.

"An incisive work of scholarship, equally valuable for its insights into its process, nuanced musicology and its groundbreaking legal analysis."
—Adam Mansbach

CONTENTS

INTRODUCTION 1

PART 1: THE HISTORY OF THE FOUR ELEMENTS OF HIP HOP CULTURE, BEATMAKING, AND THE ART OF SAMPLING 55

1 A CULTURE OF SAMPLING 59
An Overview of the Four Elements of Hip Hop

2 THE ART OF BEATMAKING 125
The Birth and Rise of the Hip Hop/Rap Beatmaking Tradition: Eight Periods of Distinct Development

PART 2: COMPOSITION & INSTRUCTION
MUSIC TRADITION, CULTURE, AND THEORY, AND THE AESTHETICS, COMPOSITIONAL ANALYSIS, PERFORMANCE, AND PHILOSOPHY OF THE ART OF SAMPLING 181

3 GRANDMASTER FLASH BATTLED MOZART AT THE FEVER, AND MOZART GOT BURNED 191
The Hip Hop/Rap Music and Beatmaking Traditions, Its Theory, and How it Does and Doesn't Jive with the Western Classical Music Tradition and Its Theory

4 HOOK A BEAT UP AND CONVERT IT INTO HIP HOP FORM 271
Composition, Programming, And Arrangement — Getting The Ingredients And Putting Them All Together

5 AN OVERVIEW OF THE ART OF SAMPLING 331

6 THE SAMPLING EQUATION, AND COMPOSITION AND ARRANGEMENT IN THE ART OF SAMPLING 367

7 DRUMS AND SAMPLING 407

8 THE STORY OF RHYTHM IN BLACK MUSIC 449
The Origins of Rhythm in American Popular Music; Key Characteristics and Nuances of Rhythm and Groove; Rhythmic Feels; The Indelible Influence of James Brown on the Use Rhythm In Popular Music; and Four Critical Factors that Impact Rhythm in Hip Hop/Rap Music

9 THE MISSING CONTEXT FOR THE CLICK-AND-CLOCK RHYTHMIC FEEL 563
Putting "Dilla Drums" in the Proper Context

10 THE SAMPLING TECHNIQUES 725
Extended Sampling Techniques, Notes, Tips, and Analysis

PART 3: THE CRITICISM SURROUNDING SAMPLING 763

11 THE FUNCTION AND VALUE OF THE ART OF SAMPLING 771
The Influence of Race, Cultural Background, Musical Hierarchies, and Other Factors on Perceptions of the Art of Sampling — and Why Sampling is a "Useful Art"

12 A CRITIQUE OF DAVID SANJEK'S ESSAY "'DON'T HAVE TO DJ NO MORE'" 885
Detailing the Primary Problems with Scholarship and Criticism Surrounding the Art of Sampling and the Implications that it Holds for Copyright Law

PART 4: COPYRIGHT LAW **949**

13 AN OVERVIEW OF COPYRIGHT LAW 959
Detailing Historical Clarity on Copyright Law and Policy in the United States

14 DEMYSTIFYING COPYRIGHT INFRINGEMENT 1019
Substantial Similarity and the Complexity of Proving Infringement (And the Problem with Copyright Infringement Cases Involving Music)

15 "NO RIGHTS WHICH THE WHITE MAN IS BOUND TO RESPECT" 1041
The Unequal Protection of Black American Music Artists and How Copyright Law, Racial Discrimination, and Inequality Has Historically Disadvantaged Black Music Artists in America... And the Impact This Has on Sampling and the Implications it Holds for Copyright Law

16 THE TRUTH ABOUT ORIGINALITY AND AUTHORSHIP 1095
How the Romantic Concept of Authorship Came to Be, and the Importance of Relocating the True Meanings of the Concepts of Originality and Authorship

17 FAIR USE, PART 1: COMMUNAL CREATIVITY AND FAIR USE DEFINED 1243
Communal Creativity and Fair Use Defined

18 FAIR USE, PART 2: DETERMINING FAIR USE 1279
A Detailed Examination of the Four Factors of the Fair Use Test and How the Courts Typically Apply Them

19 FAIR USE, PART 3: THE SUPREME COURT AND THE MUSIC INDUSTRY 1279
Determining Fair Use: A Detailed Examination of the Four Factors of the Fair Use Test and How the Courts Typically Apply Them

20 *BRIDGEPORT* AND THE FALSE BRIGHT-LINE 1391
Deconstructing the Most Infamous Court Case Involving Digital Sampling

21 POST-*BRIDGEPORT*, PART 1 1427
10 Key Developments that Signal Change in the Music Industry's Attitude Towards Sampling, Part 1

22 POST-*BRIDGEPORT*, PART 2 1469
10 Key Developments that Signal Change in the Music Industry's Attitude Towards Sampling, Part 2

PART 5: SAMPLE RIGHTS vs. SAMPLE CLEARANCE 1527

23 THE SAMPLE CLEARANCE SYSTEM 1529
How the Sample Clearance System was Born, What it Looks Like Today, and the Climate of Sampling in the Music Industry

24 HOW TO FIX SAMPLE CLEARANCE, PART 1 1567
How the Sample Clearance System *Should* Work

25 HOW TO FIX SAMPLE CLEARANCE, PART 2 1589
The Tracklib Model and the Danger of Conflating "Sampling" with "Sample Clearance"

26 SAMPLING RIGHTS VS. SAMPLE CLEARANCE 1627

27 SAMPLING, AI-GENERATED MUSIC, AND THE CONTINUUM OF PERMISSIVE BORROWING 1667

AFTERWORD 1701

APPENDIX 1711

INDEX 1725

Introduction

I'm inside D & D studios. Right in the heart of Midtown Manhattan on West 35th Street between Seventh and Eighth Avenues. A veritable hip hop institution where Nas's "Memory Lane (Sittin' in da Park)," Biggie's "The Ten Crack Commandments," Jay-Z's "D'Evils," and countless Gang Starr hits like "Mass Appeal" and "Full Clip" were all recorded. The weed smoke is thick, and I'm trying hard not to feel the effects of a contact high. At the Digidesign mixing console, a modern update from the analog SSL board that once powered this room — *the B room* — throughout the 1990s, sits DJ Premier, the greatest hip hop/rap beatmaker (producer) of all time. We're talking about digging in the crates (a hip hop/rap term for searching old records to sample), and the concerts that he'd gone to with his mother when he was a kid.

Between pulls on a blunt, Premier recalls how his mother taught him a lot about music. He remembers his mother, whom he calls "a concert fanatic," taking him to Chaka Khan and Quincy Jones concerts when he was in elementary school. "My mom really keeps up with music. And I learned a lot from her, you know." Premier's *you know* is an echo, not a question.

For most Black Americans around his age, an appreciation and reverence for music — especially Black music like the blues, jazz, rhythm & blues, soul, and funk — was fostered in us and passed on as heritage. Still, Premier can't discuss his influence on hip hop/rap music without discussing his mother's musical influence on him.

Later, when Premier tells me how he first learned to "filter," an EQing term for transforming the bass, mid, or treble frequencies of a sample, he recalls how he first learned to understand the technique indirectly from Pete Rock: "With records like 'Ex Girl, To Next Girl.' Pretty much, filtering was a hot thing at the time [ca. 1993]. Pete Rock started to layer them [filtered samples], I didn't understand how to layer them. He would have the filter

and the sample going underneath each other, where he created his own bass out of filtering the original sample. Listen to 'Reminisce.' ["They Reminisce Over You" by Pete Rock & CL Smooth]. You hear the sax, then all of sudden you hear the boom, boom. It's the same exact sample, but he's fucking put it *underneath*."

That there was once a time when DJ Premier struggled to understand any of the primary sampling techniques — techniques that *he* helped pioneer in the early 1990s — points to the complexity of sampling as an art form and the learning curve that faces anyone who takes up the practice. But while Premier is a master of sampling and remains one of the art form's most visible icons, he, like most sample-based beatmakers (producers)[1] and most people in the general public, knows very little about copyright law, specifically the de minimis and fair use exceptions — the primary safe harbors of all forms of permissible borrowing.

It's been more than two decades since my formal interview with DJ Premier. In that time, so much has changed musically; but the art of sampling endures. And given the recent success of Drake and Jay-Z against copyright infringement suits involving sampling, as well as the Ninth Circuit Court of Appeals' circuit split with the Sixth Circuit's decision in the infamous *Bridgeport* case (which questioned the applicability of the de minis exception to sound recordings), the debate around the art of sampling, and the implications that it holds for copyright law, has advanced into new territory.

But what exactly is the art of sampling? Moreover, what does copyright law actually have to say about it? This book answers these two questions, and in doing so it reveals the truth about art, originality, and authorship.

***

[1] Marley Marl, 9th Wonder, every other sample-based beatmaker (producer) whom I interviewed extensively also knew very little about copyright law.

Having set the tone, I turn now to the dynamics of this book. This introduction gives you a direct idea about what to expect from this book. Further, this introduction gives you a feel for what's in this book. And like the music that this book examines at its core, the feel is everything. Alongside the feel that this book delivers, I promise to provide insights here you won't find anywhere else. My approach in *The Art of Sampling* allows readers to gain a fuller grasp of the art of sampling and copyright law, and also decipher how concepts of originality and authorship are determined in modern-day music culture.

Thesis

Sampling is an art form and music process that personifies the essence of creative borrowing, embodies the cultural practice of using something old to create something new, and illustrates how the safe harbors of copyright law should operate. But as impressive as that is, I believe the art of sampling is much more. Given the fact that the purpose of copyright law is to "promote the progress of Science and useful Arts," it's my position that the art of sampling is one of the *most* "useful arts" since the invention of sound recordings.

When we consider the full breadth of what the art of sampling has brought (and continues to bring) to the world, especially as it's practiced in and best popularized by hip hop/rap music, the benefits of the art of sampling become undeniably clear. In this regard, I have located at least five different, sometimes interrelated areas (points) that shine the brightest light on the benefits of the art of sampling.

First, notwithstanding the art of music itself, no other art form since the invention of sound recordings has been more responsible for turning common consumers into musicians than the art of sampling. And this has meant the advent of a new class of musicians, a new music-making method and process, *and* an expanded definition of what a musical instrument is (or can be).

Second, the art of sampling is the backbone of hip hop/rap music. In recent years, hip hop/rap music displaced rock 'n' roll

as the world's most popular music genre. But the truth is, hip hop/rap music was applying pressure since the late 1980s. And sampling — a mainstay of '80s and '90s hip hop/rap music's foundational aesthetics, practices, and trends — was one of the engines that powered hip hop/rap music's rise. It's also within the scope of hip hop/rap music that we can see how the art of sampling was used as a lightning rod for communication. Hip hop/rap music grew, both in terms of aesthetic and commercial popularity, for multiple reasons, but mostt notably because of how the music was used to share news (in the hood and elsewhere), present political information, and create a new style of storytelling. All of these things were fundamentally aided by the art of sampling.

Third, the art of sampling has essentially served as an accelerant for the art of rapping, one of the world's most distinguished vocal art forms. While rapping may have existed in various forms before, from *signafiyin'* and "the dozens" in the Black literary tradition to the "Radio DJ Toasts" of Black radio disc jockeys between the 1950s and 1980s, the art of sampling is the thing that really moved rap forward and helped turn it into its own art form.

Fourth, the art of sampling is an excellent apparatus for grasping copyright law. In general, the art of sampling serves as one of the best conduits for demystifying and understanding copyright — one of the most complicated and ubiquitous concepts in history. More specifically, however, the art of sampling is one of the best mechanisms for distilling the purpose and objectives of copyright, two critical things that the public is largely misinformed about. Additionally, as the world's most dominant music culture — a music culture that has undoubtedly helped (*and continues to help*) advance society — hip hop/rap music personifies the purpose of copyright law. In fact, hip hop/rap music's very existence is an example of the sort of thing that copyright law seeks to promote.

And the art of sampling, which hip hop/rap music was built on, serves as one of the best examples of how the objectives of copyright law are fulfilled.

***

I have designed the parts, chapters, sections, and sub-sections in *The Art of Sampling* in a way that articulates my thesis statement throughout this book. That the art of sampling can be used a prism through which we can explore and better understand popular music, hip hop/rap music culture, copyright law, and concepts of originality and authorship is a testament to why I believe sampling is one of the most "useful Arts" since the invention of sound recordings.

Thesis and Questions

Sampling is the most revolutionary and controversial music process in the history of Western popular music. Sampling is also an art form that: 1) personifies the essence of creative borrowing, 2) embodies the cultural practice of using something old to create something new, and 3) illustrates how the safe harbors of copyright law should operate. *The Art of Sampling* offers a comprehensive analysis of why sampling is both an art form and music process; why sampling is a great example of the fundamental cultural practice of borrowing; the real reasons why sampling is controversial; how sampling illuminates strengths of copyright law; and why the sampling tradition of hip hop/rap music is the most dominant expression of music sampling to this day.

With all of this in mind, this book seeks to answer four questions. First, Why was (is) sampling dominated by hip hop/rap music. Second, how does sampling exemplify the objectives of copyright law? Third, why has copyright law historically worked against Black music artists, and how does this historical disadvantage manifest itself in sampling and copyright discourse today? Fourth, are sampling *rights* more important than sample *clearance*?

In answering these questions, we must look at how versioning and borrowing has always been an important practice in the Black music tradition. We must also look at what made the art of sampling so appealing (and conducive) to the pioneers of hip hop/rap music's beatmaking and sampling traditions. Finally, we must explore copyright law in the United States from its roots, and we must

ascertain its primary purpose and objectives as well as the functions of its primary safe harbors: the de minimis and fair use doctrines. And within this paradigm, we must also consider how copyright law has historically excluded and penalized Black Americans.

Sampling's rise, which was led foremost by beatmakers (producers) of the hip hop/rap music tradition, happened precisely because it was born out of the Black music tradition, which has always been the vanguard of popular music (see blues, jazz, rhythm & blues, rock 'n' roll, soul, funk, and reggae). The dominance of sampling by beatmakers (producers) from the hip hop/rap music tradition — *beatmakers (producers), it must be noted, who by and large grew up in Black cultural spaces* — stems from their own adaptive culture, their ability to harness their primary resources (source material in the form of funk, soul, and jazz records) and create not only an entirely new aesthetic, but a powerful genre of music that was powered by recycling, repurposing, and recontextualing old songs and other sound recordings. Further to this, beatmakers (producers) of the hip hop/rap music tradition were the first musicians to pioneer the use of turntables, drum machines, and digital samplers as legitimate musical instruments. These same beatmakers (producers) were the first to establish a set of methods, techniques, processes, practices, and aesthetics specifically tailored to sampling as a music process.

In as much as the types of samples used in the hip hop/rap music tradition are de minimis and fair use, sampling often presents an opportunity to see the objectives of copyright law fulfilled, and exposes the strengths and weaknesses of copyright law.

Finally, copyright law is rooted in the notion of *property* rights; this is significant for understanding how copyright law has traditionally disadvantaged Black Americans. At the same time that the framers of the Constitution constructed the first copyright law of the United States, slavery was legal and enslaved Africans were considered to be *property*. This is part of the legacy (and hypocrisy) of American copyright law, and it's also the backdrop against which Black music artists would encounter copyright law early in the twentieth century. This same legacy impacts the

discourse surrounding sampling, particularly because hip hop/rap music, which first popularized sampling and remains the genre most associated with it, is dominated by Black people.

Finally, turning to sample clearance, we must understand that sample clearance is less about the objectives of copyright law and more about the power of copyright holders and music industry bureaucracies — which collectively seek to erase the main safe harbors of copyright law, the fair use and de minnis doctrines, from public view.

Who is This Book For?

This book is for anyone interested in the art of sampling, especially as it's articulated in the hip hop/rap music and beatmaking traditions. This book is for anyone interested in copyright law. This book is also for anyone interested in the concepts of originality and authorship. Thus, I believe that everyone from beamakers (producers) to rappers, and other musicians to copyright scholars to students to professors to music journalists to intellectual property and entertainment lawyers to hip hop/rap aficionados to casual hip hop supporters to creatives of all kinds will find this book of deep value.

Why Sampling, Hip Hop, and Copyright Law?

Among the general public, knowledge of copyright law is terribly low. And because of this, those who have a warped view of copyright law are succeeding with their campaign of disinformation. Discussing copyright law and its fundamental purpose in society through the lens of the art of sampling and hip hop/rap music, the world's most popular music genre, puts copyright law in a social context that's more accessible to readers from all walks of life.

A social context is one that most people can relate to; it's the backdrop that permeates everything that we know, and it's the most practical gateway to strengthening our understanding of complicated issues. Copyright law is complicated, not *complex*.

Copyright law requires a focused examination to understand it, but it's not impossible for most people to comprehend it once they know the fundamentals and key variables. Yet many copyright owners and proponents of the clear-all-samples stance do not want the public to understand copyright law at all. Instead, their aim is to convince the public that copyright law is a unilateral statute whose only purpose is to protect copyright owners. Sampling and hip hop/rap music offers an excellent framework for demonstrating the purpose of copyright law and how copyright law is supposed to function in society (i.e. the promotion of "Science and the Useful Arts")[2]. Sampling and hip hop/rap music also provides a structure for disproving the falsehoods and common assumptions about copyright law, and it gives us an opportunity to examine when and where copyright law is race neutral and, as you will see, when and where it is not.

Finally, any serious discussion of the art of sampling and the implications that it holds for copyright law requires that the sampling tradition of hip hop/rap music be a fundamental part of that discussion. The contribution of hip hop/rap music to the art of sampling is indisputable. No music form, culture, or genre has contributed more to the art of sampling, or has been more influential in the area of sampling, or did more to develop and popularize the art form, than hip hop/rap music. Hip hop/rap music is not only the music tradition that first popularized the art form; it is the music tradition that continues to dominate the art form. Moreover, the sampling tradition of hip hop/rap music best illustrates the intricacies of the art form, and sampling in the hip hop/rap music tradition remains the best example of sampling as a music process. Lastly, hip hop/rap music is the most revolutionary, most dynamic, and most important Black American art form since the creation of the blues and jazz.

[2] U.S. Const. art. I, § 8, cl. 8. See also 17 U.S.C. § 102 (1976).

American Focus

The objective of this study is to explore all of the spaces (some contradictory) in the cultural paradigm of sampling and copyright law, to delineate an area that sound recording and music publishing copyright holders and sample clearance agents conveniently suppress, and to raise the cultural status of sampling by making the case that sampling is a distinct art form. To that end, this book focuses on the historical, compositional, and legal narratives of the art of sampling. And the United States is front in center in this study, not as a slight to other countries, but because the seminal developments in the sampling tradition of hip hop/rap music first emerged and was popularized in America. Likewise, the United States is home to the first, second, and third groups of pioneers of the sampling tradition of hip hop/rap music.

Certainly, hip hop is now a global culture with active participation by people from every corner of the globe. As the founder of BeatTips, which features writers from around the world, I am acutely aware of the contributions to hip hop/rap music that continue to be made by other countries, like France, the UK, Germany, the Netherlands, Japan, Spain, Mexico, Italy, and Australia. And in the realm of copyright law, recent court cases involving sampling in Germany and France, for example, demonstrate how other countries are grappling with the implications that sampling holds for copyright law. Still, the specific history of the sampling tradition of hip hop/rap music — not the general history of the origins of what would become known as sampling — is the focus of this study. Therefore, the focus on the United States is appropriate in this regard.

A Systematic, Comprehensive Approach to Understanding and Interpreting Sampling

To interpret sampling as an art form and to ascertain what makes it that as well as a music process, we must: 1) Systematically approach sampling as an art form *and* music process; 2) Find out

the laws of its existence, its compositional elements and philosophies as such, and the mode of its manifestation; and 3) Inquire to the meaning it has and the significance of that meaning and what this holds for the artists who practice the art form.

Composition and Musical Elements of Sampling

Focusing on the *art* of sampling as also a music process means analyzing the aesthetics and styles of sampling in hip hop/rap music as well as its compositional priorities. Most studies on sampling have spent little to no time appropriately examining the compositional practices of sampling in the hip hop/rap music tradition. But any discussion of sampling as an art form that does not include a detailed examination of its compositional processes is incomplete. Thus, this book dedicates multiple chapters to the compositional profile of sampling, and it explores all of the elements, ideologies, philosophies, and ethics of hip hop/rap music's sampling tradition.

No Elitism, No "Purism" – Consideration of Sampling in Every Period, Every Era

Some commentators and "hip hop heads" narrow their gaze to a certain era and a certain style and sound of hip hop/rap music. They speak of this era — usually it's the '90s or the late '80s and '90s — in glowing terms, and they consider the aesthetics of this era as "real" hip hop. In doing so, they relegate any era or style and sound outside of this narrow window to the position of "not real" hip hop. Another feature of this elitism is the elevation of hip hop/rap music as an art music without any other function. But while hip hop/rap music *is* an art music, it's fundamentally *dance* music. In fact, historically, hip hop/rap music functioned primarily as party music. A rejection of this fact is a rejection of the full complexion of hip hop/rap music.

Hip hop elitists — here I'm speaking specifically of those who dismiss eras, styles and sounds that do not adhere to '90s-era aesthetics — are typically not tuned into what's emerging in other

styles and sounds, most notably trap music and drill. And as such, they don't see the continuum that's actually at work in those styles and sounds.

While sampling had its biggest moment between the late '80s and mid-'90s, it has been present throughout all eras of recorded hip hop/rap music; and it's currently experiencing a revival that, in sheer numbers, eclipses the number of sample-based artists of previous eras. For this reason alone, I would be well-advised not to consider every era of hip hop/rap music. But as a historian, I'm obligated to include every era.

On Highlighting the Giants of Sample-Based Hip Hop/Rap Music

Inasmuch as this book includes detailed examinations of the beatmaking styles and sounds of well-recognized giants in the sample-based tradition of hip hop/rap music, my focus is, above all, accuracy. This is one reason why in the Composition Part of this book, I explain the nuts, bolts, and advanced areas of composition, programming, and arrangement in the beatmaking and sampling traditions of hip hop/rap music. Also in the Composition Part of this book, I highlight the most common methods, processes, and techniques employed by *all* beatmakers (producers) in hip hop/rap's music tradition. For example, things like filtering highs and mids out of samples, or writing out drum pattern and program ideas, or using shuffle rhythms, or dragging drum-techniques are neither rare or unique in the beatmaking and sampling traditions of hip hop/rap music. With knowledge of the standard (and advanced) processes of beatmaking, readers unfamiliar to hip hop/rap' sampling tradition can better understand *if* and *when* a particular beatmaker (producer) made an innovation, as well as accurately determine how monumental that innovation may have been.

In this regard, there are a number of sample-based giants that I discuss throughout *The Art of Sampling*. Among the names of particular note are: Marley Marl, DJ Premier, RZA, Pete Rock, Dr. Dre, Q-Tip, Prince Paul, Large Professor, DJ Quik, DJ Toomp, and

J Dilla. Although I do not discuss these names in any specific order, my ranking of each in the proverbial "Greatest Hip Hop Producers of All Time" can be found in the appendix of this book, along with a detailed explanation of how I ranked the top 25.

In any event, the purpose of this book is not to prop up any single hip hop/rap beatmaker (producer) above all others to fit a subjective narrative. My appreciation of the art of sampling, the art of beatmaking, and the hip hop/rap music tradition runs deeper than any praise that I may have for any single hip hop beatmaker (producer). My agenda is not to try to prove hyperbolic claims or to assign credit where it does not belong, but rather to represent the sampling tradition of hip hop/rap music (and the facts of copyright law) accurately. My examination of work and contributions of the most recognized names in sample-based hip hop/rap music is the product of empirical evidence and my knowledge as a serious practitioner — both as a beatmaker (producer) and rapper — of sample-based hip hop/rap music. Nothing more, nothing less.

Finally, in writing this book, I had no ambition to prove that any individual beatmaker (producer) is a "genius." I believe that all of the most well-known beatmakers (producers) — as well as many others — in hip hop/rap music are talented in their own unique ways. And I'd say some are musical geniuses to varying degrees. But that's not my concern, nor is it an occupation of this study. My focus instead is on describing the depth of the sampling tradition of hip hop/rap music. Inasmuch as I detail the pioneering achievements of specific beatmakers (producers), my goal in doing so is to: 1) Offer examples for the topics that I discuss in this book, 2) To present historical accuracy, or 3) To clarify the lines of influence within all beatmaking periods.

Lastly, I'm not a super-fan (nor am I a hater) of any one beatmaker (producer). I think this fact has allowed me to remain open throughout my 22 years of research in this field. This has led me to go where the story leads without bias or prejudice; and at times, due to new information, this has prompted me to revise my previous analysis whenever and wherever necessary.

The Role of Race and Racism in Music and Copyright Law

If we avoid the path of talking about race and its relation to music and its historical implications for copyright law, we distort the reality of music culture and how copyright law has been — and continues to be — used *against* Black music artists. More specifically, we must also recognize that most of the writing about Black music, "whether historical or discographical, empirical, or theoretical," has been done by white people.[3] So this book doesn't merely do lip service to the role that race plays in the discussion of sampling and the implications that it holds for copyright law. I have not watered down this factor, and I have not attempted to make the discussion more palpable to the white gaze. The reality is, race and racism are sensitive topics that has been glossed over in most of the discourse surrounding sampling and copyright law. This makes it seem like the debate around sampling and copyright law is a "race-neutral" issue. But nothing can be further from the truth.

Hip hop is universal; this is an undeniable fact proven the world over. And within the scope of hip hop/rap *music*, in terms of the racial/ethnic makeup of practitioners, beatmaking — and by extension sampling — is its most ubiquitous and accessible aspect. Evidence of this can easily be seen in the global beatmaking community. But that said, the universality of hip hop should not be celebrated at the expense of the Black innovators who pioneered and continue to lead the music's primary compositional and vocal practices. Nor should the universality of hip hop/rap music be used to temper the reality of unequal treatment by Black musicians and white musicians in the music industry and the media.

---

[3] In his book *Blues Fell This Morning: Meaning in the Blues*, originally published in 1960, Paul Oliver has noted that "blues scholarship has grown, though regrettably, not among black writer and researchers. The bulk of the work, whether historical or discographical, empirical or theoretical, has been done by white writers from outside the culture, Europeans as much as American." (Paul Oliver, Blues Fell This Morning: Meaning in the Blues, Cambridge University Press; 2nd edition (July 27, 1990), xxi. Today, nothing has changed. The bulk of the work — articles and books about Black music — is still written and published overwhelmingly by white writers and researchers.

We can't properly discuss the art of sampling and American copyright law without discussing racism in America, because Black Americans, the group most forcefully and profoundly targeted by racism in America since the inception of the United States, are at the center of the story of the art of sampling.

No ethnic or racial group has contributed more, or been more influential, in the area of sampling than Black Americans. If we were to compile the names of the ten or twenty-five or fifty or 100 of the most significant sample-based beatmakers (producers/musicians), those whose ideas move and have the greatest influence on contemporary and subsequent generations of the art form, the race of such a list would be overwhelmingly Black. Despite this fact, most scholarship and analysis around the art of sampling and the implications that it holds for copyright law, *which not coincidentally continues to be done overwhelmingly by white scholars*, has either tiptoed around the race dimension (usually by under reporting it or offering a few cursory lines about it); or it has ignored race altogether, as if music, art, culture, politics, and law are race-neutral components of society— or as if racism hasn't played a role in the American music industry since its inception. Thus, this book includes straight-forward, comprehensive discussions about race and racism when and wherever applicable.

Likewise, there can be no denying that race has played (and continues to play) a serious role in the debate around sampling and the implications that it holds for copyright law. If sampling had been popularized by white people, the conversation would be different today; we would hear a lot more about de mininis and fair use. In Chapter 19, I look at the curious case of Girl Talk (Gregg Gillis), the white sample-based musician who openly sampled thousands of contemporary artists *without* any attempt to clear the samples that he used. Girl Talk, and his then-label Illegal Art, famously claimed that his music made fair use of the artists that he sampled. But what happened next, or rather what did *not* happen next, points to the double standard.

As law scholar K. J. Greene has pointed out, copyright law does not exist in vacuum, "but in a concrete social milieu."[4] This social milieu in America is based on race, class, and economics. Thus, a more comprehensive — and more honest — discussion of the art of sampling and copyright law requires examination of the art of sampling and American copyright law from a historical and social perspective.

Some will undoubtedly find it difficult to read the aspects of this book that factor in race, ethnicity, and racism. Others will be turned off. And I'm all right with that because typically these are the folks who prefer that issues concerning race, ethnicity, and racism are white washed or left out of the conversation altogether — for several possible reasons. First, there are those who dislike the framing of hip hop/rap music from its Black historical perspective; they prefer to look at hip hop/rap music as a "universal" construct that has no significant connection to any one race. While I strongly agree (and promote the fact) that hip hop/rap music *is* universal, I reject the notion that discussing its roots, history, and numerous developments and their causes through the prism of race, ethnicity, and racism is mutually exclusive to this fact. Actually, my stance is that if you're really a fan and supporter of hip hop culture and hip hop/rap music more specifically, you will appreciate gaining more insight to it.

Second, there are those who know, to some extent, the impact of race, ethnicity, and racism on hip hop/rap music, but such issues are uncomfortable for them to consider or talk about. This is akin to people who say the proverbial "*I don't see color*" when being confronted with direct questions about race and racism.

Finally, there are those who believe that race, ethnicity, and racism have no place in a discussion about music because for them "*music is borderless*." Sounds good until you look at the facts: Hip hop/rap music is part of the broader Black music tradition; the chief pioneers and the all-time giants in the sampling tradition of hip hop/rap music are Black; throughout each of the hip hop/rap

4 K. J. Greene, "Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection" *Hastings Communications and Entertainment Law Journal*, Volume 21 | Number 2, Article 2, 1/1/1998, p359.

music's primary beatmaking periods, a period spanning 40 years, Black people have been at the forefront of hip hop/rap's sampling tradition; the most sought after source material in the sampling tradition has been soul, funk, and jazz; *and* copyright law has historically not been on the side of Black people. Are we to treat all of this as happenstance?

Hip hop, as a culture overall, is welcoming by its very nature. Part of the reason this attribute still rings true today is because hip hop/rap music *invites* and embraces the most eclectic mix of people to its shores. No genre of popular music is as accessible and accepting as hip hop/rap music! But part of the implicit deal you make when you enter hip hop/rap music is that you respect its roots.

Finally, most of the commentators writing about sampling are resolutely white and middle to upper middle class. They are not grounded in the lived experience of Black people. Rather, they are products of spaces that Black people have historically been barred from entry — legally, physically, culturally, and economically. I do not suggest that one need be Black to write about the sampling tradition of hip hop/rap music, but I do believe that an accurate, fully comprehensive, historically correct accounting of sampling in the hip hop/rap music tradition can't be told *without* an honest reflection on race and racism and the implications that it holds (and has always held) for Black music and art and copyright law. In this respect, I believe that the voices of Black writers who were reared in Black cultural spaces, who have first-hand experience with racism, who understand the historical mistreatment of Black music and art in America — including everything from stolen creative labor to whitewashing monumental innovations to criticism embedded with overt and sub-conscious racism — is highly valuable. I am one such Black writer, and my understanding in this area informs this book.

Next, as hip hop/rap music journalist Dart Adams has noted, one problem with early hip hop/rap music journalism was that the white writers who dominated the space struggled to understand the music:

> The fact that so many white rock writers were tasked with critiquing Rap early on and the resentment & racism leaps off the page as

> you read the reviews when these same men supposedly revere Robert Johnson, Chuck Berry, Jimi Hendrix, etc. but when there's no guitar player around? Those early days we had [Black music journalists] Greg Tate, Havelock Nelson, Nelson George & Barry Michael Cooper ***amidst a sea of white rock writers who had no clue of what they were listening to***. They tried to find 'value' in it whereas Tate, Nelson, George & Cooper didn't need to struggle to comprehend. [emphasis mine][5]

In academia and the music journalism industrial complex, white writers have historically been privileged to write about Black music, and this included hip hop/rap music. Commenting on the growth of scholarship around the blues, Paul Oliver noted in his book *Blues Fell This Morning: Meaning in the Blues* (1960) that "[t]he bulk of the work, whether historical or discographical, empirical or theoretical, has been *done by white writers from outside the culture*."[6] A similar pattern remains in force today with hip hop/rap music. As a result, racial bias and aesthetic preferences counter to hip hop/rap music has meant that these white writers did not comprehend hip hop/rap music— neither its compositional aesthetic forms or its lyricism, which was often loaded with slang and vernacular that they could not decipher. Owing to this, these white writers deemed hip hop/rap music inferior to other music genres (especially rock 'n' roll), muted the essence of hip hop/rap music, and doubted sampling as an art form and legitimate music process.

Finally, many white commentators shy away from discussing the details of racism and the lived experiences of Black people, not only because they haven't lived the same experiences (or at least the same experiences while being Black/non-white), but also because they think that they can't relate. This speaks to the larger issue of many white people not reading books by Black people and other people of color. The looming idea for the white person in this group is, "I can't relate."

But Black people and other non-whites spend their lives reading books that are predominantly written and published by

[5] Dart Adams, Twitter, 2/2/2021 (emphasis mine).
[6] Paul Oliver, Blues Fell This Morning: Meaning in the Blues, Cambridge University Press; 2nd edition (July 27, 1990), xxi.

white people— both because we don't have a choice (trade and academic publishing are dominated by white people) and because critical thought demands it of us. We don't check out because we can't relate. We continue to read because we know there's value in amassing insight on the subjects that interest us or the issues that define the world around us. This is another reason why race plays a prominent role in this book. Race plays a prominent role in American society at large, especially in the arts, the legal system, and public education. As a researcher and practitioner of the art of sampling, it would therefore be malpractice on my part to not discuss race, ethnicity, and racism when and where they apply.

Thus, with this book, I have focused more broadly on serving critical thinkers, regardless of their race or ethnicity. I have not lessened the blows of racism for fear of making some white readers uncomfortable. Discomfort is sometimes a part of learning, and a big part of taking on and embracing new perspectives.

Other Studies on Sampling

Hip hop/rap music introduced sampling to popular culture, and it's the music form most responsible for popularizing sampling. But most studies on sampling have focused (narrowly) on the implications of copyright law and have not offered a comprehensive examination of the compositional elements of sampling, especially within the hip hop/rap tradition. Some studies have done a commendable job of using an ethnographer's lens to observe some of the creative and social aesthetics of sampling. But while such studies may include some of the foundational points and aesthetic characteristics of sampling, they have not included a comprehensive examination and analysis of the methods, processes, and styles that collectively define the art of sampling as a compositional process. Likewise, such studies have not included an instructional guide for anyone interested in learning *how* to make sample-based beats.

Some studies on sampling have focused solely on the implications of copyright law, reducing sampling in hip hop/rap music to a component of a larger "remix" culture. Remix culture, as

coined by Lawrence Lessig, lumps together all sample-based music, and seeks to present a collective force for change in copyright law. But Lessig co-opted and misused the term "remix"; and in doing so, he minimized the importance of the sampling tradition of hip hop/rap music. A *remix* (or *remixing*) is not sampling per se, certainly not in the same sense that it's commonly understood within the hip hop/rap music tradition. A remix is where the original multi-track recording of the song is used to build a new *version* from its component parts. Remixing is where you actually separate the individual pieces of the song, even remove all instrumental pieces, *but you keep the original vocals as is* or rearranged.

So-called "mashups" do not fall under the hip hop/rap tradition's common rubric of sample-based beats; and a "remix" is not equivalent to a "sample." While a remix *may* include samples, a remix is a *version*, i.e. a variant, of an original song; for example, the same beat with new vocals or the same vocals with a new beat. A remix involves using the core of the original sound recording, and it almost always includes the lyrics of the original song, along with additional elements. Therefore, a remix is a derivative work of the original song. By contrast, sampling, as it is practiced in the hip hop/rap music tradition, involves the transformative use of snippets from sound recordings and other source material. So a sample is just a small excerpt from a sound recording that's used to help create a new song, one which contains a different core from the song it borrowed from, and new lyrics. Therefore, the new song that contains the sample is not a derivative work of the sound recording which it sampled.

So we must be careful in how we situate "remix," "sample," and "sampling" in discussions of sample-based beats. Also, the work of most mashup artists should not be compared to the work of the likes of DJ Premier, Marley Marl, RZA, J Dilla, et al. To do so is, at best, inappropriate. At worst, it's intentionally misleading. Nonetheless, some studies on sampling have introduced their discussions with Girl Talk as the focal point. If some music and copyright scholars believe that Gillis, the musician once widely considered to be the figurehead of mashups, is the best entry point into the world of

sampling, so be it. But I find that the term "mashup" is a narrow description of what Gillis actually did. When Gillis was doing mashups (he has since shifted to making more traditional beats), there was a conceptual aesthetic that he applied to his work, and he displayed a deftness for mining both old and contemporary source material. Both things, having a clear and deliberate conceptual aesthetic and a knack for digging in the crates, are important traits of sample-based beatmakers. Still, what Gillis does (did) — with regards to his mashups — is not exactly parallel to what sample-based beatmakers do in hip hop/rap music's sampling tradition.

***

As for those studies that have focused solely on the implications of copyright law, the ability or inability of the current copyright statute to effectively deal with the implications of sampling is the central thrust. For the broader purposes of these studies, a comprehensive examination of the art of sampling in the hip hop/rap tradition is presumably unwarranted. But in both cases, these studies have not been written or led by beatmakers (producers), sample-based or otherwise, or anyone with an expansive background in hip hop culture. There is nothing inherently wrong with this, but I believe that a voice from someone within hip hop, especially a sample-based beatmaker (producer) deeply rooted and actively engaged in beatmaking culture, is more valuable to any examination or discussion of sampling. Therefore, *The Art of Sampling*, which builds upon portions of my previous work found in editions of *The BeatTips Manual* (2002, 2007, 2013, 2015) is my second formal entry into the ongoing dialogue about sampling and copyright law.

Considering the fact that most studies that have covered sampling have focused on one tract or another — the aesthetic or copyright law — I wanted to write a book that thoroughly examines sampling in equal parts; everything from its methodology to its historical and aesthetical characteristics to the implications that it holds for copyright law. Furthermore, I wanted to provide an instructional guide for anyone interested in learning *how* to make sample-based beats. With regards to copyright law, I wanted to

present the implications that sampling holds for contemporary interpretations of copyright law. Within this framework, I wanted to: 1) Discuss historical concepts of originality and authorship; 2) Offer a set of guidelines for a compulsory sound recording license; and 3) Provide guidance for successfully making beats that meet the de minimis or fair use thresholds.

Problems with Scholarship on This Subject: Practical Experience, Fandom, Privilege, and Bias

With a few conspicuous exceptions, I have found that the scholars who have written about sampling lack the practical experience needed to produce serious insight. As such, they don't have a strong grasp of the compositional nature of the sampling tradition of hip hop/rap music. Thus, these scholars are handicapped by the lack of experience in actually making sample-based beats or hip hop/rap music in general. And nearly all of them have an incomplete understanding of hip hop's history.

Further, many of them approach this field of study as non-vested observers, i.e. they're not actually stakeholders in hip hop culture. Even still, their "objectivity" is often deeply biased, reflecting common assumption and the influence of their privilege. The result then is that the character of their works is either "both sides" literature or terribly one-sided, lacking details, contexts, accuracy, and whole truths.

Also, many of these scholars present their *fandom* of hip hop as a means of cover for or distraction from their bias and lack of knowledge on this subject. With regards to the latter group, what's often clear is that their fandom is linked to a narrow survey of hip hop/rap music, a love for a specific type or era of hip hop/rap music or specific hip hop/rap artists, not a comprehensive appreciation for or familiarity with hip hop/rap artistry across multiple eras. While most hip hop/rap fans like a broad swath of music, they often have specific tastes that can be easily identified by their favorite artists.

No fan is neutral. For instance, if you like Wu-Tang Clan, Nas, and M.O.P., chances are you also like Ghostface Killah, Mobb

Deep, and AZ. Likewise, if you're into Talib Kweli and Common, you probably like Mos Def and Pharoahe Monch. And when it comes to beats, if you like DJ Premier and RZA, you're bound to like Large Professor and Pete Rock. Same goes for J Dilla and Madlib. Same goes for DJ Shadow and RJD2. Same goes for DJ Toomp and Shawty Redd. Of course, you can be a fan of all of the aforementioned hip hop/rap artists (as I am), but your preference among these artists is never indifferent; we all rank our favorites.

As it follows, our taste in music dictates what we listen to and what we deem less or more significant. This explains, in part, why one scholar may place higher priority on DJ Shadow and RJD2 (or even Girl Talk), and subsequently use these beatmakers (producers) as the principle lens through which he examines the art of sampling. This is a choice, and that's ok. But this choice is insufficient if you're really interested in a comprehensive examination of the sampling tradition of hip hop/rap music, its pioneers, and its most revered icons. Whether this choice is based on bias or a lack of knowledge of the key practitioners of the art form is of less importance; what counts the most is that the scholarship reflects the reality.

Among much of the previous scholarship on sampling, we see the same list of names: Beastie Boys, Public Enemy, and De La Soul. While all of these artists are iconic in their own right, highlighting this group of hip hop/rap artists is more telling because of who's *not* included. Rarely is there ever even a cursory mention of Marley Marl, DJ Premier, RZA, Large Professor, Pete Rock, or Q-Tip and their fundamental contributions to the beatmaking and sampling traditions of hip hop/rap music.

The Beastie Boys are not the best representation of sampling in the hip hop/rap tradition; they receive attention because they were sued for copyright infringement. Many scholars begin (and often end) their research there, as if The Beastie Boys are the prime example of sampling. A similar thing is at play with De La Soul. Although Prince Paul, the producer of De La Soul's first album, *3 Feet High and Rising*, is an icon of beatmaking and sampling, *he* is never the focus, De La Soul is — because they were sued for copyright infringement.

Lastly, white privilege and bias in academia is also a problem that has shaped scolarship on this subject. White scholars are privileged in the study of Black music, legal studies, and race. In "Racial Critiques of Legal Academia," *Harvard Law Review* (1989), Randall L. Kennedy noted that it is "striking the degree to which major institutions, including those controlled by whites of a decidedly liberal bent, evinced a strong preference for *white* commentators on racial issues."[7] Today, more than 80% of all college professors in the United States are white, and only 3% are Black[8]; and the scholarship done on sampling and copyright law in America is conducted nearly all by whites. This means that not only is the whole story of modern sampling and copyright law not being told, the portrait of some of the central players — i.e. Black American music artists — is barely being sketched, leaving lots of critical analysis off to the side.[9] Because white privilege is a feature, not an accident, of academia and publishing, whites are given nearly all of the opportunities to exploit popular interest in these subjects. Thus, the distribution of scholarly influence in this area is controlled, dominated, and promoted by whites.

[7] Randall L. Kennedy, "Racial Critiques of Legal Academia," *Harvard Law Review*, Vol. 102, No. 8 (Jun., 1989), pp. 1758-1760.

[8] "College faculty have become more racially and ethnically diverse, but remain far less so than students," *Pew Research Center*, July 31, 2021 https://www.pewresearch.org/fact-tank/2019/07/31/us-college-faculty-student-diversity/; "Race/ethnicity of college faculty," Nationnal Center for Education Statistics (2018) https://nces.ed.gov/fastfacts/display.asp?id=61; Matthew Lynch, "Study: Nearly 90 Percent Of Full-Time Professors Are White," *The Ed Advocate*, Feburary 21, 2018 https://www.theedadvocate.org/study-nearly-90-percent-of-full-time-professors-are-white/; Colleen Flaherty, "Professors Still More Likely Than Students to Be White," *Inside Higher Ed*, August 1, 2019 https://www.insidehighered.com/quicktakes/2019/08/01/professors-still-more-likely-students-be-white.

[9] Chapter 8 of *The Art of Sampling* details how this privilege and lack of diversity, impacts the scholarship and criticism — even when such scholarship and criticism aims (seemingly) to defend sampling.

Skewed Audience, Skewed Research: Another Notable Problem with Scholarship on Black Music

Here, I present an important note about scholarship surrounding this subject, especially as it pertains to accessibility, research, and coverage of composition and performance practices in the art of sampling. In terms of audience, white scholars who write about Black music do so mainly for fellow whites; Black people are never their primary audience. In this paradigm, then, they have an *extractive* relationship with Black communities, which often means that they harvest loads of information — typically without a parallel absorption of critical context experienced by most Blacks. Because of this, even when the scholarship (or criticism) is useful, it can misrepresent or misinterpret facts about and developments within Black music. This extractive behavior is enabled, co-signed, and ultimately protected by those (practically all whites) who run academic journals and university presses (peer-reviewed publications).

The points I make here should demonstrate to readers how terribly one-sided and inherently biased much of the scholarship (and criticism) written by whites researching Black music actually is. This does not suggest a lack of rigorous research on the part of white scholars studying Black music and the communities that create it; again, information harvesting in this regard is prevalent — even if it does tend to work as a form of cover for whites studying Black music. Instead, speaking frankly about the dominance of white scholars in musicology in general and Black music in particular highlights the practices of exclusion embedded in musicology and Black music studies. Such frank and contextualized discussions reveal how these disciplines, its members, and its discourse are shaped: Notably with little to no input from Black voices. This is especially the case when it comes to sampling and hip hop/rap music.

And as for copyright law? The portrait is far more narrow; the level of domination of this field by whites dwarfs the level of

domination by white scholars (and critics) covering Black music. Taken together, the full picture shows us that Black people — who are the creators of Black music and who are at the very center of any discussion about sampling, copyright law, and hip hop/rap music — are practically not even a part of and typically not invited to the discussions that are often about us and our musical creations and innovations, and the implications that these creations and innovations hold for copyright law and culture more broadly.

Thus, to not deal with race head-on in a book about sampling in the hip hop/rap music tradition and copyright law is to avoid a critical part of the story. This book does not skip out that responsibility; it delivers this obligation with depth and honesty.

The Truth About Criticism Surrounding the Art of Sampling: The Authorization Problem

Here's a white writer from *New Musical Express* in 1979 writing about the voice and debut album of a Black singer named Chaka Khan:

> "Chaka has a hit now, but not the credibility… Her voice sounded *much* better when she was with Rufus [the music band Rufus]… Chaka *always* sounds stretched rigid, reedy and uptight. She sounds like a boastful *booby-prize*. And never more so than on "I'm Every Woman." **Lacking even the common sense** of Peggy Lee's swaggering torch, the single is a funky, **grandiose gravel**, 'emanicipated' only in that one can imagine the narrator taking the 'active' sex role, leaving *you*, big buyer, to just lay back and enjoy it. (Chaka didn't have the nerve to say 'This song sucks.')…
>
> Chaka blands out (not even murders, you can't kill a blank space) *unknowns* by Ashford, Simpson, Benson. But when as a finale she perverts Wonder into "*Chaka wore pigtails!*' I just want to yeukk: **how can a black singer treat a black singer this way**.
> **Still, it's very ethnic:** a strained atmosphere of 'partying' pervades the more up-tempo tracks, accompanied by a stray '*Get down!*' or '*Hey!*' when things get really out of hand. It's definitely a swinger's record; **I'm too boring for it and vice versa**. **Most interesting thing is the liptstick-print motif which links the sleeve-sides**.

This is the nicest thing I can think of to say about the record." [emphasis mine][10]



Notably, Chaka Khan's "I'm Every Woman" did not "suck" for Black people in 1978. The song was a hit upon arrival in 1978; it reached number 1 on the *Billboard* Hot Soul Singles chart, and number 21 on the Billboard Hot 100. "I'm Every Woman" sits in the canon of Black American music, and it remains an honored song — for various reasons, not least of which is Chaka's singing.

Burchill's critique represented not only the misfires of an outsider, it was implicitly racist. Further damning is the fact that Burchill *knows* the music's not intended for her (*"It's definitely a*

[10] Julie Burchill, "Black girls bare teeth … an' ting," *New Musical Express*, February 17th, 1979.

swinger's record; I'm too boring for it and vice versa"), yet she reviews it anyway! The debut album of one the most-revered Black American soul-funk singers, and the most interesting thing for Burchill (*the nicest thing she can think of to say*) is the liptstick-print motif which links the sleeve-sides.

In his book *Blues Fell This Morning: Meaning in the Blues* (1960), Paul Oliver has noted that "blues scholarship has grown, though regrettably, not among black writer and researchers. The bulk of the work, whether historical or discographical, empirical or theoretical, has been done by white writers from outside the culture, Europeans as much as American."[11] When it comes to white commentators dominating the scholarship of Black music and related topics, not much has changed. Therefore, in order to make the case that scholarship surrounding the art of sampling is dominated by white scholars and commentators and is often lacking in context, detailed facts, accurate interpretations of key moments in hip hop/rap music history, and recognition of the primary figures in the development art of sampling, I take an unflinching look at the criticism surrounding the art of sampling, and I pull back the curtain on how racial and cultural hierarchies in America have affected and continue to affect this criticism.

Chaka Khan survived Burchill's pan, of course, and she went on to become one of the greatest soul/funk singers of all time, a veritable singing giant in the Black American Music Tradition. But Burchill's "review" in NME is just one example of how white writers can sometimes be out of touch with Black music, yet empowered nonetheless to write about it.

In her 1979 piece on Chaka Khan, Burchill was either aware of her racism (in which case it was intentional and we can plainly see her contempt for Black people), or her racism was inadvertent; (in which case her contempt for Black people remaining apparent nonetheless). In either case, Burchill was *authorized* to write this piece on a Black music artist, and it's painstakingly clear that there was no one Black involved in that editorial decision.

[11] Paul Oliver, *Blues Fell This Morning: Meaning in the Blues*, Cambridge University Press; 2nd edition (July 27, 1990), xxi (emphasis mine).

I get that music reviews are highly subjective, but Burchill's review isn't a just a takedown of Chaka Khan and her music. It's a template for what often occurs when someone who lacks a fundamental understanding of Black music expression is authorized to write about Black music. This authority/ lack of understanding dichotomy continues today in hip hop/rap music, where we continue to see the editorial staffs of hip hop/rap music publications led almost always by white people.

I'm not suggesting that all white music writers and researchers misrepresent Black music, or that white people are inherently incapable of accurately covering Black music, or that white people should not write about Black music. Nor am I making the case that there are a bunch of other Burchills doing criticism in an area that they're not fit to cover — even though a careful audit of hip hop criticism from the late '80s to today would reveal a steady number of Burchills! My point is, white commentators, writers, and researchers are *authorized*, notably by academia and mainstream media, to write about Black music. And this authorization has historically meant that white commentators are privileged over Black commentators when it comes to covering Black music.

Thus, the default authorization of white writers in Black music scholarship and criticism makes it possible for the Burchills to exist just as much as it does for the well-meaning (not always) white critics and scholars who lack the range and connection to write comprehensively about Black music and Black culture.

The authorization problem becomes more complicated when we look at sampling and copyright law (the latter being an area dominated by white people from scholarship to the courts). The art of sampling is not the sole province of Black music artists, nor is the art form exclusive to Black culture. But the story of the art of sampling, especially in hip hop/rap music — the music genre that first popularized and continues to personify the art form — can't be told *without* discussing Black music artists' fundamental role in this story. In this respect, the story of the art of sampling, as written by most white writers to date, is typically missing this crucial inspection.

Favoritism vs. Empirical Evidence: How Taste and Sonic Preference Influence Hip Hop/Rap Music Scholarship

Marley Marl, Easy Mo Bee, DJ Premier, RZA, Pete Rock, Q-Tip, Large Professor, DJ Quik, DJ Toomp, J Dilla, Madlib— these are all important figures in the beatmaking tradition of hip hop/rap music. But one's sonic preference for and familiarity with (or lack thereof) these names goes a long way in shaping one's research, focus, and arguments. And I would argue that this holds political implications for many music writers. Inasmuch as most music writers reveal (through their writing) their taste and sonic preferences, it's often clear when the "favorites" of a music writer are being pushed to the forefront. This can have a chilling effect on the accuracy of the scholarship.

Certain music writers lean towards certain styles, sounds, and aesthetics. The more narrow the sensibilities, the more narrow the scholarship. For instance, if one holds no preference for hip hop/rap as *dance* music but instead prefers hip hop/rap music as "art music" (it's often both), then one is less like to be familiar with or interested in highlighting the qualities of hip hop/rap music as dance music or how this dance music powers hip hop nightclubs or the impact of such dance music on hip hop production overall. Likewise, if one has never spent time in hip hop clubs and/or dislikes hip hop/rap music as "club music" — think today of trap and drill — and does not carefully consider its qualities and aesthetics, then one's study of hip hop production in general will be limited.

Although my focus is the sampling tradition of hip hop/rap music, ostensibly a quite specific scope, my research is broad and comprehensive precisely because: 1) My tastes and sonic preferences are broad; 2) Because sampling touches all styles of beatmaking and all sub-genres of hip hop/rap music; and 3) Because, having spent a considerable amount of time in hip hop nightclubs, I know and I appreciate the hip hop/rap "club music" aesthetic just as much as I appreciate hip hop/rap as "art music." All of this leads me to follow empirical evidence and to shun favoritism.

About the Slant of This Book

Here, I'd like to make two critical notes before addressing the larger slant of this book. First, while I'm a practitioner and staunch supporter of hip hop/rap music and its beatmaking and sampling traditions, my general interest in music study and the history of music precedes my affinities to hip hop/rap music. I think this fact serves this book well, especially because it has always guided me to consume and absorb a broader spectrum of hip hop/rap music, not what often is tantamount to either purist ideas or commercial leanings. In the case of the prior, purist ideas about hip hop/rap music typically lead to a terribly incomplete and often inaccurate analysis of hip hop/rap music.

Second, this study strongly objects to the "poverty" origins of sampling. This is the false narrative that basically states that because of poverty, would-be musicians couldn't afford traditional instruments, so they had to turn to sampling. This is untrue and ridiculous. Sampling was a choice, and quite an expensive one. Digital samplers were expensive in the early to mid-1980s, certainly more than your average electric guitar, bass guitar, keyboard, and drum kit *combined*. And while the price dropped by the early '90s, digital samplers were still a considerable investment. Many beatmakers (producers) — including me — put samplers, often used ones, on payment plans. Finally, the regular purchase of vinyl records was in and of itself an expensive proposition. While poverty certainly plays a role in the roots of hip hop culture, dispelling the "poverty" false narrative of sampling as a chosen music practice helps establish the seriousness of sampling as an art form and music process.

***

This book is written from the up-close perspective of a sample-based beatmaker (producer) and life-time practitioner of hip hop/rap music. I'm deeply connected to and entrenched within the traditions and culture of hip hop, so this book is not an anthropological study

of a culture in which I only have a fleeting interest or enthusiastic but perhaps shaky or incomplete understanding of. I have not watched hip hop/rap, beatmaking, and the art of sampling from the sidelines; I have participated within these traditions for more than 30 years. I did not just recently become aware of the art of sampling, nor did I just recently become familiar with beatmaking as a legitimate music compositional method. I knew that beatmaking was a legitimate music process back in 1986, when I first heard Eric B. & Rakim's seminal classic album, *Paid In Full*.

I have not merely attempted to make beats simply to publish my findings on the processes of beatmaking, nor have I attempted to make beats due to some residual provocation from writing this book. I didn't decide to acquire an Akai MPC drum machine/sampler at the end of my research for this present study; I have owned various MPC models and other electronic music production instruments (EMPIs), like the E-Mu SP 1200 and the Roland S-88, since 1992, years before I considered beatmaking as a topic for a book. It follows that I have made beats, with a professional level of skill and understanding, for more than 20 years. In fact, while writing this book, I took many impromptu breaks to make beats. In effect, the heart and soul of beatmaking is embedded in this book.

Any and all of the participation that I've had within the hip hop/rap music tradition has not occurred expressly for the purpose of gathering data for this book. But that said, I make no apologies for my penchant for keeping a journal of notes, memorable photos, historical party flyers, vinyl records and cassette tapes, and even old sneakers. There are a number of my personal experiences within hip hop that have contributed substantially to the production of this book. Therefore, to give you an idea about the slant of this book, I will share several key facts about my background.

Since I was 9 years old, I have collected vinyl records of all sorts. Both of my parents were pseudo record collectors; I took my cue from them (along with my grandmother and my uncle). I have listened attentively, at times obsessively, to more than 2,500 hip hop/rap songs, ranging in release year from 1979 to 2021. I have personally conducted, taped, and transcribed hundreds of

interviews with beatmakers (critically acclaimed, well-known, and underground), engineers, label execs, accountants, lawyers, and other music insiders. In the past 20 years, I've been to numerous beatmaking sessions and attended hundreds of live performances and showcases at local clubs, as well as large-scale concert/tour series, in New York City and as many as 10 other states in the U.S., as well as in other countries, like France, the U.K., and Austria. I have made/produced and recorded music in more than 70 recording studios of all varieties, sizes, and scopes, from high-end commercial recording studios to mid-level professional outfits to the small bedroom setups. Lastly, since 1994, I have made/produced, recorded, engineered, and mixed more than 2,000 beats (well, at least 2000 that I care to admit to). Under my rap pseudonym, Sa'id, I have recorded, hundreds of songs and three albums in the past three decades, the latest being *Hard Target* (2023), *The Best of Times* (2016), "High Top Fade" (2017), "Funny Politics" (2018), and *Soul Review* (2001, reissued in 2020).

To further understand the slant of this book, it must also be noted that *The Art of Sampling* is not a typical academic study; academic texts are usually written by academicians for other academicians, not the general public, so those studies carry the language, feel, motives, priorities, and predilections of the academic community. By contrast, this book contains a language and feel that is accessible to beatmakers (producers), scholars, music fans, and everybody in between. Also, this book is not the work of someone who has spent some time doing field work associated with hip hop culture. This book is the product of someone who's lived in this particular field all of his life. My own musical and cultural knowledge and experiences in this area mean that I didn't have to rely on liaisons to the culture or a bevy of interviews to access or understand the material presented in this book. However, in doing research for this book, I have conducted extensive interviews of numerous acclaimed hip hop beatmakers (producers), notably: Marley Marl — the father of modern beatamking; DJ Premier — the #1 hip hop beatmaker (producer) of all time; DJ Toomp — one of the chief pioneers of trap music; and 9th Wonder — acclaimed beatmaker (producer),

DJ, and hip hop scholar. I have also interviewed music and copyright professionals, notably Dr. Lawrence Ferrara — America's most renowned musicologist in the area of sampling and copyright law, and Deborah-Mannis Garderner — the #1 sample clearance agent in the business. It's inevitable that all of their insights, in one way or another, have helped to sharpen the presentation of some the topics covered in this book.

Next, *The Art of Sampling* is not meant to be an ethnographical look at beatmaking and/or hip hop culture. That being said, most of the elements in this book will appeal to both ethnomusicologists and musicologists alike. And although this book relies on more than two decades of research, it must be noted that *The Art of Sampling* is more of a guide to sampling and a guide to copyright law than it is a research study.

It's also worth pointing out that my aim with this study is not to be politically correct but to be fundamentally accurate. I deal with what was (factually as it happened), what is, what may and what will most likely be. I do not, however, deal in what should have been, what it should be now, or what it should be in the future.

Finally, this book is less concerned with the fringe music developments of hip hop/rap music, such as the hip hop-R&B hybrid or the alternative "rocker rap" or so-called "mashups." This book concentrates on the art of sampling as it's best articulated and observed in the hip hop/rap music tradition. Thus, the beatmaking compositional methods and concepts that are explored in this book are those that are utilized by beatmakers (producers) for the purpose of creating music (instrumentals) first and foremost for rappers to rap over. But this does not mean that these methods can't be used for the purpose of creating music for other performers (i.e. non-rappers).

What This Book Covers

To properly engage in a discussion about sampling and copyright law, one must possess four things. First, a knowledge of the associated histories of the hip hop/rap music tradition. Second,

a solid understanding of beatmaking, the chief compositional process of hip hop/rap music. Third, a keen awareness of the history, purpose, and rules of copyright law. Fourth, a proper understanding of the concepts of originality and authorship. There's no excuse for sample-based musicians to remain in the dark about copyright law; and there's no excuse for copyright scholars to disregard the compositional complexities of sampling. So here's what I cover in *The Art of Sampling*:

- The early history of hip hop/rap music, how multiple art forms coalesced into one culture, and how hip hop was built upon a "culture of sampling."
- The history of beatmakinng, the chief compositional process of hip hop/rap music, which is inextricably linked to the art of sampling, and the mechanics of sampling, which includes an examination of how sampling is done in the hip hop/rap music tradition.
- The history of United States copyright law, which includes an examination of how eighteenth-century concepts of originality and authorship helped shape copyright law, and how it continues to influence our modern notions of originality and authorship.
- The criticism surrounding sampling, and the role that bias and privilege play in this area.
- The implications that sampling holds for copyright law, including in-depth analysis of the most important copyright infringement lawsuits involving sampling.
- Sampling Rights vs. sample clearance.

How This Book is Arranged

Simply put, there's a lot in here. This book is big! In order for readers to access the wealth of information present in *The Art of Sampling*, I made the design, arrangement, and organization of this book a paramount focus. I have designed *The Art of Sampling* to serve as both an examination of and instructional guide to the sampling tradition of hip hop/rap music. Thus, this book contains

a wealth of information on the sampling tradition of hip hop/rap music as well as beatmaking in general. Along those lines, I have intended for *The Art of Sampling* to be a gateway into the vast world of beatmaking. In this book, you will encounter methodical, technical, and stylistic examinations of the art of sampling. This means that this book contains a detailed examination of the most crucial compositional, cultural, historical, and legal components associated with the art of sampling. Also, within this book there are stories of my own experiences and those of people like you.

The Art of Sampling ambitiously approaches three broad areas: history, instruction, and copyright law. These areas are organized into five parts: Part 1: The History of the Four Elements of Hip Hop Culture, Beatmaking, and the Art of Sampling; Part 2: Composition and Instruction: Aesthetic and Compositional Analysis, Performance, and Philosophy of the Art of Sampling; Part 3: The Criticism Surrounding Sampling; Part 4: Copyright Law; and Part 5: Sampling Rights vs. Sample Clearance.

Long Chapters

A number of chapters in this book are much longer than what you would find in a typical academic study or trade hardcopy or paperback. This is by design. This is book is designed to create understanding. Because my concern is that readers have the most comprehensive information on sampling and copyright law, all in one place, this book's many pages and subsequent long chapters tests the limits of the legacy publisher's model for book size and scope.

Conventional publishing wisdom says that a chapter longer than 30 pages (or longer than 12 thousand words) often has multiple central points and would therefore be better split into two chapters — some editors might even say three chapters. But none of this is actually governed by what might be best for general readership and or research study. Nor is chapter length governed by the length of articles typically found in academic journals. In that case, articles pushing past 120 pages are not rare. For example, Wendy J. Gordon's "An Inquiry into the Merits of Copyright: The

Challenges of Consistency, Consent, and Encouragement Theory," published in the *Stanford Law Review* (1989), clocks in at *126* pages.

As a researcher, writer, and publisher, I prefer longer chapters; it's usually a sign of more complete, well-sourced information. I have not, however, always liked smaller chapters, especially since such chapters are typically cut down considerably (often against the author's will) to achieve a smaller length. The creation of small chapter lengths, or more directly stated, the shrinking of chapters, is often something done at the insistence of editors and publishers who are more concerned with printing costs and interested in maintaining a set page count and trim size. (It's no accident that most non-fiction books covering similar topics clock in around 400 pages.)

Just as I'm not a fan of a topic being fluffed up with filler to fit a page count, I'm not a fan of pertinent information being cut out or continuity being disrupted just to make a page count quota that's not suitable for a given topic. If a topic outweighs an estimated industry page count, it must go well beyond that suggested page count; otherwise, critical information, nuance, context, and insight will surely be missing. For example, the page count of *The Power Broker*, Robert A. Caro's definitive work on Robert Moses, clocks in at 1344 pages, with at least one chapter tipping past 75 pages — a recognition that some chapters should *not* be split, and that some chapters are better served by a longer length. Thus, as with a book like *The Power Broker*, a number of the chapter lengths in *The Art of Sampling* are in line with publishing industry standards, but where necessary, I have expanded chapter lengths for three reasons. First, to maintain continuity and to make it easier for readers to read the topic at hand in one place. Second, to help researchers to better locate and examine the topics and ideas within *The Art of Sampling*. Third, to make it easier for scholars to teach specific sections, sub-sections, and chapters within *The Art of Sampling*.

The art of sampling in the hip hop/rap music tradition and copyright law is a subject far too robust to micromanage chapter length. I trust readers will appreciate my resistance to shrinking chapters into "bite" size pieces in favor of expanding chapters to

include all relevant evidence, examples, and stories in one place. Further, traditional publishing industry standards for chapter lengths were established before the advent of e-books and PDFs and before the creation of blogs and social media. Morever, these standards were designed by a readership that read books and consumed information in a much different way than we read and consume information today. While today's information highway is personified by fractured media, this does not necessarily mean that people want less. Today's readers want to have the *best possible* understanding of a topic, and they know that requires a comprehensive analysis. So most readers today value *more* especially when it's warranted. This is one reason why a number of chapters in my book can be read as a stand-alone micro-books. In this regard, I intentionally designed this book to provide far more information than any commercial publisher could envision issuing. This meant parting with conventional wisdom about chapter length in favor of something else: The delivery of well-organized, uncut chapters that were less about print restraints and more about reader accessibility.

Articles Before The Start of Chapers

Before the start of some chapters, I have included articles designed to help set the context, tenor, and mood of the chapter. These articles appear separate from the chapters proper, and the aim of these articles is to give readers helpful context to consider while reading the chapters at hand.

How to Navigate This Book

The Art of Sampling can be easily navigated; it's not a cold, by-the-numbers style text book. It's not designed to overload you with fancy jargon or tricky algorithms. I've organized the parts, chapters, sections, and sub-sections of this book in a way that is logical and consistent with the timeline of a typical beatmaker's (producer's) progression and development. So if you know little or nothing at all about sampling or beatmaking, you can start with Part 1 and progress confidently at your own pace.

On another note, this book is not meant to be read straight through in one sitting (or even two). There's simply far too much information and detail in this book to approach it in that way. Instead, I deliberately designed and arranged this book for pauses, and not only the types of pauses that come with chapter breaks. So I urge you to pace yourself and attack this book piece by piece at your own discretion. Only then will you fully comprehend *The Art of Sampling* as a whole. So by all means, skip around! Feel free to read the parts, chapters, sections, and sub-sections in whatever order that makes the most sense to you. You don't even need to read the whole book! Read what you need. Read what interests you. Read whatever you think is cool. This book is a loaded. And all of the interrelated topics are presented in a way for you to revisit whenever you're ready. But however you skip around, make sure that you read all of Part 1: History; Part 2: Composition and Instruction; and Part 4: Copyright Law. There's a wealth of knowledge in those parts that will enhance your understanding of originality and autthorship and how copyright law works.

Methodology

In order to be able to address the full spectrum of sampling — its history, its compositional practices, and the implications that it holds for sampling — it was necessary to combine methodologies. Thus, this book is part musicology, part ethnomusicology, part social science, part independent journalism, and part "inside baseball." Thus, the topics of this book are examined using a variety of methodologies ranging from musical analysis and empirical investigations to discussions of cultural meaning and aesthetics to historical discussions of race and racism and their impact on music taste and criticism. In this way, *The Art of Sampling* combines the disciplines of ethnomusicology, musicology, music theory, music psychology, sociology, law studies, cultural studies and aesthetics, race studies, and, of course, hip hop/rap studies. And everything has been supported with historical documentation to establish as accurate a timeline as possible.

Heavy on Context

In this book, I go heavy on context — full context, not incomplete or misleading context. Whatever benefits a better understanding of the topics that I cover in *The Art of Sampling* is my concern. I'm not narrowly focused on whatever serves any argument that I make.

How My Credentials and Background Inform This Study

"You had to have a classical education to *prove* the art," Dave Hidey once responded to Tom Wolfe on "Firing Line with Thomas Buckley, Jr."[12] With this, Hidey hit on something important: The notion of art needing to be proven against classically established art forms. In other words, it's the question of *How* art is *proven*, and *who* gets to prove it? Similarly, when you look at the published work on hip hop culture and the lack of diversity among the professors who teach hip hop culture, it begs the question: How is hip hop/rap music being proven, and who's getting the opportunity to prove it? Similarly, how is sampling being proven as an art form, and *who's* getting the opportunity to prove it?

There can be no shortcuts here. You can't just dip into the sampling discussion through the window of The Beastie Boys or Girl Talk and expect to speak comprehensively (or convincingly) on the sampling tradition of hip hop/rap music or the art of sampling in general. Likewise, a survey of the handful of copyright infringement cases involving sampling (most of which never went to trial), is not going to give you a solid understanding of United States copyright law, how it came to be, how it functions, or its key problems and triumphs. Despite the various racial and class factors that are in play in popular criticism and academia (where hip hop studies continues to gain traction), I believe that in order to teach hip hop/

[12] "Firing Line with William F. Buckley Jr," Episode S0191, Recorded on July 9, 1975 https://youtu.be/m5NBoe5Qhre.

rap music, to document its critical developments, and to discuss sampling and copyright law, you must have, above all, a solid grasp of the hip hop/rap music tradition, the art of beatmaking, the art of sampling, *and* copyright law.

Few people can claim expertise in the art of beatmaking, the art of rapping (which, in the hip hop/rap tradition, are inextricably linked), the art of sampling, and the construction of copyright law. This is one reason why discourse surrounding sampling and the implications that it holds for copyright law is often inaccurate and incomplete. One of the factors that distinguish *The Art of Sample* then are my own credentials and background as a beatmaker (producer), rapper, and historian of copyright law.

I don't believe that being a sample-based beatmaker (producer) or rapper (or any other form of musician and vocalist) is a prerequisite for writing about the art of sampling, just as I don't believe that a music critic need be a musician to write quality music criticism. However, I do believe that without these crucial elements, one is limited in the level of insight into the sampling tradition of hip hop/rap music that they can ultimately offer readers.

But with that said, in order to further distinguish the depth and value of *The Art of Sampling*, I must point out that I am the first (and so far the only) sample-based beatmaker (producer) *and* rapper to comprehensively examine and document the art of sampling and to publish those findings in book form. This means that not only do I have an insider's understanding of the art form — including its compositional practices and traditions and its cultural components — I also have a craftsman's first-hand know-how of the art form. None of the processes or the terminology thereof are foreign to me or second-hand; I can make, continue to make, and have made hip hop/rap music with consistent critical praise. I have produced, written, and performed three formally released albums to date: *Soul Review* (2001), which was re-issued by HHV records in 2020; *The Best of Times* (2016); and *Hard Target* (2023). Finally, having written and published *The BeatTips Manual*, I am also the first sample-based beatmaker (producer) and rapper to comprehensively examine and document

the art of beatmaking and to publish those findings in book form. I offer transparency around these factors to show readers that my experience in this field goes a long way in demonstrating that I have spent considerable time with and thinking through this music culture. And this knowledge of process is only helpful inasmuch as you can effectively incorporate it into your criticism. Thus, I'm confident that I have constructively integrated my musician's know-how in this book.

Who Gets to Talk About Copyright Law?

I'm no lawyer, and I don't play one on TV. But you don't have to be a lawyer to study, discuss, and appreciate copyright law. In fact, it's a helpful civic function to do so. Further, copyright in the United States is not a natural right; it's a law enacted by *Congress*. And the majority of the members of Congress are not, and have never been, copyright lawyers or persons of any legal training. In fact, of the 56 signers of the Declaration of Independence, 31 were *not* lawyers. Of the 55 Framers of the Constitution, 23 were *not* lawyers or persons with legal training. And of the 32 framers who were lawyers, only 8 practiced law as their principal career. Further to this, some of the framers and founding fathers, like Benjamin Franklin and George Washington — two of the seven principle Founding Fathers — were largely self-taught or learned through apprenticeship. And only about half of the Framers and Founding Fathers had attended or graduated from college.[13]

Still, my background is pertinent to the copyright discussions in this book. And in that regard, I'm well-versed in copyright law. Like Leval and Nimmer, I'm an expert in my field: Sample-based hip hop/rap music. But in addition to that, having spent 25 years researching the history of copyright in England and the United

[13] Lee N. Katz, "Professions of Our Founding Fathers," *The Turn Around Authority* (July 2, 2014) https://theturnaroundauthority.com/2014/07/02/professions-of-our-founding-fathers/#:~:text=There%20were%20several%20lawyers%2C%20which,were%20serving%20in%20public%20office; "Meet the Framers of the Constittution," *National Archives* https://www.archives.gov/founding-docs/founding-fathers; " The Framers of the Constitution," *Exploros* https://www.exploros.com/summary/The-Framers-of-the-Constitution.

States; studied critical case law, including more than 100 pivotal decisions; thoroughly examined the leading empirical studies of U.S. copyright fair use opinions; interviewed copyright lawyers, sample clearance professionals, and musicologists with copyright law backgrounds; *and* written a book on copyright law, I'm well versed in the history of copyright and the intricacies of United States copyright law in particular. Thus, what distinguishes me from Judge Leval and David Nimmer, in at least one critical way, is that I know this subject from *both* perspectives: From the perspective of a sample-based hip hop/rap musician *and* the perspective of a copyright expert. Which means that I can tell this story from both sides of the equation. So as a comprehensive study, *The Art of Sampling* embodies this unique outlook that I bring to the table. An outlook that I believe will prove to be invaluable to the courts for many years to come.

Nomenclature and Cultural Slang

The Use of Black, African American, Afro, Western, "Hip Hop/Rap," Hip Hop – no hyphen, Beatmaking, EMPI, and Romantic

So that readers have an understanding as to why I use certain terminology in specific areas within *The Art of Sampling*, I will offer some brief explanations on certain language choices that I've made while writing this book.

First, let's look at the term "Black". During the 1960s, "Black" displaced the word "negro" and emerged in America as the chief designative word of ethnic identity for African Americans. "Black" represented a changing point for African Americans, as it gave many African Americans more pride and confidence in their cultural and ethnic identity. It should be further noted that "Black" became even more powerful in the late 1960s, due in large part to two events in American culture: (1) James Brown's song "Say It Loud — I'm Black and I'm Proud;" and (2) the black power movement. From the latter half of the twentieth century, "Black," (depending on the context), has served to represent a collective culture and world

view associated with African Americans and people of African descent. It is because of my deference to these developments and events, that I chose to use "Black" — along with the term "African American" — throughout this book. Additionally, "Black," no parenthesis, implies the Black diaspora in general. "Black" with "African American" notes things specifically developed or led by Blacks in the United States.

In this study I use "Afro" to refer to the common cultural rubric that all Blacks (descendants of Africa) around the globe fall under. That is to say, I use "Afro" and "Black" somewhat interchangeably to represent the common cultural connection (musically and otherwise) among all peoples of African descent throughout West Africa and the African diaspora — all New World cultures that owe their history to the institution of slavery and the Transatlantic Slave Trade. Finally, I should add that in this study I also sometimes use the term "Western" to describe European-derived esthetics (and creative aesthetics) and sensibilities.

As for the term "hip hop," it must be recognized that throughout the past 40 years, the terms "hip hop" and "rap" have been so misused and misrepresented that without context, it's very hard to determine what the average person actually means when they use these terms. For instance, there are some who distinguish "rap" as something purely commercial and not indicative of so-called "real" hip hop — this despite the fact that by 1983, most of the pivotal pioneers referred to the music as "rap." In fact, between 1984 and 1995 "rap" was the most commonly used term to describe the music of hip hop culture. But after 1997, around the time when beats first began to be used more prominently by other music genres that did not include rappers, e.g. the merger of hip hop and "R&B," the term "hip hop" became the primary means for describing the music of hip hop culture. This created a disconnect between the paramount role that the art of rapping has played and continues to play in the music of hip hop culture. Moreover, the misuse of "hip hop" not only narrows the culture of hip hop down to its musical expression, it takes focus away from the fact that hip hop culture is actually comprised of four distinct artistic expressions: graffiti,

b-boying, DJ'ing, and rapping.

As a verb, "rap" has long meant "to express orally" (as far back as the 14th century); and within the Black American community, "rap" has always had several distinct usages. In the 1960s and 1970s, "rap" was used to describe "talk," in particular, a heavy, intellectual (enlightening) form of speech. "Rap" could also be used to describe the slang of the Black American community. And "rap" was (is) also commonly used as a word to describe the courtship-language used by many Black American men in their social pursuit of women.

In this book, I use the term "hip hop/rap" as a means to reconcile the misunderstanding of these two terms and their subsequent use. "Rap" is embedded and interlocked within hip hop. Rap explicitly means hip hop music. So identifiable is rap to hip hop that it's impossible to seriously discuss hip hop without recognizing the interweaving connection of rap to the music of hip hop culture. Thus, I prefer to defer to the original use and intent of these two terms. "Hip hop," in its original context, encompasses and covers the entire cultural expression. However, I recognize, for better or worse, how contemporary lexicon employs both "hip hop" and "rap." That is to say, today, "hip hop" is often used synonymously with "rap." Also, in some parts of this book I only use the term "rap," as it is sometimes necessary to distinguish it from the hybrid of R&B and hip hop, which does not often include rapping.

Lastly, I use "hip hop" — no hyphen — because that's the way the original architects and pioneers of hip hop wrote it. My deference is to them. In the specific context of hip hop culture, the first appearance of the term "hip hop" in print was in Robert Flipping Jr.'s article "If You Funk Us, We'll Funk You," which was published February 24, 1979 in the *Pittsburgh Courier*, one of America's oldest Black newspapers. Flipping wrote "hip-hop," with a hyphen. In comparing Pittsburgh smaller disco scene to New York's disco scene, Flipping wrote: "St. James [Pittsburgh DJ] has garnered success because he has dared to be creative. D.J. Starsky [sic], one of the more prominent New York based disc jockeys, who will be in Pittsburgh to host Enterprise Communication's Rock Contest, has also. He is responsible for the derivation of ***the***

'Hip-Hop.'"[14] Note that Flipping misspelled Lovebug Starski's name as "Starksy," and he added the article "the" before hip hop. No one, especially in New York in the 1970s, referred to hip hop as "*the* hip hop." Hence, I presume that Flipping never saw the term "hip hop" as it was written in New York at the time; and I also presume that he never saw Starski's name written on party flyers in New York. So I reject Flipping's spelling.

The second time the term "hip hop" appeared in print, which many believe is the first time, was in Michael Holman's interview of Afrika Bambaataa, published in the January, 1982 edition of *East Village Eye* magazine. Michael Holman, a seminal figure in hip hop history, was installed deep within New York hip hop's scene. Based on his serious involvement in hip hop culture and the fact that he lived in New York at the time and played a pivotal role in bringing hip hop from "uptown" to "downtown," I adhere to Holman's spelling of "hip hop."

The third time that "hip hop" appeared in print was in Steven Hager's book *Hip Hop: The Illustrated History of Break Dancing, Rap Music, and Graffiti* (1984) — The same spelling, "hip hop," no hyphen, appears. Steven Hager's documentation of New York's hip hop culture is the seminal book on the topic. Hence, my deference for the spelling of "hip hop"is not to a style-guide decision arbitrarily made by the *New York Times* ca. 1990, nor to *The Source* magazine, which followed the *New York Times* with the same spelling shortly thereafter. Instead, I observe the same spelling of "hip hop" as Michael Holman and Steven Hager, the first writers to formally document New York hip hop culture with great depth and detail. But above all, I defer to the early architects and pioneers of hip hop culture who spelled "hip hop" the same way.

Next, the terms "beatmaking" and "production" are often used interchangeably to describe the same thing, but depending on the context, they're actually not. Producing does not always involve actual beatmaking (i.e. making beats), but most people who make beats refer to themselves as "producers". The fact remains, however,

[14] Robert Flipping Jr., "If You Funk Us, We'll Funk You," *Pittsburgh Courier* (February 24, 1979) (emphasis mine).

that in the annals of hip hop/rap music lore, the "beatmaker" is more prestigious, more hands-on. Beatmakers literally make beats. Moreover, the term "beatmaker" itself is a unique name for a different kind of music composer. Because of this, and because I prefer to defer to the essence and scope of the originators and architects of beatmaking, I describe those who actually make beats as "beatmakers" first and foremost. This is also why in this book I primarily use the term "beatmaking" rather than "producing." Still, throughout this book, I sometimes link these terms and their variations, e.g.: "beatmakers (producers)." In those cases I'm confident that, given the topic and context of discussion, readers will know which term applies more appropriately. Also, wherever the terms "beatmaking," "production," and the like appear, I am only referring to the compositional methods of hip hop/rap music.

I should also note that within this book there is some slang, cultural jargon, and similar expressions mostly known to members of the beatmaking and hip hop/rap communities. Deliberate effort was made to preserve the authenticity of these expressions, along with their actual or intended meanings.

With regards to music equipment, in this book, I use the term "EMPI." It's an acronym, pronounced: em-pee, that stands for Electronic Music Production Instrument. Throughout this study, all beatmaking or electronic music production gear is routinely referred to as EMPI or EMPIs.

Finally, "Romantic" is capitalized throughout this book because it refers to the Romantic Period, which began in the late eighteenth century. Many scholars and commentators who have covered sampling and copyright law have written romantic without the "r" capitalized. For instance, take the phrase, "the romantic notion of authorship." Without the "r" capitalized, readers might miss the connection to the Romantic Period in Europe, and instead believe that the context is related to naivety, i.e. a rose-colored idea of authorship. To avoid this confusion, I only used Romantic (with the "r" capitalized) throughout this book.

Case Study Production Setup

With a book such as this, you need a primary beatmaking (music production) setup through which the various technical and theoretical components and principles of hip hop/rap beatmaking can be examined. For this purpose, I've used my own production setup. Because my setup is a hybrid composed of hardware — both classic/vintage and contemporary pro audio gear and equipment — and software, it is particularly well suited for the task at hand. The individual EMPIs within my setup include:

- Akai MPC 4000, Akai MPC 60 II
- Akai S950 Digital Sampler (maximum memory)
- Roland Fantom S Keyboard Workstation (88-note)
- Akai MPC Studio, Akai MPC One, Focusrite 2i2 Pre Amp
- Mackie 32/8 Analog Mixing Console
- Apple Power Mac G5 1.8 GHz/6GBRam/150GB
- Apple MacBook Pro (2016) 2.6GHz/16GBRam/512GB
- Apple MacBook Pro (2017) 2.6GHz/16GBRam/512GB
- Apple MacBook Pro (2018) 2.3GHz/8GBRam/2TB
- Digidesign 002 Rack (not Control Surface)
- Pro Tools
- Propellerhead Reason
- Numark DM 1200 DJ/Stereo Mixer
- Technics SL-1200 MK2 Direct Drive Turntable
- Mackie HR 824 self-powered Studio Monitors
- Tascam 302 Dual Cassette Deck (with pitch control)

The setup I use, which I have used separately and together at different times over a period of more than 20 years[15], offers a variety of particular nuances that permit me to apply many different methods and techniques. But the compositional and procedural aesthetics of beatmaking are nearly universal, so for the most part these processes can be applied to any setup (in principle at least). Moreover, sampling can't be restricted to any particular

15 In recent years, I've stripped down my setup to the Akai MPC One, Pro Tools, and the Focusrite preamp.

hardware and/or software. But the methods and techniques which a beatmaker (producer) is able to use can vary depending upon the setup. Also, the setup that I use offers a number of sound and technical effects that are unique to this particular gear and software combination.

No two digital samplers, drum machines, sequencers, keyboard workstations, or even software programs are identical. There may be many similarities at their core, but each piece in any setup performs in line with its design and function capability, and different EMPIs combine to produce various effects. What one beatmaker (producer) may be able to do on a particular setup, other beatmakers (producers) may not be able to accomplish on another setup. Likewise, where one beatmaker (producer) is limited by a particular setup, another beatmaker (producer) may discover unlimited possibilities using that same setup. The compositional possibilities within the hip hop/rap beatmaking and production process depend on a beatmaker's individual creativity and imagination and the specific use of their gear and other production tools. Finally, in no way is this book about or an endorsement of a particular setup or EMPI. While it is impossible to produce a study like this without examining the beatmaking tradition and the gear and equipment used within it, the focus of this book is the art of sampling and copyright law.

The Goals of This Book and The Primary Takeaways

Nothing in *The Art of Sampling* is the result of over simplification of complicated subjects. What exists in this book is a comprehensive, detailed examination of the subjects at hand. Also, each examination contains, where applicable, precise footnotes designed to offer readers enhanced understanding and additional sources for discovering more about the subject. That said, what follows are the goals and primary takeaways of this book.

Awareness

One goal of *The Art of Sampling* is to help the public construct a deeper understanding of the art of sampling and copyright law. Another goal of this book is to make sample-based musicians, especially in hip hop/rap music, aware of de minimis and fair use, two critical safe harbors of copyright law that apply to all copyrightable material.

The Context of a Social Movement and Cultural Status

Central to this study is my approach to the discourse around sampling and copyright law in the context of a mass movement for social justice. The debate about sampling and the implications that it holds for copyright law doesn't only affect sample-based musicians, it impacts all creatives and society as a whole. By making these complicated issues much more accessible to the public, I hope that *The Art of Sampling* helps ignite a more inclusive and more sophisticated discussion about sampling and copyright law. Sampling is not in a fight against or at odds with copyright law. Sampling's greatest struggle is against disinformation and common assumptions about the art form and copyright law itself.

Cultural Status

Another goal of this book is to help raise the cultural status of the art of sampling. In doing so, I want to: 1) engage musicians, critics, and other commentators in the appreciation of the art of sampling, showing its richness and complexity; 2) lead a more comprehensive discussion of copyright law; and 3) draw attention to the ways in which the media and copyright holders misinform the public about sampling and copyright law.

The Damage Done By the Music Industry and the Music Journalism Industrial Complex

The music industry, historically known for cheating music artists, forcing music artists to sign draconian record contracts (in the name of "industry standard"), and fighting technology that they can't control (for example, cassette tape recording machines, Napster, streaming), has never had the public's best interest at heart. Since the early 1990s, the music industry, aided by a music journalism industrial complex that is dominated by music journalists who prize their proximity to major labels and artists and who are ill-equipped to discuss the intricacies of the art of sampling and the facts of copyright law, has worked to negatively influence the public's opinion of sampling. This has damaged the image of hip hop/rap music and the public's psyche around the questions that sampling raises for copyright law. This book seeks to help reverse the damage caused by the music industry and the music journalism industrial complex.

Increase Civic Involvement, Dispel Myths and Common Assumptions, and Fight Disinformation

Information is a measure of uncertainty reduced. *Dis*information and *mis*information operate in a completely different way; there, the goal is to create uncertainty. One goal of this book is to boost the signal of accurate, useful information. To do this, I attack both disinformation and misinformation. Further, I take on common assumptions about sampling and copyright law and demonstrate when, where, and why these assumptions do or do not align with the facts.

A detailed and accurate discussion of copyright law is a symbol of strong civic involvement and a symbol of a vibrant public. But disinformation is a serious threat to the public good. Disinformation is best fought by a strong tradition of community and public discourse. Thus, another goal of this book is to increase civic involvement in the discussion of copyright law, dispel the myths

and common assumptions associated with sampling, and confront the disinformation that is spread about sampling, sample clearance, and copyright law.

Authorship, Originality, and Creativity

Another goal of this book is to draw attention to the ways in which the practices of the art of sampling may be applied to a rigorous reevaluation of the concepts of originality and authorship. This book explores the fact that *all* authors (creatives) borrow, that originality is always the result of influence and individualism, and that creativity does not exist without permissive borrowing. Here, the goal is to also show how the Romantics' concepts of originality and authorship still influence copyright law and culture in our day.

Raise the Profile of de Minimis and Fair Use

De minimis and fair use are vital aspects of United States copyright law. One goal of *The Art of Sampling* is to make the principles and application of copyright law, especially de minimis and fair use, more accessible and understandable to the public.

Change Attitudes

For more than thirty years, despite the growth of hip hop studies (mostly hip hop culture) in recent years, there has been a struggle against the idea that the study of beatmaking, the art of sampling, and hip hop/rap music is not intellectually challenging enough to justify college instruction. Sampling attracts academic attention largely because of the implications that it holds for copyright law, but beyond that, sampling is often not taken seriously as a legitimate music process or aesthetic form. I take the position that the art of sampling also justifies compositional, historical, and sociological college instruction. So another goal of *The Art of Sampling* is to change attitudes about sampling and copyright law from negligence, bias, ignorance, and fatalism to understanding and optimism.

The Fair Use Playbook for Sample-Based Hip Hop/ Rap Music Artists

One of my goals for *The Art of Sampling* is that it becomes the playbook for sample-based hip hop/rap music artists who affirm a fair use defense against a copyright infringement claim. Fair use, and copyright law more broadly, is complicated, but it's not complex. Where sampling is involved, the music industry stokes the fear that a copyright infringement lawsuit is imminent. Better safe than sorry, the mantra seemingly goes. Thus, the "industry standard" approach is to insist that *all* samples be cleared. But this stratagem is not based on any serious recognition of, or respect for, fair use. (In Chapter 19, I cover the music industry's attitude towards fair use in more detail; and in Chapter 26, I detail the flaws of the clear-all-samples stance.) And, unfortunately, the music industry's sample clearance scheme dissuades sample-based musicians from even learning about fair use. In fact, some music industry leaders have openly expressed their hostility towards fair use. Dina LaPolt, one of the most well-known and respected lawyers in the music business — purportedly, she was voted the #1 music business attorney in 2011 by her peers — said that "Fair use is a misnomer. People start screaming, 'Fair use, fair use, fair use,' but it's just a defense. Which means you have to defend it." And she further added that "*It's a useless part of the Copyright Act. It should be just deleted.*"[16]

Then, there are the headlines of copyright law infringement lawsuits involving sampling, which have spooked the music industry as well as some sample-based musicians. What are always mentioned as cautionary tales are the big-money settlements, as was the case with De La Soul and The Turtles, or Biz Markie in *Grand Upright*, or N.W.A (Dimension Films) in *Bridgeport*. What's never mentioned, however, is that in none of these cases was a fair use defense ever affirmed. And with regards to *Bridgeport* specifically, it's widely regarded as a terrible decision! In fact, the decision in

[16] Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling*, (Duke University Press Books, 2011), 238, 240 (emphasis mine).

*Bridgepor*t is not followed by the Second and Ninth Circuits of Appeals, the two most influential Circuits in terms of copyright infringement cases involving sampling, entertainment, and media.

Still, there have been a number of hip hop/rap music artists who have successfully asserted a fair use defense against copyright infringement claims involving sampling, including: Beastie Boys, Jay-Z, Drake, Kanye West, and Nicki Minaj. Of course, the common dominator among these artists is that they all have (had) the financial resources to access top-notch legal counsel, or more precisely, access to the knowledge-wealth that is necessary to mount a fair use defense in court. But since courts regularly resolve fair use issues at the summary judgment stage, the cost factor is less significant than the knowledge-of-fair use factor.

It's further worth noting that copyright infringement case law involving sampling is very slim; and in the *only* fair use case involving sampling to reach the Supreme Court — *Campbell v. Acuff-Rose Music, Inc.* — fair use was determined. Most commentators will point to the "parody" component of the decision without discussing the Supreme Court's *full* analysis, which included analysis of the transformative nature of the sample-based beat.

So where does all this conventional wisdom come from that you're "taking a chance" with fair use when it comes to sampling? Truth is, there really isn't that much case law involving sampling — cases are often settled out of court and never advance in court. But of the cases where defendants did *not* settle out of court and asserted a fair use defense — for instance, Beastie Boys, Jay-Z, The Estate of the Notorious B.I.G, Salsoul Music, Drake, Kanye West, Nicki Minaj — they prevailed overwhelmingly. So it's not that where sampling is involved, fair use is some kind of toss up. It's not that fair use isn't being found in copyright infringement cases involving sampling, it's that defendants aren't even affirming the fair use defense when faced with a copyright infringement suit. Instead, they're following the misguided conventional wisdom that they'll automatically lose in court. So they settle out of court.

In terms of sample-based hip hop/rap songs, where practically every instance of sampling exemplifies the transformative element

of the first factor of the four-factor fair use test, this should almost never be the strategy. Sample-based hip hop/rap music artists facing a copyright infringement claim should be focused first and foremost on fair use defense. And I'm confident that *The Art of Sampling* is the best playbook for sample-based hip hop/rap music artists looking to prevail on a fair use defense against a copyright infringement claim.

A Guide to Sampling That's Instructive for the Courts

In formulating their determinations of fair use and other related copyrighted issues, the courts have, for decades now, cited judge Pierre Leval's article "Towards A Fair Use Standard" and Melville and David Nimmer's *Nimmer on Copyright*, the number one legal treatise on United States copyright. One of my goals for *The Art of Sampling* is that in the specific area of sampling and copyright law, it becomes instructive for the courts much in the way that Judge Leval's influential article on fair use has become, or as impactful as Nimmer's treatise on copyright law.

Part 1
THE HISTORY OF THE FOUR ELEMENTS OF HIP HOP CULTURE, BEATMAKING, AND THE ART OF SAMPLING

Before exploring the sampling tradition of hip hop/rap music, we must first examine hip hop's artistic and cultural roots. This is where we discover the critical aesthetic priorities, sensibilities, and attitudes that are deeply woven into sampling's foundation. Without an analysis of the connection between the four artistic elements of hip hop culture, we can't understand how hip hop itself is actually a *culture of sampling*.

In a culture of sampling, everything from language to fashion to the fine arts — dance, painting, music — is fair game for borrowing and repurposing into something new. In a culture of sampling, if it can be converted and *flipped* (trasnformed), it will be. This culture of sampling sensibility permeates throughout hip hop culture. For example, there's the b-boy fashion, which took sportswear and casual attire and combined them into a new style of dress that was celebrated for its comfort, flexibility and style. And then there's hip hop terminology, which often converts different words (even tragic ones) into terms of triumph; for example, words like "dope" and "sick" become impressive expressions of magnificent creativity and authenticity.

Everything in hip hop culture involves borrowing (sampling) — flipping one thing or the other into something new. That's why it's important to first look at the four founding artistic expressions, commonly known as the four elements, of hip hop culture and examine how they all featured a different but commonly practiced form of sampling. Although each of the original elements of hip hop culture represented its own distinct tradition and subculture within the broader hip hop tradition and culture, the development of each of these elements overlapped and cross-fertilized throughout the 1970s and early 1980s. It's widely recognized that all of the early hip hop pioneers practiced at least two of the four elements of hip hop, and many were capable of performing all four of the elements of hip hop. What follows in this chapter is a historical breakdown of each of the four original artistic elements of hip hop culture, along with an examination of the aesthetics, tenets, priorities, values, and principles that underscore all of the elements of hip hop collectively.

Chapter 1

A Culture of Sampling

An Overview of the Four Elements of Hip Hop

A culture of sampling exists in all communities that are plagued by catastrophic socio-economic circumstances. Within these oppressed, isolated, and fragmented communities, the resilience and ingenuity of its people always remains. To survive and fortify their own culture, residents of these communities learn to borrow, salvage, reconceptualize, and incorporate elements within or outside of their environment. Such was the case with the South Bronx Disaster[1] that caused a new culture of sampling to emerge. A culture in which residents of the South Bronx (and other similarly hard-hit cities across the United States) learned to take pieces from mainstream American society and convert them in accordance with their own needs and values.

"Where They Jamming At?"

Street and Party Cultures Collide

Parties are vital cultural events in ghettos because they serve two important functions. First, parties let people escape from the harsh realities of an impoverished environment. Second, parties form a celebration of the resilience of the human spirit in the face of hopelessness and despair. Throughout the burning and destruction of the Bronx (1969 to 1979), impromptu parties or "jams" and

[1] The South Bronx Disaster, which refers to the harsh socio-economic backdrop of hip hop's origins, was created by a combination of socially disastrous events that took place in New York City between the 1950s and 1970s. For a thorough examination of the South Bronx Disaster, *see* Amir Said, *The BeatTips Manual, 6th Edition (*New York: Superchamp Books, 2013) Chapter 1.

music provided much needed healing and entertainment.[2] But what's distinct about the 1970s South Bronx party scene is how it was further bolstered and unified through the arts and talents of its party-goers.

To be sure, there were certainly parties and park jams *before* that seminal day in Augsust, 1973, where, as legend has it, the "first" hip hop party (or coming together) took place. There were parties held at other community and recreational centers, ballrooms, churches, school gymnasiums, and street blocks. Even by DJ Kool Herc's own admission, he didn't play any music that wasn't already heard before at that initial party; he played the music that the people wanted. And all of the partygoers took to the floor knowing exactly how to move to it. But it was this one party — and many others like it, especially the ones given by Grandmaster Flash and Afrika Bambaataa — that soon followed and served as the initial breeding ground and force that would merge the four elements of hip hop into the mighty culture that would soon come to be known as hip hop.

The Unification of the Four (Original) Elements of Hip Hop Culture

The culture that would eventually come to be known as hip hop was actually brewing long before DJ Kool Herc's Sedgewick Rec Party in 1973. But historians love clear benchmarks, timelines, and assigning definitive historical developments to key figureheads. So the fewer the number of key events and figureheads, the easier it is for historians to draw a clean narrative. This is why the story of hip hop, for better or worse, always begins, *neatly* with the DJ Kool Herc/Sedgewick Rec Party narrative. Accordingly, the story of

[2] Hip hop culture did not grow directly from the street gang era of 1970s New York City as some writers and commentators maintain. The street gangs, in particular the *organization* of the street gangs, served as *one* conduit (there were others) for which hip hop was able to travel and mobilize into one formidable force. Street gangs represented a street level organization of would-be party goers. For a more in-depth discussion on this topic, specifically South Bronx street gangs and the role they played in the evolution of hip hop, see Beny Melendez and Amir Said, *Ghetto Brother: How I Found Peace in the South Bronx Street Gang Wars*, (New York: Superchamp Books, 2015).

Kool Herc DJing at the Sedgwick Rec Room on August 11, 1973 has been offered up by hip hop historians, prime hip hop architects, and common fans alike, often with such reverence that it has risen to the level of romantic legend.

But the Sedgwick Rec party storyline didn't emerge as if Kool Herc had said, "Hey, I'm going to throw a 'hip hop' party." Moreover, according to Kool Herc, the party wasn't even *his* idea, it was actually the idea of his older sister, Cindy Campbell. As the story goes, Cindy hired her brother (Herc) to DJ the party, which was either a birthday celebration or back-to-school affair (or perhaps both). So one of the biggest misconceptions about hip hop culture is that it was the initial product of one lone force: hip hop music, and one lone person: DJ Kool Herc.

Alhough the music of hip hop did indeed drive the entire culture as it further developed, hip hop/rap music did not spawn each element of hip hop culture. There were other creative impulses that were happening at the same time as that first hip hop party. The hip hop movement formulated with a wide range of expressions that were moving parallel to one another in the South Bronx and other areas around New York City (most notably Brooklyn) at the same time.

So it should be understood that hip hop culture is not the story of a single event or the invention of a single person. Instead, it's the story of the coalescence and formalization of seed elements that were already present within a community devastated by the South Bronx Disaster. B-boying (later more commonly known as "break dancing" or "breakin'"), DJing, rapping (MC'ing), and graffiti writing all sprang up from the same cultural and social conditions. And the development of each of these elements overlapped and cross-fertilized.[3]

[3] "Cross fertilization" is crucial to the birth and development of hip hop culture. Nearly all of the earliest pioneers practiced more than one of hip hop's four elements (art forms). Many were DJ's, b-boys, graffiti writers, *and* rappers. This means that all of the pioneers had a keen awareness of each of the art forms that eventually came together to comprise the collective hip hop culture. Kool Herc was a graffiti writer *before* he became a DJ. This fact is significant for two reasons. First, it demonstrates that Herc, like all of the early hip hop pioneers, was skilled in more than one of the four original elements of hip hop. And second, it demonstrates that as a graffiti writer, Kool Herc found his first real artistic apprenticeship in the underground New York City art form of graffiti,

Graffiti

In New York City between the 1950s and late 1960s, graffiti was mostly used by street gangs to mark their turf (neighborhood) or by some political activists to make statements. However, the underground art form that would take hold in New York City actually had its roots in Philadelphia, PA in the mid-1960s. The two writers from Philly who are credited with the first "conscious bombing efforts" are CORNBREAD and COOL EARL. It's unclear exactly how the Philly concept of graffiti made its way to New York City, but by 1971, it was apparent that the form was rising.[4]

In 1971, the *New York Times* published an article on TAKI 183, a teenage graffiti writer from Washington Heights. The article was influential in that it not only made TAKI 183 the first graffiti writer in New York City to be recognized outside of the newly formed subculture, it also helped push forward an already growing underground New York City graffiti movement. As the article noted, TAKI 183 worked as a foot messenger who, being on the subway frequently, wrote motion "tags" in subway stations and on subway cars as well as buildings all across New York City.[5] But TAKI 183 was certainly not the first graff writer in New York City, nor was he even considered to be one of the graffiti kings. During this time, JULIO 204 was most widely credited as being one of the first graffiti writers of significance. After noticing JULIO 204's tag, TAKI 183 took up writing his name and street number (with a wide marker) wherever he went. Other significant writers who appeared in 1971 were LEE 163, SLY II, and PHASE 2, LEE 163's cousin.[6]

---

not DJing. This fact makes it clear that by the time Kool Herc took up DJing — some seven years after first arriving in the Bronx as a child — his direct musical influences were American, not Jamaican.

[4] For an extended history of graffiti see: @149st (http://www.at149st.com/history.html). Also, see: *Subway Graffiti: An Aesthetic Study of Graffiti on the Subway System of New York City, 1970-1978*, by Jack Stewart; also see *Subway Art* by Henry Chalfant and Martha Cooper; and "History of Graf," daveyd.com.

[5] *New York Times*, "'Taki 183' Spawns Pen Pals," July 21, 1971.

[6] History of Graffiti, Part I," @149th Street (http://www.at149st.com/history.html). There was a burgeoning graffiti movement growing on the streets of Brooklyn at the same time, with FRIENDLY FREDDIE being one of the most recognizable Brooklyn graffiti writers at the time. Also see: Stephen Hager, *Hip Hop: The Illustrated History of Break*

Between 1971 and 1974, the first pioneering period of graffiti, hundreds of new graffiti writers emerged. During this time, the output of graffiti increased dramatically in volume throughout the five boroughs of New York City, and the art form continued to grow in style and complexity. Tags were the norm for most writers and competition was a major driving force. Writers competed with each other all over the city, seeing who could get the most tags up as possible. At first, buses, handball courts, schoolyards, and other locations were hit, but as graffiti grew more competitive and writers grew more daring, subway cars became a favorite target. Not long after, the concept and method of "bombing," i.e. painting subway cars as they sat parked in train yards, was born.

During this time, writers experimented with script and calligraphic styles. Flourishes, stars, crowns, and other similar designs also marked the earlier part of this pioneering period. It was also during this period when graffiti writers began to experiment with the size and scale of tags. Using the creative commons of their craft, graffiti writers began to create tags that were larger by using letters that were thicker and outlines with additional colors. After graffiti writers began to use caps from other aerosol products — *again, the culture of sampling at work* — they learned that the width of the spray could be increased. This discovery, widely credited to SUPER KOOL 223, who used the cap from an oven cleaner can, led directly to giant signatures known as "masterpieces" or "pieces." Pieces were large-scale visual themes and statements with bigger letters and bolder styles and ideas. Credit for the development of the first masterpieces is also given to SUPER KOOL 223 (of the Bronx) and WAP (of Brooklyn). Soon, pieces began to appear on the entire height of subway cars, and these pieces were known as "top-to-bottoms;" RIFF 170 is credited for having revolutionized top-to-bottoms. During this period of intense "sampling," style became the most important aspect of graffiti, as it was more prestigious for graffiti writers to create original lettering styles. Less talented graffiti writers who merely imitated others became known as "toys," and graffiti writers whose tags were *just* local and not "all

Dancing, Rap Music, and Graffiti (New York: St. Martin's Press, 1984), 13.

city" — as in not seen in all of the five boroughs — were described as DGAs: "Doesn't Get Around."[7]

With competition steadily driving the movement, forcing less-talented graffiti writers out of the limelight, styles began to move away from the typical tag pieces. The Broadway style, introduced by TOPCAT 126 (who had moved from Philly to New York City), emerged. The Broadway style led to block letters and leaning letters. Then came the bubble letters, a style first developed by and credited to PHASE 2. It was the combination of PHASE 2's work and competition from other style masters that began what became known as the style wars. "Style wars" was the term used to describe the explosion of graffiti writers who borrowed ideas from each other, improved upon them, and took them to a new level. During this period, pieces became more complex in style, especially in size, depth, and meaning. By 1974, works with scenery, illustrations, and cartoon characters, first popularized by TRACY 168, CLIFF 159, and BLADE ONE, started to appear.

It was also during this time when graffiti writers began gathering in loose-knit groups that mirrored small artistic professional associations. Meetings among graffiti writers were held at various '"writers' corners" around the city. The two most prominent writers' corners were located in the Bronx and Manhattan. There was the writers' corner at a subway station at 149th Street and the Grand Concourse in the South Bronx, and the writer's corner at 188th Street and Audubon Avenue in upper Manhattan. Wherever graffiti writers gathered, they shared sketch ideas from their personal art books, compared notes on various lettering styles, and generally talked shop about their art form. Through these various writers gatherings, graffiti writers soon developed their own slang and fashion styles.

It is widely considered by most graffiti historians that by 1974, all of the graffiti standards (i.e. graffiti's foundation) had been established. That being said, the period between 1975-77 marks the time when the most bombing in New York City took place, no doubt due in some part to New York City's fiscal crises in the mid-

[7] *Ibid*, 19-24.

1970s. Also during this time, "whole car" pieces became standard fare, and the "throw up" became the definitive form of bombing. The throw up, a style based on bubble lettering, is a piece (hastily rendered, usually just two letters) that consists of just a simple outline and a fill-in. Just like competition had driven graffiti writers in 1971 to put up as many tags as they could, competition for the most throw ups exploded throughout the city between 1975 and 1977. Incidentally, it was also during this time that the number of graffiti crews increased dramatically.[8]

Between 1978 and 1981, there was a graffiti revival of sorts, brought on by the new style wars between major graffiti writing crews like UA, CIA (founded by style master DONDI), TDS, TCF, RTW, TMT, and more. But this period also marked the final wave of bombing before the New York City Transit Authority ratcheted up their efforts to end graffiti on trains. Although graffiti writing would continue on through the mid-1980s, by 1985 the New York City street graffiti culture had declined dramatically.[9] However, due in large part to the efforts of graffiti writer and sharp self-promoter Fab 5 Freddy, graffiti would find a new audience in the downtown New York City art scene.[10]

Finally, it must be noted that the New York City subway system played a big role in the development of New York City's graffiti culture, both in terms of being a de facto art "canvas" and more importantly, as a line of communication and a unifying element for all of the different graffiti writers and separate graffiti developments (movements) throughout the five boroughs.[11]

---

[8] *Ibid.*

[9] There are many reasons for the decline of graffiti culture in the mid-1980s, notably the stepped-up anti-graffiti efforts of the New York City Transit Authority (which were prompted by then Mayor Ed Koch), stiffer penalties for graffiti, drug usage, and the allure of hip hop/rap music as a "safer" and more profitable career path.

[10] Fab 5 Freddy's efforts in the downtown New York City art scene of the mid-1980s not only helped popularize graffiti in the mainstream, it also helped break rap music and hip hop to a wider (white) audience.

[11] Hager, 19. Graffiti culture is parallel to beatmaking culture in that it is quite racially and ethnically inclusive. Although during the first pioneering graffiti period (1971-1974) many graffiti writers were Puerto Rican, it's a little-known fact that most of the first graffiti writers in the South Bronx were Black.

B-Boying ("Break Dancing") and DJing

Dance has always played an integral part in the development of the Black American music tradition. But the explosive new dance style that was taking hold in New York City in the early 1970s was quite different. "Going off," "burning," or the "good foot" — named after the James Brown song of the same name — were the words that morphed together under the umbrella of "b-boying," which would later become widely known as break dancing. "Going off" was a dance style that featured an erratic assortment of floor drops and spins and other James Brown-inspired leg movements. Dancers who "got wild" would wait for the "break," the part in the record where the song is stripped down to the high energy of the rhythm section, just the drums, guitar or bass licks, and maybe some additional syncopated percussive elements, no melody. Once they heard the break, they would get out on the dance floor and go wild.[12]

At the same time dancers were getting wild, Kool Herc was building a name as a DJ. After seeing these dancers go wild whenever he played the breaks, Herc began calling them "break boys," which he shortened to "b-boys." In the dialogue between Kool Herc and the b-boys, the b-boys pushed Herc just as much as he pushed them. In addition to helping the b-boys further develop their art form, Herc also found that by using two turntables, two copies of the same record, and a DJ mixer, he could not only keep the b-boys engaged, he could also keep the party going for everybody *without* interruption.

Herc wasn't the first American DJ to use two turntables. Club DJs, especially New York City disco (early disco) DJs were already using two turntables before Herc. However, most of the club/disco DJs typically played one record at a time; that is, they let one record play all the way through before transitioning to the next record. But it was Herc who pioneered the style of playing the breaks continuously with two turntables.

[12] It's worth noting that, throughout the development of the b-boy dance form, dancers continued to draw their cue from a rich musical heritage that had long valued rhythm and breaks.

Herc was directly influenced by a South Bronx DJ named John Brown, who was actually the first to focus on spinning the breaks of records. As a teenager still in high school, Herc (not yet Kool Herc) hung out at a small nightclub called the Plaza Tunnel. Herc spent time at the Plaza Tunnel soaking up the records (most early funk) that John Brown played and studying the style of DJing he was doing.[13] It was this experience and interaction at the Plaza Tunnel that led directly to the style of DJing that Herc showcased at the infamous Sedgwick party in 1973 and subsequent parties thereafter.

As Herc, Grandmaster Flash, and Afrika Bambaataa continued to pioneer the hip hop DJ style, specifically, the elongation of the break of early funk records (the "merry-go-round" technique), the b-boy culture continued to solidify and become more definitive. B-boys would create "ciphers," dance rings (circles) in which b-boys would enter one at a time and compete against each other. Now that the music had been extended, the energy level had gone up and more intense competition sparked the creation of new moves. Early b-boys like the Nigga Twins (Kevin and Keith, who were only 12 years old when they attended their first Herc party), the Zulu Kings, and "Clark Kent" continuously borrowed moves from each other and used the *extended* break to experiment and come up with new moves.

During this time, spins became more prominent and footwork grew more complex. Floor drops, where b-boys dropped to the ground and popped back up again *on beat*, became basic stuff for all b-boys worth their weight. Arm- and hand-use for body support developed quickly; freezes and leg shuffles became popular; and knee spins and butt spins emerged. And around this same time, out in Brooklyn another early funk-based dance style known as the "Brooklyn Uprock" or "Brooklyn Rock" (soon it would come to be known as "uprocking" in the South Bronx) was serving as the foundation for another pivotal dance movement. Each of these moves, and others based upon them, eventually became part of the definitive architecture of the b-boy dance style, a style predicated upon dancers sampling and repurposing moves from one another.

[13] Hager, 31.

Similar to the way that graffiti was developing into its own subculture with its own slang, fashion, and crews, b-boying was quickly morphing into its own subculture, complete with its own slang, fashion (at first jeans and sneakers, then sportswear, usually warm-up suits and sneakers), and crews. B-boying was also just like graffiti in that it "was all about battling…Breakin' on somebody was the attitude you had to have if you called yourself a b-boy. You had to be ready to battle at the drop of a hat, whether you were on the street, in a park, or at a jam, and you had to be on your shit if you dared to compete."[14]

By 1977, many DJs had followed Kool Herc's lead, none more notable than Grandmaster Flash and Afrika Bambaataa. Although Herc was the first DJ to use turntables as instruments, it was Grandmaster Flash who took the art of hip hop DJing to the next level. Herc developed the style of elongating the break, but he used the "needle-drop" technique. That is to say, he dropped the needle of the turntable on the groove of the record where the break began. Flash went beyond the needle-drop and developed techniques and methods for *blending* records, mixing them, and cutting the beats together all *on beat*. Rather than simply keep records playing continuously, Flash wanted to create a continuous groove, one that was made up of all the "reorganized pieces of songs" he'd found. He wanted to "keep the beat." That is, he wanted to figure out a way to start and stop records on the left and right turntables without listeners knowing where one record stopped and the next one began.[15]

Grandmaster Flash became the first DJ to actually *physically* put his hands on the vinyl while the turntable's platter was spinning, giving him a level of control previously unrealized by other DJs. Using his hands to wind the records back and forth, a technique he dubbed the "spin back," and keying in on the *marks* (pencil lines at first) that he placed on the labels of his records, Grandmaster Flash developed what he called the "clock theory." Soon, he took the clock theory further and developed

[14] Grandmaster Flash and David Ritz, *The Adventures of Grandmaster Flash: My Life, My Beats* (New York: Broadway Books, 2008), 39.
[15] *Ibid*, 54-84.

the "quik mix theory," which was a collective of his own techniques for quickly cutting back and forth between records *on beat*, making one musical passage flow seamlessly to the next. Flash's "quik mix theory" included a number of firsts, but it most notably included the "spin back," a method for quickly rewinding records, and the "punch phase," a method for *punching* a record forward, right on the break. By using these methods, Flash was manually sampling and looping records.[16] Further, Flash was the first hip hop DJ to play a drum machine and to introduce it as a part of the hip hop DJ performamce — subsequently, becoming the person to "make beats" (drum machine-based beats) for rappers to rhyme over. Flash remembers using the drum machine this way:

> "There was this drummer who lived on 149th Street and Jackson, I think his name was Dennis. He had this manually operated drum machine and whenever he didn't feel like hooking up his drums in his room, he would practice on this machine. **You couldn't just press a button and it played, you had to know how to play it.** It had a bass key, a snare key, a hi-hat key, a castanets key, a timbale key. And I would always ask him if he ever wanted to get rid of it I would buy it off him. **A day came that he wanted to sell it and I gave it a title: beatbox.** *My flyer person at the time put this on the flyer: 'Grandmaster Flash introduces the beatbox. Music with no turntables.' ... what I would do is play it, play it, play it, doomm ah da-da uh-hah. Stop. Zoom. Play in a record. And then, while the MC was MCing,* where you would fade the beat out for a minute, I might switch back to the turntables. It was a real high part of our performance. A real high point. **'I stayed in my room for a month. And once I learned how to play it, myself and my MCs made up routines,** "Flash is on the beatbox." So the first time we did it, we didn't get screams and yells and whatever. It was, "Oh shit! Flash got this new toy." It probably got back to Bam, it probably got back to Herc, "Flash is making music – drum beats – with no turntable."'[17]

[16] Grandmaster Flash, who is considered to be the first hip hop DJ to play a drum machine, is widely credited with coming up with "punch phasing," a technique where sounds from one record, even vocals, are punched in from one record over the top of another. Punch phasing is the pre-cursor to cut-offs, or what is more recently known as "mute groups". The origins of the punch phasing partly explains why DJ Premier excels at the cut-off beatmaking style. A style that revolves around *punching* in a sound that *cut offs* another before releasing back to the previous sound. This style can't be done when a sound is in one-shot mode on a beat machine, rather, the sound must be in note mode.

[17] Brewster and Broughton, 248.

Grandmaster Flash's performance work with the Vox percussion box and his studio performance on the 1981 seminal album *The Adventures of Grandmaster Flash On the Wheels of Steel* (the first record made using only records and turntables, not studio musicians) illustrates that he was conscious of the fact that he was making beats. And taken all together, Grandmaster Flash's actions and innovations foreshadowed the art of beatmaking and the beatmaker as we know it today. This is yet another reason why Grandmaster Flash is the father of beatmaking. But it doesn't stop there. Grandmaster Flash exhibits another common characteristic of the quintessential beatmaker: He was a gearhead who loved to tinker and experiment.

As Kool Herc was winding down his career and while Grandmaster Flash was pioneering the use of turntables as instruments, Afrika Bambaataa was making a name for himself as a cultural unifier and DJ, one whose stash of records knew no bounds. Although the name "hip hop" is curiously credited to being first used by Lovebug Starski sometime before 1974, it was Afrika Bambaataa (ca. 1975-76) who first (consciously) used "hip hop" specifically to describe the type of jams (parties) he was throwing. All of Bambaataa's jams were well-attended by graffiti writers, b-boys, DJs, and rappers alike. Thus, it was mostly because of Afrika Bambaataa that "hip hop" came to (informally at first) describe the collective culture (movement) that encompassed the four separate New York City underground street elements (i.e. art forms): graffiti writing, b-boying, DJing, and rapping.

While a Grandmaster Flash music set was characterized by turntable wizardry and precision, an Afrika Bamabaataa set personified an eclectic musical mix. Although Bambaataa certainly played funk music, he also experimented with other music genres, particularly late 1960s and early 1970s rock.

Finally, even though Kool Herc, Grandmaster Flash, Afrika Bambaataa, and other pivotal DJs of the time ultimately developed distinct hip hop DJ performance styles (all based upon Herc's original innovation), it must be remembered that the parties that each threw between 1973 and 1978 were really more like events, wherein all four of the elements of hip hop culture were always well represented.

The Late Years of B-Boying and the Birth of Break Dancing

After developing the b-boy style for more than five years, many Blacks all but stopped by 1978. At the same time, more Puerto Ricans were just starting to get into b-boying. By 1979, b-boying, which had once been a movement almost exclusively practiced by Blacks, had become a new movement that was now led by Puerto Ricans. New crews like Rockwell Association, TDK, TBB, and the Rock Steady Crew (founded by Jimmy D and JoJo) emerged, taking over where the earliest b-boys like the Zulu Kings, Profile, and The Nigga Twins had left off. During this period, b-boying continued to move forward, but suddenly in 1980 it entered into a decline. That's when 14-year old Richie Colon stepped up and changed everything.[18]

Having grown up in the Bronx most of his life, Richie Colon moved with his family to Manhattan in 1980. Before he moved to Manhattan, he spent two years practicing the b-boy style in hopes of one day joining Rockwell Association. He changed his name to Crazy Legs, and he was now ready to join the ranks of master b-boys. But Rockwell Association and Rock Steady Crew were no longer dancing as much as they had been in the previous two years. So Crazy Legs was forced to find his own crew. After getting permission from Jimmy D (co-founder of Rock Steady Crew), Crazy Legs started a Manhattan branch of Rock Steady Crew. It was Crazy Legs and this branch of Rock Steady Crew that would bring the most fame to the Rock Steady Crew name.

The early and mid-1980s brought the advent of the so-called "power moves;" these were dance moves that emphasized gymnastics and more spinning action. From this period, dances like the infamous "windmill" (credited to Crazy Legs), and "1990s" (one-hand-stand spin) emerged. The early and mid-1980s also brought a level of media coverage of b-boying that had previously been unimaginable. This is when the Rock Steady Crew, along with another pivotal New York City b-boy crew, New York City Breakers, and

[18] Hager, 86-89. Also, information extracted from interviews with various 1979s Bronx and Brooklyn residents, specifically Canell Johnson.

movies like *Style Wars* (1982), *Wild Style* (1982), *Beat Street* (1984), *Breakin'* (1984), and *Breakin' 2: Electric Boogaloo* (1984), combined to spark a break dance craze all across America.

While b-boying was developing in the South Bronx and "Brooklyn uprocking" was happening in Brooklyn (the latter dance form unifying into the b-boy movement), there was a parallel dance movement, "locking" and "popping," that was happening on the west coast. Like b-boying in the South Bronx, locking and popping were inspired by funk music as well. But it should be noted that early west coast funk was slightly different than east coast funk.

From out of this separate early 1970s "funk movement" in Los Angeles, California emerged Don Campbell, aka "Don Campbellock," originator of "locking" (ca. 1970-73). Locking, a dance somewhat based on the "funky chicken," another popular dance at the time, featured a locking motion of the joints of one's arms and the bending of one's elbows. Soon after introducing locking, Campbellock formed a group called The Lockers. The Lockers were very influential in that they pioneered a number of new moves and other dances that made up the locking repertoire, including: "knee drops," "butt drops," the "stop n' go," "the fancies," "the lock," and "scooby doos." And, as with some of the later b-boys of New York City, some of the west coast lockers incorporated dives, drop downs, and other gymnastic moves.[19]

"Popping" was introduced in 1976. Originated by Sam "Boogaloo Sam" Soloman, one of the three founders of The Electronic Boogaloo Lockers, popping was a dance that featured the tick-like contraction movement of hands, arms, neck, chest, and legs, which gave off a mechanical or smooth robotic effect. There are conflicting stories as to how locking and popping made their way to the Bronx and the rest of New York City, but it is widely regarded that the dance was picked up (and initially misnamed "electric boogie") by dancers in New York City after groups like The

[19] Information extracted from interviews with various b-boys and dancers, including King Uprock, Mariella Gross, and Canell Johnson. Also see: Jorge "Popmaster Fabel" Pabon, "Physical Graffiti: The History of Hip Hop Dance," DaveyD.com. Further, see: episodes of television dance show *Soul Train* (ca. 1976), as well as other television shows of the same period, including: *The Dick Van Dyke Variety Show* and *The Carol Burnett Show*.

Lockers and The Electronic Boogaloo Lockers appeared on 1970s television shows like *Soul Train, Saturday Night Live, The Dick Van Dyke Variety Show*, and the popular sitcom *What's Happening!!*.

By the mid-1980s, mainstream media had grouped together most of these dance forms, both from the east and west coasts, and dubbed it "break dancing." Soon, break dancing became over-commercialized and all of the separate art forms that comprised hip hop dance lost emphasis on their root structures and nuances. More specifically, the essence and spirit of b-boying culture faded and seemingly disappeared. More than 40 years later, however, some elements of b-boy culture are thriving once again.

Rapping (MC'ing)

To truly understand the force that is rapping, you must first accept rap's conceptual heritage and its material artifacts and their authentic significations in history, i.e. origin and social intercourse and orature.[20] The roots of the art of rapping go back much farther than most people recognize. In fact, rapping, a clear example of the broad Black vernacular tradition, is a continuance of the African American "toasting" tradition, an oral tradition of lively verbal art that stretches back from the Reconstruction Era through to the jazz age and the social movements of the late 1960s and on through to today. A uniquely urban phenomenon, the African American toasting tradition — not to be confused with the Jamaican toasting tradition of the late 1960s and early 1970s[21] — is a dynamic

[20] For context and reference, see Wole Soyinka, "The Critic and Society: Barthes, Leftocracy and Other Mythologies," *Black Literature & Literary Theory* (New York and London: Methuen, 1984), 44. In his essay, Soyinka illuminates the problem that arises in academia when *critics* of African literary theory attempt to *teach it*. Soyinka points out that because these critics of the African literary tradition "refuse to accept the conceptual heritage or even material artifacts and their authentic significations…as valid dialectical quantities" for any literary theory, the "roots" of the African literary tradition are mis-taught, and students are ultimately "imprisoned" by the subsequent mis-teachings. I find a parallel in the ways in which the various elements of hip hop, specifically rapping and beatmaking, are taught. Because many contemporary teachers willfully refuse to accept the roots of rapping and beatmaking, new rappers and beatmakers are often hindered by mis-teaching and are therefore prone to misrepresenting these two art forms.
[21] The Jamaican toasting tradition of the 1970s has wrongly been considered by some to have played a major role in the art of rapping in hip hop. Because Kool Herc migrated

poetic performance art. It is traditionally learned directly from or by studying other "toasters," and it includes intense verbal training. African American forms of "toasts," which often feature boasts, "trickster" tales, adventures, and social commentary, typically use slang (and profanity) and center around some form of heroics or uplift made by a central Black character who *beats the odds* (i.e. a tragic event, a villain, etc.) by using his wits and common skills. Often in toasts, the central character "top talks" (out talks) an opponent, often a dangerous or tyrannical authority figure. Also, within this toasting tradition, versioning (oral sampling), improvisation, and using one's individual style are highly valued.

Before rapping emerged, the three most common forms of African American toasts were: (1) "signifyin' toasts;" (2) "radio DJ toasts;" and (3) "hustler toasts." "Signifyin' toasts," which appeared in both print and music and were often performed a capella, stem from the African American vernacular practice of "signifyin'." Signifyin' describes the verbal process of using the direct (denotative and figurative) meanings of words to say something *else* indirectly. Signifyin' is often used to parody or satirize a character, theme, subject, or event. Also, signifyin' emphasizes the connotative (secondary), context-bound significance of words or expressions in addition to their explicit or primary meanings, which is accessible only to those who share and/or understand the unique cultural values of a given speech community. Signifyin' toasts involve telling "trickster tales" in which central characters use verbal strategy to tap the *direct* meanings of words while summoning *indirect* meanings, often for the purpose of obtaining "hidden" but intended outcomes.[22]

---

from Jamaica, some historians and musicologists have incorrectly drawn parallels of the separate Jamaican toasting movement with the African American toasting tradition's direct influence on rapping and hip hop. Despite evidence that refutes the theory that Jamaican toasting influenced rapping, including Kool Herc's own testimony that it did not, this false narrative is still maintained by many today. But the truth is that the Jamaican toasting tradition played absolutely no role in the development of rapping or the hip hop style of music.

[22] Two of the most popular African American signifyin' toasts are "Shine and the Titanic," and "The Signifying Monkey." In "Shine and the Titanic," a Black stoker named Shine uses his wit and common abilities to both escape the sinking of the Titanic and the threat of a hungry whale. In "The Signifying Monkey," the Signifying Monkey in the jungle cleverly dupes a Lion. See: Henry Louis Gates, Jr., *Black Literature and Literary Theory* (New York and London: Methuen, 1984), 288.

"Radio DJ toasts,"[23] which were pioneered in the 1950s by Philadelphia radio disc jockey Douglas "Jocko" Henderson (of JOCKO & The Rocket Ship Show fame)[24], were quite different than signifyin' toasts. Unlike signifyin' toasts, radio DJ toasts were typically not too narrative in nature, and they were most often not characterized by a central character but instead a "hip," improvised telling of the moment. Radio DJ toasts were rapid, quick-witted radio "raps" (rhymes) or "skats," usually simple one- and two-liners filled with "hip" urban slang. Radio DJ toasts were impromptu and performed *throughout* radio shows, but particularly before and after records were played. DJs like Jocko would use toasts to help keep their shows moving or to boast about themselves, their radio shows, and/or the hit records they played. Jocko would often say things like, "Eee-tiddlee-dock, this is the Jock! Back on the scene with the record machine," or "Oo-papa-doo, how do you do?" "He ain't mean, he just wanna be seen;" "Mommy-Os and Daddy-Os;" "The Ace from outta space;" and similar toasts all exemplify the kinds of toasts Black radio DJs performed and their limitless ability to extemporize hip rhyming slang. Black radio DJs borrowed from each other and used their toasts to build up their radio shows and to communicate in a more personal way with their listeners.

By the early 1970s, there were a number of Black radio DJs who performed radio toasts, but the leader in 1970s New York City radio was Frankie Crocker. Frankie Crocker "the Chief Rocker", who was also the MC (Master of Ceremonies) at the Apollo during the mid- and late 1970s, said toasts like, "More dips in your hips, more glide in your stride;" and "If Frankie Crocker isn't on your radio, your radio isn't really on." Frankie Crocker, and later some New York City disco radio DJs, would have a role in the development of rapping in hip hop, as early rappers certainly borrowed from them.

[23] Some commentators draw a connection between rapping and the tradition of the African griot. While there's merit to that, over stressing this African griot link undermines the direct link that rapping has to the Black radio DJ.

[24] Other important pioneering black radio DJs of the time who performed radio DJ toasts include Maurice "Hot Rod" Hulbert, Jr. and Rufus Thomas. Also note: The radio DJ toast tradition was pioneered first on rhythm and blues radio stations.

It should further be noted that rappers are not descendants of the Jamaican sound system DJ tradition. More on this point at the end of this chapter.

"Hustler toasts," which reached prominence in Black street-corner culture and Black prison culture between the mid-1960s and early 1970s, share more similarities with signifyin' toasts than radio DJ toasts. Hustler toasts are mostly narrative and carry a message; but that's where the similarities stop. While signifyin' toasts often emphasize the connotative and are indirect, hustler toasts usually emphasize the straight-forward (often confrontational) and are mostly direct. While signifyin' toasts are often *versions* of well-known toasts, hustler toasts are often the true accounts of the individuals who perform them. Finally, signifyin' toasts are generally humorous and contain profanity in a passive context, but humor (when it is used) in hustler toasts is often sinister, and profanity is used aggressively. Although all three common forms of African American toasts played a role in the development of rapping in hip hop, no form had more direct influence than the hustler toast. And the most important hustler toasts to hit the streets of the South Bronx were James Brown's version of "King Heroin" and the Lightnin' Rod album, *Hustlers Convention*.

Released in 1973 and performed by Jalal Nuriddin under the pseudonym "Lightnin' Rod," *Hustlers Convention* became the single biggest inspiration for the early formulation of rapping in hip hop. Set to the music of Kool and The Gang, Bernard Purdie, Billy Preston, and Colonel Dupree, *Hustlers Convention* masterfully demonstrates the African American toasting and rapping traditions. The album contains a series of "rap songs" (prison-style toasts) that tell the story of two hustlers, Sport and Spoon, as they hustle their way through the ghetto one summer. Each rap spares no punches, as stories of drug use, dice and pool games, sexual episodes with random women, drug sales, and shoot-outs make up the balance of the album. Told through the first-hand account of Sport, the story begins with Spoon coming home from jail. It ends with Sport going back to jail, where after "twelve years of time," he realizes that he

was just a "nickel and dime hustler," and that the "real hustlers are those rippin' off billions from those millions who are programmed to think they can win."[25]

There can be no doubt that James Brown and Lightnin' Rod's (Jalal Nuriddin) album *Hustlers Convention* were the two biggest and most direct influences on the development of early rapping in hip hop; most (if not all) of the earliest hip hop/rap pioneers have maintained this. In fact, the first hip hop/rap music architect and pioneer, DJ Kool Herc, plainly said as much more than 25 years ago: "The inspiration for rap is James Brown and the album *Hustlers Convention*."[26]

Rapping in Hip Hop

Early on in the development of hip hop, rapping was very simple and rappers (MCs as they were also known then) were a sideshow to the DJ. The first hip hop toasts (raps) ever performed were by DJ Kool Herc, who, inspired by James Brown and the album *Hustlers Convention*, would say impromptu toasts while DJing. The toasts that Herc performed were not long or particularly narrative. They were simple expressions designed to keep the energy of the party going. He would say things like, "Yes, yes, y'all, it's the serious, serio-so joint*ski*," or "YES-YES, Y'ALL! TO-THE BEAT, Y'ALL." He would also shout out the names of some of the party-goers, combining these shout-out-like expressions with rhymes and some of the well-known slang of the day: "As I scan the place, I see the

[25] *Hustlers Convention* (United Artists, 1973). At the time of the release of *Hustlers Convention*, Jalal Nuriddin was the leader of The Last Poets, a group of Harlem poets and musicians who earned acclaim through their searing social commentary and Black nationalist sympathies. Prior to becoming the leader of The Last Poets, Nuriddin was incarcerated.

[26] Hager, 45-49. Early rap pioneer Grandmaster Caz of the Cold Crush Brothers makes a similar unwavering claim: "I knew the entire *Hustlers Convention* by heart. That was rap…" See also: Toop, 53-58: "James Brown was the most direct connection between soulful testifying and Bronx poetry… His position as spokesman for black consciousness and minister of super-heavy funk might have been on the wane by the '70s, but for the b boys he was still Soul Brother Number One." Accounts by Herc, Caz, and other early hip hop architects contradict the romantic notion that rap comes from or is inspired by African griots. Some scholars maintain that rap is directly linked to the African griot tradition. Perhaps the broader, ancestral connection applies in this regard. However, the immediate roots of rap are more directly linked to the African American toasting tradition, especially hustler toasts.

very familiar face…of my mellow;" or "Wallace Dee in the house. Wallace Dee, freak for me." Soon, Herc added Jay Cee and Clark Kent (The Herculords) to the show, and the Herculords would rap the same type of toasts first performed by Herc.[27]

Interestingly enough, it was another DJ who pushed rapping in the direction that eventually led to modern rapping. In an effort to keep pace with Kool Herc, Grandmaster Flash — borrowing from Herc — wrote a rhyme (sometime between 1974 and 1975) that would prove even more influential than Herc's initial toasts. The rhyme went like this: "You dip, dive and socialize. We're trying to make you realize. That we are qualified to rectify that burning… desire…to boogie." Hardly the sort of lyrical dexterity that we recognize in modern rapping; still, what Flash's rhyme did was open up the possibilities for *how* rhymes *could* be written and performed.

Grandmaster Flash was not consciously trying to advance the art of rapping, he was just acting out of necessity. According to Flash, "vocal entertainment became necessary to keep the crowd under control."[28] Flash soon put together a group of rappers to be part of his DJ show. The group, The Furious Five, which was composed of rappers Cowboy (Keith Wiggins), Kid Creole (Nathaniel Glover), Eddie "Mr. Ness/Scorpio" Morris, Guy "Rahiem" Williams, and Creole's younger brother, Melle Mel (Melvin Glover), would quickly become one of the most pivotal rap groups of all time, almost immediately sparking similar groups like the Cold Crush Brothers and The Treacherous Three.

Between 1975 and 1979, rap styles[29] were an assortment of party rhymes, nursery rhymes, boasts, and comic-book inspired joke rhymes. Rap routines, like the ones first performed by The Furious Five, became more elaborate and more entertaining in the late '70s. The quintessential "rap routine" was perhaps most

[27] Hager, 47. See also: Flash and Ritz, 102.
[28] *Ibid*, 47.
[29] There were countless rappers who helped advance the art of rapping, but some of the most notable rappers of the period include: The Furious Five (Melle Mel, Cowboy, Raheim, Mr. Ness, and Kid Creole), The Cold Crush Brothers (Grandmaster Caz, Whipper Whip, Dot-A-Rock, Easy A.D., DJ Charlie Chase, Kay Gee, DJ Tony Tone, J.D.L., and Mr. Tee), Double Trouble (Lil Rodney Cee and KK Rockwell), The Treacherous Three (Kool Moe Dee, Special K, and LA Sunshine), Funky Four Plus One More (Lil Rodney Cee, KK Rockwell, Sha Rock, Keith Keith, and Jazzy Jeff with DJ Breakout), and Spoonie Gee.

personified (and perfected) by The Cold Crush Brothers and The Fantastic Five. Just as with graffiti, b-boying, and DJing, rapping became increasingly more competitive as rappers borrowed from one another and created new styles. Rap "battles" became a defining event of the time. It was also during this era that personal styles, like those from Grandmaster Caz, Kool Moe Dee (of the group the Treacherous Three), and Spoonie Gee, were rapidly developing.

By 1980, the art of rapping had begun to shift towards the style and structure we recognize today. Paramount to this broad directional shift in rapping were Kurtis Blow and Melle Mel. Kurtis Blow's big hit was the song "The Breaks." Neither a party rhyme, a boast, nor a joke rhyme, "The Breaks" was the first attempt at serious subject matter, albeit set to a party-style backing track. Using an updated, hard-hitting version of the studio band sound of the time (inspired by the studio-band approach used for the Sugar Hill Gang's "Rapper's Delight"), Kurtis Blow articulated a more direct and consistent flow, one that was more rhythmically balanced than any other rap previously recorded.

In 1982, two years after "The Breaks" and just months after the release of "Planet Rock" (the breakaway hit by Afrika Bambaataa), Melle Mel pushed the art of rapping into another stratosphere when he and The Furious Five released "The Message." Building off of Kurtis Blow's pioneering efforts of serious subject matter, Melle Mel and producer Duke Bootee (Ed Fletcher), leader of Sugar Hill Record's in-house studio band, created what was essentially the very first "reality rap" song. "The Message," which featured a grim, down-tempo rhythm track created by Duke Bootee, was a stark departure from the club rhymes and light subject matter of the period. Reminiscent both in tone and performance to Lightnin' Rod's *Hustlers Convention*, "The Message" tells the stories of many typical figures living in the ghetto, and it ends with a youth going to jail, where, after being raped, he commits suicide. Equally impressive to the straight-forward subject matter of the song was the structure of the rhyme itself. The meter that Melle Mel used was more rhythmic in nature, and the rhyme bars that made up each stanza were more conversational than any rap that had been

previously recorded. "The Message" marked the beginning of the rhyme style in which a rapper seemingly talks directly to individual listeners rather than addresses an audience, the style that had been the guide for most rappers up to that point.

Finally, it should be noted that in addition to sparking the development of more complex rhymes, "The Message" was the hip hop/rap song that prompted white music journalists to start taking hip hop seriously.

In 1983, just one year after Melle Mel laid down the foundation of modern rapping, Run-DMC released their first single, "It's Like That." Similar to "The Breaks" and "The Message," "It's Like That" was a rap re-telling of *the way it is* in the hood. However, what set "It's Like That" apart from those other earlier efforts was the instrumentality that it used. The rhymes on "It's Like That" were set to a sparse drum-programmed beat, a fact that seemingly inspired rappers Run and DMC to borrow and merge the rhyme styles of Kurtis Blow and Melle Mel, respectively.

In 1984, T La Rock broke onto the rap scene and introduced the "complex lyrical rhyme style" with his single "It's Yours," which was produced by a then unknown producer named Rick Rubin. Unlike the message-driven and crowd-moving rhymes of Kurtis Blow, Melle Mel, and Run-DMC, T La Rock's "It's Yours" was a celebration of lyricism. Backed by a sparse drum track (a sound that would come to personify the period), T La Rock put forth a lyrical arsenal that clearly separated his style from the less complex rhyme structures that preceded him. Rather than use the typical A B A B rhyme structure, T La Rock instituted a rhyme style that completely abandoned conventional rhyme structure, offering up stanzas in "A A A B" and "A A A B B" form. Eschewing simple rhyme patterns and easy metaphors, T La Rock introduced a rhyme structure that was more dense and layered than anything before. Until T La Rock, words were mostly used to set up the rhyme that came at the end of each line, but T La Rock pioneered the rhyme style in which any word in the meter could be rhymed.

Between 1985 and 1988, there were six new rappers who emerged and solidified the modern style of rapping: LL Cool

J, KRS-One, Rakim, Slick Rick, Kool G Rap, and Big Daddy Kane. With his debut album, *Radio* (Def Jam, 1985), LL Cool J borrowed from the collective lyrical energies that preceded him and furthered the tradition of aggressive rapping (an approach that was perhaps first pioneered by Grandmaster Caz). Incorporating the blastmaster skills of the Cold Crush Brothers, Kurtis Blow, Melle Mel, and Run-DMC, and utilizing the dexterity of T La Rock's rhyme structure and Silver Fox's[30] phrasing, LL Cool J (only 15 or 16 years old at the time), put together a lyrical force that combined the complex rhyme style with the blastmaster approach.

With his first two singles in 1986, "Eric B. Is President" and "My Melody," Rakim (of Eric B. and Rakim) immediately secured his position among the most influential rappers (lyricists) in the history of hip hop/rap music. Rakim pushed the boundaries and dimensions of the poetics of rap in a way in which new structures could be explored. Coupling both complex and easy riddles with a dead serious rhyme flow and an uncanny knack for using breath control and delivery to accentuate each word in a rhyme, Rakim established a dense, multilayered rhyme-scheme approach that helped revolutionize the complex lyrical rhyme style.

Not to be outdone, in that same year Kool G Rap met DJ Marley Marl and the pair made the single "It's a Demo." Although he was influenced by Silver Fox and T La Rock, Kool G Rap shattered the previous complex lyrical rhyme style. With "It's A Demo," Kool G Rap further pushed the complex lyrical rhyme style by taking full advantage of sample-based beats, which featured tight rhythms and repetition— *Repetition being the fuel that powered the more skilled rap lyricists to shine with their own rhythmic flows and verbal dexterity*. This allowed Kool G Rap to aggressively attack the basic poetic structure and exhaust simple meter. He doubled-, tripled-, and even quadrupled-up hyperactive rhyme couplets, judiciously stretching and chopping words and using slant rhymes more as a means for tempo control and stylistic intonation than for

[30] After 1987, most "new" rhyme styles were stylistic innovations that were based upon the canon of lyrical work produced prior to 1988. Rapper Silver Fox unfortunately recorded very little, but he must be credited for his influence over the lyrical style and techniques of LL Cool J and Kool G Rap.

their implicit value. And like Rakim, Kool G Rap demonstrated an extensive understanding of breath control and its effect on delivery and flow. Powered by increasingly aggressive and complex sample-based beats, Rakim and Kool G Rap established the complex lyrical rhyme school and style architecture that would later become the foundation for many lyricists of the same cloth, like Nas, O.C., AZ, Ghostface Killah, Black Thought, and Kendrick Lamar.

In 1987, the South Bronx crew Boogie Down Productions (BDP) dropped the seminal album *Criminal Minded* (B-Boy, 1987). An album distinguishable for many reasons, not the least of which being that it contained a song that sparked one of the most infamous beefs in hip hop/rap history,[31] *Criminal Minded* featured KRS-One using yet another new rhyme style. Borrowing from the styles of Kurtis Blow and Melle Mel, and drawing on his true life experiences in the streets of the South Bronx, KRS-One introduced a new style of reality rap. It was a style that was defiant, in your face, conversational, pulled back in pace, and educational; that is to say, it was educational in the same vein as Lightin' Rod's *Hustlers Convention*. One year after *Criminal Minded*, KRS-One and BDP dropped *By Any Means Necessary*. Although the album still featured KRS-One's own brand of reality rap, it also presented a much more educational-minded KRS-One. Here, I should mention that although KRS-One and Chuck D of Public Enemy laid down the foundation for so-called "conscious rap," both rappers were not considered as such at the time (the term "conscious rap" didn't exist yet); they were merely thought of as great rappers with unique rhyme styles that were well-grounded in hip hop's rap tradition.

As far back as 1975, the storyteller rhyme style was in effect in hip hop, but prior to 1988 the form was used rather sparingly. That changed after the release of Slick Rick's *The Great Adventures of Slick*

[31] The album *Criminal Minded* included the songs "The Bridge Is Over" and "South Bronx," both diss records were aimed at Marley Marl and M.C. Shan and the Queensbridge Housing Project (Long Island City, Queens, New York). KRS-One apparently believed that Marley Marl had said that hip hop started in Queens; thus the diss. But in my interview with Marley Marly, Marly told me that he never made such a claim. It would appear then that KRS-One lobbied the first strike over what he felt was a slight. As the story goes, KRS-One tried to give his demo to Marley Marl, but Marl didn't accept it. Whatever the actual causes were, however, the songs personify the classic BDP/Queensbridge battle.

Rick (1988). Unlike the stortyteller rhyme style of the '70s, Slick Rick's style, which borrows extensively from the South Bronx reality rap style, featured a narrative approach that was both broad and meticulously detailed. Moreover, Slick Rick's rhyme flow was easy and not overbearing, something entirely unassuming yet engaging. It should be recognized that the modern standard for the storyteller rhyme style was established with Slick Rick.

Finally, in the same year that Slick Rick made his debut, Brooklyn rapper and Juice Crew member Big Daddy Kane dropped his debut album *Long Live the Kane* (1988). As far as rhyme *styles* go, Big Daddy Kane falls somewhere in between Rakim and Kool G Rap. However, Big Daddy Kane introduced a consciously "smooth" element to the art of rapping. Before Kane, rappers were not particularly concerned with the polish of their rhyme style but rather the rawness of it. Kane, who could just as easily rip the complex lyrical rhyme style as he could the more straight-forward rhyme styles, introduced a new component to rhyme styles, something that I call the "showmanship delivery." The showmanship delivery describes the delivery style in which a rapper delivers lines in such a way that they resonate much more clearly and come off more profoundly (perhaps even more than they really are). Using the showmanship delivery and his mastery of rhythm and tempo, Big Daddy Kane carved out a rhyme style that mirrored the confidence of Grandmaster Caz and the mid-1970s MCs *and* personified the structural dexterity of the newly created modern rhyme style.

To sum it all up, rapping, in the abstract, was nothing new. In fact, it was a continuum of the Black American oral tradition, specifically the vernacular tradition of toasting in the United States. In particular, rapping was a blend of the signifyin', radio DJ, and hustler toasts of the African American toasting tradition. That being said, the art of rapping in hip hop did distinguish itself and present a new development in the Black vernacular tradition. From borrowed simple toasts and nursery rhymes, boastful and light subject matter, complex lyrical structures and reality rap concepts, rapping developed into the newest and one of the most powerful vocal styles of the twentieth century.

Setting The Record Straight About DJ Hollywood and the Art of Rapping

It's misleading to note that DJ Hollywood was the first *DJ* to incorporate "rhythm talk," most popularized by Black radio DJ's like Frankie Crocker (WBLS) and Hank Spann, "The Soul Server" (WWRL). Rappers had incorporated rhythm talk before DJ Hollywood; and the call-and-response that he did was also nothing new. Still, DJ Hollywood is an important piece of the rhyme and commercialization puzzle of hip hop/rap music. Because DJ Hollywood catered to a crowd that was more into late disco, his performances certainly helped spread rapping to larger audiences, and his style of rapping — which was borrowed from the same commonwealth of the early Bronx MCs — became a familiar part of hip hop/rap music rhyme repertoire.

Before "The Message" There Was "How We Gonna Make the Black Nation Rise?"

"The Message" is considered to be the first "reality rap" or "conscious" rap record — a form of rap song that eschews the subject matter of partying or braggadocio and focuses on a sociopolitical message. But the truth is, the first rap record in this tradition was "How We Gonna Make the Black Nation Rise?" by Brother D with Collective Effort (Clappers, 1980). With its message of self-improvement — Black education and organization — "How We Gonna Make the Black Nation Rise?" is that rare kind of record. Written entirely by Brother D (Daryl Aamaa) and performed by Brother D and uncredited men and women whom he dubbed Collective Effort, "How We Gonna Make the Black Nation Rise?" was militant and it spoke to a Black uprising and Black nationalism while critiquing material activities and possessions, all set to a sample *and* replay of Cheryl Lynn's dance-friendly, late-disco hit "Got To Be Real" (1978). A political song, yes; but "How We Gonna Make the Black Nation Rise?" is much more than that in terms of how it contributed to the evolution of hip hop/rap lyricism.

In the short term, "How We Gonna Make the Black Nation Rise?" paved the way for "The Message."

Critical Observation: Hip Hop/Rap Music Was Retro Based From The Start

Basing an art form and music on the use of music that the world had forgotten is how hip hop/rap music was born, and hip hop ultimately became the world's most powerful music culture. Within the hip hop/rap music tradition, it was not the art of rapping that elevated the of art sampling, rather it was the art of sampling that lifted up the art of rapping and cemented hip hop/rap music as a legitimate music form and tradition.

The Hip Hop Sensibility & Hip Hop Attitude

Having looked at the development of the four original elements (art forms) of hip hop, it's clear that hip hop has its own esthetic standards as well as its own aesthetic priorities. Taken together, these standards and priorities form what I call the **hip hop sensibility.** To understand what the hip hop sensibility is and how it drives and informs creativity in hip hop, you have to know the five fundamental attributes, i.e. properties and traits, that personify it.

First, there's **the importance of style**; more specifically, there's a sharp focus and emphasis on individual style. Style identity was a critical factor in the development of the four elements of hip hop. The early hip hop pioneers were completely consumed with forming and representing their *own* style. In fact, to the pioneers, originality was not based so much on some arbitrary "newness," but rather on the stylistic innovations of the shared creative commons that one was able to *add to*.

Second, there's the transgressive philosophical approach to creativity. As is often the case in ghettos and their subsequent street cultures, there exists a **culture of sampling.** That is, a culture which enables its residents (in this case, the residents of the South Bronx and other similarly hard-hit sections in New York City) to take

and make use of pieces of culture from both within *and* outside of their own settings, particularly from mainstream American society. Immersed in this culture of sampling, hip hop pioneers learned how to convert those pieces of mainstream American culture in accordance to their own needs, principles, priorities, and values. In this culture of sampling, everything is fair game and open to transformation, reconceptualization, and recontextualization. Music, music instruments, language, dance moves, aerosol cans, fashion, automobiles— *If it can be converted and flipped, it will be.*

Thus, the early hip hop pioneers openly relied on their ability to convert traditional forms and elements of music, art, and fashion into a distinctly hip hop aesthetic. In this way, hip hop has always been a transformative and transgressive culture. For example, b-boys borrowing karate moves and gymnastic stunts and reconceptualizing them; or borrowing popular Black American dance moves like the "bus stop" or James Brown's "good foot" and converting them into an entirely new dance form. All of this while simultaneously turning sportswear into a new fashion style that would come to be known as streetwear.[32] And how about hip hop DJs using turntables as instruments, that is to say, in a way that transgressed their traditional use and designed boundaries? Then there's the case of graffiti writers, who used aerosol paint cans to create a fresh new art form, which they applied on non-traditional "canvases". And finally, we see this culture of sampling at work when we look at how rappers (MCs) borrowed from toasters and radio DJs, and how they break up and extend the implicit and indirect meanings of words (even inventing new words), formalize slang, and reconstruct traditional poetic (rhyme) forms and meter.

Hip hop's transgressive nature is governed by what I like to call its "rules/freedom duality." The rules/freedom duality describes the sensibility that hip hop practitioners *consider* before they use something (i.e. a form, expression, element, etc.) outside of hip hop. This simply means that hip hop practitioners work with a sense of freedom to use tropes and elements from other traditions

[32] B-boys — b-boy culture and hip hop culture in general — is one of the main reasons why sneakers are *fashionable* in hip hop to this day. Prior to b-boys, sneakers were something mostly worn for sporting events and children's play.

or cultures, provided they can convert these tropes and elements *into* hip hop form.

Communal creativity[33] is the third attribute of the hip hop sensibility. All of the early hip hop pioneers participated in and mastered their art forms through the process of communal creativity. This is to say that every new style and method that was originated entered directly into a well-known creative commons. From this creative commons, wherein canonical works, styles, methods, and techniques were developed, the architects of hip hop openly borrowed ideas and knowledge. In turn, they further created new styles, methods, and techniques that also went directly into the creative commons, codifying the hip hop tradition.

This communal creative pipeline was perhaps best personified by the practice of "versioning." **Versioning** can best be described as the stylistic reworking of established (popular) styles or works. Versioning was paramount to the overall creative process of all of hip hop's earliest pioneers. When PHASE 2 introduced bubble letters, every graffiti writer thereafter developed their own *version* of the new style. And incidentally, it's important to point out that although PHASE 2 is credited with having introduced the style, it wasn't considered *his* style; instead, it was *one* established style that, once created, entered directly into the creative commons. Therefore, it belonged to all graffiti writers. Similarly, when DJ Kool Herc began using two turntables and two copies of the same record, focusing exclusively on the "break," his style, method, and technique entered directly into the creative commons, which other DJs borrowed and developed into new styles, methods, and techniques.

Within hip hop's early communal creativity, syncretism played a major role. Syncretism, as I use it here, refers to the combination or fusion of the inflectional forms (slang), practices, principles, presuppositions, and/or ideologies of each of the original four elements (art forms) of hip hop. Cross-fertilization of the four elements of hip hop culture and cross-participation by the architects of hip hop in the four elements was not only very common, it

[33] The cultural tradition of communal creativity is further discussed in greater detail later in chapter 17.

was expected.[34] In this way, each element influenced the other in a uniquely reciprocal manner. Thus, the incredibly high level of syncretism that occurred between the four distinct elements of hip hop led to their unification and ultimately to the formulation of one common hip hop ideology and philosophy.

Finally, because of hip hop's early communal creativity, many of the architects of hip hop willingly entered into apprenticeships with masters of one or more of the four elements of hip hop. In hip hop's developmental years, there was an objective reverence for the masters of the art forms. As such, most (if not all) style masters took on apprentices, often as an obligation to the development of the art forms. And because they understood the importance of training and having the proper foundation (knowledge), many budding style masters actively and unshamefully sought to be apprentices.

Competition is the fourth attribute of the hip hop sensibility. The *competitive consciousness* of the architects of hip hop was second only to *style consciousness*. The earliest hip hop pioneers saw competition not only as a necessary component of creativity but also as a critical means to individual recognition.[35] Through their commitment to regular, intense competition, the architects of hip hop were able to ensure that the overall level of originality and quality of each art form remained high. It's also worth mentioning that the hip hop pioneers competed based on their knowledge and mastery of established styles as well as the styles and innovations that they were able to bring to the table. In other words, although competitors were revered for their ability to introduce something new and innovative, they were also judged by their knowledge and manifestation of the core tenets of the art forms that they represented. Finally, it's important to understand that through such vehement, quality-based competition, the architects of hip hop were able to maintain a strong sense of artistic integrity and pride. Moreover, they consciously established the process of intense

[34] This means that the pioneers and original architects of hip hop were embedded with a deep overall understanding of the culture, in particular, how and why it coalesced into a movement. Today, this understanding is lost on many people. More and more people enter into beatmaking with little to no understanding of hip hop culture.
[35] Flash and Ritz, 39.

individual practice as a critical rite of passage.

The fifth attribute of the hip hop sensibility is the **hip hop attitude**. The **hip hop attitude** is best described as an anti-establishment, "me-against-the-world" sentiment that grew out of the harsh socio-economic backdrop of hip hop's beginnings. The architects of hip hop took to heart the notion that *This is a tough world*, one in which, *Nobody gives you anything*; and therefore, *You gotta take chances, because you can't sit back and wait for things to happen. You gotta make it happen*! Within the DNA of the hip hop attitude is the ever important idea of survival, which means that there's no room for weakness. Thus, the hip hop attitude is in-your-face and often confrontational, a reflection of the harsh realities of the South Bronx Disaster.

Again, it's worth remembering how this attitude was, in large part, created. Hip hop culture represented a cultural and social change from the bottom-up. And among the many emotional and philosophical conditions that the South Bronx Disaster created, a heightened level of urgency and uncertainty about the future were two conditions that profoundly (and disproportionately) affected the South Bronx youth, hip hop's earliest architects and pioneers. This urgency and uncertainty was predicated primarily upon one thing: daily survival. Therefore, it should come as no surprise that hip hop/rap music, and the encompassing hip hop culture, has a distinct sense of urgency and chaotic certainty (controlled chaos) that is governed by a proactive, "Get yours!" attitude. Perhaps a fair analysis would deem this attitude pragmatic, given the socio-economic climate and urban renewal circumstances that flanked hip hop's earliest pioneers from every angle.[36]

The Evolution from Hip Hop to "Rap Music"

By 1978, a noticeable change had emerged in hip hop culture. Although DJs were still the central figures at this point, rappers were

[36] Hip hop/rap music is based foremost on its own *practical* aesthetic standards. Hip hop/rap music carries a straight-to-the-point musical philosophy. Because of this, it often has little use for drawn-out conceptions based on abstract knowledge.

now almost on par with them. Between 1976 and 1978, rappers had developed their performance showmanship and lyrical content so significantly that crowds were steadily coming to parties to see *them* almost as much as they were coming to see DJs. Moreover, cassette tapes of "rap music," then the only means through which hip hop/rap music was documented and distributed, were becoming ever more popular and increasing the notoriety of the rappers in the process. Then, in 1979, one single event instituted a seismic shift in hip hop.

"Rapper's Delight," released in 1979 by Sugar Hill Records, *six years* after rap music had been brewing in the South Bronx, was the first bona fide hit rap record on radio airwaves.[37] The story surrounding the song itself is as much legend as the milestones that it set and the doors that it opened up. Sugar Hill Records owner, Sylvia Robinson, who lived in and operated her label (with her husband, Joe Robinson) out of Englewood, New Jersey, became interested in the commercial prospects of hip hop music, purportedly after noticing her children's affection for rap music. (By 1979, rap tapes were traveling throughout New York City and in some parts of New Jersey, where people there had family in New York, thus this story appears to be the most accurate). The Sugar Hill Gang, the rap *performers* of "Rapper's Delight," were actually not an original Bronx hip hop group of rappers at all. Instead, they were a make-shift "hip hop/rap" concoction, assembled by Sugar Hill Records label-head Sylvia Robinson.[38]

"Rapper's Delight" went on to popularize rap music nationally, setting the stage for rappers to become just as iconic as soloists and lead singers from other music forms. Thus, of the four original elements that comprised early hip hop culture, rap music would become the most far reaching, most visible, most commercially

[37] "Rapper's Delight" was not the first rap song commercially recorded and released. That distinction belongs to Brooklyn's The Fatback Band, which released the single "You're My Candy Sweet," which had on the B side a rap called "King Tim III (Personality Jock)." Neither the Fatback Band's song or the Sugar Hill Gang's song was considered to be the authentic hip hop of the time, primarily because each song's musical track was performed by a band rather than a DJ.

[38] David Toop, *Rap Attack: African Jive To New York Hip Hop* (New York: Pluto Press, 1984), 71-81. Information also extracted from my interviews with producers Marley Marl and Minnesota.

viable one of them all. Rap music stepped out of the park jam and off of cassette tapes right into the recording studio and, subsequently, the music business. It went from a mainly live-performance medium to a more fine-tuned recorded medium. Once this happened, rap music garnered widespread acceptance from both the music industry and the mainstream media. In no time at all, the term "rap music," the music of hip hop, was shortened to "rap."

Soon, hip hop culture in general, and rap music specifically, was co-opted and commercialized by corporate American interests and influences. Once this happened, many self-described hip hop purists and traditionalists began arbitrarily rejecting the "rap" classification, ignoring the fact that it was the architects of hip hop who first described the music as "rap," and instead began referring to the music synonymously with and exclusively as "hip hop". Perhaps this was a means to both reclaim the music as well as distinguish and signify a truer, supposedly purer form of hip hop. A brand of hip hop that was seemingly more influenced by the love for the art-craft and less influenced by the spoils of commercialism. Whatever the real cause, this conscious move to not use the "rap" designation ironically opened up hip hop music to many more broader interpretations than it can fundamentally hold.

Finally, as rap music grew, inevitably the significance of the rapper increased and the role of the DJ decreased. Thus, it was also inevitable that the beatmaker, the direct descendent of the DJ, would soon become the primary music provider for the rapper.

Hip Hop's False Origin Stories

Setting The Record Straight on the Disco and Jamaican Roots Origin Stories of Hip Hop

Hip hop's early history is inundated with false narratives, myths, fables, repurposed facts, and a cacophony of "the first" to do something claims. This is because when it comes to hip hop's roots, there are lots of people who have a vested interest in engaging in revisionist history. This revisionist activity mostly takes shape in the form of ascribing credit to or scaling back credit from specific persons, scenes, and locations. But overall, there's nothing worse than the false origin stories that try to claim credit for hip hop's *creation*. Not only do these false "roots of hip hop narratives" misinform, they often center people or movements that held no direct or indirect influence or impact on the origins of hip hop. This is why in this section, I will examine the six main false origin stories of hip hop.

Two notes before starting. First, the commercial strides or the national (then global) spread of a music culture and the root causes of a music culture are not one in the same. Second, I have not tried to force any narratives; I have only followed what the evidence dictated. On the other hand, some commentators — many of whom have accessed some of the same evidence as I examined — have forced certain narratives; even when confronted with direct evidence that contradict their claims, they have persisted with propping up inaccurate claims. And in some cases, as we will see, some commentators have walked-back their claims without ever bothering to correct their records.

The Disco Narrative

Let's get a few things straight. First, hip hop is *not* a "reconstruction, deconstruction or selective evolution of disco."[39] While house and garage music may accurately be described as such, hip hop should never be described in this way. Hip hop is not *based* on disco. S*ome* of the records (source material) favored in early hip hop overlapped with early disco, but overlaps often happen in subcultures that are emerging parallel and independent to each other in the same era, especially in a city like New York. We can't conflate an overlap of certain records being played in one music culture as the father of another music culture that's emerging at the same time. Hip hop repurposed a specific sub-set of the same music of the time — soul, funk, Latin, and rock — and developed *independently* of disco. Hip hop did not follow disco's lead, nor looked to it for its cues.[40]

Second, Francis Grasso (more on him later) had nothing to do with hip hop; more precisely, he has *no* connection to the story of the sampling tradition of hip hop/rap music. Third, there *is* a link between hip hop and disco, but the connection is not as strong (or weak) as some commentators have claimed that it is.

Late disco did play a role in helping to spread hip hop to larger audiences, but by 1979, when "Rappers Delight" hit radio, hip hop had already been established. It's here that many commentators often play loose with the timeline and context. The commercial strides or the national spread of a music culture and the root causes of a music culture are not one in the same. Still, despite the fact that disco does bear a link to hip hop, there are some people who prefer not to give credit to disco for helping hip hop along; and there are others who refuse to draw a connection between hip hop

[39] "...hi-energy, house, garage, techno and hip hop are all reconstructions, deconstructions or selective evolutions of disco – the primal parent of the modern dancefloor." Bill Brewster and Frank Broughton, *Last Night A DJ Saved My Life: The History of the DJ* (New York: Updated edition 2006, Amazon Kindle version), 202.

[40] Sugar Hill Gang's hit "Rapper's Delight" (1979) was neither a reflection of early disco or early hip hop. It was, however, an almagamation of things: authentic street raps and late disco.

and disco under any circumstances. This deliberate removal of disco from hip hop's story is egregious, especially once you consider the significance of DJ Hollywood, a DJ from Harlem who was less about the breaks and more in-line with the disco sounds that were being released at the time, ca. 1977-1979.

The apprehension with properly crediting disco with *any* role in the development of hip hop comes down to two things. First, the "disco" that most people think of — the disco ca. 1976 to 1979, i.e. the *Saturday Night Fever* era — has nothing to do with the roots of disco, i.e. *early* disco, which was based on soul, funk, and Latin records and interesting rhythmic (beat-driven) music from around the world. This is where we mainly find the musical link.[41]

Second, early disco (1971-1975) was a scene driven by gay people at underground gay clubs in New York City. These gay clubs were predominantly Black and featured white DJs. Thus, the disco backlash that arrived at the end of '70s wasn't just about the music, it was often homophobic in nature. And for much of the straight masses who adore hip hop and who, for the most part, control its historical narratives, disco has too many gay associations, so the link between early disco and hip hop, which is really a sourced music and DJ/technique-based connection, often goes undiscussed.

This apprehension, which again is due to the over polished commercialism of late disco and the gay associations of disco in general, makes parsing out *where* to credit disco, and the people who pioneered it, in hip hop's origins stories. Some commentators have gone overboard, crediting disco with too many "firsts" and neglecting the fact that certain DJ techniques and preferences developed in hip hop independently from disco. For instance, if we go by the Sedgwick Rec Room "first hip hop" party legend of 1973, then we can't ignore the reality that hip hop DJing was already being forged by Kool Herc in August, 1973, two months *before* the famed disco club Le Jardin even opened its doors in Manhattan.

[41] "The disco that drives West End musicals, the disco that compels drunken students to don afro wigs and platform shoes, the disco that gets everyone on the dancefloor after a million weddings, has very little to do with disco's roots, or indeed with the larger body of work which comprises disco. It is instead the legacy of a short (roughly 1976–79) period when some of the music crossed over into super-profitable commerciality." Brewster and Broughton, 176, 200-201.

Francis Grasso Did Not Directly Influence Hip Hop DJs

The legend of Francis Grasso is warranted. He was a figurehead of New York-inspired club DJ culture; he did play a major role in elevating the idea of DJing. (But here he wasn't alone: Jamaica, the UK, and hip hop has their own DJ stories in this regard). The Grasso legend, as big as it is, stops there, though. Hip hop's founding fathers did *not* take their cues from Grasso as author Nate Patrin indirectly implies in his book *Bring That Beat Back*.[42] And Grasso is not "the ancestor of all modern DJs, the godfather of the craft...," nor is Grasso "the first DJ to present a *true* creative performance," as Brewster and Broughton claimed. In fact, the authors contradict and walk back these claims in the same book: "The first disco remixers developed their techniques – which were initially more about lengthening and restructuring than about sonic dismemberment – **without being aware of what was happening in Jamaica**."[43] What's equally telling is that Patrin, who cites Brewster and Broughton's work as providing "numerous insights into the ins and outs of club culture as it pertained to hip-hop's early DJ roots," does a similar walk back in his own book, even though he still can't let go of the implication that disco is responsible for or at least the *first to do* certain DJ techniques innovated and popularized by DJs: "**Many of the ideas Flash had either come to independently or**

[42] Nate Patrin, *Bring That Beat Back: How Sampling Built Hip-Hop* (Minneapolis 2020 Paperback and Amazon Kindle versions), p. 13-14: "If Grasso's technique was the prototype for what New York nightclubs eventually turned into disco, it was also widely shared as a common ancestry with the DJs that hip-hop founding fathers would take their cues from a few years down the line….So Herc gave them breaks: stretching seconds into minutes, a handful of bars into a whole breakdown, a mix into a stream of consciousness. He used the same technique that most DJs from Grasso onward did—cueing up a second copy of the same record to keep the break going in a loop once the first record reached the end of the breakdown. The clear implication that Patrin is making is that Kool Herc got his "cues" (his techniques) from Francis Grasso. First, that is not true; second, how Kool Herc was spinning was different than what Grasso was doing in both scope and purpose. Also, if the techniques that Grasso and other DJs used was so ubiquitous, why does Grasso need to be centered in hip hop's narrative? Especially, if what separated DJ Kool Herc was the music that he played and why he played it?

[43] Brewster and Broughton, 138-39, 130.

did for the first time *in a hip-hop context* were disco simpatico: the idea of matching beats per minute, his 'peekaboo' method of previewing the cue point of the record he had lined up next through a pair of headphones, and his crates. **They were closer to the glamorous Manhattan crowd's preferences,** but still part of what *would become the lineage of hip-hop's own sound.*"[44] What's this insistence on making hip hop a part of the "lineage" of disco really about? And in the interest of scholarship, why double down on the same disproven claims of Brewster and Broughton, then follow their same walk-back pattern?

Some commentators have attempted to insert disco DJ Francis Grasso into the origin story of hip hop/rap music, but the connection is, at best, indirect. And the claim that Grasso is both the *father* of "beatmatching" and "mixing" is even less convincing. Nonetheless, in addition to the boost that Grasso receives (in some cases rightfully so) in Brewster and Broughton's and Patrin's books respectively, there now also seems to be a Wikipedia campaign to boost Grasso's name and contributions. But Francis Grasso doesn't need this additional boosting, he's already a New York City DJ/nightclub legend and one of the key figureheads of the popular club DJ that we know today. And while disco *does* bear a connection to hip hop/rap music, situating him as a point of emphasis in the roots of hip hop/rap music is revisionist history and a distortion (and undermining) of Grasso's work and contributions.

In Hip Hop's Beatmaking Tradition, Nobody Used The Term "Beatmatch" or "Beatmatching"

By most accounts, Francis Grasso began DJing either in 1968 or 1969, yet Wikipedia now credits him with "inventing" the technique of "beatmatching." But this claim is questionable. First, the technique of DJing with two turntables existed before Grasso started DJing. Second, such a claim would suggest that no other DJs in America's predominantly Black cities, like Chicago, Detroit, Los Angeles, and even New York were not "blending" or "mixing"

[44] Patrin, 23 (emphasis mine).

records during the same period. It's common knowledge that mobile DJs were in full swing in New York, Chicago, Detroit, and LA ca. 1971, the same year that Grasso was making his name using two turntables at the Sanctuary, the famous gay nightclub in New York City. And in Jamaica, DJs were using the two-turntable system in the *1950s*; by 1971 they'd already perfected the sound system style and sound. And in America in 1958, Bob Casey was using the two-turntable system at sock hops. Although it would be inaccurate to equate Casey's style to Grasso's, Casey — not Grasso — was the first DJ to use two turntables or a the two-turntable system in the United States. Even Casey himself is less at ease about the claim that he's the "inventor" of the two-turntable system. Asked about this subject in 2013, he had this to say:

> "Well, *they proclaim*, some fellas wrote a book on the history of disc jockeys, and they were from England. And they interviewed people from New York, Boston, Washington, D.C., Chicago, and LA. All around, and France and stuff. And *they said* when I was running my record hops, I was the first one to use two turntables."[45]

Turning back to Francis Grasso, as far as New York goes, 1971 is important to the timeline, because this is the year that the Sanctuary — Grasso's DJ home nightclub — was at its zenith, and it's just two years before the legendary Sedgwick Rec party that DJ Kool Herc presided over. DJ Kool Herc is the father of the hip hop/DJ style, which includes needle dropping (a method that aims for the same purpose of "slip cuing"), but he has never mentioned that he spent time at the Sanctuary, or that he picked up on what Francis Grasso was doing and incorporated it into his own DJ style.

Again, there's no dispute as to whether Francis Grasso contributed tremendously to the rise of disco, DJ culture, or the art of DJing in general. But in terms of the hip hop DJ style, Grasso is not the inventor of what DJ Kool Herc was doing (Herc essentially pioneered the breakbeat).[46] And Grasso certainly bears no influence

[45] Laurel Fritzsch, "Lemelson Center Podcast: Bob Casey Spins Double Disks," (July 25, 2013) Smithsonian National Museum of American History. Smithsonian Institution. https://invention.si.edu/podcast-bob-casey-spins-double-disks.

[46] DJ Kool Herc "had invented what we now know as the 'breakbeat': the use of a record's

on the full repertoire of Grandmaster Flash. Even Grasso himself is uncomfortable with some of the things attributed to him. In an interview published by Rave Fest in 2010, Grasso was asked directly: "Did Francis Grasso discover mixing, or was he…?" Grasso replies: "I don't know. I don't know. He was probably the first DJ. But did he discover mixing? It just turned out, like you discover fire. You know… I don't know, it was like that. It was like a whirlwind." The discomfort with that question was apparent on his face. Nonetheless, the interviewer presses him and tries to *lead the witness* to take credit. But Grasso doesn't bite, he refuses to back up the claim. Much of the interview is like this. The interviewer repeatedly tries to lead Grasso into saying something:

> **Interviewer: The fact that there was two turntables and somebody was mixing two records together. Not just playing one record after another. But creatively mixing. And we didn't call it "mixing," and this has to be pointed out, we called them "changes."**
> Frank Grasso: "…I actually said those words, 'changes.' Because that's what it was. First of all, you have to know the music…"
>
> **Interviewer: "We were reading the grooves. Without headphones. We used to read the grooves. That's exactly what we did. We read the grooves…**
> Frank Grasso: "Among other things we did."
>
> **Interviewer: "How else would you do it? We read the grooves."**
> Frank Grasso: "You really had to know the music and know how it started."[47]

Grasso's confirmation of "changes" is important. Herc and Flash used the term "mix" and "mixing" from the start. Even here, Grasso can't take credit for being "the first." As Brewster and Broughton correctly point out, it can't be proven definitively who was the first DJ to mix records, but "Grasso can be excluded from

---

percussive break in place of playing the whole song." Brewster and Broughton, 231 What Herc did, and what Grandmaster Flash developed further, was done independently of disco. That the breakbeat sits at the core of hip hop/rap music — not disco — offers further evidence that disco did not spawn hip hop.

[47] Rave Fest interview of Francis Grasso, September 11, 2010 https://www.youtube.com/watch?v=djtqZY2gJMk.

that distinction because of his predecessor **Terry Noel**. Noel, who spun records at a club called Author, which was the 'Studio 54 of the jetset sixties,' is said to be the first DJ to mix records…"[48] While Frank Grasso is no doubt an icon and, for all intents and purposes, the early prototype of the modern club DJ, music historians and other commentators shouldn't over glorify his importance or implied connection to hip hop simply because he mixed records.

Further, in the audio of a 1971 Francis Grasso DJ set[49] that I examined, it's clear that Francis Grasso was playing early funk records, not late *disco* records as we would come to commonly know the term. Therein lies another problem with the disco narrative. The term "disco" was used for a type of night club; but by the mid- /late 1970s it had come to represent a style of music and music culture as well. So when people say, "hip hop comes from disco," there is a huge disconnect from what they're saying and what they *think* they're saying. Grasso may have played some of the same records that contained breaks favored by DJ Kool Herc, but such overlap is normal for that era in New York; it shouldn't be construed as Kool Herc took his "cues" from Francis Grasso.

Black mobile DJs of the 1970s are another crucial factor in debunking the myth that hip hop DJs got their cues from Francis Grasso. Pete Jones, AKA Pete "DJ" Jones, Grandmaster Flowers (Cameron Flowers), and the Smith Brothers were all Black mobile DJs who spun at parks, hotel ballrooms, and other places throughout New York and New Jersey. These DJs did not play in the underground gay clubs of New York; rather, they catered to the straight-Black "overground" crowd. More importantly, it was these Black mobile DJs who developed and passed on some DJ techniques that would go towards the emergence of the hip hop DJ style. Brewster and Broughton can't deny this fact, so once again they are forced to walk back some of their claims and reckon with the evidence:

> "While the music they played was hardly ground-breaking – the length and breadth of the Billboard R&B chart **sprinkled through with funky oldies**

[48] Brewster and Broughton, 75-77.
[49] "Legends of Vinyl — The Sanctuary 1971 — Francis Grasso" by DJ Luis Mario: https://www.youtube.com/watch?v=L7G2KMuRAqY.

> **and a smattering of more obscure southern soul – Jones and his peers were key in spreading mixing techniques beyond downtown's underground clubs.** On the gay scene Francis Grasso had made beatmatching and blends (or '**running' records, as Pete calls it) required skills. *Flowers and Pete Jones deserve credit for developing the same techniques at the same time* and, crucially, for showing them off to wider New York, including the Bronx….**
> "**Jones explains how in those early days DJs were considered either 'mixers' or 'choppers' depending on their style. He regularly used two copies of a record to extend it.** 'Best part of the record is usually that groove part,' he says with a Deputy Dawg chuckle, dusting off a stack of what he calls 'gutbucket' 45s – the JB's 'Monorail', Leon Haywood's 'Believe Half Of What You See' and 'Mister Magic' by Grover Washington – to play through his GLI mixer the size of a television. 'I'd play a record over and over again, because you didn't have many hits in those days, and you had to keep playing until four or five in the morning. So you'd play it over again and you'd shine a light on that groove and play it awhile.'"[50]

So at one point in their book, Brewster and Broughton credit Francis Grosso for "beatmatching," then later in their book they stress that Grandmaster Flowers and Pete Jones "deserve credit" for developing the "same techniques" *at the same time*. Either Nate Patrin read this part of Brewster and Broughton's work and forgot it (not likely as he makes similar walk backs), or he intentionally ignored this key point in order to center Francis Grasso and assign him undue credit to hip hop's DJing roots. Either scenario is bad; and it speaks to the bleaching of Black music history that often takes place when white commentators cover Black music.

DJ Techniques and Innovations

There are some fundamental DJ and recording techniques that were at work among all DJs and recording engineers of the early to mid-1970s. In other words, some DJ techniques were fluid, so in this regard there can be no denying that New York's disco-era DJ scene had an indirect connection to hip hop. After all, both DJ groups were spinning some of the same records and listening to some of the same radio DJs. There are also, however, some techniques that were ushered in and popularized by disco,

[50] Brewster and Broughton, 236 (emphasis mine).

Jamaican, and hip hop DJs respectively. The remix or remixing, for example, has two parallel lanes. In Jamaica, remixing was more about restructuring sonic components and creating version rhythms for deejays to add their own vocals to. In New York among disco DJs, remixing began as a means to extend and restructure records so that they met dancefloor demands (*3-minute records were too short*).

There's also slip cueing. This common radio DJ technique, which required DJs to put their hands on the record while it was on the turntable, relied on the use of a slipmat (usually felt cut in the same shape as the turntable platter) placed between the record and the turntable platter. The technique allows a DJ to hold the desired cue point of one record while the turntable spins underneath; at the same time, the record on the other turntable is playing. This gives a DJ control over how and when to cue up another record for mixing. Hip hop DJs built upon this technique to include the spinback (for extending parts of records), the quick-mix[51], cutting, scratching, and punch phasing.

Still, while there were some DJ techniques that were undoubtedly fluid in the '70s and some that were unique to hip hop DJs, this is an area where some commentators try to reduce hip hop to merely an "offshoot" of early disco:

> "…far from rejecting disco as some have suggested, the Bronx DJs simply reformulated it. **Think of hip hop as an *offshoot* of early disco which then grew in parallel – a version of disco's dance revolution tailored to the tastes of the Bronx.** The formula 'hip hop = disco + *ghetto*' isn't too far from the truth." [emphasis mine][52]

The claim is disturbing not only because it's technically wrong, but because Brewster and Broughton seem to want to have it both ways. They acknowledge that hip hop developed independently and parallel to disco, that hip hop had its own distinctly powerful

[51] As described earlier in this chapter, the quick-mix was invented by Grandmaster Flash. Disco DJ Walter Gibbons, who had a penchant for percussion-based tracks, was known for quick cutting between two copies of the same record. This, however, was not the same that Grandmaster Flash was doing, nor was it a "prototype" for what Grandmaster Flash was doing as Brewster and Broughton have claimed (275). Grandmaster Flash developed his suite of DJ techniques independently of Gibbons.

[52] Brewster and Broughton, 275-76.

movement. But then they describe hip hop is merely an "offshoot" of early disco? Adding for good biased (racist) measure, that hip hop was just the "*ghetto* version" of disco?

Again, despite the fact that Brewster and Broughton actually recognize the fact that hip hop DJing developed independently (techniques and all) from disco around the same time, despite the concrete evidence that shows the clear *non*-connections (and in some cases connections) between early disco and hip hop, the two authors refuse to let go of the narrative that disco spawned hip hop, that hip hop is just an "offshoot" of early disco. The danger in forcing these narratives with such a heavy hand, despite evidence that outright contradicts the narrative in certain parts or at least tempers it in others, is that new researchers read Brewster and Broughton's work and come away with the heavy-handed impression that: 1) Disco is the *real* father of hip hop; 2) Hip hop owes a "high debt" to disco; and 3) The hip hop DJ style, which was created and dominated by Black DJs is actually the offshoot product of white DJs. The introduction of Nate Patrin's book *Bring That Beat Back* is a great example of this problem. In a book ostensibly about sampling, or in Patrin's words, "how sampling built hip hop," it's jarring to read an introduction that centers Francis Grasso, an early disco DJ who bears no direct connection to the sampling tradition of hip hop/rap music.

Notes About The DJ: Revolutionizing State-of-the-Art Recording Technologies

In broadening the profile and impact of the DJ beyond what's appropriate, Brewster and Broughton insist that the DJ "revolutionized the use of studio technology."[53] Some DJs went on to become renowned remixers, but by and large, attributing "revolutionizing the use of studio technology" to the DJ is not entirely accurate. What DJs did in turning the dancefloor into a musical utopia deserves to be recognized. But the dancefloor/club/audience context reveals the problem with some music historians

[53] Brewster and Broughton, 23-24.

trying to assign credit to the DJ what is rightfully the province of the sample-based beatmaker (producer) of the hip hop/rap music tradition.

DJs spun records and rocked the crowd — an artistry and craft in its own right — and promoted records; they didn't create recorded instrumentals that would be combined with rhymes and made into a new song. Despite hip hop/rap's DJ roots, which included the advent of rappers rhyming live while DJs spun back rhythm sections of popular records, DJs were not creating beats (per se) for rappers to rhyme to, not in the way that we'd come to know when hip hop/rap went from the park jam to the recording studio. Thus, the DJ was the crowd controller and record promoter who at times *added* musicianship. The sample-based beatmaker (producer), by contrast, is always the music creator and composer. Sample-based beatmakers (producers) had considerable insight into how digital samplers and drum machines worked and, more importantly, how they *could* work. This was not the province of DJs in general.

Sampling powered hip hop/rap music between the late-'80s and mid-'90s; it was a force equal to the rhymes. And the beatmakers (producers) who made the beats were cutting their teeth on state-of-the-art technology that was not designed for the new ways in which sample-based beatmakers (producers) in the hip hop/rap music tradition were using it. It wasn't the *DJ* that was sampling drum sounds, sound stabs, and music phrases and arranging new drum sequences and more— *Doing all of this on expensive recording equipment that was never meant for consumers but rather professional recording artists*. In other words, it was the sample-based beatmaker (producer) of the hip hop/rap music tradition, *not* the DJ, who revolutionized the use of studio technology and state-of-the-art electronic recording techniques (and paved the way for what we commonly known now as the bedroom producer).

DJs around the world were not doing what sample-based beatmakers (producers) were doing between the late-'80s and mid-'90s. The sheer output of new music that was *created* by sample-based beatmakers (producers) of hip hop's first two golden eras

stands alone. DJs were not "making" new music or revolutionizing studio technology in the manner that Brewster and Broughton give them credit for. The connection between the sample-based beatmaker (producer) and the DJ is real, we can't lose sight of that; and there is at times some overlap between the art of sampling and the art of DJing. But the sample-based beatmaker (producer) and the DJ are not one in the same. And it's a grave error to ascribe the innovations of the sample-based beatmaker (producer) of the hip hop/rap tradition to the DJ in general. The DJ — in the abstract, not beatmakers (producers) who also DJ — does not make beats. Full stop. This is not a slight against DJs but rather a recognition that the sample-based beatmaker (producer) of the hip hop/rap music tradition and the DJ (abstractly speaking) represent two distinct art forms. The prior creates (composes) music — beats, stand-alone instrumental compositions — which are joined together with rhymes for the purpose of creating new songs. The latter plays (performs and manipulates) existing songs in front of live audiences. Not the same.

New York's Record Grapevine

This biggest connection between disco and hip hop lies within New York's record grapevine of the 1970s. New York's record grapevine[54]— i.e. DJ discussions about hot new records and patronage at common vinyl record stores in New York, like Downstairs Records[55]

[54] Vince Aletti, who covered New York's disco scene in the 1970s and was the first person to write a published article about disco (*Rolling Stone*, 1973), remembers the intensity of New York's record grapevine: 'The New York grapevine was so intense,' says Aletti. 'A record could break in a club one night and next day everybody who cared about it would know about that record and would be running around town trying to find it. At this point, everybody was friendly and it didn't feel like a scene full of rivals. They really wanted to share the music.' (Brewster and Broughton quoting Aletti, 159).

[55] In 1978, Downstairs Records was dubbed New York's "leading disco retailer" by *Billboard*, which had run a story on how Downstairs Records "was doing a roaring trade in 'obscure r&b cut outs', mentioning Dennis Coffey's 'Son of Scorpio', Jeannie Reynolds' 'Fruit Song' and the Incredible Bongo Band's 'Bongo Rock'. Profiling Kool Herc as the instigator of this phenomenon, the paper noted . . young black disco DJs from the Bronx . . . are buying the records just to play the thirty seconds or so of rhythm breaks that each disc contains.'" Brewster and Broughton, 244-45.

— meant that news, or records, traveled fast. DJs and record collectors frequented the same record stores, and it was these record stores, as well as clubs, bars, and other dance spots, that served as hubs for exchanging news about records that were popular among various crowds. There, people would talk and introduce each other to new records. Records like "Backstabbers" by the O'Jays, produced by Kenneth Gamble and Leon Huff (Gamble and Huff) and released on their label The Sound of Philadelphia (TSOP) in 1972, were not the sole province of early disco DJs; it was not a record reserved for gay underground clubs in New York. All Black clubs, lounges, and after hours spots in cities across America played this record and featured this music; and all of the Black mobile DJs in New York were playing these records. Still, because of New York's record grapevine, there were naturally some lesser-known or underground records, like Babe Ruth's "The Mexican," an undisputed b-boy anthem that overlapped the disco and hip hop music scenes. One important thing to remember here is that before disco was known as "disco", the music was mostly a mix of early funk, soul, Latin, and rock records.

The Jamaican-Roots Narrative

For a proper perspective of the roots of the hip hop DJ style and the sampling tradition of hip hop/rap music's true lineage, as well as the birth of rap music (rhyming in hip hop culture), the popular legend that hip hop *comes from*, was directly shaped or influenced by Jamaican music (reggae and dub specifically) music deserves serious attention. It's not a question about whether or not there's a connection between hip hop/rap music and Jamaican music; there's a connection, to one degree or another, between *all* twentieth-century Black popular music. The problem with the Jamaican roots narrative is that it absorbs credit for the *creation* of hip hop/rap music. But Jamaican music is not the father of hip hop, and it bears no integral or formal connection to the hip hop/rap music or hip hop culture. Hip hop/rap music developed independently from Jamaican music, it did not grow from Jamaican music culture as Jeff Chang and other commentators have alleged. Hip hop does not "owe reggae an enormous debt;" and hip hop or what Kool Herc "did in the Bronx" was *not* "based largely on wanting to build a New York version of the Kingston sound systems of his youth" as Brewster and Broughton have claimed.[56] That Kool Herc was born in Jamaica does not inherently make Jamaican music the root of hip hop/rap music. Herc immigrated to New York, not as a DJ, but as a 12-year-old boy who never participated in the Jamaican deejay culture.

The historical accuracy of a given culture (even simply just an event, movement, or moment in time) is doomed to be misrepresented in the future whenever the most critical variables of that culture's origins are inaccurately recorded or misinterpreted. Such is the case with the Jamaican-roots narrative. To be certain, Kool Herc did not take Jamaican reggae or dub music or the Jamaican toasting tradition to the South Bronx and use it to "invent" hip hop. That narrative, either explicitly or implicitly, is inaccurate. Yet today, the Jamaican-roots narrative continues to be advanced by

[56] Brewster and Broughton, 130.

key historians, musicologists, and other scholars, as well as countless music critics, pop culturists, and hip hop aficionados alike. Thus, in this section, I will refute the Jamaican-roots narrative and show how (and perhaps why) this narrative was able to advance and why it still continues to do so.

No matter how accurately an author examines and present facts that occurred *outside* of the direct nucleus of hip hop culture's origins, those findings can never displace the truth of hip hop's origins. But even in the face of evidence that directly contradicts the Jamaican-roots narrative, many commentators have pushed this story; and in doing so, they have propped up a myth as fact. So how did this myth first begin? Essentially, what appears to have happened is that at some point, probably around 1987, when Dick Hebdige's book *Cut 'N' Mix* was published, the story surrounding the immigration of Clive Campbell (Kool Herc) from Jamaica to the South Bronx was misinterpreted, and assumptions were drawn between Herc's place of birth and his role as DJ in hip hop. The facts (confirmed by Kool Herc himself) are that Herc arrived in the South Bronx in 1967 *at the age of 12*. More importantly for our purposes here, it should be clear that when Kool Herc came to New York he was *not* yet a DJ and did not have any experience with DJing. In fact, it wasn't until at least five years *after* his arrival in the South Bronx that he began to DJ. But the myth, most likely first set in motion by author Hebdige, is that Clive Campbell came to New York *as* "DJ Kool Herc" and brought along with him key tenets of the Jamaican music culture, which he used to formulate hip hop music. In the section rather curiously titled, "The beginning of hip hop," from his 1987 book,*Cut 'N' Mix,* Dick Hebdige writes:

> **In 1967 a dj called Kool Herc emigrated to the States [United States] from Jamaica** and came to live in the West Bronx. **Herc knew the Jamaican sound system scene,** and had heard the early talk overs of the new djs like U Roy. By 1973 Herc owned his own system." [emphasis mine][57]

[57] Dick Hebdige, *Cut 'N' Mix* (New York: Methuen, 1987), 137. Published in 1987, *Cut N' Mix* was a seminal work on the study of Caribbean music and culture. The book is ground breaking for its findings. However, the connection that author Dick Hebdige draws between the Jamaican music culture of the early 1970s and hip hop's beginnings during the same period is inaccurate.

There are several points that must be made clear about Hebdige's misleading account. First, Hebdige either misread the facts concerning Clive Campbell's immigration to the United States or he intentionally played loose with them. In 1984, three years *before Cut 'N' Mix* was first published, two different and rather pivotal Kool Herc interviews appeared in two separate books: *Hip Hop* by Steven Hager and *The Rap Attack* by David Toop; Hebdige cites the latter book by Toop in two separate end notes of *Cut 'N' Mix*. What's important about both of these 1984 interviews is that each is consistent and clear about the details surrounding Clive Campbell's (Kool Herc) immigration to the United States. Each interview plainly makes it clear that Herc was a boy when he came to the Bronx, and that it wasn't until high school that he got the nickname "Herc," which was short for "Hercules."[58] Moreover, both interviews also revealed that Herc didn't even begin DJing until 1971, and that at that time his biggest influence was John Brown, an American DJ from the Bronx who played breaks of funk records, *not* a Jamaican *deejay* who played Jamaican music.[59]

Next, there's the issue of Herc "knowing" the "sound system scene." By Herc's own admission, he was "too young" to get into the legendary Jamaican sound system parties.[60] Therefore, he couldn't have "known" the Jamaican sound system scene, at least not in the way that Hebdige projected that he did. Brewster and Broughton described Herc as "knowing" the sound system seen this way:

> "He has clear memories of **living near a Trenchtown dance hall and watching the huge speakers of a sound system run by King George being wheeled in. 'We used to be playing at marbles and riding our skateboards, used to see the guys bringing the big boxes inside of**

[58] Herc was given his nickname by an American friend in high school.

[59] For some of the clearest and earliest evidence that refutes the Jamaican-origins narrative of hip hop's beginnings, see Hager, 31-33, and especially 45: "'Jamaican toasting?' said Herc. 'Naw, naw. ***No connection there***. I couldn't play reggae in the Bronx. People wouldn't accept it. The inspiration for rap is James Brown and the album *Hustlers Convention*.'" See also: Toop, 18-19, 39, 60-63. Note, Hager's interview with Kool Herc is more extensive and detailed, and therefore, more revealing and reliable. In Toop's Rap Attack, it's Afrika Bambaataa, not Kool Herc, who suggests that Herc took "Jamaican toasting" and brought it to the Bronx. But that statement is inconsistent with what Herc himself adamantly says in Hager's *Hip Hop*.

[60] Chang, 68, Kool Herc: "I was too young to go in. All we could do is sneak out and see the preparation of the dance throughout the day."

> **the handcarts.** They used to make watercolour signs and put them on lightposts, let people know there's going to be a dance coming.' **Too young to get inside, Herc and his friends would listen to the music, watch the partygoers enter and discuss in whispers the guests' reputations for violence.** 'We on our skateboards, skating round, you know, and you saw the little gangster kids, and they knew who was from the gangs, or the bad bwoys. [He whispers] "Yeah, that's such and such, man." "Awww!" **And you see all the big reputation people come through. We're little kids, and we sit on the side and watch.'** The parties Herc was around as a child in Jamaica were at the front of his mind when he was building his equipment and his DJing style. **Especially important were his memories of the sound systems themselves. 'Little did I know at the time, that would be a big influence on me,' he admits."** [emphasis mine][61]

But childhood memories of Herc *watching DJ equipment being rolled into parties that he was too young to attend*, regardless of what indirect influence it might have had on him creating a booming sound system later, doesn't exactly rise to the level of him "knowing" the Jamaican Sound System scene. Furthermore, the Black American mobile DJ scene, which Herc was directly influenced by and a part of, was already in existence before Herc began DJing.

Finally, there's the fact that Clive Campbell (Kool Herc) was already in the Bronx when Jamaican deejays like U-Roy pioneered the Jamaican dub and toast sound. In other words, Kool Herc wasn't a DJ in Jamaica listening to U-Roy or the other "Jamaican toast masters." In fact, a *Brian Lehrer Show* interview with Kool Herc in 2009 reveals much about this. Here's Kool Herc in his own words:

> **Brian Lehrer: "So you must remember toasts like that from Kingston in the '60s, before you moved to New York. Do you think you were influenced by that for your early composing in the Bronx?"**
> Kool Herc: "No, it wasn't all about that! I was a kid. All I know is the Skatalites, Don Drummond, Barry Reed, and the Dragonaire, you know, Toots and the Maytals. And U-Roy and Big Youth and I-Roy was doing things like that. I didn't — we didn't try to come and play reggae music; American people wasn't feelin' reggae music… *I used other records* that had a beat to it more than a reggae beat to it. **I never hide the fact that I was Jamaican, [but] *I wasn't here reppin' Jamaica.* I was just a kid. You know, I was born in Jamaica;** I knew what time it was, far as me leaving from a country coming to another country. I was there when Jamaica got its independence. I remember historic things like that. You know, I admit the fact that when I migrated to the United States, I don't remember those

[61] Brewster and Broughton, 232.

> art forms, but **I would never try and take nothing away as far as, *but it [Hip Hop] didn't have nothin' to do with Jamaica***.... And as far as Jamaican toasting and DJing, it wasn't two turntables they used. They used one turntable. It wasn't two turntables, it was one!"[emphasis mine][62]

With regards to rapping, Brewster and Broughton make another inaccurate claim that the art of rapping was based on Jamaican toasting. But hip hop's MC'ing/rapping tradition is not "clearly based on Jamaican toasting" (This is actually one of the contradicting claims that Brewster and Broughton try to walk back in their book.)[63] Not only has Herc made it clear in a number of published interviews that Jamaican toasting was *not* what hip hop MC'ing/rapping was based on, it was common knowledge among all MC's/rappers of the time where the primary influences for hip hop's rap tradition came from. Hip hop's first MCs/rappers did not draw their inspiration from Jamaican music; they didn't even

[62] "The Brian Lehrer Show," WNYC Radio, February 26, 2009.] It's further worth adding that Grandmaster Flash and Afrika Bambbaataa — the other two DJ's who make up hip hop's big three pioneering DJs — declare that Jamaican music was not a factor in what they did or the development of hip hop culture. Brewster and Broughton, who interviewed each, have noted: "In common with Herc and Flash, Bambaataa can claim Caribbean forebears (his grandparents were from Jamaica and Barbados). ***However, any link to Jamaica in terms of its DJ culture was not a factor***. The sound systems he knew were those of Kool Herc and the mobile disco DJs; he knew nothing of reggae, except its records, until much later." Brewster and Broughton, 242.

[63] Brewster and Broughton, 245: "Certainly, as hip hop was being formed in the Bronx, reggae there was either disliked or seldom heard. So instead, Herc moved to the funk and Latin music his Bronx audiences were used to: 'I'm in Rome, I got to do what the Romans do. I'm here. I got to get with the groove that's here.' However, in choosing records and in tailoring the sound, he emphasised the same factors prized in Jamaican music, the 'boonce', as he says his musically minded father would pronounce it, and the bass. 'A lot of my music is about bass,' he says." (emphasis mine). A lot of Black music is about bass. Brewster and Broughton insist on forcing a stronger link between hip hop and Jamaican music than what the evidence (and even their own research) bears. It would appear that they assumed this was the case before they researched hip hop's history. Being confronted with evidence that did not support their hypothesis should have given them pause; and in some cases in their book, that seems to be what happened. But between their multiple walkbacks of claims and insistence on other claims in various sections of their book, they render a cloudy record where the record is clear. Hip hop developed independently from Jamaican reggae; hip hop did not draw on any of the techniques that Jamaican reggae employed; and hip hop MC'ing/rapping did not come from Jamaican deejays. Brewster and Broughton say as much in their book, contradicting earlier claims that they make to the contrary. This is the frustrating thing about Brewster and Broughton's book, which is an otherwise stellar achievement. Depending how much you actually read of their book, you can be left with a wrong conclusion about the link between hip hop and Jamaican music, because while they walk back claims, they never simply say that they got it wrong about earlier claims.

listen to reggae music. Instead, they were directly influenced and inspired by the Black American oral tradition, most notably: radio DJs, like Jocko Henderson; comedians, like Pigmeat Markham (of "Here Come the Judge" fame) and Moms Mabley; club MC's, and poets/spoken-word artists, like Lightnin' Rod (Jalal Nuriddin), The Last Poets, and Gil Scott-Heron.

***

If Dick Hebdige is most responsible for putting in motion the Jamaican-roots narrative, there is no commentator more responsible for prolonging this myth and, subsequently, the misrepresentation of hip hop's roots, than Jeff Chang. In his book, *Can't Stop, Won't Stop: A History of The Hip Hop Generation*, Chang constructs a narrative of hip hop's roots that is at times terribly at odds with the evidence that he presents. For instance, Chang includes a chapter on the rise of Jamaica's "roots generation" and the turmoil of Jamaica's two warring political parties in the 1970s. Despite the fact that neither the Jamaica Labor Party (JLP) or the People's National Party (PNP) had anything to do with the South Bronx Disaster[64], neither its causes or the *South Bronx* street culture in the 1970s, Chang still incorporates such material into his study as if it proves a connection to hip hop's roots. But the truth is, the Jamaican political climate has no connection to the birth of hip hop. At best, Chang's choice to include this chapter misleads readers to believe that the political climate of Jamaica had some link to the origins of hip hop culture— *It didn't*. At worst, Chang's inclusion of this chapter misleads readers to believe that the political climate of Jamaica somehow had a direct *impact* on the origins of hip hop culture— *It didn't*.

Among all of the travesties that the residents of the South Bronx were forced to endure, benign neglect was front and center. In other words, the South Bronx youth did not participate in

[64] For a detailed discussion of the South Bronx Disasteer, see: Amir Said, *The BeatTips Manual: The Art of Beatmaking, The Hip Hop/Rap Music Tradition, and The Common Composer*, Sixth Edition (New York, Superchamp Books), 2015, Chapter 1.

New York City politics; they did not enter into any political squabble between New York's Democratic and Republican parties. Furthermore, during the 1970s, New York City was under the death grip of fiscal malfunction; the city was teetering on bankruptcy and sinking fast. There was no intense "power grab" situation in play for two opposing political parties. And even if there had been such a situation, there certainly wasn't a place for the disconnected South Bronx youth to join in the fray and aid one side or the other.

Chang also surveys the history of Jamaican dub music and the musical developments that grew out of Lee "Scratch" Perry's Black Ark recording studio. Chang maintains that "Dub's birth was accidental…" and then he goes so far as to say that "it would become **a diagram for hip-hop music**. **A space had been pried open for the break**, for possibility."[65] Dub as "*a diagram for hip-hop music*" isn't just an overreach, it's flat-out wrong! But while Chang is occupied with trying to connect dub music to hip hop/rap's roots, specifically attempting to show how dub music was the precursor to break-beat music (b-boy music) and, subsequently, hip hop/rap music, he fails to include critical details that completely undermine his claim. First, let's look at the year 1967, a crucial year to many of those who push the Jamaican-roots narrative of hip hop. Again, the way the story goes is that a *Jamacian DJ named Kool Herc* came to New York in 1967. As I noted earlier, Herc wasn't yet a DJ when he first came to the Bronx; he wasn't even *Herc* yet. And as it so happens, 1967 is widely considered by Jamaican music historians to be the first year in which dub music emerged in Jamaica. Looking at the history of dub's development, dub music isn't fully realized and developed until around December 1973— The date associated with the start of Black Ark studio, the creation of Jamaican producer and dub pioneer Lee Perry. Chang, too, no doubt is aware of this date, as he mentions it in his book. So this raises a couple of questions.

First, if by December 1973, Kool Herc had already given the notorious Sedgwick party, the party that is widely recognized for having informally kicked off the nascent hip hop movement, how could Herc have been using the underdeveloped Jamaican

[65] Chang, 30, emphasis mine.

dub style as "a diagram for hip-hop music?" Second, if funk — a music tradition which is widely considered by Black American music historians to have begun around 1964/1965 with the James Brown releases "Out of Sight" in 1964 and "Papa's Got a Brand New Bag" in 1965 — was indeed the music from which hip hop was spawned, why does Chang claim that *Jamaican dub* was "a diagram for hip-hop music?"[66]

Next, let's look at what Kool Herc — the most important link in the Jamaican-roots narrative — has repeatedly said about this issue. In 1970, while still in high school, Herc started hanging out at a disco called the Plaza Tunnel, formerly located in the Bronx on 161st Street and the Grand Concourse. According to Herc, John Brown, the DJ at the Plaza Tunnel, was the first to play records like "Give It Up or Turn It Loose" by James Brown, and "Get Ready" by Rare Earth, and "Soul Power" by James Brown. Herc has long said that it was John Brown who influenced him to spin funk records and the like, and that it was what John Brown — *not* Lee "Scratch" Perry — who was doing the style that led him to develop what would become the hip hop DJ style and the formulation of the break-beat — A phenomenon that subsequently shaped the hip hop/rap music tradition. Herc has never said that Jamaican dub music, Jamaican toasts, or any part of the Jamaican music culture was the inspiration or "diagram" for what he and the other hip hop DJs were doing.

Again, from Kool Herc:

> Jamaican toasting? Naw, Naw. No connection there. I couldn't play reggae in the Bronx. People wouldn't accept it. The inspiration for rap is James Brown and the album *Hustlers Convention*.[67]

Further, it was a well-known fact at the time that "while most other deejays [sic] played disco…Herc played hard-core funk…"[68] So if Herc himself has made it clear — on numerous occasions since 1983 — that the inspiration for what he and, subsequently,

[66] Ibid, 30.
[67] Hager, 45.
[68] *Ibid*. Note: While Herc's DJ sets featured break-beat sub-sets, they also included the playing of disco and other popular songs of the era in full, not just the breaks.

the others that immediately followed him did, was not Jamaican dub music, Jamaican "toasters," or Jamaican DJs (selectors), but rather Black American funk and a 1970 funk-based DJ named John Brown, then Chang's claim is wrong. Moreover, if in two separate interviews appearing in *Hip Hop* (1983) and *The Rap Attack* (1984) respectively — both of which that Chang cites (multiple times) in the endnotes of his own book — Kool Herc makes it clear that he was not influenced by Lee "Scratch" Perry or Jamaican dub music, but rather by a South Bronx funk DJ (John Brown), and that the inspiration for rap (what he and others were doing) was James Brown and the album *Hustlers Convention*, how can Chang insist that Jamaican dub music was the "diagram" for hip hop/rap music?

Then there's this terrible false equivalent from Chang:

> "The blues had Mississippi, jazz had New Orleans. Hip-hop has Jamaica."[69]

Jamaica is in no way to hip hop what Mississippi is to the blues and what New Orleans is to jazz.

Around this point, Chang does a major sleight of hand. He describes Jamaican music, specifically Jamaican dub as the "diagram" for hip hop, and adds this implication that Jamaican roots culture is where hip hop's roots are found:

> "Reggae, it has often been said, is rap music's elder kin. Yet the story runs much deeper than just music. **During the 1970s, Marley and the roots generation—the first to come of age after the island nation received independence from Great Britain in 1962**—reacted to Jamaica's national crisis, global restructuring and imperialist posturing, and intensified street violence. **Seeing politics exhausted, they channeled their energies into culture, and let it flow around the world**. They pulled global popular culture into the third world. **Their story is the prelude to the hip-hop generation**, felt as a portentous shudder from the dub side. 'Some are leaves, some are branches,' Bob Marley had sung. 'I and I a di roots.'"[70]

Again, Jamaica is in no way to hip hop what Mississippi is to

[69] Chang, 22.
[70] Chang, 23.

the blues and what New Orleans is to jazz. Chang situates Jamaica's youth culture — Jamaica's "roots generation" — as the "prelude" to hip hop culture. But that's like saying that the scuttling gangs of nineteenth-century Manchester, England were the "prelude" to the South Bronx gangs of the 1970s. Unlike the blues and jazz, which were created and cultivated in Mississippi and New Orleans and then transported up north via widespread Black American migration, hip hop was not created or cultivated in Jamaica. Full stop. Further, hip hop did not emerge because Bronx youth "saw politics exhausted." Party culture, well established in New York before and in no way related to the events surrounding Jamaica's independence, was the main catalyst that coalesced then propelled the nascent hip hop movement. And energies were already being channeled into culture in urban areas throughout America since the start of 20th century American popular music. The Bronx youth did not catch Jamaica's "flow."

Where Chang plays up hip hop's alleged indebtedness to Jamaican youth and music culture, author Tricia Rose, who makes the same claim, seems to plays it down. In fact, buried at the end of her notes on Chapter 3 of *Black Noise* (1994), her seminal cultural study of hip hop and rap music, Rose maintains — in just one brief sentence — that "Rap music is heavily indebted to Jamaican musical practices." Aside from this one sentence (buried in endnotes) she offers no further examination or detail to support her claim; and she doesn't offer any description as to where she sees the connection between the Jamaican music culture of the 1970s and hip hop in the South Bronx during the same period.

Here, it's also worth examining three other areas of contention. First, the importance of audio/sonic quality in hip hop/rap music. Second, the history of park jams, block parties and the like. Third, the Jamaican toasting tradition of the 1970s. Kool Herc's understanding of sound systems was likely a hybrid of what he heard as a child (to some small degree) and what he learned from his father, who helped him with his first system in the Bronx. But that does not remove the fact that Herc was primarily influenced in America. It was in the Bronx where Kool Herc made the discoveries that allowed

him to make his sound system *more* powerful (amplified) than most. Prior to Herc's discovery in Bronx, neither Herc or his father knew how to increase the peak level sound in their family's system.[71] The importance of audio/sonic quality and bass tones was already a preference among Black Americans before Herc began DJing. For example, in the early 1970s, in both Chicago and New York City, at least three of my uncles had hi-fi sound systems. (My father had a hi-fi system as early as 1971.) It's probably worth mentioning that neither my uncles nor my father were from Jamaica, they were all born and raised in America. Furthermore, one of my uncles played bass guitar in a band throughout the 1970s and early 1980s. In his band, as with other Black American bands of the time, the bass tone was always highly valued. Finally, when I interviewed Atlanta beatmaker (producer) DJ Toomp, he shared a story about a time in Atlanta (throughout the 1970s), wherein he checked out what kind of speakers DJs were using at house parties. This indicates that speakers and sonic quality were not only valued, they were both expected at parties and Black American homes during the 1970s and early 1980s. Also, Toomp recalls how people were often remembered by the sound systems they had and how much bass each system kicked out.[72]

As for park jams, block parties and the like, my mother and various family members attended multiple live shows. And some close family friends, like Canell Johnson, as well as Ghetto Brother founder, Benjy Melendez, have shared many stories about partying in parks and "on the block" as early as 1965. Hence, recorded or live music and parties at parks or on the block were certainly nothing new when Kool Herc arrived in the Bronx as a young boy. And it's worth mentioning that Herc's decision to move his "rec room jams" over to Cedar Park (right up the corner) was not inspired by the yard parties of Trench Town, Jamaica. On the contrary, the decision was a practical one: Herc simply needed a bigger space to accommodate the growing number of party-goers, who had typically ranged in age from as young as 8 to as old as 50. The late night

[71] Chang, 68-69.
[72] Amir Said DJ Toomp interview in *The BeatTips Manual, 6th Edittion*.

yard parties of Trench Town that many researchers have tried to link to Kool Herc were for adults only.

Finally, with regards to sound systems and the significance of bass, the Los Angeles hip hop scene, and especially the backstory of Rodger Clayton, co-founder of Uncle Jamm's Army dance party promotions[73], also points to the fact that sound systems were already a thing in Black America around the time Jamaican dub music, and the sound systems that helped powered it, emerged. Clayton was DJing garage parties in 1972, when he was 13 or 14 years old, charging 50 cents by the time he was 15. Also, Clayton remembers learning his sense for music from his father. As a result, at around 8 or 9 years old (ca. 1967/1968), he was into **James Brown and Marvin Gaye.** Rodger Clayton's sister, Adrienne Clayton, remembers that "Rodger was working at Burger King around the corner from our high school. He tells the manager, 'I can help you sell some burgers. What I'm going to do is **I'm going to set up a *soundsystem*. You let me bring my *soundsystem*** and plug it in in the parking lot, and the kids will come, because they love music, and then you can sell more Whoppers.' On Friday, he tells everybody at school... That night at Burger King, the sales went through the roof."[74]

As for bass and a preference for booming sound systems, Jamaican DJs (selectors) were not alone in this regard. The Los Angeles DJ scene privileged booming sound systems and prioritized heavy bass. Clayton remembers ruining the mix of their first recorded song because too much bass was added: "It took us six months because we didn't know any better and the engineer was a

[73] In their books *Last Night A DJ Saved My Life* and *Can't Stop, Won't Stop*, respectively, Brewster and Broughton and Jeff Chang do not factor in the Los Angeles hip hop DJ scene, nor do they situate the importance of Uncle Jamm's Army and their impact on DJing and hip hop, despite the fact that by 1983, Uncle Jamm's Army was the biggest dance party promotions team in Los Angeles, complete with a number of DJs who were key to the West Coast's nascent hip hop scene. Here, it's also worth noting that the Los Angeles party scene, while not parallel to New York's hip hop party scene of the 1970s, did have fundamental similarities. And as New York's hip hop party scene helped produce Grandmaster Flash, effectively hip hop's first beatmaker, Los Angeles' party scene produced Dr. Dre, one of the greatest hip hop beatmakers (producers) of all time.
[74] "Nightclubbing: Uncle Jamm's Army," *Red Bull Music Academy* October 31, 2017 https://daily.redbullmusicacademy.com/2017/10/uncle-jamms-army-nightclubbing (emphasis mine)

crook. He told us it would take 10 hours to EQ, we just didn't know. **And we put too much bass in there, because we was DJs…**"[75] And Edwin Vaultz, Clayton's equipment and sound system supplier, fondly remembers the quality of their sound systems and the impact of the bass in particular: "We used 100% Cerwin-Vega. The amount of speakers we'd have, we didn't need that many, but we liked the people standing in front of them. They'd just stand and let the bass blow their clothes**.**"[76]

There are a number of takeaways to note here. First, though Rodger was playing 45s at the beginning (and likely not with a two-turntable setup), his DJing represents a proof of early Black American DJ culture, which was distinct from Jamaica's DJ culture. Second, the music that Rodger was playing — particularly James Brown and Marvin Gaye, not Jamaican reggae — was some of the same Black American music that was popular in New York (and other cities) at the time. This serves as additional evidence that the Black people on the West and East Coasts (as well as in the South and the North) had always been connected by Black American music. Third, that Rodger had a sound system just like DJ Kool Herc did at roughly the same time, supports the fact that "sound systems" within Black American communities were already prevalent in the early 1970s; they were not exported from or influenced by Jamaica. Fourth, Black American DJs prioritized bass and booming sound systems independently of what was going on in Jamaican during the same period.

***

Overall, for their tireless research and work and invaluable contribution to hip hop studies, I respect Jeff Chang and other authors who have contributed to this space; some of their findings were in-line with the realities of hip hop/rap music, then and now. But with regards to their advancement of the Jamaican-roots narrative, they are wrong. This highlights a problem with

[75] *Ibid*.
[76] *Ibid*.

scholarship like this. Communities often gather around the work of an author. So it's possible to teach them how to contribute structured knowledge and to share accurate information. This way, the public is ultimately better informed. The flip side, however? When authors provide inaccurate or misleading information to these communities, the public suffers from exposure to false narratives.

To equate Kingston, Jamaica as the *cradle* of hip hop/rap music, as we would rightfully equate Mississippi and Chicago with the blues, or the way we would rightfully equate New Orleans, Chicago, or Kansas City with jazz is, at worst, a conscious attempt to overstate Jamaica's connection to hip hop/rap music. At best it's a woefully misleading exaggeration. Hip hop was not directly shaped by Jamaican dub and reggae. Parallels existed, sure, but mainly in terms of: 1) sonic priorities — bass and volume; 2) a focus on rhythm and groove — tropes important to all popular Black musics of the period; 3) DJs as figureheads; and 4) A form of MC'ing. But these are parallels between two burgeoning music traditions — one in the United States and the other in Jamaica — that were functioning at roughly the same time. It's not, however, an instance of one music tradition giving rise to or guiding the other. Did the young Clive Campbell (Kool Herc) bring some Jamaican musical customs with him when he immigrated to the South Bronx as a child? Perhaps. About as much as any 12-year old kid could have when he immigrated to the United States in 1967.

Kool Herc's pivotal role in the development of hip hop/rap music and hip hop culture in general is unquestioned. His contributions are absolutely central to the birth of hip hop/rap music and the formulation of the collective hip hop cultural movement of the time. For that, he should always be remembered and revered, and his efforts should never be tarnished. However, in the interest of historical accuracy, Kool Herc's contributions should never be misrepresented or overstated. Nor should Herc's contributions be airbrushed into a flawed historical narrative— *A narrative that even Herc rejects*. Likewise, the contributions of DJ Grandmaster Flash and Afrika Bambaataa, respectively, should not be understated or conveniently omitted.

Finally, in lieu of the features and developments of the Jamaican music culture — ca. 1968 to 1973 — we must look at those features and developments for what they are: The ingredients of an incredible music culture that made a major contribution to Western popular music, but a music culture and tradition that did not have a direct connection to or major influence on the origins of hip hop/rap *music* in the specific, and certainly not on hip hop culture in general.[77] Although my findings contradict earlier research on this matter, it should really come as no surprise to the authors that I've mentioned in this section. After all, in their bibliographies they've cited some of the same books that I have. Two of those books in particular that appear in the bibliographies of some other hip hop historians, Stephen Hager's *Hip Hop* (1984) and David Toop's *Rap Attack* (1984), leave little room for misinterpretation; and both books offer evidence that debunk the Jamaican-roots narrative.

Whatever parallels that existed between Jamaican music culture of the early 1970s and hip hop/rap music of the same period are merely examples of the type of similarities (and perhaps coincidences) that can often be found throughout all musics of the Afro-diasporic. To misread these parallels, or worse, to misinterpret them as having had a pivotal role in the creation of hip hop/rap music is not only detrimental to accurately understanding the roots of hip hip hop/rap music and the art of sampling in the hip hop/rap music tradition, it's detrimental to comprehending the unique origins and scope of hip hop culture itself. What was happening in the Bronx, ca. 1970-1973, was developing independently of what was going on in Jamaica during the very same period.

[77] The fact that there were no b-boys and/or graffiti writers in Jamaica in 1973 can't be ignored. Kool Herc was influenced by the "b-boys" in the Bronx just as much (if not more) as they were influenced by him.

Post-Disco: Uptown Meets Downtown – Hip Hop, Punk, and the Art World

Whenever the connection between hip hop and punk is mentioned, the assumption is that we're talking music. This may be true in some cases, especially when you think of punk-rap acts like Rage Against the Machine, Korn, Limp Bizkit, Kid Rock, and Linkin Park. But the link between hip hop and punk goes back farther than the late '90s/early 2000s, and it is a link that was based mostly on the mixed club scene that both music scenes, hip hop/rap and punk, combined to make in early '80s New York. Still, the connection between hip hop and punk is not what some commentators have made it out to be. Rather than being a *musical* connection or exchange of political ideas, the connection was simply a comingling party-scene connection in the early '80s. And the link basically rested on Malcolm McLauren's (famed manager of the Sex Pistols) and Michael Holman's, Fab 5 Freddy's, and Riza Blue's (English club promoter) role in helping to bring hip hop from Uptown to Downtown club culture.

In New York City in the early '80s, Riza Blue, aka Kool Lady Blue, partnered with Michael Holman, creator of the short-lived rap show "Graffiti Rock" and first journalist to write "hip hop" in print, to promote hip hop parties at Negril, a club situated in Manhattan's The Village neighborhood. Holman knew the pioneering hip hop personalities of the time and he booked DJs like Afrika Bambaataa and Jazzy Jeff (it was Holman who actually put the shows on, not Riza). And it was at Negril where b-boys, graffiti artists, and others from the Uptown hip hop scene mingled with punks and other partygoers from the downtown scene. A year after Holman and Blue's hip hop parties took off at Negril, Riza Blue started the "Wheels of Steel" night at the Roxy. The Roxy, located in the Chelsea section of Manhattan, was a tremendously popular New York City nightclub, famous for its mix of clientele, which

included b-boys and other members of hip hop's scene alongside punks, artists, and every manner of Downtown Manhattanites. The Roxy featured an eclectic mix of music, everything from electro to soul to rhythm & blues, to dub, to post-punk, and it foreshadowed the power and influence of hip hop on dance club culture.

But before The Roxy, before Holman and Blue's hip hop night at Negril, there was Fab 5 Freddy. Fab 5 Freddy was crucial to linking the Uptown and Downtown scenes, and he did it mainly through his efforts to gain respect for graffiti among New York's Downtown art world. Brewster and Broughton have documented Fab 5 Freddy's role best:

> "Fab 5 Freddy was another important link between uptown and down. His motivation for bringing the two together was to gain art world respect for graffiti – which had evolved alongside rap music and breakdancing – and thereby further his own career as a graffiti artist. By the early eighties, Bronx spray-can Picassos were painting startling subway-train-sized masterpieces, and with the patronage of Andy Warhol, serious critical respect was being accorded to Jean-Michel Basquiat and Keith Haring, who had both started as graffiti artists. The galleries were jumping on this 'street art' fairly quickly, and as he ventured deeper into the art world, meeting people like Glenn O'Brien, editor of Warhol's Interview, and Blondie's Chris Stein and Debbie Harry, Freddy soon found himself the Bronx's unofficial cultural ambassador. This role led him to put together *Wildstyle* with novice director Charlie Ahearn, a film aimed at documenting the nascent world of hip hop. 'I was serious about trying to be a painter, and I wanted this graffiti movement to be seen as a serious movement like Futurism or Dada. I didn't want us to be looked on as folk artists. 'I wanted to let people know that this was a complete culture, which I had read somewhere included dance, painting and music. So I wanted this film to be made to demonstrate that this graffiti thing, which was the focus, was a complete culture: that it was related to a form of music and related to a form of dance. Prior to that, nobody had seen these things as being connected.' **He also arranged for DJs to spin at gallery events. Thanks to Freddy, Bambaataa had actually been playing for the downtown art trendies since 1980, considerably before Holman and Blue's Negril and Roxy nights.** Of the Bronx DJs, Bam had the closest connections to the downtown club world (as well as being in many of the record pools, his playlist was published in several dance music newsletters) and Freddy brought him down to play in Club 57 on St Mark's Place, the Fun Gallery and the Mudd Club, the after-dark home of post-punk weirdness."[78]

[78] Brewster and Broughton, 273-74 (emphasis mine),

Chapter 2

The Art of Beatmaking

The Birth and Rise of the Beatmaking Tradition of Hip Hop/Rap Music: Eight Periods of Distinct Development

DISCLAIMER:
The purpose of detailing the developments of the eight periods of the beatmaking tradition is to document each period as it occurred in the past 46 years. I've made no attempt to present one period as superior to another; effort has only been made to show the actual developments (or lack thereof) within each period of beatmaking and how these developments have affected hip hop/rap music overall. I encourage you to draw any additional conclusions that can be reached about each period. Likewise, it's my hope that the information presented in this chapter further informs and helps beatmakers (producers) make those compositional choices that are right for them individually.

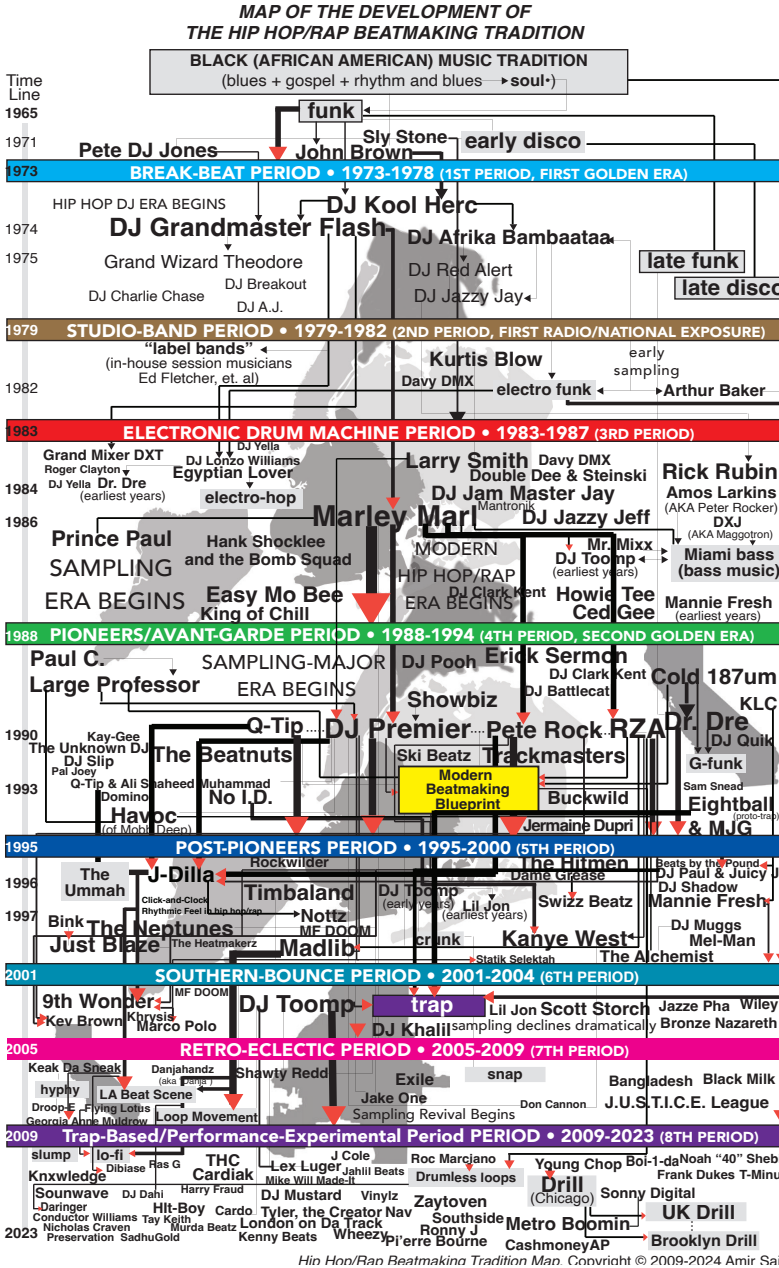


Figure 1 Map of the Development of the Beatmaking Tradition

"To Herc, a DJ set was one continuous piece of music. My man was composing something. And if he was a composer, that went for me too."
–Grandmaster Flash

"Fuck the melody, forget the chorus, and leave the verses alone; we're talking about the pure rhythmic groove."
–Grandmaster Flash

Beatmaking, or the compositional practice of "making beats", has been a part of the hip hop/rap music tradition right from the start. In addition to "rocking the crowd" or providing music for people to party to, early DJs like Kool Herc, Grandmaster Flash, and Afrika Bambaataa considered what they were doing (the DJ element of hip hop) as a form of music composition, not just a method for spinning records. The DJs of hip hop's first era used the breaks and other fragments from records (mostly funk, soul, some disco, and other genres that fit the hip hop style) to make new musical statements. But in the earliest years, beatmaking, as a stand-alone element of hip hop, had yet to formulate into what we commonly know it as today. Thus, what follows in this chapter is an examination of the eight developmental periods of the beatmaking tradition, from 1973 to 2023.

Break-Beat Period, 1973-1978: The Hip Hop DJ Style, the Foundation of Sampling

The art of sampling in the hip hop/rap tradition evolved from live hip hop DJ sets, wherein the DJ (spontaneously) wove together a mix (blend) of record breaks, cuts, scratches, ruptures, and other sound effects. Between 1973 and 1978, the first five years of what can be described as the hip hop movement, the job of making beats with turntables was something done only by qualified DJs. Before going further with my discussion of the Break-Beat Period, it must again be noted that a particular brand of funk records became the

foundation for hip hop/rap music when, in 1970, a lesser known South Bronx DJ named John Brown used them. John Brown was the DJ at a place called the Plaza Tunnel, a local South Bronx spot that was situated in the basement of the old Plaza Hotel, which once stood on 161st Street and Grand Concourse. It was at the Plaza Tunnel where John Brown became the first (in the South Bronx) to play funk records (in a specific style) like "Give It Up or Turn It Loose" by James Brown and "Get Ready" by Rare Earth. It was also at the Plaza Tunnel where what would become known as the hip hop style of DJing was first born in the mind of a teenager who went by the name of Herc.[1]

While still in high school, Herc used to hang out at the Plaza Tunnel, soaking up John Brown's style of DJing and the records he played. It was this experience and interaction at the Plaza Tunnel that had a direct influence on the style of DJing Kool Herc first showcased at the infamous Sedgwick party in 1973. Herc's style of DJing, which was influenced as much by dancers (whom he aptly dubbed "b-boys") as it was by John Brown, centered around the use of a mixer, two turntables, and two copies of the same record on two separate turntables. Herc would go back and forth between each record (mostly funk), only playing the "breaks," the raw rhythm section, stripped of melody, and underscored by the pulse and groove of the drums, bass guitar, and rhythm guitars. He would extend these breaks continuously, pumping up the action by b-boys on the dance floor. Thus, by cueing and extending a particular rhythmic break, Herc was the first person to use the turntable as an instrument, thereby setting the tone for a new group of non-traditional musicians. He was also among the first DJs in hip hop to stress the importance of having the most unique records.

As Herc's new DJ style took the South Bronx by storm, other DJs soon followed, most notably Grandmaster Flash, who appeared on the scene within a year of Herc's initial success and Afrika Bambaataa, who first appeared sometime shortly after that. It was during this period between 1973 and 1978 that DJs emerged as the most powerful and most revered figures of the hip hop movement,

[1] Hager, 31.

which is why at the time the average South Bronx teenager aspired to be a DJ (not a rapper).

It was during the Break-Beat Period that the break-beat style or hip hop style of DJing began to lay the foundation for the modern beatmaking tradition. First, Herc developed what he called the "merry-go-round" technique, a process of using two copies of the same record, one to play and one to cue up while the other was playing. Then Grandmaster Flash took the "merry-go-round" technique and developed new techniques as well as a new performance style of his own. Flash moved to *blending* records, mixing them, and "cutting the beats together in exact syncopation and planning out" his DJ sets "like a chess game."

As I mentioned in Chapter 1, Grandmaster Flash surpassed Kool Herc when he became the first DJ to actually *physically* put his hands on the vinyl while the turntable's platter was spinning. Up until that point, DJs, including Herc, were only "needle dropping;" that is, lifting up and placing the needle down on the record's groove. Further, Flash developed the "quik mix theory," which included a number of "firsts", but it most notably included the "spin back", a method for quickly rewinding records; and the "punch phase", a method for *punching* a record forward, right on the break.[2] In effect, Flash had developed a method for "looping" the breaks and other segments of the same record. Thus, it was the pioneering developments of Grandmaster Flash that first hinted at the looping, cutting, and chopping techniques of the modern beatmaking tradition.

Grandmaster Flash must also be recognized for other innovations that laid the groundwork for modern beatmaking. In addition to being the first DJ to "rig" his mixer, specifically for the purpose of creating his own headphone input jack, Flash was the first DJ to use an electronic beat box, incorporating additional percussion sounds and effects with his regular DJ setup. And while Herc was the originator of the break-beat style, and Grandmaster Flash was the first true *technician* and the closest link to the modern beatmaker,

[2] *Ibid*, 34. Also, see Flash and Ritz, 54-84. During this same period, other DJ techniques emerged like the "scratch" (widely credited to Grand Wizard Theodore, once an apprentice to Grandmaster Flash), and the earliest form of pause-tape sampling.

it was Afrika Bambaataa (perhaps the undisputed record collection king at the time), who hinted at the future of sampling when he pioneered the "pause tape," a technique of using a cassette tape to record a segment of audio (from a record, the radio, TV show, etc.). With a dual cassette deck, he would play the recorded music from the first deck, then pause the recording on the second deck at the desired end point, then rewind the first deck back to the start point, and record the sample again. Thus, utilizing the pause button on a cassette tape recorder, he would record the breaks (or desired segments) then press pause, then record the same section again in a effort to create what could best be described as a crude loop.

Summary of the Break-Beat Period

The Break-Beat Period represented the first group of beatmakers in hip hop/rap music. These DJs were conscious of the fact that what they were doing was anti-establishment. In fact, in many ways what the first beatmakers were doing was a rebuttal to a lot of the popular, (more polished) disco that was on the radio in the mid- to late 1970s. Furthermore, all of the first beatmakers were DJs. This fact should not be taken lightly. For six solid years, the DJ was the sole controller of the music of hip hop! More importantly, in this period, hip hop DJs became the first musicians to use turntables as instruments. In doing so, they became the most non-traditional musicians in America. Finally, it must be recognized that as a self-contained music-maker, one who used non-traditional or non-conventional compositional practices, the hip hop DJ sketched the blueprint for the model of the modern beatmaker.

Studio-Band Period, 1979-1982

Prior to the late 1970s and early 1980s, DJs were the main draw. They were the most powerful, most revered, and most imitated figures in hip hop. At the same time, rappers were a secondary thought; their main purpose being to introduce the DJ and to provide a level of crowd control.

But as lyrical content (subject matter) expanded and the mechanics and language of the art of rapping grew more complex, rappers moved to the forefront, replacing DJs as the center of attention in hip hop. Also during this period, hip hop was going through its first experience with the music industry. Before 1979, there were no studio-recorded hip hop/rap songs or hip hop/rap acts that were signed to any record label. Until then, hip hop/rap songs were mostly live DJ/rapper performances that were recorded on cassette tapes and distributed "hand-to-hand" throughout New York City. However, after the first two official studio hip hop/rap recordings in 1979, "King Tim III (Personality Jock)" by Brooklyn's The Fatback Band, and the monster hit "Rapper's Delight" by the Sugarhill Gang), studio-recorded hip hop/rap music became a more regular occurrence.[3]

Beginning in 1979, DJs saw their power decrease as the lane of fame and opportunities widened for rappers, who were now becoming more eager to cut a record in the studio. Further, independent labels, sensing a quick payday, were completely enamored with the idea of making rap records. Having seen the breakaway success of Sugar Hill Records' "Rapper's Delight," upstart self-described "rap" labels were bent on capturing the same lightining in the bottle that Sugar Hill Records had captured.

The most noticeable feature of the Studio-Band Period was the replacement of the hip hop DJ by the studio band (i.e. recording studio session musicians) as the sole music provider for rappers. During this period, indie rap labels actively sought out rappers and brought them into the recording studio where the label's in-house studio bands — who were not a part of or even aware of the hip hop movement — worked up "cover versions" of the breaks and grooves of hit records of the time, many of which from the records that were most popular among the hip hop DJs.[4] In effect, the indie rap labels had come up with a way to cheaply manufacture

[3] Toop, 82-89.

[4] It has often been reported that "Rapper's Delight," the first hit rap record, used a sample of the song "Good Times" by the group Chic. This is not correct. The truth is that the Sugar Hill Records in-house band played a cover version of the main riff (a "break" so to speak) of Chic's "Good Times." That was the rhythm track that the Sugar Hill Gang rapped to, not an actual sample of Chic's song.

rap records. Moreover, the indie rap labels, most notably Sugar Hill Records and Enjoy Records, figured out how to use the wisdom and influence of the hip hop DJ without having to actually use or *pay* the hip hop DJ.

Subsequently, it was during the Studio-Band Period that the DJ/rapper connection began to fall apart; and for the first time in hip hop's history, the DJ and rapper were separated. It was also during the Studio-Band Period wherein rappers, who had by the late 1970s and early 1980s displaced the DJ as the most visible figures in hip hop, first began to realize that the DJ could not adequately serve as the sole music provider for studio recorded records, which were based on the recording studio environment and model, not the live party structure.

Around the same time that hip hop/rap music was finding its way into the studio, there were key advancements rapidly occurring in audio and recording technology. Drum machines and more affordable digital samplers were just beginning to hit the market. These music production tools, which were not only accessible to DJs but also to a larger pool of would-be musicians who had missed out (or couldn't cut it) in the first DJ era, provided access to enhanced music-making processes. Thus, realizing that they no longer had to be attached to one specific DJ, that they were now essentially self-contained, independent contractors and that the art of rapping was moving into new levels of complexity and reaching new artistic heights, rappers began to see themselves like other recording artists who were eager to get into the studio and cut a record.[5] Therefore, the need for hip hop/rap DJ-inspired music — *without* necessarily the DJ — soon developed.

There were other pivotal developments that occurred during the Studio-Band Period. By 1981, the studio-band method of music production for rappers had all but died out. After getting over the initial novelty of hearing rap on the radio for the first time, there

[5] The distinct element of beatmaking, which began to formulate into its own tradition, didn't emerge until the late 1970s and early 1980s. Beatmaking emerged as its own distinct element because of three main factors: (1) The displacement of the DJ as the central figure in hip hop/rap music by the rapper; (2) Hip hop/rap's move into the recording studio and, subsequently, into the modern music industry; and (3) Rapid, parallel advancements in audio and recording technology.

was a huge pushback from those who recognized that the studio band hip hop was not authentic hip hop/rap music. In fact, many participants of the hip hop movement began to outright reject the studio-band sound, as it did not represent the *essence* of hip hop.[6] It was around this time that Kurtis Blow, Grandmaster Flash, and Afrika Bamabaataa (the latter two being among the first architects of hip hop/rap music), emerged as the new leaders and pioneers of the studio-recorded rap song.

In 1980, Kurtis Blow, a former b-boy and DJ who went by the name Kool Kurt, tapped into his DJ roots and a lesser-used rap style and form — the message rap — and came up with the seminal hit "The Breaks."[7] Although Kurtis Blow and co-producer Larry Smith used a number of musicians for the making of "The Breaks," they did not merely do cover versions of the breaks of funk records that were popular with hip hop DJs. Instead, they used an original rhythm track that was inspired by both funk and Kurtis Blow's block party DJing days. The other pioneering achievement of "The Breaks" could be heard in both the lyrics and rhyme style that Kurtis Blow employed. Before "The Breaks" in 1980, most raps were of the bragging and boasting style and form; Kurtis Blow changed all of that. Two years *before* "The Message" (Grandmaster Flash and the Furious Five) would shake up the standard lyrical form and style in the art of rap, Kurtis Blow had already perfected the "message rap" form and style.

In 1981, for the making of the landmark song, "The Adventures of Grandmaster Flash on the Wheels of Steel," Grandmaster Flash made a triumphant return to his DJ roots. Opting not for any assistance of a studio band, Flash instead chose to do what he had always done best: Serve as the sole controller of the music. Using

[6] It's worth pointing out that the initial success of "Rapper's Delight," Sylvia Robinson's Sugar Hill Records, and the like was due more to the novelty of rap being heard on the radio for the first time after its birth six years earlier. However, the studio band-lead "hip hop" inevitably died within two years of its inception, as young hip hoppers who had grown up with the real thing reclaimed the movement and brought back the hip hop DJ. This sentiment has been widely expressed and shared by many hip hop/rap pioneers of the time. In fact, the rejection of the studio band "hip hop" sound was something directly mentioned by Marley Marl in my interview with him.

[7] Though "Rapper's Delight" was the first big rap hit record, "The Breaks" by Kurtis Blow was the first big rap hit record on a major label (Mercury Records).

three separate turntables and all of his best techniques — cutting, scratching, blending, punch phasing, and back spinning — Flash weaved together various records into one cohesive tapestry, demonstrating for the first time how, given the chance, the hip hop DJ could translate to the studio recording environment.

"The Adventures of Grandmaster Flash on the Wheels of Steel" was pivotal to the advent of the beatmaking tradition for two reasons. First, it established a model for how the hip hop DJ could in fact make it in the studio recording environment. Remember, by 1981, when Flash made "The Adventures of Grandmaster Flash on the Wheels of Steel," the hip hop DJ had been written off as a hip hop element that couldn't translate into the studio recording environment. Moreover, it was thought at the time (mainly by the indie culture vultures and exploiters of rap) that the hip hop DJ was naturally a casualty of the progression of hip hop into the music industry and, subsequently, the mainstream. In fact, when Sylvia Robinson signed Grandmaster Flash and the Furious Five to her label, she did so to capitalize off of and use Flash's *name*, not any of Flash's ideas about music-making. Case in point: "The Message," the biggest hit song credited to Grandmaster Flash and the Furious Five, wasn't written or produced by the members of the group, except for Melle Mel (Melvin Glover). "The Message" was acually the brainchild of Duke Bootee (Ed Fletcher), the leader of Sugar Hill Record's in-house studio band.

The second reason why "The Adventures of Grandmaster Flash on the Wheels of Steel" was pivotal to the advent of beatmaking was because it established the model of the principal (lone) beatmaker in a studio setting. When Sylvia Robinson finally permitted Flash to go into the studio alone and record a hip hop/rap album in the vein of the original essence of hip hop, he took full advantage of the opportunity. Inside the studio, Flash combined his hip hop sensibility and unique DJ style with the recording technology of the time. It was his innovative use of both his DJ skill-set and the recording studio tools that paved the way for the beatmaking tradition, as it would come to be known five years later.[8]

[8] Also, Grandmaster Flash and "The Adventures of Grandmaster Flash on the Wheels of Steel" are credited for being the catalyst of the art of turntablism.

Much in the same way that Grandmaster Flash had returned to his roots, Afrika Bambaataa reached back to his DJ and king-of-the -record-collection roots to make a series of critical hit singles between 1981 and 1983. "Jazzy Sensation" (1981), "Planet Rock" (1982), "Looking For The Perfect Beat" (1982), and "Renegades of Funk" (1983), all featured Afrika Bambaataa's hip hop DJ sensibility and examples of his forward-thinking usage of recording studio technology. Bambaataa used his understanding of cutting, mixing, and rupture, and combined it with the recording technology of the time. He used synthesizers and other gear. And in perhaps one of his truest pioneering moments, he reached into his extensive record collection and, with the help of co-producer/engineer Arthur Baker, he digitally sampled some of the most unlikely sound sources. Bambaataa called his new sound "electro funk", a homage to both the funk music (records) that had originally inspired hip hop and to the level of creativity that electronic instruments and equipment was able to uncork.

Summary of the Studio-Band Period

The Studio-Band Period represented a number of critical developments in the art of beatmaking. First, it's in this period that the DJ is first separated from the rapper. Second, it's within this period that hip hop/rap music gets on the radio for the first time and gains a national audience outside of New York. Moreover, the Studio-Band Period marks the first time the distribution of hip hop/rap music first began to move from street-sold cassette tapes to records sold in stores. We could also say that the Studio-Band Period represents the first time that hip hop/rap was first snatched from its creators and exploited commercially.

Third, within this period there was a decisive move away from the *actual* use of breaks from records as the primary (basic) material for making new music compositions. Although most of the in-house studio bands continued to draw inspiration from what hip hop DJs were spinning at parties, they never brought the DJ into the studio for input on the creation of their "rhythm tracks" for rappers.

Fourth, it's in this period that we first see the emergence of the lone, self-contained beatmaker (producer). Fifth, it is in this period where we first hear how a limited use of melody can be used in the rhythm and groove-orientated form of music that hip hop/rap is. Kurtis Blow's "The Breaks," co-produced by Larry Smith, features a recognizable melody line along with the central rhythm, and "The Message," produced by Duke Bootee (Ed Fletcher), soon followed suit. Finally, it was also within the Studio-Band Period where many hip hop/rap practitioners started to become increasingly aware of hip hop/rap's ability to distinguish itself as a popular genre in the music industry. In fact, in this period, Kurtis Blow becomes the first hip hop/rap artist to ever sign with a major record label.

The Studio-Band Period does not represent the original hip hop movement. Many people wrongly consider this period to be the real roots of hip hop/rap music and the beatmaking tradition. This is inaccurate. The roots of hip hop/rap music took shape in 1973 and consistently developed for six years *before* the Studio-Band Period began in 1979. Furthermore, aside from the isolated developments of Kurtis Blow, Grandmaster Flash, Afrika Bambaataa, and Duke Bootee, the beatmaking of the Studio-Band Period was, for the most part, simply a poor knock-off of the original hip hop style and sound of the early 1970s. Most of the music put forth by the first indie rap labels in this period was nothing more than ill-conceived, superficial renditions of some of the turntable compositions that the hip hop DJs had been doing in the South Bronx since 1973. Moreover, the music of the Studio-Band Period was a music that was not in deference to the hip hop sensibility or the underlying hip hop style and sound. Instead, it was designed more for making a splash on national radio than representing authentic hip hop/rap music or hip hop culture.

Finally, to appropriately analyze the Studio-Band Period, you must again remember that the hip hop/rap movement had been going on strong in the South Bronx for six years *before* label-head Sylvia Robinson came around and manufactured a make-shift "rap" group and took a non-authentic caricature of rap straight to the airwaves. Yes, "Rapper's Delight" by the Sugarhill Gang was the

first single to take rap to the mainstream, and it was the first single to popularize rap music nationally. But it must never be forgotten that the Sylvia Robinson invention[9] was not considered real rap by any of the hip hop pioneers and architects of the time. This is why, by 1982, the Studio-Band Period, which was really more the result of a business innovation rather than a music development, was wiped out. Having no real pipeline to the streets — where hip hop was still emanating and being guided from — or to the new rap groups and crews that were rapidly emerging, the Sugar Hill-inspired outfits were displaced, paving the way for a new development in the hip hop/rap music and beatmaking traditions.

Electronic Drum Machine Period, 1983-1987

In 1983, a number of events occurred within the beatmaking tradition, which at this point was now steadily solidifying. Taking a cue from Afrika Bambaataa and his electro funk sound as well as other elements of the Bronx/New York style and sound, DJ Lonzo Williams (Alonzo Williams) formulated a sound he called "electro hop". Williams is significant for two reasons. First, he is widely recognized as one of the first persons to perform and create any form of hip hop on the West Coast (Los Angeles). Until Williams Disco Daddy & Captain Rapp, Ronnie Hudson, and Uncle Jamm's Army came on the scene, there was no hip hop in California. And although California indeed had its own funk and dance movements (most notably "locking"), these artistic expressions, which had some parallels to the funk inspired b-boying in New York, were not quite the same thing. Thus, it was Williams who developed the first hip hop-based music style on the West Coast. Second, in 1984, DJ Lonzo Williams served as an early mentor to and group mate of a young Dr. Dre.

[9] Despite the Studio-Band Period's penchant for a "less-than-true" approach to the South Bronx-born hip hop, it must be recognized nonetheless that Sylvia Robinson and Sugar Hill Records helped crack open the music industry's doors to hip hop/rap music. Moreover, Sylvia Robinsion and Sugar Hill Records played an indispensable role in the early commercialization of hip hop/rap music.

West Coast Beats

What often comes to mind when beatmakers say "West Coast beats" or the West Coast Sound is: *the West Coast Style is Dr. Dre and G-funk*. But the West Coast beat scene is much more than that; and its beatmaking roots, which are an extension of New York party rap and electro, began in the Electronic Drum Machine period. Technically, the roots of West Coast beats span three beatmaking periods: the Studio-Band Period (1979-1982), the Electronic Drum Machine Period (1983-1987), and the Pioneers/Avant-Garde Period (1988-1994). In 1981, Disco Daddy & Captain Rapp released "The Gigolo Rapp." This song followed the late-1970s New York model of using a live-band replay — in this case, a studio-band rendition of Rick James's 1981 hit "Give It To Me Baby" — and it featured the New York party-rap style, sound, and lyrical structure that the Sugar Hill Gang rode to fame in 1979.

In 1982, Ronnie Hudson and the Street People released "West Coast Poplock." Unlike "The Gigolo Rapp," with its use of a late-disco backing beat and the distinct New York party-rap style, "West Coast Poplock" is effectively the precursor to the West Coast blueprint of late funk-infused hip hop. The smooth-rap style featured on "West Coast Poplock" is a stark departure from the New York party-rap style. There's a party vibe to be sure, after all the hook, "California knows how to party, California knows how to party, in the city of LA,"[10]is explicitly about partying. But the rapping is less "off-the-block" and more polished and smooth. In any case, 1982 would prove to be a pivotal year both in New York and West Coast hip hop; again, the latter would pick up something originated by the prior and run with it.

[10] Those familiar with Dr. Dre's West Coast anthem "California Love" will undoubtedly know these lyrics.

"Scorpio" and Planet Rock: The Electro Template and Organic Sampling

Grandmaster Flash and the Furious Five's "Scorpio" predates "Planet Rock" by a year, but it's "Planet Rock" that's most often associated with pioneering the style and sound known as electro, a sub-genre of hip hop/rap music that fused funk and boogie with synth-pop and electronic music. Recorded in 1981 and officially released in 1982, "Scorpio" features all of the elements that define electro: drum machines, electronic/synth sounds, and distorted vocals by way of vocoding and talkboxing. Because "Scorpio" arrived first, it deserves credit for establishing the electro template. But it was "Planet Rock" that crystalized the electro style and sound — and it was also "Planet Rock," not "Scorpio," that influenced the West Coast electro scene.

"Planet Rock": The Seminal Beat

Afrika Bambaataa and the Soul Sonic Force's "Planet Rock" spawned electro, ignited Miami bass, and helped the West Coast find its hip hop footing. Produced by Arthur Baker — who at the time didn't know how to work a drum machine and was thus obliged to hire someone from a want-ad in the *Village Voice* to make the beat[11] — "Planet Rock" was, broadly speaking, an eclectic amalgamation that paralleled the live DJ sets that Afrika Bambaataa was known for. But it was deeper than that; it was less about the eclecticism of the different replayed elements (not actual samples) of songs that Afrika Bambaataa had spun at parties and clubs and more about the cohesive construction into something new. Featuring keyboardist John Robie's interpolations of elements of "Numbers" and "Trans Europe Express," two songs by the '70s German synth band Kraftwerk, "Planet Rock" was a seminal

[11] Brewster and Broughton, 265: "Baker, who had no experience with drum machines, recalls hiring a programmer out of the paper. 'There was an ad in the Village Voice: 'Man with drum machine, $20 a session.' I don't even remember the guy's name or anything. So I got him for twenty dollars and said, "Programme this."'

composition because of its electronic drum programming. Despite the fact it did not contain samples per se, the construction of "Planet Rock" was the precursor to the modern method of beatmaking: drum programming[12] combined with the arrangement of other musical elements. Also, "Planet Rock" shares a conceptual lineage with "Rapper's Delight," "The Adventures of Grandmaster Flash On the Wheels of Steel," and "The Gigolo Rapp" inasmuch as all three of these songs directly borrowed from other records. Although not *sampling* in the way that we commonly know it today in the hip hop/rap music tradition, this type of borrowing exceeded the passive takings or so-called organic "sampling" that has always been present in music.

Double Dee and Steinski: Godfathers of the Mashup

1983 was also the year that the mashup, or proto-mashup, was born. Double Dee and Steinksi created sample-based collages that they called "Lessons." "Lesson 1" was their contest entry for Tommy Boy Records' promotional contest that asked entrants to make a remix for G.L.O.B.E. and Whiz Kid's single "Play That Beat, Mr. D.J." "Lesson 1" featured samples from a broad swath of genres and artists, but it also included vocal samples (pop culture references) from a wide variety of sources, including dance instruction records and films.

***

By the end of 1983, studio-band hip hop was dead, and in the Bronx as well as all the other boroughs in New York City there was a widespread resurgence of hip hop/rap DJs and park jams. At the time, "nobody wanted to see the bands anymore," says Marley Marl.[13] In fact, during this period there was a hip hop renaissance. B-boying, known as break dancing or breakin' by 1984, pushed

[12] "Planet Rock" may be the first "beat"/hip hop record to use the famous Roland TR808 drum machine,

[13] Amir Said interview with Marley Marl (August 2008), from *The BeatTips Manual, 6th Edition* (2015).

forward like never before, due in large part to Crazy Legs (Richie Colón) and the Rock Steady Crew.[14] And graffiti writing, which had previously lost its turf battle with NYC subway administrators, had begun to see a new surge of expression all across the city, especially in the Bronx and Brooklyn. This larger hip hop renaissance coincided with further developments in audio and recording technology, specifically in the area of electronic music production instruments (EMPIs). But it was the new focus on rhyme form and style — within the hip hop renaissance, ca. 1983-1985 — that was the most pivotal factor in the further development of the beatmaking tradition.

Rappers, standing on the shoulders of Melle Mel, Grandmaster Caz, and Kurtis Blow, began experimenting with more complex rhyme schemes. They were now increasingly pushing the boundaries of the rap form and style, offering up rhymes that were more poetically dense and rhythmically charged. Rising to the challenge of the more extensively developed rhyme form, DJs, who were now becoming more aware of their role as beatmakers (producers), began creating sparse, drum track-based compositions that were intended to highlight the lyricism and rhythm of the rappers. And the key to this new beatmaking style and sound was the electronic drum machine.

Among those at the forefront of the electronic drum beat sound were Larry Smith, DJ Jam Master Jay, and Rick Rubin. In 1983, Larry Smith crafted the two beats that would serve as the instrumental tracks for Run-DMC's first two records, "It's Like That" and "Sucker M.C.s." Following the success of Run-DMC's debut single, Larry Smith (joined by Jam Master Jay's assistance on occasion) would continue to make up hit tracks for Run-DMC. Rick Rubin's first officially acclaimed beat was the instrumental he did for T La Rock's "It's Yours." But it was with Run-DMC (and later LL Cool J and The Beastie Boys) that Rick Rubin would distinguish himself as a pioneer in the beatmaking tradition.

[14] The Rock Steady Crew that caught national acclaim did not feature Jimmy D and Jojo (the original founders) of the South Bronx RSC. Instead, the Rock Steady Crew that most people were familiar with in the mid-'80s was composed of a crew from upper Manhattan that Crazy Legs had put together after he and his family moved from the South Bronx to Manhattan sometime around 1980. See: Hager, 81-90.

While he was clearly influenced by Larry Smith's earlier work with Run-DMC, Rick Rubin must be recognized for the individuality that he introduced into the beatmaking lexicon. Drawing on his rock music background, Rubin was the *second* beatmaker (producer) to successfully fuse together elements of rock with hip hop/rap music,[15] a feat that hinted at the potential range of the beatmaking tradition and pointed to the inevitable appeal of hip hop/rap music in the mainstream.

Marley Marl's Revolution

In 1984, an event occurred that would establish forever the model of modern beatmaking. One day, while sampling sounds inside Unique Recording Studios in New York City with recording engineer Arthur Baker, Marley Marl, an intern at Unique at the time, made the revelation that changed the hip hop/rap and beatmaking traditions forever. Marley Marl remembers:

> My first step was I got my break-beats up. All the songs I used to hear them cuttin' up…I got my break-beats up. And then after that, I would go out into the park and have my crew rhyme over it. After that…I kind of discovered sampling by accident. That's how I got into looping… **I was getting another part of the record, and we didn't truncate it yet. The snare was there and the vocal. I was playing a beat that I made on the drum machine, and I heard the sampled snare playing with it. Then I realized… I was like, "Yo, I can take any kick and snare from ANY of my break-beat records on how rap should sound…**
>
> I don't know if I would call it hunting for a new sound. **I was trying to make rap sound accurate to what I was brought up on. That's basically it. I wasn't looking for a new sound… Maybe you could call it looking for a new sound. <u>But I know the representation of what I was hearing [on the radio at that time] was NOT what I grew up on…</u> hearing on these cassettes…and I just wanted to make it more like the rap that I heard before it hit records.** That was my whole premise of everything. [emphasis mine][16]

[15] Larry Smith was the first producer to fuse rock with hip hop/rap music.
[16] Said, *79*.

Soon after his initial sampling revelation, Marley Marl took the beatmaking tradition to another level. Before Marley, there were very few examples of *digital* sample-based compositions in hip hop/rap music other than Afrika Bambaataa. Although DJs of the first beatmaking period were not sampling *per se*, their use of breaks from records was more of a *virtual* form of sampling. Marley was not only the first DJ/hip hop music maker to realize the full potential of sampling technology and the implications that it held for beatmaking, he was also the first to grasp the complete picture of beatmaking. That is to say, he was the first person to recognize beatmaking as a distinct art form and collective musical process that drew on the foundation and understanding of DJing, sampling skills, and traditional instrumentation.

With the combination of his DJ background and his recording studio knowledge, Marley Marl devoured his crates of records, looking for drum sounds and all sorts of musical fragments and phrases. In the process, he developed a number of fundamental standards in the beatmaking tradition. First, he developed the modern practice of using unique drum sounds. Until Marley, the drum sounds in beats were always of the generic, unmodified stock sounds found in electronic drum machines. In pursuit of a more accurate, realistic, and customized sound, Marley Marl sampled actual drum sounds from the records he learned as a kid and DJ. He followed this up by using his engineering knowledge to further color and customize these sounds, giving him a sound that was (at first) not easily duplicated.

Second, Marley Marl established the modern method for all sample-based compositions. Marley was the first beatmaker (producer) to recognize that *any* piece on a record, not just the break near the middle or end, could be converted to hip hop/rap form. Also, it was Marley who first developed the techniques that would come to be commonly known as "chopping" and "layering." The truncation of sounds had been practiced before, but only with the stock sounds of electronic drum machines. Marley took the concepts of truncation and tuning to a new level, instituting the practice of carving up *any* sound so that it worked correctly in the loop and fit

into a desired rhythmic and sonic pattern. It was also Marley Marl who first instituted the use of drum breaks as the primary drum track of a beat. He was the first beatmaker (producer) to sample entire drum breaks and match them or "lock them up" — *without any quantizing or timestretching* — with a variety of different types of musical phrases and sound stabs.

Finally, Marley Marl perhaps even had a role in the birth of the "Miami Bass" sound, also known as "bass music," one of the biggests sub-developments to emerge during the Electronic Drum Machine Period. Marley Marl recalls:

> I brought the bass to Miami… I was with my 808 drum machine… I used to be on tour with Shanté; this before Miami had bass! Me and Shanté was doing a show for Luke and Ghetto Style DJs, before he even had 2 Live Crew… This before they even started their sound! There was no 808s out there. What I did, I brought my 808 to a show, 'cause I used to play live beats while she rhymed. I went up there with my 808, and was [imitates sounds] BOOM… Everybody ran over to the booth like, "What is THAT?" Right away, people was like, "What is that?" I was like, "It's the 808." I brought the bass to Miami… At a Ghetto Style DJs show…bass didn't start hitting them until '85… In '84/'83, I brought the bass to Miami.[17]

It was during this same period that DJ Toomp first came on the scene. Just out of high school (ca. 1987), Toomp, who was admittedly very much influenced by Marley Marl, worked directly with Luke (of 2 Live Crew fame). After spending some time in Miami, Toomp returned to Atlanta, where, by 1994/95, he had already played a role in the development of the "Atlanta-Miami Sound" ("Southern bounce") sound. It would be this sound, along with the New Orleans version of bass music and the Memphis rap sound, that would go on to serve as the foundation for all of the sounds that collectively defined the "Southern rap sound."

Finally, the Bomb Squad (Hank Shocklee, Eric "Vietnam" Sadler, Keith Shocklee, and Chuck D) must be recognized for

[17] *Ibid*. Also, in my interview with DJ Toomp (who worked with Luke Skyywalker and was MC Shy-D's DJ in Miami in 1987), he recalls the impact that Marley Marl had on Miami bass as well as his own music production development.

their contributions in the area of sampling. The Bomb Squad was composed of the first beatmakers (producers) to approach sampling not merely as a collage of sound, but rather as an almost indiscriminate "wall of sound." They also helped solidify the "booming" sonic impression that had been brewing in New York production, but had yet to completely materialize prior to 1987.

Summary of the Electronic Drum Machine Period

The Electronic Drum Machine Period can be characterized by several key developments. First, this is the period in which individual drum sounds came alive. Marley Marl's use of drum samples from various records would change that. The Electronic Drum Machine Period can also be characterized as the period in which the matching of drum breaks to other supplied musical components occurs. Mechanic-like drum patterns and sparse sample-stabs typified the kinds of beats (rhythm tracks) that were made throughout this period. This is also the period in which the 808 sounds are prominently used for the first time. Finally, the Electronic Drum Machine Period represents the period in which the foundation for the modern art of sampling is established.[18]

Pioneers/Avant-Garde Period, 1988-1994

The Pioneers/Avant-Garde Period brought an explosion of new developments in the beatmaking tradition. First, this is the period in which the quintessential self-contained, lone beatmaker is typified; and it's also during this period that beatmakers (producers) begin to gain recognition similar to that of rappers.

[18] Key or notable beatmakers and other figures who emerge in this period include: Larry Smith, Rick Rubin, DJ Lonzo Williams, Kurtis Mantronik (of Mantronix), Marley Marl, The Bomb Squad (Hank Shocklee, Eric "Vietnam" Sadler, Keith Shocklee, Gary G-Wiz, and Chuck D), DJ Toomp, Grand Mixer DXT, Prince Paul, EZ Mo Bee, Steinski, and Mannie Fresh. Key sub-traditons of hip hop/rap to emerge during this period: Electro-hop and Miami bass, also known as bass music. Note: Miami bass stems directly from electro funk, electro-hop, and other elements of early/mid-1980s New York hip hop/rap music. Key EMPIs of the period: Roland TR 808, E-Mu SP, Technics Turntables.

Next, this is the period in which the beatmaker virtually resurrects the role of the DJ as the sole controller of the music for the rapper. Not only is DJing seen as a rite of passage for many of the beatmakers (producers) of this period, the notion of "digging in the crates" and having a thorough record collection, the original essence and foundation of the first hip hop/rap DJs, becomes paramount.

It's also during this period that there is a celebration of hip hop/rap's underground heritage and subculture roots. More importantly, there's a return to and reaffirmation of the importance of the use of the break and riffs as source material. Also during this period, rhythm and groove once again stand out as the guiding compositional principle in hip hop's beatmaking tradition. And along with the experimentation of filtered bass lines, drum frameworks became more pronounced, as they were designed to create distinct rhythmic grooves that more often resembled the core drum arrangements and backbeats of early funk and disco records.

In the Pioneers/Avant-Garde period, EMPIs became critical to a beatmaker's (producer's) methods and techniques. In this regard, three key EMPIs that stood out during this period include: the Akai S950, the Akai MPC 60 (II), and the E-Mu SP 1200. And during this period advancements in sampling technology further point to the potential for a new direction in hip hop/rap music. Also, during the Pioneers/Avant-Garde Period, pivotal strides in sample and arrangement strategies were made. Furthermore, the use of rare and obscure records for source material personified the middle of this period.

Note About Compilations of Source Material: Super Disco Breaks, In the Groove, and Ultimate Breaks & Beats

While compilation albums were mostly sampled during the Pioneers/Avant-Garde period, their impact on the sampling tradition of hip hop/rap music has been displaced or misunderstood by some commentators. Compilations such as *Super Disco Breaks*,

In the Groove, and *Ultimate Breaks & Beats* were indeed popular, *Ultimate Breaks & Beats* being the most popular of them all. *Ultimate Breaks & Beats* compilations were a dominant force in the early history of the beatmaking tradition of hip hop/rap music, but not for the reason some claim. These compilations were not popular for the break-beats, per se; rather, they were popular for the individual drums *within* the drum breaks. In other words, *Ultimate Breaks & Beats* was sourced less for its break-beats (as a whole) and more for its individual (open) drum sounds.

I started buying *Ultimate Breaks & Beats* volumes in 1992, the year the first compilation debuted. Certainly, beatmakers (producers) sampled from the *Ultimate Breaks & Beats*; practically every beatmaker (producer) in New York in the early '90s sampled drums sounds from *Ultimate Breaks & Beats*. But this certainly wasn't the default source. By 1994, most of the *Ultimate Breaks & Beats* volumes in my record collection were bought used or traded, and I seldom used them. There were drum sounds everywhere, and beatmakers (producers) on the East and West Coasts were well aware of this. *Ultimate Breaks & Beats* may have inspired some beatmakers (producers) to dig deeper, for many it was a starter-pack introduction to sampling drum sounds. But the truth is, by '92, most beatmakers (producers) — certainly the pioneers — were already digging deeper and bypassing *Ultimate Breaks & Beats* for drum sounds. After Marley Marl had demonstrated that *any* drum sound could be sampled from *any* record — and at *any point* on a record, not just the break — beatmakers (producers) immediately began to follow suit.

Note About Dr. Dre, Hybrid Beatmaker (Producer) and Bandleader: Sampling and Live Instrumentation – A New Musicality

It's not clear if Dr. Dre was the first to combine sampling with live instrumentation. Marley Marl, for instance, was doing it around the same time. But Dr. Dre took this hybrid approach to a new level and made it a staple of hip hop/rap music. Thus, it's

also during the Pioneers/Avant-Garde period that G- funk emerges. Although Dr. Dre deserves credit for popularizing G-funk, he was not the originator of the style, sound, and aesthetic. That credit goes to Cold 187um (of the group Above the Law), who had the *idea* and the name for the style and sound prior to Dr. Dre:

> While working on Above the Law's second album, Black Mafia Life, in 1991, Hutch had the breakthrough that changed everything. He took grooves from the P-Funk catalog, added a melodic sense inherited from a family that included noted songwriters and composers; rapped hard, streetwise lyrics on top; and came up with a sound that he called "G-funk."[19]

[19] Shawn Setaro, "Dr. Dre Perfected G-Funk, But He Didn't Invent It—Gregory Hutchinson Did," *Complex*, July 11, 2017 https://www.complex.com/music/2017/07/the-inventor-of-g-funk-interview

The Crucial 26
26 Albums That Personified the Fundamental Developments in Hip Hop Beatmaking

It's also during the Pioneers/Avant-Garde Period that hip hop/rap music experiences a second art-based renaissance. By 1988, the modern hip hop/rap era was two years old, and hip hop/rap had shifted from a mostly dance-based music to an art-based music that celebrated beats as works of art in and of themselves, rather than mere tracks for rappers to rhyme over. This created the new *art/dance duality* that continues to underscore hip hop/rap to this day. Further, it was during the Pioneers/Avant-Garde Period that beatmaking began to distinguish itself as an art form of equal weight to DJing and rapping. In other words, the *beat* was drawing parallel with the rhyme.

This new development in beatmaking was best personified in 26 classic hip hop/rap albums. All but two of these albums were released squarely during the Pioneers/Avant-Garde period, and they are noteworthy for what they individually and collectively established. Since the release of the crucial 26, there has only been two *major* style and sound developments in the art of beatmaking that are on par with the significance of boom bap: Trap music and Drill Music.[20]

The 26 noteworthy albums that were released between 1988 and 1995 are: *Goin' Off* (Biz Markie); *It Takes a Nation of Millions to Hold Us Back* (Public Enemy); *In Control* (Marley Marl); *Critical Beatdown* (Ultramagnetic MCs); *3 Feet High and Rising* (De La Soul); *Peoples Instinctive Travels and the Paths of Rhythm* (A Tribe Called Quest); *All Souled Out* (Pete Rock & CL Smooth)*; Step*

[20] Tthe click-and-clock rhythmic feel popularized by J Dilla is an important style and sound development, but it's variation of boom bap. See chapter 9 for a more extensive discussion of this point.

In the Arena (Gang Starr); *Quik is the Name* (DJ Quik); *The Low End Theory* (A Tribe Called Quest); *Mecca and the Soul Brother* (Pete Rock & CL Smooth); *Breaking Atoms* (Main Source); *Daily Operation* (Gang Starr); *The Chronic* (Dr. Dre); *Enter The Wu-Tang (36 Chambers)* (Wu-Tang Clan); *Return of the Boom Bap* (KRS-One)*; Midnight Marauders* (A Tribe Called Quest); *Doggystle* (Snoop Doggy Dogg)*; Comin' Out Hard* (8Ball & MJG); *Illmatic* (Nas); *Ready to Die* (The Notorious B.I.G.); *Word...Life* (O.C.); *The Sun Rises in the East* (Jeru the Damaja); *The Main Ingredient* (Pete Rock & CL Smooth); *Livin' Proof* (Group Home); and *Mystic Stylez* (Three 6 Mafia).

***

In terms of the beatmaking tradition of hip hop/rap music, Biz Markie's *Goin' Off* (1988), produced entirely by Marley Marl, is one of the most important albums of all time. There are five reasons for this. First, drum sampling and programming. While much attention has been given to break beats, particularly the use of James Brown's "Funky Drummer" (1970), what has gone largely overlooked is that Marley Marl didn't actually use break beats in the way most people think. Marley Marl sampled individual drum sounds from break beats *and* other songs, and he *played* his own drum patterns. Sometimes these drum patterns followed similar patterns from which the drum sounds were sampled from; but most of the time, Marley's drum patterns were original. In 1985, hip hop/rap albums were dominated by sparse drum-machine sounding beats. Marley Marl changed all of that! Marley Marl's innovative use of *individual* drum sound samples — from a variety of songs, not just break-beat records — sparked a revolution in hip hop beatmaking and resulted in a seachange effect in hip hop's beatmaking tradition. In this way, Marley Marl changed the way every hip hop beatmaker (producer) who came after him approached drum sampling and programming.

Second, the "2-bar sound-stab" technique. "Goin' Off," the title song, features a funky original drum beat by Marley Marl (*not a*

break beat). And what makes the drum beat pop? A sound-stab that arrives at the start of every second bar. This 2-bar sound-stab technique would go on to become a commonwealth staple of hip hop beatmaking's tradition. Incidentally, in relation to copyright law, this song and the technique that it relies on is a perfect example of a de minimis use of sound recordings.

Third, the "2-bar groove" technique. On "The Vapors" and "Nobody Beats the Biz," Marley Marl built upon the 2-bar sound-stab technique by replacing a sound-stab with a sampled *groove* on the start of every second bar.[21] "The Vapors" also proves that "*James Brown samples"* weren't just about breaks as some commentators mistakenly believe.

Fourth, the "bass line groove" technique. On "This is Something for the Radio," Marley Marl loops a one-bar bass line groove flush on the one, creating a beat off of a one-bar beat structure. This would become staple technique in hip hop's beatmaking tradition.

Finally, one other thing that makes *Goin' Off* a crucial 26 album — and perhaps the *most* crucial of all 26 albums — is that it represents the genesis of soul sampling in hip hop/rap music. Here, I don't mean that *Goin' Off* was the first album to contain samples from soul songs. What I'm talking about is the specific way in which Marley Marl sampled and programmed a soul sample at the end of this song. The last 10 seconds of "Cool V's Tribute to Scratching," the very last song on *Goin' Off*, features a snippet of the Jackson 5's "Darling Dear" (1970). It's essentially an "outro" beat that switches up the drums, gives the track a new bounce, and features the 4-bar "Darling Dear" sample as the main loop. The blue print of the standard soul sample type beat.

Public Enemy's *It Takes a Nation of Millions to Hold Us Back* (1988) featured the Bomb Squad's signature poly-sample collage sound. Dense and staunchly rhythmic, sonically aggressive and fresh, the beats on *It Takes a Nation…* amounted to what could best be described as harmonic chaos. Cuts, ruptures, screeches, voices,

[21] I suspect that this was inspired by his DJ background, wherein he'd cue parts of songs and peeka-boo the sounds using the crossfader on the DJ Mixer. DJ Premier and Pete Rock would use and build upon this same technique. No surprise that both were also DJs.

breakbeats, and sound-stabs were all intricately blended together into lively, often unpredictable sound walls.

With *In Control* (1988), the first "producer album" that featured rappers, Marley Marl surpassed his own innovations and created trends that would become hip hop/rap standards; in the process, he raised the bar for all hip hop beatmakers (producers) thereafter. One of the album's songs, "The Symphony," stands out for two reasons. It was the first beat to feature all of Marley Marl's innovations. It included Marley's talent for beat juggling, mixing/blending, and cutting; it included both individual drum samples layered over a whole drum break; it included a chop of the front end measure of a soul classic; and it included a haunting 808 drum sound that created a powerful sonic impression. Together, "The Symphony" was innovative for its arrangement strategy and its overall sonic composite. The second reason that "The Symphony" stands out is because it was essentially the first "posse cut" that included multiple rappers on one song — Masta Ace, Craig G., Kool G Rap, and Big Daddy Kane — who were *not* all in the same rap group but in the same crew.

1988 also gave us the Ultramagnetic M.C.'s album *Critical Beatdown*, which marked the first notable appearance of lesser known but influential beatmaker (producer) Paul C. Although not officially credited for the bulk of *Critical Beatdown*, it's widely recognized that Paul C. was responsible for the sound of that album. Paul C. would go on to make beats for Eric B. & Rakim, and he was poised to do work for Biz Markie, Main Source, and others. However, in 1989, at the age of 24, he was murdered. Although Paul C.'s career was tragically cut short, he left an indelible legacy on hip hop's beatmaking tradition, mostly through his apprentice, Large Professor.

In 1989, De La Soul dropped *3 Feet High and Rising*, one of the most original, enigmatic and experimental albums in hip hop/rap history. Largely regarded as one of the most important albums in hip hop/rap history, it helped develop the alternative hip hop/rap subgenre, it introduced the proverbial rap skit, it offered a serious crossover hit, and the beatwork on this LP was outstanding. The

production, which was heavily sample-based, featured a number of sample-based motifs. More deliberate uses of longer musical fragments; a more streamlined arrangement approach; emphasis on one primary sample and two or three secondary fragments; more original drum machine programming and less reliance on break-beat frameworks as the main drum pattern. All of these sampling motifs would go on to become common characteristics of the beats made by all sample-based beatmakers (producers) thereafter. Finally, Prince Paul's drum programming work (for example, "Potholes in My Lawn") and deliberate use of longer musical fragments foreshadowed the direction that the art of sampling would follow during this beatmaking period as well as the major sampling era overall.

In 1990, A Tribe Called Quest released their debut album, *Peoples Instinctive Travels and the Paths of Rhythm*. If Marley Marl hadn't yet made it clear how critical individual stylized sampled drum sounds could be to a beat's overall sound, A Tribe Called Quest hammered this point home with *Peoples Instinctive Travels...* It's on Tribe's debut that we first hear their signature snare drum. And although this album did not have the musical dexterity of their second and third LPs, it was clear from the start that A Tribe Called Quest (Q-Tip) would prove to be very influential in hip hop's burgeoning beatmaking tradition.

1991 and 1992 would prove to be power years in hip hop's beatmaking tradition. First, Gang Starr released its second album, *Step In The Arena*. This album forshadowed DJ Premier's rise as a mainstay in the top tier of beatmakers (producers). Drawing from a wealth of knowledge shared by other beatmakers (producers) — *Large Professor's knowledge of filtering and the importance of deep crates; Showbiz's knowledge of sampling, especially chopping; and Marley Marl's use of the break and distinct drums* — DJ Premier crafted one of the most influential art-based, beat-driven albums in the history of hip hop/rap music. From the chop patterns and arrangements that he developed to the virtual pioneering of the "scratch-hook" (a highly-regarded signature of songs that Premier produces), DJ Premier pushed the art of beatmaking into a new

stratosphere. In 1992, Gang Starr released *Daily Operation*, an album in which DJ Premier further laid down the drumwork foundations that would soon lead to the distinct signature drum sound that he's still known for today.

Next, came DJ Quik, who released his debut album, *Quik is the Name*. Before Dr. Dre's *The Chronic*, before the world would get acquainted with G-funk, *Quik is the Name* served up a distinctly Cali sound that blended hard beats with synth melody lines. Like Marley Marl did before him, and like Dr. Dre would do after him, Quik perfected the hybrid composition style and sound of sampling and live instrumentation. Finally, on *Quik is the Name*, Quik showed how powerful drum sounds could be *outside* of a typical East Coast boom bap beat.

Next, one year after their 1991 debut EP, *All Souled Out*, Pete Rock and CL Smooth dropped their first full length album, *Mecca and the Soul Brother*. With this album, Pete Rock demonstrated his dedication to soul source material and established himself as a master drum programmer. And just like DJ Premier, A Tribe Called Quest, Large Professor, and RZA, Pete Rock showed his commitment to a signature drum arrangement and a compositional style that sought to balance out the original essence of the hip hop DJ with the commercial and technological realities of the mid-'90s. Lastly, Pete Rock also set the bar for the art/dance duality of beatmaking with the beat for "They Reminisce Over You (T.R.O.Y.)."[22]

Just one month after *Mecca and the Soul Brother* was released, and several months after Gang Starr released *Step In The Arena*, Main Source (then Large Professor's group) released its first and only album, *Breaking Atoms*. Large Professor, who produced every beat except for one Pete Rock-assisted track, "Vamos a Rapiar," helped further propel the art-first trend that began to underscore hip hop's beatmaking tradition sometime between 1988 and 1990. Large Professor's beatwork on *Breaking Atoms* was an explosive demonstration of "diggin' in the crates" (a phrase that

[22] "They Reminisce Over You (T.R.O.Y.)" was a searingly emotional tribute to Pete Rock's and CL Smooth's deceased friend, Troy Dixon, AKA Trouble T-Roy. Because of its message, style, and form, It's widely considered one of the best hip hop/rap song ever released.

would reemerge during this period) and carefully crafted sampling arrangements.

Two months after Main Source released *Breaking Atoms*, A Tribe Called Quest dropped *The Low End Theory*. On this, their second album, Tribe was intent on maintaining its smooth, but hard-hitting drum-driven sound. The song "Check the Rhyme" was clearly built off the momentum that they had gained with songs like "Can I Kick It" and "Bonita Applebum" from their debut. But it should also be noted that Tribe was also obviously bent on showing a much rougher production sound. With cuts like "Scenario" (one of the best posse cuts of all time), "Buggin' Out," and "Verses From the Abstract," Tribe created a formula that blended their colorful bounce sound with an edgier (sometimes funkier) drum arrangement strategy.

At the end of 1992, Dr. Dre released *The Chronic*. With *The Chronic*, Dre, who by this time had already made a name for himself with N.W.A., pioneered the "G-funk" sound. In addition to relying on rhythm and groove as his guiding compositional principles, Dr. Dre introduced a new (some might say ambitious) style, one that sought to use distinct melody lines to complement fundamental hip hop/rap grooves. Admittedly inspired by P-funk — a sound developed by George Clinton and Parliament, which used late '70s West Coast funk as its foundation) — Dre created a unique sound that represented the sum of his various musical experiences and ideas. Moreover, with his G-funk sound, Dre helped create the sound that would typify what would soon be known as the West Coast sound. Because *The Chronic* was released in December of 1992, it had a strong shelf life that lasted well throughout the balance of 1993; a fact that further established the West Coast Sound as the new national hip hop/rap sound of the time.

In 1993, KRS-One released *Return of the Boom Bap*. It's not that boom bap had actually gone anywhere. Instead, this was perhaps KRS-One's response to the to then West Coast shift in hip hop/rap music. In any event, the album, which included six DJ Premier produced songs, defintely cemented the term "boom bap". Aside from that, two things stand out the most about *Return of the Boom Bap*. First, this album exemplified the increasingly original

and complex drum patterns that were emerging in hip hop/rap's beatmaking tradition. One example of this was the song "Mortal Thought" (prod. by DJ Premier). Second, *Return of the Boom Bap* not only shared a sonic sisterhood with early Gang Starr albums, it also foreshadowed DJ Premier's range when working with other artists outside of Gang Starr, as well as his beat print on the entire period. *Over the next three years alone, DJ Premier would go on to produce classic songs for Nas, M.O.P., Jeru the Damaja, Group Home, the Notorious B.I.G., and Jay-Z.*)

Also in 1993, Snoop Doggy Dogg released his debut album, *Doggystyle*, produced entirely by Dr. On *Doggystyle*, Dre. Dre further showed what the combination of sampling and live instrumentation *could* be. Having first used the hybrid music process on *The Chronic*, keeping the stylistic and aesthetic characteristics of the sampling tradition of hip hop/rap (especially the drums) and never losing hip hop's core feel and sound, Dre perfected this sound and aesthetic on *Doggystyle*.

Also in 1993, A Tribe Called Quest released their third album, *Midnight Marauders*. In its third installment, Tribe delivered its most comprehensive album and ground-breaking beatmaking offering to date. With two albums and four years under its belt, Tribe put together an album that summoned both the best of their prior innovations and their veteran recording studio experience. Cuts like "Sucka Nigga," "Oh My God" (feat. Busta Rhymes), and "Steve Biko (Stir It Up)" display both Tribe's (Q-Tip's) commitment to deeper crate digging and the new multi-layer chop scheme that they were using to compose their rhythm tracks. And with tracks like "Electric Relaxation," "Award Tour," and "Lyrics to Go," Tribe showed off a new artistic shine and polish that was now permeating through the beatmaking craft, much in the same way that Dr. Dre had demonstrated on *The Chronic*. What's more, on *Midnight Marauders*, Tribe profoundly delivered the new "listening pleasure" component to beats and rhymes that had come to personify the Pioneers/Avant-Garde Period.

Near the end of 1993, the force known as Wu-Tang Clan crashed the hip hop/rap scene with the release of their debut album, *Enter the Wu-Tang (36 Chambers)*. On an album recognized as much (if not more) for the individual Clan rappers who appeared on it as the beats it contained, RZA orchestrated a designed chaos of soul source material, '70s karate-flick nuances, and the darkest, rawest underground sonic composite ever heard up until that time. As was the case with his beat pioneering peers, RZA constructed his own signature drum programming style and sound. At the heart of RZA's drum sound was his time-*correctless* approach to drum programming. RZA pioneered the technique of capturing the natural feel of drum programming and arrangement *without* relying heavily (if at all) on the time correct function. RZA's experimentation in this area allowed him to explore arrangement ideas that took full advantage of the concepts of rupture, rhythm, and groove, creating what has appropriately been described as the "Wu-Tang Sound" or simply the "Wu Sound." Finally, it's also worth mentioning that it was both RZA and DJ Clark Kent who first pioneered the use of sped-up soul samples, not Kanye West as it is often assumed. And it should further be distinguished that RZA's use of sped-up soul samples was more in a complimentary or sound-wall role rather than a featured role, as was the case for Kanye West and many of those who followed.

While the East Coast boom bap sound was steadily re-asserting itself as the king of sounds (by the middle of 1993, most of the nation's attention had been driven to the popularity of the West Coast sound, spearheaded by Dr. Dre and *The Chronic)*, there was a nascent sound and movement going on in Memphis that would result in a new style, sound, and aesthetic. A sound that would eventually send shock waves through hip hop/rap music (and popular music in general) 10 years later. *Comin' Out Hard*, 8Ball & MJG's debut album, is critical because it spawned the style, sound, and aesthetic that we know today as trap music. If Atlanta is to be known as the home of trap music, then Memphis is the cradle of trap music. Songs like "Mr. Big" and "9 Little Millimeta Boys" may best be descrbied as proto-trap, but make no mistake,

this is trap music. In fact, if you listen to "Mr. Big" today, not only does it sound like something released in 2023, it sounds new and authentic.

And since *Comin' Out Hard* was entirely self-produced by 8Ball & MJG, they must be recognized among the other iconic pioneering beatmaking (producers) of the same period. And when we talk of DJ Toomp and Shawty Redd and their popularization of trap music as we know it today, we must mention 8Ball & MJG because they laid down the foundation for the style, sound, aesthetic, and rhythmic feel. Of course, we might want to include DJ Paul and Juicy J (of Three 6 Mafia) into this conversation as well, since the crunk style that they pioneered also went on to help shape the trap music as we know it today.

In 1994, with the release of four more classic hip hop/rap albums, *Illmatic, Ready To Die, Word...Life,* and *The Main Ingredient,* the overall focus in both the beatmaking and greater hip hop/rap communities abruptly shifted back to New York. For *Illmatic* (1994), Nas assembled what has been commonly dubbed the first all-star team of hip hop producers. The beats on *Illmatic* were created by Large Professor, DJ Premier, Pete Rock, Q-Tip (of A Tribe Called Quest), and DJ L.E.S; all of whom were either approaching or at the beginning of their prime. Taken alone, the lyricism on *Illmatic* was a seminal event. But it was the beats of this album that both helped illuminate Nas' lyrics and make *Illmatic* not just one of the most memorable hip hop/rap albums of all time, but one of the most creative albums in the history of twentieth-century popular American music. Had Notorious B.I.G. not released his debut album that same year, *Illmatic* would have no doubt been THE album of 1994 (still, for many it was).

Taking a page from Nas (in more ways than one), several months after the release of *Illmatic,* The Notorious B.I.G. released his debut album, *Ready To Die*. This album also featured an all-star line up of beatmakers (producers). Easy Mo Bee, Chucky Thompson, Poke, DJ Premier, and Lord Finesse made the beats on *Ready To Die*. Although perhaps not as artistically far-reaching as the beatwork that permeated throughout *Illmatic, Ready To Die* did feature a

sound strategy that was well-designed for radio and national appeal; even the lone DJ Premier produced track, "Unbelievable," featured an R Kelly assist via Premier's signature scratch-hook. But in no way was *Ready To Die* something only for the radio. The heart of the album did feature the sharp East Coast drum style that had recently been established, and the sonic composite of *Ready To Die* was unquestionably dark and menacing.

Parallel to *Illmatic* and *Ready to Die* in terms of critical acclaim, O.C.'s *Word...Life* was the third classic hip hop/rap album of 1994 that would go on to have tremendous impact on the in hip hop/rap music tradition. *Word...Life* features beatmaking tropes of the time, like jazz samples and filtered bass lines. But what stands out about this aspect of the album is how the jazz samples were often made to sound soulful on their way to being converted to hip hop/rap music. A great example of this is the song "Let It Slide," produced by Buckwild. Another pioneering feature of Word...Life is that it's one of the earliest (if not the earliest) uses of what would 20 years later become commonly known as drumless loops. The song that featured this technique was "Time's Up," the lead single off the album, produced by Buckwild. Finally, another significant point about *Word...Life* is that bore the production imprint of producer Bucwkild. Having produced 8 of the album's 14 tracks; *Word... Life* was the album that cemented Buckwild among the leaders of the Pioneers/Avant-Garde Period.

Released in May of 1994, the same year as *Illmatic, Ready to Die,* and *Word…Life*, *The Sun Rises In The East*, produced entirely by DJ Premier, featured some of the beatmaking techniques that would come to define and distinguish some of DJ Premier's later work, and serve as a model for other beatmakers (producers) that followed. Four songs are off of *The Sun Rises In The East* are of particular note. First, "Come Clean." This beat stands out because of its primary sample. Legend was that Premier had sampled drops of running water from a sink or bathtub and pitched the sound down. But in reality, it was a sample of obscure percussion sounds from jazz drummer Shelly Mannne. Nonetheless, it marked another example of Premier's knack for taking obscure samples and

flipping them into beats. Premier's pitched-down technique (a flip of the sample of Shelly Manne's "Infinity") clearly was the model for Havoc's (of Mobb Deep's) pitched-down sample technique on songs like "Shooks Ones, PT. 2" and "Survival of the Fittest" (1995), both songs from Mobb Deep's classic album *The Infamous* (1995). Second, "D.Original," which toted a beat built around a piano-roll chop and crisp drum programming. Third, "Da Bichez," a beat that personified crisp drum sounds and boasted one of the snares that would become a staple of DJ Premier's style and sound. Fourth, "Jungle Music," a beat based on a one-note sample that's played. Premier used a similar technique, style, and sound on Nas's "Represent" (remix/*Illmatic* album version).

In November, 1994, Pete Rock & CL Smooth dropped *The Main Ingredient*, a classic especially formidable for some of the foundational drum programming and drum patterns that Pete Rock did. There are many standout songs from *The Main Ingredient*, but I'll highlight three here. First, "In the House," which actually includes *two additional* beats: An "intro" beat, which featured dragging drums (achieved via a unique open-hat sound); and an "outro" beat that featured the pitter-patter hi-hat technique, basically a triplet hi-hat shuffle. Second, "I Got a Love," which featured a filtered bass line and rising/descending horn, vocal sample, and scratch hook— all against Pete Rock's signature drums. Third, "The Main Ingredient," which featured a beat whose bounce, hi-hat sound, and specific sonic collage was clearly a model for early J Dilla. (*In fact, if you're a student of J Dilla, you have to study The Main Ingredient, because Dilla was heavily influenced by this album.)*

Livin' Proof, Group Home's debut classic album, was technically released in 1995, but all of the beats were made between 1992 and 1994.[23] What's extremely important about this album is that it features the song that would influence J Dilla like no other. The first song on *Livin' Proof*, "Intro," which is just an instrumental track — *40 seconds of an open beat* — is essentially proto-"Dilla drums." In other words, the dragging drums that we typically

[23] Amir Said interview with DJ Premier (2006), first published in part in The BeatTips Manual (2015).

associate with J Dilla was pre-defined by DJ Premier. Neither DJ Premier nor J Dilla can be credited with the invention of this specific rhythmic feel (in Chapter 9, I discuss this in greater detail), but make no mistake, in terms of how this rhythmic feel was (is) defined and done hip hop/rap music, Premier's work on the "Intro" is the clear model for what Dilla would do several years later. After "Intro," there are many other standout songs on *Livin' Proof*, but here, I consider two. First, "Livin' Proof," a neck-breaker of a song with drumwork that absolutely smacks! Premier uses small snippets of obscure sounds, once again demonstrating his knack for making deceptively simple beats that are all based on feel. Second, "Sacrifice," which totes another funky beat that demonstrates Premier's mastery of time. This beat features a descending bass line and a drum program that's has what I call "crossing swings", two different rhythmic swings: The pitter-patter 1/8th hi-hats against a straight boom bap kick and snare.

In terms of overall impact on hip hop beatmaking, outside of New York and Los Angeles, Memphis — not Atlanta, not Miami — is the third most influential city in hip hop/rap music history. Where New York is the cradle of boom bap and Los Angeles is the cradle of the West Coast Sound, Memphis is the cradle of trap music. To understand this, listen to early 8Ball & MJG, Project Pat, and Three 6 Mafia; these three form what I call the nucleus of proto-trap. And on their album *Mystic Stylez* (1995), produced by DJ Paul and Juicy J, we hear shades of things that are in vogue in 2023. *Mystic Styles* isn't an album that's packed with hits, but in terms of understanding how crunk and proto-trap mixed together, this album is a crucial study. In this regard, the song that stands out the most is "In Da Game." This song sounds like something made in 2023. And Gangsta Boo's rapping on "In Da Game" sheds light on where Megan Thee Stallion got her style from.

Summary of the Pioneers/Avant-Garde Period

The Pioneers/Avant-Garde Period is best summarized, first and foremost, as the period in which beatmaking became a nationally

recognized art form, subculture, and distinct tradition *within* the broader hip hop/rap art form, culture, and tradition. In fact, it is during this period that the beatmaking tradition essentially explodes and becomes more codified, especially in terms of styles, methods, terminology,[24] and gear used. This is also the period wherein beatmakers (producers) become more recognized figures in their own right. Also, in many ways, the Pioneers/Avant-Garde Period represents the manifestation of the DJ in the beatmaker. During this period, there's a fundamental return to and reaffirmation of the importance of the use of the breaks from records and the rhythm and groove as the guiding principle in beatmaking. Furthermore, this period is also characterized by the extensive development of the techniques first established by Marley Marl. Finally, it should be recognized that the beatwork of the Pioneers/Avant-Garde Period (specifically the twenty-three noteworthy albums singled out in this section) provided the blueprint for modern beatmaking and hip hop/rap production.

Among all the many developments that took place throughout the Pioneers/Avant-Garde Period, there are six critical developments that deserve special attention. First, the art of sampling is explored and expanded far beyond points previously imagined. In this period, sound-stabs and horn phrases become common place, and there's an extensive use of bass filtering. Second, the scratch-hook becomes a major staple of hip hop/rap songs. Third, Dr. Dre introduces the first "orchestral-like" broad-based style and sound to hip hop music production. Fourth, the emphasis on *the mix* as an equally important production process is realized during this period; A Tribe Called Quest, DJ Premier, RZA, and Dr. Dre all stand out in this regard. Fifth, the modern New York sound or East Coast sound reaches its zenith, surpassing the West Coast Sound, which had reached its own plateau earlier during the same period. Finally, it's during the Pioneers/Avant-Garde Period that beatmaking drum frameworks began to emulate those of soul and funk records;

[24] Beatmaking (hip hop/rap production) vocabulary and lexicon, e.g. chopping, layering, flipping, filtering, etc., becomes more formal during this period. Also, it's worth noting that much of the vocabulary used in beatmaking actually comes from the engineering and recording terminology that's associated with the operation of a reel to reel tape machine.

this move further increased hip hop/rap music's use of common song structure.[25] It's important to point out that during the early/mid-'90s, beatmaking and hip hop/rap music began (inevitably) to fragment in a way similar to how jazz fragmented from big band to bebop to cool jazz and later to fusion. This fragmentation laid down the foundations for new styles of hip hop/rap music (styles that were based fundamentally off of the East Coast or West Coast sounds). It's also worth noting that during this period, beats were driven, in large part, by "the listening pleasure" aspect. In other words, much like how Western classical music was a music meant for *listening* and appreciating — not necessarily for *dancing* — beatmaking and hip hop/rap became something that was recognized and appreciated as much for its listening pleasure as it was for its dancing and partying function.

Finally, it must be noted that the Pioneers/Avant-Garde period was so dominant that practically every beatmaking style, sound, aesthetic, and rhythmic feel was *first* introduced during this period. The only distinctly different style, sound, aesthetic, or rhythmic feel that did emerge in the Pioneers/Avant-Garde is UK drill.

Post-Pioneers Period, 1995-2000

Fresh off of the explosive strides that were made in the Pioneers/Avant-Garde Period, the Post-Pioneers Period begins in 1995 with the new, well-codified New York sound poised to reign supreme. Barely two years into the period, Mobb Deep, Raekwon, and Jay-Z all release classic albums; each album strongly reinforcing the New York sound and feel. But by the second half of this period, things would begin to change.

The latter half of the Post-Pioneers Period really represents a period of inevitable transition in hip hop/rap music in general and the beatmaking tradition in specific. The first noticeable

[25] Key or notable beatmakers and other figures who emerge or appear in this period include: Marley Marl, DJ Toomp, DJ Premier, Erick Sermon, Prince Paul, Dr. Dre, Q-Tip (of A Tribe Called Quest), Buckwild, The Beatnuts, No I.D., Havoc, D.R. Period, DJ Quik, and The Hitmen. Key sub-traditons or styles of hip hop/rap to emerge during this period: G-funk and "hardcore" hip hop/rap.

change was the dramatic new interest in beatmaking. In 1997, the beatmaking tradition got its first big surge of new interest, due in no small part to EMPI maker Akai. When Akai introduced its MPC 2000 in 1997, it aggressively marketed the EMPI to the burgeoning hip hop/rap production world and made beatmaking instantly accessible to more people at one time than ever before. Thus, the new interest in beatmaking, coupled with the advent of the Akai MPC 2000 (an EMPI soon to become an important stable in late-'90s hip hop/rap production), the sheer number of beatmakers increased dramatically. By the last quarter of the '90s, the beatmaking tradition was no longer a small, little-known subculture, it was a phenomenon that was gaining steam in the United States and around the world.

The second noticeable change of the second half of the Post-Pioneers Period was that most of the new beatmakers (producers) in the late '90s went straight into beatmaking, bypassing the DJing phase that was once considered a rite of passage in the previous two beatmaking periods. This was a major change because it assured that for the first time in hip hop/rap's history, there would be a generation of beatmakers (producers) that was dominated by members *without* DJ backgrounds.

The third significant change that takes hold during the Post-Pioneers Period is the beginning of the end of the sampling-major era. After what seemed like the criminalization of the art of sampling, brought on in large part by the landmark *Grand Upright v. Warner* copyright infringement case, the use of sampling as a primary compositional method in beatmaking began to decline. Furthermore, because many new beatmakers (producers) at the time either bypassed DJing and/or did not have access to it, the art of sampling slowly began to lose ground as a core beatmaking method. At the same time, there were increasing commercial (pop) influences that were pushing even some of the veteran beatmakers (producers) away from sampling.

This widespread move away from sampling led to the fourth significant change of this period: The increased usage of keyboard or synth-based beats that featured little to no sampling. Remember, at

this time, hip hop/rap music is beginning to become more national than regional. And although it has not yet reached the heights the that it would in the late 2000s, many new beatmakers (producers) at the time were not necessarily deferring to the art of sampling, but rather being drawn to the appeal of two new creative sounds emanating from beatmakers (producers) like Timbaland and The Neptunes. Seemingly overnight, this very noticeable shift away from the art of sampling opened up an entirely new beatmaking lane.

Around this same time, hip hop/rap music was beginning to return to its party roots. With the appearance of the Puffy "shiny suits" and the so-called "Jiggy era", the party trend came at the expense of art. And even though sampling is on the decline and the party scene is on the rise during this period, some beatmakers (producers) like Timbaland, The Neptunes, and Dame Grease still kept the notion of art at the forefront of their production styles and sounds. Also, by the end of the Post-Pioneers Period, a pushback against the tone and mood of the national sound of hip hop/rap music emerged. This pushback was sparked in part by a sampling renaissance led by Just Blaze, J-Dilla, and Kanye West. Lastly, this was the period in which a major style development occured in the form of the Click-and-Clock (drag) rhythmic feel, aka "Dilla drums," whose prototype was actually done *first* by DJ Premier in 1995 on the song "Intro" from the Group Home album *Livin' Proof*), then popularized by J-Dilla. (I discuss the history of the click-and-clock rhythmic feel in greater detail in chapter 9.)

Summary of the Post-Pioneers Period

Beatmakers in the Post-Pioneers Period were the first group to directly benefit from the massive blueprint that was provided by those from the Pioneers-Avant-Garde Period. Thus, it's no surprise that during the Post-Pioneers Period, there were a number of important strides made in hip hop's beatmaking tradition. During this period the synthetic-sounds-based style (once commonly known as "keyboard beats") was born. This was a major developement, as it represented the first style and sound in beatmaking that primarily

used synthetic or so-called "live" sounds (instead of samples) while still attempting to remain true to some of the fundamental tenets of the overall hip hop/rap form and style. Also, during the Post-Pioneers Period, production duos and teams became an important new development, no doubt inspired by The Neptunes. Finally, it is during this period wherein the beatmaking culture begins to become one of the most racially/ethnically integrated sub-cultures in hip hop.[26]

The Southern Bounce Period, 2001-2004

The Southern Bounce Period marks the beginning of the dominance of the Southern rap sound in the United States. During this period, sampling is marginalized more than any other time in the history of beatmaking.[27] Also, although the basic form of rhythm and repetition are left in tact, it's during this period that the hip hop/rap compositional ethic and form undergo their most obviously pop/traditional music-influenced changes yet. During this period, the number of changes or "switch-ups" and "sweeps" in a typical beat increase within arrangements; and bridges, intros, and choruses become more pronounced and elaborate.

During the Southern Bounce period there is also a diminishing interest in customized or signature drum sounds and drum frameworks. Stock or preset drum sounds become commonplace, and drum patterns, based on the use of claps instead of snares, become rather prevalent. Furthermore, extra heavy syncopation, particularly of the stutter hi-hat, kick drum, and snare variety, coupled with the 808 boom and kick, become a standard.

[26] Key or notable beatmakers (producers) and other figures who emerge or appear in this period include: DJ Premier, Timbaland, Just Blaze, Kanye West, Dame Grease, The Neptunes, J-Dilla, Swizz Beatz, Lil' Jon, Mel-Man, Dr. Dre, Focus, Madlib, Mannie Fresh, DJ Shadow, Megahertz, Erick Sermon, Rockwilder, and DJ Toomp. Key EMPIs of the period: Akai MPC 2000XL, Korg Triton, Korg Trinity, Roland Fantom, and Akai MPC 3000.

[27] This period marks the first time in the history of beatmaking that a number of hip hop/rap beatmakers began to make accusations that sampling isn't creative or original. Such sentiment is a direct assault on the fundamental roots of hip hop/rap music and the beatmaking tradition. Moreover, it demonstrates a lack of respect for and understanding of the richness of the beatmaking tradition in its entirety.

Next, while the Southern bounce sound was clearly on its way to becoming the national hip hop/rap sound, another renaissance, one based on the New York sound of the mid-'90s, begins to take shape. Beginning with Jay-Z's album *The Blueprint* (2001), Kanye West and Just Blaze established themselves as both sampling aficionados and commercial realists. Balancing the differences of artistic integrity and commercial viability, the pair went about developing a sample-based sound that was respectfully obscure, but not too arcane or intricate that it pushed away non-fans of sampling. This new sound of theirs is even more conducive to additional live instrumentation. And around the same time that Just Blaze and Kanye West latched on to their new styles and sounds, Swizz Beatz found his own style and sound, after perhaps having seen the advantages of beatmaking's compositional middle ground, and after seeing the successful direction of Just Blaze, Kanye West, and Dame Grease. But unlike Just Blaze and Kanye West, Swizz Beatz's sound was not based upon sampling, but rather synthetic-based (live) sounds. Still, even this push from Just Blaze, Kanye West, and Swizz Beatz couldn't hold back the rising dominance of Southern bounce.

And when it came to the Southern bounce or trap music sound, there were few beatmakers (producers) more responsible than DJ Toomp. A long-established veteran DJ and beatmaker (producer), DJ Toomp was (is) widely considered to be one of the chief pioneers of the trap music sound, a sound that, along with snap music some years later, would come to personify much of what could be described as "the Sound of Atlanta."[28] It should also be noted that this is the period in which Lil Jon came to major prominence through the use of his signature three-chord synth sound.

Interestingly enough, the Southern Bounce Period also marks the beginning of the all software-based production setups. Even though the mighty Akai MPC 4000 is introduced during this period (2002) and the Roland Fantom series is still in its prime, new software applications like Proellerhead's Reason and Image-Lines

[28] While DJ Toomp is widely recognized as one of the chief architects of trap music, DJ Paul and Juicy J (of Three Six Mafia), Shawty Redd, and Lex Luger all deserve credit for helping to define and popularize the style and sound. And before them all, we must recognize 8Ball & MJG.

Fruity Loops (now FL Studio) became the chosen production tools of many new beatmakers (producers).

Summary of the Southern Bounce Period

The Southern Bounce Period signals the start of three important developments in the beatmaking tradition. First, it's during this period that a noticeably synth-heavy sound is established. As sampling is marginalized as a compositional method, many beatmakers (producers) take to using pre-sets of synthetic or live sounds as the basis for their beats. There is debate as to why the synth-heavy sound gained ground during this period. On one hand, the sample clearance issue certainly pushed many veteran beatmakers (producers) away from sampling and dissuaded some newcomers from even considering the method. On the other hand, one could argue that the trends of the time influenced many beatmakers (producers) to move towards the "synth-heavy" sound. Still, it could be argued that as the connection between veteran beatmakers (producers) and new beatmakers (producers) broke down, so went the relationship of veterans passing on important knowledge and guidance to rookies. Subsequently, new beatmakers (producers) made do with the EMPIs and information that was available at the time. I suspect that all three factors contributed to the rise of the "synth-heavy" sound and a lack of hip hop/rap quality standards.

Second, during the Southern Bounce Period there were some noticeable changes in composition methods and arrangement schemes. During this period, the increased use of melody begins to stand out. Furthermore, while rhythm and repetition still remain in tact (for the most part), the concept of linear progression starts to gain importance in the work of some notable beatmakers (producers).[29] Again, it's during this period that the number of

[29] Most of the new interest in melody and progession can be attributed to the commercial success of beatmakers (producers) like Scott Storch (once-regular producer with Dr. Dre and ex-keyboardist for The Roots) and to an increasing number of new beatmakers (producers) who enter into beatmaking with Western classical-trained music backgrounds.

"changes" within an arrangement increase; and in many cases, other arrangement constructions (e.g., bridges and the like) become more pronounced and elaborate.

Finally, the Southern Bounce Period marks the start (perhaps not ironically) of a somewhat populist return to sampling. In the beginning of 2004, at the end of the Souther Bounce period, Kanye West released his debut album, *College Dropout*. Both a critic's choice and a commercial success, *College Dropout*, which features very pronounced and straight forward sample-based beats (perhaps Kanye's deliberate alternative to Southern bounce), sparked a new popular interest in sampling.[30]

Retro-Eclectic Period, 2005-2009

The Retro-Eclectic Period is a period marked by an eclectic mix of both a return to some of the elements of beatmaking's earlier periods and the incorporation of a number of non-hip hop/rap compositional influences. With Madlib leading what would become known as the loop movement, and off the success of Kanye West in 2004, sampling gains a new audience, and a number of key sample-based beatmakers (producers) capitalize off of the seemingly sudden interest in and appreciation for sampling. But whatever strides sampling has been able to gain (or regain) in the Retro-Eclectic Period, it's clear that one other development during the same time has also gained a foothold: non-hip hop/rap compositional influences.

In the past, if and when melody was used in hip hop/rap, it was always used in a subordinate role. However, during the Retro-Eclectic Period, melody took on a more prominent role. Furthermore, in this period, the concept of linear progression was increasingly winning favor among various beatmakers (producers).

[30] Key or notable beatmakers (producers) and other figures who emerge or appear in this period include: DJ Toomp, Lil Jon, Scott Storch, Jazze Pha, Just Blaze, Kanye West, Swizz Beatz, Timbaland, The Neptunes, J-Dilla, Mel-Man, Dr. Dre, Madlib, Mannie Fresh. Key sub-traditons to emerge during this period: trap music. Key EMPIs of the period: Akai MPC 4000, Roland Fantom, Akai MPC 3000, Reason (by Propellerhead), Recycle (by Propellerhead), and Fruity Loops (by Image-Lines).

This trend was particularly curious because such concepts are actually counterintuitive to the hip hop/rap form and the fundamental tenets of its tradition. Still, J Dilla's album *Donuts* (2006) played a crucial role in igniting a resurgence in the art of sampling.

The Retro-Eclectic Period also represents the first beatmaking period in which the majority of new beatmakers (producers) *start off* with software-based production setups. Prior to this period, the majority of new beatmakers (producers) began by using hardware-based production setups. However, this trend began to change during the Southern Bounce Period. After beatmaker (producer) 9th Wonder garnered critical acclaim and commercial success working from a software-based production setup, many new beatmakers (producers) followed his path. (*It's worth noting that at the time of this printing, 9th Wonder now uses a hardware setup as well.*) Moreover, software beatmaking tools became more affordable, which made them much more accessible to the average person interested in beatmaking. Add that to that fact that software EMPIs were (are) more mobile and in some cases, more flexible, than hardware EMPIs, and it was inevitable that software-based setups would increase in popularity.

Finally, one development that has continued on into the Retro-Eclectic Period is the general inclusiveness of hip hop's beatmaking tradition. Of all of the sub-elements and subcultures of hip hop, beatmaking, like graffiti, continues to be the most ethnically and racially inclusive. In fact, more ethnic groups and races are now involved in beatmaking (both professionals and hobbyists) than in any of the four original elements of hip hop combined.

Summary of the Retro-Eclectic Period

What makes the Retro-Eclectic Period unique is the amount of cross-fertilzation of styles from the different previous beatmaking periods. During this period, there was as much of a noticeable return to some of the compositional trends of the Electronic Drum Machine Period as there was to some of the developments made during the Pioneers/Avant-Garde Period. But things weren't

all nostalgic. In many ways, the Retro-Eclectic Period further confirms the Southern Bounce sound (and its peripheral styles and sounds) as the national beatmaking sound. And while there's was a return to extreme minimalism — minimalist loops with no drums, à la Madlib and later Alchemist, becomes a popular style during this period — there was also more development in the area of arrangement, particularly when it came to the concept of linear progression. Moreover, the Retro-Eclectic period marked a heightened use of non-hip hop/rap compositional influences. In this period, there was a widespread attempt by many beatmakers (producers) to conform the hip hop/rap compositional approach — style and form — to the styles and compositional approaches of other forms of popular music, rather than reaffirm hip hop/rap's own tradition.

Finally, as these high levels of cross-fertilization persist during a time where audio and recording technology is all but making the beats for some beatmakers (producers), the question remains: What role will beatmakers allow technology to play in their fundamental compositional processes?[31]

Trap-Based/Performance-Experimental Period, Trap & Drill Period, 2009-2023

In many ways, the Trap Based/Performance-Experimental Period is a broad continuation of the Southern Bounce Period. In this period, trap-based beats become the dominant sound. And within this trap-based continuum, two approaches emerge: The minimalist approach and the broad orchestral approach. The minimalist approach features sparsely made beats that mostly rely on 808 sounds and bare-bones drum frameworks. The broad orchestral approach features the familiar trap sound — i.e. 808

[31] Key beatmakers who stood out and/or emerged during this period include: Madlib, J Dilla, Alchemist, Flying Lotus, Ras G, Dibia$e, Danjahandz, Don Cannon, Jake One, Black Milk, Keak Da Sneak, Droop-E, Young Chop, Vinylz. Key sub-traditons to emerge during this period: hyphy. Key EMPIs of the period: Reason (by Propellerhead), Recycle (by Propellerhead), FL Studio (by Image-Lines, Akai MPC 1000, Akai MPC 4000, Akai MPC 3000, Akai MPC 2000XL.

drums and heavily syncopated percussion, synth tubas and other synth brass — along with some sampled elements and additional instrumentation, usually elements found in urban dance or mainstream pop trends that run parallel to this period.

Besides the utter dominance of the trap-based style and sound, performance-experimentalism also marks this period. A growing number of beatmakers (producers), notably Flying Lotus, Ras G, and Dibia$e, take to live performance, demonstrating their beatmaking skills in front of audiences in real time. At the same time, in this period there's a growing number of beat battles and producer showcases, wherein a new focus is given to beat instrumentals. Within this climate, an increasing number of beatmakers (producers) create beats that are *intended* for battles and showcases rather than for use in traditional songs. The noticeable effect of this is that many beats are now made purely for instrumental purposes. In other words, some beatmakers (producers) in this period make beats that have no room for vocals.

While the concept of linear progression or material growth continued to be a feature of this period, it should be noted that this concept takes on a deeper hip hop connection. In this regard, traditional sampling approaches remain, but increasingly beatmakers (producers) are using their sampling skills to repurpose stock sounds in software and hardware EMPIs, rather than relying on pre-recorded songs as primary source material. This has created a new kind of digging in the crates experience for many beatmakers (producers), where one is mining the vast sound libraries of EMPIs and sound packs, which include a number of ever-growing sounds and vintage plug-ins. Right now, Marco Polo stands out in this regard. But I expect more beatmakers (producers) to take up the same charge in future beatmaking periods, especially given the sampling capabilities and sound libraries found in the likes of Native Instrument's Kontakt and Komplete series.

Software EMPIs like Ableton Live, Reason, and FL Studio, and Kontakt and Komplete maintain a high profile in the Trap-Based/Performance-Experimental Period, but hardware EMPIs remain as stalwarts and hardware/software hybrid EMPIs like the Maschine

by Native Instruments and the Akai MPC Renaissance emerge as popular go-to production units for many beatmakers (producers) in this period.

Finally, while the trap-based style and sound dominates this period and performance-experimentalism carves out its own small niche, what appears on the horizon is yet another sampling revival. With the emergence and popularity of new rappers like Joey Bada$$, who conjures up memories of '90s style sample-based music, and Mac Miller's early success with '90s style sample-based beats, a number of new beatmakers (producers) have taken to the art of sampling and, for the most part, have rejected the trap-based style and sound. Still, there are many beatmakers (producers) who have embraced the trap style and sound and have incorporated sampling within their production process.

New style developments that mark this periold include: Performance-Experimental and "drumless loops."

"Drumless Loops"

"Drumless loops" marks a minimalist, deceptively simplistic style, sound, and aesthetic of beatmaking that also emerges in this period. Typically with this style, sound, and aesthetic — the seeds for which *appear* to have begun (but did not begin) with rapper/producer Roc Marciano (2010) — the beats are *drumless* loops. Drumless loops are personfied by an absence or minimal use of drums or percussion. And while there is sometimes focus on using samples of melody and harmony, this should not be taken to mean that rhythm is still not the guiding light of drumless loops. Understand something, omitting percussion does not omit rhythm! The loop (of the sample) makes the rhythm. Furthermore, just as with other beats, the groove in drumless-loops based beats, which often created by the looping of the sammple, is always the anchoring presence of the beat. So the key thing to remember is that, although drums more often than not play the most dominant role in the groove, even with the drums removed, you still have the groove and, of course, the rhythm.

Since there are no drums, or at least presumably not in the traditional hip hop/rap music sense, what's happening here is a style and aesthetic that some might describe as "anti-beats." Next, drumless loops represents the combination of "anti-beats" — i.e. beats with no *added* pulse to be heard in the traditional music sense — and rhymes delivered in either a laidback, slick-talk, or intense fashion. And that's largely the appeal of this style, sound, and aesthetic. It's liked for what it *is*, not for what it isn't.

Final note. It's not entirely inaccurate to say that Roc Mariciano sparked the drumless-loops trend in 2010. Still, drumless loops, as an *intentional* style, sound, and aesthetic in hip hop beatmaking, really started with RZA in the mid-'90s. Here, several RZA produced songs stand out. Ghostface Killah – "260" (feat. Raekwon) (1996). Ghostface Killah – "Daytona 500" (feat. Force MDs, Raekwon, and Cappadonna) (1996). Cappadonna – "97 Mentality" (1997) (On this song there's an added snare, but for all intents and purposes, this a drumless loop). Since RZA was the first to seize on drumless loops as definite style, sound, and aesthetic, this would make RZA the father of the drumless loops style and sound. And it would make Roc Marciano the leader of the new awakening of the drumless loops style and sound. And some of the other beatmakers (producers) who helped further popularize and define drumless loops include: Alchemist, Daringer, Preservation, Nicholas Craven, and SadhuGold. Still, it should also be noted that even while Roc Marciano took the drumless loops style, sound, and aesthetic and made it a key part of his overall aesthetic, other drumless loops undoubtedly appeared before Marciano zeroed in on them. For instance, listen to Papoose – "Across the Track" (feat. Nas) (2006), produced by Swizz Beatz.

Distinguishing the "Drumless Hip Hop" Aesthetic

In terms of the "drumless hip hop" aesthetic that was best popularized, but not *first* done, by Roc Marciano in 2010, there's some confusion about and misrepresentation of what "drumless"

actually means. The garden-variety late-'80s style of beat typically featured a loop of the sample of the main groove of a familiar soul/funk song — *with the drums still in the loop*. Sometimes these beats included added drums or percussion, sometimes just hi-hats added over the top. But for all intents and purposes, these beats were never "drumless." In other words, in stark contrast to the specific "drumless hip hop" aesthetic that grew in popularity after 2010, drums played a prominent role in the garden-variety late-'80s style of beat. In the "drumless hip hop" aesthetic, as it's currently practiced, drums play no role or a very minimal role; and that is the *intentional* aesthetic.

It must be further noted that "drumless" doesn't simply mean "no drums" without any qualification. It's not merely an *absence* of drums that's going on with the "drumless hip hop" aesthetic heard in the music of Roc Marciano, KA, Alchemist, and the like. It's also the very specific *kinds* of samples that are being used.

There's an *intentional* aesthetic and stylistic choice between using a sample (a loop) that does *not* have drums in it or a sample (a loop) wherein there are *minimal* drums in it. Likewise, *minimal* drums added that are obviously *not* prominent in the beat also fall under the "drumless hip hop aesthetic." On the other hand, using a sample (a loop) in which the drums are *prominent* — and therefore negates the need for drums — is something different. *Not* adding drums to a beat where the primary sample (loop) already has drums in it *that are prominent* is less about overall aesthetic and more about function. Point being, the drums in the sample already serve the basic function of the drums in a beat. And the thinking was (is) in this scenario, since the drums are already there and sound dope, there's no need to mess the beat up or overproduce. Lastly, looping a melody that has no drums — a common aspect of today's "drumless hip hop" aesthetic — and rapping over that is not the same thing as a looping a rhythmic groove wherein the drums are front and center.

The Griselda Effect

Classic boom bap, minimalism, drumless loops, mood music—From 2016 to 2023, no hip hop collective has better defined this style and sound than Griselda. Rappers Westside Gunn, Conway the Machine, Mach-Hommy (the three co-founders of Griselda Records), Benny the Butcher, Stove God Cooks, Boldy James, Rome Streetz, Jay Worthy, YN Billy, and Estee Nack have helped boost this genre of beats like no one else. More specifically, the Griselda in-house production team, including Conductor Williams, Daringer, Camouflage Monk, and Denny LaFlarev, stand at the forefront of this beatmaking style and sound. The Griselda effect is no doubt the most important development of this period in terms of pushing this style, sound, and aesthetic forward and turning a new generation of beatmakers (producers) on to it.

Summary of the Trap-Based/Performance-Experimental Period[32]

This period does not stand out for its uniqueness. On the contrary, with so much trap parity and little distinction from one trap-based hit song to the next, the Trap Based/Performance-Experimental Period stands out because of how much of this dominant sound echoes itself. Compare this to the Pioneers/Avant-Garde Period, a period that featured a collective sampling aesthetic as a whole, but nonetheless a period that held for a broader space of interpretation of the aesthetic itself. I believe that one important reason for this is due to the nature of a beatmaker working with

[32] Key beatmakers who stood out and/or emerged during this period include: Shawty Redd, Lex Luger, Bangladesh, Harry Fraud, S1 (Symbolic One), Flying Lotus, Boi-1da, Noah "40" Shebib, Mike Will Made It, Jahlil Beats, J.U.S.T.I.C.E. League, DJ Mustard, T-Minus, Metro Boomin, Cardi Got Beats, DJ Dahi, Sounwave, Ronny J, Dibiase, Wheezy, Kenny Beats, Murda Beatz, Tay Keith, Pi'erre Bourne, Zaytoven, Cardo, London on Da Track, Nav, Daringer, Southside, CashmoneyAP, Sonny Digital. Sub-traditions to emerge during this period: slump, boom trap. Key EMPIs of the period: Maschine (by Native Instruments), Reason (by Propellerhead), Recycle (by Propellerhead), Kontakt and Komplete (by Native Instruments) FL Studio (by Image-Lines, Akai MPC 2500, Akai MPC 1000, Akai MPC 4000, Akai MPC 3000, Akai MPC 2000XL, Akai MPC Renaissance, Roland SP 303, Roland SP 404.

different pre-recorded songs as source material. On the other hand, the core component (the engine really) of the trap-based sound is the 808 aesthetic, which, because of its limited number of sounds and familiar programming, naturally lends itself to duplication, including everything from arrangement scopes, drum frameworks, percussion structures, and general style and sound. Thus, trap-based music benefits from and relies on familiarity. Everybody knows the style, sound, and aesthetic because it's unmistakable. But the very things that make trap music popular and easy to emulate right are also the same things that make it susceptible to duplication and a surplus of beats that nearly sound the same.

As for the performance-experimental component of this period, some conceptual strides were made. And with regards to the live performance of beats, this is a great development, but as a stand-alone thing, it's yet to be seen if this will be a sustainable business model for beatmakers (producers) in future beatmaking periods. Finally, as with the Retro-Eclectic Period before it, within the Trap-Based/Performance-Experimental Period there continues to be high levels of cross-fertilization. Yet, we find also in this period that there has been renewed focus on minimalism in various pockets of the beatmaking tradition of hip hop/rap music.

Conclusion of the Eight Periods of Hip Hop's Beatmaking Tradition: Three Modern Production Sounds

There are three basic production sounds that have emanated from the eight periods of hip hop's beatmaking tradition: (1) The East Coast rap sound, also known as the New York rap sound; (2) The West Coast rap sound; and (3) The Southern rap sound, also known as the Southern bounce sound.

The traditional East Coast rap sound or New York rap sound is best characterized by digging in the crates and chopped samples. That is to say, the East Coast/New York rap sound features the unique truncation of samples from old soul, funk, and jazz songs, as wells obscure sounds from other genres, and heavy (often dark)

drum sounds and heavy-hitting drum patterns. The East Coast/New York rap sound is also characterized by thick filtered bass lines and straight-forward 2- to 4-bar loops.

The West Coast rap sound is an amalgamation of late '70s West Coast funk and some elements of the East Coast or New York rap sound. The West Coast rap sound is perhaps best characterized by a collage of heavy moog-like bass lines, live instrumentation, samples, and *replays* of samples. Also, in contrast to the heavy chop-and-loop sound of New York, the West Coast Sound is much more orchestral and laid back. It's also more open-ended than the New York Sound, as it also features melody in a more prominent role than the East Coast/New York rap sound.

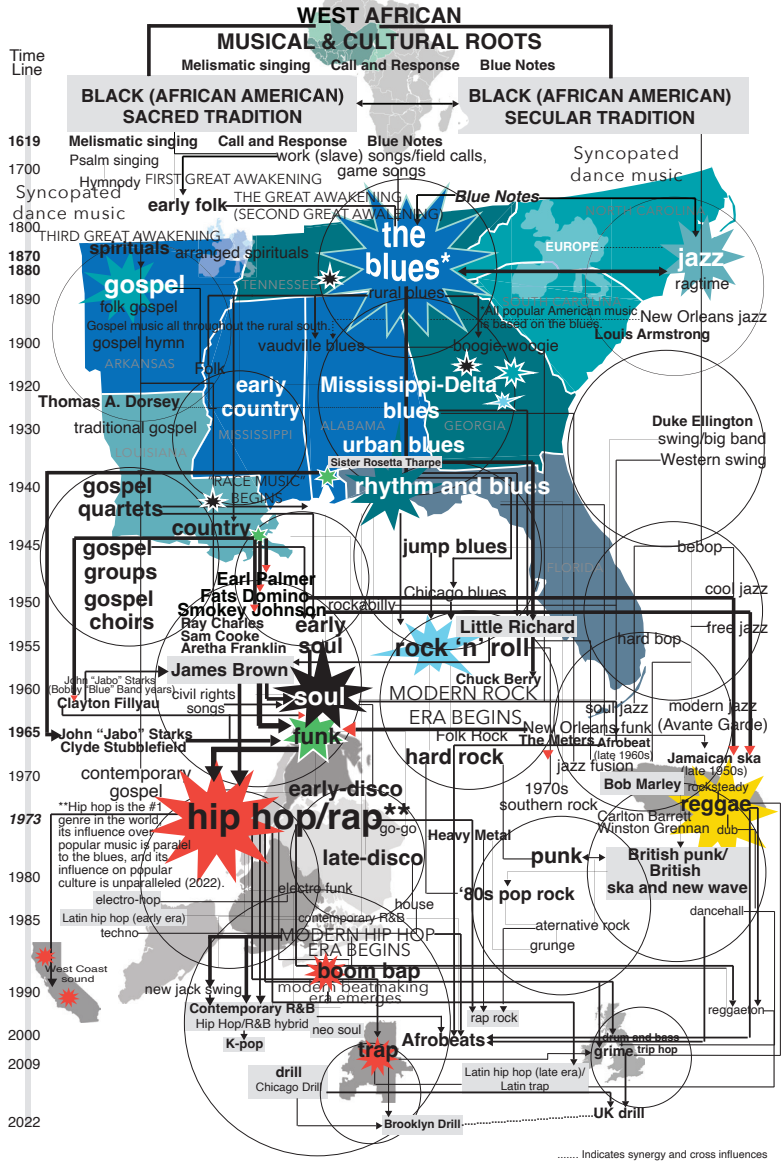
Finally, the Southern rap sound — which is based on Memphis proto-trap and the Miami bass/Atlanta sound hybrid with early '80s New York undertones — is characterized by stutter drums and heavy bass lines. The Southern rap sound carries two primary styles: One style that is sparse with simple keyboard melodies, and another style that is conceptually, structurally, and texturally dense. The latter style includes more extensive melody motifs and chromatic harmony accompaniment. Both of these styles, however, still often feature 808 drum sounds and heavily syncopated snare, hi-hat, and kick patterns.

Given all of the collective developments that have occured throughout the eight periods of hip hop's beatmaking tradition, the art of sampling has continued to grow. Because of hip hop/rap's mainstream rise, in some periods it would appear that sampling all but went away. But the truth is, sampling has always flourished, to some extent, in the mainstream and the underground, despite the widespread mainstream shift away from sampling. And now, with a renewed interest in the art of sampling among new beatmakers (producers) and the beginning of the changing of the guard of beatmaking leaders, the art of sampling is poised to thrive at the forefront of hip hop/rap music once again.

Part 2
Composition & Instruction
Music Tradition, Culture, and Theory, and the Aesthetics, Compositional Analysis, Performance, and Philosophy of the Art of Sampling

"James Brown's got more musical genius than Bach, Beethoven, and Mozart put together."
—Stokely Carmichael

MAP OF THE HISTORY OF BLACK (AFRICAN AMERICAN) MUSIC TRADITION and TWENTIETH-CENTURY AMERICAN POPULAR MUSIC



Map of the History of the Black (African American) Music Tradition and Twentieth-Century American Popular Music, Part 1 Copyright © 2024 Amir Said

Note About the Timeline Map of the Development of the Black (African American) Music Tradition and Twentieth-Century American Popular Music

The names of early Black music genres are now well known public information and ubiquitous in both music scholarship and music criticism. Still, I'm compelled to point out that I first learned about early Black music genres, their appearance on the historical timeline, and their interrelated connections through the work of Eileen Southern. Her book *The Music of Black Americans: A History* (1971) is the seminal work of Black music studies in America. While Southern did not include a *visual* timeline or map, at least not in the first edition of *The Music of Black Americans,* she did however thoroughly chronicle and describe Black American music genres (traditions) along with their styles and unique characteristics.

The first grouped *visual* timeline that included some if not all of the Black traditions first chronicled by Eileen Southern was created by Portia K. Maultaby in 1980, with subsequent revisions in 1992, 1995, 2012, 2013. After Maultaby's timeline, Jerry Lucky published his timeline (modifications made by Mark Fonda, 1998). Although Lucky's timeline featured the foundational Black music genres such as the blues, jazz, and rhythm and blues, it centered the history of rock 'n' roll. Finally, Rob Fields's timeline of Black music genres was published in 2009.

In formulating my timeline map of the history of Black (African American) music tradition and twentieth-century popular music, I examined multiple music history timelines, including all three of the aforementioned timelines that I cited above. I cross-referenced these timelines with the data and findings on the history of Black American music first published by Eileen Southern in 1971, and I noted parallels to or differences with Portia K. Maultaby's timeline, which, to my knowledge, was the first *visually*-grouped timeline of the history of Black American music to be published (countless authors have described or given accounts of the development

of Black American music over time without presenting an accompanying timeline graphic).

The timeline map that I present here, which is a companion timeline map meant to be studied together with the other music maps that I include in this book, relies on the historical facts and data first presented and published by Eileen Southern as well as my own discoveries and analysis. Motivated and guided by the Eileen Southern, in 1992, I began throwing myself into an intense study of Black (African American) and twentieth century popular music. My research included 1000s of hours of close listening to music that spanned a century; 1000s of hours of watching taped televised music performances and variety shoes; months spent in branches of the New York Public Library poring through newspaper clippings of music events in Black centers throughout America, like New Orleans, Memphis, Chicago, New York, Detroit, Philadelphia, and Southern Los Angeles (show review articles like those covering performances at the Apollo in the 1950s and 1960s were especially helpful); and multiple trips to North Carolina, Georgia, and Virginia. All of this research (and too much more to be described here) allowed me to better see and understand the flowchart connections, synergies, influences, connections, cross fertilization, and fundamental relationships of Black (African American) music and twentieth century popular music.

Further, unlike other music timelines that I have seen, my timeline map includes city, regional, state or country distinctions to show *where* music traditions (and their sub-traditions) emerged. Beyond simply showing the pathways by which music traditions arrived from one place to another, I believe that the geographic dimension of Black music history timelines tell an interesting story of their own, particularly with regards to migration, immigration, and racial demographics. I have also added rings, Venn diagrams if you will, around certain traditions to denote aesthetic or style echoes and spheres of influence.

Finally, my timeline map highlights hip hop/rap music, not only to show the continuum of Black (African American) music, but to demonstrate how hip hop/rap music has become a powerful

seed music form, just as the blues was (is). In this way, my timeline map — which illustrates all of the music traditions that hip hop/rap music samples (literally and figuratively) — shows why hip hop/rap music is the second most important seed music tradition/genre in American history and the world's most popular music genre today.

Note About the Purpose of This Part

The purpose of this part of *The Art of Sampling* is twofold. First, to provide a robust understanding of the art of sampling from a compositional perspective. Second, to offer serious *how-to* music-making instruction for those who want to learn how to make sample-based hip hop/rap beats or for those who want to improve the skills that they already have.

As with all of the parts and chapters of *The Art of Sampling*, I encourage you to read everything. But the nature of this Part is such that the instruction chapters and sections are intended, first and foremost, for sample-based beatmakers (producers) and other musicians. That said, Chapters 3 and 4 are must reads for everybody, for several reasons. First, because they validate the complexity of beatmaking as a compositional process. Second, because they shed light on some of the criticism against sampling as a legitimate music-making process. Third, because they offer a historical overview of the development of the sampling tradition of hip hop/rap music.

Chapters 4 through 7 are hardcore music instruction. These chapters offer extensive nuance and detail on the methods, processes, and techniques of beatmaking and sampling more specifically. Further, these chapters explain the nuts and bolts of composition, programming, and arrangement in the beatmaking (sampling) tradition of hip hop/rap music. In these chapters, I highlight the fundamental processes, methods, and techniques employed by *all* beatmakers (producers) in hip hop/rap's music tradition. (For example, things like bass filtering, writing out drum pattern and program ideas, or using shuffle rhythms or variations of dragging drum-techniques is neither rare or unique.) With knowledge of the fundamental processes of beatmaking, readers unfamiliar to hip hop/rap's sampling tradition can better understand *if* and *when* a particular beatmaker (producer) made an innovation — as well as accurately determine how monumental that innovation may have been.

If you're not interested in learning how to make sample-based beats or how to improve your beatmaking skills, you can skip chapters 4 through 7 and move on to the next part of the Art of Sampling.

Finally, as beatmaking is the chief compositional process of hip hop/rap music, it's also the chief compositional process of the sampling tradition of hip hop/rap music; the latter can't be discussed or understood without knowledge of the prior. In the previous chapter, I detailed the history of hip hop beatmaking and chronicled the rise of beatmaking as well as the eight distinct beatmaking periods that emerged between 1979 and 2023. In this chapter,[1] I cover the specifics of composition, programming, and arrangement in the beatmaking tradition of hip hop/rap music and examine what I call hip hop music theory. (The succeeding chapters of Part 2 focus on the mechanics of the art sampling, and they offer extensive instruction on *how* to make sample-based beats.)

Before discussing hip hop theory, and before detailing the mechanics of the art of sampling, and by proxy the art of beatmaking, there's a critical note that must be made about music tradition, culture, composition, and theory in Western music. To do this, I will borrow liberally from my own book *The BeatTips Manual*.[2]

[1] This chapter borrows liberally from my book *The BeatTips Manual* (2015). In the Composition, Music Theory, and Culture of that book, I make a comparative analysis between hip hop/rap music and Western classical music.

[2] First published in 2002, *The BeatTips Manual: The Art of Beatmaking, The Hip Hop/Rap Music Tradition, and The Ccommon Composer* (New York, Superchamp Books) has been published with regular updates since 2002, the last update being the 6th edition, which was published in 2015.

Disclaimer: Facing a Trifecta of Bias

The lines between high and low art, highbrow and lowbrow culture, have always been presumably clear. And for mainstream media and academia, hip hop/rap music, born from the street culture that introduced it to the world, has long held the stigma of low art. As such, hip hop/rap music has always been *compared to* presumably "higher" music traditions and always considered the "other", i.e. the tolerated non-music that's nothing more than *noise*.

Underscoring all of this is the fact that hip hop/rap music comes from and is still grounded in Black art. So there's a trifecta of bias against hip hop/rap music that we face even before we begin to examine hip hop/rap music's composition aesthetics. (In Part 3, I examine how this trifecta of bias influences the criticism surrounding hip hop/rap music and the art of sampling.) What I hope to have demonstrated in Part 1 — and what I hope to continue to further demonstrate in the chapters throughout Part 2 — is how extensive hip hop/rap music's compositional process is and why that alone commands a serious level of respect.

Chapter 3

Grandmaster Flash Battled Mozart at the Fever, and Mozart Got Burned[3]

The Hip Hop/Rap Music and Beatmaking Traditions, Its Theory, and How it Does and Doesn't Jive with the Western Classical Music Tradition and Its Theory

> "Producers who never studied music theory... a lot of them are blowing us out of the water. I was classically trained on two instruments & a dude clicking in the FL piano roll is making musically amazing beats without being able to name a scale or chord. Formality is overrated."
> –DJ Pain 1

> In the field of music, perhaps more than in any other field, the black man's preeminence was acknowledged by the nation…His contributions not only made a decisive impact on the existing style of music in the western tradition, but also gave birth to a new style of music.
> –Eileen Southern

[3] Battles are an important part of hip hop culture. In hip hop/rap music specifically, head-to-head battles have taken place between rappers, DJs, and crews traditionally at park jams and clubs. The title of this chapter, which pays homage to DJ Grandmaster Flash and the once-popular Bronx nightclub the Disco Fever (a prominent late hip hop tent pole from the late '70s to the mid-'90s), is a metaphor. I use it to show that classical music could never beat hip hop/rap music on *hip hop's* terms, live in front of a *hip ho*p audience. Point being that hip hop/rap music represents its own music culture and tradition, and it need not be compared to Western classical music, or any other music form for that matter, to be legitimized. Nevertheless, a comparison can tell us much about the compositional process of hip hop/rap music.

This is why we sample. We're borrowing from music that was already here, and just like Rakim said, we converted into hip hop form. Hip hop can take anything and just make an ill beat. It's just about who's constructing it and understanding the science of it and understanding how to listen to it.
–DJ Premier

Much African music features rhythmic patterns that make it sound almost childishly simple, but since nobody is called upon to write them down or read them the music is labeled "primitive."
–Christopher Small

"Soul with the role, I'm not European"
—Charlie Brown, Leaders of the New School

When I knew him, Jelly still had a whorehouse complex—sang dirty songs and thought they were great. I remember inviting him to dinner one evening after a rehearsal or recording date and having him decline because he had two suckers waiting for him down the street. He was a shark all right! Often he and I used to rehearse together at the Melrose office. Morton was a tremendous worker. If he was working on something, he would sit there for four or five hours at a stretch.
–Volly DeFault

A work of art is not and cannot ever be free from the conditioning imposed by history, class and market conditions….We shall judge him [the artist] by what he makes of the conditions of his time and place in the continuum of history, but we shall not ignore those conditions.
–Gerald Moore

When ragtime pianists from all over the country gathered for the Ragtime Championship of the World Competition held at Tammany Hall in New York City on January 23, 1900, it was Ernest Hogan's song that was recommended for the final test. The three pianists who had reached the semifinals were asked to demonstrate their skill in ragging a song by playing "All Coons Look Alike to Me" for two minutes.
–Eileen Southern

For many musicians, music scholars, and music critics in America, Western classical music represents a superior intellectual frontier, while hip hop/rap music represents an inferior horizon. In fact, there are those who don't even consider hip hop/rap to be music at all. And then there are those who regard hip hop/rap as just a lowly form of music that can only be "elevated" through an extended use of Western music theory and/or the processes and practices associated with rock 'n' roll and the like.

Traditional musicians, music scholars, and music critics, who claim (or imply) that hip hop/rap music represents a primitive sphere of music, are completely off base. Whenever this claim is leveled against hip hop/rap music, it's inevitably leveled from the perspective of music traditions outside of and not closely related to the hip hop/rap music tradition. Therefore, the "primitive" accusation against hip hop/rap is ill-founded and misguided. That's why in this chapter, I'm going to flip the script! I'm not going to compare key elements of the hip hop/rap music tradition *to* the Western classical music tradition (and Western music theory) on the Western classical tradition's terms, nor am I going to look at things through the lens of Western classical music's cultural and philosophical perspective. Instead, I'm going to compare key elements of the Western classical music tradition *to* the hip hop/rap music tradition, on hip hop/rap's and beatmaking's terms and from their perspectives.

But before I begin this comparative analysis of some of the core components of the hip hop/rap music, beatmaking, and classical music traditions, I'd like to point out that the aim of this chapter is not to mock, attack, or otherwise attempt to undermine the Western classical music tradition but rather to make four critical points. First, I want to further extend upon the detailed discussion of the beatmaking tradition and how it manifests itself within the broader hip hop/rap music tradition. Here, the ultimate aim is to provide additional evidence that the hip hop/rap and beatmaking traditions are independent, often *interdependent*, distinct, and both creatively and commercially legitimate music traditions that are worthy of such description. Second, I want to point out how ideological

presuppositions about music, in specific, certain ideologies of composition, performance, and authenticity, have driven the dominant culture's view of what constitutes music and legitimate musical processes. Third, I want to provide further evidence that the beatmaker represents what I call "the common composer". Fourth, I want to show why it's impossible to objectively designate one music culture and tradition as superior to another.

In this chapter, I will also show how the classical music tradition and culture — the pinnacle of musical expression in Western culture — does not subscribe to the fundamental aesthetics, principles, nuances, predilections, presuppositions, predispositions, and priorities of the hip hop/rap music and beatmaking traditions. In doing so, I will show how the presumption that the Western classical tradition is superior to the hip hop/rap and beatmaking traditions is a reflection of the peculiar bias of the dominant culture in Western society, and how that in reality, it's not a fair and objective examination of simply another independent and legitimate music tradition and culture.

Although I concede that one might be able to objectively ascertain whether one music tradition and culture contains a more complex series of processes than another, the *judgment*, support, and criticism of one music tradition and culture over another is entirely subjective and based on one's familiarity and knowledge of the music traditions and cultures that are being compared. A music tradition is best evaluated (and judged if necessary) by its chief practitioners and constituents, i.e. the community from which it was born, exists in, and functions for. Moreover, **the value of a music tradition and culture is determined by the functions it serves for its constituents.** If the given functions are met, then the music tradition is thereby considered to be *successful* in the eyes of the constituents of the encompassing culture. Sure, music traditions and cultures may vary in their compositional processes, principles, properties, practices, and priorities. But no one music tradition and culture can arbitrarily hold more meaning or a level of supremacy over another.

Furthermore, whenever we consider established standards from two separate music traditions, we must remember that our tendency to uphold one standard as superior to the other is always rooted within the philosophical insight — worldview slant — of the dominant culture in which the larger, more extensive standard was formally and firmly codified. In the case of the hip hop/rap music tradition and its own "theory" and the classical tradition and Western (European) music theory, there is no question whether or not music theory is the more extensive, more *formally* and firmly codified standard. But here, it's also important to point out that in music, as with all arts and philosophy, whatever the dominant culture deems to be the standard is usually held up as the bar of excellence against which all new standards are measured. Hence, it will ultimately follow that the established standard will then have an air of superiority about it.

Also, we must be mindful that the upholding of Western music theory as the *standard* set of musical principles of "intelligent", "great" music serves as insurance against any threat to that very assertion. Therefore, to the gatekeepers of music theory (in Western culture, we don't even qualify it as *Western* music theory, we just say "music theory" like it's the only music theory in the world), the hip hop/rap music and beatmaking traditions, which do not necessarily rely on music theory to the same extent of classical music, can't simply be *different* from the Western classical music tradition, they must be considered inferior. As such, it's more likely that the values and fundamental aesthetic choices of the established standard, in this case Western classical music and its use of music theory, are predictably preferred — without any need for legitimization, by members of the established *standard* culture. And equally predictable, these same members see the values and fundamental aesthetic choices of the hip hop/rap and beatmaking traditions as irrelevant at best, non-existent at worse. Thus, in any head to head comparison of two or more music traditions and cultures, one should expect the host culture and tradition to prevail on its own terms, i.e. its own sensibilities, principles, ideologies, and aesthetic priorities. So following this line of thinking, a head-

to-head competition between the Western classical tradition, on its own terms, and the hip hop/rap and beatmaking traditions, the Western classical tradition wins hands down. However, and this is the critical point here, in a head-to-head battle (competition, comparison), on hip hop/rap's and beatmaking's own terms, the classical tradition loses.

Next, I should point out that this chapter is by no means intended to be a definitive study of or an extensive survey on the full scope of Western classical music and culture and Western music theory, hereinafter referred to simply as music theory.[4] A thorough study of the Western classical music tradition and music theory would be exhaustive and would not serve the purposes of this chapter. Music theory and the Western classical music tradition are too large of subjects to be thoroughly covered here. But I'm confident that some of the key components of music theory and the classical music tradition that I present in this chapter will permit readers to better understand the contrast between two separate musical traditions and music cultures — one music tradition and music culture that spans 400 years, and the other that spans roughly 50 years. But it's important to note that while both traditions are known today, it's hip hop/rap music that dominates popular music.[5]

Finally, in this chapter I discuss what are commonly recognized to be the most basic (fundamental) elements of music theory. It should also be noted that the information in this chapter serves multiple purposes, but with regards to music theory there are two primary aims. First, to introduce music theory to those beatmakers (producers) who have yet to grasp the basic understanding of it.

[4] In the interest of accuracy, it should be noted that it is often forgotten or ignored that there are multiple "music theories" around the world. However, Western music theory is most often referred to simply as "music theory", as if there are no other prominent and/or relevant music theories around the world. There are other music theories; for example, there are Asian music theories, take for instance India's music theory, which by the way is widely considered to be more complex than Western music theory. I concede that I'm no more qualified to discuss Western classical music than a Western classical music composer is to discuss hip hop/rap music and/or beatmaking. But since it's commonplace for many outside of the hip hop/rap tradition to offer their analysis (critique) of hip hop/rap, I'm more than comfortable with exploring the contrast between the hip hop/rap and beatmaking traditions and the Western classical tradition.

[5] It must be distinguished that hip hop/rap is more representative of popular culture, whereas Western classical music is more associated with highbrow or elite culture.

Second, to demonstrate to both those new to and very familiar with music theory how hip hop/rap music distinguishes itself from other music traditions that are governed by and/or rely on music theory.

Why Compare The Western Classical Music Tradition to the Hip Hop/Rap Music Tradition?

Why unpack the differences between the hip hop/rap music tradition and the Western classical music tradition? First, there's value in nuance, full stop. We can gain a better understanding of music in general and the processes of creativity by examining two music traditions that are mostly at odds with one another. Second, we can develop better, more accurate criticism for hip hop/rap music's compositional processes.

Next, every music culture has its own so-called "classical" tradition, that is, a tradition that represents the highest form of musical expression within a given culture. Such a musical expression is predicated upon four fundamental things: (1) A set of well-understood aesthetics, principles, and priorities; (2) A set of distinct and well-defined compositional methods (and approaches); (3) A core philosophical approach to music-making; and (4) A well-recognized canon of works. In Europe and the United States, Western classical music is widely considered to be the highest form of musical expression. And although rock 'n' roll, may be the most "well-known" popular musical expression in the Westt, in this study there's no point in comparing it to hip hop/rap music for two reasons. First, rock 'n' roll was also treated like a bastard stepchild of American popular music. Second, rock 'n' roll, like hip hop/rap, comes from the Black (African American) music tradition, and therefore, it too does not necessarily subscribe to the compositional ethic of the Western classical tradition.[6]

[6] Rock 'n' roll was once hated by the dominant culture; it wasn't even considered music at all. It was often described by established musicians and the media as "noise". And major record companies of the time were reluctant to sign rock 'n' roll acts. Within the stark contrast, and in some cases similarities, between the hip hop/rap music tradition and the Western classical music tradition, we see the fundamental parallels that hip hop/rap music has with two of America's biggest music revolutions: the blues and rock 'n' roll.

Finally, it should be noted that hip hop/rap music is American street culture's "classical" music. So it's from this vantage point that we must approach hip hop/rap music if we're truly committed to understanding its full magnitude. Who or whatever you are — rich or poor, highly or poorly educated, traditionally trained or self-taught, from the city or the suburbs — if you want to create quality hip hop/rap music, and I'm not talking about a sham off-shoot or "mash-ups", then at some point you will inevitably have to reconcile your station in life and presuppositions about music with the fact that hip hop/rap music is fundamentally a street culture music.

Does this mean that hip hop/rap music, American street culture's "classical" music, is exclusively for those who come from the street? Certainly not. Hip hop/rap is actually the most inclusive music tradition in the history of American popular music. And I should add that throughout the world, street culture is perhaps the most inclusive culture within society; membership is not based on one's acquisition of abstract knowledge, but rather on a sensibility to and knowledge of the ubiquitous "codes" of the street. If you can handle yourself in the streets, regardless of race, ethnicity, and even gender, then you're welcome in the streets. And should you rise up the hierarchy of the street, through mastery of the codes and rules of the streets, then you will be respected.

Much in this same context, the hip hop/rap music and beatmaking traditions do not demand that its members pass some sort of bar of abstract knowledge. Moreover, no one is considered privileged or thrusted to the top of hip hop/rap's and/or beatmaking's hierarchy merely because they can play a traditional instrument, read music, or comprehend advanced concepts of music theory. These elements are not necessarily prioritized in the hip hop/rap and beatmaking traditions. Instead, the hip hop/rap and beatmaking traditions make one simple demand: That all those who participate within it demonstrate a respect and understanding for its fundamental aesthetics, priorities, and unique musical features. So while it's a fundamentally a street culture music, its barrier to entry is more accessible — *to anyone, from anywhere, with any socio-economic background* — than the Western Classical music tradition.

I compare and contrast key elements of the Western classical music to those of the hip hop/rap and beatmaking traditions for several other important reasons. First, both musical traditions are on opposite ends of society as well as various spectrums of culture. The western classical music tradition is now widely regarded as high-brow culture, while the hip hop/rap music tradition is broadly considered to be low-brow. Of course, implicit in the notion of high-brow culture is the idea of strong intellectual activity. Likewise, the notion of low-brow culture implies little to no intellectual activity. Second, for hundreds of years, the Western classical musical tradition has served as the musical culture par excellence for the Western world, and thus, it has become the supreme musical culture for which, presumably, all musical cultures are measured against. Finally, the third reason I've chosen to compare and contrast key elements of the Western classical music tradition to those of the hip hop/rap and beatmaking traditions is because Western classical music represents the ultimate manifestation of (Western) music theory.

The number of traditionally trained musicians (and others on the fringe of hip hop culture) moving into hip hop/rap music is always increasing. And paramount to this phenomenon is the fact that, by and large, these musicians bring with them their presuppositions, ideologies, philosophies, and priorities about how to make music and which musical processes are legitimate. And those presuppositions, ideologies, philosophies, and priorities are well-grounded in and guided by the principles of music theory, not the principles of the "hip hop sensibility". And despite the apparent wishes of some traditionally trained musicians who flirt with the hip hop/rap form, beatmaking is not in need of an increased usage of music theory. This doesn't mean that the hip hop/rap and beatmaking traditions seek to be at odds with music theory. Hip hop/rap theory uses music theory whenever and however appropriate; likewise, it ignores music theory at will.

My goal is not to malign the magnificence of the Western classical music tradition and/or the brilliance of music theory, but instead to bring attention to and highlight the magnificence of the

hip hop/rap music tradition and the brilliance of beatmaking, the chief compositional practice of hip hop/rap music. The hip hop/rap music tradition is no more or less great than the classical music tradition. As I maintained earlier, to compare the "relative greatness" of both traditions is actually the wrong analytical approach. Both traditions are rich and hold entirely different meanings and purposes for the communities that enjoy them. But I'm compelled to point out that hip hop/rap music, and the beatmaking tradition that emanates from it, are not orphan music traditions that are in want or need of rescue by any other music tradition. Hip hop/rap music and its beatmaking tradition shine their own light; they do not stand in the shadow of the Western classical music tradition. Hip hop/rap music has its own autonomous tradition and culture. A tradition and culture that contains its own logic and language and vocabulary; its own aesthetics, properties, and principles; its own values and priorities; and its own distinct history.

Music Defined

Let's set the record straight about the definition of music. Often people confuse the definition of what music *is* with their own particular music tastes, preferences, and/or prejudices. And taste varies with the position, perceptions, assumptions, and priorities of the observer. But technically speaking, what is music really? Can it not be simply defined as "the organization of sound?" So then, what distinguishes music from other forms of organized sound, for instance, the sound of a telephone ringing? One useful definition of music describes it as being "the art, the craft, and the science of organizing sound and silence in the framework of time."[7] To that definition I would add that music is distinguished by the conscious and willful *intent* to make music through the use of pre-established musical elements and properties. And it's in the area of *pre-established musical elements and properties* where the biggest discrepancies — about what exactly is or isn't music — have

[7] Michael Miller, The Complete Idiot's Guide to Music Theory, Second Edition, (New York: Alpha, 2005), 3.

often been found. In fact, what actually constitutes an established musical element or property? Perhaps a more important question is, *who* decides which musical elements and properties are important and which ones are not? Fundamentally, the answer is determined by one's background, i.e. their cultural sensibilities, values, and prejudices; their musical training and orientation; and the range of their knowledge of music history in general.

Western (European) and African Perspectives of History, Time, and Repetition and Their Influence on Music

The Western (European) perspective of history and time, which finds its roots in nineteenth-century Western (European) philosophy, is linear. Thus, in the Western (European) perspective, progression is seen as something that is linear, hence, the term "linear progression". Also, unique to the Western (European) perspective of time is the notion that growth is something new, something non-cyclical and non-repetitive. In fact, within nineteenth-century European culture there stood the belief that "there is no repetition in culture, but only a difference, defined as progress and growth."[8]

The African perspective of history and time, which predates nineteenth-century Western (European) philosophy by centuries, is *cyclical*. In the African perspective, history and time are seen as things that occur in a cyclical, repetitive manner. Also, unique to the African perspective is the notion that growth, and the process thereof, is an instance of repetition, or *a series of repetitions linked together* (sound familiar? *A loop*?). This explains in part the roots of the Black (African American) music tradition's emphasis and priority on repetition and rhythm. As Ives Chor has noted, music styles of the African diaspora feature highly repetitive rhythms that can interact with metre to create unique rhythmic frameworks, which provide context for composition, performance and dance.

[8] James A. Snead, "On Repetition in Black Culture," *Black American Literature Forum*, vol. 15, no. 4, 147, 1981.

Understanding the function of such rhythmic frameworks is essential to understanding the organization of rhythm in these styles."[9]

As nineteenth-century Europeans "were defining themselves over against other European nations, they were also busy defining 'European culture' as separate from 'African culture.'" Moreover, "Black culture" was a "concept first created by Europeans and *defined in opposition* to 'European culture.'" For instance, Georg Wilhelm Friedrich Hegel, the influential nineteenth-century European philosopher, "saw 'black culture' as the lowest stage of that laudable self-reflection and development shown by European culture whose natural outcome must be the state or nationhood. In his by no means atypical nineteenth-century view, ***Hegel said that black culture simply did not exist in the same sense as European culture did.*** **Black culture (as one of several non-Western cultures) had no self-expression.**"[10] From this context, we can also see how cultures, particularly dominant ones, project themselves as superior to all others that are different. Thus, in Western culture, it's no surprise that the European perspective of history, time, and repetition is more highly regarded than the African perspective.

The distinct differences between the Western (European) and African perspectives of history and time have been, for the better part of the last three centuries, contentious, albeit unknown to the casual music listener. However, because of the peculiar institution of slavery, this contention has, on the one hand, been almost neutralized in America. Clearly the origins of a specifically American music certainly includes contributions by both African and European descendants. But on the other hand, this contention has still worked to establish Western (European) music as the standard of music superiority the world over. Usually, when one says "classical music", it's widely understood that they're referring to a

[9] Danielsen: Ives Chor, location: 528 (emphasis mine).

[10] *Ibid*, 147, [emphasis mine]. Snead examines how and why repetition is a major component within Black culture, specifically within the arts. Also, he examines how European culture has a long history of both denying the existence of and suppressing repetition in culture. In the reference that I cite here, Snead points out how cultures (particularly dominant ones) project themselves as superior to all others that are different. Also, I use this Snead reference to reinforce my argument that Western classical music is not only widely viewed as simply different than hip hop/rap music but superior to it.

European music tradition that was most personified by eighteenth and nineteenth-century Europe.

Although the hip hop/rap music tradition was created in America (obviously a segment of the broader Western society), we must not make the mistake of forgetting that hip hop/rap, like all other twentieth-century Black (African American) popular music forms, prioritizes and relies on the African perspective of cyclical progression and repetition.[11] And even though hip hop is an art-based cultural phenomenon of American culture, it falls under the rubric of post-modern Western culture.

Finally, for further cultural context, it's necessary to point out that it's precisely because of the fact that the hip hop/rap music tradition is grounded *within* the Black (African American) music tradition that it has, throughout most of its history, received a negative bias in the American mainstream. Only recently has hip hop/rap music began to be "accepted" as a legitimate art form by traditional music institutions and the gatekeepers of American pop culture alike. But let's be clear: This acceptance is due more to the pop-culture co-option of hip hop/rap music than it is to a true acknowledgement or recognition of hip hop/rap's sovereign creativity and/or its canon of compositional methods and aesthetics.

The Architects and Pioneers of the Hip Hop/Rap Music and Beatmaking Traditions: A Proper Context

It's important to remember that the pioneering DJs and early beatmakers were surrounded by people (family members, friends, neighbors, etc.) who played traditional instruments and who knew music theory very well. Also, hip hop's earliest architects went to school at a time when music and band were still public school educational requirements. Hence, the architects and pioneers of the hip hop/rap music and beatmaking traditions were familiar

[11] It also must be understood that the roots of the Black (African American) music tradition firmly emanate from the larger African concept and framework of time and music.

with traditional instruments, and they were introduced to music theory on various levels. Still, the architects and pioneers consciously rejected traditional instruments and most of the advanced tenets of music theory. The big myth, pushed by those who love to romanticize hip hop's roots, is that the first hip hop architects were so poor that they couldn't afford instruments, so they were *forced* into DJing as a cheaper alternative. This is bullshit.

Fact is, choosing electronic music production gear was certainly not a choice prompted by poverty. The equipment that hip hop's earliest architects used to create a new music form was much more expensive than traditional instruments; the cost of traditional instruments in the early 1970s pales in comparison to the cost of the complete DJ rigs that the early architects and their immediate descendants desired. Moreover, in the '70s and early '80s, traditional instruments (guitars, horns, etc.) were much more accessible and cheaper than complete DJ rigs and the first wave of digital samplers, which were around $5,000! Even still, the pioneers, and their direct apprentices, opted for DJ gear and other electronic music production instruments.

When they made the conscious decision to focus on making a new music form through the use of recorded music, hip hop's earliest architects were fully aware of what they were doing. They knew that they were going in a different musical direction; they knew very well that they were doing something that had never been done before. And they embraced the fact that what they were doing was something that wasn't easily comprehensible to outsiders, i.e. those who were outside of hip hop culture, or those who were otherwise non-appreciative of hip hop/rap music. These conscious decisions, and many others, led directly to the development of hip hop/rap's own way of composing music and, subsequently, its own music "theory."

***

A Note About the Music Theory Section

The following section is not intended to be an exhaustive discussion of music theory but rather a brief (but detailed) examination of the key concepts, principles, and terminology that are most applicable to hip hop/rap music, beatmaking, and common forms of twentieth-century American popular music. Further, by describing the properties and elements of music theory, I hope to show that all music theories have their own systems, processes, language, and vocabulary; in the case of hip hop beatmaking, some of the same concepts of music theory bear different names.

Music Theory Defined

A "music theory" is a system that organizes and distills the elements, properties, language, mechanics, and parameters of music; it's a study that deals with how music works; and it's also a means for notating musical "instruction". Because a music theory may include any belief, statement, conception, or presupposition of or about music, I also like to consider a music theory as the "grand approach" of a particular music tradition. All music uses some sort of music theory; that is, a way of expressing how and what musical events have occurred. When most people in the West say "music theory," they typically say so as if there is only one music theory in the world. While European music theory is perhaps the most well-known music theory in the world, it certainly isn't the *only* music theory on the planet.[12]

European music theory — i.e. the Western conception of music composition and theory — is considered, mainly by those in the West, to be the "standard". The fact that European music theory is often misrepresented as *the* standard isn't about a superior conception of music and theory; it's about the localization of the

[12] For instance, there are a number of Eastern music theories. Indian (India) music, for example, has its own theory, its own grand approach. Indian (India) music theory, which is based more on rhythmic structures than melodic structures, is more rhythmically complex than Western music theory.

international world in the nineteenth and twentieth centuries. As Adam Longman Parker (pka Afriqua) has noted:

> As the world became more international, it's undeniable that ***a Western conception of music composition and theory – fairly or unfairly – came to be the predominant framework of musical understanding.*** Just as English became the "world language", the diatonic system of European harmony became the "world music theory". But just as there are expressions in other languages that can't possibly be expressed in English, there are numerous styles of music that don't adhere to Western tuning systems, can't be adequately written on staff paper, and aren't played on Western instruments. [emphasis mine][13]

The Basic Properties and Elements of Music Theory: Harmony, Melody, Rhythm, Timbre, Texture, Structure, Form, and Dynamics

Before discussing the basic elements of music theory, a few words about tones, semitones, pitch, notes, intervals, chords, and scales are necessary for readers not entirely familiar with their definitions. A **tone** is any sound of distinct pitch. A **semitone** is a "half tone" or a half step in pitch. **Pitch** refers to the frequency (speed) of a note. High pitch translates to "fast frequency," low pitch translates to "slow frequency." A **note**[14] is a tone of a particular (definite) pitch and duration. An **interval** is the relationship between the pitches of two notes. Intervals are described as either "linear" (or melodic), i.e. if the notes sound successively, or "vertical" (or harmonic), i.e. if the two notes sound simultaneously. A **chord** is three or more notes sounded simultaneously. The notes of the chord may be played at the same time ("block chords"), or may be played separately with some overlap, or may be played separately but in a quick enough

[13] Adam Longman Parker (Afriqua), "Afriqua Presents Principles of Black Music: Blue NotesAfriqua Presents Principles of Black Music: Blue Notes," *Ableton* (March 1, 2022) https://www.ableton.com/en/blog/afriqua-presents-principles-of-black-music-blue-notes/]

[14] Sample-based beatmakers use samples similar to the way traditional musicians use notes. However, in this process, sample-based beatmakers are not governed by the abstract knowledge and/or rules that the use of notes follow in music theory. Instead, sample-based beatmakers are focused on what sounds good or what "works" according to the priorities and values of the hip hop/rap music tradition.

succession that they will be "heard" as a chord or understood to imply a chord (**arpeggiated chords or arpeggios**). Chords are either major, minor, or diminished.

A **scale** is a progression of seven notes all in a row, upwards or downwards, in steps. Scales are defined by their starting point/step or, more precisely, their starting note. Scales in Western music generally consist of seven notes and repeat at the octave. In Western music, there are four specific seven-note scales: "major", "natural minor", "melodic minor", and "harmonic minor". Other commonly used scales in Western music are: the *chromatic scale* (twelve notes), the *whole tone scale* (six notes), and the *pentatonic scale* (five notes).[15] Notes in the commonly used scales are separated by whole and half step intervals of tones and semitones. Finally, it's important to note that scales are used to create melodies.

Major and Minor Scales

To understand what "major" or "minor" means, one must recognize that music in a particular key tends to use only some of the many possible notes available; these notes are listed in the scale associated with that key. **Major scales** all follow the same interval pattern, for example: whole step, whole step, half step, whole step, whole step, whole step, half step. Each major key uses a different set of notes (its major scale). In each major scale, however, the notes are arranged in the same major scale pattern and build the same types of chords that have the same relationships with each other. Therefore, music that's in C major, for example, won't sound significantly different from music that's in D major. Major chords also have a **tonal center**, a note or chord that feels like "home", or "the resting place", in that key. **Minor scales** sound different from major scales because they're based on a different pattern of intervals, and so the

[15] Jazz and blues use scale intervals smaller than a semitone. The "blue note" is an interval that is technically neither major nor minor but "in the middle", giving it a sound and feel that is unique to jazz and the blues. In blues, a pentatonic scale is often used. Moreover, in jazz many different modes and scales are used, often within the same piece of music. Chromatic scales are very common in modern jazz. It's worth noting that scales translate well to the basic concept of building a loop in the beatmaking tradition.

notes in the minor scale have different relationships with each other; for example: whole step, half step, whole step, whole step, half step, whole step, whole step. Music in minor keys has a different sound and emotional feel and develops differently harmonically. So you can't, for example, transpose a piece from C major to D minor (or even to C minor) without changing it a great deal. Major chords are used for happy, up-tempo moods; "minor chords" are used for sad, tragically reflective moods; and "diminished chords" are often used for darker moods.

The Three Primary Elements of Music Theory: Harmony, Melody, and Rhythm

Harmony

Harmony is the most highly developed aspect of Western music; as such, music theory tends to focus almost exclusively on harmony and melody. In music, harmony is the use of simultaneous pitches or chords. That is, when you have more than one pitch sounding at the same time in music, the result is harmony. This does not mean that harmony has to be particularly "harmonious"; the important fact to be understood is that notes are sounding at the same time. Harmony can be the subject of an entire course on music theory, but for the limited purposes of this section, here are eight basic terms and/or concepts associated with harmony that are helpful to know.

First, it's important to know that there are different "harmony textures." There's an implied harmony texture. A melody all by itself (monophony) can have an implied harmony, even if no other notes are sounding at the same time. In other words, the melody can be constructed so that it strongly suggests a harmony that could accompany it. For example, when you sing a melody by itself, you may be able to "hear" in your mind the chords that usually go with it. But some melodies don't imply any harmony; they're not meant to be played with harmony and don't need it to be legitimate music. Parallel harmony occurs when different

lines in the music go up or down together (usually following the melody). Homophony is a texture of music in which there is one line that is obviously the melody; the rest of the notes are harmony and accompaniment. (See Homophonic in Texture sub-section.) Polyphony refers to a harmony texture in which there is more than one independent melodic line at the same time, and they are all fairly equal in importance. (See Polyphonic and Counterpoint in the Texture sub-section.) I should also mention drones. A drone is a note that changes rarely or not at all. The simplest way to add harmony to a melody is to play it with drones.[16]

Next, it's important to briefly discuss chords and their relationship to harmony. In Western music, most harmony is based on chords. Chords are built on major or minor triads. **Triads** are simple three-note chords. "In traditional triadic harmony, there are always at least three notes in a chord (there can be more than three), but some of the notes may be left out and only "implied" by the harmony. The notes of the chord may be played at the same time (block chords), or may be played separately with some overlap, or may be played separately but in a quick enough succession that they will be "heard" as a chord or understood to imply a chord (arpeggiated chords or arpeggios)."[17]

A discussion of harmonic analysis is also important here. Harmonic analysis refers to the understanding of how a chord is related to the key and the other chords in a piece of music. There are a number of reasons why harmonic analysis is useful, especially to those who have not studied music theory. First, many standard forms (for example, "twelve bar blues") follow very specific chord progressions, which are often discussed in terms of harmonic relationships. A **chord progression** is a series of chords played one after another.[18] Second, if you understand chord relationships, you can transpose (change the key) of any chord progression to any

[16] Catherine Schmidt-Jones, CNX.org (Connexions), "Harmony," http://cnx.org/content/m11654/latest/.
[17] *Ibid*.
[18] *Ibid*. Musicians may describe a specific chord progression (for example, "two measures of G major, then a half measure of A minor and a half measure of D seventh," or just "G, A minor, D seventh"), or speak more generally of classes of chord progressions (for example, a "blues chord progression.")

key you like. Third, let's say you're searching for chords to go with a particular melody (in a particular key). Knowing what chords are most likely in that key, and how they might likely progress from one to another, is very helpful. (Incidentally, this is a basic example of how abstract knowledge works and guides a composer in the Western classical tradition.) Finally, understanding how a chord is related to the key and the other chords in a piece of music, specifically the chord progression of a piece of music, is paramount to improvisation.[19]

The concepts of **consonance** and **dissonance** is also important to this discussion of harmony. Consonance and dissonance are musical terms describing whether combinations of notes sound "good" together or not. Notes that sound pleasant, i.e. good or stable when played at the same time, are **consonant**. A **dissonant** note may sound unpleasant, i.e. harsh, jarring, and/or unstable.

It's also necessary to mention cadence. A **cadence** is a point where the music feels as if it has come to a temporary or permanent stopping point. In the Western classical music tradition, cadence is tied very strongly to the harmony. For example, most listeners will feel that the strongest, most satisfying ending to a piece of music involves a dominant chord followed by a tonic chord.

Accompaniment is another term and concept important to this discussion. Accompaniment refers to all of the parts of the music that are not melody. This includes rhythmic parts, harmonies, the bass line, and chords. Accompaniment contains inner parts or inner voices. **Inner parts** or **inner voices** describes accompaniment parts that fill in the music in between the melody (which is often the highest part) and the bass line.

Another basic concept of harmony that is helpful to know is **functional harmony**. Functional harmony is harmony in which each chord functions in a specific way in the key, and underpins the form of the piece of music. It's worth noting that harmony can simply be more than one note sounding at a time, providing texture and interest to a piece.

[19] *Ibid*.

Finally, the last basic concept of harmony that is helpful to know is harmonic rhythm. The **harmonic rhythm** of a piece refers to how often the chords change. Music in which the chords change rarely has a *slow* harmonic rhythm; music in which the chords change often has a *fast* harmonic rhythm. Harmonic rhythm can be completely separate from other rhythms and tempos. For example, a section of music with many short, quick notes but only one chord has fast rhythm, but it has a slow harmonic rhythm.[20]

Melody

Melody is technically defined as a linear succession of musical notes which is perceived as a single entity. A melody is a sequence of pitches and durations that consist of one or more musical phrases or **motifs**, usually repeated throughout a song or piece in various forms. The melodic line of a piece of music is the string of notes that make up the melody. Melodies move in three ways: up, down, or repeat. This is referred to as "direction". The way in which notes move gives the melody its "shape", and the shape of a melody is called *contour*. As the melody progresses, the pitches may go up or down. "Compass" refers to the difference in pitch between the lowest and the highest notes of a melody. Melodies are distinct and clear, i.e. even without words, the phrases in a melody can be very clear.

There are a number of other important characteristics associated with melody. A musical **phrase** is a measurement of a musical line; it's a short musical passage — usually of four bars, sometimes less, sometimes more — that has a complete musical *sense* (character) of its own. A musical phase is composed of one or more "motives" (figures, cells) and usually consists of a single idea, which is then repeated, complemented, or added to by the next phrase. **Theme** is a complete melody fragment, a section of melody that reappears in the music of a song. A theme can also be described as a recognizable melody upon which a part or all of a

[20] *Ibid*.

composition is based.[21] **Counter-melody** describes the sequence of notes, perceived as a melody, written to be played simultaneously with a more prominent melody. In other words, counter-melody refers to a second but subordinate melodic line. One common basic principle of composing a counter-melody deals with moving the counter-melody while the "main" melody is least busy and vice-versa. Essentially, this can also be described as the process of creating variations upon a similar theme.[22]

A **motif** (or **motive**), also commonly referred to as a cell or a figure, is a short musical ideal — shorter than a phrase or theme — that occurs often in a piece of music. In the Western classical music tradition, a motive must consist of at least two notes to have purpose (usually a motif is made up of three, four, or more notes). This short "melodic idea" is a scrap of melody that can be pieced together and formed into main melodies. When a motif returns (reappears) in a piece of music, it can be slower or faster, or in a different key. It may return "upside down" (with the notes going up instead of down, for example), or with the pitches or rhythms altered. In order to make up a line of music, a motive must lead somewhere and must link to the next motive and from the previous motive so that the piece flows well.[23]

Finally, extra notes, such as **trills** and **slides**, that are not part of the main melodic line but are added to the melody (either by the composer or the performer to make the melody more complex and interesting) are called **ornaments** or **embellishments**.

[21] Aside from melody, a theme can refer to any prominent musical idea that's established in a piece of music. In beatmaking, a theme can be used to describe the sense or mood of a beat. A theme can also be used to describe a prominent structural component that reoccurs within a beat, like a heavily syncopated drum roll proceeded by a bouncing bass line. Also, in beatmaking a theme can be used to describe the style of a beat; for example, a hardcore beat, a party track or club banger, etc.

[22] A great example of counter-melody led by rhythm can be heard in the song "Heartbreak Hotel" by The Jacksons (1980).

[23] Symphonic music uses motives all the time. With just four little notes Beethoven created one of the most famous motives ever written. In his piece "Symphony No. 5," he repeated four little notes and made them grow into a big symphony.

Rhythm

The term rhythm has more than one meaning, but generally **rhythm** means the placement of sounds in time. Music cannot happen without time. Because music must be heard over a period of time, rhythm is one of the most basic elements of music. Rhythm is comprised of four elements: the beat, accent, meter, and tempo. The term "beat" also has more than one meaning, especially depending on the context. Fundamentally, **beat** refers to (the speed of) the underlying "pulse" in music; it's the basic time unit of music. Therefore, one description of rhythm is that it's the pattern of regular or irregular pulses caused in music by the occurrence of strong and weak melodic and harmonic "beats". Beats are grouped into measures or bars. The first beat is usually the strongest, and in most music, most of the bars have the same number of beats. This sets up an underlying pattern in the pulse of the music. "Beat" may also refer to a distinct or recognizable (specific) repetitive rhythmic pattern that maintains the pulse (as in "it has a jazz beat").

In a rhythmic pattern, it's also important to understand the differences between the "downbeat", "upbeat", or "off" beat. The **downbeat** refers to the moment when the pulse is the strongest; the downbeat is the impulse that occurs at the beginning of a bar of measured music. The **off-beat** is in *between* pulses; and the **upbeat** is exactly halfway between pulses. (Think of the upbeat as "and": 1 *and* 2 *and* 3 *and* 4.) Here, it's worth noting that James Brown's signature funk groove emphasized the downbeat, the "one" — emphasis on the first beat in 4/4 time measure — rather than the upbeat. In hip hop/rap, a descendent of funk, the downbeat is emphasized.[24]

A meter is a division of a composition into units of equal time value called "measures". **Measures**, synonymously known as **bars**,

[24] For a more extensive understanding of rhythmic features, in particular, the "beat", see: Southern, 206: "The modern scholar Richard Waterman has used the term metronome sense to refer to the African tradition for 'conceiving music as structure along a theoretical framework of beats regularly spaced in time…whether or not the beats are expressed in actual melodic or percussion tones…Since this metronome sense is of such basic importance…it is assumed without question to consideration to be part of the perceptual equipment of both musicians and listeners and is, in the most complete way, taken for granted.'"

simply refers to the notes and rests between two bar lines; more specifically, it's also described as a segment of time defined as a given number of beats of a given duration. A **bar line** is a vertical line which separates measures. Also, it's worth noting that the word "bar" comes from the vertical lines on the music staff, which separate one measure from another.[25] I should further add that a more specific description of **meter** in a piece of music is that it is the repetitive arrangement or "grouping" of strong and weak pulses (beats) in the rhythm. It's on these pulses, the beat of the music, that you tap your foot, clap your hands, dance, etc. Also, the meter of a piece of music is the arrangement of its rhythms in a repetitive pattern of strong and weak beats. This does not necessarily mean that the rhythms themselves are repetitive, but they do strongly suggest a repeated pattern of pulses. The concept of meter emanates in large part from the rhythmic element of poetry or song, where it means the number of lines in a verse, the number of syllables, and the arrangement of those syllables as long or short.

Time signature, also commonly known as "meter signature", is the notational convention used in Western music to specify how many beats are in each measure and what note value constitutes one beat. Meters can be classified as either "simple" or "compound". In a simple meter, each beat is basically divided into halves. In compound meters, each beat is divided into thirds. The length ofthe meter, or metric unit (usually corresponding with measure length), is usually grouped into either two or three beats, being called duple meter and triple meter, respectively. If each beat is divided by two or four, it's simple meter. If it's divided by three (or six), it's compound meter. In fact, there are four different categories of time signature or "meter signature": simple duple, simple triple, compound duple, and compound triple. Again, if the beat is divided into two, the meter is "simple", if divided into three, it's compound. Likewise, if each measure is divided into two, it's "duple," and if into three, it's "triple". In other words, **simple duple** describes two or four beats to a bar, each divided by two, the top number of the

[25] There are different types of bar lines, each with a specific instruction. However, I have not included the various descriptions of bar lines because it's not critical to the purposes of this chapter.

signature being "2" or "4" (2/4, 2/8, 2/2…4/4, 4/8, 4/2…). Note: When there are four beats to a bar, it's alternatively referred to as "quadruple" time. Simple triple describes three beats to a bar, each divided by two, the top number of the signature being "3" (3/4, 3/8, 3/2…). Compound duple describes two beats to a bar, each divided by three, the top number of the signature being "6" (6/8, 6/16, 6/4…). **Compound triple** describes three beats to a bar, each divided by three, the top number of the signature being "9" (9/8, 9/16, 9/4). For example, if the meter of the music feels like "strong-weak-strong-weak," it's in duple meter; "strong-weak-weak-strong-weak-weak" it's triple meter, and "strong-weak-weak-weak" is quadruple.

Tempo is the speed or pace of a given piece of music. More specifically, the tempo is a measure of how quickly or rather how slow or fast the pulse in music *repeats*. Tempo is usually measured in "beats per minute" (BPM); for example, 60 BPM translates to a speed of one beat per second. Rhythms are usually arranged with respect to a **time signature**, partially signifying a meter, and set to a tempo. Tempo is a crucial element of music composition, as it can affect the mood and difficulty of a piece. Finally, tempo is also described as the interval of time between beats. Therefore, the closer the beats, the faster the tempo; the farther apart, the slower the tempo.

Finally, rhythm can also mean the basic, repetitive pulse of the music, or "a rhythmic pattern" that is repeated throughout the music (as in "*feel the rhythm*"). It can also refer to the pattern in time of a single small group of notes (as in "*play this rhythm for me*"). There are also different types or kinds of rhythms. For instance, **syncopated rhythms** are rhythms that accentuate parts of the beat not already stressed by counting. Syncopation occurs when a strong note happens either on a weak beat or off the beat. Then there's polymeter. **Polymeter** is different rhythms played simultaneously in more than one time signature.

The Primary Sub-Elements of Music: Texture, Dynamics, Timbre, and Form/Structure

Texture in music describes two areas of musical phenomena: (1) melodic and harmonic relationships; and (2) the density of the simultaneous layering of different musical components. With regards to the melodic and harmonic relationships, texture is used commonly to describe the construction of music. That is, it refers to the number of melodies (or rhythms on percussion instruments) played at a given time in a piece of music. There are three typical texture constructions: monophony or monophonic texture, polyphony or polyphonic texture, and homophony or homophonic texture.[26] In a **monophonic** texture, a single melodic line (one melodic voice) is played without harmonic accompaniment. A single musical instrument playing a melody or many instruments playing the same melody is monophonic texture.

Polyphonic texture describes a texture in which two or more melodic lines (voices) of relatively equal complexity (considerably independent from one another) are played simultaneously. Melodic lines in a polyphonic texture are complementary to each other, they sound well together and don't interfere with each other sonically. It should be noted that the craft of combining two or more melodies of equal complexity that occur in music at the same time is known as **counterpoint**; that is to say, point against point. Music that has a polyphonic texture is said to be contrapuntal. Each melodic line in a **contrapuntal** texture occupies a separate sonic range, and their rhythm activity compliments each other. Note: **Simultaneity** describes more than one complete musical texture occurring at the same time rather than in succession.[27]

A case in which a single melodic line plays with an accompaniment of harmony is called homophonic texture. In homophonic texture,

[26] There are two other broad types of texture: simple and complex. Simple texture is a texture in which the same rhythm is played by all musicians. A complex texture is one in which a different rhythm is played by each musician.

[27] Southern, 209. Also, see: Danlee Mitchell and Jack Logan, Ph.D, "Four Combinational Operations of Music: Texture," Cartage.org, http://www.cartage.org.lb/en/themes/Arts/music/elements/four.

there are actually multiple voices of which one, the melody, stands out prominently and the others (clearly less important melodies) form a background of harmonic accompaniment. Most songs and much instrumental music is composed in this texture. Also, homophonic texture represents the classic idea of simplicity and balance.[28]

Finally, there are two musical techniques or styles that are often associated with analysis of texture: heterophony and antiphony. **Heterophony** describes a "shadow" or "echo" effect in music, wherein two or more voices simultaneously perform variations of the same melodic material. In the **heterophonic** style, one performer plays the basic melody while other performers "shadow" or "echo" the melody notes by playing slightly after the basic notes. In some heterophonic styles, the "shadow" performer not only "echoes" the basic melodic tones, but also ornaments them as well. **Antiphon**y describes the stereo or quadraphonic effect achieved by placing two or more groups of performers at different locations in a performance space, such as a large church or performing hall. When each antiphonal group alternates its musical material in succeeding phrases this "effect" is known as **antiphony** or the music is said to be antiphonal. Another term for this technique is **call and response**.[29]

Texture is also a term used to describe the overall quality of sound of a piece of music, most often indicated by the number of "voices" — the number of different instruments and their timbre (unique sound and color) — in the music, and by the relationship between these voices. Many composers often use more than one type of texture in the same piece of music. The texture of a piece of music can be affected by the number and character of parts playing at once, or the timbre of the instruments or voices playing these parts, or the harmony, tempo, and rhythms used. This is what contributes to the "thickness" or lack thereof in a given piece of music.

[28] *Ibid*.

[29] *Ibid*. The call and response technique described here is not to be confused with the tradition of "call and response" of West Africa or African American slaves and/or the Black Church.

Dynamics

Dynamics refers to the selected "levels of volume" of the voices in a given piece of music. More specifically, in the Western classical tradition, dynamics describes the range of sounds from barely audible to very loud. Dynamics has its own distinct terminology and instructions used for achieving each range or style of sound. **Dynamic markings** (terminology) used in the Western classical tradition are based on Italian words. The two basic dynamic indications are: ***piano*** or ***p***, which means "soft," and ***forte*** or ***f***, which means "loud" or "strong." From these basic dynamic indications, subtle "degrees" of loudness or softness are indicated as: ***mezzo-piano*** or ***mp***, which means "moderately or medium soft," ***mezzo-forte*** or ***mf***, which means "moderately or medium loud," ***fortissimo*** or ***ff***, which means "very loud," and ***pianissimo*** or ***pp***, which means "very soft." For pianissimo and fortissimo, there are still further indications: ***pianissimo possibile*** or ***ppp***, which means "softest possible or very, very soft," and ***fortissimo possibile*** or ***fff***, which means "loudest possible or very, very, loud." Sudden changes in volume also have specific dynamic markings: ***sforzando (sforzato)*** or ***sf***, ***sfz***, or ***fz***, means a "strong, sudden accent. Finally, gradual changes in volume also have distinct dynamic markings: ***crescendo*** or ***cresc.***, which means "get gradually louder," and ***decrescendo*** or ***diminuendo*** (***descresc.*** and ***dim.***), which means "get gradually softer."

Dynamic indications are relative, not absolute. For example, an entire orchestra playing very loudly is louder than a single pianist playing very loudly. Hence, dynamic indications do not indicate an exact level of volume, but rather the dynamic instructions for a music passage in a given piece of music.

Timbre

Timbre (pronounced as "tamber") is the term used to indicate the distinctive properties — characteristic, quality, or substance — of a sound or sound produced (made) by a particular instrument

or voice. Timbre, commonly referred to as "tone quality" or "tone color," describes all of the aspects of a musical sound that don't have anything to do with pitch or duration. Timbre speaks to the fact that each individual instrument or voice has its own distinct sound. For example, there's a timbral difference between a saxophone, a piano, a trumpet, and a guitar. Each instrument playing the same note at the same pitch and volume will sound differently because each instrument conveys its own distinct "character", "tone quality", or "tone color". Timbre is also relative to amplification and harmonics; that is to say, the timbre of an electronic guitar is recognizably different from that of an acoustic guitar. Also, because of the attack of each note or sound, the timbre of two *different* electric guitars is also recognizably different. Thus, various musical instruments have different musical colors.

Form/Structure

Form is the basic "structure" of a piece of music. Form is a musical blueprint that helps the composer put his sounds together in different ways. Every piece of music has an overall plan or structure, the big picture, so to speak. In the Western classical music tradition, musical forms offer a great range of complexity. Therefore, in this sub-section, I will briefly go over some of the most familiar and commonly used forms in the Western classical music tradition.

The simplest musical forms that composers use are the **binary**, **ternary**, and **rondo** forms. The **binary** form consists of two sections (complementary and of roughly equal duration) that are commonly known as the "question section" and "answer section." Note: these two sections are often repeated to highlight the differences between them. In the binary form, the first section, "A," will start in a certain key, and will usually modulate to a related key, while the second section, "B," begins in the newly established key. To achieve the "question" and "answer," section A ends in a different key to the one in which it starts. Section B then goes through a series of modulations into different keys until it ends up at the "home" key once again. Thus, the binary form is usually characterized as having

the form AB. The **ternary** form is simply an A section, followed by a contrasting B section, and then the A section repeated. Finally, the rondo form is just a progression of ternary form: the A section is often itself in binary form and the B and C sections are deliberately contrasting.[30]

Some of the more commonly used complex forms include: **canon**, **fugue**, **sonata**, and **concerto**. The canon form is contrapuntal, which means a lot of emphasis is placed on the melody and its structure. In the **canon** form, the instruments play the same melody but at different times in relation to one another; in other words, the melody is imitated by various parts at regular intervals. So one instrument will begin and another will start playing the same melody a few bars later.

The **fugue** form or style incorporates "imitative counterpoint;" that is to say, it involves the overlapping of several melodies, beginning with an initial theme or subject. This subject is developed and repeated becoming a counter-subject, at which point another instrument enters and "imitates" the subject, often transposed into the dominant key so that the parts sound different but stay in close harmonic relation.

The **sonata** form consists of three parts: the exposition, the development, and the recapitulation. The **exposition** is where the main "themes" are introduced. The **development** is where the material from the exposition is "developed" to a climax. Throughout the development, tension builds steadily. In the **recapitulation**, tension is "relieved" by the repeat of the exposition. However, this is the *appearance* of the exposition, as the familiar motives of the beginning are actually slightly modified in the recapitulation. Finally, a sonata is a piece of music that consists of many movements, whereas a **concerto** is a piece of music for a solo instrument accompanied by a full orchestra.[31]

---

[30] "Structure In Classical Music," http://www.bbc.co.uk/dna/h2g2/A8379219. "Rondo Form," Capistrano School, http://www.empire.k12.ca.us/CAPISTRANO/Mike/capmusic/form/rondo%20form/rondo.htm.

[31] *Ibid*. It's worth noting that the Western classical tradition tends to encourage longer, more complex forms which may be difficult to recognize without the familiarity that comes from study or repeated hearings.

Compositional Ethic of the Western Classical Tradition

Every music tradition has its own compositional ethic, i.e. its own guiding philosophy. In the Western classical music tradition, its compositional ethic (guiding philosophy) emanates, above all, from five things: (1) The reliance upon music theory — abstract knowledge; (2) The importance of logical (clearly understood) form or structure; (3) A strong emphasis on harmony; (4) The principle of linear progression (material growth, horizontal forward movement); and (5) The use of rhythm as only an *aid* to progression, and the suppression of repetition.

In the Western classical tradition, music theory is the fundamental apparatus (mechanism) through which music is made. One might say that it's the "life force" of the Western classical tradition. *But we must remember that music theory is a very complex system*. In the previous sections of this chapter, I surveyed the basics of music theory and described how complex even the most introductory aspects of music theory can be. In fact, music theory is an incredibly dense framework that incorporates a range of components, including, but not limited to, physics, mathematics, Western philosophy and notions of logic, Italian terminology, and even the Western literary tradition. As a rigid set of logical rules, music theory achieves a number of things. It provides an orderly system for music-making. It reinforces Western presuppositions about harmony, melody, and rhythm. It maintains harmony as the most highly developed aspect of Western music. It governs the "approach" of composers. And finally, it dictates the elements that inform composers of the Western classical tradition and other Western musicians on how music is *supposed to* work.

In the Western classical tradition, form/structure is an entirely literal and logical concept. That is to say, there is a premium on the written score or a set of instructions that make logical sense in relation to the directives, sub-theories, and principles of music theory. Thus, what "works" in the Western classical tradition is absolutely defined by the tenets (rules) of music theory. This means

that within the Western classical music tradition, everything in the form or structure of music must make *literal* sense. In the Western classical music tradition, composers approach music in a literary sense. In fact, some of the most important *language* of music theory makes this connection quite clear: "theme", "sentence", "structure", "verse", "bar", "phrase", etc. In this way, the written score in the Western classical music tradition is akin to a narrative in a literary work. A composer from the Western classical tradition need not hear the score to know if it makes sense, they can *read* the score and *comprehend* that it *makes sense*. Incidentally, this is precisely why the notion of musical "questions" and "answers" is a pivotal component of the Western classical music tradition.

Finally, it's worth noting the fundamental presuppositions of form or structure within the Western classical tradition. A "good" structure, according to the Western classical tradition, is one in which the music takes the listener on a musical journey, through a clear *beginning*, *middle*, and end. Moreover, the common view within the Western classical tradition is that music, without structure, is merely a random set of ideas that leaves the listener completely unsatisfied. Certainly such a view implies, at the very least, that the *full* enjoyment of Western classical music requires that a listener understand music theory. Composers in the Western classical tradition are quite concerned with conveying to the listener his or her musical ideas, which implies that the common listener actually understands his or her ideas. Also, the goal of Western classical composers is to create "interest" in a piece. However, it would appear then that what's interesting can only be "understood" by those who know the abstract knowledge of music theory. Moreover, this also seems to suggest that the listener's level of enjoyment is dependent upon their ability to see the big compositional picture, that is, to see the given form that a composer is using. Thus, this all raises an important question: *Who* is Western classical music actually meant for? Is it meant for the common listener, or is it ultimately really meant for those who understand music theory?

Next, because harmony is the most highly developed aspect of Western music, music theory tends to focus almost exclusively on

harmony and melody. Thus, **tonality**, a system of music in which specific hierarchical pitch relationships are based on a key "center" or tonic, is central to the compositional ethic of the Western classical composer. Since the mid-eighteenth century, tonal music has increasingly been composed of a 12-note chromatic scale in a system of equal temperament. As we've already learned, tonal music makes reference to "scales" of notes selected as a series of steps from the chromatic scale. Most of these scales are of 5, 6, or 7 notes with the vast majority of tonal music pitches conforming to one of four specific seven-note scales: major, natural minor, melodic minor,and harmonic minor. Hence, in the Western classical music tradition, there's a strong priority on definite tones, pitch relationships, and on constant "shifts" in melody.

It must also be remembered that Western classical ideology is completely invested in the notion of linear progression, and that linear progression in music theory is actually a representation of European (Western) culture's perspective (philosophical slant) of history and time. What's most illuminating about this perspective is that on the one hand, it views history and time as a matter of "material growth", "progression", and "newness". On the other hand, it views repetition as *regression* when it repeats what has come before, and it views repetition as *progression when there is a quality of difference* to it.[32] Because of this, the Western classical compositional ethic, which emanates from European (Western) culture,[33] considers music as a *logical process* that seeks to move forward in time through a series of "new" *developments*. No surprise then that progression and material (differential) growth are prioritized in the Western classical tradition. But because rhythm both implies and *requires* repetition, it's the least prioritized of the three main elements of music theory.

---

[32] *Ibid*, 146.

[33] Here, I use "culture" in the same way that James A. Snead, Raymond Williams, and Tricia Rose all do: Culture is a "whole way of life, which is manifest over the whole range of social activities, but is most evident in 'specifically cultural' activities — a language, styles of art, kinds of intellectual work; and an emphasis on a 'whole social order' within which a specifiable culture, in styles of art and kinds of intellectual work, is seen as the direct or indirect product of an order primarily constituted by other social activities." Tricia Rose, *Black Noise: Rap Music and Black Culture in Contemporary America* (Hanover and London: Wesleyan University Press, 1994), 198. Tricia Rose actually quotes Raymond Williams, *The Sociology of Culture* (New York: Schocken, 1981), 11-12.

Because the Western classical tradition places such a premium on linear progression (material growth), rhythm is necessarily reduced to a secondary role:

> **European music uses rhythm mainly as an *aid* in the construction of a sense of progression** to a harmonic cadence, **repetition has been *suppressed* in favor of the fulfillment of the goal of harmonic resolution**. [emphasis mine][34]

Rhythm is valued in the Western classical tradition only inasmuch as the beat, accent, meter, and tempo relate to linear progression or "forward movement." Thus, the drums — a fundamental characteristic of African and African derived musics — are not a priority or a fundamental aspect of the Western classical tradition. Furthermore, what also stands out about the role of rhythm and repetition in the Western classical tradition is the fact that actual occurrences of (natural) repetition are often covered up or ignored, as if they don't exist:

> Although the key role of 'recapitulation' in the ABA or AABBAA sonata form (often within a movement itself, as in the so frequently ignored 'second repeats' in Beethoven's major works) is undisputed in theory, in live performance, these repetitions are often left out to avoid the undesirability of having 'to be told the same thing twice.' Repeating the exposition, as important as it no doubt is for the 'classical style,' is subsumed within and fulfilled by the general category called 'development.'[35]

[34] Snead,152.
[35] *Ibid*.

INTERMISSION

Hip Hop Theory

Hip hop/rap music is an art form and system governed by its own principles and rules. It's based on methods, techniques, practices, and processes cultivated from within its own tradition and the larger Black music tradition. While some of these processes are sometimes filtered through standard tropes of the European concept of music composition and theory, they are not guided by such tropes.

Again, all musical cultures use some sort of music "theory", i.e. a way of forming and expressing (describing, explaining) how and what musical events have occurred. However, not all musical cultures use a written notation to express their theories. (Some areas of hip hop/rap music can be analyzed and understood by some of the basic language and concepts of music theory, some areas cannot.) But music theory, as a whole, is an inadequate means for surveying and truly understanding hip hop/rap music and beatmaking.

We must also not forget that hip hop/rap music is a different musical convention altogether — the hip hop/rap music tradition is an amalgamation of a number of things. It's a music tradition that is well embedded within the Black (African American) music tradition. It's not a descendent of seventeenth, eighteenth, or nineteenth-century European music traditions. Also, hip hop/rap music is a hybrid of pre- and post-industrialism, coupled with great advancement in recording technology. Even more telling, hip hop/rap music is the born product of urban American street culture and neglected lower class Blacks and Latinos, not privileged whites. Finally, and perhaps most importantly for the purposes of this study, hip hop/rap music is the first music in the world to be created exclusively through the use of prexisting songs and other sound recordings.

Hip hop theory is further distinguished by the fact that it governs and speaks to two different but co-equal and interdependent layers or dimensions of musical activity: the beat and the rhyme — the instrumental and the vocal. In the hip hop/rap music

tradition, the "rap" or the "rhyme" describes the chief (native) form of vocalization, while the "beat" is used to describe the entire instrumental.

Order and "Rules" in Hip Hop Theory

Music theory depends on order, a set of rules and logical equations that must at all times be accounted for and respected. This is a major area in which hip hop theory differs from music theory. "Logic" in hip hop theory does not defer to a set of "rules" but rather a set of flexible aesthetic parameters, which don't always have to be strictly followed. Where music theory seemingly demands, above all, the pursuit of perfection — based of course on the logic of music theory — hip hop theory demands, above all, the pursuit of the *style, sound,* and *feeling*, as determined by the individual beatmaker (producer), not abstract knowledge.

In hip hop/rap music, the pursuit of perfection is secondary to the pursuit of a particular style, sound, feeling, and overall impact. Hip hop/rap music is less concerned with rigid and rudimentary notions of perfection; it's more concerned with capturing the naturalness and energy of the creative moment. This is one reason why hip hop theory accounts for and seeks out mistakes; even going as far as to manufacture mistakes in the form of cuts, scratching, distortion, delays, shuffles, and, of course, looping. Because of this, the factors that determine what "works" in hip hop/rap music are largely outside of the realm of music theory and the Western classical music tradition. What works in the hip hop/rap music tradition depends on its own distinct aesthetics, principles, ideologies, priorities, and what sounds good. But let's not forget that what sounds good or not is certainly relative to the tastes and musical ideologies of the specific musician working within the parameters of a given music tradition.

How the Primary Elements of Music Theory Translate to Hip Hop Theory: Rhythm, Repetition, and Groove in the Hip Hop/Rap Music Tradition

Unlike the Western classical tradition, where harmony rules supreme, the organizing force which underscores the hip hop/rap music tradition is rhythm. As with all of the core Black (African American) music traditions, rhythm is the most perceptible thing. Rhythm has long been recognized as a focal constituent of African music and its American descendants — slave songs, spirituals, hymnals, blues, gospel, rhythm and blues, soul, and rock 'n' roll. In the hip hop/rap tradition, rhythm also serves as what I call the "vibe of timing", the feeling of an established pace. Contrary to this, in the Western classical tradition rhythm is employed inasmuch as it helps in the pursuit of precision, "order", and linear progression. But in the hip hop/rap tradition, rhythm (and then melody and harmony) is always used to help in the pursuit of capturing the groove,[36] the locked-in rhythm section, the natural feel, pulse, and main rhythmic moments where the rapper rhymes. This is because in hip hop/rap music, the development of the groove takes major precedent.

Although there are "rules" for harmony, there are no rules for rhythm.[37] And rhythm in the hip hop/rap and beatmaking traditions completely lends itself to the lyrical style, syntax, and syncopation of rapping, hip hop's native form of vocalization — the 2nd dimension of the hip hop/rap music tradition. Actually, it should be understood that in the hip hop/rap tradition, the more harmony and melody, the looser the rhythm, the weaker

[36] The **groove** is the sense, feel, and sound manifested through rhythm and created by the rhythm section: the drums, bass, and rhythm guitars, etc.

[37] Christopher Small, *Music, Society, Education: An Examination of the Function of Music in Western, Eastern and African Cultures With Its Impact on Society and Its Use in Education* (New York: Schirmer, 1977), 20. Small drives home the point that "harmony," in the post-renaissance musical tradition, is the "logical element par excellence," and that it's the "most systematically taught and most bound by rules." He further adds that "in teaching melody writing, instrumentation, rhythm, the teacher may give advice and criticism, but there are 'rules' only for harmony."

the repetition, and thus, the less room and space, which leaves a smaller "groove" for the rapper (lyricist) to settle in on and key off of. Likewise, the *tighter* the rhythm, the stronger and more effective the repetition and, therefore, the more "room" and space and the larger the groove for syntax and the unique syncopation of rapping. In contrast, the more harmony and melody, the less space for vocal style, syntax, and syncopation. Essentially, this also means that the more harmony and melody are added to a beat, the less space or room for extensive rapping styles. This is because the more harmony and melody that a piece of music has, the more rhythm is overshadowed and relegated to a secondary role. And in hip hop/rap music, rhythm is always primary, it's *never* secondary. As I previously discussed, hip hop/rap music emanates from the use of the break — the rhythm at its rawest point — and *not* from the use of harmonies and melodies of songs. Even when harmony and melody are used in hip hop/rap music, it has always been typically percussive in nature. For example, in hip hop/rap music, it's not unusual for bass lines to be used as the only form of melody. Also, in hip hop/rap music, harmony and melody are usually better suited for singing or rapping *simple* rhyme schemes and strategies.

Finally, it should also be noted that rhythm and repetition in all Black (African American) music traditions are not only a "priority", they're both a necessary and *beautiful* thing:

> "In black culture, repetition means that the thing circulates (exactly in the manner of any flow, including capital flows) there in an equilibrium. In European culture, repetition must be seen to not just circulation and flow, but accumulation and growth. **In black culture, the thing (the ritual, the dance, the beat) is 'there for you to pick up when you come back to get it.' If there is a goal (Zweck) in such a culture, it is always deferred; it continually 'cuts' back to the start, in the musical meaning of 'cut' as an abrupt, seemingly unmotivated break** (an accidental da capo) with a series already in progress and a willed return to a prior series. ***A culture based on the idea of the "cut" will always suffer in a society whose dominant idea is material progress ….*** The greater the insistence on **the pure beauty and value of repetition**, the greater the awareness must also be that **repetition takes place on a level not of musical development or progression."**[emphasis mine][38]

[38] Snead, 150.

BeatTip – Rhythm, Time Correct, and Natural Feel

It's important to remember that rhythm isn't merely a mathematical concept, it's a "time" concept; it deals with how musical elements move through time. When you attempt to narrow the scope of rhythm to simple mathematical principles, you actually subtract away from the natural essence of time in music. *Timing correct* is the mechanical correction of time. It "corrects" the value of timing that a beatmaker (producer) programs. But another way of looking at timing correct is that it disrupts (in some cases destroys) the natural — live — sense of timing by making time more *artificial* than it already is, thanks, of course, to the looping that takes place in the framework of a beat.

It's also necessary to note that when beatmakers (producers) make beats, we are essentially moving between artificial and natural (live) realms. Still, the more artificiality we incorporate into our beats, the more likely they are to sound mechanical, stiff, stuck, or just plain lifeless. On the other hand, the more naturalness that we are able to incorporate into our beats, the more likely they will have a "real" feeling to them (more "vibe"). Hence, hi-hats (and other percussive elements) are ideal for incorporating a more natural feel and rhythm to our drum patterns and our beats overall. Therefore, the fewer corrective measures you take with hi-hat programming, the better the chance that you'll retain some naturalness and vibe in your beats.

But naturalness aside, beatamkers (producers) are also known for deliberately making things sound *unnatural* — again, if it sounds good, then it works in hip hop/rap music. Deliberate disruptions, whether made by manipulating drum sounds via time correct or some other method, are part of a standard set of techniques in hip hop beatmaking.

Melody and Harmony in the Hip Hop/Rap Music Tradition

Despite the increasing use of melody in recent years, melody has not played the same major role in the hip hop/rap music tradition as rhythm has. Hip hop/rap music does not use or rely on melody in the same way that other popular music forms do. Rather than feature or build the musical framework *around* melody, in the hip hop/rap music tradition, melody is often used to support and/or accentuate the rhythm of a beat. Also, in the hip hop/rap tradition, sounds of less than two notes in length can indeed have purpose (e.g., 808, chimes, sound-stabs, etc.). And unlike in the Western classical tradition, hip hop/rap motives do not necessarily have to lead somewhere, i.e. to other melodies, nor do they necessarily have to link to the next motive (if there is one) in order to ensure that the beat (piece of music) flows well.

Also, the rupture (abrupt cuts) of musical phrases of various lengths is common in the hip hop/rap music tradition, especially considering the pivotal role that the loop plays in every hip hop/rap beat. Because of this, hip hop/rap songs often exhibit varying types of melodic contours that are not always consistent with other music forms. For instance, melody lines in hip hop/rap music are often short and less developed, not because of a beatmaker's (producer's) inability to develop the sense or range of a melody, but because the longer (larger) the melody line, the more rhythm gets overshadowed. When this occurs, a beat moves away from the quintessential hip hop/rap form, and it goes towards other music forms, presumably with some hip hop/rap *flavor* underneath it.

There are, however, some parallels that can be drawn between the principles of melody in the Western classical and hip hop/rap music traditions. For instance, the term "change" or "changes" in beatmaking translates well to "motif " or "motives." Also, where the Western classical tradition typically features constant melody shifts, the hip hop/rap tradition commonly features "phrase shifts," or rather well-developed changes. And just like motives are used in the Western classical tradition to form larger melodic lines and

various movements, in the hip hop/rap tradition, changes are used to create what is commonly known as "switch-ups," "build-ups" (crescendos), and bridges. Also, "heterophony", the "shadow" or "echo" effect created when two or more voices simultaneously perform *variations* of the same melodic material, is akin to the process of "stacking" in the hip hop/rap music tradition, where melody lines are shadowed with additional instrumentation and varying timbre, usually strings, synths, and/or bass.

As for harmony, well, for starters, the hip hop/rap tradition recognizes two separate meanings for harmony: (1) The use of simultaneous pitches or chords — the traditional meaning in music; and (2) The combination of sounds considered "pleasing" to the ear. In the traditional sense of harmony, there are some parallels between the Western classical and hip hop/rap music traditions. First, chromatic harmony is a common feature of the synthetic-sounds-based style. Here, chromatic harmonies (scales of ascending or descending pitches proceeding by semitones) are used within the basically diatonic (major scale) coloring. Second, consonance and dissonance — musical terms describing whether combinations of notes sound "good" together or "stable" or not, or rather "pleasant" or "harsh" — is not necessarily in-line with the Western classical tradition's view. In hip hop/rap music, consonance is relative to the aesthetic values and priorities of the tradition itself, which for the most part, favor rough, rugged, raw, and harsh tones. In other words, what is often harmonically "stable" in hip hop/rap music is considered to be "unstable" in the Western classical tradition. The fact that harshness is often embraced in hip hop/rap is one of the key distinctions between the Western classical and hip hop/rap music traditions.

If I had to translate hip hop/rap's relationship to dissonance, I would say that dissonant phrases play a fundamental role in many beats. In the Western classical tradition, unstable tone combinations, which are said to be harsh, are used to express (themes of) pain, grief, and conflict.[39] However, in the Western classical tradition,

[39] For an interesting look at dissonance in the African American (Black) music tradition, particularly a discussion of "blue notes" in blues music, see Cornel West's segment in Astra Taylor's documentary, *Examined Life*, 2009.

unstable tone combinations have to be *resolved*. This is not so in the hip hop/rap music tradition, where the focus on dissonance does not necessarily have to be resolved, and where breaks and loops, by their nature, do not resolve but instead repeat. It must also be remembered that Western classical music is centered on a "wholeness" and a "*new* completeness" that reinforces the European (Western) perspective of history and time: linear progression. In contrast, the Black (African American) music tradition (and West African music tradition more broadly) is centered on a "returning *newness*," that is, repetition, which reinforces the African perspective of history and time: cyclical progression.

In the hip hop/rap tradition the second meaning of harmony isn't merely a matter of aurality but of philosophy. That is to say, like many concepts in hip-hop/rap music, harmony, in this other sense of the word, is ultimately concerned with the end results and not necessarily the means to them. In beatmaking, whatever sounds good together — no matter what the actual sounds are or whatever beatmaking compositional style is used — is what matters the most. In other words, whatever works to make it sound good together is the key; there are no rules of abstract knowledge to follow. In this way, the hip hop/rap music tradition is less restrictive about harmony because it doesn't necessarily have to subscribe to any system and/or rule about harmony to achieve harmony. Here, the concept of harmony mostly refers to cohesion and agreement, as it's understood under the aesthetics, values, and priorities of the hip hop/rap form and sound. It doesn't refer to a strict scheme of tones that logically fit together. In the hip hop/rap music and beatmaking traditions, there's no tonal litmus test that must be passed; if it works, it works! Moreover, in the hip hop/rap music tradition, the second meaning of harmony really serves to denote feeling more than a "correct" sound equation.

The Assumptions of Consonance and Dissonance

Music theory supposes that there are limits to what the human ear will find pleasant or harsh, desirable or undesirable — whether a combination of notes sound good or bad, appealing or not. But *whose* human ear are we talking about? All humans do not find the same sounds or arrangement of sounds "desirable" or appealing. Western music theory is powered by the presumption that the human ear has limits; logically, this is accounted for through the relationship of consonance and dissonance and tonality. But what's desirable or undesirable is not so cut and dry. Even if we accept the logical assumptions of music theory, what happens when one group of humans finds something pleasing to the ear that another group finds undesirable? Further, what happens if the music theory of one group is not quite the same as *Western* music theory? Is the prior group of humans wrong? In fact, what we're really talking about is not just music theory but *taste*, and taste is hierarchical. Western music places those music forms that privilege Western ideas about harmony, melody, and rhythm at the top of this hierarchy. In this paradigm, hip hop/rap has historically been placed at the bottom of the totem pole precisely because it was not (is not) pleasing to the human ears that controlled (control) coverage of hip hop/rap music in the media. Even while the popularity of hip hop/rap music has grown, the residue of this bias — the legacy of Western presumptions about consonance, dissonance, and tonality — remains.

BeatTip – Regarding Tonal Progression in Hip Hop/Rap Music

I strongly recommend that all traditionally trained musicians really get to know the hip hop/rap music and beatmaking traditions first, before exploring ways for incorporating traditional practices such as tonal progression methods. Many traditionally trained musicians who become beatmakers (producers) often attempt to do two things that are actually contrary to the tenets of hip hop/

rap music — things that often lead to the creation of hip hop/rap-*like* beats at best, or just plain wack beats at worst. First, many traditionally trained musicians try to apply methods of tonal progression to hip hop/rap music — irrespective of the fact that hip hop/rap has its own notions of form and harmony; irrespective of the fact that hip hop/rap beats are predicated upon rhythm; irrespective of the fact that hip hop/rap emanates from the use of breaks in a *looped* strategy. Second, many traditionally trained musicians carry out such musical exploration with little to no concern for, nor aim to preserve, the cultural flavor, nuance, and other crucial idioms of hip hop/rap music.

Still, methods of tonal progression can be applied to *certain* forms and styles of hip hop/rap music. In some cases, I even encourage that sort of exploration. However, I do not favor applying — forcefully no less — methods of tonal progression when such methods are used to displace, supplant, and/or usurp the fundamental parameters that gave rise to, and still maintains, the hip hop/rap music tradition.

Texture in The Hip Hop/Rap Music Tradition

In the area of texture, there are some parallels in the Western classical and hip hop/rap music traditions. Specifically, the concept of "simultaneity" is fundamental in hip hop/rap music. Typical hip hop/rap beats have at least two different textures going at the same time. For instance, in hip hop/rap music, "the drums", i.e. the entire drum framework or pattern, comprise one musical texture and rhythm, while the "non-drums", i.e. rhythm riffs, tone-stabs, ruptured chords, short melodies, and/or other musical phrases, form other complete musical textures and rhythms. Also, the way in which the "recapitulation" in the Western classical tradition is comprised of variations of the subjects and motives that appear in the exposition, structures in hip hop/rap music (particularly drum frameworks) are similarly created by adding variations or "changes" to the frameworks and patterns and other musical phrases introduced within the first 4, 8, or 16 bars of a beat.

However, the hip hop/rap music tradition is not necessarily engaged in the process of establishing elaborate expositions and extensive recapitulations. This is because there's no premium placed on creating extensively (overly) dense sound textures. In the hip hop/rap music tradition, beatmakers (producers) create sound walls for the purposes of rappers to rhyme over. These sound walls, regardless of the number of musical layers, can never be too dense as to clash with the syncopation and rhythm of a rapper's rhyme flow (stylistic vocalization). Also, these sound walls or beats are typically just three minutes long (usually never more than five minutes); therefore, a beat's typically short duration, as compared to the duration of a Western classical piece of music, and a beat's typical (fundamental) form, i.e. looped break-like textures, actually make beats less adept to the same type of melody shifts and various movements in a typical Western classical piece of music.

Form or Structure in the Hip Hop/Rap Music Tradition

Before analyzing form and structure in the hip hop/rap music tradition, it's first necessary to spend a few words on the notion of "conversion" in the hip hop/rap music and beatmaking traditions. Like hip hop culture in general, hip hop/rap music is predicated upon conversion. Nothing starts out as hip hop/ rap music. Instead, beatmakers (producers) *convert* pre-existing recorded sounds *into* hip hop/rap form.[40] A music form, you will recall, that is driven by rhythm, repetition, and an upfront, syncopated drum beat, which is fused together into a tight "sound montage" that is then looped for a pre-determined number of bars (measures).

There's no permanent source of hip hop/rap "notes", there's no "blue note" equivalent waiting to be arranged to spec. For beatmakers (producers) in the hip hop/rap music tradition, any pre-recorded or available sound — raw notes, electronic or acoustic included — can be modified to fit within the hip hop/rap aesthetic.

[40] The very compositional process of hip hop/rap music is transformative by nature — a crucial component of what makes something fair use.

Thus, in the hip hop/rap process of "conversion", any ingredient that works goes into the musical pot that ultimately manifests the general hip hop/rap form.

The general hip hop/rap form is predicated upon the use and creative manipulation of repetitious loops, fragmented sounds, sharp drums, and solid bass lines. Beatmaking is embodied by the use of fragmentation. And as the hip hop/rap music and beatmaking traditions further developed over the years, a series of structural patterns emerged. Many of these patterns have been streamlined and emulated to the point where they are now more like *structural clichés*.

Within the general hip hop/rap form, there are two basic forms, i.e. compositional structures and styles: sample-based and synthetic-sounds-based. Within each basic form there are distinct forms or styles. For instance, the sample-based form can take on three varieties. First, the **simple sample-based form** describes a form of sampling in which a substantial portion of a recorded work is sampled and then imitated, with little to no significant transformation of the part that was sampled. Second, the **break-beat sample-based form**, which describes the form of sampling in which breaks and/or patches of recorded works are woven together in a fashion more akin to a hip hop/rap DJ blending and matching multiple segments of records. Third, the **intricate sample-based form**, the most sophisticated form of sampling, involves the deconstruction of the sampled work in a meticulous, intricate manner, followed by a unique arrangement of the substantially transformed sampled work.

There's also the synthetic-sounds-based (no-samples-featured) form, which also has several sub-forms. First, **the non-orchestral synthetic-sounds-based form,** which is a very basic music theme and/or an underdeveloped chord progression with sparse percussion. Second, the **semi-orchestral synthetic-sounds-based form**, which is a moderately developed, but effective and often catchy, musical theme. Often the theme that takes shape in this form is characterized by one or two pivotal changes, some level of sound-stacking, and usually one primary chord progression pattern. Third, the **orchestral**

or "epic" synthetic-sounds-based form, which is distinguished by well-developed musical themes that incorporate multiple chord progressions and melody lines, multiple changes and "build-ups."

Dynamics in The Hip Hop/Rap Music Tradition

Just as in the Western classical tradition, dynamic (volume and velocity) changes occur in hip hop/rap music composition as well, and for similar reasons. Namely, to affect the mood of a piece of music, to color the overall sound, and/ or to serve any number of structural possibilities. The big difference in the hip hop/rap music tradition is that dynamics are not regarded as being part of a highly instructive process (as is the case in the Western classical tradition), but rather a straight-forward process that depends on one's imagination and creative use of particular dynamic "functions" of a given EMPI.

Dynamics in the hip hop/rap music tradition work quite differently than in the Western classical tradition mainly because the way in which beatmakers (producers) change sounds from one dynamic level to the next is through the use of various "dynamics functions" (velocity, sustain, fade, chorus, filter, etc.) of EMPIs. In the Western classical tradition, the realization of a composer's dynamics instructions depends on the individual ability of each performer. By contrast, in the beatmaking tradition, the realization of a beatmaker's dynamics ideas is made through his or her knowledge and use of multiple dynamics functions within a given EMPI. For instance, in beatmaking, velocity is the term most associated with the manipulation of the volume of individual sounds during the initial composition process. All EMPIs have default velocity levels which can be adjusted, thereby giving beatmakers (producers) the ability to create sudden changes in sound and the overall sonic impression of a beat (piece of music).

It's also important to note that most words or phrases used in the Western classical tradition to indicate changes in dynamics have a corresponding "function" in the beatmaking tradition. For example, **al niente**, which means "to nothing" or "fade to silence",

and **calando**, which means "becoming smaller", are dynamic effects that are achieved in the beatmaking tradition through the modification of the "sustain" function on most EMPIs. Similarly, **da niente**, which means "from nothing, out of silence," and **perdeno** or **perdendosi**, which means "losing volume, fading into nothing, dying away," are dynamic techniques (styles, effects) that are achieved in the hip hop/rap tradition through the "fade," "sustain," and "chorus" functions of EMPIs. Finally, **marcato**, which means "stressed, pronounced," **sotto voce**, which means "soft, subtle," **crescendo** which means "becoming louder," and **decrescendo** or **diminuendo**, which means "becoming softer," are sound techniques (styles) that are easily achieved in the beatmaking tradition by using the velocity function of EMPIs. Also, **accents**, the increased volume of one particular note (sound) above the rest, can also be achieved through velocity function manipulation as well.

The "Lack of Music Theory Knowledge" Narrative is Wrong: Hip Hop Composition is A Conscious Choice, Not the Result of Non-Traditional Music Training

In recent years, there have been murmurs about the "lack of music theory knowledge" of some of the most well-known beatmaking pioneers. This argument has been lobbied into the hip hop/rap musical process debate as some sort of answer as to why many principles of music theory were not used in the hip hop/rap music and beatmaking traditions' developmental years. Here, I want to set the record straight.

By the time Marley Marl, DJ Premier, RZA, Pete Rock, Q-Tip, Dr. Dre, Prince Paul, Large Professor, DJ Toomp, and notable others garnered their first level of critical acclaim, there was already a well-defined approach to creating beats in hip hop/rap music. So the concept that hip hop beatmakers (producers) suffer from a "lack of music theory knowledge" is woefully inaccurate and, more importantly, irrelevant. All of the aforementioned beatmakers (producers) were extremely knowledgeable of *their* particular

music tradition and culture — the hip hop/rap music tradition and culture. This is all they actually *needed* to be knowledgeable of. Would you say that a Western classical composer's "lack of hip hop/rap knowledge" weakens his understanding of the Western classical tradition? Of course not, that's absurd. A Western classical composer is expected to be thorough in his own music tradition — the Western classical tradition. While knowledge of other music traditions might be helpful to Western classical composers, such knowledge is certainly not necessary for them to be successful within the Western classical tradition. But all Western classical composers must have a solid understanding of music theory. Likewise, beatmakers (producers) from the hip hop/rap music tradition must have a solid understanding of the fundamental aesthetics, concepts, practices, methods, presuppositions, and priorities of the hip hop/rap music tradition. Thus, to imply that beatmakers (producers) who lack a knowledge of music theory have a musical deficiency is bogus, misguided, elitist, and completely unmerited.

Another related point is the notion that none of the earliest pioneers of the hip hop/rap music tradition even knew how to play a traditional instrument. Not true. Many of those involved in the development of hip hop/rap music and beatmaking *did* play traditional instruments; and a majority of them also knew music theory, or were at least familiar with its basic tenets. Remember, from 1930 to 1970, New York City was one of the epicenters of music in the United States. Much of the top blues, jazz, rhythm and blues, soul, and certainly funk, was played in New York city during that time. Thus, for proper context on why or why not music theory is used, one must concede the fact that many of the first practitioners of hip hop/rap music were the children of traditional instrumentalists and musicians. And as we've learned in Part I of this study, the hip hop/rap music tradition was built upon the *conscious rejection* of more traditional compositional methods that typically rely on music theory.

Finally, I should note that herein lies the reason why so many traditional musicians have difficulty actually creating, dare I say, "authentic" hip hop/rap music: They approach hip hop/rap music

from the perspective of music theory. They try to think of hip hop/rap music first in terms of music theory and its principles. But hip hop/rap music is not meant to be thought of in this way, hip hop/rap music in not bound or made "better" by the context of music theory. Although I have tremendous respect for music theory (I use it whenever applicable), I also recognize that it's just one music theory out of many that exist throughout the world. As such, I don't consider music theory to be a grand musical converter that has ominous powers to conform any music that it touches into something greater. Intuitively, I think most hip hop beatmakers (producers) understand this. In any event, we must recognize that hip hop/rap music is an entirely different musical convention altogether precisely because it converts other music forms and musical elements *into* hip hop/rap music, and it can't be converted into something else (think live-instrumentation renditions like the Kennedy Center's hip hop treatments) quite the same way.

Sound and "Sounds" in the Hip Hop/Rap Music Tradition

The hip hop/rap music tradition's conception and use of sound differs than that of the Western classical tradition. For example, within the fundamental compositional methods of the hip hop/rap music and beatmaking traditions, there is a predilection for the use of pre-recorded and/or electronic–generated sounds. No such predilection exists in the Western classical tradition. But where hip hop/rap's conception and use of sound differs the most from the Western classical tradition's conception can be seen in the area of harmony. Hip hop beatmakers (producers) — hip hop/rap music *composers* — and Western classical composers are both concerned with the way in which individual sounds render collective audio composites. However, Western classical composers are more concerned with the "collectivity" of sounds, inasmuch as they are juxtaposed in harmonic relation. This is not the case in hip hop/rap music for several reasons.

As I've pointed out before, in the hip hop/rap music tradition, harmony isn't always about the combination of simultaneous musical notes formed into different chords. Instead, for beatmakers (producers) in the hip hop/rap music tradition, harmony is actually more about the *arrangement* of sounds, irrespective of the logic and rules of music theory. The point I'm making here is that the very practice of creating chords isn't as significant in the hip hop/rap form because hip hop/rap music is fundamentally predicated upon the use of pre-recorded (electronic) sounds and music, rather than the use of raw musical notes. In the hip hop/rap music and beatmaking traditions, individual components, i.e. sounds or instrument voices, are valued more for the unique audio results that they may produce *in conjunction* with or separately from other sounds. That is to say, beatmakers (producers) place a premium on the role and position an individual *sound* (not necessarily a *note*) will play in a collective audio imprint (i.e. sound wall). So when it comes to the question of sound(s), beatmaking is fundamentally about creating a unique collective timbre through the use of individual pre-recorded (electronic) sounds in arrangement styles that don't necessarily defer to the rules (abstract knowledge) of music theory. Still, I concede that the Western classical tradition is also similarly concerned with achieving a unique collective timbre, but the concern arrives from a different perspective, approach, and intention.

Sound Rendition and Timbre

The two types of recorded sounds that are most valued in beatmaking are: (1) Self-sampled sounds, in particular those sounds sampled from vinyl records; and (2) Stock or preset sounds, like the ones typically found in keyboards, sound modules, and music production software suites. Both stock sounds and sampled sounds change according to their source, i.e. vinyl record and/or EMPI. Raw musical notes never change; middle C is always middle C, it always sounds the same. However, how middle C is *rendered* (the audio representation of middle C via a given instrument) and the timbre of middle C changes dramatically, depending on the EMPI

(keyboard, synth, sound module, etc.) that produces it. This factor of sound rendition is paramount in beatmaking. Again, beatmakers (producers) are not driven or motivated by the logic behind linear progression or the rules of music theory in general. Beatmakers (producers) are fundamentally concerned with how something sounds, and the way in which specific tapestries of sounds make a collective audio composite. And thus, for beatmakers (producers), having "unique" sounds is critically important because the use of non-unique sounds is in many ways tantamount to "biting" , i.e. unmotivated, rampant "copy-catting" and duplication.

Sonic Properties

Hip hop/rap music is meant to be *felt* and heard; it's not meant to be *understood*, literally, through the prism of abstract knowledge. In the hip hop/rap music tradition, rhythms and sounds are chosen as much (if not more) for their impact as they are chosen for their unique sound. This is one reason that explains why the hip hap/rap music tradition often features bass lines and bass frequencies for melody. And from hip hop/rap music's inception, sonic *force* has always been a key aesthetic. Also, just as with all twentieth-century Black (African American) music traditions, the notion of capturing *feeling* within the music has always been a critical component of hip hop/rap music. Thus, for beatmakers (producers) in the hip hop/rap music tradition, the sonic properties of sounds, not notes, hold the most value. This is a key aesthetic that most traditionally trained musicians have a hard time grasping when they venture into the world of beatmaking.

The Art of Rapping, The 2nd Dimension of Hip Hop/Rap Music

Afro-American music is primarily a vocal music. –Eileen Southern

"Rhymes overflowin', gradually growin', everything is written in code so it can coin…cide…" –Rakim, from "Microphone Fiend"

There can be no serious discussion about the hip hop/rap music and beatmaking traditions without an analysis of the art of rapping. "Rap" or "rapping" is a unique form of vocalization that distinguishes the hip hop/rap music tradition from all other forms of vocal music. And although some of the vocal characteristics of rappers can be traced back to the Black (African American) traditions of "toasting," "signifying," and radio DJ raps, there are other factors (as we will see in this section) that help make rap the most percussive and rhythmic of all Black (African American) oral traditions. Finally, it must be pointed out that rapping, like the art of beatmaking, is yet another component that greatly sets apart the hip hop/rap music tradition from the Western classical tradition.

As I mentioned earlier in Chapter 2, the beatmaking tradition developed in part as a direct response to the development of more complex rhyme flows. The art of beatmaking grew, necessarily, as rap schemes, styles, and flows grew more advanced, more poetic, more syncopated, and more rhythmic. Also, rhyme verses gained a new level of density and grew longer in duration. Further, subject matter became more serious and varied. Such complex advancements in the art of rapping could no longer be adequately serviced by DJs backspinning breaks live or on cassette. Hence, the beatmaking tradition emerged as a means of both representing the DJs music-making role, and as a means to accommodate the new complexities of rapping.

The Fundamental Characteristics of Rapping

The art of rapping, which has a level of depth and complexity that rivals beatmaking, is an amalgamation of many different cultural components. It's a manifestation and extension of Black vernacular. It's a vocal style heavily grounded in Black (African American) dialect and street slang. It's an American "patois" done over music. Lastly, it's also a highly developed form of vocalization and poetry.

The poetics and musical metrics of rapping are unlike any other vocalization style in popular music. On one hand, rap's *verbal rhythm* bends, cuts, and reshapes combinations of standard languages with slang and other common language nuances, illuminating words with new phonetics and metaphorical meanings. On the other hand, rap's percussive sensibility and vocal attack and release projects a poetic dexterity that's both dense and astonishingly fluid.

The Mechanics of Rap: Improvisational Writing, Performance, Delivery, and Flow

Unlike typical songwriters/lyricists in modern popular music, rappers use far more words to fill up song stanzas, and they occupy a great deal of instrumental space and time on a common 4/4 measure. And in doing so, rappers also use a more rapid rotation of words in an improvisational style. This improvisational style allows rappers to respond to and accentuate the pulse of the beat (the instrumental), using vocal inflection, non-verbal sounds, and emotional tenor. In this way, rappers are charged with the job (goal) of writing more words per bar and more bars per stanza. Thus, in the art of rapping, each bar can either be its own story or serve as the basis upon which other storylines emerge. Moreover, these multiple words, lines, and bars are often connected (strung together) to accommodate one central lyrical theme — while at the same time they merge and mesh with the beat.

Finally, rapping also stands out because of the style and level of declamation that it requires. Rappers not only play off of the unique

timbre of their individual voice, they take great pride in developing their delivery, the unique personification and enunciation of their rhymes, and their flow — the rhetorical and rhythmic pace, pitch, tone, and volume of their rhyme performance. And it's through the creation and mastery of one's own unique delivery and flow that rappers are truly able to make a beat come alive. In this light, rappers are vocal virtuosos. Taken together with the mechanics of rapping, this is why there is no lyrical art form or vocal performance style in modern popular music that can be compared to it.

Rapping and Form – Dense Measures: More Words Per Measure

Rap lyrics, interchangeably referred to as *rhymes*, contain dramatically more words per measure than your typical song. Because of these dense measures, the writing/performance style of rapping relies heavily upon the ongoing recurrence of the beat. Below, consider part of the first verse to rapper Nas's song "Memory Lane (Sittin' In Da Park)" (1994) produced by DJ Premier:

> I rap for listeners, blunt heads, fly ladies and prisoners/
> Henessey holders and old school niggaz, then I be dissin' an/
> unofficial that smoke woolie thai/
> I dropped out of Cooley High,
> gassed up by a cokehead cutie pie/
> Jungle survivor,
> fuck who's the liver/
> My man put the battery in my back,
> a difference from Energizer/
> Sentence begins indented…
> with formality/
> My duration's infinite, moneywise or physiology/
> Poetry, that's a part of me, retardedly bop/
> I drop the ancient manifested hip-hop, straight off the block[41]

In the verse above, even without any accompanying music, you can read *and* hear the verbal rhythm it embodies. This verse presents a series of "cuts", "ruptures", and precise transitions that could only

[41] Nas, "Memory Lane (Sittin' In Da Park)," produced by DJ Premier; from the album *Illmatic* (Columbia Records, 1994). Transcription mine.

fit in a framework of rhythm and repetition. Such poetic dexterity could never fit (quite the same way) with linear progression or constant material growth (this is one reason why the loop of a beat is so essential in hip hop/rap music.) Thus, rappers — especially those who use the complex lyrical rhyme style — depend on points of return, or in other words, the start *restarting*. It's the rhythm, the repetition, and the cycle of the groove that allows for the nature of rap's orality to properly manifest itself.[42] Rappers respond to the rhythm and the repetition. And from the drums of a beat, they take their cue and internalize the proper tempo — rappers never rap to the set tempo of the beat, but instead to their own internal tempo that the beat's tempo inspires. Therefore, the weaker the rhythm, the less opportunity for a rapper to respond to it. So it must be understood that rappers *value* (and depend upon) the repetitive nature of the looping of a break. The loop returns the new starting point in strategic repetition, which supports and encourages the multiple starting points within rap rhyme stanzas. It's this response by the rapper to the rhythm and repetition that actually completes a song in the hip hop/rap music tradition.

That the loop itself is often composed from brief snippets (often de minimis in nature) speaks to the transformative nature of beats made from samples and the rhymes that are added to create new songs. Given the facts of hip hop/rap music's compositional processes and the impact that hip hop/rap has had on American culture (as well as global culture), this is clearly the type of "useful Art" that copyright aims to promote.

[42] "The growth of emotional force also serves to better connect the audience to the sonic world and communal feeling created in the context of repetition," quote from Guthrie P. Ramsey, Jr., *Race Music: Black Cultures From Bebop To Hip-Hop*, (Berkley, Los Angeles, and London: University of California Press, 2003), 129. "The repetition of a well-chosen rhythm continually affirms the power of the music by locking that rhythm…," quote from John Miller Chernoff, from *African Rhythm and African Sensibility: Aesthetics and Social Action in African Musical Idioms*, (Chicago and London: The University of Chicago Press, 1979), 111-12.

The Function of Hip Hop/Rap Music ("Gonna Make You Move")

> Above all, music in the African tradition is functional.
> –Eileen Southern

Since its inception, there have always been five fundamental functions or purposes of hip hop/rap music: (1) To make people *move* — dance and provide "party music;" (2) To entertain; (3) Inform and teach; (4) To serve as an "art music;" and (5) To provide a coping mechanism for some of the trials of daily life.

The original function or purpose of hip hop/rap music was to make people move, i.e. dance at parties. The proverbial "park jam" was a major cornerstone in the early development and spread of hip hop/rap music. And when the pioneering DJs moved from the parks (and rec rooms) and into to the clubs, the park jammers migrated with them. Thus, the park jam era subsided and gave way to the club era that still exists today. Fittingly, hip hop/rap clubs are still ruled by the DJ, who still has the essential task and purpose of "movin' the crowd."

Next, as hip hop/rap music developed, spread, and grew more complex, it also became a form of entertainment, a powerful means for teaching listeners (effectively providing listeners with an array of needed information), and a form of art music. In addition to providing the vibe for dance parties and social gatherings, songs in the hip hop/rap music tradition were (are) used as much to chronicle everyday life, give "street reports", and even decipher political information as they were (are) to serve as art music to be listened to and appreciated for their artistic merit.

But of all the functions and purposes that hip hop/rap music serves, perhaps the most critical one is the function of providing a "coping mechanism" for some of the trials of its listeners' daily lives. All of the independent music traditions within the broader Black (African American) music tradition, have always been primarily *function-based*. For instance, to enslaved Africans in America, music meant a cultural and kind of psychological survival;

it was a companion of sanity. The very presence of music allowed these enslaved Africans to hold out for hope, even in the face of incredible despair. Hence, music functioned as a means to deal with the daunting experiences of a tragic daily life. Fast forward to the twentieth-first century, and we still see a similar *function factor* in hip hop/rap music.

Throughout the 1970s and on up until the present day, hip hop/rap music has functioned in much the same way that it always has for oppressed Blacks and Latinos and other minorities. Of course, the conditions of slavery cannot be appropriately compared to the conditions of contemporary America; even the worst oppressed Blacks, Latinos, and other minorities do not live in the horrendous social and legal conditions and environments of slavery. Still, it's important to note that by today's living and social standards, many Blacks and Latinos and other minorities do indeed live through the rigors of other peculiar institutions such as poverty, institutional racism, unemployment, inadequate social services, de facto segregation, and disproportionately high unemployment, and the like.

Hence, while the hip hop/rap music tradition serves the five aforementioned functions for its primary constituents, there aren't many comparable functions that the Western classical tradition serves. Western classical music isn't meant for partying or dancing (at least not in the same sense as hip hop culture is). Furthermore, Western classical music isn't meant to make people *move* — dance — in the manner that hip hop/rap does. Also, Western classical music doesn't have the function of providing news and information in the way that hip hop/rap music does. Moreover, Western classical music isn't intended to serve as a coping mechanism for the harsh daily realities of its constituents daily lives. And although I concede that many of those who enjoy Western classical music may also find it therapeutic, I maintain that the function that Western classical tradition has most in common with the hip hop/rap music tradition is in the area of art music.

Compositional Ethic of the Hip Hop/Rap Music and Beatmaking Traditions

There are a number of core factors that distinguish the compositional ethic of the hip hop/rap music and beatmaking traditions. First, in the hip hop/rap music and beatmaking traditions, the use of electronic pre-recorded sounds (music and synthetic-based) is the fundamental apparatus (mechanism) through which music is made. Unlike the Western classical tradition, in the beatmaking tradition, beatmakers (producers) are not necessarily concerned with using raw musical notes; instead, they're focused on using unique electronic sounds to compose their musical ideas.

Next, we already know that in the Western classical tradition, the compositional ethic is grounded on the use of abstract knowledge with great emphasis on harmony and the concept of linear progression (material growth). By contrast, the compositional ethic of the hip hop/rap music and beatmaking traditions emanates from the use of electronic pre-recorded sounds (music and synthetic-based), with great emphasis on rhythm and repetition (cyclical progression). And in the concept of cyclical progression, the ultimate aim is not material growth, but instead, a willful return to a prior series of musical ideas.

Another core factor that distinguishes hip hop/rap music and beatmaking's compositional ethic can be seen in the area of structure. In hip hop/rap music, structure is not about grappling with the "pure physics of tone" or manifesting linear logic. Structure in the hip hop/rap music and beatmaking traditions is more about creating cuts and rupture in a way that emphasizes strong rhythmic and repetitive activity and powerful (overbearing) sonic impact. In the Western classical tradition, a "good" structure is one in which the music takes the listener on a musical journey, through a clear beginning, middle, and end. Fundamentally, in the hip hop/rap music tradition, the notion of a clear beginning, middle, or end is quite different. The origins of hip hop/rap music are predicated

upon the use of the break (a cut section of recorded music), overtly repeated for the rhythmic effect that repetition produces (cyclical rotation). So it's not that the notion of "taking a listener on a musical journey" isn't a priority in the hip hop/rap music tradition; it is. But the musical journey is made possible by an instrumental structure that is cyclical-based rather than linear-based. Further, in the hip hop/rap music tradition, the "journey" is also moved from the beginning, middle, and end by the rhymes of the rapper.

Drums, specifically, the creation of drum frameworks (drum programming), is another core factor of the compositional ethic of the hip hop/rap music and beatmaking traditions. In the hip hop/rap music tradition, the drums are fundamental to hip hop/rap's musical architecture; in fact, they play a paramount role in the overall compositional ethic of the hip hop/rap music tradition. This is in stark contrast to the Western classical tradition, where drums (think of a modern drum kit) are certainly not prioritized, mostly because they are said to have no *definite* pitch. Furthermore, it's well-understood that drums play a key role in the development of rhythm and groove; therefore, they actually necessitate the use of repetition. Finally, drums also offer a powerful, in-your-face sonic impression; a characteristic that's not a priority in the Western classical music tradition.

The "hip hop sensibility" is another core factor that distinguishes the compositional ethic of the hip hop/rap music and beatmaking traditions. The "hip hop sensibility" is a sensibility that highly values and prioritizes competition, individual style, syncretism, a "culture of sampling", transformation, and the transgression of musical rules. Also, the "hip hop/rap attitude", which is fundamental to the "hip hop sensibility", is an attitude that carries a straight-to-the-point music philosophy, an attitude that is decidedly anti-establishment, hyper competitive, in-your-face, and often confrontational. Though competition and individual style exist in some areas of the Western classical music tradition, it certainly doesn't engross the entire tradition in the way that competition and individual style underscores and engrosses the hip hop/rap music and beatmaking traditions. "Battles" (both rap and beat) are fundamental in the hip

hop/rap music and beatmaking traditions. Obviously, battles are not a characteristic of the Western classical tradition. And although the Western classical tradition does indeed host its own forms of competitions, these competitions are not a main part of the fabric that makes up and informs the compositional ethic of the Western classical tradition.

Finally, the hip hop/rap compositional ethic is also distinguished by the unique process and relationship that beatmakers (producers) and rappers find themselves in. Although beatmakers (producers) are concerned with conveying to listeners their musical ideas, they are equally focused (if not more) on forming their musical ideas into a beat, i.e. an instrumental layer, that will ultimately be used, first and foremost, to inspire a rapper to provide the rhyme (vocal layer) for it. This is certainly unlike the Western classical tradition, where composers are more often concerned with conveying to the listener his or her musical ideas. And although some composers in the Western classical tradition do provide music intended for vocals (for instance, the opera), they are not assigned with the fundamental charge of providing one half of the total dimension of an entire music tradition.

Key Differences Between the Western Classical and Hip Hop/Rap Music and Beatmaking Traditions

The hip hop/rap music tradition doesn't abandon music theory altogether; it can't because it necessarily uses some of the basic elements and language and vocabulary of music theory *within* its own compositional ethic. But the point here is that the hip hop/rap music tradition does not prescribe to, use, or have need for most of the rules about music that Western music theory governs. More importantly, the hip hop/rap music and beatmaking traditions do not subscribe to the core concepts, practices, principles, or priorities that drive the Western classical tradition — most notably, the hierarchy of harmony, melody, and rhythm, and the notion of linear progression (material growth). In the hip hop/rap music tradition, the hierarchy of the basic elements of music are reversed: Rhythm is dominant, melody is secondary, and harmony is the least important. And as I mentioned before, in the hip hop/rap music tradition, repetition (cyclical progression), not linear progression (material growth), is the guiding philosophy for time and space.

The "Hip Hop Sensibility"/"Hip Hop Attitude" Factor

Obviously, the Western classical tradition does not incorporate the "hip hop sensibility" nor does it rely on the "hip hop attitude" to manifest its musical ideas, presuppositions, and predispositions. And while the Western classical tradition can teach you about the principles, ideas, presuppositions, and predispositions of European culture in the seventeenth-, eighteenth-, nineteenth-, and early twentieth centuries, it can't teach you anything about the "hip hop sensibility" or the underlying "hip hop attitude". In other words, a better understanding of the Western classical tradition or music

theory, no matter how advanced, does not provide you with a greater understanding of the hip hop/rap music and beatmaking traditions.

"Logic" in Each Compositional Ethic

"Logic" is something that is always open to interpretation in music traditions. Any objective analysis of logic must recognize two important questions. First, *Whose* point of view of logic is being considered? Second, *in what context* is logic being considered? Logic that is based on the laws (properties and elements) of music theory is quite different than logic that is based on the idioms, tropes, properties, and principles of the hip hop/rap music tradition. Logic is certainly at work within the Western classical and the hip hop/rap music and beatmaking traditions; however, how logic is *interpreted* and *used* differs from tradition to tradition. In the Western classical tradition, the notion of logic is more literal and attached to Western rules about harmony and tonality. But in the hip hop/rap music tradition, the notion of logic is based on hip hop/rap's own aesthetic priorities. Moreover, logic in the hip hop/rap music and beatmaking traditions is rooted in a pragmatic approach: To beatmakers (producers), if it works, then it's *logical*, regardless if it makes literal sense or not.

Significance of the Written Score

The fact that beatmakers (producers) do not write their compositions down on sheet music doesn't disqualify them as composers. The arrangements (the sequences of consciously placed musical events) created in their EMPIs serve as their de facto sheet music. And the capture media that beatmakers (producers) record their beats in/to serves as their score. Taken in a creative and technical context, this is no different than a traditional composer inputting musical directions into a sheet-music computer application. Furthermore, the non-use of traditional compositional techniques also does not disqualify beatmakers (producers) as composers, especially in the most fundamental sense. Electronic

music production tools have made it possible for beatmakers (producers) and traditional composers to bypass using separate performers, which allows beatmakers (producers) to truly be both composer and performer simultaneously.

A Note about the Written Score and Sampling

Technically, you can notate a sample. But samples can't be captured by the notation system in the way Western classical music can. Sure, you can *replay* a sample, even using the same instruments that were used to create the source music and under the same recording conditions, but the *replay* isn't the sample; it doesn't carry the same sonic qualities or the same overall *feel*, and it cannot conjure up the same historical nuances of the original recording.

Function and Accessibility

Western classical music is primarily an art music; it's something on display where the listeners and onlookers do not, nor are they expected to, participate. The music of the Western classical tradition is typically something that is experienced apart from everyday life. In fact, the Western classical tradition really has no participatory function, other than the concert hall-going experience. And even within that setting, audiences do not *move* along with the music, nor do they echo (out loud) anything familiar to them. Instead, they are expected to remain silent, clapping (as is custom) only at the end of the symphony or opera.

By contrast, hip hop/rap music is both a function music *and* an art music. Hip hop/rap music, which is highly participatory in its functions, has several functions or purposes. It's original function is to make people dance as well as to serve as party music. Hip hop/rap music, like Western classical music, also functions as a form of entertainment. However, the difference here, again, is the level of involvement by listeners and patrons. And although hip hop/rap and Western classical music share a somewhat similar art music function, hip hop/rap music also serves as a powerful means

for teaching listeners and providing an array of information. The Western classical tradition has no such function and serves no such purpose, especially when you consider the fact that the works that are performed in front of audiences are from the tradition's greatest canonical works, which are centuries old in most cases. Finally, as I've pointed out in this chapter, hip hop/rap music provides a coping mechanism for some of the trials of its listeners' daily lives. Western classical music serves a parallel function in its listeners' lives, but certainly not to the extent of the hip hop/rap music tradition.

Here, it's also worth mentioning that the Western classical tradition does not have a *common-man* accessibility. To even begin to have the remote resemblance of a career in the Western classical tradition, one must have a solid grasp of the abstract knowledge of music theory, as well as be familiar with the canonical works of the Western classical tradition. By contrast, the common-man accessibility does exist with the hip hop/rap music and beatmaking traditions, which also prioritizes the value of study and knowledge of its canonical works.

Instrumentation and Vocalization in the Western Classical and the Hip Hop/Rap Music and Beatmaking Traditions

The fundamental purpose of hip hop/rap beats, in their native context, is not to remain as an instrumental, the "1st dimension" of hip hop/rap music. The purpose of a beat is to be paired with the lyrics of a rapper, the "2nd dimension" of hip hop/rap music. It's the bringing together of these two dimensions that makes the hip hop/rap music and beatmaking traditions whole.[43] By contrast, the Western classical tradition is a mostly instrumental tradition. And although opera is a part of the Western classical tradition, it doesn't play the same primary role that rapping does in the hip hop/rap music tradition.

[43] Today, there is an instrumental beat scene. But this is not what is commonly understood by the traditional hip hop/rap song.

Final Analysis of The Battle

The Western classical and hip hop/rap music traditions are both formidable traditions. Each tradition has its own systems and grand approaches, and each tradition has its own encompassing culture. But when it comes to a battle between the Western classical music tradition and the hip hop/rap music tradition, on hip hop/rap's and beatmaking's turf and terms, the Western classical music tradition gets burned!

The Western classical music tradition has music theory as its greatest compositional apparatus; the hip hop/rap music tradition counters with beatmaking as its greatest compositional system and achievement. And while music theory may be the more well-known, more complex, and presumably more advanced compositional devices, it can't convert the advanced or even most basic processes of beatmaking for its uses. However, the hip hop/rap music and beatmaking traditions can indeed convert and use much of music theory, *at will*, throughout its basic and advanced processes. Finally, while the Western classical tradition is completely and rigidly bound by the abstract knowledge of music theory, the hip hop/rap music tradition is not bound just by beatmaking. It is best translated and *enhanced* by the unique processes and nuances and pragmatic logic of beatmaking just as much as it is informed by the cultural metrics of the encompassing hip hop culture.

Furthermore, while the Western classical tradition has the opera as its chief form of vocalization, the hip hop/rap music tradition has rapping as its native form of vocal expression. But unlike opera, rapping is truly a "2nd dimension" that makes the entire hip hop/rap music tradition whole. Opera does not make the Western classical music tradition complete, but rapping does make the hip hop/rap music tradition complete. And although rapping represents its own separate sub-tradition within broader hip hop culture, it is widely considered to be indispensable to the hip hop/rap music tradition.

Finally, while the function of the Western classical tradition may be to serve as entertainment and an art music that prompts

listeners to literally *comprehend* a composer's musical instructions, the function of the hip hop/rap music tradition is not only to serve as an art music as well, but to inform, teach, serve as a coping mechanism, and, of course, to make people move and get up and dance. And, it must be remembered, listeners of the hip hop/rap music tradition need not "understand" the musical instructions of beatmakers (producers) to fully realize this function.

More Insight and Perspective That We Can Take Away from the Battle

The Usefulness of Music Theory in The Hip Hop/Rap Music and Beatmaking Traditions

Music theory doesn't necessarily unlock the creative potential of beatmaking and/or hip hop/rap music; again, you need not know Western music theory to excel at beatmaking in hip hop/rap music. And in fact, because of the additional set of rules that music theory applies to the beatmaking process, it often works to inhibit beatmaking. In many ways, applying some of the rules of music theory is like calling out cues and counts to a b-boy as he battles in a cipher. Stripped from the freedom of his tradition, he's led to focus on nailing cues rather than doing dope moves and catching wreck on the dance floor. As with b-boying (hip hop's original dance), the hip hop/rap music and beatmaking traditions prioritize *staying true* to the rules of its own tradition, while recognizing the freedom of exploration of those very rules at the same time. Therefore, it's with this understanding of the "rules/freedom duality" of hip hop culture that music theory can be used most effectively. In other words, there's nothing wrong with using music theory in beatmaking, so long as the essence of the hip hop/rap art form isn't compromised and/or diluted in the process.

Here, let's remember that the South Bronx Disaster[44] created a heightened level of urgency that was predicated upon daily survival. So it should come as no surprise that hip hop culture and hip hop/rap music have an underlying urgency to them. This urgency manifests itself in different ways in hip hop/rap music, but one notable way is that it outfits hip hop/rap and beatmaking with a straight-to-the-point musical philosophy. Such a philosophy tends to have little use for drawn out conceptions based on a rigid set of abstract knowledge.

Still, the fact remains: Music theory is one of the most magnificent systematic musical inventions in the world. So a working knowledge of music theory can be of great help to some beatmakers, particularly those who are interested in making the "pop-hop" sound. But a working knowledge or understanding of music theory is not critical to a beatmaker's (producer's) ability to make dope beats. The pursuit of beatmaking through the lens of music theory is actually a major detriment to those who aim to make hip hop beats in the most fundamental/traditional meaning of the entire art form. Again, hip hop/rap music is not reliant upon the laws of music theory in the way that the Western classical tradition is. Moreover, the displacement of the use of pre-recorded music — the core component that gave rise to, and is the fundamental definition and essence of, the hip hop/rap musical form — is not some modern example of the "evolution" of hip hop/ rap music. It is something separate and different altogether.

Finally, because some rules of music theory are actually used within the hip hop/rap music tradition, an understanding of the basics of music theory is helpful. The advantages of having even the most remote understanding of music theory are plentiful. For one thing, it undoubtedly helps with the scope of arrangements, which will in turn increases one's overall production capabilities. Also, an understanding of music theory helps beatmakers (producers) learn how to "play things out more", instead of only sampling. (Of course, not that there's anything wrong with sampling.) And perhaps

[44] The South Bronx Disaster is the term I use describe the collective factors that turned the South Bronx into the worst urban disaster in American history. Hip hop culture was born out of these conditions.

the biggest advantage of possessing *some* knowledge of the basics of music theory is the fact that it helps with the recognition and analysis of structures and patterns in existing music works outside of the hip hop/rap music tradition. This is key because the more that a beatmaker (producer) is able to identify common music structures and patterns, the more effective he will be in determining how to convert them into hip hop/rap form.

Compositional Ethic and the Eight Periods of the Beatmaking Tradition

There have been a number of developments that have occurred throughout the past forty years of the beatmaking tradition, but perhaps none have been as interesting and more responsible for the state (good or bad) of beatmaking than the development of what I call the "pusher/resister compositional dialogue". What I mean by the "compositional dialogue" is that there are essentially two compositional sentiments that now underscore the hip hop/rap music and beatmaking traditions. One compositional sentiment can be best described as the "push" by some beatmakers (producers) for conformity. That is to say, the push to use more traditional compositional schemes that are *outside* of the hip hop/rap music and beatmaking traditions. The other compositional sentiment is best described as the "resistance" to conformity, i.e. the resistance to use more traditional compositional schemes that are *outside* of the hip hop/rap music and beatmaking traditions.

The push for conformity in beatmaking has resulted in beats that feature melody and harmony in much more prominent roles than rhythm and groove, two musical elements that are prominent in the hip hop/rap music and beatmaking traditions. Those who push for conformity have widely attempted to create beats that are more in line with other popular genres of music rather than beats that speak to the fundamental tenets and priorities of the hip hop/rap music and beatmaking traditions. On the other end of this spectrum, those who resist conformity have consciously attempted to create beats that rely prevalently on the use of compositional schemes that

are well within the hip hop/rap music and beatmaking traditions, which means a reliance on rhythm and groove in the fundamental manner that hip hop/rap music was characterized, especially prior to the Post-Pioneers Beatmaking Period.

To be certain, there have been questionable choices made on both sides of this compositional dialogue. On the "push" side of this conversation, there has been far too much movement away from what actually distinguishes hip hop/rap from other music forms. And on the "resistance" side of this dialogue, there has been, at times, too little openness to the benefits of compositional exploration and experimentation. Debating which compositional sentiment is better or worse for beatmakers (producers) is a useless endeavor, mostly because of the realities that come into play when a *sub*-subculture like beatmaking moves into the mainstream.

If we look at the way in which the compositional ethic of beatmaking was governed over the past 40 years, we can see that this governance fundamentally comes down to either the use or non-use of some form of the break (the loop) as the guiding compositional process for beatmakers (producers). And we already know there's no dispute in the matter of the break: The use of the break is the core compositional tenet that the hip hop/rap music and beatmaking traditions were founded upon. By its definition and how it was used by the earliest DJs (beatmakers), the use of the break emphasized the importance and priority of rhythm and groove. It didn't place any emphasis on the use of harmony and/or melody, tropes fundamental to American popular music traditions *outside* of hip hop/rap. This compositional ethic of beatmaking governed supreme for approximately 15 years, or as long as hip hop/rap music remained a subculture and not a major part of American mainstream culture. But although the break is a core compositional tenet of the hip hop/rap music and beatmaking traditions, it can't be forgotten that once hip hop/rap music hit the mainstream, it was inevitable that the compositional ethic would expand for two reasons. First, mainstream access warrants it. Second, the addition of different cultural influences assures it.

An objective look at the mainstream reveals that what constitutes "mainstream" is almost never anti-establishment and/or particularly cutting edge. But anti-establishment and cutting edge are exactly what hip hop/rap music was in its initial state and what hip hop/rap music remains in its fundamental form. Moreover, the mainstream of American popular music is mostly *safe*. That is, it's not risky; it's designed to appeal to the greatest common denominator. And when it comes to the musical tastes of the listeners who make up the greatest common denominator, these are mostly people who are persuaded by and more familiar with tunes and songs that are in a more traditional song form and style, i.e., inclusive of a definitive melody and definitive harmony. Likewise, the listeners who comprise the greatest common denominator are not expected to be persuaded by and certainly not familiar with or in favor of the "non-traditional" priorities and processes of a non-traditional music form like hip hop/rap music, or for that matter, beatmaking, its chief compositional process. Therefore, as hip hop/rap music became a major part of the fabric of the American mainstream, many beatmakers (producers) saw conformity (once something considered to be a terribly bad thing in hip hop/rap music) not only a means to success but also as a means to *separating* themselves from the beatmaking pack.

Furthermore, as the hip hop/rap music and beatmaking traditions spread, more people inevitably joined in the dialogue of its development. And as hip hop/rap and beatmaking garnered more attention, each new person who entered into both traditions brought along with them the presuppositions of their own personal background. Their age, their ethnicity, their cultural and socio-economic background, and, of course, their city, region, and state of origin all factored into what they brought to the dialogue. Each one of the factors in one's personal background collectively defines one's *sensibilities* about the creative compositional practices and processes they ultimately choose to rely upon. More importantly, it is these sensibilities that also serve to inform how each person chooses to interpret the roots of the hip hop/rap music and beatmaking traditions.

Parting Shots: The Soul and Essence of the Hip Hop/Rap Music Tradition

Regardless of what side of the music theory or sampling issue you're on, there can be little debate as to whether or not the majority of contemporary hip hop/rap music offerings lack much of the "soul" and essence of the original, fundamental tradition.[45] There are a number of combined factors that have contributed to this, notably the over-commercialization of hip hop/rap music and the attempted *illegalization* of sampling. However, I consider the single biggest contributing factor to be the emergence of a negative slant towards the art of sampling and the subsequent widespread move away from sampling — the use of fragments of old recordings — as a major part of the compositional process of hip hop/rap.

It bears repeating that the architects and pioneers of the hip hop/rap music tradition had access to traditional instruments, some were even as talented on the drums, keyboard, and guitar as they were on two turntables and a mixer or a sampler and a drum machine. The architects and pioneers did not separate their talents with traditional instruments from their talents with non-traditional ones. Instead, like the pioneers of b-boying — who did not separate their "power moves" and acrobatics from the rest of their b-boy repertoire (or the dance form on a whole), the architects and pioneers of beatmaking maintained all of their talents as one collective skill-set. But today, the true essence of beatmaking (and hip hop/rap music in general) is often overshadowed by an overabundance of, and reliance on, live instrumentation (i.e. no sampling) as well as concepts and methods that are clearly contrary to the essence of the hip hop/rap music tradition.

This is by no means an attack on such concepts and methods outside of hip hop/rap; truth is, live instrumentation has often played some (minimal) role in beatmaking, be it a keyboard

[45] The majority of hip hop/rap music between 2005 and 2015 is best characterized as brilliant examples of what I call "popularism" songs, songs that have a decidedly "pop" slant rather than a "rap" slant. Hence, my earlier "pop-hop" description of this new hip hop/rap-based genre. However, between 2016 and 2023, there has been a new sampling renaissance.

harmony fill, a live bass line, or perhaps even a live drums program. That said, this presents a rather simple question. If the fundamental tropes, aesthetics, predilections, principles, and priorities of the hip hop/rap music tradition are neutralized, ignored, and ultimately *replaced* by those of another tradition, is not the resulting music something "other" than hip hop/rap music? Fortunately because of the new sampling renaissance, hip hop/rap music is still in good hands and won't be replaced anytime soon. But I do foresee a new grand genre *based-on* hip hop/rap music emerging in the future.

Although I embrace, and in some cases encourage, the intermixing of musical genres, I also recognize that "intermixing" hip hop/rap with other musical forms is quite different than *converting* other musical forms *into* hip hop/rap music. The reality is that too much intermixing of other musical influences (like contemporary pop-rock or pop-R&B or even Western classical) with hip hop/rap tends to dissolve hip hop/rap's structure, and ultimately dilutes, if not destroys, its fundamental identity. This doesn't mean that the "other", i.e. the hybrid results of intermixing, is better or worse. It's merely a recognition that an "other" *exists*. But classifying this hybrid "other" as hip hop/rap music is really a misrepresentation of the hip hop/rap music tradition. This is why, inevitably, a new name (genre) will have to emerge. It's the only way to distinguish the hybrid "other" from the original base essence of the hip hop/rap music tradition. And what name this new hybrid-based "other music" takes going forward is certainly open for discussion, but I'm convinced that neither "hip hop/rap" "hip hop" or "rap" can carry its weight any longer.

This is not the stance of a purist — I'm certainly not a purist. Nor am I concerned with or focused on to taking hip hop/rap music back to its so-called golden days. I like hip hop/rap music from the '70s, '80s, '90s, and the '00s. Moreover, as far as the "hit song"/to release ratio, I believe the '00s have produced far more, and from a larger number of different artists. Although there were undoubtedly some timeless works of art made during the '90s, it's not like everything created in that era was pure gold.

I also want to be clear that this isn't an attempt to quantify "good" or "bad" hip hop/rap music; nor is it a condemnation of the new or a boost of support for the old. My only goal (concern) is to present the facts that the history of the hip hop/rap music tradition overwhelmingly support. In other words, this is about recognizing and upholding what hip hop/rap music *is* in its fundamental essence and in accordance to what its chief architects and pioneers have consistently maintained that it is. It's also about how change inevitably happens within music traditions, or more specifically, how changes and new developments are reconciled with the core tenets of a given music tradition.

Although there may have been new techniques and styles incorporated into hip hop/rap's musical lexicon over the past decade, the *base* tradition itself can't be revised or redefined no more than can the blues be revised and redefined; or jazz be revised and redefined; or rhythm and blues be revised and redefined; or soul and funk be revised and redefined. And with regard to those other aforementioned well-defined music traditions, no one has dared to loft a generic (wholesale) misguided claim of "evolution" against them. Each of those music traditions — the blues, jazz, rhythm and blues, soul, and funk — are forever locked in *as is*. Whatever new flavor someone wants to add to them is perfectly fine and perhaps even encouraged, but it should be well understood that such an addition can never change or replace the base tradition itself. The facts that comprised the history of a music tradition, and the culture which produced it, can't be undone. Thus, no matter who attempts to add to it, the fundamentals of the hip hop/rap music tradition, like the Western classical tradition and music theory, are permanent.

No new group of musicians (no matter how well "trained" they are), nor any new legislation (no matter how much backing it has from the RIAA, or how recognized it may be within intellectual property circles), can revise or redefine the autonomous and socially codified musical tradition and culture that is the hip hop/rap music tradition. Likewise, no group or legislation can reorganize, neutralize, or otherwise discard the fundamental aesthetics, principles, and priorities of the hip hop/rap music tradition and culture.

However, it's also important to recognize that there's no way to restrict one music tradition and culture from influencing and/or serving as the basis for the creation of a *new* music tradition and culture. After all, the blues begot rhythm and blues, and the blues and rhythm and blues begot rock 'n' roll; and yet today, no reasonable person would refer to rock 'n' roll (especially as we now know it) as the blues, despite rock's actual musical kinship. Hence, a fixed musical tradition and culture can't be overhauled simply because new musicians discover it. Moreover, if the outer fringes of a well-codified music tradition and culture begins to move in a new direction, via the fusion of other music traditions and cultures, then that new direction deserves to and should be recognized and even celebrated as its own movement, as something new and distinguishable from the tradition(s) which spawned it.

This is why the oft-heard "hip hop has evolved" claim is consistently misapplied. The hip hop/rap music tradition has indeed evolved in a number of areas. For instance, in the area of the modern rhyme style; in the area of more meticulous sampling and more intricate production processes; in the area of an increased usage of technology; and, of course, in the area of pop culture exposure and commercialism. But what fundamentally defines the essence of the hip hop/rap music tradition has not evolved, it's the same. The only thing that has consistently changed is the waves of new practitioners who have migrated to the hip hop/rap music and beatmaking traditions.

The underlying fundamentals of the hip hop/rap music tradition and culture can't change. The only thing that can change is the people who migrate to the traditions and their subsequent interpretations of them. There are those who, with great care and patience, take the time to learn about the hip hop/rap and beatmaking art forms and cultures. In turn, they interpret the hip hop/rap music tradition in the way the art form and the culture was intended to be. Then, there are those who either haven't made enough effort to learn the art form properly, or lack the resources to do so; thus, they are unfamiliar with the root structure and nuance of beatmaking and hip hop culture in general. In this case,

it should be expected that they will not likely interpret the art form and culture in the way that it was intended. Therefore, when these alternative interpretations manifest themselves, in ways that are foreign to the hip hop/rap music and beatmaking traditions and cultures, what you have is not the wholesale "evolution" of the hip hop/rap and beatmaking traditions, but rather the makings of a *new* tradition and culture altogether.

What made — and still makes — hip hop/rap music and beatmaking so powerful (and alluring) is their level of non-conformity. Hence, the more practitioners of hip hop/rap music and beatmakers (producers) seek to conform to the "accepted norms" and concepts, methods, and structures of other musical forms rather than holding fast to hip hop/rap's and beatmaking's own nuances, the more hip hop/rap music and beatmaking actually lose their power, impact, and overall allure. But for whatever it's worth, I acknowledge the fact that, naturally, conformity to a dominant culture does present a broader appeal. But hip hop/rap music wasn't founded upon the idea of broad appeal or on the idea of being safe or pleasing to everyone. Hip hop/rap music was founded upon the idea of being hip on its own terms, not on the terms of outside musical or cultural forces. Here, I'm neither co-signing nor condemning whether a beatmaker (producer) stays close to the fundamental tropes and nuances of the hip hop/rap music tradition or not. I'm merely presenting the fact that this is a choice that each beatmaker (producer) ultimately makes. A choice, I should add, that determines whether or not a beatmaker (producer) is actually being guided by the hip hop/rap music tradition or another one.

Finally, one of the primary points that I've hoped to get across in this metaphorical battle between Grandmaster Flash and Mozart was that each music tradition and culture has its own ideology and distinct aesthetics, common elements and priorities, principles, presuppositions, and dispositions. Although one music tradition and culture may be compared to and contrasted with another, one music tradition and culture can't be appropriately judged by another, because in the final analysis, such judgment is, despite all attempts at objectivity and fairness, always one-sided. The hip hop/

rap music and beatmaking traditions and cultures can no more be *judged* (appropriately) by the Western classical music tradition and culture than can the Western classical music tradition and culture be judged (appropriately) by the Eastern classical music tradition and culture. Music traditions and cultures can only be judged (appropriately) by its constituents and the metrics of their own unique devices. Thus, while the metric for superior classical music may be based on the mastery of music theory (Western or Eastern), the metric for superior hip hop/rap music is based on the mastery of beatmaking and the execution of a dope beat and an ill rhyme.

Finally, we must not forget that EMPIs[46], not traditional instruments, lie at the heart hip hop/rap music tradition. In this regard, it's critical to note that beatmaking, and the machines and software programs that beatmakers (producers) use to create music, have proven two important things. First, that music-making is not the sole province of traditional musicians. Second, that beatmakers (producers), working only from beat machines and computers, can contribute to the continuum of ideas about rhythm, melody, and harmony. In the latter case, it's not merely that beatmakers (producers), whom I call the "common composers", are disruptive to traditional music practices, it's that beatmakers (producers) have become the *leaders* of new musical horizons that traditional musicians have been blocked from, due primarily to the limitations of human performance and traditional instruments. This is one strong example of the impact of hip hop theory on modern music.

[46] Electronic Music Production Instruments, including beat machines like the AKAI MPC and software programs like Ableton Live.

Chapter 4

Hook a Beat Up and Convert it Into Hip Hop Form

Composition, Programming, and Arrangement – Getting the Ingredients and Putting Them All Together

> "This is why we sample. We're borrowing from music that was already here, and just like Rakim said, we converted into hip hop form. Hip hop can take anything and just make an ill beat. It's just about who's constructing it and understanding the science of it and understanding how to listen to it."
> –DJ Premier[1]

[1] Amir Said interview with DJ Premier, *The BeatTips Manual: The Art of Beatmaking, The Hip Hop/Rap Music Tradition, and The Common Composer* (Superchamp Books, 2015).

The Best Way of Doing Things: How to Rise Up in the Skills Hierarchy

When you want to learn how to actually make music, the most important thing you can do is to draw from teachers who have learned the best way of doing things. This is especially the case when it comes to beatmaking, where lots of new beatmakers (producers) wander aimlessly in the dark for years. One benefit of the music student who starts out with a music teacher is that the teacher actually tells him the fundamentals. When the fundamentals are laid out for you, you don't have to scramble to learn them on your own. And learning the fundamentals means that you are really learning a *system*. And this is the key! Because once you learn the system, you can practice the system. Then eventually, you master the system, which permits you to incorporate your creativity, individuality, and sensibilities into making the music that corresponds to the style, sound, and aesthetic that appeals to you.

While figuring things out on your own is also a critical step in learning to make music, having a music teacher is always valuable, even for master musicians. (For example, while the great saxophonist John Coltrane was already playing in clubs in New York City in the mid-'40s, he studied with guitarist and composer Dennis Sandole well into the '50s.) The truth is, the higher and higher up in the skills hierarchy, there are going to be fewer and fewer things that will allow you to actually reach one step higher. This is where having a teacher is also helpful, because rising up in the skills hierarchy means that you must always add to your learning; it also means that you might have to relearn (even unlearn) some things.

I learned from many teachers. That learning allowed me to accelerate my understanding and achieve my goals. Here, in this chapter, as with this entire study, I'm paying it forward as someone who has become a teacher. This chapter of *The Art of Sampling* not only provides the fundamentals of the art of beatmaking, and sample-based beatmaking more specifically, it gives you the systems to learn and master. This saves you time by accelerating your learning process.

When you know the history, all of the fundamental and advanced elements that comprise the compositional process of the art of sampling, you are well-equipped to come up with your own unique approach, the identifying spark that sets you apart. One reason I wrote *The Art of Samplng* was to help people avoid being a beatmaking clone. With critical context and nuance, there's an infinite number of directions you can go in. This chapter takes a close-up look at the fundamentals, standards, and advanced concepts of composition, programming, and arrangement in hip hop/rap music's beatmaking tradition.

Programming, Conducting, Performing, and Playing (In Beatmaking, It's All Interrelated)

Even though beatmaking is not a traditional live music medium, its core compositional processes are programmed (conducted) and performed (played) in real time. In beatmaking, every musical element is programmed/played *exactly* as it is designed by the individual beatmaker (or beatmaking collective). Every pattern, every event-strike of a sound within every sequence requires both programming and performance to be handled by the lone beatmaker (or a beatmaking collective). By contrast, in the more traditional music forms, the musical arrangements (either written or verbal musical instructions) are given to separate musicians. Having been giving their instructions, each musician fulfills the instructions that were assigned to them and their particular instrument. Within this traditional setting, the expectation of the conductor or bandleader is that each musician will play (to the best of their ability) each prescribed note, on time and in complete accordance to the proscribed arrangement, all the way through to the end of the song. In the traditional live music medium setting, there is a lot of room left for chance; everything from unique improvisation to poor musical timing to shaky musicianship can occur.

On the other hand, in the compositional processes of beatmaking, not much (if anything) is ever left to chance. Every

component of a beat is programmed and sequenced exactly as each beatmaker (producer) intends it to be. Once the beat is conceived, composed, structured, and programmed, it's locked in as is. If a beatmaker (producer) programs the beat to have changes occur on the 16th bar, there will be no concerns about whether or not the changes on the 16th bar are going to come in correctly and on time. In beatmaking, all of the musical elements have already been programmed, so the changes will occur exactly in accordance with whatever the beatmaker (producer) programmed. This does not mean that improvisation does not occur at any time during the beatmaking process. Even though composition in beatmaking relies on the programming process, the compositional process is still very much a matter of capturing the creative moment.

Improvisation in beatmaking typically occurs at two primary moments: Once during the structural conception of the beat, and then once again after the beat has been created and additional changes are added. But in either case, the final result will still be an electronic program. In this way, beatmakers (producers) *give musical instructions* to their EMPIs, not live instrumentalists.[2] And unlike traditional instrumentalists, EMPIs play their instructions exactly as they were programmed. This means that in beatmaking, *all* music-makers are not only musicians, they're also *programmers*. This is a crucial distinction from traditional musicians that continues to have a tremendous impact on modern music.

Composition, Programming, and Arrangement

In its simplest understanding, composition, in the beatmaking tradition, refers to the process of creating and coming up with sounds (ingredients) and the ideas for using them. The compositional process in beatmaking has no need for, is not predicated upon, nor does it necessarily rely on a *written* composition (as is the

[2] A number of beatmakers (producers) often bring in live instrumentalists to play over their beats. Even still, this instrumentation will only occur where the beatmaker (producer) instructs or allows it to occur.

case in the classical music tradition).[3] Instead, composition in beatmaking involves the process of developing components and pieces of music that are then combined, arranged, and built into separate *blocks* of music that are then joined together to form one whole musical work. It is through this creation of separate music blocks, sequenced together using hardware or software sequencers, that the character of composition in beatmaking is most realized. Further, in hip hop's beatmaking tradition, the overall aim and essence of the compositional process is to come up with a break (loop) — the musical anomaly that the earliest hip hop DJ pioneers found on records, and then cut, mixed, and blended together into new compositions. In this vein, not only are beatmakers (producers) doing the job of the earliest hip hop DJ pioneers, they are also doing the job previously reserved for traditional musicians.

Finally, in beatmaking, this aforementioned break (loop) is usually made up of 2 or 4 bars. This is particularly important to know, as it helps in determining how and where *changes* (motifs) can be applied in a beat. For instance, a 2-bar break (loop) doubled up is 4 bars. So the typical spot that an effective change can be inserted is somewhere near the middle or end of the 4th bar. Likewise, 4 bars doubled up is 8 total bars, and therefore, the typical spot that an effective change can be inserted is somewhere near the middle or end of the 8th bar. (These are not rules, but rather guides for common arrangement changes.)

Programming

In the beatmaking tradition, the compositional process is closely linked to the programming process. In fact, in beatmaking, the term "programming" can at times refer to several different processes all at once, it depends on the context. Programming can refer to the technical organization of the compositional components; it can refer to the *technical* organization of the arrangement components; or it can simply refer to the process of inputting technical instructions

[3] For a detailed comparison of some of the fundamental characteristics of the beatmaking and hip hop/ rap music traditions and the Western classical music tradition, see chapter 3.

to EMPIs, like the values for certain functions and the like. Drum programming, which is actually drum *composing*, specifically refers to the program (compositional) approaches that beatmakers (producers) take to create their drum frameworks (drum patterns). I like to divide drum programming (composing) into three different categories: simple, steady, or complex drum programming. "Simple" drum programming describes the composing approach that renders a bare minimum drum framework — drum patterns that essentially stay the same throughout all sequences of a song. "Steady" drum programming describes the composing approach that renders a drum framework that contains slight changes on alternating bars, perhaps an extra kick here or there, maybe an open hi-hat. "Complex" drum programming is a bit more involved; it describes the composing approach that renders a drum framework that contains more deliberate pattern changes on alternating bars. Complex drum programming may include two or more kicks, snares, and hats, and "double" or "triple" drums. Break downs, custom drum rolls, drum fills, and "stutters" are also common characteristics of complex drum programming. Likewise, a more involved percussion scheme, like the inclusion of a timpani, chimes, bongos, and such are also great examples of complex drum programming.

Finally, if composition is the process of developing components and pieces that form music blocks, and if programming is best described as either the technical organization of the compositional components or the process of inputting technical instructions to EMPIs, then arrangement is the process of creatively organizing those components, pieces, and subsequent music blocks into a conscious thematic order. In simpler terms, arrangement in beatmaking refers to the approach that beatmakers (producers) take when arranging the elements of their beats. This involves the use of different techniques in basic structure, for example, 2-bar, 4-bar, 8-bar, and 16-bar schemes. It also involves the use of different techniques within arrangement themes and within the sectional structures that make up songs, i.e., simple, steady, or complex transitional developments, and the schemes that make up

the verse, intro, hook (chorus), and the build-up (bridge) sections. In the following section, I examine just how the composition, programming, and arrangement processes manifest themselves in the three main approaches (compositional styles) of beatmaking.

The Three Compositional Styles of Beatmaking

Before examining the three main compositional styles of beatmaking, there are two factors that must be addressed. First, it's important to remember that the beatmaking process stems from two general approaches to making hip hop/rap music: (1) DJing; and (2) live instrumentation "covers" of the main riffs and rhythms of popular funk, soul, and disco songs that were preferred and played by hip hop DJs. The second factor that must be addressed is the fundamental recipe for beatmaking and how it influences one's own personal style and sound identity. There are many different ways to make a beat, but all beatmakers (producers) essentially do the same thing: Combine non-drum sound arrangements with drum arrangements that serve as the backing beat. Together, these two arrangements of core music blocks formulate a solid rhythm and the beat is born. All beatmakers (producers), regardless of style, work from this fundamental recipe. And it's the way in which each beatmaker (producer) works from or expands upon this fundamental recipe that determines their own personal style and sound identity.

Sample-Based (Samples-Featured) Beatmaking – The High Art of Sampling

Sample-based beatmaking relies primarily on the use of samples of recorded sound. In its most common and fundamental case, these samples (snippets and segments) of riffs, melodies, or sound-stabs and sound-tones are sampled from vinyl records, but today, samples are also egularly accessed from CDs, .mp3 and .wav files, YouTube, and internet streams. Usually, beatmakers

(producers) who employ the sample-based compositional style try to remain close to the tradition of the second Golden Era of hip hop/rap music (1988-1994). The most noticeable characteristic of this compositional style is its timeless sound. Practitioners of this approach typically frown upon the misperceived laziness and the sometimes lack of commitment to the art of beatmaking that is often associated with the synthetic-sound compositional style, which in its most primitive form involves a low level of creative programming and arrangement. That said, the sample-based (samples-featured) approach certainly does allow room for useful melody phrases, additional percussion fills, etc.

Another important characteristic of the sample-based (samples featured) approach is that it trains most beatmakers (producers) in many of the methods that were initiated and mastered by beatmakers (producers) of the first two Golden Eras of hip hop/rap music. Beatmakers (producers) who rely on the sample-based compositional style are often masters at complex and unique sound customization techniques as well as the advanced tier of other processes like chopping and looping. Because of this, many sample-based beatmakers (producers) have the advantage of being able to create a sound that is, on the one hand, reminiscent to a past era, and on the other hand, in line with contemporary trends.

Advantages and Benefits of the Sample-Based Compositional Style

The sample-based compositional style offers numerous benefits, but there are three areas in which it gives beatmakers (producers) a clear advantage. First, this compositional style offers the fastest opportunity for setup mastery. Because the sampling process requires you to develop advanced chopping and arranging skills, you stand a better chance at really learning how to *flip* (creatively manipulate) sample source material, sampling methods and techniques, and the EMPIs within your setup.

Second, the sampling process teaches you an understanding of sounds and their relationship to each other — an understanding, I

should add, that is not interdependent upon the abstract knowledge of music theory. Whether the possession of a sound understanding of music theory is an advantage to a beatmaker (producer) or not isn't the point here, because frankly you don't have to have a theoretical knowledge of notes in order to be a successful sample-based beatmaker (producer). Sampling involves searching through pre-recorded source material for musical fragments that appeal to you. It doesn't involve the process of fashioning stagnated preset sounds and tones (notes) into an effective musical arrangement. On the contrary, within the sampling process, you are given the challenge of having to choose brief sections of sound-stabs and collages, based on two criteria: *Does it sound good to you, and does it fit within the hip hop/rap aesthetic*?

The third and perhaps most profound benefit of the sample-based compositional style is the fact that this approach helps you to actually teach yourself about note and pitch variations, tonal progressions, and sound frequency characteristics. Incidentally, this is why sample-based beatmakers (producers) are often very adept and creative whenever they move to the synthetic-sounds-based style. When most sample-based beatmakers (producers) study the basics of the music theory, they usually pick it up quickly, precisely because they've trained themselves to edit and arrange multiple notes and pitches prior to switching to the synthetic-sounds-based style.

Synthetic-Sounds-Based Beatmaking

The **synthetic-sounds-based** (no-samples-featured) compositional style of beatmaking relies primarily upon the use of keyboards or hardware or software sound modules (and the like) for coming up with sounds, rather than the use of samples (in the traditional sense). Unlike the sample-based (samples-featured) style, the synthetic-sounds style features non-samples — usually stock sounds from EMPIs — as the main sound-ingredients for a beat. Within the synthetic-sounds-based style of beatmaking, there are three separate forms: The non-orchestral, the semi-orchestral, and the orchestral or epic form.

The **non-orchestral** form of the synthetic-sounds-based compositional style is characterized by a very basic music theme (or lack thereof), a simple or underdeveloped chord progression, sparse percussion, and a general focus on a simple but often strong backing beat that prominently features 808 kick and hi-hat sounds. Examples of this form can be heard in Soulja Boy Tellem's song "Superman" (2007), and in many snap music selections. The **semi-orchestral** form is characterized by a moderately developed (but effective and often catchy) musical theme, one or two pivotal changes, some level of sound-stacking, and usually one primary chord progression pattern. Examples of this form can be heard in most Southern Bounce beats, which feature typical chord progressions, oft-copied steady chromatic harmony patterns, staccato string patterns, and heavily syncopated drum hits, especially often copied hi-hat patterns, snare and kick fills. The **orchestral** or **epic** form of the synthetic-sounds style (no-samples featured) is characterized by a well-developed musical theme, multiple chord progressions and melody patterns, multiple changes and "build-ups", an often very distinctive C section (chorus), and heavy "stacking" of sounds. Examples of this form can usually be heard in the more "crossover" hip hop/rap-pop type of offerings.

There are various techniques and approaches to the synthetic-sounds-based compositional style. For the non-orchestral form (the simplest form of the synthetic-sounds-based compositional style), there aren't many techniques to focus on other than the sort of techniques that can be learned from playing (programming) percussive elements and simple sound-stab strikes over a solid backing beat. However, for the semi-orchestral form, beatmakers (producers) would be well-advised to focus on chromatic harmony and melodic structures that don't override the theme and impact of the established backing beat. Because the semi-orchestral form is really the closest to the sample-based approach than the other synthetic-sounds-based forms, it tends to include an advanced level of syncopated arrangements that are designed to accentuate a strong back beat. Finally, for the orchestral form, beatmakers (producers) should take a close look at the ways in which chromatic

harmony is established alongside the development of more complex melodies and countermelodies and additional (separate) motives. It's worth noting that both the semi-orchestral and orchestral forms often utilize "build-ups" (specific structural changes, e.g. bridges) within their arrangements. Furthermore, the semi-orchestral and orchestral forms of the synthetic-sounds-based style are the beatmaking styles most commonly linked to the use of traditional "live instrumentation."

BeatTip – Anchor Technique: Melody

Although there are a number of beatmakers (producers) who have been traditionally trained in music theory, most beatmakers (producers) — who are typically autodidacts — devise their own techniques and methods for creating melodies. For me, such a technique was based on what I call the anchor melody.

I use the term "anchor melody" to refer to the main melody phrase or riff of a beat. Before I understood the basics of music theory or how melody worked in traditional Western music forms, I created anchor melodies by arranging a group of three or more successive tones into a pattern of my liking (usually more rhythmic than melodic), and in a manner that made my drum arrangements shine. Unable to actually play piano, I simply used two or three fingers to find a possible riff or melody. Having found that riff or melody, I established the first note within the phrase as the "anchor point" (or root) to which I returned, then I played the sequence of keys and/or pads correctly (as desired).

My process of the anchor melody technique was done mostly by sight rather than memorization. Simply put, I looked at the keys or pads that contained the sounds that I was working with and I played out the sequence of arrangements to the best of my untrained ability. Over time, I got better, and my memorization and finger positioning improved and I found that in order to make the anchor melody sound more complex, or to add an effective change, I could stack the anchor melody with additional phrases. Usually, I simply stacked the anchor melody with the same melodic

phrase, in the same key of course, but with a different sound. For example, I would use the timbre of a violin sound stacked over the timbre of a piano or guitar sound.[4]

BeatTip – "Play-'in'-Sample" Technique: Approaching Synthetic-Sounds-Based Beatmaking Through The Prism of Sampling

Another unique technique for effectively manifesting the synthetic-sounds-based compositional style is what I call the "play-'in'-sample" technique. This technique simply describes the process of playing out melodic or rhythmic phrases via a guitar, keyboard, MIDI controller, or a drum machine's pads, then sampling those phrases and assigning them to keys or drum pads and playing them as a sample, as opposed to playing them out as is, i.e. "live" — non recorded — notes. If you're going to employ this technique, it might be more advantageous to use vintage analog keyboards or sound modules, as they offer unique sound colors and other sonic qualities not present in contemporary EMPIs. But if this is not an option for you, then I recommend utilizing the vintage expansion cards or classic sound packs that are available for your hardware and software EMPIs.

Key Advantages and Benefits of The Synthetic-Sounds-Based Compositional Style

The synthetic-sounds-based compositional style certainly does have its advantages. First, it's the most accessible style for a beatmaker (producer); it offers a quick entry point into the world of beatmaking. Any person (without even an inclination of soul, funk, or heavy rhythm-based musics) interested in beatmaking can immediately begin using the synthetic-sounds-based compositional style, especially the non-orchestral form.

[4] To hear an example of the sound achievable using this method, check out Ice Cube's "Why Me" featuring Soulchild.

Second, the synthetic-sounds-based style doesn't require a beatmaker (producer) to spend countless hours digging for and studying source music material to sample; it also doesn't require a beatmaker (producer) to spend more countless hours meticulously learning the most advanced chopping and looping techniques.[5] Because of this, it offers a beatmaker (producer) a broader range of musical directions to choose from. But then again, some sample-based beatmakers (producers) could easily argue that sampling opens a broad range of musical possibilities as well. I'd argue that possessing the ability to work effeciently in both styles is means to the broadest range of musical possibilities.

Third, software setups, which are very conducive to the synthetic-sounds-based style, are much less expensive than hardware setups. In recent years, the pro-consumer recording and audio market has seen an explosion of reasonably priced software programs designed for electronic music production. This alone has accounted for a sizeable increase in the sheer number of beatmakers (producers) in recent years. Finally, when it comes to arrangements, the synthetic-sounds-based style offers more opportunity for additional changes, bridges, switch-ups, and build-ups all on the fly.

Check This Out – A Note About the Popularity of the Synthetic-Sounds-Based Style

The synthetic-sounds-based style didn't emerge from a new found fervor of creative intensity. The popularity of the synthetic-sounds-based style was actually due to two key factors. First, for many former sample-based beatmakers (producers), shifting to the synthetic-sounds-based style was a reaction to the increased scrutiny on the use of samples, sample clearance issues, and the "misperceived" processes of sampling itself. Second, the pro-consumer recording and audio market saw an explosion of reasonably priced software programs designed for electronic music production, a fact that has

[5] Sample-based beatmakers (producers) consider this to be in line with the most fundamental processes of the beatmaking and hip hop/rap traditions.

significantly accounted for a sizeable increase in the sheer number of beatmakers (producers) over the past 12 years. Because of this, the entry point of the synthetic-sounds-based style became the most accessible (easily learned) compositional style for beatmakers (producers), especially *new* beatmakers (producers). *Alternatively, in more recent years, there has been an explosion of software programs and EMPIs specifically designed for sampling.*

The increased use of the synthetic-sounds-based compositional style does not represent "evolution" within the beatmaking or hip hop/rap music traditions, as some commentators have maintained. There is absolutely nothing *evolutionary* about the use of keyboards, synthesizers, or sound modules in hip hop/rap music. Moreover, there is nothing evolutionary about composing R&B or rock arrangements with some rap lyrics over the top. Prior to 1979, there were no professional (commercial) recordings of hip hop/rap music. Up until that time, hip hop/rap music was only available on cassette tapes that were sold and shared in the streets of the South Bronx and other areas throughout the five boroughs of New York City. So before 1979, the use of live instrumentation — a precursor to the synthetic-sounds-based compositional style — was not a compositional component used by the first architects of hip hop/rap music. The use of live instrumentation in hip hop/rap music, which didn't began until 1979, was the chief style used by the *imitators* of hip hop/rap music. The imitators, who were immediately recognized as such at the time, were not considered to be authentic by the early architects of hip hop. One great example: The studio session musicians like the Sugar Hill Records house band, who did *re-plays* of the breaks of songs that hip hop/rap DJs cut and blended together.

In 1979, the year that "Rapper's Delight" was released, the people who created the instrumentals for hip hop/rap music were actually not DJs or even people in the hip hop/rap community. They were all session musicians and members of the house bands of the first labels to exploit hip hop/rap music as a commercial product. These traditional musicians, who, again, were not DJs, had little to no real contact with the authentic hip hop movement and

culture of the South Bronx, let alone any real inclination of what hip hop/rap music really was, or what hip hop culture represented. Instead, under the guise and mass-market inspired direction of the likes of labelhead Sylvia Robinson, these musicians created their own rendition or *interpretation* of hip hop/rap music by replaying, mimicking, and altering, the most well known breaks and rhythms of the records that were made popular by hip hop's earliest DJ pioneers.

In time, those house-band instrumentalists began creating compositions without taking a cue the era's hip hop DJs, a development that, right or wrong, helped to broaden the beatmaking tradition. By 1982/1983, this development had helped to usher in a new party-synth sound that was not only a departure from the authentic essence of hip hop/rap music, it was a stretch from the hip hop/rap knock-offs that the house band instrumentalists had previously created.[6]

The Differences Between Creating Beats Using The Sample-Based and Synthetic-Sounds-Based Compositional Styles

When it comes to the sample-based compositional style, originality depends on how well a beatmaker (producer) can reference, reconstruct, and more importantly, ***rearrange and reapply***, the source material that they sample. Whereas with the synthetic-sounds-based style, it's more about how well a beatmaker (producer) can rearrange a set of manageable, more isolated sound tones. With the synthetic-sounds-based style, the recreation factor that's associated with the sample-based style is mostly non-existent because beatmakers (producers) choose separate notes, rather than samples to be used as notes. And the samples that most sample-based

[6] This party-synth sound and development is thematically parallel to the synthetic-sounds-based trend. The trap and drill styles and sounds, which are, thematically speaking, extensions of the party-synth sound, remain closer to the fundamental tropes of hip hop beatmaking as they include out-front drum patterns with notable syncopation, and they also often include a blend of the sample-based style and sound.

beatmakers (producers) use often contain multiple notes and sounds that can't be removed — whatever's in the source material, stays in the source material. Therefore, like a sculptor, a sample-based beatmaker (producer) can only chop and add to a sample. They can't, however, extract the locked-in elements that comprise the sample as is (*at least that's how it was before AI*). This is a factor that further distinguishes the sample-based and synthetic-sounds-based compositional styles from each other.

Plus, the underscoring fact is that notes are always the same: Middle C is always *Middle C*; A Minor is always *A Minor*. Beatmakers (producers) who employ the synthetic-sounds-based approach know beforehand what each note (key) sounds like, or at least they have some inclination of the basic characteristics of tone and pitch and how these characteristics manifest themselves across a keyboard or set of chromatic drum pads. This choice gives synthetic-sounds-based beatmakers (produceers) a considerable amount of control. On the other hand, however, no sample is ever really the exact same. For instance, most beatmakers (producers), like other composers, "hear" arrangements in their head. So, in the case of the sample-based compositional style, the main challenge then becomes translating those arrangements into an effective, quality sounding program and ultimately a dope beat.

With sampled material, a beatmaker (producer) has to bend and re-shape and reorganize an original recording in a manner that matches up with the arrangement that they envision. On the other hand, a synthetic-sounds-based beatmaker (producer) is presented with a different — but not necessarily more difficult — challenge. Instead of re-shaping and reorganizing sampled source material, their challenge is to organize (not re-organize) a preset group of sounds (notes) into an arrangement that they too have envisioned. But despite the fundamental differences in the sample-based and synthetic-sounds-styles, within each form there are less difficult, minimal or non-creative approaches as well as more difficult, extensive or highly creative approaches.

Hybrid Approach: The Sample-Based and Synthetic-Sounds-Based Styles Combined

The hybrid compositional style is a cross between the sample-based and synthetic-sounds-based styles. Beatmakers (producers) who employ the hybrid approach are not stubbornly focused on using record samples exclusively, nor are they completely interdependent upon the use of synthetic-sounds (and the accompanying methods) as well. The hybrid approach is the most ambitious and often the most rewarding of the three main compositional styles of beatmaking.

The central aim of the hybrid approach is to create musical arrangements that utilize the most effective blend of both samples and synthetic sounds. In some cases, practitioners of this approach will create beats that only feature samples; then again, in some cases they'll create beats that only feature synthetic-sounds. But in most cases, they tend to create beats using a unique combination of both samples and synthetic-sounds.

The hybrid approach is the most prominently used compositional style of beatmaking. On one hand, it clearly offers the most composition possibilities of the three main compositional styles. On the other hand, because it combines sampling with synthetic sounds, which is a contemporary force that can't be ignored, the hybrid approach presents itself as the most inclusive compositional style of beatmaking. Plus, the hybrid approach allows for more experimentation, which often leads to new ideas and trends.[7]

While the hybrid approach is the most widely used of the three compositional styles, it's also the one approach that carries the greatest risk of the "over-gear syndrome". The "over-gear syndrome" describes the phenomenon of beatmakers (producers) who tend to incorporate every piece of gear of their setup into every beat that they create. Generally speaking, the more gear that you have

[7] One unique thing about the hybrid approach is that it allows for the combination of opposing musicmaking methods that still fit the hip hop/rap form. One such case are beats that are both sparse and developed at the same time. A good example of this type of beat can be heard in 50 Cent's "If I Can't," produced by Dr. Dre and Mike Elizondo.

does not automatically mean the better your beatmaking will be. It's about beatmaking quality, not gear quantity. But far too often, beatmakers (especially newer beatmakers) add something to a beat that simply isn't needed. In some rare cases, this can be the result of maintaining an impractical perfection level, but in most cases it's because these beatmakers (producers) want to flex their setup muscle; that is to say, they want to use every piece of gear in their arsenal, just because they have it to use. When this occurs, the hybrid approach is always undermined.

Which Compositional Style Should You Choose?

Before answering this question, you must consider the fact that sampling is taking place within all three of these compositional styles. That said, the kind of beats and hip hop/rap music that you want to make will determine the methods that you use. That said, the compositional method that you choose should be the one that gives you the best opportunity to create the kind of beats and overall sound that you like. Still, as I pointed out earlier in this chapter, each compositional style does offer its own unique advantages and disadvantages. Therefore, before you choose or switch from one compositional style to another, consider both the benefits and disadvantages of that style.

The Nuts and Bolts of Composition, Programming, and Arrangement in Hip Hop/ Rap Music

Group Map Assignments Extended: Triggering Non-Drum Sounds Through Drum Machines, Keyboards, and Midi Controllers

"Triggering" sounds is simply the process of playing a pre-programmed sound, via a drum machine's pads or the keys from a keyboard or MIDI controller or computer keyboard keys. Whether you sample your own sounds, use preset sounds or a combination of both samples and preset sounds, the way in which you trigger those sounds is paramount to your workflow and personal beatmaking style. In order to successfully trigger your sounds, they must first be placed in an effective position; and by effective position I mean that your sounds have to be assigned to the pads or keys that work best for you and your compositional style. With regards to drum machine pads, it's important to note that the manufacturers of these machines (most notably Akai, E-Mu, and Roland) issue each individual pad a name, e.g. PERC, HIHAT, etc. However, it should be understood that you don't have to assign the drum sound to the pad name that denotes the sound that you want to assign. For instance, you don't have to assign a percussion sound to a pad marked PERC; you can assign any sound to any drum pad — *you should ultimately develop your own preference for which pads you want to use to trigger your sounds*.

But no matter how you do decide to assign your individual sounds, I strongly recommend that you assign your sounds into Group Map Assignments. A **Group Map Assignment**, hereafter referred to as GMA, is a way of organizing sound categories into groups and then assigning sounds to drum pads and/or keyboard/MIDI controller keys, according to those groups. For example, "main drums" can be a group, "bass sounds" can be a group, "main samples" can be a group, "percussion" can be a group, etc. Organizing your triggering method into a series of GMAs will streamline how and where your sounds are placed and triggered, and it will improve the efficiency of your workflow.

Determining Where to Assign Your Sounds

If you use an MPC of some sort or the Maschine, or any other Drum Machine/Sequencer that uses a similar 16-drum pad design, to sequence your music and gear, take a look at the image in Figure 10. Here's an example of how I map out particular sounds across the 16 pads of a given drum bank. I should note that all of my GMAs are also organized according to the different banks within my Akai MPC 4000 (and my Akai MPC One). For example, the image in Figure 10 is a screenshot of my GMA for bank A, my "main composition bank." My main composition bank contains an assortment of separate sound categories. However, I use subsequent banks for GMAs of the same sound category; for example, I use bank C as my "percussion bank," it's where I assign my most used percussion sounds.

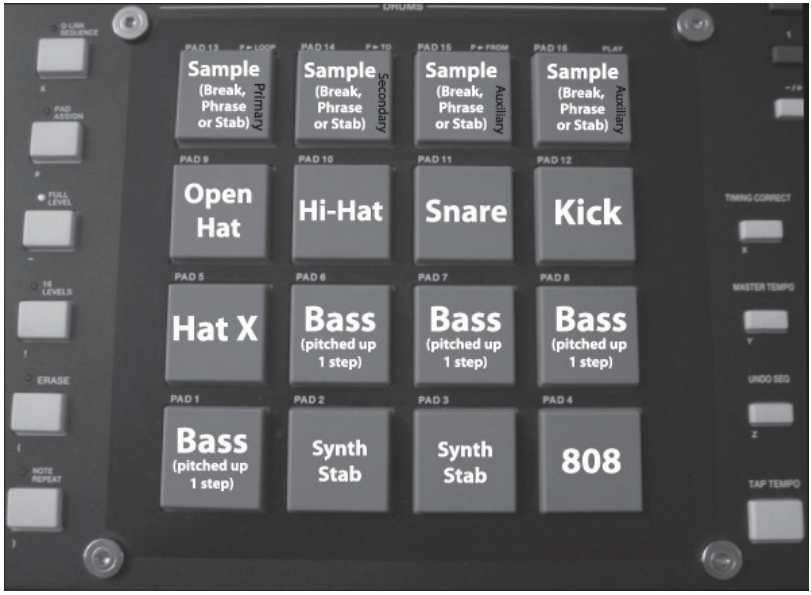


Figure 10 16-Pads of Main Composition Bank

Assigning Bass Sounds, Samples, and Other Non-Drum Music

If it could be said that hip hop/rap music gets its identity from the drums, then it perhaps might be said that it gets its character from the bass. Therefore, when it comes to assigning drum sounds, I recommend that you assign them one row below your main drums. Keeping your bass sounds close to your main drums, in this case one row below, is very helpful for when you're trying out new drum ideas (and beat ideas in general) because it helps you facilitate the arrangement of those ideas quite effectively. Also, although playing the bass on drum pads is certainly a lot different from playing your typical electronic bass guitar, the idea essentially comes down to the same thing: pitch progression. For samples, the notion of the rhythm section should be considered. And in keeping with the scope of the rhythm section in a band, I recommend assigning primary samples to the top row of four pads, just right above the drums. Finally, having assigned your main drums, bass sounds, and samples

to the first top three of four rows or drum pads, I recommend assigning synth stabs and/or percussion to the bottom row of pads.

Special Note About Sequencing

Before I go on with a more detailed discussion of the composing, programming, and arrangement processes in beatmaking, it's important to discuss the nomenclature that is associated with the term "sequencing". In beatmaking, the term "sequencing" actually refers to two separate things. One meaning of sequencing deals with the obvious: The sequencing (linking) of multiple EMPIs; it's the linking up of equipment through MIDI. Once linked up, sound generators (samplers, modules, etc.) redistribute their sounds through the main linking device, or better yet, the "master sequencer" within one's setup. In this meaning of the word, sequencing refers to the way that the pieces of your gear communicate with each other; each piece has its own say, but it's the master sequencer that has the final say. Therefore, the goal is to use a master sequencer that *talks* well with all of the gear in your setup. EMPIs use the same language to communicate with each other, via MIDI, but getting multiple pieces of gear to link in the manner that suits your workflow best is an entirely different dialect. For instance, the Akai S950 can be triggered by any Akai MPC as well as any keyboard workstation or controller; however, *how* each unit *links* with the Akai S950 (or any other stand-alone sampler for that matter) will vary.

The other (perhaps more prominent) meaning of sequencing deals with beat structure, i.e. the actual process of *programming* the structure and arrangement of a beat. Under this definition of sequencing, a "sequence" is the arranged and recorded program data within any measure. And simply put, a beat is composed of multiple sequences linked together.[8] Finally, though beatmakers (producers) vary in the amount of equipment that they utilize to create beats, nearly all beatmakers (producers) strive to sequence

[8] The use of the term "sequencing" in this manner was first popularized by beatmakers (producers) of the Pioneers/Avant-Garde Period of beatmaking, ca. 1988-1995.

everything through one sequencer. This is one of the reasons why MIDI is so important. It allows the sequences created in other EMPIs to be streamlined and *sequenced* (recorded) into one master sequencer. This is yet another example that demonstrates how a beatmaker (producer) is the composer, the arranger, the musician, *and* the programmer all at once.

Beat Structure: The Basic Components – The Sequence and the Loop

A beat is composed of a series of sequences. A sequence is a program of chronologically arranged events (steps) within a measure of at least one bar. A "loop", the cornerstone time structure of beatmaking, is the perpetual repetition of the same sequence or series of sequences. For instance, a 1-bar loop means that the sequence plays for one bar, having reached its end, it returns (loops back) to the beginning of the sequence and plays again. Likewise, a 2-bar loop means that the sequence and/or series of sequences plays for two bars, having reached its end, it returns to the start of the first bar of the first sequence and plays again.

The Main Ingredients of a Successful Loop

The success of a loop depends on a number of things but mainly: The chop (truncation) of the sound, the pitch of the sound, the tempo of the sequence, and the drum framework (pattern and design of the drum arrangement). The "chop" or truncation refers to how the main sound phrase(s), whether samples or synthetic sounds, are chopped. This is to say, how precise the chops (cuts and truncation) are or how purposefully *off* they are; another way of seeing it is how long or short the main sound phrases are.

The "pitch", in this case, refers to the pitch (speed) of the main sound phrases. Often the difference between a dope beat and a wack beat is the pitch of the primary sound phrase. Should you speed the sound up, slow it down, or leave it at the default pitch that

you captured it in? The tendency for most beatmakers (producers) these days is to speed the sound up. But remember, for every pitch value you go up or down, you affect how the sound will loop in a sequence, as well as how the sound will sound over the drum framework and, ultimately, how the entire beat will sound.

The "tempo" of the sequence is just that; it refers to the tempo, the BPM (Beats Per Minute) value of a sequence, series of sequences, or song. Tempo determines the speed of the sequence and, subsequently, the beat. A deeper examination of tempo reveals that it does more than just determine the speed of the beat; the tempo also determines what I call "the turnover rate" of the loop.

The turnover rate is the interval, the time and space, between the ending and beginning again of a sequence. The interval determines what I refer to as the "loop point", the audibly *dead* point right before the loop *turns over* to the next sequence. The slower the interval, the easier it is to hear the dead space — the loop point. Likewise, the faster the interval (and, subsequently, the faster the tempo), the harder it is to hear or recognize the dead space, which means the loop point is seamless, no glitches. Unless you want to feature the dead point or a space-glitch as a component of the beat that you're making, you should increase or decrease the tempo until the loop point is seamless and indiscernible. Finally, whenever you're deciding on which tempo to use, always remember: The right tempo can snap or slide the beat into place; the wrong tempo can drag the beat or crack it out of place, making the drum framework sound awkward.

Here, it's important to point out that "drum framework" refers to the pattern and design of the drum arrangement. When designing a drum framework, keep in mind that drum designs that are too active always disrupt the loop, if not the entire beat for that matter; and on the other hand, drums that lack the right kind/level of activity (accents and overall structure) can really *drag* or *drain* the flow of the loop. The right drum framework is critical in beatmaking because the role of the drums is paramount in within a beat. This is because in the hip hop/rap music tradition, the drums are often called upon to maintain various responsibilities simultaneously.

In all cases, the drums have to steady the beat, i.e. keep it running smoothly. And in most cases, the drums also have to *knock* (maintain a hard-hitting rhythmic pressence) without overpowering the other musical elements within the beat. Still, in some other cases, the drums have to be balanced and subtle; that is, instead of taking a leading role, they take a supporting role.

BeatTip – A Note About Using Timestretch

At first glance, timestretch is really just BPM matching — matching the tempo of the drum framework with the non-drum music. But a closer look at timestretch reveals the genius of it. Timestretch changes the length of a sound (sample) *without* changing its pitch. Hence, it permits you to mesh together multiple pieces of music that contain slightly off-setting beat patterns; it smooths out the kinks and awkward "clicks". Moreover, it connects music phrases, and it makes audio patterns and textures that otherwise would clash sound as if they're one tight musical composition.

Beat Structure: Creating and Programming Sequences

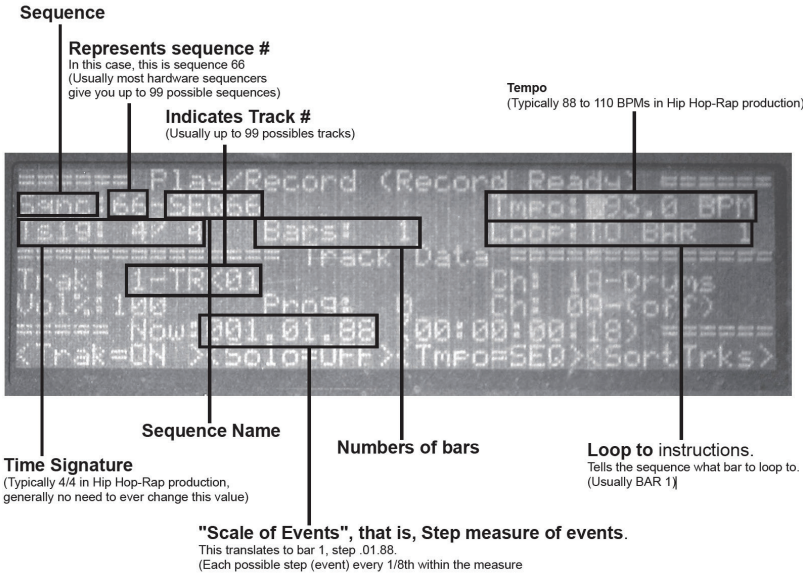


Figure 11 LCD of Main Screen, Akai MPC 60 II

As described earlier, a beat is composed of a series of sequences. A sequence is a *program* of chronological musical events (steps) within a measure of at least one bar. An "event" or "step" within a sequence is the point at which any programmed *action* takes place. The event serves to represent when and where a piece of specific musical *action* (instruction) takes place within a sequence. An event can be anything. It can be as simple as a kick-stab, it can be a sample of any length. A "track" is an individual channel in which an event(s) is recorded in/on. Most sequencers allow at least 99 separate tracks per sequence. Hence, all of your sounds (events) can be tracked within the same sequence on separate tracks. Which means that you can have your kick on track 1, your snare on track 2, your hi-hat on track 3, your bass on track 4, and so on and so forth. You can also assign sounds to the same track if you like.

For example, if you want to make your own drum break, you can assign all the drum sounds to the same track, then sample yourself.

There are two basic ways to create a brand new sequence and, subsequently, create and build a brand new beat. You can either start with the drums, or you can start with the non-drum music material. What I mean by *the non-drum music material* is samples, bass lines, melodic lines of synthetic-sounds, etc. Many beatmakers (producers) can start a beat either way, so it's really not an issue of which way is better or worse; how each beatmaker (producer) begins a new beat ultimately depends on them, their mood, their resources, and their level of commitment to creativity.

You can start beats off by creating drums from scratch (that is, an entirely new drum design and pattern), or you can use your own default (preset) patterns that you've created previously and stored away. But if you're going to create a new drum pattern from scratch, be aware that the new pattern will likely not be too different from any other drum pattern you've already created and/or will ever create. This is because many drum patterns share the same fundamental foundations. And it's also because there are standard drum pattern clichés in beatmaking that all beatmakers (producers) consciously and subconsciously know. Thus, all beatmakers (producers) create new drum patterns from these standard drum clichés.

The other option for starting new beats is to go with the non-drum music material, i.e. samples, bass lines, melodic synth lines, and the like. The idea here is to get the music into a sequence as soon as possible. Take a simple sample, for example, one bar in length. After I've assigned the sample to the pad that I will be triggering it from, I use the sample to create a new sequence in the sequencer of my Akai MPC 4000 or Akai MPC Ones. The simplest way to do this is to record (place) the sample on the first step of bar 1 within the sequence. I can just go to step edit, then place — record — the sample in. Next, I set a generic tempo, something like 93 BPM, then I play the sequence. As the sequence plays, I pay attention to how it loops. If there is a long pause (interval) between the ending of the sample and when the sequence loops over, then I know that the tempo is too slow. Likewise, if the sequence loops before

the sample plays out *to the predetermined length that I've chosen*, then I know that the tempo is too fast. (Remember, when you're looping something, you want to make the loop point seamless, and unnoticeable). Once the sample is looping (turning over) to my liking, without any glitches, then I can go in and add drums, percussion, bass lines, keys, and whatever else. And once I know the tempo of how the sample should loop, I can also go to some of my preset (premade) drum patterns and throw the sample in over the top of one of them.

Beat Structure: Song Form

All beatmakers (producers) are given the same seemingly impossible task: *make a loop not sound like it's looped!* Huh? Crazy, right? But the truth is, that's what it is. In this light, beatmakers (producers) are masters of the *misdirect*. We have to know how to misdirect the listener away from the otherwise or seemingly mundane boringness of the loop. But let's not forget that within the hip hop/rap music tradition, progression is based on and advanced by the concept of the loop, i.e. repetition. Even though a typical hip hop/rap song may have any number of progressions, the power of the loop is what dominates the song. Other music traditions like jazz and rock 'n' roll are not as emboldened to the loop concept as much as the hip hop/rap tradition.[9] Even though repetition plays an important role overall in those music traditions as well, there's a premium on adding and advancing as many new changes in the arrangement as effectively possible, so as to progress towards some sort of thematic climax. In the rock 'n' roll tradition, songs return to the core melody (or loop, if you will), but the changes are often so varied that it can't be considered loop-based in the same manner that hip hop/rap music is.[10] Hip hop/rap music is more about returning, that is to say, *returning to the core riff(s)/core grove and*

[9] The Western classical music tradition isn't beholden to the concept of the loop at all.
[10] There are certain forms of rock music that definitely lend favor to the loop-based medium of hip hop/ rap music. For a more thorough understanding of what I mean, check out the following: 1970s power rock, especially Led Zeppelin; 1970s punk, especially The Clash; 1980s British Ska, especially The English Beat and The Police.

rhythm, returning to the main loop(s). And because the hip hop/rap music tradition is based on cyclical progression (repetition) rather than linear progression (material growth), the arrangement of the musical elements is much more clear cut, but deceptively simple.

s

The So-Called "Rules" of Song Form

As with all twentieth-century Western popular music, the song structure of hip hop/rap music subscribes to a general system of well-defined musical **sections**. In beatmaking, a typical song is composed of two to five different types of well-defined (arranged) sections. Each section is comprised of a series of sequences that are linked together through a program. Once all sequences are linked together, they can be converted into song mode. The two most important sections are the **verse** and the **hook** (or the chorus in other popular music forms). The verse section refers to the primary section of the song; it's the instrumental section where the main rap verses (vocals) will ride over. As such it's the section that has the longest duration in a beat. The main purpose of the verse section is to *establish and work the point* of the song. It's like the starting pitcher in baseball, it's his job is to keep the winning momentum going just long enough for the hook — the closer — to come in and punctuate the main point of the song.

The **hook** (chorus) is the *secondary* section of the song; it's the instrumental section where the hook (chorus) vocals will ride over. Even though the hook is secondary in terms of the real-time duration of a song, the hook (chorus) is actually the *marquee* section because it's the section of the song that carries the most exclamation. This is why I like to call the hook (chorus) section the "pay-off section". Even though it doesn't play nearly as long as the verse section, it's often the section that stands out the most because it carries the hook vocals, the most memorable part of any song. The main purpose of the hook (chorus) section is to *reinforce and punctuate the main theme*, the main point of the song.

The other three types of musical sections that make up a song in beatmaking are the **intro**, the **build-up** or the **bridge** and the **outro**.

The **intro**, or what I sometimes like to call the "teaser section", is the lead-in section of a song. Its role is to establish the mood and to engage listeners by giving a sneak preview of the caliber of music that's about to proceed. So naturally in an arrangement, the intro is placed before the first verse section. The purpose of the intro is to draw listeners in, entice them and make them want to hear what's about to come next. An intro is also used for the initial ad lib vocals. I like to separate intros into two categories: either straight-ahead or counter. A straight-ahead intro is one that is made up of some of the same musical components (sequences/sounds) within the rest of the song. This can be the drum framework by itself, it can be the melody and the hi-hat riding, etc. On the other hand, a counter intro doesn't contain any of the components from the other sections of the song, it contains components (sequences/sounds) that won't be heard again in the rest of the song.

The **build-up/bridge** is a catalyst *change*. It's the section that plays between the verse and the hook (chorus). It's like the setup man in baseball, it relieves the starting pitcher, and at the same time, it sets up the hook (chorus). The bridge is unique, in that it can do two things to a beat. First, it can serve as an interesting intermission or break within the song. Second, it can serve as a crescendo or the last rising instrumental *statement*, signaling a climax or finale of a verse. The build-up (bridge) is often just an octave or pitch change of the verse melody or rhythm. And just like the intro, it can be counter; it can be an independent section that contains entirely new components (i.e. sequences, sounds).

The **outro** section (which isn't necessary) ties up the entire song. It's the section that advances the final ideas of a beatmaker (producer), the final touch, the finishing signature of a beatmaker (producer). It also serves as that extra instrumental time, without lyrics, that DJs appreciate for mix blends. The outro, just like the intro and bridge, can be straight-ahead or counter. Typically, the outro is an understated (stripped-down) version of the main verse section, but it can also be completely independent, containing components that are entirely new.

When you're arranging and organizing sequences, remember to be flexible with the final structure because until the beat is actually complete, every created sequence, and subsequent section, can be *rearranged*. This is why it's critical to know the different types of arranged sections, how they work, and their fundamental purposes. When you're creating a new beat, the entire arrangement is subject to change. For instance, the verse section can be reorganized to become the hook (chorus) section, or the intro section can become the verse. Embracing this reality gives you more freedom to take intuitive chances when you're building those sequences that will ultimately be linked together into the sections of the song.

From Sequence to Section

By default, the first sequence that you begin is your **core sequence**. From this sequence, you will most likely build the sequences that become the verse section. Most beatmakers (producers) do not start off making the hook (chorus) first. The hook is usually just the verse section, sprinkled with just enough minor changes to distinguish it as the hook. This is why it's those changes and modifications that you're able to make to that initial core sequence that enables you to really get creative with the beat.

Earlier in this section, I broke down how sequences are often created, starting with either drums or non-drum music material. Here, I'll discuss more in-depth how beats are made, more *technically* speaking, that is. The technical aspect of how beats are made can be described as: the composition of rhythm-based musical elements, followed by the process of recording these musical elements into sequences, followed by the process of linking these sequences together in preprogrammed arrangements.

And how are sequences "linked" together? The most common way that sequences are linked together is through the process of duplication, copying one complete sequence and attaching it to itself or combining it with another sequence. You can copy and link as many sequences as you want to. In fact, you can even make a beat from just a 1-bar sequence. All you have to do is convert

that 1-bar loop into a song; just copy the sequence to itself until you have the appropriate number of bars, equal to the length that you want the song to be. Once you've established a core sequence, the idea is to copy the sequence to itself so that you can increase the length. A 1-bar core sequence copied to itself becomes a 2-bar core sequence; a 2-bar **core sequence** copied to itself becomes a 4-bar core sequence.[11] The advantage of duplication in this way is that all events, especially the drum framework, remain intact even though the length of the measure has been increased. The more bars within your core sequence means the more opportunities to program in changes. Conversely, the shorter the number of bars within your core sequence, the less opportunities you have to insert changes. One bar *turns over* faster than two, and so on. Therefore, keep in mind that 1-bar loops also have the potential to restrict your programming and increase the probability of a simple loop; subsequently, it can increase the chance of the entire beat sounding stale or mundane.

Here, I should raise again the point that hip hop/rap music is not dependent upon linear progression but upon repetition and cyclical progression. Still, some beats that include a number of changes often come off *more pleasing* to a listening public conditioned to favor a more pop sound. On the other hand, rappers with major lyrical skills know how to incorporate their own verbal changes. They can get busy off of any track! But all skillful lyricists favor tracks with *stability*. That is to say, they tend to favor less noticeable changes, because the loop and repetition allows them to take advantage of a solid, continuous groove. Beats with too many changes often restrict a skillful rapper's verbal talents, forcing them to "dumb-down" their lyrical flow and subject matter.[12] Therefore, one general guide you might want to consider for yourself is this: For more lyrical rappers, keep the changes to a minimum; for all other rappers, it's O.K. to add more changes; actually, the more changes in beat, the more easily their lyrical *deficiencies* are masked.

[11] Most hip hop/rap songs are based on root 2-, 4-, and 8-bar loops.

[12] A great example of how a "steady beat" can inspire (provoke) complex lyricism can be heard in Fabolous' "Pachanga." Fabolous, a true lyricist, can "dumb down" his lyrics when he wants to; likewise, he can turn it up when given the right beat to do so.

BeatTip – The Genius of 1-Bar Core Sequences

Even though 1-bar sequences can be restrictive, as beats in and of themselves, establishing a 1-bar core sequence is one of the most fundamental ways to start a new beat. Point is, when I strike up a new core sequence, I already know beforehand that I will be duplicating the sequence either way it goes. So it's important for me to establish a basic core sequence that has a tight drum framework. Once I have a 1-bar sequence looping nicely, I copy it to itself, giving me two bars of a real tight drum framework. From out of these two bars, now I can take the beat anywhere. I can further build the verse section (the primary 2-bar sequences that I initially created from the 1-bar core sequence). I can build the hook (chorus), intro, the build-up (bridge), or outro sections; from this point I can do whatever. After I've auditioned several changes, I make another copy of that 2-bar sequence, then I leave the initial 2-bar sequence off to the side as my default idea to return to if I go too far from the feeling and idea that's driving the beat. Next, I move on, using the copy to sketch out any new ideas.

Song Structure

The bar structure of a typical hip hop/rap song breaks down like this:

- 8-bar intro
- 16-bar verse
- 8-bar hook (chorus)
- 16-bar verse
- 8-bar hook (chorus)
- 16-bar verse
- 8-bar hook (chorus)

Notice how the basis of this song structure is comprised of 8-bar increments. Looking at the above song structure, you can't tell how different one section is from the next, but by seeing the

mathematical relationship of the exact number of bars used for each section, you can infer that some sequences were duplicated to create others. Here's another example of a possible song structure:

- 8-bar intro
- 16-bar verse
- 8-bar chorus
- 8-bar verse
- 8-bar bridge
- 8-bar chorus
- 12-bar verse
- 8-bar outro

By making some common modifications to the above song structure, you're able to add more variety to the basic beat. In the second song structure example, notice the changes that I inserted. One of the most difficult concepts for both new and advanced beatmakers (producers) to understand is the relationship between the measure of a sequence and timing. Think of the measure of a sequence as being a timeline of clearly defined, highly detailed events that, once programmed, automatically repeat when the end of the time line (i.e. the total number of bars) is reached.

BeatTip – Section Contrast

A "section contrast" is the term that I use to describe an arrangement scheme in which two or more sections in a beat that are not predicated upon one another (based on most of the same elements) are moving in a similar direction and feel. One of the best things about a section contrast is the fact that when they're done right, they appropriately add variety as well as a strong sense of tension and release. This in turn makes both the hook and verse sections of the song much more climatic, which ultimately keeps the interest of the listener.

BeatTip – Knowing the Right Tempo and Bar Structure for Samples

Most twentieth-century American popular music is predicated upon on 4/4 time, which means it has 4 beats per measure (four "beats" per bar). It doesn't matter if there is any percussion to be heard, because any four-count will give you one complete bar in this time signature. Moreover, most beatmakers (producers) tend to build beats using either 2-bar, 4-bar, 8-bar, 12-bar, or 16-bar sequences (basically, some multiple of 2); but *which* numbered bar structure depends on the length of the sample(s) being used. One way to determine the right tempo and bar-count for a sample(s) is to simply determine the length (duration) of the sample(s). What you do is, listen to the sample and run off a 4-bar count by snapping your fingers as if they were a metronome. If the sample(s) is a short phrase or riff, snap faster, if it's a longer complete phrase, snap slower.

An easier way to determine the right tempo and bar-count for a sample(s) is to record the sample(s) into a sequence and set the tempo to something like 89 or 92 BPM. Next, press play and let the sequence progress all the way through. Adjust the tempo as needed so that you can hear the complete sample(s) from beginning to end without the end of it being cut off before it loops. After having played it completely through, when it loops back, without any exaggerated interval, then you've got the right tempo.

Of course with today's software you find the tempo of the sample automatically. But I'm less convinced of finding the right feel and tempo automating the process. I trust nodding my head to the beat more.

BeatTip – Note About Building the Hook (Chorus) Section

Many beatmakers (producers) often neutralize the bang (overall quality impact) in their beats by adding elements that simply do not belong in them. This typically happens when beatmakers

(producers) make the hook (chorus) section of a track. When I'm working on a beat using the synthetic-sounds-based compositional style, I try to build out everything in the beginning. However, when I'm using the samples-based style, my main concern is to establish the rhythm that bangs the most. In this case, finding a change for the hook is a second thought, depending on how tight the primary sample sounds with the drum framework.

For me, the idea is always to create a musical platform that best allows a lyricist to catch wreck (i.e. have a great performance). Rap lyrics and rhyme form are unlike any other style of lyrics and rhyme form in contemporary popular music. By their nature, there is a lot of rhythm and percussive poetic movement in rap lyrics. Because of this, rap lyrics add another musical element to a composition in a way that often minimizes the need for extensive changes. This is one reason why some beatmakers (producers) wait until after the rapper has laid down their vocals to the original core riffs/core groove (base rhythm) of the beat before they consider adding additional hook elements to the beat.

Check This Out – Overall Note About Beat Structure

Beatmakers (producers) used to make beats specifically to be used by rappers only. Today, many recording artists from separate music traditions borrow from the hip hop/rap music tradition. Because of this, some beatmakers (producers) have taken to making beats from the vantage point of what is most likely to get them a buyer from a range artists from different genres, rather than what is more likely to be a dope beat. Inevitably, this trend has led to a number of beatmakers (producers) who try to structure their beats more and more like pop songs. If this is your approach, keep this in mind: The more you try to structure a beat like a *pop* song, the more you actually move away from the hip-hop/rap music tradition. This is not necessarily a bad thing. But if what appeals to a pop artist is your hip hop/rap beats, that's what you should give them. If need be, you can always *lighten up* on the hip hop, but it's best to keep your style, sound, and feel.

Extended Composing and Sequencing Notes, Techniques, and Tips

Composing Bass Lines Using the Same "Anchor" Bass Sound

When it comes to creating bass lines in the beatmaking tradition, it's first important to recognize that you don't need actual bass guitar sounds to create great bass lines. Bass lines can be created using any sound that represents (i.e. sounds like) a bass sound. You can make bass lines out of anything, just filter out the mid and high frequencies of whatever sounds you're trying to transform into a bass line.[13]

Moving forward with this understanding of how bass sounds can be created in the beatmaking tradition, you next have to examine the dynamics of the bass guitar itself. For example, consider that a typical bass guitar only has five strings. This means you can never really go up higher than four whole pitch levels (whole tones). Therefore, when assigning your actual bass sounds to drum pads or keys on a keyboard, synthesizer, or MIDI controller, there isn't a need to account for more than four or five assignments. In other words, it's not necessary to assign a bass sound to 16 different pads or 48 different keys and use more than five of those assignments. You can if you want to, but I'm not sure if there's any noticeable advantage, as too much variance in the corresponding pitch values can undermine whatever bass line you create. This is why I simply assign the same bass sound to four or five pads on my MPC, then I pitch up each pad by one whole tone, then I "walk" (play) up or down to the drum framework I've created, or I match the

[13] This sound technique, common in the beatmaking tradition of hip hop/rap music, was advanced most prominently by Pete Rock. (DJ Premier, Large Professor, and RZA, all used the technique as well). J Dilla, Kev Brown, and Marco Polo are among those who also personified this technique.

rhythm or melody that I have going. However, if you use an MPC (or any EMPI with a polynote function), you can also use the 16-note function to automatically slice an individual bass sound into multiple bass tones, which are then mapped out across the 16 drum pads. Still, you can also compose bass lines using the stock bass sounds of a keyboard/ synthesizer or sound module. Although this might be the least creative way, it's just as effective, provided you apply some additional sonic modification to the sounds. This helps customize the otherwise generic-ness of the sounds.

Finally, whichever method you use to create your bass sounds (specifically the various pitch levels/tones), the important thing to remember is that it's typically more effective to play out your bass lines in real time with either a drum framework or the established rhythm of the beat.

Composing Bass Lines – An Extended Look at My Process of Composing Bass Lines Using the Anchor Technique

When making effective bass lines in beatmaking, what matters most is how you plan to use the bass line. Let's say you're developing a bass line simply for accentuation or emphasis of some other musical element within a beat. In that case, it's not too difficult to come up with an effective bass line. For example, using the pads of a drum machine or the keys on a keyboard or MIDI controller, you can load up a bass-stab over four separate pads or four keys. Next, you just play out an order of notes (some sort of bass line theme), using just those four sounds; it's almost like mapping a rhyme scheme because each sound represents its own pitch: A B C D — here, everything left of the "D" drum pad or keyboard key is lower in pitch chromatically by one level. So in essence, creating bass lines in the beatmaking tradition is really more about matching the pitch and dynamics of the non-drum elements and the feel and impact of the backing beat.

In the previous sub-section, the description of pitch and tones is a very crude and simplistic snapshot of the basic pitch characteristics of

traditional music theory. But this is exactly how I was able to work it out and make bass lines with no knowledge of music theory at all. Also note: Although possessing a sound knowledge of music theory may give you some advantage when composing bass lines, as with some other musical processes, the possession of even the most advanced knowledge of music theory does not mean that you will automatically make more effective bass lines.

Composing Bass Lines Using the Anchor Technique

Bass lines are typically three to four steps up or down a scale. (A scale is seven notes all in a row). When creating bass lines using the anchor technique, the idea is to find your "high" and "low points". These are the highest and lowest pitch levels of the bass sound that you're trying to play. Since a typical bass line (sequence) is composed of three to four pitch levels, just find your anchor. What I mean is, pick the pitch level that you want to start and end with. Let's say you've already auditioned some bass sounds from your EMPI of choice (keyboard, sound module, MPC, etc.). Start with your anchor, and walk up or down the keyboard using the three to four phrases that you've scoped out. From here, you can experiment with different phrases (lines). The thing to notice is what happens every time you return to your anchor sound.

Here, I should note that when it comes to the sample-based style, as opposed to the synthetic-sounds-based style, it's not necessarily about trying to match the *exact* key of a sample, which in the first place, is very difficult to try and determine with multi-sound/multi-instrument samples.[14] It's much more about trying to match (blend) the bass tones with the overall *tonal mood*, feeling, and sonic texture of the beat. Like a lot of other beatmakers (producers), when I create bass lines to be used with samples, more often than not I

[14] Again, you don't necessarily have to set the pitch of the bass at the exact same pitch of your primary sample. The bass sound is its own thing, it can go off pitch (what I like to call "wildcat") if it works. That's why you can short the measure of a bass melody, while having it at a lower pitch than your primary sample. This is exactly why an 808 can work with nearly anything, without ever having to really be pitched up or down.

try to extract a bass frequency from somewhere within the primary sample that I'm using. I use the filtered framework of the main sample, i.e. a duplicate of the sample, but only its low frequency. From here, I use this filtered duplicate at the exact pitch and length of the main sample, or I chop it up into pieces and arrange it over four to eight different MPC pads. After that, I match (play) the chopped bass tones to the feel of the beat, using the flow and feel of the main sample as my guide and inspiration. Furthermore, if and when these bass-tone chops lack sonic presence (that certain "umph"), I layer first generation sounds (i.e. synthetic sounds — live keyboard/synthesizer) at strategic points within the arrangement. This adds depth to the initial bass arrangement that I've composed.

When I'm creating beats using the synthetic-sounds-based compositional style, I focus on the anchor point or anchor sound. Again, before I knew anything about music theory (and I'm always learning more), I knew that the creation and development of bass lines, melody lines, and the like depended upon an anchor point, or rather some anchor sound. I further understood that my ability to play progressions up or down from that anchor sound/point, in accordance to the drum framework and rhythmic pattern, was essential to whatever beat I was working on. I now know that this process is actually akin to using scales (in music theory). Even though I'm armed with this "new" knowledge, I still keep in mind that a standard bass guitar has 5 strings, which leads me to work only with two to five notes. When I trigger bass sounds (either samples or synthetic sounds), I arrange one bass tone over 16 pads. Next, I pick out what I call a "scale area" to work with. A scale area is just any two to five tones/notes (pads), not necessarily directly ascending/descending but agreeable to the theme of the beat that I'm working on. From here, I kind of give each tone (pad) a mental number, like 1, 2, 3, 4, etc. Then I play out some simple progressive phrases like, 1-2-3...3-2-1... and so on. After I get a good feel for the possibilities, for what I might want to work on, I get a little more advanced with it. The phrases then begin to look something like this: 1-2-3 3-3 2-3-3-3-4, 1. After I'm happy with the phrase, I loop it, then after I've recorded and looped that, I lay down another

simple phrase based on (playing off of) the first simple pattern that I laid down. Finally, once I've composed a complete phrase that I'm happy with, I let the sequence play out, then I solo and sample it. This allows me to then assign the entire bass phrase to just one drum pad. And thus I'm right back to working from the sample-based compositional style. Another advantage of this final process is that it allows me to store that bass phrase as a default bass phrase, which can be used as part of the musical building blocks for a new beat later on.

BeatTip – Bass Framework is Not Predicated on the Concept of a Bass Line

Hip hop/rap music is *bottom-heavy*. In most hip hop/rap beats, bass tones and colors play a fundamental role. But does this mean that most beats contain bass lines, per se? Actually, no. Thing is, in beatmaking, the concept of using bass passages or phrases is more about bass *frameworks* than traditional notions of bass *lines*. And in beatmaking, bass frameworks are more often than not constructed through the use of individual bass sound-stabs.

Bass sound-stabs — individual bass sounds/tones — typically come from two main sources: Synthetic bass sounds, i.e. sound modules, keyboard patches, or VSTs; and samples of recorded source material, i.e. vinyl records, CDs, mp3s, streams, etc. (A very small minority of beatmakers (producers) also play bass sounds from a traditional electric bass guitar.) Regardless of each beatmaker's (producer's) sonic preference and overall beat style, bass sound-stabs are generally what we use as the building blocks for the bass frameworks of the beats that we create. As such, when it comes to bass, we are not always focused on creating a bass line *per se*, but a bass *part* that fits the scope and slant of the beat that we're working on.

In beatmaking, coming up with bass frameworks is mostly about accompanying the overall feel and direction of the beat. In some cases, bass frameworks are made up of traditional bass line schemes. But in most cases, bass frameworks are composed through the use

of strategically placed bass parts. Thus, in many ways, beatmaking's bass framework concept is about balancing bass tones with the high and mid textures of a beat. Moreover, bass frameworks are often simply the product of filling "holes" in the arrangement structure of a beat. A great example of beatmaking's bass framework concept could be heard in the song "Keep It Thoro," by Prodigy (of Mobb Deep), produced by Alchemist.

Looping Your Samples and Sounds Through the Sequencer (Using the Tempo as an Additional Chopping Function)

Looping your sounds or sound phrases through the sequencer of an EMPI is often more effective than looping your sounds or sound phrases before you sequence them. By looping your samples (and other sounds) using the sequencer, in real-time, you gain more control over the structure of the beat. Whenever you loop your sounds or sound phrases (especially samples of two bars or more in measure) *before* you sequence them, you forfeit the sample's full potential. What I mean is when you begin to try things out, by having the sample looped already, you can't really hear what it sounds like looped from different **end points**.

The initial chopping of your samples is simply setting the start and end points. So once you commit to looping the sample before you sequence it, you're pretty much stuck with the same **end point** — the point where the sample ends before it loops back to itself. On the other hand, by sequencing or what I like to call **"tempo-ing your loop",** you can hear how the sample sounds with *unintended* end points, that is to say, the end points that you didn't intentionally set when you initially chopped the sample. Therefore, as you increase and/or decrease the tempo of the sequence, you can clearly hear the changes.[15]

[15] This is an example of the fact that many beats will often be created through a beatmaker's knack and ability for capturing and redirecting unintended accidents.

BeatTip – Spacing is Fundamental: The Right Element Spacing in Your Beats Is Critical

Sonically, hip hop/rap beats have a "knock" (hard-hitting) factor to them. But despite the overall sonic characteristics of hip hop/rap beats, the use of space (and often silence) within a beat's given compositional framework can often make or break the beat.

In my interview with mix engineer Steve Sola, one of the main points that he discussed was the nature of sound individuality. In particular, Sola stressed to me the importance of each sound being able to stand on its own in the mix. The same sentiment was echoed by mix engineer Rich Keller. These discussions reminded me of my long-held approach to beatmaking. Much like how each sound (track) in a mix has to be able to stand on its own, each element in a beat must also be able to do the same as well as be able to effectively represent its own nuance. And nothing enables an element in a beat to stand on its own and to project its nuance more than the proper spacing of a beat's elements.

Here's the context. All of the elements of a given beat can be broadly divided into two main areas or *grouped elements*: The drum elements ("the drums") and the non-drum elements. Inside of these broadly described grouped elements, there are sub-divisional elements. For instance, a drum framework is fundamentally made up of a kick, snare, and hi-hat (or some reflection thereof). In order for one single element (from any group of elements) to play an effective role in a beat, the element's role must be well-defined, more importantly, the element must have its own space.

One thing that all great beatmakers (producers) tend to have in common is the spacing of their beats. Inexperienced beatmakers (producers) and those who tend to over-produce typically do not share this advantage. Inexperienced beatmakers (producers) are often still working out how to create and merge solid drum frameworks with non-drums, thus their spacing is typically either too wide, too sparse, too full of distance between elements, too shallow, too overlapping, and void of virtually any spacing or room for individual elements to breathe. With regards to those beatmakers

(producers) who over-produce, their common problem is extremely shallow spacing, which comes from constant overcrowding — s*omething that often comes from routinely composing beats with multiple unnecessary elements.* Those beatmakers (producers) who tend to over-produce often create good core rhythms, but then they proceed to bury those rhythms with layers of unneeded elements, seemingly rejecting the fundamental role that tighter core rhythms play in hip hop/rap music.

On the other hand, great beatmakers (producers) never create spacing between their beat's elements that are too wide or too shallow. Instead, their beats tend to have the spacing that always fits the style and sound of the beat they're creating. Whether working from the sample-based style or the synthetic-sounds-based style, great beatmakers (producers) establish a core rhythm, isolate it, then add in only those elements that enhance it, which ultimately leaves the entire structure of the beat well-spaced.

3 Safeguards Against Poor Spacing

Silence is golden. Allow for some silence in your beats. Every fraction of every measure doesn't have to have a definite sound or event. The effective use of silence within a beat's given compositional framework is incredibly important. This doesn't mean create any unnecessary gaps, but it also doesn't mean covering up gaps (especially smaller ones) just because they exist. Certain gaps of silence at specific points in a beat's arrangement adds nuances that can't be easily duplicated by other beatmakers (producers).

Avoid crowding your elements. Don't overcrowd the elements within your beats. Typically, overcrowding occurs when there are too many elements playing at once, rather than taking turns and meshing together in a cohesive cycle. Make sure that each element has its own space and adds its own nuance to the overall structure and texture of the beat. For instance, kicks need space to knock and anchor the pace of the drumwork. But if they're smothered with useless elements, they'll lack depth and purpose. With the proper spacing, kicks are able to breathe and play their role.

Avoid unnecessary elements. If an element in a beat doesn't hold its own space and nuance, then it's merely an incidental sound. In other words, if it's an incidental sound, not consequential, i.e. not causing any notable nuance that enhances the quality of a beat, then it's not necessary to the beat. Many beatmakers (producers) fall into the trap of adding unnecessary elements to beats because they take a quantitative approach to arrangement. But the arrangement of a beat is determined by its quality, not the sheer quantity of elements that it contains.

Study Examples for Element Spacing: "Fish" by Ghostface Killah feat. Raekwon & Cappadonna (Produced by True Master); and "If I Can't" By 50 Cent (Produced Dr. Dre & Mike Elizondo)

With "Fish" (1996) listen carefully to where the elements of the sampled breaks (primary and secondary samples) fall. In each case, the samples ease through each measure in their own space and at their own pace. And even though the drums are obviously moving at the same time, notice how each element is taking its turn, so to speak. This turn-taking, if you will, is the beat's spacing (its use of space). Specifically, pay attention to the nuance of the hushed and brushed hi-hat that True Master uses, and how he utilizes a very simple and straightforward kick and snare pattern, which he offsets with various sampled breaks and sound-stabs.

A similar simple and straightforward kick and snare pattern is also at work in "If I Can't" (2003). But for added texture and weight, there's a clap layered on top of the snare. Next, the loop or core beat of "If I Can't" is established by a simple pattern of ascending and descending keys. And for the hook, the keys are just stacked with some brass sounds in the same key. There other sound elements that come in every 2- to 4- bars, as well an additional synth pass that appears as a change up at the :42 mark of the song and another synth change up at the 1:17 mark. All of the elements have their own space.

Check This Out – Escaping the Tempo Trap: Exploring Different Tempo Ranges, and How to Avoid Getting Stuck With the Same BPM for All of Your Beats

When it comes to making beats, setting the right tempo (BPM) isn't as easy as it might seem. Some beatmakers (producers) prefer to "tap out" the tempo of a beat in real time, while others opt to go for pre-set tempos. Both scenarios are fine, but one problem that tends to plague many beatmakers (producers) is the inability to expand the tempo range of their beats. I like to refer to this issue as the "tempo trap".

For most of us, the beats that we make fall within the same general tempo range. And this fact is guided by the style of beats that we like as well as the base compositional style that we work from. Each beatmaking compositional style — sample-based, synthetic-sounds-based, or hybrid-based — offers its own set of possibilities and challenges. So each compositional style, along with the style and sound of beats that you like, plays a big role in the tempo ranges you will ultimately work within.

For instance, with regards to sample-based beats, up-tempo is usually not the norm for most sample-based beatmakers (producers). One reason for this has to do with the pitch limits of sampling. Although sample-based beatmakers (myself included) enjoy utilizing the flexibility of being able to pitch a sample up or down, we're mindful of the fact that drastic pitch moves away from the original pitch of the sample can hold back the sample's true potential, and thereby torpedo the chance of a dope beat. For example, if you speed the sample up *too much*, do you then also speed up the overall BPM of your beat's sequence? And if you increase the BPM rate, do you then have to decrease or increase the number of steps (events) in your drumwork? Sometimes, speeding a sample up (specifically, the primary sample) can be properly reconciled (depending on your style and taste) by slowing down the overall BPM of a beat, and by increasing the number of steps (events) in your drumwork. But of course, that all depends on the

type and tone of the sample that you're working with. For instance, with the synthetic-sounds-based compositional style (the so-called "keyboard beats"/synth rap style), there is perhaps more flexibility with tempo ranges. After all, once free of the sometimes inflexibility of samples, synthetic-sounds-based beatmakers (producers) can presumably work from a much broader tempo range. Well, in theory that's correct. But in practice, this isn't always the case.

Here, the important thing to remember is that contemporary hip hop/rap music is pretty much underscored by a median tempo range. Still, there are certainly slower and faster tempos being used in hip hop/rap music. But anything slower than 70 BPM is typically used for today's "R&B" ballads. Likewise, anything faster than 120 BPM is typically used for urban pop dance tunes rather than core hip hop/rap styles and sounds. Hence, even most synthetic-sounds-based beats ascribe to similar tempo ranges that are found among sample-based beats.

Although the three main beatmaking compositional styles defer to the same tempo ranges, the reality still remains that some beatmakers (producers) get stuck in a tempo trap, making beats that are consistently too slow or too fast. So how do you break from this? For me, the key to escaping the tempo trap has always been my insistence on practicing making beats within four distinct tempo ranges (BPM ranges): 83 - 87; 88 - 93; 94 - 98; and 99 - 103 BPM (fine tune +/- 5%).

Typically, most of my beats fall within the 86 - 98 BPM range. However, I still practice (experiment) with much slower and faster tempos, because doing so helps me to better understand the subtle vibe and nuance differences between smaller tempo ranges. For example, on the surface, the difference between let's say 96 and 97 BPM is minimal. But depending on all of the elements of the beat — samples, synthetic sounds, arrangement scheme, drumwork, etc. — the slight incremental BPM difference can either push, pull, or shuffle the movement (pace) of the entire beat.

As a rapper, I know the importance of feeling the right pace of a beat. If I feel (know) the beat is pushing, then I know to be quick with my rhyme flow and to truncate words at certain spots in each

measure. If I feel (know) the beat is pulling, then I know to lag with my rhyme flow and maybe slur some of my words together. And if I feel (know) the beat is shuffling, then I know to increase my word count in each bar, which requires me to be very careful with my breath control. In each case, when I'm creating a new beat, knowing the subtle differences that occur between incremental BPM changes helps me to quickly identify what tempo the beat *should* be at (especially for me to appropriately rhyme to it). Because of this, I never get trapped in either a slow or fast BPM zone. Instead, I'm always prepared to set the right tempo for the style and sound of beat that I'm working on.

Finally, I should also point out that while I rarely use beats that are north of 99 BPM, there are several reasons why I still like to practice making beats at faster tempos. Using my own tempo and loop exercises, in which I use higher tempo ranges (usually 103 - 125 BPM) with the same primary sample over different drumwork sequences, allows me to work on ideas that I have for new drum structures. It also helps me to audition new snare sounds. Further, practicing with faster tempos also helps me to better understand the different ways that loops can work at faster and slower tempos.

BeatTip – Real-Time Programming and Recording

After you've programmed your main sample and/or collage of sound phrases into a sequence and you have it looping at the right tempo, scrap the drums, especially if they're not clicking with everything else. Next, put the sequence back into record mode and play the drums live, right in over the top, in real time. The result of everything together, moving correctly and at the desired tempo, is what I call the "primary theme loop". In most cases, the primary loop is where the entire beat stems from. This description is also a more detailed explanation of how to create the core sequence that I described earlier in this section.

Check This Out – Programming Improvisation

Since the typical beat is programmed beforehand, improvisation in beatmaking must be accounted for at the beginning of the composition phrase or in the mixing or re-programming phase of the beatmaking process. After the completion of a beat, any changes that you add or any parts that you subtract is considered the re-programming of the beat. This is one of the reasons that a number of well-known beatmakers (producers) often like to get the track back after the vocals have been laid to the initial beat. This way, they can further embellish the beat and thereby accent the entire song.

Parts, Components, and Elements in Progressive or Repetitive Arrangement Schemes

All beats are made up of separate music parts, each part contains a variety of music *components*, and each component is comprised of a number of different music "elements". For example, a drum framework is a music part. The particular patterns of each drum sound within a part is a music component, and the individual drum-hits (sounds) within a music component would then refer to the music elements. This formula can be used for phrases of strings, keys, and the like. In other words, *arrangement* is literally the creative organization of the separate music parts, components, and elements.

In beatmaking, arrangement can also be split into two broad schemes or structured varieties: **repetitive** and **progressive**. **Repetitive arrangement** is essentially the organization of music parts in a manner that consistently repeats a primary musical theme.[16] In the repetitive arrangement scheme, the onus is placed on remaining close (in some way) to the essence of the hip hop/rap DJs musical processes — the earliest compositional roots of the hip hop/

[16] It's worth noting that virtually all forms of mid/late-twentieth-century Western popular music features some sort of a repetitive arrangement scheme.

rap music tradition. This is to say, the repetitive arrangement scheme is a structure that seeks to represent the processes in which DJs cut or blended the breaks from records together into new compositions. Examples of repetitive arrangement schemes include sample-based beats like those that rely on one lengthy sampled music phrase, or those beats that have multiple chopped samples that are weaved into one cohesive music part. Further examples of the repetitive arrangement scheme include synthetic-sounds-based beats that are based on the use of prominent and oft-repeated phrases. A sample-based song that demonstrates the repetitive arrangement scheme quite well is Nas' "Nas Is Like" (1999), produced by DJ Premier. A synthetic-sounds-based song that demonstrates the repetitive arrangement scheme nicely is Red Café's (feat. Fabolous) "Bling Blaow" (2005), produced by Reefa.

Progressive arrangement is essentially the organization of music parts into several (or more) progressively different musical themes. In progressive arrangement, the aim is to structure a succession of music parts that unravel through a song in linear, *not* cyclical, progression. Unlike the repetitive arrangement scheme, the progressive arrangement scheme is not necessarily predicated upon the repeating of (or consistent returning) to one or two specific themes. Instead, the emphasis is placed on developing multiple themes and, at times, more complex music components.

The progressive arrangement scheme can often be effective, especially when it's used in deference to the hip hop/rap music tradition. For one thing, a progressive arrangement scheme can shake up any monotony that may exist from generic drumwork or a typical loop of a lengthy sample. Also, because progressive arrangement can go a long way in establishing a unique contrast in a beat, it's very useful when you're trying to convey a sense of urgency or seriousness within a song. Furthermore, a progressive arrangement can also be an excellent structural scheme for story-themed songs because the changes within the music components and parts work like chapter accompaniments. Plus, the changes can provide more acute depth and *distinguished* meaning for each of the rapper's verses. A very good example of a progressive arrangement

scheme (albeit a simple one) is demonstrated in 50 Cent's "If I Can't"(2003), produced by Dr. Dre and Mike Elizondo.

In recent years, there's been an increase in the number of beatmakers (producers) who have moved towards the progressive arrangement scheme as their base arrangement method. There are several reasons for this development. The first reason deals with the hip hop/rap music and beatmaking traditions in their own right. Some beatmakers (producers) are simply unfamiliar with the roots and fundamentals of the hip hop/rap music tradition. And they are particularly unaware of the fundamental aesthetics, tropes, nuances, principles, and priorities of hip hop culture itself and both the hip hop/rap music and beatmaking traditions. But more alarming than that is the fact that there are some beatmakers (mostly new) who do not care at all about the roots and the recent history of the beatmaking and hip hop/rap music traditions (*some even show a total disregard for it*). In both cases, these beatmakers (producers) are prompted to incorporate the aesthetics, tropes, nuances, principles, and priorities of *other* music traditions that are not inline or consistent with the beatmaking and hip hop/rap music traditions. Incidentally, this is one reason why there's been a recent uptick in the number of beatmakers (producers)s who have deliberately tried to fuse the "trained musician" nuance into beatmaking. Specifically, there's been a more concentrated (*forced*) effort to apply advanced concepts of music theory to beatmaking.

The second reason that a sizeable number of beatmakers (producers) have turned to the progressive arrangement scheme deals with the lure of the pop music scene. At the time of the publication of this edition, pop music seemingly presents itself as the "safe" music genre for the fledgling music industry to back, despite the clear dominance of hip hop/rap music. And many beatmakers (producers) are uprooting their styles and sounds to fit this larger music industry philosophy, hoping that it will increase their chances of a placement. Professional beatmakers (producers) have to deal with both the artistic *and* business realities of beatmaking, so I don't cast judgment on any beatmaker (producer) who has made or is considering making this change in style and sound. But even

though trends can offer short runs of opportunity, it's individuality and distinguishable creativity that consistently offer the best opportunities and longevity.

Finally, the third reason that a sizeable number of beatmakers (producers) have moved to the progressive arrangement scheme deals with what I can only describe as an identity crisis — perhaps caused by either a deep inferiority complex or music tradition self-hate. For years, the hip hop/rap music tradition operated in the shadows of mainstream neglect. But as the American mainstream made room for and, subsequently, co-opted key areas of the hip hop/rap music scene, many beatmakers (produceers) found themselves in cultural and financial spaces that had been previously inaccessible to beatmakers, DJs, and rappers who had came before them. Thus for the first time in hip hop/rap's history, many beatmakers (producers) begain forfeiting the pursuit of dope beats and are started becoming much more preoccupied with how they measure up as music producers against those from other mainstream (more traditional) music forms. Hence, these beatmakers (producers) have come to view more elaborate arrangement schemes as a sort of conduit out of and away from the beatmaking tradition. Many of the beatmakers (producers) within this group seemingly despise being labeled as "beatmakers" or "*hip hop* producers." They instead think of themselves — and want to be known — only as "music producers." This despite the fact that beatmaking and hip hop/rap music have been and are paramount to their ability to even compete in a narrow-minded and otherwise non-inclusive music industry.

Creating Arrangement Changes: Three Things That Can Help You

Ever make a beat that seems like it's missing something? I mean, the core track is dope; everything is tight and looping correctly, but after 4 to 8 bars, it just seems, well, too redundant? Although redundancy is a good thing in some cases and for certain styles of beats, and although the crux of all hip hop/rap beats is repetition (i.e. frameworks based upon continuously looped riffs/grooves),

some beats just work better with effective changes. In beatmaking, "changes" — embellishments, breakdowns, switch-ups, sweeps, etc. — vary in sound and complexity. They can be as simple as added percussion, something like a mini-phrase of bongo hits over vocals, or they can be as complex as entirely new arrangements of sounds and textures, something like dual lines of melody and countermelody played out with a synthesizer.

For many beatmakers (producers), coming up with effective changes (changes that actually fit well) isn't necessarily an easy part of the beatmaking process. On one hand, you have to consider the style and sound of beat that you're making. For instance, to make changes in sample-based beats, many beatmakers (producers) simply sample, chop, and insert different parts/pieces of the same song or even the primary sample. In many cases, this approach is all that it takes to come up with an effective change or two. (Again, listen to "Fish" produced by True Master.) Still, there are those times when the same song (source material) doesn't have any more pieces that fit with the beat at hand. Therefore, in cases like these, it can be moree difficult coming up with changes that work. And while there are some who believe that creating changes for non-sampled based beats is a much easier challenge, the truth is, even with non-sampled based beats, creating effective changes can be difficult as well.

But difficulty aside, there are three things that can help you a great deal (or at least make the task less daunting) with your approach to creating (adding) changes to your beats. First, knowing if a change or changes are actually needed. Second, recognizing which *types* of changes typically work well with which types of beats. Third, having a good understanding of mood, i.e. the moods that specific sounds and certain categories of sounds invoke and tend to convey.

It should always be remembered that some beats simply do not *need* a change. For example, if a beat is made up of a 4-bar pattern, chances are that complete pattern — from start to finish — is not monotonous; and therefore, it may be able to do without any significant change. Perhaps a few drops (mutes) and solos at various points of the beat can be all the change that's needed.

Next, it's important to gauge which types of changes usually work well with which types of beats. For instance, does the beat need a breakdown or a bridge? An intro or a stacked synth phrase, or just a simple riff pitched up or down? In either case, a change should relate to the basic style, scope, and structure of the beat at hand. Which means everything from style, sound, form, and tempo must be considered before incorporating changes. For example, when working with a sample-based beat, particularly a mid-tempo one (93-96 BPM), I prefer to incorporate changes that feature samples, not synths. If I can help it, I avoid blending samples and synths. But when I do add synth sounds to a sample-based beat, I play the actual synth sounds/phrases myself, then I sample myself, and then I match their sound and feel to style and sound of the beat I'm making. However, when I'm working on a synthetic-sounds based (non-sample-based) beat, I take more leisure with the samples that I incorporate because non-sampled based beats tend to absorb samples more effectively than sample-based beats absorb synth sounds. Most of the time, I find that synths either stick out like an obnoxious blemish or they betray the sample style and feel of a beat.

Finally, having a good understanding of mood, i.e. the moods that specific sounds and certain categories of sounds tend to invoke and convey, is the third thing that can help you with your approach to creating (adding) changes to your beats. A big part of coming up with an effective change is being in tune with the core mood and feel of a beat. When you know the moods that particular sounds invoke and convey, you're better equipped to create those changes that work well within the framework of the core structure, form, style, and sound of your beat.

BeatTip – Five Guidelines for Making Changes in Your Beats

The prospect of adding in changes and transitions in beatmaking can be challenging. However, with a number of basic guidelines for adding in changes to your arrangements, you'll likely find that it's not as difficult as you might think. So to help you with making

changes in your beats, below I have included five basic (but key) guidelines that I follow when I add in changes to an arrangement.

(1) What kind of rhyme and rhyme voice will go with the beat?

After you've established the main groove of a beat, let it play for a while. Do this for one main reason: You want to really think about what kind of rhyme and rhyme "voice" would go well with the beat. Figuring out what sort of rhyme and rhyme voice would match up well with the beat helps you determine if the beat needs any changes. Remember, even track solos and sound mutes can serve as effective changes. And sometimes, once you've established a great groove, you might not need to add any changes.

(2) Is the arrangement of the beat sample-based or non-sample-based?

Sample-based beats often allow for fewer and less-complex changes because of their stricter adherence to the groove. Overly complex changes in sample-based beats tend to cause too much distraction throughout the beat. On the other hand, non-sample-based beats typically allow more room for changes. But that doesn't necessarily mean that this room must always be filled up. Changes need not simply occupy space, they should exist to serve some purpose in the beat; for example, to show contrast or to create tension or release. So whether sample-based or non-sample-based, consider the usefulness of a change and its overall effect on the beat's sound composite.

(3) What sort of changes can the beat handle? Minor changes? For example, a slight embellishment? Or major changes? For example, a main transition or a broad "switch-up"? And how long should they be?

Having determined that the beat could use a change(s), the next thing you want to assess is what kind of change would work

best with the beat. Different types of changes can be added to a beat, but just like with other popular forms of music, the most common change is an embellishment. Embellishment typically refers to the embellishing (decorating) of an existing melody. This applies in beatmaking and hip hop/rap music as well. However, because of the "looped groove" nature of hip hop/rap music, it's the groove — riffs and melodies locked in a rhythm — that is most often decorated. Thus in beatmaking, think of an embellishment as just any musical component(s) that decorates the main groove or any aspect of the rhythm of the beat.

A "switch-up" in beatmaking can be a much more elaborate affair. Unlike an embellishment, which more often than not is simply a musical element based on something already present in the beat, a switch-up is often an independent musical phrase, one that isn't based on something already in the beat, like the main groove. As for how long a change or switch-up should be, well, each beatmaker (producer)s is different. That being said, a length of 1-4 bars will be quite effective in most beats. If you need to extend the length of an existing change, just duplicate it and take out or add an additional element to the added bars; you can even program drops (track solos and sound mutes) here as well.

(4) Where should you add the changes?

Typically, for embellishments it's good to work them in the hook and near the beginning of the second verse, i.e. the second pass (the second installment of 8, 12, or 16 bars) of the main groove. But there aren't any hard rules, you can work in changes wherever you like. Just be mindful of a couple of things. First, wherever you place a change, make sure that it doesn't disrupt the feel and scope of what the main groove of the beat has firmly established. Even a change that runs counter to the groove can still fit the feel and scope of a beat. Second, when deciding where to add in a change, always consider whether or not a rapper would be able to effectively rhyme over the changes. If the core groove of a beat is going in one solid direction for 8 bars, any change(s) worked in on the 9th,

10th, 11th, or 12th bar should not be so disruptive as to hinder or break up the rapper's flow.

(5) How many times should you add these changes?

Generally, if you add your changes in too much, i.e. on *every* pass (8, 12, 16 bars), the beat may sound cluttered, overworked, or too complicated. But again, this is a guide. And even though there aren't any hard rules that you have to subscribe to, do bear in mind that too many changes can disrupt continuity and undermine the feel of a beat.

Chapter 5

An Overview of the Art of Sampling

> "The real samplers, we was creative with it. We took things, changed the note, chopped it up, made our own beats, made our own patterns or did our own thing."
> –Marley Marl[1]

By the coldest, most technical definition possible, sampling is simply the act of digitally recording a sound. Musicologist Dr. Lawrence Ferrara has described sampling as "taking a portion of an existing sound recording and inserting that portion of the sound recording, either exactly the same way or manipulating it some way, but the point is taking that [portion] of a sound recording and inserting it into a new sound recording."[2] More precisely in its fundamental context within the hip hop/rap music tradition, sampling is the artistic process of extracting snippets from old songs and using those snippets to make new music. Historically, this has mostly meant using vinyl records, but today, any audio format can be used. Further, in hip hop/rap music, all forms of sound, previously recorded or otherwise, are used as potential compositional elements, it's not just records that are sampled. Sampling, especially as it's practiced in the hip hop/rap music tradition, isn't only about sampling recorded songs. So the traditions and processes detailed in this chapter apply to all sound recordings, including those sound recordings that you make yourself. Still, this is a simplied definition of sampling. The complete, most accurate definition of sampling requires a much deeper examination.

---

1 Amir Said interview with Marley Marl, published in my book *The BeatTips Manual: The Art of Beatmaking, The Hip Hop/Rap Music Tradition, and The Common Composer* (Superchamp Books, 2015).

2 Author's interview with Dr. Lawrence Ferrara, November 29, 2018.

What Is the Art of Sampling? Consider the Context First, Then the Meaning, Purpose, Value, and Conceptual Understanding

To understand sampling, one must first comprehend hip hop DJing, hip hop culture, and the hip hop sensibility. In chapter 2, I discussed how hip hop DJing was born from the central use of record "breaks". The earliest hip hop DJs were the first to use turntables in ways that transcended their designed capabilities. Hip hop DJs cut, blended, and mixed the breaks of various records in an impromptu fashion that was a compositional style all its own. In chapter 1, I pointed out that one prominent result of an isolated and fragmented culture is that its residents learn to make use of and salvage everything within and outside of their environment.

I further discussed how the fragmentation caused by the South Bronx Disaster had, in effect, led to the formation of a "culture of sampling", a culture which enabled the residents of the South Bronx (and other similarly hard-hit cities across the United States) to take and make use of pieces of culture from both within their own settings and from mainstream American society. Thus, the earliest architects of hip hop learned how to convert those pieces of mainstream American culture in accordance with their own needs, principles, priorities, and values.

Also in chapter 2, I discussed how the culture of sampling is an important part of the hip hop sensibility, and how the culture of sampling often manifests itself. I pointed out that in a culture of sampling, everything is fair game and open to transformation, transgression, and recontextualization (reconceptualization). In reality, this is not much different from how traditional musicians and artists utilize everything within culture for the source and inspiration of their creative activity. And thus, it is from this context and perspective, the culture of sampling context and perspective, that we must continue our discussion about what sampling is. But before delving deeper into the many things that sampling is, it's worth discussing why sample-based beatmakers (producers) sample in the first place.

Why Sample-Based Beatmakers Sample

The Connection, the Dig, the Find, and the Flip – Being a Part of Hip Hop's Past Tradition and the Value of the Sound and Process Itself

Every musician, every artist, working from within a specific tradition or medium makes the decision whether or not to stick to or scale away from the fundamental techniques and philosophies of that tradition or medium. In this way, sample-based beatmakers (producers) are no different. We make the choice to create beats in a way that help us maintain a connection to the hip hop DJ style and allows us to use the backbone compositional technique of hip hop/rap music. Although the DJ's role in hip hop/rap music has been dramatically reduced from its heyday — when the DJ was the music's figurehead and chief composer — the essence of the hip hop DJ lives on through sample-based beatmakers (producers). And although recent electronic music production tools have helped to bring about new approaches and techniques for making beats, the fundamental process of digging for and finding new songs and other source material to flip remains the same for most sample-based beatmakers (producers).

There's also the sound of sampling itself. Sample-based beatmakers (producers) are drawn to the one-of-a-kind sound and sonic quality that only older songs can provide. We sample for the one-of-a-kind "blue notes" that appear on old songs, especially the blue notes heard on soul and funk songs. (In Chapter 8, I describe in more detail what blue notes are.) The blue notes that we hear on the songs cannot be replayed with the exact same feel or the exact technique. So what's literally being sampled is a moment in time, a sound being performed by an individual representing the most monumental era's in the history of Western popular music. What's being sampled is not simply a disposable musical part that can simply be replayed in a modern recording studio by today's musicians. Thus, the very essence of the sampling aesthetic is not only about engaging with history, it's also about sampling rare musical moments (even mistakes), from rare musicians who were

recording music under circumstances vastly different than today. So the sampling aesthetic allows sample-based beatmakers (producers) to make music with older generations; it allows sampled-based beatmakers (producers) to play with musicians from eras gone by. And from out of these cross-generational jam sessions, if you will, emerges new music.

The preferred music eras among most sample-based beatmakers (producers) is situated roughly between 1960 and 1975. For those of us who prefer to sample soul, funk, and rhythm & blues in particular, we like the feeling that *this* particular music gives off. We like our grooves and rhythms to cook with soul and feeling. And the sound of the '60s and '70s represents a sonic quality that deeply appeals to us. Not to mention the fact that these years represent exceptional achievement in Western popular music. Thus, the sound of these periods share one important common characteristic: An analog sound and feel that can't truly be duplicated today.

Besides the fact that current recording, engineering, and mastering trends lean heavy towards the digital side of things, the other reason why it's difficult to re-create the sound that so many sample-based beatmakers (producers) prefer is the fact that the talent pool of musicians, who could reference or approach an specific historical sound with all of the nuance and resonance of that era and moment in time, is limited. There are simply not that many musicians today who can play, convincingly, in the same manner or feel. Also, the number of recording engineers who might be able to recapture that particular sound is dwindling. And while some may feel that replays of recordings are a decent alternative (for the best example, think Dr. Dre's "Nothin' But a 'G' Thang"), the truth is that replays are rarely a real substitute for the aesthetic sound of older recordings. (That said, however, live-instrumentation sampling is becoming a bit closer to the aesthetic sound and feel of older recordings.)

Finally, another important connection that sampling holds for sample-based beatmakers (producers) is this. It answers the desire of those musicians who want to actively interact with history. Historical fiction writers are celebrated for their ability to

engage with history. These authors have long referenced history, commented on it, and *reworked* it. In doing so, they have brought new or alternative histories that have entertained, informed, and provided fresh perspectives on the human condition, all while reminding us (more or less subtly) of the original history they've *sampled*. In a similar vein, sample-based beatmakers (producers) are celebrated for their ability to reference, comment on, and rework fragments of old songs and other sound recordings. By using pulses, snippets, sound-stabs, and phrases from old songs — many long forgotten or overlooked — sample-based beatmakers (producers) are able to engage with history in ways that remind us of the old and the importance of cultural heritage, while demonstrating how to combine the valuable old with the valuable new.

What is Sampling Really?

Sampling is a Special Kind of Derivative Art

Sampling is a special form of derivative art. Whether consciously or subconsciously, musicians borrow and incorporate sounds, rhythms, melodies, ideas, and musical frameworks from other artists all the time. So the question *What is sampling?* is also grounded in the notion of an artist's ability, necessity, and right to create art based on works that came before. But in terms of United States copyright law, sampling does not fit the meaning of creating a "derivative work". For example, making an exact drawing from a photograph is what it means to make a derivative work in terms of copyright law. Or making a movie based on a book; that's a derivative work. Simarly, a "remix" of a song, where the original song is remains at the core, that's a derivative work. However, in sampling (in most cases) only a small piece of a song is used in the creation of an entirely new song. Therefore, the new song that uses small pieces, — for example drum sounds, small notes, or even a couple of bars that are transformed into something new — is not a "derivative work" of the song it borrows from.

Derivative art itself is a necessary and an inevitable process. It's also a tradition long-practiced in every major art form. All music,

at its core, is virtually *derivative*, inasmuch as it's derived from ideas and works that have come before. The intellectual reuse of tropes and elements from pre-existing songs is nothing new in music, it has always been a major part of the creative process in music and the other art forms. Every musician (every artist) at some point within their creative process *borrows* in one way or another. Historically, musicians/recording artists have, in their pursuit to create new music, routinely borrowed ideas, musical phrases, notes, and sounds from each other. There's no such thing as a musician or recording artist that does not intellectually, i.e. *virtually*, sample and draw influence and inspiration from other musicians and recording artists or practitioners of a similar artistic medium.[3]

This process of intellectually (*virtually*) sampling other musicians/recording artists is widespread, overtly expected, and accepted as normal; and in some musical cultures it's celebrated. What is new, however, is the *physical* use, i.e. *digital sampling,* of these elements in a fixed recorded form, which is also what sampling is. But here, we must be careful not to forget that there is no conceptual difference between the intellectual (virtual) copying and the physical (digital sampling) copying of someone's work. Both involve copying and intellectual transformation. Hence, "it is not accurate to say, as the *Bridgeport* court does, that when 'sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.'"[4] An artist who samples a song doesn't literally "take" the sound out of the original recording. Instead, sampling technology creates a copy that is transferred to a computer hard drive. An actual physical taking of

[3] "Thus, 'sampling' could almost never create a derivative work. Section 101 defines a 'derivative work' as one 'based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.' As should be evident from this definition…, one could not create a derivative work in this context unless the original work was used as the main theme of the new work." Quote from Jennifer R. R. Mueller, "All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling," *Indiana Law Journal*, Vol. 81, Issue 1, Article 22 (2006), 451. Further, in *Williams v. Broadus*, the court noted that "a work is not derivative simply because it borrows from a pre-existing work." *Marlon Williams v. Calvin Broadus* No. 99 Civ. 10957 (MBM), 2001 WL 984714 (S.D.N.Y. Aug. 27, 2001).

[4] Mueller, 450.

a vinyl record would mean that after sampling a vinyl record, the sampler would spit out a piece of the actual vinyl record, and the original vinyl record would be missing the piece that was physically taken.

Sampling Is Sound Collage

Sampling is part of the broader tradition of sound collage, the art technique that involves combining portions of sounds from previous recordings, including songs. In sound collage, or better stated, music collage, sound recordings are viewed and treated as sound sources. Music collagists extract pieces and snippets, commonly known as "found sounds", from these sound sources to create music montages that make up new songs.

The sampling tradition of hip hop/rap music fits within the borders of music collage, as the aims of the music collagist and the sample-based beatmaker (producer) are mostly mutual; both seek to create new music from the sound objects of other sound recordings. But the sampling tradition of hip hop/rap music has its own distinct priorities and parameters. So while every sample-based beatmaker (producer) is in fact a music collagist, not every music collagist is a sample-based beatmaker (producer).

Found Sounds: Sampling in Hip Hop/Rap Music Is a Form of Music Making Through Found Sounds

When someone — and by *someone* I mean commentators who do not have quite as firm a grip on the art of sampling as they'd like to think — describes sampling (particularly in hip hop) as the process of "incorporating found sounds" to make new music, they're pulling a sleight of hand. Why go out of the way to avoid describing sampling in hip hop/rap music as anything other than what it is as recognized by the culture and people that did the most to popularize and develop it? In this regard, we'd need only say, if we're keeping it simple, that sampling is an art form and music process made through the use of snippets of old songs.

Rappers rap, they don't *sing*. A rapper *can* sing; however, rapping — a *form* of singing one might say — is never confused with singing because rapping is its own thing, with its own references and characteristics. Rapping is not a vocal process performed by singing; it is a standalone vocal practice that might be generally placed within the category of singing. This goes for sampling in hip hop as well.

As previously stated, sampling, *is* a form of collage and music making process achieved through the use of found sounds. However, sampling, as best popularized and developed by the hip hop/rap music tradition, is a very specific art form and music process that relies on, by and large, the *sampling* of on old songs. In other words, sampling is its own thing, with its own references and characteristics. What singing is to rapping, collage/found sounds is to sampling. And to be clear, while samples of other sound recordings *may* also be a part of the repertoire of the sampling tradition of hip hop/rap music, there can be no confusion in what sampling in hip hop is widely understood to mean: *sampling old songs,* not incorporating "found sounds" (a generalization much like singing is a generalization). No one in hip hop/rap music, certainly not the chief architects and practitioners of the art form as we know it, think of sampling as a process that incorporates, fundamentally speaking, "found sounds".

Sampling Is A Technique, Method, and Compositional Style

Sampling, or rather sample-based beatmaking, is a music making technique that relies primarily on the use of samples of recorded sound for the creation of new music. In its most common and fundamental case, these samples, i.e. snippets and segments, of music notes, sound-stabs, riffs, grooves, or melodies are sampled from old songs. But sampling is not limited to just old songs. For most sample-based beatmakers (producers), any sound recording can be sampled and transformed.

Usually, beatmakers (producers) who employ the sample-based style try to remain close to the vein of the second Golden Era of beatmaking, ca. 1987-1995. In fact, one of the most noticeable characteristics of this compositional style is its timeless sound. Practitioners of this approach typically frown upon the misperceived laziness and the sometimes lack of commitment to the art of beatmaking that is often associated with the synthetic-sound compositional style, which in its most primitive form involves a low level of creative programming and arrangement. That said, the sample-based style allows room for melody, additional percussion frameworks, and the like.

Another important characteristic of the sample-based style is that it indirectly familiarizes beatmakers (producers) with many of the methods that were initiated and mastered by beatmakers (producers) from the first two Golden Eras of hip hop/rap music. So those who use the sample-based compositional style are often masters at complex and unique sound customization techniques as well as the advanced tier of other processes, like chopping and looping. Because of this, many sample-based beatmakers (producers) have the advantage of being able to create a sound that is both reminiscent to a past era *and* inline with contemporary trends.

Sampling Is Versioning

Sampling is also a natural extension of "versioning." Versioning can best be described as the reworking of popular melodies or familiar folk tunes, songs, catch phrases, and the like. The process of using intellectual (*virtual*) samples of other works as source material (and inspiration) or as the model for new works is nothing new, especially in the Black (African American) music tradition.

But there are different meanings of versioning. In the context of Jamaican reggae, a *version* is a record with the vocals removed, an alternative cut of a song made to let any deejay *toast* (a Jamaican style of singing) over the top of the instrumental. In most cases, this form of versioning meant simply using music made from existing, i.e. *whole*, backing tracks from other songs. These backing tracks,

basically the entire song stripped of the vocals, were then used as the basis for new songs by re-recording them with new elements, like a deejay's vocals, horns, or a keyboard melody line instead of a guitar. This, however, was (is) *not* the tradition or model of versioning and rapping that rappers (MCs) in the Bronx were following. When hip hop/rap music first emerged, and when hip hop/rap music's tradition began in full force. In sampling, whole songs, i.e. entire backing tracks, are not used. Rather, songs are treated as raw materials, tools for composition.

Sampling Is Arrangement, Not "Cut-and-Paste"

"Cut-and-paste" implies plagiarism, i.e. the *wholesale* copying of the *whole* of something, like the copying of an entire essay and presenting it to the world as one's own work. Sampling is not the process of "cutting-and-pasting"; such a description implies random placement. When a traditional musician borrows a few notes from a song, say part of a melody line, etc, and uses this melody line as raw material to create a new song, do we describe his actions as "cut-and-paste"? Of course not. What's taking place is arrangement. Likewise, in the art of sampling, what's taking place is *arrangement*. Difference being that sample-based musicians are also programmers because they are programming their arrangements.

Sampling Is Fine Art

Within the beatmaking tradition, sampling is also a fine art. Some critics maintain that sampling is uncreative, limiting, or even worse, *lazy*. On the contrary, sampling is a real-time mix of all of one's musical understanding. That is to say, sampling forces beatmakers (producers) to identify multiple sounds, tones, and rhythms all at once, in one completed composition. Furthermore, what makes sampling a fine art is the fact that it is also what I like to call "a grid of discovery". Sampling is a combination of substantial training, part intuition, part accident, and a whole lot

of digging in the crates. In this way, beatmakers (producers) who use the sample-based compositional style are rewarded for their discoveries, i.e. for what they find and flip.[5]

Sampling Is Digitally Recording a Sound

As a technological concept, sampling is simply the act of digitally recording a sound, then rearranging and assembling that sound into a programmed sequence. Next, the idea is to turn this programmed sequence into a new composition. As an art form, however, the practice of sampling is quite intricate. Not only does it involve a creative understanding of how sounds, tones, and pitches work, it requires a uniquely meticulous method for editing and manipulating sounds. In this way, the art of sampling represents a number of important musical processes.

Sampling Is Referential Music-Making

Sampling is also referential music-making. No music is truly independent and free of any references. All forms of music are referential, as all musicians create by referencing the elements, styles, themes, sounds, principles, and priorities of music created by others, either before or during their time. The art of sampling builds on this truth and sensibility, as it is a compositional process that uses — *references* — segments of recorded music and other sounds to create new music. And again, the fact is, sampling, in terms of referencing of ideas, has always gone on in music. Borrowing pieces, segments, or fragments of songs for the purpose of creating new works is certainly not anything new in the world of music. For instance, jazz giant Charlie Parker is widely considered to be a genius for using a little bit of Gershwin's "I Got Rhythm" and recontextualizing and reconceptualizing it into new music. This makes all of the jazz greats throughout the '30s, '40s, and '50s

[5] **Flipping** (or to Flip) a sample is the process of manipulating and fashioning a sample into a beat. Often a sample is manipulated so much that it's impossible to identify its source. Still, there are other cases where a sample can be flipped even while it contains much of its original identity.

similar "geniuses" for using *samples* of many blues standards in the same way within the creative process of new musical works.[6]

Sampling Is *Musique Concrète*

In the 1940s, French composer Pierre Schaeffer experimented with recording technology, specifically tape manipulation, and came up with the music (aesthetic) process known as *musique concrète*. Utilizing a magnetic tape recorder, which was invented in Germany in the 1930s, Schaeffer produced the recording "Étude aux chemins de fer," which was composed entirely of a variety of different train sounds that were edited (i.e. looped and chopped) by Schaeffer. It is for this reason that "Étude aux chemins de fer" is widely recognized as the first piece of music composed entirely from sampled sounds, and why some regard Pierre Schaeffer as the godfather of sampling.

Sampling, as we know it today, relies on the same fundamental concept of musique concrète, in that pre-existing sounds are used to make new music. Further, "the idea behind musique concrète is that the composer begins with a set of 'concrete' sounds *and arranges them into a piece of music*. This concept means that the composer is not limited by traditional musical instrumentation and theory. They can, in fact, collect any sound that appeals to them and use it in the realisation [sic] of a final piece of music."[7]

[6] "I Got Rhythm" was a George Gershwin song composed for the 1930 Broadway musical *Girl Crazy*. That a song from a Broadway musical was used for the basis of new jazz works demonstrates just how critical sampling and versioning was to the existence and development of the jazz tradition. Moreover, it personifies the importance of sampling and versioning in the Black (African American) music tradition. In fact, the use of pieces of songs for the creation of new music is certainly nothing new. "These early pieces [of blues songs provided] a basic repertory of stock melodies that have been drawn upon innumerable times by jazz composers." Quote from Eileen Southern, *The Music of Black Americans: A History*, (New York: W.W. Norton & Company, 1971), 339. Here, it is also important to note that within Black (African-derived) musical cultures, "the past" has always served as common fertile ground and inspiration for creativity.

[7] Golo Föllmer, Pierre Schaeffer: "Études aux chemins de fer," Medien Kunst Netz (Media Art Net), http://www.medienkunstnetz.de/works/etude-aux-chemins-de-fer/ (emphasis mine). Also see: Marc Henshall, "Musique Concrète – Pioneering Electronic Music – Part1," Sound Matters (October 30, 2011) https://www.yoursoundmatters.com/musiqueconcrete1/. You can listen to Pierre Schaeffer's "Étude aux chemins de fer" on YouTube at: https://www.youtube.com/watch?v=N9pOq8u6-bA.

Sampling Is Music Recycling

Sampling is also music recycling, especially as it celebrates the very concept of music recycling. Recycling is a major component of all contemporary music practices. But for hip hop/rap's earliest and recent pioneers and contemporary practitioners, the art of sampling is the rightful recycling of a common heritage. Sampling stems from the art of hip hop DJing, which itself stems from a keen interest in the heritage of the Black (African American) music tradition, specifically the major sub-traditions of soul, funk, and disco. This *heritage music* is an embedded tradition (style, sound, and unique nuance) that can not be easily duplicated. The first hip hop DJs, who were acutely aware of and sensitive to this fact, took to recycling this music at a time when it was considered past its prime and no longer usable or relevant. The art of sampling extends this tradition of hip hop DJing, as it makes relevant use of a musical heritage that is considered unusable or no longer relevant.[8]

Looking to the Past for the Future

There has been a lingering question about sampling as a music form that is largely based on sourcing old songs. Where can sampling go when there are no more old songs to discover? First, such a question supposes that the number of old songs left to be discovered is definitive, like there's some number or plateau on the horizon where, once discovered, that's it, *no more old songs*. This sentiment defies logic, as there is effectively an infinite number of old songs that remain to be discovered. Second, and more importantly, the art of sampling relies on recontextualization and reconceptualization, so already "discovered" old songs can (and often are) always recycled.

[8] Sampling is not only an extension of the hip hop DJ art form, it is an extension of the *competition* hip hop DJs maintained with one another to find the rarest and most crowd-moving records and breaks.

What's a Sampler and How Does It Work?

Technically speaking, a **sampler** is any EMPI (Electronic Music Production Instrument) that can digitally record sound, usually through the use of external audio sources. Instead of having the ability to simply generate and manipulate tones (like a synthesizer), a sampler deals with the actual digital recording of sounds. Once sounds are recorded into a sampler, they can be altered in pitch, duration, or sequence, while the unique timbre (tonal qualities) of the sounds within the sample remain intact. The sampled sound(s) can then be "triggered" (played back) through the use of a MIDI instrument such as a keyboard/MIDI controller or drum machine.

A Sampler comes in two basic forms: hardware or software. Each essentially does the same thing, but each offers different advantages or disadvantages, depending upon your intended use, gear preference, and comfort zone. Typically, most hardware samplers (not all) can only play samples of its own or similar audio file formats.[9] On the other hand, software samplers, which are basically virtual hardware samplers, are usually not limited to any one particular file format. They can read and use just about any audio file format.

Here, it's worth mentioning how samplers determine the clarity of sound. Samplers use audio bandwidth to determine the clarity of a sound. The general formula states that: bandwidth of the sample signal is usually around half the sampling rate. So 16kHz is = 8kHz audio bandwidth. But clarity does indeed vary from sampler to sampler. The Akai S950, one of the samplers famously linked to the development of the art of sampling in hip hop/rap music, samples at 12 bit. However, it's just as clear as many of the 16-bit samplers that are currently available, but not as bright and clear as let's say a 24-bit sampler.

Finally, it's important to remember that samplers can be and are often used to sample any sound imaginable. They can be used to sample the smallest tones, such as a closed hi-hat; or they can be used to sample large musical phrases, like drum loops, extended

[9] With the advent of hardware/software hybrid EMPIs, this is less of an issue.

vocal passages, and more. The important thing to remember is that the art of sampling is not limited to the use of recorded music as source material.

The History of Pre-Modern Samplers

Technically speaking, the first sampler was the tape recorder; and the first practical tape recorder was the Magnetophon K1, which was developed by German engineers at AEG in 1935. In the '40s during World War II, tape recorders were used by the Nazi regime to broadcast propaganda, which was edited of course. After World War II, a number of Magnetophon K1s found their way elsewhere in Europe, and by the '50s tape recorders were further developed and commercialized in America by the company Ampex.[10]

Next, from 1949 to 1956 the instrument known as the Chamberlin, invented and developed by Harry Chamberlin, was what many regard to be the precursor to the well-known Mellotron. The Chamberlin was an electro-mechanical keyboard that triggered sounds and loops of other pre-recorded instruments. The Mellotron, which was actually just the Chamberlin in mass production, would become more popularly known in the '60s and '70s.[11]

In 1976, the Computer Music Melodian became first the commercially available digital sampler. Notably, it was compatible with other analog synthesisers via syncing with their pitch.[12]

---

[10] Marc Henshall, "Musique Concrète – Pioneering Electronic Music – Part1," Sound Matters (October 30, 2011) https://www.yoursoundmatters.com/musiqueconcrete1/] See also: http://www.historyofinformation.com/detail.php?entryid=1620.

[11] Joe, "A BRIEF HISTORY OF SAMPLING," T Blog (July 1, 2018), https://www.thomann.de/blog/en/a-brief-history-of-sampling/ The Chamberlan was used by Led Zeppelin, The Rolling Stones, The Beatles, and many other recording artists.
See also: Synthhead, "MELLODRAMA: Mellotron/Chamberlin Documentary Trailer" at Synthopia (February 12, 2009) http://www.synthtopia.com/content/2009/02/12/mellodrama-mellotronchamberlin-documentary-trailer/

[12] "Music Technology Research: The History of the Sampler," *Fli's Music Blog* https://flismusicblog.wordpress.com/tag/computer-music-melodian/. See also: David McNamee, "Hey, what's that sound: Sampler," *The Guardian* (September 28, 2009) https://www.theguardian.com/music/2009/sep/28/whats-that-sound-sampler; "Computer Music Melodian" interview on *NPR* 1980 https://soundcloud.com/harry-mendell1/computer-music-melodian; and Francis Preveu, "Sampler Evolution," *Keyboard Magazine* (November 29, 2017) https://www.keyboardmag.com/gear/sampler-evolution.

Fairlight, the Blueprint for Modern Samplers

Sampling has actually been a music recording process for 70 years. But the first polyphonic digital sampler, the Fairlight CMI (Computer Music Instrument), didn't arrive until 1979. Two Australian engineers, Kim Ryrie and Peter Vogel founded the Fairlight Company in 1975. Frustrated by the limitations of analog synthesizers, the pair wanted to design a digital synthesizer, or rather a digitally controlled analog synthesizer. They wanted to make a device that could create sound by modeling all of the parameters of a waveform in real time. Their initial quest failed, prompting them to take their efforts in a different direction. After enlisting the help of Tony Furse (who was then a Motorola consultant), and after many revisions of their eventual prototype, the QASAR M8, Ryrie and Vogel developed the Fairlight CMI I.

Described as a computer-based digital sampling instrument, the Fairlight came equipped with two six-octave keyboards, an alphanumeric keyboard, and an interactive VDU where sounds could be edited or drawn on the screen using a lightpen. Among the many major contributions of the Fairlight, perhaps the two that stand out the most were: The first ever graphical pattern-based sequencer and the first user-interface arranged in a set of menu views called "pages". During the 1980s, the Fairlight Company introduced two new models, the Fairlight II and the Fairlight III. The last revision of the Series III, which replaced the cumbersome lightpen with a graphics tablet that was integrated into the alphanumeric keyboard, was made in 1991.

Because of its hefty price tag, the Fairlight was out of reach for pro-sumers and even many recording artists. Only the most affluent recording artists[13] and the most high-end recording studios could afford it. The original Series I sold for $30,000; the Fairlight Series II generally sold for around $25,000; and the Series III started at $40,000.00 — customized with options, it could cost $100,000.00.

[13] Stevie Wonder, Peter Gabriel, The Art of Noise, Tears For Fears, Howard Jones, and Thomas Dolby are among the many popular recording artists who were known to have used the Fairlight for some of their biggest hits.

By the late 1980s, however, the unreachable suddenly became reachable. The advent of complex and affordable samplers from Ensoniq, E-Mu, and Akai ended the era of absurdly expensive digital sampling instruments.[14]

A Brief History of MIDI: The Technology that Makes Sampling Even More Flexible

By 1981, the "stability, playability, and polyphony" of synthesizers had evolved from the first musician-used electronic synthesizers of the mid- to late 1970s. However, the issue of combatibility had remained a problem for manufacturers Moog, Oberheim, Sequential Circuits, Korg, Roland, and Yamaha. Because of the multifarious nature of synthesizer design, each manufacturer had been defining pitch and timing data in their own way. Thus, unless all of a musician's synthesizers were from the same manufacturer, they could not operate together through a single keyboard; there was no standard of compatibility. But the compatibility issue would soon be rectified.

Concerned about the lack of compatibility between manufacturers — and likely encouraged by Herbie Hancock, the first person to customize different models of pre-MIDI synthesizers in order to connect them — Dave Smith and Chet Wood (both programmers and audio/design engineers at Sequential Circuits) came up with a concept of an Universal Synthesizer Interface, for which they presented to the 1981 Audio Engineering Society (AES) Convention. That following year at the 1982 Winter NAMM (National Association of Music Merchants) show, a meeting took place between the leading American and Japanese synthesizer manufacturers and certain improvements were made. What resulted was what Dave Smith dubbed the Musical Instrument Digital Interface: "MIDI."[15]

[14] "Fairlight- The Whole Story," *ANerd.com*, http://www.anerd.com/fairlight/fairlightstory.htm.

[15] For an extensive history of MIDI and synthesizers, see "Tutorial: History of MIDI," MIDI Manufacturers Association, http://www.midi.org/aboutmidi/tut_history.php (accessed July 28, 2009).

MIDI is the electronic music industry standard communications protocol that enables electronic musical instruments such as synthesizers, keyboards, keyboard controllers, digital samplers, computers, and other electronic equipment to communicate, control, and synchronize with each other. MIDI allows computers, synthesizers, MIDI controllers, sound cards, samplers, and drum machines to "talk to one another," i.e. to control one another and to exchange system data. MIDI does not transmit audio signals or media, it only transmits "event messages" like pitch and note velocity, and it renders control signals for parameters such as volume, vibrato and panning, cues, playing and recording, and clock signals to set the tempo. In other words, by allowing digital samplers to essentially be "played" over a variety of electronic musical instruments, especially drum machines, MIDI extended the flexibility of digital samplers and, in effect, gave beatmakers (producers) a tool that they could use for the performance aspect of their compositional goals.

The History and Evolution of Sampling in the Hip Hop/Rap and Beatmaking Traditions

Early hip hop DJs were *sampling* what to them were the most valuable parts of the records. Pushing the boundaries of the turntables, pioneering hip hop/rap DJs (most notably Grandmaster Flash) transformed turntables into *manual* sampling machines. And under the early guidance of recording engineer/producer Arthur Baker, Afrika Bambaataa began experimenting with synthesizers and early samplers. As hip hop/rap music grew, both in terms of size and scope, this development did not go unnoticed by major EMPI manufacturers like E-Mu, Ensoniq, Akai, Roland, and Yamaha. By the mid- '80s, there were five big EMPI corporations that were jockeying towards advancements in sampling technology.[16]

[16] The primary focus on a high-end clientele and an inability to dramatically decrease manufacturing costs were the two factors that ultimately led to the Fairlight Company going out of business. After Fairlight, sampler manufacturers reset their attention on common "consumer musicians" rather than high-end users. This was a clear indication of where they believed sampling and samplers was headed.

At this time, hip hop/rap DJs — who had steadily been experimenting with a variety of electronic sound-making devices and who had spawned an entirely new kind of music maker — were the perfect consumer group for the new samplers that the major EMPI manufacturers were marketing. For the first wave of hip hop/rap DJs (beatmakers), turntables had been their chief instruments. But having seemingly pushed turntables to their limits, these DJs began to expand their music rigs to include echo boxes, drum machines, synthesizers, and early sound modules. Soon these music rigs morphed into what we now commonly call production setups or simply "setups".

These new developments in the hip hop/rap DJ world prompted the big five EMPI companies to release a wave of EMPIs that would go on to become classic instruments in the beatmaking tradition. In 1985, Ensoniq introduced the Mirage, a digital sampling keyboard that was the first sampler with keyboard control. In 1986, Akai released their S900, which was quickly updated to the celebrated S950, one of the most important EMPIs in the development of hip hop's beatmaking tradition. Later that same year, Roland introduced their own 12-bit, high-powered sampler: the S50. Then in 1988, two of the biggest sampling classics came to market. First, the SP 12 by E-Mu, which was soon succeeded by the SP 1200. And second, the Akai MPC 60, which was quickly succeeded by the much revered MPC 60 II and later the MPC 3000.[17]

Advents like the E-Mu SP 1200, Akai S950, and the Akai MPC 60 II ushered in a new way of sampling and further extended hip hop/rap music's compositional process. Before the late '80s, beatmaking was best characterized by sparsely arranged drums (particularly Roland's TR 808) and equally simple keyboard patterns. But by the late '80s and early '90s, the pioneers of sampling — most notably Marley Marl, The Bomb Squad, Prince Paul, DJ Premier, Large Professor, Q-Tip, Pete Rock, Dr. Dre, and The RZA — used the sample technology of their time to introduce a more dramatic, more aggressive way of making beats. These pioneers

[17] The original Akai MPC series was actually designed by Roger Linn, the inventor of the Linn Drum, an EMPI which is widely regarded as the predecessor to the first Akai MPC.

went beyond just sampling the break, they explored the entire record and sampled sound segments from everywhere. In turn, they would then "flip" the samples; that is to say, they would take these sampled sections and chop, filter, and fashion them into new music compositions. These compositions represented something that was more challenging and creative than anything previously produced in the young history of beatmaking.

Through an aggressively creative style of trial and era, pioneering beatmakers (producers), particularly those of the Pioneers/Avant-Garde Period (1988-1994), were able to establish the foundation for which all sample-based beatmakers (producers) now build upon. The primary sample-manipulation techniques that were fostered and developed by the aforementioned pioneers still serve as the basis for the sampling process that we now recognize in beatmaking today. Therefore, all beatmakers (producers) who sample are forever indebted to these pioneers.

The Impact of the Sampling Pioneers and the Response of EMPI Manufacturers

The new compositions created by the early sampling pioneers were drum-backed re-creations or savvy hip hop/rap conversions of the original recordings that they sampled. The processes that they formulated were critical to the overall development of the beatmaking tradition for a number of reasons, but perhaps the biggest reason is the fact that it allowed a generation of impoverished Blacks and Latinos — many of whom had been deprived of instruction with traditional musical instruments — to be reconnected with the sounds, culture, and heritage that they had been mostly stripped of. This connection, which brought about a renaissance for soul smusic of the late '60s and '70s, helped make beatmaking a legitimate alternative to traditional musical instruction and creation. Today, beatmaking (hip hop production) is a music discipline that is appealing to people of all races and ethnicities and from walks of life. Thanks to beatmaking, young kids who dream of playing the saxophone or the guitar when they

grow up still dream of playing those instruments, only now, many of them want to use an MPC, a sampling keyboard, FL Studio, or some other EMPI to do so!

The sampling process formulated at the end of the Electronic Drum Machine Period (1983-1987) and throughout the Pioneers/Avant-Garde Period (1988-1994) also had a considerable impact on the technological advancements of the samplers and other EMPIs of today. Before 1995, no manufacturer offered an EMPI with the function name: "chop" or "chopping". Chopping was the jargon used by the pioneers (and other practitioners of the time) to describe the multi-part process of sampling, dissecting, separating, and rearranging the desired pieces of the original sample. Before 1995, beatmakers (producers) had to manually chop up the original sample into sections. After 1995, manufacturers began offering EMPIs with auto-chop functionality, i.e. chopping functions that *automatically* chopped up samples into regions and sections for you.

Finally, as the sound in hip hop/rap music production and other genres grew cleaner, brighter, and generally more louder, the EMPI manufacturers once again targeted the hip hop/rap beatmaking audience when they began offering samplers with higher sampling bit rates. From 1985 to 1996, the only available sample bit rates were 8khz, 12khz, and 16khz. After 1996, the sample rate in samplers ballooned to 24khz. The sampling terminology (mostly created and first echoed by hip hop/rap beatmakers) and the evolving sound design of the beatmaking pioneers prompted EMPI manufacturers to completely re-structure their design and marketing strategies. By the late '90s, it was quite clear that hip hop/rap music was the king of all styles of electronic music production. Hence, Akai and Roland, two of the biggest EMPI manufacturers of the time, made sure that their product lines were hip hop/rap production compliant. And what was the result of the EMPI manufacturer's dramatic re-direction and commitment to hip hop/rap music production? The result was *more* intuitive samplers, complete with more standard sampling time, higher sample rates, more critical sampling techniques (like mute groups), and more dynamic processing effects.

Given these developments, there are several questions that beg answering. First, *why* did EMPI manufacturers continue to develop their sampling technology? Second, *why* did EMPI manufacturers continue to mass market their new sampling product lines? Third, did EMPI manufacturers anticipate a decline in the interest of sampling and, therefore, a decline in the use of samplers? Or did they anticipate (correctly) that the interest in sampling was going to grow? Given their collective advancements in sampling and sequencing technology, then and now, it's clear that EMPI manufactures saw (and continue to see) sampling as a valuable art form that's here to stay.

The Revival of Sampling
It Was Never In Danger of Dying, and the Internet Didn't Save It

In *The BeatTips Manual* (2015) and previous editions of *The Art of Sampling* (2017), I noted that the sampling tradition of hip hop/rap music was never in jeopardy of dying. In view of recent commentary that continues to suggests that sampling had become an "endangered practice," or something consider to be in "danger of being completely lost,"[18] in this section I will more forcefully show why sampling was never in danger of being lost, and why the stage for its revival was actually set back in 1995.

Despite sample clearance issues, despite a wave of hyper commercialism that settled as a mainstay of hip hop, despite the infamous *Grand-Upright* and *Bridgeport* court decisions, and despite a number of sample-based beatmakers (producers) moving away from sampling as their chief mode of composition, the sampling tradition of hip hop/rap music was never really in danger of dying, and the internet didn't save it.

I don't mean to say that the internet didn't play *any* role in the revival of sampling. Rather, my argument is that the internet did not play nearly as consequential a role as author Nate Patrin and some other commentators claim that it has. The primary reason for the revival of sampling was the sample-based hip hop/rap music itself and the beatmakers (producers) who made it. The sample-based hip hop/rap music — collectively in the mainstream and underground — that continued to be released between the late '90s and mid-2000s is what prompted the revival of sampling, not the internet, not online communities of sample-source-material searchers or preservationists.

What the internet *did* do, however, was provide increased access and exposure to certain sample-based hip hop/rap music projects. There were a number of towering hip hop/rap albums that were

[18] Patrin, 208, 209.

released between 1986 and 2006, both on major and independent labels and via mixtapes. Much of this music was out of print soon after its release. Had it not been for the internet — message boards, blog posts, file sharing, sample-source sites — most of this music would have gone unheard by new ears. Whether some of these music projects had actually been overlooked at all is a separate discussion. In recent years, there's been a trend of considering certain projects as "slept on" (not known) when first discovered by *new* fans of these projects. What is clear, however, is that these projects serve as evidence that the art form continued, was thriving, and still considered to be an important composition process. Sampling remained fundamental to hip hop/rap music's DNA despite a migration of some beatmakers (producers) away from the style of beatmaking. In other words, the work — the commitment to and appreciation for the art of sampling — persisted despite the internet. This does not mean that the internet played no role in reinvigorating the popularity of sampling. But we should be weary of any commentary that maintains that the internet *saved* sampling. This narrative does not center the people who carried on with sampling; rather, it centers the *exposure* to — and the "new" audience or others who discovered — sampling.

Almost as soon the jiggy era (aka the shiny suit era) began (ca. 1997), which was short-lived and mostly associated with the East Coast, there were already signs that the sampling tradition of hip hop/rap music was already *re-enforcing* itself. Hip hop/rap music has always been a music culture that valued its connection to its past. Even when the "youth driven" conception of hip hop/rap music plays out, we see the youth referencing, quoting, copying, and imitating the past icons of hip hop/rap music. One reason for this is because hip hop/rap music has always been — *and continues to be* — driven by the streets. In this way, hip hop/rap has always been bottom up, never top down. Hip hop/rap music is a culture that takes its cue from the rawness of the street. Once you recognize this you understand that the wanton commercialism of the jiggy era was really just an outward extension of hustler glorification in a more digestible form, less gritty but the message still the same: *Get money*!

But the jiggy era's fate was sealed as sure enough as a drug dealer who flashes his lifestyle in the hood without bothering to maintain the rawness and edge that built that lifestyle. *This causes resentment in the hood.* Sooner or later the hungry young ones rise up, following the same path that the fat kingpin did when he was skinny and without food, and they attack and reclaim the same essence.

In terms of the fight for the *essence* of hip hop, this meant throwing scrutiny at jiggy music and asking what's really *real*? Party music and club culture was never the problem. Party music and club culture is a fundamental part of the roots and lasting force of hip hop culture. The problem was the *inauthenticity* of it all, the happy-go-lucky and often fraudulent nature of the jiggy era. *Get your money, playboy. But don't front for me*! This has always been an unwritten code in street culture. The idea being that you can *do you*, but keep it real. This essence is embedded in hip hop/rap music regardless of what type of hip hop/rap music you make. The jiggy era *didn't* keep it real, and the music styles and sound that emerged directly after it represented a clear rejection of the era.

In musical terms, this means using any equipment you can get your hands on; it means turning constraints and limitations into strengths; it means looking to the past for *authentic* examples of the essence that speaks to you. As the simplicity of trap music (the everyman style and sound that's ubiquitous and popular today for good reason) and drill music would later show, sampling during the jiggy era got *hungry*.

In this light, the "return" of sampling in hip hop/rap music was more about a broad reclaiming of the essence of hip hop/rap music, not only a specific style and sound but also the processes associated with it. The return of sampling wasn't about what the internet provided. The internet served as an open space for posting and sharing music that may have gone otherwise unheard, this included hip hop/rap music and much of the source-material music that was used to make it. Certainly, the internet enabled like minds to discover *their tribe* and the community grew. This undoubtedly added to the notion of preserving sampling in hip hop/rap music, but hip hop/rap music has always been preservationist by nature.

The internet helped transform hip hop/rap's natural preservationist bent into a celebration of the aesthetic of sampling itself.

As for the revival of the art of sampling in the hip hop/rap tradition, the idea of making music "that put artistic integrity first"[19] was neither something that had died by the early 2000s, nor was it particularly new in hip hop/rap music. Any suggestion otherwise is an inaccurate reading of the history of hip hop/rap music and an unmerited amplification of events and persons directly after the jiggy era. Each of the albums on the Critical 26 list (see chapter 2), put artistic integrity first! Moreover, there were important, ground-changing albums with major sampling that were released between 1995 and 2001 — before, during, and directly after the jiggy era. Furthermore, for better or worse, artistic integrity in hip hop/rap music has often been synonymous with street creditably. This is one reason why so much of classic hip hop/rap music is essentially street reporting.

So when we look at the *revival* of the art sampling in the hip hop/rap music tradition, we must first acknowledge the fact that sampling never came close to dying. Next, we must recognize that at least for some beatmakers (producers), the move *away* from sampling was less about sample clearance concerns and more about an aesthetic choice. Starting from this context, we can more accurately see the role that the internet, advanced samplers, and post-pioneers beatmakers (producers) like J Dilla, Bink, Just Blaze, Kanye West, Madlib, Alchemist, and others played in the revival of the art of sampling.

Another point about preservation: Black creative/communal culture, as I discuss in Chapter 17, has always been concerned with preservation and protecting against forgetting its past. In his book *Bring That Beat Back*, Nate Patrin points to the emergence of the internet in the late '90s — with its "mass cultural form of communicative and commercial media" and its online markets like eBay and Discogs — as the *start* of the "bulwark against *forgetting* and an exercise in discovery (or rediscovery, as it where)."[20] But

[19] Patrin, 209.
[20] *Ibid*.

Patrin's assessment situates the internet as both the cause and the catalyst, the reason and the trigger, of the "renewal" of the sampling "ethos." What makes this assessment problematic is not only does it rest on a broken premise, it uses the internet as a catch-all maneuver to do something familiar, something that often occurs whenever Black art is at the center of the matter: Remove credit from where it belongs, then transfer it elsewhere — the transfer destination typically being an inclusion of white participation if not outright centering. I don't suggest that Patrin's hypothesis is racially motivated, but racial bias (even if unintentional) does exists in this area of study, and thus the same patterns are present.[21]

Patrin buys into the narrative that sampling was *left for dead*, then he formulates the hypothesis that sampling/sample culture was saved — "renewed" — by the internet. At first glance, this might seem plausible, until you recognize the trope that's at play here. Patrin's the internet-saved-sampling narrative ignores the embedded preservation and the resilience of the sampling tradition of hip hop/rap music, *it removes credit* and transfers that credit to the internet where the credit does not belong.

This brings to mind the writers' corners that graffiti writers would frequent between the late '70s and early '80s. These "corners" (really not corners at all but subway stations) served as community posts. My response to Patrin's narrative is not about doubting the power of the internet; the internet facilitated a number of different things, chief among them where accessibility to music is concerned was the unchecked ability to share music freely, which put a spotlight on music that would have otherwise been overshadowed. Geekdom, fandom, obscurity— No matter the descriptor Patrin uses to *over* credit the internet and under credit the artists who kept the art of sampling going strong, what we must recognize is that it was the music and the beatmakers (producers) who revived the art form. The internet just made it more easy

[21] For instance, Patrin's persistence on using the term "beatmatching" to retroactively describe "mixing" — "beatmatching" being a relatively recent term, and DJ technique that Patrin (and some other commentators) credit to Frank Grasso, a white DJ. In fact, Patrin opens his book with a discussion of Grasso, the implied message being: *Grasso did it first, hip hop DJing and hop/rap music owes a debt to Frank Grasso*. In chapter 1, I make it clear that Grasso had no direct influence on hip hop/rap music.

for the community to spread. But even this doesn't recognize the fact that preservation and resilience were a part of the hip hop/rap music tradition long before the advent of the internet as we'd come to know it.

From the start, before its recorded/music industry history, hip hop/rap music relied on apprenticeship and was powered by the honoring and preserving of its history. From graffiti writing to b-boying (like DJing and rapping), hip hop/rap music has always moved forward via a reverence for the past icons who contributed to the canon of the culture *(the greats study the greats before them then create something new)*. The argument that it was the internet that triggered the revival of the sampling tradition of hip hop/rap music is weak and misleading. The internet may have served as a conduit for *more* "outsiders" to discover the "secrets" of "sample culture,"[22] but the truth is, from its early days to its heyday, the sampling tradition of hip hop/rap music made insiders of outsiders who simply listened the music. So we must be careful to measure appropriately the role of the internet. We can't do a hatchet job of the actual history. We can't deny hip hop/rap's innate ability to preserve itself. We can't position hip hop/rap music, or more precisely hip hop's sampling tradition, as something that *needed* saving by outsiders (read into that narrative as you will). And we certainly can't connect dots that don't connect when we're missing key context of the history and its most common attributes.

Regarding the internet and sampling culture, I agree with Patrin — inasmuch as I view the internet as a gateway that helped more people discover the art of sampling and beatmaking in general. But the "outsiders" as Patrin has described them, were not saviors of sampling, no matter how "monomaniacal" their fascination with the art of sampling might have been. From Patrin:

[22] Patrin, 209: "...as the Internet started to emerge from its college-bound utilitarianism in the early '90s into a mass-cultural form of communicative and commercial media, some things just couldn't stay hidden. Whereas clearance fees and mandatory liner-note attributions had already started to take a lot of the mystery out of sampling and cratedigging culture, the existence of online markets—from the generalist auction site eBay to the specialist record dealer hub Discogs—and the growing prominence of sample-spotter sites like the 2003-established TheBreaks.com made some of sampling's more arcane origins that much *more accessible to neophytes and outsiders*."

> [i]f the Internet did its share to foreground the cultural status of the ***geek***—the fan so enthusiastic about their choice of hobby that it became an almost **monomaniacal fascination** — it did so with the *side effect* of enabling the kind of obsessive enthusiast that would set the stage for an ***entire renewal*** **of an ethos that had been considered in danger of being completely lost."** [emphasis mine][23]

The art of sampling never came close to "being completely lost." And its so-called "enitre renewal" or revival was not the "side effect" caused by geeks or hobbyist antiquarians. Again, sampling never stopped, it continued to be powered by sample-based beatmakers (producers). The number of sample-based hip hop/rap releases during this period make this quite clear.

Patrin also states that:

> [t]his is about where sample culture *really started* to become self-aware: not just as an integral part of hip-hop production, *but as a bulwark against forgetting* and an exercise in discovery (or rediscovery, as it were). While some hip-hip icons were on their way to becoming media moguls in the late '90s, **another segment of artists had their sights on becoming a different kind of tastemaker: the curator, the archivist, the antiquarian.** [emphasis mine][24]

First, all sample-based beatmakers (producers) were doing this *before* the internet; all sample-based beatmakers (producers) were curators and archivists. Second, this statement is both misdirection and revisionist history. Here, Patrin is awarding credit to so-called "sample-spotting culture" where it does not belong, and in the process, he's centering parties in stories where their contributions are minimal in comparison to those most responsible for the preservation and revitalization of sampling in hip hop/rap music. First, I'm not sure what Patrin is trying to convey by referencing Diddy's and Dre's *mogul* pursuits; their career arcs to do not speak for where hip hop/rap music was at the time or where it was going, nor does it have anything to do with the revival of sampling. Second, sample-based beatmakers (producers) have *always been*

[23] *Ibid*.
[24] *Ibid*.

"curators" and "archivists". This tradition, which is hard baked into hip hop's sampling culture, did not *start* in the late '90s. Early hip hop DJing, which was predicated upon the use of older Black music, was in and of itself a form of preservation and a "bulwark against and forgetting and exercise in discovery (or rediscovery, as it were)." Preserving memory and the exercise of discovery/rediscovery, in all Black music not just hip hop/rap music, has always been important; and passing on record collections is well-established tradition in Black America. Hip hop DJs/beatmakers (producers) were reared on this understanding, and they were conscience of the fact that they were helping to preserve otherwise forgotten music through sampling. In my interviews with DJ Premier, Buckwild, and DJ Toomp, for instance, each recalled their paths from DJ to beatmaker (producer), and each noted that "preservation" and discovery/rediscovery has long informed their work. Similarly, Marley Marl, the father of modern hip hop sampling and one of the seminal beatmakers (producers) who pioneered a number of sampling techniques by the late '80s, reveals a lot about this phenomenon:

> My whole premise of getting into production was because I didn't like the *representation* of rap that was on wax [ca. 1979-1981]. Once rap was on cassettes, and everybody was running around with the latest Flash tape, that was dope! Because there was cutting, there was scratching, there was echoes, and it was original beats they was rhyming off of. That's what…**as a kid, that's what I was brought up on, you know**, the scratching element, the echoes, **the break-beats**, the RAWNESS, the rub-a-dub scratching.
>
> ***I was trying to make rap sound accurate to what I was brought up on.*** That's basically it. I wasn't looking for a new sound… Maybe you could call it looking for a new sound. But I know the representation of what I was hearing [on the radio at that time] was NOT what I grew up on hearing on these cassettes. And I just wanted to make it MORE like the rap that I heard before it hit records.
> That was my whole premise of everything!"….
>
> It was the fusion of where I was trying to take the music. I guess it was the fusion of hearing break-beats, and scratching, and echoes, and all of that on earlier tapes that came to my attention. So I think the fusion of all of that. **And the reason I even used, went back to the break-beats was because I *remembered*. When I went back and started making records, after what I realized with sampling what I could do! They made me go back to my brother and them records. I started**

> **digging in my brother and them crates.** …***I was remembering***, and I was like, "Yo, hold on. This African music today!" The beat was dope! So I would go back to my brother's crate. That was in my brother's crate…" "Fly Like An Eagle" [the song sampled for "Nobody Beats the Biz"], all those elements was in my brother's crates. Even the James Brown stuff, ***I would remember that they used that***… "Funky Drummer" [James Brown] was dope. ***Then I started going back to every song that I remembered*** people used to dance to. And that's why my selection was always something hot. And by me putting elements together, once I learned about tracking [cuts a serious look], it was over![25]

The internet opened up a lot of spaces for various art forms, and it is here that we must recognize the difference between the internet being a *destination* or *a* pathway to community, not the *cause* of the "entire renewal" or revival of the art of sampling in the hip hop/rap music tradition. The revival had been brewing mainly because the art form never died and key beatmakers (producers) from the Post-Pioneers Period made sampling their chief compositional process. Even Patrin doesn't deny this: "[T]here was *already* a groundswell of underground hip-hop running up and down the West Coast by the mid-'90s"[26] Thus, it was the music and its makers who *continued* the tradition of "bulwarking" hip hop/rap music against forgetting its artistic past, while leading the way in showing how discovery (and rediscovery) would be a part of its future.

The mainstream/underground dichotomy has always been a contested point. And an incomplete understanding of this fact skews how you look at the decrease of sampling (on the surface that is). In the case of *why* sample-based hip hop/rap music appeared less in the mainstream, the big claim was that "sampling died," that it was "a relic." (Patrin considered the same claim: "If sampling itself was increasingly considered a dated *relic* of hip-hop's old days…"[27]) However, a more accurate reading considers three things. First, as some beatmakers (producers) and rap artists enjoyed more mainstream success, they gravitated more towards compositional aesthetics that were more in line with *traditional* Western popular

[25] Amir Said interview with Marley Marl (2008), *The BeatTips Manual* (2015).]
[26] Patrin, 212.
[27] *Ibid,* 247.

music practices, notably live instrumentation, i.e. non-sample-based music making. In other words, it was not so much as a rejection of sampling by beatmakers (producers) and artists as it was it the perception of leveling up musically. Second, sample clearance fees were certainly a headache for some rap artists some of the time, but not all rap artists all of the time. And even top rap artists who veered away from sample-based beats as a whole continued to use sample-based beats not only as a means of maintaining their roots, but also as competitive advantage (they could afford the clearances on hit songs that contained samples). Third, the majority of the underground, from the jiggy era on into the mid-'00s never stopped sampling! Look at this list of mainstream artists that released sample-based music between 1999 and 2004 — a critical period in the stabilization of sampling:

Jay-Z – Vol. 3…Life and Times of S. Carter (1999). Major influence on new generation of sample-based beatmakers (producers).

Mobb Deep – *Murda Muzik* (1999).

Nas – *I Am...* (1999).

Inspectah Deck – *Uncontrolled Substance* (1999).

Ghostface Killah – *Supreme Clientele* (2000). Major influence on new generation of sample-based beatmakers (producers).

Common – *Like Water for Chocolate* (2000). Major influence on new generation of sample-based beatmakers (producers).

Jay –Z - *The Dynasty: Roc La Familia* (2000).

Prodigy – H.N.I.C. (2000).

Beanie Sigel – *The Truth* (2000).

Jay-Z – *The Blueprint* (2001). Major influence on new generation of sample-based beatmakers (producers).

Nas – *Stillmatic* (2001). Major influence on new generation of sample-based beatmakers (producers).

Wu-Tang Clan – *Iron Flag* (2001).

Ghostface Killah – *Bulletproof Wallets* (2001).

Jadakiss – *Kiss the Game Goodbye* (2001).

Nas – *The Lost Tapes* (2002).

Nas – *God's Son* (2002).

Cam'Ron – *Come Home With Me* (2002). Major influence on new generation of sample-based beatmakers (producers).

50 Cent – *Guess Who's Back* (2002).

Jay-Z – *The Black Album* (2003).

50 Cent – *Get Rich or Die Tryin'* (2003). Major influence on new generation of sample-based beatmakers (producers).

T.I. - *Trap Muzik* (2003).

Freeway – *Philadelphia Freeway* (2003).

Kanye West – *The College Dropout* (2004). Major influence on new generation of sample-based beatmakers (producers).

Nas – *Street's Disciple* (2004)

Lloyd Banks – *The Hunger for More* (2004).

And look at this list of underground artists during the same period whose albums *featured* sample-based beats:

Capone-N-Noreaga – *The War Report* (1997)

Mos Def – *Black On Both Sides* (1999).

MF DOOM – *Operation Doomsday* (1999).

Prince Paul – *A Prince Among Thieves* (1999).

Lootpack (produced by Madlib) – *Sound Pieces: Da Antidote*; *Rawkus Presents Soundbombing II* (1999).

The Beatnuts – Musical Massacre (1999).

Reflection Eternal – *Train of Thought* (2000).

Slum Village – *Fantastic, Vol. 2* (2000). Major influence on new generation of sample-based beatmakers (producers).

Madlib – *The Unseen* (2000).

M.O.P. – *Warriorz* (2000).

Bumpy Knuckles – *Industry Shakedown* (2000).

Screwball – *Y2K* (2000).

Cormega – *The Realness* (2001). Major influence on new generation of sample-based beatmakers (producers).

J Dilla – *Welcome 2 Detroit* (2001). Major influence on new generation of sample-based beatmakers (producers).

Pete Rock - *PeteStrumentals* (2001). Major influence on new generation of sample-based beatmakers (producers).

Royce Da 5'9 – *Rock City* (2001).

Cormega – *The True Meaning* (2002).

Large Professor – *1st Class* (2002).

AZ – *Aziatic* (2002).

7L & Esoteric – *Dangerous Connection* (2002).

Gang Starr – *The Ownerz* (2003).

JAYLIB (J Dilla and Madlib) – *Champion Sound* (2003). Major influence on new generation of sample-based beatmakers (producers).

Brother Ali – *Shadows on the Sun* (2003).

Little Brother – *The Listening* (2003). Major influence on new generation of sample-based beatmakers (producers).

Madvillain – *Madvillainy* (2004). Major influence on new generation of sample-based beatmakers (producers).

In considering these releases, ask yourself this question. When was sampling "in danger of being completely lost?" The sampling that took place on these releases was *not* inspired by or had anything to do with so-called "sample-spotting culture." And one critical observation that we can note from these releases is that plenty of hip hop/rap artists continued to create hit songs that were driven by sampling. (Jay-Z, arguably the greatest rapper of all time, and Nas, one the greatest lyricists of all time, have continued to rap over sample-based beats theire entire careers!) All of these releases served

as inspiration for a new generation of sample-based beatmakers (producers) much the same way earlier sample-based songs served as inspiration for earlier generations. Each generation of sample-based beatmakers (producers) inspire the next generation (See the beatmaking periods in Chapter 2). To position the internet as the prevailing factor in sampling's revival is to downgrade the role of those who continued to steadily grow the art of sampling from *within* hip hop/rap's sample-based beatmaking tradition.

Finally, it's further worth clarifying that in the mid-2000s, sampling wasn't killed off as much as the popularity of synthesized-based music, most notably trap, then later drill, took hold. But what's less known is that various sampling techniques and methods continued to be at play even within the rise of trap and drill. DJ Toomp, one of the pioneers of trap as we know it today, never swore off sampling. Toomp continued to incorporate (or its techniques and methods) in his trap beats. Today, trap and drill often includes sampling; and of course, the core sample-based style of hip hop/rap music is alive and well, just as it has always been. Thanks in large part to the sample-based music makers who continued (and continue) to practice the art of samplng.

Chapter 6

The Sampling Equation, and Composition and Arrangement in the Art of Sampling

"Hip hop can take anything and just make an ill beat. It's just about who's constructing it and understanding the science of it."
–DJ Premier

"Sampling is not simply the reshaping and reuse of recorded text, but a method of textual production…that proceeds by listening for and incorporating discrete parts, rather than completed wholes, and constructing an aesthetically satisfying text out of them."
–Richard L. Schur

"A tool is just a tool and the craftsman is responsible for how he uses it. However, craftsmen need to understand a tool's built-in biases and limitations in order to wield it well."
—Jeff Sonderman

The Sampling equation is a term that I use to describe the core set of processes that make up the compositional tract of the art of sampling. It also describes some of the fundamental factors that ultimately determine the success and effectiveness of the art of sampling. There are seven separate but interrelated components that make up the sampling equation: (1) the philosophical approach, (2) the sampler's code, (3) source material ("digging in the crates"), (4) signal chain, (5) chopping/editing and sound manipulation, (6) triggering, (7) arrangement/programming and sequencing.

The **philosophical approach** refers to the overall philosophy of sampling that a beatmaker (producer) holds; it also refers to the style of sampling that a beatmaker (producer) employs. The **sampler's code**

represents the creative and ethical standards of sampling in the hip hop/rap music tradition. Each beatmaker's (producer's) adherence to this code goes a long way in determing the quality and originality of their beats. **Source material/digging in the crates** refers to what the sample actually is, where it comes from and how it was found. **Signal chain** refers to how the source material/music is accessed. That is to say, through which capture media is the source material/music accessed and through what audio connection is it achieved. In other words, the format of the source material/music and where the source material/music goes *before* it's sampled. **Chopping/editing** refers to the "trim" techniques and the other editing processes that sample-based beatmakers (producers) use to transform samples through a series of cuts and trims, commonly known as chops. **Triggering** refers to the means through which samples are triggered and played, for example, through the use of a drum pad on a drum machine, a key on a keyboard or MIDI controller, or key on a computer keyboard. **Arrangement/Programming** and **sequencing** refers to the process of programming/arranging samples into sequences and linking sequences together into fully arranged songs. In this chapter and the next, I detail each component of the sampling equation.

The Philosophical Approach

In order to further explain what is meant by the philosophical approach, it's a good idea to share the approach that I and many other sample-based beatmakers (producers) use. My philosophical approach to sampling is this: I look at sampling as a grid of music discovery with vast creative potential. Unlike a single note on a keyboard or software synthesizer, a sample of a pre-existing song can give you more than just movement up or down the pitch scale. And aside from the various incidental nuances that samples provide when they're looped, samples often act as cementing agents. That is to say, as samples typically serve as half of the rhythm section of a beat, and as such they *glue* the drums of the beat together in a way that makes the whole composition move more organically rather than mechanically. Furthermore, the art of sampling can educate you — on tones and textures, rhythm and timing, function and feeling — in ways that traditional music processes cannot. Whenever I sample a record, I always learn something new about composing and arranging music. Moreover, I gain a better understanding of how to insert a particular mood that I'm feeling into my music.

Whatever your philosophical approach to sampling is, you should consider three factors when you take up the sample-based compositional style. First, you should always seek and fully expect to find something fresh and unique every time you sample something, even if it's just a sound-stab, like a new hi-hat or snare. Second, you should think carefully aboutt the mood and feeling of the source material/music that you want to sample. Regardless of what you're sampling, whether it's a complete-phrase or spare-part phrase, focus your attention on identifying the mood and feeling of what you're about to sample. Third, having identified the mood and feeling, shift your attention to trying to get an *audio snapshot* of where you want to go with what you've sampled, like how can you use, and in some cases reuse, what you've just sampled.

The approach that I just outlined is the one I use, but I encourage you to add your own unique thoughts to it. It's important that you identify and incorporate your own approach to sampling. In doing so, you will carve out your own sampling identity. Furthermore, because sampling requires that you devote serious time to mining through source material for things to sample, having a clear-cut approach and expectation will dramatically increase your overall beatmaking efficiency. Finally, the proper sampling approach will train your music ear, giving you a better indication of what kinds of samples that you're likely to flip successfully.

The Sampler's Code: The Ethics and Unwritten Rules of Sampling in the Hip Hop/Rap Music Tradition

The purpose of the sampler's code is to help sample-based beatmakers (producers) create the best art that they can. The sampler's code is not meant to be a restriction of art but rather a guide and catalyst for creating the best art possible. There are a variety of unwritten ethical rules that govern the general beatmaking community, but in the case of sample-based beats, these unwritten rules have been taken more seriously. For most seasoned sample-based beatmakers, these rules, which are often learned directly or indirectly from other sample-based beatmakers, are well understood and timeless. Also, the ethical rules of sampling are an extension of the creative, stylistic, and competitive rules that governed over the four elements (main artistic expressions) of hip hop's earlier days. As such, these rules implicitly stress the importance of knowing the fundamentals of the art form as well as knowing the work and styles of the art form's most respected artists. Moreover, the ethical rules of

sampling are inextricably connected to notions of originality and aesthetic value. What follows below is a list of the most recognized ethical rules of sampling.

Know the Art Form

Before anything else, a sample-based beatmaker (producer) should know the art and craft of sampling. This part of the sampler's code means that you should have a commitment to studying the art of sampling; this is the primary prerequisite for developing a skill and appreciation for sampling. Within this understanding, a highly-skilled sample-based beatmaker is expected to know four things. First, the history and heritage of sampling in hip hop/rap music. Second, the styles and work of the art form's key practitioners. Third, the aesthetic and technical characteristics of the art of sampling. Fourth, the practice of digging through source material. *Also, knowing the art form of sampling in itself underscores the importance of preserving it*.

Be Creative and Original

Being creative and original is the second most important rule after knowing the art form. Hip hop culture prioritizes originality in general, but in beatmaking, and sampling in specific, being creative and maintaining an original sound is especially important. For one thing, the most sought after source material in the sampling tradition of hip hop/rap music spans from the '60s to the '70s. (As I discussed earlier, this is for the aesthetic value of records released in that time frame.) This means that sample-based beatmakers (producers) are often using the same kinds of source material and, in many cases, the same exact songs or recordings from the same album and/or recording artists. To be original, a sample-based beatmaker must commit to being creative by using his knowledge of the art form along with his own ingenuity and imagination. Further, being original can mean digging deeper for more rare and obscure source material. It can also mean transforming known source material in new ways that thoroughly demonstrate the sampler's level of creativity and originality.

Finally, the creativity and originality rule in sampling also adheres to the competition dimension of the hip hop sensibility. Because sample-based beatmakers (producers) aim for creativity and originality,

either through a unique blend of their skills or through the use of obscure recordings, they are upholding one of hip hop's driving forces: competition. In my interviews with DJ Premier, !llmind, Buckwild, and 9th Wonder, each pointed out how, on many occasions, they were motivated and pushed by the beats of their peers to come up with even more dope beats of their own. Each described this as healthy competition. This chain of respectful competition and motivation plays a major role in the sample-based beatmaking community, and being creative and original are important aspects of this competition.

No Biting Allowed

Biting, the overt (sometimes less overt), deliberate copying of another artist's style, has never been respected in any of hip hop's four artistic expressions. As I discussed in Part I, style and originality have been prioritized in hip hop culture since its inception. As two of the most valued and celebrated traits in hip hop, individual style and originality also means that you don't bite! You don't copy someone's style and sound. Instead, you develop your own style and sound, and you always aim for originality. And while demonstrating clear influences of other sample-based beatmakers' works is certainly not a violation of the sampler's code — after all, it's normal to study and practice styles — a total mimic of another sample-based beatmaker is a clear violation of the sampler's code.

Same Sample/Source Rule: Is Using the Same Sample (Record/Source Material) Ever O.K.?

It's generally understood that sampling the same record and using it in the same or substantially similar way is unethical, a clear violation of the sampler's code. However, there are three main exceptions. First, the use of a different section of the same record. Using a different section of the same record, especially in a creative and original way, does not violate the sampler's code. Second, it's totally acceptable to even use the same section (part) of the same record as another sample-based beatmaker (producer), so long as you flip it, i.e. substantially transform it in a different way through your own creativity and skills. Third, coincidental usage of the same source material does not violate the sampler's code. Many sample-based beatmakers of the early '90s held common cultural backgrounds; thus, they shared access to or awareness of much of the

same vinyl records of the '60s and '70s. In other words, coincidental uses of the same record, even the same part of the same record, have always been inevitable.

Either way, it doesn't matter how many people have used the same sample, because if you can flip it differently, then that's perfectly inline with the sampler's code. Besides, what is using the same sample and flipping it really all about? Is it not a more transformative form of *versioning*? So the bottom line is this: Every sample can be flipped differently. It all depends on the ingenuity, imagination, creativity, and skill set of a particular beatmaker.

Using Break-Beat Records (Compilations) Is OK

Using break-beat records (or compilations) is highly ethical, especially when it comes to drum sounds. Nearly every beatmaker (producer) that I've interviewed in the past 20 years has mentioned their use of break-beat records (compilations), specifically noting the "Ultimate Breaks & Beats" series of compilations. I've seen "Ultimate Breaks & Beats" volumes in the studios of various beatmakers, including DJ Premier, Buckwild, True Master, and Marco Polo. When I first began making beats, the "Ultimate Breaks & Beats" were widely considered an invaluable piece of a sample-based beatmaker's arsenal. They were used regularly by beatmakers throughout New York City, Atlanta (DJ Toomp also mentioned to me that he used them), Miami, and LA. Thus, I suspect that most (if not all) sample-based beatmakers of the Pioneers/Avant Garde Period used so-called break-beat records (compilations) particularly for the creation of new drum sounds. Therefore, to avoid the use of break-beat records is certainly not the normal stance amongst most sample-based beatmakers, nor is it a purist declaration. And while most beatmakers certainly sourced other records for drum sounds, opting *not* to use break-beat records (compilation) was simply a matter of personal choice. So using or not using break-beat records (compilations) shouldn't be looked at as being aesthetically superior or inferior.

Source Material/Digging in The Crates[1]

The Importance of Mining

Since the art of sampling has traditionally been about retrofitting old songs to fit the aesthetics of hip hop/rap music, sample-based beatmakers (producers) are a special breed of "sound collectors". Sample-based beatmakers mine through used, long-forgotten records for music elements of value. These elements of value are what beatmakers use, re-work, and refashion into new music. This is why sample-based beatmakers are only as good as their source material. And when it comes to record collections, it's never about quantity, it's always about quality and value.

Records (and other source material, i.e. any recorded sound or sound that can be recorded) are more valuable to a sample-based beatmaker (producers) than instruments are to traditional musicians. For sample-based beatmakers, records — or pre-existing music in any available media format — are the primary currency from which the heart of their beats are made, which is certainly not the case for traditional musicians. For instance, a pianist has the exact same tool to draw from every time he sets out to create something new. He knows that music notes aren't going anywhere; middle C is *always* middle C. In other words, the framework which traditional musicians work from essentially remains the same. However, a sample-based beatmaker has to rely on a *new* tool every time out. I mean, one good album might have anywhere from 0 to 10 (perhaps more) good segments to sample. And "good" is only subject to the imagination and inspiration of a given beatmaker. Thus, a sample-based beatmaker never really knows what they'll be able to get from a record until they actually mine it, i.e. listen carefully to it. So the ability to mine quality source material is paramount to a sample-based beatmaker. In this way, mining — ie. digging in the crates — is a fundamental part of the music process for sample-based beatmakers.

[1] There are two basic forms of sampling source material: arcane and familiar. Arcane source material refers to source material that is unknown or unrecognizable (to most people) or obscure. Familiar source material refers to source material that is recognizable or easily identifiable. "Digging in the crates" is a term used to describe mining for source material (usually old songs). The term comes from the act of DJs storing their vinyl records in milk crates.

Digging in the Crates as Competition and A Means for Harnessing History

Much of sampling in the hip hop/rap music tradition is often about besting other sample-based beatmakers' (producers') source material. Because of this, having a deep record collection — or access to a large catalog of music — and a broad knowledge of records is something that is highly respected and regularly celebrated within the sample-based beatmaking tradition. In fact, in the hip hop/rap music tradition, sample-based beatmakers are often respected for their digging prowess — the size and scope of their record collection, their knowledge of records, and their historical music knowledge in general — just as much as they are for their beatmaking skills. In this way, digging in the crates is also about discovering and harnessing history.

This is why most sample-based beatmakers believe it's always a good idea to carefully study the credits and names of the songs that they sample from. Not only is it a widely held tradition that goes all the way back to Grandmaster Flash, the grandfather of modern beatmaking, it's one of the best ways to enhance your familiarity with the musicians and writers of a given era and genre.

E-Digging vs. Record Digging

Before comparing "e-digging"[2] to traditional vinyl record digging, there are several contextual points that must be made. First, you must remember that hip hop/rap was the first music tradition to be entirely predicated upon the use of previously recorded music. This wasn't an accident, this was a conscious decision by the earliest hip hop/rap practitioners (chief among them Kool Herc, Grandmaster Flash, and Afrika Bambaataa). Furthermore, the preferred recorded music came from vinyl records. And from the onset of the hip hop/rap music tradition, this wasn't merely a cost-effective necessity, this was the life-force of the entire tradition. Truth is, buying a keyboard would have been much more cost-effective than regularly buying records. In fact, vinyl record

[2] The general principles of sampling apply no matter what audio source you're sampling from. The only difference that may exist can be found in the amplification of the original audio source. Also, it's important that you not only listen to music in beatmaking-mode. That is, take time to listen to the records that you've acquired while doing other things, not just making beats.

digging is/was often an expensive endeavor. During the earliest days of hip hop/rap, there weren't any second hand vinyl record stores, records were not yet displaced by CDs (and later downloading and streaming). Therefore, all records were sold at full retail price.

Second, crate digging itself was (is) considered as a part of the artistic process for those beatmakers who make sample-based beats through the use of vinyl records. Many beatmakers considered the ability to dig for quality source material a skill, something that required a unique music education and much music research experience.

Third, digging for records is not something that is old fashioned or in danger of being displaced by technology. There's nothing old fashioned or outdated about building your knowledge base. Technology serves at the command of the one who uses it. That is to say, technology is to be used in the manner that each individual deems that it can best be used. And it should be added that one's over-reliance on technology for technology's sake can have a negative effect on their creativity. The goal of technology is not simply to replace something, the goal of technology is to facilitate and make easier those fundamental things that we have always done. For instance, shooting a full length feature film with digital cameras is very cost-effective, yet nearly all feature length films are still shot with film. Shooting with film, as opposed to digital, is not considered an old fashion or outdated way of doing things in the movie business. On the contrary, it is an artistic choice, one that still holds tremendous value to filmmakers on both sides of the movie budget extremes.

Although technology now provides a new method for digging for source material, we must be careful not to conclude that this new method, i.e. e-digging, should replace the existing method of digging for vinyl records. And consider these two important facts. First, there were hundreds of thousands of vinyl records containing jazz, rhythm and blues, rock, soul, and funk that were released between 1969 and 1975. And second, most hard core vinyl record collectors own on average about 1,000-5,000 records; that's not even 5% of the possibilities. So while e-digging — essentially technology in the form of a search engine — may help one find rare records, technology can not displace the vinyl record search method. Why? Because search technology depends upon the data that it has access to, so hundreds of thousands of songs may never be uploaded to YouTube or streamed on any music streaming service or shared elsewhere online. Thus, for sample-based beatmakers, the only access we will have to plenty of songs that were released in the twentieth century will only be through vinyl records. That's actually one of the

things that makes hip hop/rap so unique: It has always been based on the principle of unique access. And being unique, well, that should never go out of style.

Finally, it must be pointed out that digging for vinyl records doesn't necessarily determine whether you can be an effective beatmaker or not. In fact, it doesn't even give you an advantage (unless perhaps you really value vinyl and everything that surrounds it). You could have all the vinyl records in the world, but if you don't know how to effectively extract value from them, then you're only taking up space with otherwise useless source material.

As for the process of e-digging, i.e. digging for source material on the internet, it should not be seen as an inherently good or bad thing. Instead, it should be considered as a necessary alternative for many sample-based beatmakers (producers). Fact is, vinyl records are simply not as accessible as they were many years ago. Therefore, digging for source material online has become the only reality for some beatmakers. Moreover, it's another legitimate means for finding/discovering new music, often quickly. This is why I strongly endorse e-digging. That being said, there are some key differences between e-digging and traditional record digging that are worth noting.

The primary difference between e-digging and record digging is that the source material found on the internet has a notable difference in sound quality. The sound of a vinyl record is more rich in character, and the nuances of the recording translate better from a vinyl record than an WAV or file that has been "squashed" (overly compressed) and flattened. Still, with various sound mixing techniques you can sometimes come close to replicating the nuance of vinyl.

The other difference between e-digging and record digging could be found in the processes themselves. Traditional record digging is a more extensive, physical pursuit. By contrast, e-digging is essentially the process of using an online search engine. Record digging permits you to actually hold a record, which allows you to get a feel for the artwork and perhaps the intentions of the artists behind the music, and this adds another dimension of creative inspiration. More importantly, the physical record provides critical information such as relevant dates and the ever vital musician, production, and studio credits. Such information is generally not provided in the process of e-digging, so the potential for a more extended music education, which traditional record digging often provides, is usually not afforded with the e-digging process.

The Validity of E-Digging and Why I Support It

There are a number of beatmakers (some of them very notable) who view e-digging as some sort of bad or inferior process. Inasmuch as e-digging is, fundamentally, a means for searching for and finding new music, I don't see how anyone can dislike it. I think that the basis of opposition towards e-digging lies in the fact that it does not correspond with the nature and unwritten protocol of digging for vinyl records. But let's be clear here: Digging for or possessing vinyl records doesn't necessarily determine whether or not someone is going to be a dope beatmaker. Knowledge, skill, and creativity determine that.

Thus, the rants against e-digging itself are actually off base. I've been digging, consciously, for records for more than 30 years. As a result, I, like many music diggers, am a *de facto* collector of vinyl records. And not just any collector, perhaps you could say that I'm a preservationist preserving otherwise forgotten music. But I don't allow my slant as a collector/preservationist of vinyl records to interfere with my interest in searching for and discovering "new" music, especially those recordings that I would never be able to find in the rapidly dwindling number of vinyl record stores.

Spending long hours in record shops, flea markets, yard sales, vintage stores, record exchanges, used book stores, or the basements, attics, and storage spaces of friends and relatives (all of which I have done) does not equate to any superiority in the area of musicianship, nor does it necessarily make anyone more skilled at the art of sampling. Instead, it mostly equates to the desire for that particular process and experience. It is also simply a reflection of one's "collector's slant", because the reality is this: Most beat diggers with large vinyl record collections will most likely never sample even 25% of their total collection. There are many people (myself included) who have upwards of 2,000 or more vinyl records that they have never sampled. (I can assure you, out of my own 3,000+ vinyl record collection, I have yet to sample 2,500 of them.) And if those who tout 10,000 and 20,000 vinyl records in their collections have really sampled even 15% of those records, then it

stands to reason that there should have been a much larger number of classic sample-based beats in rotation over the past 30 years.

Furthermore, as I stated earlier in this chapter, technology serves at the command of the one who uses it. So it matters less how I came to discover "new" music. As long as I discover it, I'm fortunate. After all, I can't flip something that I can't hear; and I can't hear something that I don't have access to. And whether I prefer to handle vinyl in my hands or stream a song on YouTube, I still can't ignore the fact that e-digging gives me much more access to "new" music than digging for vinyl records ever did or ever could. I also can't ignore the fact that the e-digging search process generates, on a whole, more suggestions for similar findings than any cross-credits referencing I've done reading the credits or liner notes of vinyl records that I've acquired.

Still, I certainly do recognize that there is a difference between digging for vinyl records and e-digging. There are some nuances that come with sampling a vinyl record. Perhaps most notably the sound quality of a vinyl record, or the sort of connection to a music past that a vinyl record can offer, or the connection to the traditional method of sampling in the beatmaking tradition. That being said, the notion that someone is lazy and uncreative, or that someone is doing it (i.e. sampling) *wrong* just because they use source material (music) that they've found (discovered) online rather than a vinyl record that they've acquired is ridiculous and completely out of tune with the realities of the day.

In most cases these days, e-digging is the only choice for would-be sample-based beatmakers; it's the only way many people have access to valuable music from eras gone past. And accessibility to the music (source material) that is to be sampled has always been a key factor of the art of sampling. Because sample-based beatmakers have always been distinguished not only by their skill but by what they actually sample, it should be understood that sample-based beatmakers are also often distinguished by the music (source material) that they actually have access to.

But because of the limited accessibility of vinyl records, the playing field for sampling has been largely uneven. For years, those

who lived in or near hot-spot centers for vinyl records have had an advantage of access over those who did not live in those centers. But e-digging virtually makes an indefinite number of hot-spot centers available to anyone with a working internet connection. In this way, e-digging has removed the "advantage of access" that some sample-based beatmakers previously held. Through this new level of access to the same music most privileged by veteran vinyl diggers, e-digging has leveled the playing field for sample-based beatmakers. Moreover, because of the scarcity of vinyl record shops and the like, e-digging is providing a pivotal link to the sampling tradition — a link that many people might not otherwise be so fortunate to enjoy.

Finally, any capture method — whether it be through the vinyl digging or e-digging process — that adheres to the fundamental tenets of the art of sampling while also bringing to light the elements of valuable music from older eras should be embraced, not spurned. Beyond that, we should remember that no one judges sample-based beats according to the original audio format of the music (source material) that was sampled. Besides, there's no way for anyone, other than the sample-based beatmaker who sampled the source material, to be absolutely certain which audio format was actually used. One can just as easily *say* that they sampled a piece of music from a vinyl record when in fact they sampled it from a source online. Who's to know either way?

But the basis for how we judge sample-based beats is still the same for how we judge any style of beat. Our personal tastes, the level of quality of a beat, and the beat's cohesion with the lyricist, are all the main factors that determine how we rate a beat. Therefore, if e-digging plays any role in the creation of a beat that suits our taste and measures up to our individual and collective perceptions of quality, then we have no choice but to support it.

Practicality of Digging in the Crates

Vinyl records are also valued for their practical nature. Scanning a record, searching for pieces, parts, and sections to sample, has always been as simple as moving a turntable's needle across the record as desired. The speed and accuracy with which you could locate (and relocate) different parts on a record gives sample-based beatmakers (producers) a certain level of immediacy and efficiency. For decades, no other medium could compare to the search speed that vinyl records allowed. Today, however, current production software programs like FL Studio and Pro Tools allow beatmakers to import entire songs (digital versions of course), which can then be quickly searched over with a click of a mouse or key stroke. So with regards to search speed, other mediums have caught up with vinyl records to some degree. Still, search speed aside, there will always be a difference (sometimes slight, sometimes more pronounced) between the sound of a vinyl record and another format like a WAV or MP3 file. And, of course, there's also the fact that each vinyl recording has its own subtle differences. Unlike a digital recording, no vinyl record sounds exactly the same because the wear and tear of each vinyl record is unique. In essence, static, hisses, warps, pops, and even scratches make each vinyl record a one-of-kind recording.

Setting the Record Straight About Vinyl Purism: Vinyl Records Are Not the Only Acceptable Medium to Sample

As I've discussed earlier in this chapter, there is an aesthetic value to vinyl records that many sample-based beatmakers (producers) prioritize. Further, digging in the crates, in the traditional sense, will always be linked first to vinyl records. Still, we must remember that the underlying idea and motivation behind digging isn't just about using one particular audio format or recorded medium, it's about the practice of mining/searching for new material to sample. In other words, digging in the crates, both as a traditional idea and practice of hip hop, extends beyond any one audio

format or recorded medium. For example, as I discussed in Chapter 2, in the early pioneering days, Afrika Bambaataa was the first to sample television commercials onto cassette tape and incorporate those samples into his DJ set. In doing so, Bambaataa made it clear that digging for new source material wherever and however you could was the essence of digging. And that it was Bambaataa — one of the first three and most important hip hop DJs — who did this first means that digging for and sampling any material on any available audio format is just as traditional as digging for, sampling, and using vinyl.

Build Your Sampling Ear

How to Listen to Source Material, What to Listen For, and How to Find a "Good" Sample

There are two ways to approach listening to sample source material: **spot-listening** and **full-listening**. Both approaches require you to listen to or survey the music that you intend to sample; however, the difference is in *how* you listen and survey the source music. Spot-listening is the process of randomly and quickly surveying a record. The idea here is to give quick listens to areas of the record where you might expect the intros, breaks, bridges, and outros to be. For intros, you affix the turntable needle to the beginning of the record. Intros often have a "ready-made loop" that is free and clear without drums. This is why intros are very appealing to many sample-based beatmakers (producers).

When I first started making beats, that's pretty much all I did. I probably spent three years like this. I would buy records and skim over them until something popped out. I would check over the beginnings of songs on an album, looking for ready-made loops, and if I didn't find one, I would leave the record alone — thinking it held no value — without ever really listening to each song on the album thoroughly. I assumed that this was how most beatmakers did it. I reasoned, *Who had time to actually listen to the complete songs on an entire album?* But as purchasing records became more costly, I found myself going back to my crates for those records that I had once mislabeled as invaluable. The second, third, and even fourth time that I listened to a record, I increased my patience and discipline until I was able to give each song on an album a full-listen.

During the process of full-listening, I learned that spot-listening was most useful when working with records that I was already familiar with. For example, if I was looking for kicks and I remembered a drum intro or break from a particular song. In this case, it was helpful to target the areas of the song that I was already familiar with. Still, I recommend that you try to limit how much you spot-listen a record that you've never heard before. There's too much that you will undoubtedly miss. Hence, I suggest that when you have some records that you've never heard before, give each song a full-listen. Don't skim or skip ahead, and don't scrap the

record just because you can't immediately find anything useful.

Finally, I also recommend that you don't only listen for loops or music phrases that have an sopen beginning and end. You should also listen for the "offness" of music phrases; i.e. listen to the 1/2, 1/4, and 1/8 parts of the music phrase.

The Five Categories or Types of Samples: Complete-Phrases, Spare-Part Phrases, Section Pieces, Sound-Stabs, and Sound-Tones

All songs, regardless of the music genre, are made up of a combination of any number of varying music phrases and smaller pieces of sound. Here, I use "music phrase" to describe any structured music pattern that lasts for a measure of one bar or more. Samples themselves can be broken down into five categories or types: **complete-phrases**, **spare-part-phrases**, **section-pieces**, **sound-stabs,** and **sound-tones**.

A **complete-phrase**, or full music pattern, measuring one complete bar or more,[3] is like a short story. It has a clear beginning, a middle, and an end. As such, it's already conducive for a beat. Think of complete-phrases as "ready-made-loops". Complete-phrases are very easy to identify, so they're easier to sample and loop, which makes them big targets for many sample-based beatmakers. Most sample-based beatmakers (new *and* advanced) often tend to listen for complete-phrases first and foremost. However, the craftiest sample-based beatmakers realize that the more rare the record that you're sampling from, the more rare the complete-phrases, and thus, the better the chance you have for achieving a higher level of creativity and of avoiding the sample police.[4]

Spare-part phrases are simply sections of larger complete-phrases. Sampling spare-part-phrases is more challenging because it requires serious patience and a knack for intuitive chopping.[5] One interesting

[3] Usually, the complete-phrases that are sampled by beatmakers measure 2 to 4 bars. However, there are also some that measure just 1 bar, and there are some that measure up to as many as 16 bars. Samples of 4 bars or more are easily identifiable; so they usually present a sample-clearance headache.

[4] Sample Clearance is the process of securing a license to use samples. Labels employ people to scan music for samples. Chapter 23 includes a thorough examination and critique of the sample clearance process.

[5] **Mental-Intuitive Chopping** is the ability to hear any music phrase and formulate a chop-pattern or scheme in your head. It's similar to how film directors shoot footage according to the edits that they foresee inside their heads while they're shooting the film. In this way, these film directors are virtually editing the film in their heads.

thing about spare-part phrases is how they stand alone like missing pieces of dialogue; as such, they help signal where the discussion may go. That is to say, each spare-part phrase helps to determine how the entire beat will flow. Although it's much more difficult to identify and sample useful spare-part phrases, the process is considerably more creatively rewarding.

With spare-part phrase sampling, you sample the root notes/sounds of a complete phrase (not the entire measure of the phrase) of a preexisting song, then flip it, i.e. creatively transform it into something new and original. Here, the phrases or pieces that you sample won't be nearly as easy to identify as the original complete-phrase from which it came. So when you use spare-part phrases, it's more likely that the samples will be de minimis, which should allow you to avoid having to get sample clearance. Another benefit of spare-part phrase sampling is that it trains and develops your music ear and overall understanding of rhythm arrangements and drum and loop programming.

A number of classic beats, produced by many of hip hop's beatmaking pioneers, were actually recreations (manipulations) of just *one* sample. In those cases, spare-part phrases were almost always used. The more experienced beatmakers are skilled at one-sample beats. They know how to chop, copy, or manipulate one sample to the point where the original sample is unrecognizable, even though the original mood and integrity is, in some way, still left intact. The core track[6] of nearly all sample-based beats are composed of or based upon one primary sample. The main point with spare-part-phrase sampling is that it always prompts you to create beats using the shortest or simplest fragments of pre-recorded music and sounds.

Both complete-phrases and spare-part phrases are comprised of smaller elements called **section-pieces**. Section-pieces are shortened or incomplete music patterns. Because of their duration, they're often uneven, so they usually require something else to sustain them, for example, an additional complete-phrase or spare-part phrase. As with spare-part phrases, section-pieces are de minimis; but section-pieces offer greater *source anonymity* because it's much more difficult to identify the source record from which section-pieces are sampled. Also, because section-pieces are widely uneven, i.e. heavy or light at the beginning of the phrase and heavy or light at the end of the phrase, they require a great deal of chopping. So as you would expect, beatmakers who hone

[6] The **core track** is the fundamental beat framework. It consists of the primary rhythm section and main theme of the beat.

their chopping skills with section-pieces become masters at chopping and arranging.

Sound-stabs — de minimis by default — are individual instrumental sounds, single hits, like a drum kick. Surveying records to sample is a meticulous process. A lot of times, you can feel prohibited from sampling something, either because the record doesn't have any interesting phrases or because the good (interesting) phrases are trapped (not free and clear from other unwanted sounds).[7] But the fact is, nearly all records can be salvaged for sound-stabs. Everything from short or long horn-hits to keyboard strikes and tambourine shakes make for excellent sound-stabs.

Sound-tones — also de minimis by default — are sustained fragments of section-pieces. They work like sound-stabs, in that they are quick single hits. But sound-tones are slightly different from sound-stabs because they are often made up of multiple sounds, not just one single instrument. Since they are simply chipped off fragments of a larger section-piece, sound-tones are a big favorite among chop masters like DJ Premier, Pete Rock, J Dilla, Kev Brown, Marco Polo, and 9th Wonder.[8]

Micro-Chopping

Finally, complete-phrases, spare-part phrases, section-pieces, sound-stabs and sound-tones can all be used and blended together in a variety of ways, but the two primary types of **sample blends** are: **phrase-blends** and **stab-blends**. **Phrase-blends** are usually more about connecting one phrase or more to the front or back end of another phrase, whereas **stab-blends** are usually more about layering[9] one sound-stab with another. Further to this, chopping samples (sounds) down to spare-part phrases, section pieces, sound-stabs, and sound-tones and using them like music notes is a composition process known as "micro-chopping".

[7] When sampling sound-stabs and phrases, a sample is considered to be **free and clear** when there are no surrounding sounds, particularly drums or vocals, that prohibit it from being "isolated" and sampled clean and clearly.

[8] For a more thorough education on the sound-tone technique in practice, study DJ Premier, Pete Rock, and J Dilla. All three of these beatmakers (producers) are chop masters, and sound-tones often play a prominent role in their production.

[9] **Layering:** The process of combining two or more sounds into one. It is typically achieved by taking one sound and stacking it on top of the other.

Signal Chain

A **signal chain** is the connective audio route between two or more devices. When it comes to sampling, a proper signal chain plays a critical role in the *capturing* of the distinct nuances of a sample. Furthermore, a proper signal chain is paramount to the development of a beatmaker's own unique sound.

For instance, in the past, I ran my turntable, CD player, cassette player, VHS, and DVD all through my Numark DJ mixer, which outputs an analog signal. From my DJ mixer, I sent the master L/R outs to my Mackie analog mixing console. From there, I routed two direct out channels (which carry the Numark's signal from my Mackie), to the LINE input of my Akai MPC 4000. I used this signal chain so that I had more control over the EQs and amplification of the sounds and music prior to sampling them. This idea is universal, and thanks to today's DAWs like Pro Tools and Ableton Live, you can achieve some of the same nuances "in the box", i.e. inside the DAW. Either way, when you sample something, the idea is to arm (prepare) the best possible audio signal, *without clipping*, that you can. To achieve this sort of amplification, it's best to use some kind of DJ mixer as the hub through which you run all of your audio sources to be sampled. Still, if you're only e-digging, the signal chain is not as consequential, because when you're importing WAV and MP3 files into your DAW, for instance, you can EQ the sound inside of the DAW.

Naming Samples and Choosing Audio Bandwidth Settings

Before I sample anything, especially drum sounds, I come up with a short and descriptive name. If I don't readily have a name to associate with the sound, I simply use a "default" name. For instance, if it's a snare, and I can't relate anything to what it sounds like, I simply name it "snrx1" ("snr" for snare, and "x" for whatever number). If and when I use the snare again, I rename it with a more descriptive name, then I store it within my library of drum sounds. (I avoid using elaborate names because it takes up too much time scrolling and assigning long names.) Bottom line: When it comes to naming samples, I try to keep it as simple and as relative as I can.

Also, I should point out that I never name anything a "loop." Why? Because complete-phrases are not actually loops, they are breaks that are

programmed to loop. And note: Because songs of the '60s and '70s were typically recorded using live musicians in the studio, most of those songs do not come with "loops," *per se*.[10]

Further, whatever sampler you use, I recommend that you use a default audio bandwidth setting.[11] More specifically, I do not recommend using dramatically different bandwidth settings for everything you sample. Don't get me wrong, you won't really disrupt anything that you normally do when you use various settings. It's just more time consuming, and it goes against *customizing* your sound. But if you do ultimately decide to use different audio bandwidth settings, I recommend that you at least make those the default settings for the types of sounds you sample. For example, always use the same audio bandwidth setting for deep, hard kicks, or thick bass lines, etc. One benefit to having a default audio bandwidth setting is that it saves you a lot of production time. Moreover, it enables you to sample new sounds more rapidly and efficiently. It also familiarizes you with what works, like how certain sounds might best be sampled and edited. Finally, another reason that I utilize a default bandwidth setting for nearly everything I sample is because it allows me to customize and uniform my sound.

Chopping/Editing

> When we chop, we do it in a way that even the artists who are really against how rappers use shit would appreciate how we put it into a different form, out of respect! *All of that pours into the way that I make beats*. That's what always keeps me fresh. —DJ Premier[12]

Fundamentally, samples are edited (altered) through one or two processes: "chopping" and/or "filtering." **Chopping** describes the process of dissecting, separating, and rearranging a sample (and other sounds) for use in a beat. It's the process of removing or trimming unwanted sections from a sample. Typically, it involves trimming sections from the

---

[10] When beatmakers (producers) say that they got a loop from a record, what they actually mean is that they sampled a complete phrase, usually 2 or 4 bars, and *then* they looped it. This is why the notion of *looking for "loops"* in pre-recorded music is a misleading proposition.

[11] A higher Audio Bandwidth setting, or rather higher frequency response level, will make the sample sound brighter. The frequency response level is one of the things that separates the Akai S950 from the E-mu SP 1200. Although both units are 12-bit, the Akai S950 has a higher (range) frequency response level; therefore, sounds have a bigger, warmer overall sound. Many samplers today offer a choice of 24- or 16-bit.

[12] Amir Said interview with DJ Premier, *The BeatTips Manual* (2015).

start and end of a sample. However, as a beatmaker's overall beatmaking skills develop, he will inevitably chop and manipulate various sections of a sample.

When you chop a sample, your main concern should center around an audio snapshot. When you play a song, what happens when you hear something that you like? You get a broad, quick "audio snapshot" of where you *might* be able to take that segment. So you sample it. Now that it's sampled, what's your prime objective? To simply tune it (trim it) down to the right start and end points? Not necessarily. Naturally, the first thing to do is to chop it to the exact segment that you heard. Sometimes this works out just like you imagined it, but most of the time it doesn't. So when you chop a sample, you should be prepared to end up with something that you didn't necessarily see clearly at first. Remember, when you hear something that you like for the first time, before you sample it, it's just a quick, broad audio snapshot. So the photo, so to speak, is not entirely clear. It's only after you've sampled the segment, chopped it, and tried it *within* a drum framework that the picture starts to become clearer.

In this way, sampling is like sculpting; you always have to be prepared to shave off more than you initially intended. On the other hand, you also have to be ready to reapply, reshape, and reconfigure those seemingly unwanted shavings. The goal is to make the best beat that you can; it's not about how many chops you can work in or how many modifications that you can apply to a sample. Chopping is about extracting the pieces that work best with your drums. It's not just about cutting and truncating something, it's also about understanding what happens to a sample when a piece of it is removed or rearranged and reapplied. Thus, chopping prompts you to uncover the unintended sounds and feeling of the original sample, and it allows you to survey the texture of the initial sample, giving you a broader palette from which to paint your beat portraits. Chopping is also akin to improvisation, as it involves embellishing the source material/music, on the fly, with little to no music direction at the onset of the beat. From one recording to the next, a sample-based beatmaker improvises how to transform what he samples.

Finally, there are two broad forms of chopping: basic and complex. **Basic chopping** describes a simple, minimal form of truncation of a sample/sound at its start and end points. The most notable sub-form of chopping within the basic chopping form is loop chopping. **Loop-chopping** describes the basic chopping form that is used for chopping loops. **Complex chopping** or **micro-chopping** describes the more extended form of chopping. It includes the processes of cutting sounds

down to "tonal chops", i.e. chopping samples/sounds down to individual notes for the purpose of being played — often in a chromatic manner — over drum pads or keys, or *drawn* into a beat sequence through the use of a computer mouse. Within the complex form of chopping, there are two sub-forms: **stab-chopping** and **phrase-chopping**. **Stab-chopping** describes the complex chopping form that is used for chopping sound-stabs, e.g., drum-hits, key-stabs, and tones. **Phrase-chopping** describes the complex chopping form used for chopping phrases.

Precision Chopping: Finger-Point Accuracy

Here's a good rule for precision chopping. In the sample edit mode of your sampler, tap (press) the play back button (or key on MIDI controller or key on a computer keyboard) repeatedly until the sound plays on the *hit* of your fingertip. If the sound is not falling on the hit of your fingertip, then you need to chop (cut) the **start point** of the sample some more until it does. If the **end point** carries over longer than you want it to, then you need to chop (cut) the end point of the sample until it stops where you want it to. The idea is to tap, not hold, the playback button when you're first chopping the sample. If you hold the playback button too long, you will get an inaccurate starting point. After you establish the right starting point, then you can hold the play-back button down. This allows you to play back the sample in a way that permits you to capture the intended end point.

While chopping drum sounds is more straightforward than chopping any other type of sounds, when chopping phrases you have to be much more careful. The reason is because the start and end points of phrases have the power to off-set any drum timing. That is to say, the precision chopping of phrases is critical for a different reason: Phrases actually play *over* the drums. So, if the hit of the phrase is off a little, not hitting on that finger-point accuracy, it will make the entire drum program (looped sequence) sound off.

The Genius of Chopping Before "Auto-Chop"

Technology has long raised questions about musicianship, musicality, creativity, and imagination. And now it would appear that it's also reshaping what it means to have "skills" in beatmaking, especially in the area of chopping. Consider the "auto-chop" functionality of the Akai

MPC (models 4000, 1000, 2500, and 5000) and other EMPIs. Where does the skill enter into the equation? Is it the source selection? Is it the setting of an automatic 16-piece chop, something previously only achieved through a beatmaker's careful selection, good ear, and meticulous manual chopping? I'm not sure where skill begins or ends when this now go-to functionality is used, but one thing's for certain: Auto-chop, and its ability to make some beatmakers *appear* to be doing much more than they actually are, has become more than just a tool for evenly chopping up samples, for some, it's become a creative crutch.

Even worse, some beatmakers use auto-chop as a means of copying the styles and sounds of some of the best known sample-based beatmakers (producers). For instance, auto-chop functionality has given birth to thousands of DJ Premier sound-alikes. But it's important to make the distinction that the core of DJ Premier's process and setup (he primarily used an Akai MPC 60 II and Akai S950 for the bulk of his productions; ca. 2015, he switched to MPC Renaissance) does not rely upon auto-chop functionality. His sampling and chopping style is the product of a good ear and his unique manual chopping schemes, *not* auto-chop functionality.

While I'm an avid Akai MPC 4000 user and more recently an Akai MPC one user, I almost never use auto-chop, i.e. the "slice sound into zones" function. Instead of sampling something and automatically dividing it up to 16 slices (zones), I prefer to sample something, duplicate it (two or three times, sometimes more, if necessary), then assign it to three or so separate drum pads on my MPC. In doing so, I find that I get a better feel for the many different ways in which the chops of one sample can be used.

When it comes to auto-chop functionality, I have mixed feelings. I was groomed on the Akai S950/MPC 60 II combo. Before that, I'd used the E-Mu SP 1200 along with my Akai S950. Both setups only allowed me to chop samples manually, there was no 16-slice sample divide, push-button architecture that would *automatically* chop up a sample for me. Because I knew that I'd have to manually chop samples, I found that I listened to source music more carefully. Specifically, I listened closely for possible start and end points of the streams of sounds on a given piece of music. As a result, I was able to develop a better feel for the ways in which sounds, particularly complete music phrases, could be chopped up and re-arranged. This helped me to chop samples in a manner that most favored my style, sound, and aesthetic. On the other hand, the use of auto-chop hasn't prompted the same sort of experience. Instead, when I use auto-chop, in some ways, I actually feel like I'm being less creative.

The process of assigning multiple slices (regions) of a sample for it to be automatically divided into separate parts seems too easy (at times), or at least less demanding of your digging and chopping skills, specifically how you hear chops in your head. Still, I'm not totally against using auto-chop.

Auto-chop does have its advantages. For example, if you want to audition specific parts of a sample without having to manually chop each piece that you find interesting, using auto-chop is the way to go. Or let's say you want to quickly sketch out an arrangement idea using a full scale (12 chromatic pieces), of a sample. With auto-chop, you can quickly slice up a sample, then program its parts with pitch adjustments. As I mentioned earlier, the same idea can be achieved without auto-chop. But auto-chop allows you to perform this process much faster, with more immediate separate chops per performed function. Because of its robust functionality, auto-chop quickly opens up a new level of possibilities that could not otherwise be achieved without it. So when used thoughtfully and creatively, auto-chop can certainly enhance your workflow.

But the workflow advantages aside, if you're not careful, auto-chop can stifle the way in which you approach chopping all together. Auto-chop can essentially reduce chopping to nothing more than a scheme of regions and numbers. Which is to say, it can take away a lot of the craftiness or ingenuity that you regularly find associated with manually chopping duplicated samples. Think about it. You load up a sample, assign the automatic slices, then voila!: 16 neatly sliced pieces of the same sample. Because of this, auto-chop can prompt you to focus less on the ways in which a given sample can be chopped and more on the prospect of shoving a sample into the "auto-chop box." This, in turn, can make you rely more on auto chop functionality and less on your own intuition and ingenuity or your familiarity with the given source material.

Sound Manipulation

Meticulous Transformation (and Disguising Samples)

The pursuit of creativity is one reason that many sample-based beatmakers engage in the meticulous transformation of samples. The other more practical reason is to disguise samples. As such, there are a number of ways to both ensure creativity and disguise the source material that you use. And most transformation/disguise techniques fall into four main categories: Chopping (which I've discussed earlier in this chapter),

layering, distortion, and filtering, a more complex technique that I discuss in greater detail later in this chapter.

Layering Techniques

Layering, the process of taking one sound and stacking it on top of the other, can be done with a number of sounds. Cuts and scratches, vinyl static, percussion and drum sounds, sound effects, synth phrases or stabs, and more can all be layered over the top of a sample. Added together with any combination of other techniques like chopping, distortion, or filtering, a sample could be transformed or disguised in ways that leave little to no clue of the original source.

Distortion Techniques

Distortion, the process of modifying the sound, character, and texture of a sample in a way that makes it sound completely different than its original intent, is another popular technique among sample-based beatmakers. When you sample something, you consider what the sound is in its original state; and your consideration of what the sample sound could become is a separate thing altogether. For instance, a guitar riff can be chopped, layered to itself, distorted, and filtered and transformed into a bass line. The sound of a key chain shaking can be used as a tambourine; in fact, it can be layered with a snare to make a unique snare-tamb sound. A tom tom from a song can be sampled, pitched down, and converted into kick drum. The many different ways that a sample can be transformed and disguised through distortion are endless. And note: Each transformation/disguise technique contains any number of processes, including EQing and other sound processing practices. So although there are four main categories of transformation/disguise techniques, there is no limit on the number of ways that you can transform or disguise a sample.

Making Samples Sound Thicker: Fattening up Samples

There are two common questions regarding the sound of samples that many new sample-based beatmakers ask. First, How do you make a sample not sound *thin*? And second, How do you add *umph* to a sample?' To answer these questions appropriately, you must first consider the sound source that you're using. Are you sampling from

vinyl records? Are you sampling from a CD? Are you importing a WAV or MP3 file? This matters a great deal because the potential modifications of a sample are only as good as the sound of the sample when you first sample it. The brighter the sample, the thinner it will sound, and therefore, the harder it will be to make it sound "warm". And *umph*, i.e. fattening or beefing up a sample, is a separate issue that I discuss later in this section. But in both cases, the fundamental thing to understand is that the approach you take in this matter is really determined by the sound and source that you start with. Typically, vinyl records will always have a thicker (warmer) sound than a CD. Likewise, a CD will always sound thicker than an MP3 or a WAV file. Although MP3 and WAV files may be cleaner and brighter, they're thin to begin with. On any given recording, each of these formats produces an aural response that sounds as if 1/8 - 1/4 of the sonic quality has been squashed (compressed) and flattened. So when you work with an MP3 or a WAV file, the first thing you might want to do is *re-sample* it into your own sampler. This way, you have more room to play with. Once you recapture the sound into an environment that you control, you can go about modifying the sample into a thicker sound.

With vinyl and CDs the process is a little different. Instead of re-sampling the sample from the vinyl or CD, just duplicate it (make an exact copy of the sample) then focus in on the lower tones and frequencies. The **duplicate and layer** method allows you to build up the sonic quality that you're aiming for. Many beatmakers will sample something and just let it be. Then after they throw in some drums and percussion, they think that the sample is too "thin". Most of the time, it's not even an issue of the sample being thin, it's just that the drums are texturally and sonically stronger than the sample. Thus, in a situation like this, I recommend that you "boost" (enhance the sonic impact of) the sample with a lower frequency version (copy) of itself.

The other thing that you can do is program in low and low-mid sound-stabs. Here's what you do. Check out the sample that you want to use, identify the parts in the sample that you hear thinness. Next, determine which specific sounds in the sample are causing that thinness. The majority of the time the thin-spots will be either a guitar, bass, or keyboard. After you've determined the thin-spots in the sample, make and play sound-stabs that match the tone and timbre of the thin-spots. To get the sound-stabs to match the thin-spots, you'll have to modify either their velocity, sustain, attack, overall volume, or all of the above. Incidentally, adding *umph* (i.e. sonic

punch) to a sample is very similar to what I just described. If all you want to do is add *umph* to a sample, you need not always duplicate and layer the sample. Instead, you can simply accentuate the sample with a combination of percussive elements and short (or medium) bass-stabs.

Note: The duplicate and layer method can also be applied to audio files that you import into your DAW.

Filtering Samples

Filtering refers to the process of boosting or subtracting various EQ levels, i.e. bass, mid, and treble. Filtering is a sound coloring or enhancing technique that is often misused or grossly underestimated. Typically, when beatmakers are talking about filtering, what we're really talking about is tweaking the low and high frequencies of a given individual sound or sound phrase. The "low" being the *bottom*; for instance, the low frequency in bass lines, bass kicks, low-note piano and organ keys, etc. Filtering is also about accentuating the hi and and mid instrument frequencies, like horns, strings, and hi-hats. The effects and enhancements that filtering can offer are tremendous. Creative filtering can *fatten up* (bring out) a weak bass line. At the same time, it can push down unwanted high and mid frequencies, or it can revitalize weaker high and mid frequencies. Furthermore, filtering can tuck or hide unwanted sounds (sometimes even vocals) deep inside the sample.

There are a couple of good filtering techniques that are commonly used. For your lows, the process is fairly straightforward, so long as your sampler or DAW has effective low and hi-pass filtering functions. All of my samplers, the Akai S950, the Akai MPC 4000, and the Akai MPC One have filtering functions, yet each are very different. The Akai S950, a vintage sampler, has the simplest filtering function that I've ever used. Essentially, it has a filter value of 0 to 99, 0 being the lowest level and 99 being the highest level. Via the S950's menu dial, the value can be adjusted up or down until you reach the desired tone, feel, and texture. The Akai MPC 4000, on the other hand, contains an extensive filtering function that is comprised of a series of filtering pages that are designed to color the frequency of a sound in various ways. In order to filter samples on the Akai MPC 4000 and Akai MPC One (and many other contemporary samplers like software samplers and keyboard workstations with sample engines), you have to tweak both the low and hi-pass filters separately. Whether you use a vintage sampler or a contemporary one, the

idea of filtering is universal: Bring down the lows to kill the high and mid frequencies, and turn up the high frequencies for brightness. To achieve this with contemporary samplers, you have to increase the value of the low-pass filter and decrease the value of the hi-pass filter if you really want to fatten up low-end sounds. You also have to adjust the level of resonance, which essentially smooths out the scope of the filtered bass line.

My Process for Filtering Out Bass Lines on the Akai S950 or the Akai MPC 4000

Before I break down my process for filtering samples on the Akai S950, I should note that the technique that I use is universal, so it can be applied to any hardware or software sampler. However, it must be pointed out that the sound quality, feeling, and warmth will vary from EMPI to EMPI. So here's what I do, as well as the most notable masters of the Akai S950. *(Big respect to Peter Panic for teaching me this technique. And much respect to DJ Premier for confirming and thoroughly explaining it to me.)*

- In the EDIT PROGRAM mode, I locate the sample that I want the bass filtered out on.
- Then I go to the Keygroup page (page 03).
- Where it says Copy (+), I initiate the (+) sign.
  This will copy the entire Keygroup, the sample, the filtering parameters, the assigned output channel, and all.
- Next, I locate the *new* Keygroup and assign it to a different channel, preferably the channel/output on my mixing console that is next to the channel/output of the high part of the sample. (Note: I use all eight individual outputs of my Akai S950, and each are assigned to their own channel on my mixing console.) Then I set the filter on the new Keygroup to 0.
- Now, when I strike the assigned pad on my MPC, I will actually trigger *two* sounds simultaneously. Thus, I'll have both a mid to hi sound of the sample and a low sound of the exact same sample.
- Therefore, on my mixing console I simply mix the low part with a little more bottom, being mindful to keep it warm. On the other hand, I mix the mid to hi part with some hi,
  a little more mid, and nearly no low at all. And thus the proper blend will effectively filter out (bring up) the bass.

Filtering Out Bass Lines on the MPC 4000

My process for filtering out bass lines on the Akai MPC 4000 is different, but it's easier and much faster than my process with the Akai S950. Here's how I do it. In the Program mode, I go to Edit page, then to the Filter page. It should be noted that within the Akai MPC 4000, there are 35 different types of filter modes. When I want to filter a sample to sound *comparable* to the sound that the Akai S950 generates, I use the "Lo<>Hi" filtering mode. There, I set the default cutoff frequency somewhere between 15-23, and I set the resonance value somewhere between 10-17. Keep in mind, increased resonance increases presence and "thickness" of the bass, but it also induces rumbling (distortion) the higher you go up the value dial.

While many beatmakers (producers) still use some form of a mixing console, almost none of them use an Akai S950 or Akai MPC 4000 sampler. So essentially what I just described above is the practice of duplicating a sample, then treating it as left and right stereo sound, the left being the low, the right being the hi. So the idea is just to copy the sample and EQ the duplicate sample in a manner that contrasts the original. To achieve this using a Hi-Pass/Low-Pass filter combo, make sure you *ground* the Low-Pass filter, that is to say, boost up the low. At the same time, you want to pull back on the Hi-Pass filter until you decrease the distorting rumble of the bass sound.

Any DAW makes this process easier and more effective. Regardless of whatever sampler you're using, if you have access to any DAW, then all you need to do is duplicate the sample that you want to filter. From there, just EQ the duplicated sample until the bottom is out in front where you want it, and blend the two samples according to taste.

Composition, Arrangement, Programming, and Sequencing

To really understand the concept of sampling, you must understand how arrangement works, specifically how to weave samples — fragments of recorded music — into a montage of sound. There are two ways you can look at arrangement. You can look at it as the order and measure (length) of sounds and sequences within a song (composition), or you can look at it as the pattern in which sounds correspond sequentially within any song (composition). The length (measured in bars or seconds) and sound of a sample determines the way in which the backing drum pattern is going to be arranged. Until the backing drum pattern is established, which gives you the core track (the basic rhythm track), the arrangement of the composition cannot be completed. Understanding how standard drum patterns work with varying sample arrangements (e.g. 2-bar loop beginning on the downbeat), allows you to map out how you will be able to manipulate your samples. This is critical because it teaches you how to break samples into multiple sections, i.e. the intro, verse, chorus, and bridge.

Before discussing sampling and arrangement/programming and sequencing in more detail, it's necessary to first review composition, arrangement, and programming as it's understood in the beatmaking tradition. In its simplest understanding, composition refers to the process of creating and coming up with sounds and the ideas for using them. The compositional process in beatmaking has no need for, is not predicated upon, nor does it necessarily rely on a *written* composition, as is the case in the Western classical music tradition.[13] Instead, composition in beatmaking involves the process of developing components and pieces of music that in turn are combined, arranged, and built into separate *blocks* of music that are then joined together to form one whole music work. It's through this creation of separate music blocks, sequenced together using hardware and/or software sequencers, that the character of composition in beatmaking is most realized. In the beatmaking tradition, the overall aim and essence of the compositional process is to come up with a "break" (loop), the music anomaly that the earliest hip hop DJ pioneers found on records when they cut, mixed, and blended together into new compositions. In this vein, beatmakers are doing the job of the earliest

[13] For a detailed comparison of the fundamental characteristics of the hip hop/rap music tradition and the Western classical music tradition, see Chapter 3.

hip hop DJ pioneers, while at the same time doing the job previously reserved for traditional musicians and composers.

Furthermore, the main break that most beatmakers typically come up with is usually made up of 2 or 4 bars. This is particularly important to know, as it helps in determining how and where *changes* (motifs) can be applied in the arrangement. For instance, a 2-bar break doubled up is 4 bars. So the typical spot that an effective change can likely be inserted is somewhere near the middle or end of the 4th bar. Likewise, 4 bars doubled up is 8 total bars, and therefore, the typical spot that an effective change is often inserted is somewhere near the middle or end of the 8th bar. *(Bear in mind that a change can be inserted anywhere in an arrangement, as long it serves your intended purpose.)*

Programming

As I mentioned in Chapter 4, in the beatmaking tradition, the compositional process is closely linked to the programming process. In fact, in beatmaking, the term "programming" can at times refer to several different processes all at once, it just depends on the context. Programming can refer to the technical organization of the compositional components; it can refer to the *technical* organization of the arrangement components; or it can simply refer to the process of inputting technical instructions into EMPIs, for example, inputting the values for certain functions and the like.

Drum programming, which is actually *drum composing*, specifically refers to the program (compositional) approaches beatmakers (producers) take to create their drum frameworks (drum patterns and overall designs). Also as I noted in Chapter 4, drum programming (composing) can be divided into three different categories: simple, steady, or complex drum programming. **Simple drum programming** describes the composing approach that renders a bare minimum drum framework, i.e. drum patterns and designs that essentially stay the same throughout all sequences of a song. **Steady drum programming** describes the composing approach that renders a drum framework that contains a *steady* back beat and also slight changes on alternating bars, perhaps an extra kick here or there, maybe an open hi-hat, etc. **Complex drum programming**, which is a bit more involved, describes the composing approach that renders a drum framework that contains more deliberate pattern changes on alternating bars. Complex drum programming may include two or

more kicks, snares, and hats, and double or triple drums. Break downs, custom drum rolls, drum fills, and "stuttering" (sounds rapidly repeated — syncopated — usually through note-repeat functionality) are also common characteristics of complex drum programming. Likewise, with complex drum programming there is a more involved percussion scheme, for example, the inclusion of a timpani, chimes, bongos, etc.

Sampling and Arrangement
The Three Forms of Sampling

When it comes to the various forms of sampling, there are both quantitative and qualitative considerations. Thus, the art of sampling can be broken down into three general forms: (1) **simple** or **"piggy-back" sampling**; (2) **break-beat or "mix" sampling**; and (3) **intricate sampling**. **Simple** (imitative) or **"piggy-back" sampling** is the form of sampling in which a substantial portion of a song is sampled and then "imitated" with little to no significant transformation of the sample used.

Typically, the simple or "piggy-back" sampling form of sampling involves looping a 2-, 4-, or 8-bar break (from familiar or arcane sources) and combining it with a backing drum framework that "mimics" the drum pattern of the sampled song as close as possible. Usually, the "piggy-back" form of sampling utilizes well-known material, i.e. popular songs, wherein beatmakers use *sufficient familiarity* so that the listener may recognize the quotation (sample) and may, in turn, pay more attention to the new material as a consequence of that familiarity. Finally, within the spectrum of piggy-back sampling is the process of simply using a segement of a song — usually the most prominent, most recognizable portion — without transforming it in any real material way.

Nonetheless, many beats of this kind make for great songs, for example, Diddy's "I'll Be Missing You" (1997). Although it's a clear case of piggy-back sampling, the song is still recognized as a hit appreciated by many beatmakers (producers). More recently, Pinkpantheresse's "Just A Waste" (2021) samples Michael Jackson's "Off the Wall." Even when you sample the heart of a well-known song, you can still reconceptualize it and add new meaning to it, which is a form of transformation.

Break-beat or mix sampling is the form of sampling in which breaks or patches of songs or other sound recordings are woven together in a fashion more akin to a DJ blending and matching multiple segments of records. In this form of sampling, the sampled work can be both minimal

and substantial, familiar or arcane. In this form of sampling, drum breaks are typically used as opposed to original drum programming. However, in some cases, beatmakers who utilize this form of sampling will add additional drumming.

Intricate sampling is the most sophisticated, most complex form of sampling. It involves the deconstruction of the sampled work in an intricate manner, followed by a unique arrangement of the now substantially transformed sample. Using the intricate sampling form, beatmakers (producers) seek to convert both familiar and arcane sources into an entirely new medium, while adhering to the aesthetic priorities of hip hop/rap music. A great example of the "intricate" sampling form can be heard in Nas's "Nas Is Like" (1999), produced by DJ Premier or J Dilla's "Don't Cry" (2006).

Finally, each of the three forms of sampling involve either a use of *wholecloth, major,* or *partial* sampled elements. And each of the three forms of sampling are also distinguished by the degree of the transformative nature of the source material used.

Transformation, Reconceptualization, and Recontextualization

Much of sampling is about utilizing fragments of old songs (and other pre-existing recordings), altering and creatively rearranging them, then turning the altered and arranged elements into new music. Of course the types of fragments chosen — and the preferred arrangement schemes and drum programming abilities of a given sample-based beatmaker (producer) — is what separates one sample-based beatmaker (producer) from another. All samples and forms of sampling are not created equal. That said, those sample-based beatmakers (producers) who follow the sampler's code, especially with regards to creativity, always aim to do one main thing with the scraps of music that they sample: *Transform it*. And this transformation is most often achieved through reconceptualizing and recontextualizing of the samples — i.e. the source material as raw materials — that they use.

Some examples of reconceptualization and recontextuallization include things like sampling music phrases that originally served as brief intros on old songs then chopping them up, changing their pitch, contour, and sonic quality, rearranging them and using them for *any* song section — verse, chorus, bridge, even an extended intro. Another example involves using the tail- or front-end of a riff, duplicating it, and combining the twin sounds into one elongated sound that can be used for everything from a bass line to a melody. In any case, the idea is to transform samples by coming up with different ways to reconceptualize and recontextualize them.

In this pursuit of transformation, transparency is not important for most sample-based beatmakers (producers). In fact, a distinguishing mark of dope sample-based beats is the intentional obscuring of the source material. Still, there are some instances where transparency is preferred, like when a beatmaker (producer) *wants* it to be known that he flipped a classic or well-known song. However, most sample-based beatmakers staunchly prefer not to be transparent with their source material.

Using Chopped or Filtered Samples to Make Beats

After you've collected and chopped your sample(s), you basically have two different ways to incorporate them into a beat. You can "paper clip" (blend and fasten) your samples to a preset drum beat that you've already created, or you can build a new drum beat from scratch, a drum beat, i.e. a drum framework based around the arrangement of your sample(s).

Minor paper-clipping is the process of taking a sample, usually a 2- or 4-bar complete phrase and matching a backing drum beat to it or vice versa. It usually involves sampling a complete phrase, i.e. a ready-made loop or a similarly long music phrase. Essentially, it's just clipping one finished piece of music, i.e. a sample, to another finished piece (or pieces) of music, like a drum pattern. For example, let's say you have a preset drum beat playing on your EMPI. With the drum beat sequence in record mode, you simply trigger the sample right in over the drum beat. With the primary sample successfully recorded into the sequence, the sample (complete-phrase, etc.) along with the drum beat now becomes the rhythm section, and as such, it serves as the **core track**[14] from which the entire beat's design (arrangement) will be orchestrated.

Major paper-clipping, or what I like to call **"B 'n' P-building",** employs the same process. But in this case, you're using smaller samples (segments that have been put through the complex chopping process) and, as such, it's somewhat more involved. Unlike minor paper-clippin', which tends to be characterized by complete-phrases and ready-made loops, major paper-clipping is best characterized by its use of "bits and pieces" (smaller segments of sounds). Major paper-clipping requires a beatmaker to meticulously fashion both a backbeat *and* a solid rhythm while using non-ready-made loop samples to do so. Thus, B 'n' P-Building requires a beatmaker to have very creative chopping skills.

Building Arrangements Using Primary Samples and Derivative Samples

A sample or song that serves as the source material for which other samples are then derived from is called the **primary sample**. A sample that's made (chopped) from a primary sample or any other

[14] The core track, composed of the core riffs and groove, is the main framework for which the entire beat is based upon. The core track is the initial foundation of rhythm and groove and it can perhaps be a simple melody. It provides the basis, the "core," of the beat.

sample already used in a beat is a **derivative sample**. One common purpose of **derivative samples** is to provide a change or progression to the sample from which it was derived. When sample-based beatmakers (producers) sample something from a record and build a new beat around it, we tend to return to that same record for the *changes* that we want to incorporate into the same beat (we also often look for separate recordings for changes.) Likewise, when we have a sizable complete phrase, spare-part phrase, or a section-piece, it's somewhat intuitive to chop up the phrase even more, especially for the purpose of finding suitable changes that are likely to fit texturally and sonically with the core track that we've already established.

Building Arrangements Using Primary Samples Along with Derivative Samples

Whether you build your sample-based beat around your drums or build your drums around your samples, one effective way of carving out compositions is by using arrangements that incorporate the use of primary samples *and* derivative samples. As I discussed earlier, you can make some quality beats with just one sample by itself. But one-sample beats are typically non-progressive in nature because they rely more upon a central, repetitive loop theme. So if you would like to make more progressive arrangements, then you essentially have two choices: Incorporate several or more different samples from a number of different records, or incorporate multiple samples from the same song. (This involves the process described above.) My recommendation is to aim for the derivative approach.

After you create your drum framework and you have the primary sample laid down, here's a couple of ways that you can work in the derivative samples. First, allow the primary sample to play for 4 bars, then program in one of your derivative samples, beginning on the 5th bar. Since the newly added derivative sample changes the sequence (program), it is considered a *change*; I call this "sample-change 1". When you only have one change, one effective way to arrange your beats is on the "4" or the "8". That is, for every 4 or 8 bars, you work in "sample-change 1". If your "sample-change 1" is only 1 bar, double it up to 2 bars before you loop back to the primary sample. If your "sample-change 1" is 2 bars, you can either loop back to the primary sample, or you can double it up to 4 bars before you loop back to the primary sample.

If you want to make an even more progressive arrangement, using only samples and very minimal synthetic-sounds, then you can add

other derivative samples. Naturally, I call the next derivative sample that I add "sample-change 2", and the next, "sample-change 3", and so on. Multiple sample changes gives you a great deal of flexibility when you're building arrangements. For instance, you can put one of them in right after the first sample change ends, landing the new change on every 7th and 9th bar that proceeds the primary sample. This technique enables you to build out the texture of the beat, using samples in a carefully crafted arrangement pattern. Furthermore, it allows you to build better sound collages for your drum programs.

Here is an example of what the formula could look like, using primary samples and derivative samples:

- 8-bar intro = 4 bars of "sample-change 1" + 4 bars of "sample-change 2"
- 16-bar verse = 4 bars of primary sample + 2 bars of "sample-change 1" + 8 bars of primary sample + 2 bars of "sample-change 3"
- 8-bar hook = (This is where you can get extra creative. Mix up the drum program, rotate in two changes, while keeping the primary sample moving steady. Or you can drop the primary sample all together, and play the changes off of the new drum program.)
- 16-bar verse = 4 bars of primary sample + 4 bars of "sample-change 3" (or "sample-change 4" if you have it) + 6 bars of primary sample + 2 bars of "sample-change 1." (This is the middle of the song, so you can really push the envelope.)
- 8-bar hook = Keep steady
- 16-bar verse = 4 bars of primary sample + 2 bars of "sample-change 2" + 2 bars of "sample-change 1" + 8 bars of primary sample
- 8-bar hook (chorus) = Keep steady
- 8-bar outro = 4 bars of "sample-change 1" + 4 bars of "sample-change 3"

Final Word About the Sampling Equation

The examination of the mechanics of sampling in the previous two chapters should dispel the notion that the art of sampling is simple, easy, or void of its own compositional system. Within the mechanics of sampling, there are many different dimensions. Collectively these dimensions underscore the *science* of the art of sampling. This science, better stated as *the Sampling Equation*, encompasses a unique system that includes philosophical, technical, and compositional spectrums as well as a code of ethics. Thus, to truly understand (and appreciate) the mechanics and compositional tract of the art of sampling in the hip hop/rap music tradition, you must first understand this robust equation.

Chapter 7

Drums and Sampling

"Without dope drums, you can't have a dope beat."
–Marley Marl

"Drums are the most important part of a beat."
–DJ Premier

"I spend a lot of time making sure that my drums are right."
–DJ Toomp

Drums are the cornerstone of a beat. Regardless of whatever non-drum arrangement a beatmaker (producer) creates, it's always the drums that serve as the foundation and the glue by which all other elements within a beat stick together. So it's typically the drums that garner the most attention from beatmakers (producers). In this chapter, I examine drums in all of their beatmaking glory. From the basics of drum sounds to the various structures that drum programs formulate, I explore both the aesthetic and functional roles that drums play within the beatmaking process.

The Basics: Drum Sound Categories

In beatmaking, drum sounds are divided into four primary categories: kicks, snares, hats, and cymbals. For each category (type) of drum sound there are multiple variants. For example, from among the kick variety there are standard bass kicks, "booms" and 808s. A standard bass kick is your garden variety bass drum, a boom is a more amplified bass kick sound, and an 808 (its name taken from the famed Roland TR 808 drum machine) can be described as a super-powered boom with an additional sustain and broader resonance.

Within the snare drum variety there are standard snares, snare toms, woodblocks, and rim shots. It's important to note that in beatmaking, snare sounds (and kicks and hi-hats) can be anything that *represents* the role of a snare, not necessarily a typical snare sound (more on that later when I discuss the role of drum sounds and programming).

Among the hat variety of drum sounds there are hi-, open-, and closed-hats (or mid-hats). **Hi-hat** refers to the sound of standard hi-hat cymbals in their default position, not tightly closed but resting close to one another. Think of a drum set in which one hi-hat cymbal rests on top of the other, held loosely together by the hi-hat foot pedal. Thus, in beatmaking, the sound made when these two cymbals are held loosely together and struck is what is meant by a typical hi-hat. Likewise, **open-hat** refers to the sound of standard hi-hat cymbals in the their maximum open position. **Closed-hats** refers to the sound of standard hi-hat cymbals in their closed position, i.e. held tightly together.

Within the cymbals variety there are "rides" and "crashes." **Rides** refer to the ride cymbal sound of a standard drum set, **crashes** refer to the gong-like cymbal sound that's created when two cymbals are *crashed* into each other. Here, I should also point out that there are a number of secondary percussive sounds that beatmakers (producers) use to compliment primary drum sounds. These secondary percussive sounds include shekeres, triangles, blocks, tympanies, sleigh bells, tambourines, and castanets.

Drum Sound Representation: Drum Sounds Are Not Always Actual "Drum Sounds"

In beatmaking, drum sounds do not always correspond with the actual category of sound that it represents. For instance, snares are not always actual snare-drum sounds. Instead, the term "snare" is used loosely in beatmaking to describe *any* sound that is used, played, and programmed where the snare drum sound typically would land within a drum pattern. In other words, in beatmaking, the term "snare" serves to represent *any* sound that acts like or

carries the purpose and associated dynamics of a snare drum. Hence, snares in beatmaking can be anything from the captured sounds of a hammer hitting a chair to a drum stick smacking the top of a shoe box (both things I've done before). This same representational/actual duality of drums in beatmaking applies to all drum sounds as well as bass sounds. For instance, a kick can be any sound that represents the sound and impact that simulates any variation of the sound that a bass drum typically makes. So for example, a kick can be something as creative as a sample of a boot kicking a shoe box stuffed with t-shirts (I made a kick like this). Likewise, a bass sound doesn't necessarily have to come from a bass guitar or the bass patch of a keyboard/synthesizer. A bass sound can be made from the low-end filtering of an organ patch or something similar or any sound that you can transform.

How Many Drum Sounds Are Enough? Core Set (Limited) Drum Sounds vs. Unlimited Set of Drum Sounds; and Customizing and Sampling Your Own Drums

The number of drum sounds that a beatmaker (producer) should have is debatable. There are some who believe that you can never have enough drum sounds. On the other hand, there are those who believe that you should have simply a core set of drum sounds. So what is the right amount of drum sounds? Truth is, that's up to each individual beatmaker (producer). But when deciding upon how many drum sounds to carry, either a core (limited) set or an unlimited set, there are a number of things you should consider.

To begin with, you must recognize how the *sound* of drums are perceived and valued in the first place. In beatmaking, as well as in traditional drumming, the value of drums is predicated more upon *tonal* possibilities rather than simply *quantitative* possibilities. That is to say, it's not the sheer number of available drum sounds that are really important, it's the various kinds of tones (unique sounds) that drum sounds can be made to produce.

Traditional drummers can employ several different techniques to produce different tones. For example, they can tighten or loosen the skin heads on their drums, and they can also modify their playing style to manipulate the velocity, attack, and sustain of a drum strike. Each technique has the potential to render a unique tone. Likewise, through effects processors, EQs, plug-ins, and the like, beatmakers can also modify their drum sounds. And just as with traditional drummers, beatmakers in their playing/programming can also manipulate the velocity, attack, and sustain of the drum sounds that they deploy. Traditional drummers often do more with less. Celebrated drummers like John "Jabo" Starks, Clyde Stubblefield, Bernard Perry, John Bonham, and Neil Peart did not have an arsenal of snare sounds, yet they were able to carve out very distinct sound signatures. This is because the style, approach, and modification that a particular drummer uses is paramount to their ability to tap the various tonal possibilities of a given drum sound. Because beatmaking is a form of electronic music production, there will inevitably be a larger selection of drum sounds to chose from. However, this does not change the fundamental value of drum sounds. The tonal possibilities of drum sounds still outweighs the sheer number of drum sounds.

But those who advocate for having an unlimited set of drum sounds have their arguments as well. Some maintain that an unlimited amount of drum sounds leads to a better drum sound library, which in turn makes for more creativity. But if the purpose of a drum sound library is for amassing both a set of standard and customized drum sounds so that one can create and develop their own unique sound, then an infinite number of drum sounds actually undermines this purpose and contradicts the creation of one's own unique sound. After all, a unique overall drum style and sound requires familiarity; and familiarity depends upon a beatmaker's (producer's) ability to repeatedly use a core set of drums in new (creative) ways. All great drummers have their own style and sound.

There are some beatmakers (producers) who purport to use entirely new drum sounds every time that they make a new beat. So it would seem that an unlimited amount of drum sounds presents

a beatmaker (producer) with an unlimited amount of options. But here's the question that begs asking. Is such an approach actually practical or even worth it in the long run? An infinite number of drum sounds doesn't necessarily translate into a higher level of quality. For instance, let's say you have a set of 500 separate snares. If you were to critically survey each snare, how many of those snares would actually sound distinct and unique? In fact, how many times would a certain tone be replicated? Furthermore, how many of these snares would actually be usable? What I'm getting at is that out of a given set of 500 snares, it's not at all unreasonable for you to expect to find many that are quite similar. Finally, there's also the management and real-time use issue of deferring to an unlimited set of drum sounds. Scrolling through thousands of drums sounds just takes something away from the creative process. For one thing, it's time consuming; but more importantly, it disrupts your workflow, which in turn hampers the creative process.

Core Drum Sounds and Unique Style

A core (limited) set of drum sounds tends to breed a sort of familiarity and personal style and sound, whereas an unlimited set of drum sounds breeds an over-reliance on variety for variety's sake. It also breeds as a degree of uncertainty and indecision, which typically leads to bad choices.

At one point in time, I probably had more than 5,000 drum sounds. I had nearly all of the MIDI Mark drum kits, the Kid Nepro drum kits, Sample Kings drum kits, various drum sound CDs, the E-Mu SP 1200 full drum sound library, the Akai S950 full drum sound library, *and* sampled drum sounds from over 14 volumes of the *Ultimate Breakbeat Records* series! I even had drum sound libraries that were comprised of sounds that I recorded and had mixed at recording studios. So at one point in time, I had a huge drum-sound library.

Then I reconsidered what I was doing and what I *wanted* to do. Ultimately, I simply wanted to make dope beats. But paying too much attention to building up an infinite drum-sound library

was actually destracting me from my ultimate goal. Once I made this revelation, I vigorously started purging my drum sound library. I tossed out every drum sound that I wasn't using. After that, I did another purge; this time I tossed out all drum sounds that I considered to be just *okay*. I went on to do more purges, separating the great drum sounds from the good drum sounds, followed by a separation of the best drum sounds from the great ones. When all was said and done, I was left with only those drum sounds that I thought were dope and those sounds that worked best within the style and sound of beats that I wanted to create.

I understand that some beatmakers (producers) thrive on having an unlimited set of options at their disposal. Some beatmakers (producers) simply like the notion of having unlimited choices. But what often happens in these cases is that you *force-feed* beats, i.e. you use new drum sounds simply because you have them, not because of their distinct tonal value or unique character or because they actually work well within their style of beats you're making. For many beatmakers (producers) like myself, it's not about spending unnecessary time searching for an arbitrary perfect snare. It's about locating a snare from your library that you know well and making that snare sound fit with the theme of the beat at hand.

As I've already discussed, drum sounds can really be divided into four main categories, with additional sub-categories. For instance, you have heavy kicks and standard kicks. Then there are standard snares and "irregular" snares. Next, there are hi-hats, closed-hats, and open-hats. And after that there are cymbals: rides and crashes and the like. Finally, there are the secondary percussion sounds: tambourines, rims, bells, timpani, and the like. Of all of the aforementioned kinds of drum sounds, I carry about three to five drum sounds of each variety. And *if* and when I find that I can't make any of those sounds work with a new beat that I'm making, then that means that the new beat is wack, simple and plain. Here's the bottom line for me: I know my personal drum sound library very well. In fact, I know my drum sounds far better than I know my gear, and almost as well as my favorite records. But when I had 5,000 drum sounds, there was no way that I could realistically ever

know all of those sounds. Therefore, I prefer the feeling of knowing that my drum kit, if you will, is set and ready to go whenever I have a new idea.

Drum Sound Customization and Building Your Own Drum Sound Library

Because the drums are such a prominent feature of the hip hop/rap music tradition, and because beatmaking is set in a pre-recorded-based medium as well as a live performance-based medium, beatmaking relies, to a great extent, on extensive sound modification of individual drum sounds. But when it comes to drum sounds, the truth is, there are only but so many standard sounds that you can have: a typical bass kick, 808 kick, boom kick, mid-pitch snare, truncated snare, shekere, hi-hat, open-hat, closed-hat, ride, and crash. So an appropriate number of standard drum sounds (within your choice of style and sound) should be comprised of your base set of drum sounds. And once you've added the appropriate standards (based on your choice of style and sound) to your drum sound library, the balance of a unique drum sound library is usually made up of customized drum sounds. For many beatmakers (producers), the most effective drum customization comes from the manipulation and modification of drum sounds that are already in their base drum sound library. Hence, here, it's worth examining some of the methods for customizing drum sounds.

There are several somewhat simple ways to effectively customize drum sounds. The easiest way to customize a drum sound is through truncation or the chopping and shortening of sound. Next, you can manipulate the velocity (volume and release) of a drum sound, and you can also manipulate the pitch of drum sounds. There are also a number of complex methods for customizing drum sounds. There are those processes that involve the EQing (sound coloring and leveling) of drum sounds. EQing drum sounds essentially involves turning up or down the low, mid, or high frequencies of a given drum sound. Then there are those methods that incorporate the use of external or software effects processors. These methods include

things like adding compression, chorus, or reverb to a drum sound. Methods like these are considered to be more complex because they demand a greater amount of experience and understanding of sound frequencies, effects processors, and, of course, beatmaking itself.

Methods for Customizing Drum Sounds

Here are my primary methods for customizing drum sounds. First, it begins with a beat. After I track (record) a new beat into Pro Tools, I pick a drum sound, usually a kick or snare, then I sample it and rename it as a variation of the original drum sound. Because Pro Tools allows me to solo (isolate) individual tracks, I solo the drum sound that I want to modify. Next, I play the track, then I sample (duplicate) the drum sound and rename it as a variation of the original drum sound. For example, if the original drum sound was "snare 1," I name the variation "snare 1 x." If I want to thicken up a drum sound, I duplicate it a couple of times, then I play the track and sample all three sounds together as if they were one drum sound. For added effect, I EQ each of the sounds separately or modify their pitch before I sample them.

Another way that I customize drum sounds is similar, but it involves using my Akai MPC 4000 and my Akai S950. First, I create a basic drum track, or I use a drum track from a previous beat that I made. Next, I take the drum hit or stab that I want to customize and I layer it on top of itself by programming the event in the sequence of the beat. But instead of layering the same hits exactly on top of each other, that is, at the exact same step (event) in the sequence, I offset each hit about one or two events (steps) before or after the original hit. It is then this new "fattened," more resonant sounding hit that I then record into Pro Tools.

Here, I should note that all of my MPC 4000 and S950 outputs are routed through a Mackie 32-channel analog board. So the signal that is ultimately recorded is further *beefed up* (amplified) before it lands in Pro Tools. Once inside Pro Tools, the process can get even more complex, as I might do additional EQ'ing or put some reverb or other effect on the drum hit. Finally, when I'm happy

with the result, I sample that sound back into my Akai MPC 4000 or my Akai S950. Once this is done, what I end up with is a new drum sound that is unique and modified to my desired tonal and sonic spec.

The establishment of one's own sound is mostly about sonic preferences (preferred frequencies), arrangement scopes, types of sounds and tonal preference, individual approach and technique, and an underlying style. Therefore, in this overall scope, drum sounds should be routinely interchanged and reused. This is one of the fundamental things that beatmaking is about: alterating and alternating familiar sounds, techniques, and styles in ways that gives a beatmaker (producer) his own unique style and sound.

BeatTip – Think Outside the Box for Custom Snare Sounds: Presets Get the Job Done, But Customized Sounds Help You Create Your Own Style and Sound



Figure 1 Sa'id floppy disk of customized drum sounds

Whether you've made your 10th or 1,000th beat this week, you've learned the importance of dope drum sounds. And when it comes to drum sounds, you can get away with a limited number of non-descript kicks. But without a distinct group of snare sounds, your beats might suffer. Why? Because since the early 2000s, widespread sample packs, and advanced software programs, many beatmakers have taken to using the exact same stock snares. And, in the process, they've decreased the chance of giving their beats a distinctive sound.

Don't get me wrong, there have been some beatmakers (producers) who have been able to get away with using only one or two stock snares. But in most of those cases, the snares have been cultivated to an ultimate level of distinction, a level in which they work almost with any non-drum arrangement. However, in order to arrive at such snare sounds, some level of customization had to have gone on previously. So in this BeatTip, I want to discuss some different methods for customizing snares. Some of which were taught to me and some of which I developed on my own.

The first set of snare sounds that I ever customized was part of a classic rock kit (*on floppy disk*) that came with the E-Mu SP 1200, the first drum machine/sampler I ever used. Some of the snares on the kit were OK, but they didn't fit what I was trying to do sonically. So after finally recognizing that none of the snare sounds fit with the feel and style of music that I was going for, I started to customize them. At that time, I didn't have an analog mixing console to run my sounds through, so I couldn't easily boost up the the low end of the sounds I wanted to modify. But I did have a dual cassette recorder and a lot of imagination. So here's what I did the first time I customized snare sounds. I recorded every snare sound that I had to cassette tape. Next, I dubbed (duplicated) them. After dubbing the sounds, I sampled them into my Akai S950. Once inside of the Akai S950, I was really able to get creative. It wasn't that I couldn't have chopped or filtered the sounds inside of my old SP 1200, I could have. It was just that the S950 gave me a different sound, plus I felt more comfortable working with its sampling functions than those in the SP-1200.

Next, I went around my bedroom with a Shure SM-58 live microphone sampling all sorts of sounds. I took a hammer and hit the bottom of a metal folding chair. I took a drum stick and rapped back and forth on a Nike sneaker box stuffed with socks (I sampled the sneaker box with and without the lid on; there was indeed a noticeable difference). Switching up between the hammer, the drum stick, and a wooden hanger, I hit the inside of a window pane. Needless to say, I sampled every sound

that I could imagine, anything that I thought might be interesting. All of this sampling probably took me 10 minutes. *By the way, I would also like to think that this process taught me more about acoustics*.

Having sampled this wide assortment of sounds, all in the same room, mind you, I went about "matching" the sounds with the cassette versions of E-Mu's classic rock kit as well as several other snare sounds that I had. Incidentally, this was around the time that I first began to understand the process of layering sounds. Particularly, I was discovering the *potential* for layering, both as a means for customizing drum sounds as well as other sounds. I was also learning how layering could affect the overall texture and tenor of a beat. Shortly after that, I began applying these techniques to all of the drum sounds that I used. And after a while, I stopped buying other peoples' drum kits altogether and I started sampling drums from records and literally making my own drum sounds.

Special Note: Since I first began customizing my snare sounds, I have never used a pre-set drum sound *as-is* again. Although pre-set drum sounds undoubtedly serve a purpose (I have heard some pretty nice pre-set drums), I've always found that customizing your own sounds goes a long way in helping you carve out your own unique style and sound. Still, if I come across a pre-set drum sound that I like, I'll use it. Of course, I modify it to make my own.

Short list of items great for customizing snares:

- Live microphone or portable recorder.
- A tambourine. Any percussion instrument you can pick up from a music store will help you customize your snare sounds as well create sound composites that are unique.
- A wood block, mallet, hammer, and a shekere.
- At least one drum stick. You can use two in rapid succession on any hard surface. You'll be surprised at what you can come up with after you filter and adjust the pitch on a sound created by two drum sticks.
- A real set of bongos.
- A cassette tape player. Yes. They're dirt cheap now, and they allow for connection back to the analog age (if that matters to you). Also, nobody will ever be able to duplicate your sounds if you've used some combination involving a cassette tape.
- Some sort of wooden board, maybe a chef 's cutting board,

something that you can strike with anything, like a bottom of a shoe, a mallet, a set of keys, a hockey puck, and, of course, a drum stick.
- Some studio foam.

Check This Out – Creating Your Own Customized Drum Signature: Matching Up Certain Sounds and Keeping Them Together

There is perhaps no better way to add continuity to your beats — and to distinguish your sound — than having your own custom drum signature. Just like a typical overall signature sound, a custom drum signature is your own personal drum sound. Various beatmakers (producers) have custom drum signatures. Think of DJ Premier, Pete Rock, RZA, Q-Tip, J Dilla, Just Blaze, Nottz, 9th Wonder, The Neptunes, Jake One, Metro Boomin, and so on. But how do you create your own custom drum signature?

Building your own custom drum signature starts with a core set of drum sounds. So how do you get a core set of sounds, you ask? Well, the best way (perhaps the only way) that you can develop a core set of drum sounds is through an audition process of the drum sounds that you already have. Whenever you select any drum sound for one beat, you're essentially auditioning that drum sound for future beats. Each beat that you make acts as a reference for a new beat. Using this understanding as the foundation for auditioning drum sounds, let me break down how I developed my core drum sounds and my own drum signature.

Strip the Beat

First thing that I did was I stripped down five of my favorite beats to their drum framework, i.e. no non-drum sounds. Each beat had a mid-range tempo of 94 to 97 bpm. Next, I listened to each beat to determine if there were any discernible patterns. Having noticed specific sonic and texture consistencies between the sounds in each drum framework, I then examined the "value settings" for each drum sound (one by one) that I've used. Although I use an Akai MPC 4000, the majority (60%) of my core drum sounds were sampled and modified in my Akai S950 sampler. Therefore, I must spend a brief moment discussing the main

"page" in the Akai S950 in which I modify sounds. In "PAGE 08" inside of the Akai S950, each sound — once assigned to a program — can be modified in four ways: (1) Loudness; (2) Filter; (3) Transpose (pitch); and (4) Fine Pitch. (Note: Most contemporary samplers — both hardware and software — have multiple filter options and effects.) For each drum sound that I use, I wrote down the values of "PAGE 08" on a yellow posted note or a yellow legal pad. For example, take a look at Figure 2.

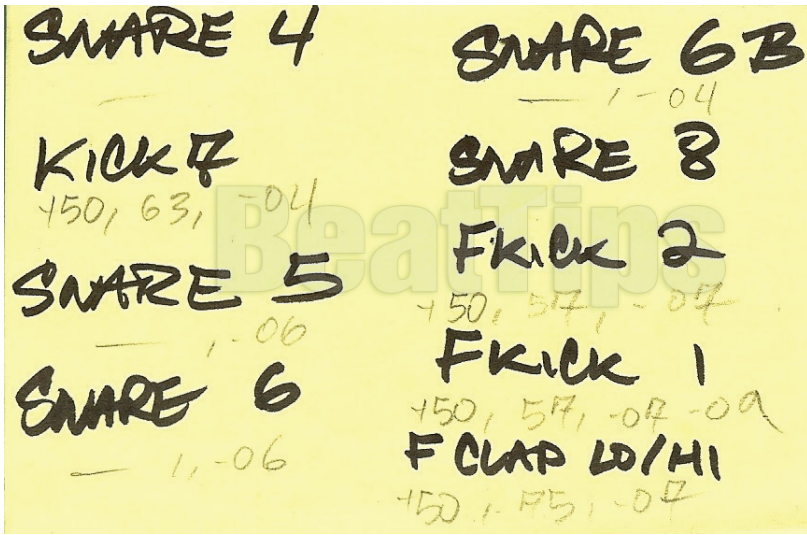


Figure 2 Drum Sounds and Values on Yellow Pad

This allowed me to objectively examine the settings for each sound, which in turn helped me determine the typical settings that I tended to use for each type of sound, e.g. kick, snare, and hi-hat. By writing down my tendencies, I was better able to modify those drum sounds that I liked.

Having found a clear scope of the characteristics that drew me to a particular drum sound, I then auditioned those sounds with each other — pattern after pattern — to see which sounds fit together and which sounds fit with everything. It's worth remembering that for the most part, drum sounds do not play alone; therefore, the true test of a drum sound is how well it plays with and *off of* other sounds in the drum framework (and the entire beat for that matter). So auditioning drums sounds together (rather than alone) better helps you identify those drums in your collection that are sure-shot and those that are better used as featured players.

After many drum-sound-audition practice sessions, I was able to identify roughly 15 sure shot (dependable) drum sounds. Also, I was able to identify about another 20 feature players — i.e. great auxiliary drum sounds — that could be used for special beats and mitigating circumstances; such as matching beat styles. As of today, my 15 sure-shot sounds are composed of 4 kicks; 4 snares; 4 hi-hats; 1 crash; 1 tambourine, and 1 ride cymbal. From just these 15 drum sounds, I create the drum frameworks for the bulk of my beats. I should note, however, that although I always use at least one of my core drum sounds, I routinely use slightly modified versions (for example, slower pitch) of my core drum sounds. I should also point out that I have another set of 15 "2nd-tier" drum sounds that I use for specific types of beats or for certain layering effects.

When it comes to customizing drum sounds that I sampled and modified in my Akai MPC 4000, the process is similar in terms of writing down my tendencies on a yellow posted note. However, the Akai MPC 4000's editing capabilities (for example, filtering, reverb, etc.) are more extensive than the Akai S950's. And this makes it possible for an expanded area of exploration. That being said, I often work to match the sounds from my MPC 4000 to those made in my S950, the only difference being the level of brightness and perhaps reverb.

Assigning Your Main (Primary) Drum Sounds

There is no wrong or right way to assign drum sounds to pads, but I do believe that some pad assignments are more practical than others. In the following section, I will describe one of the simplest and practical ways that you can assign your main (primary) drum sounds over a standard 16-pad bank of a drum machine.

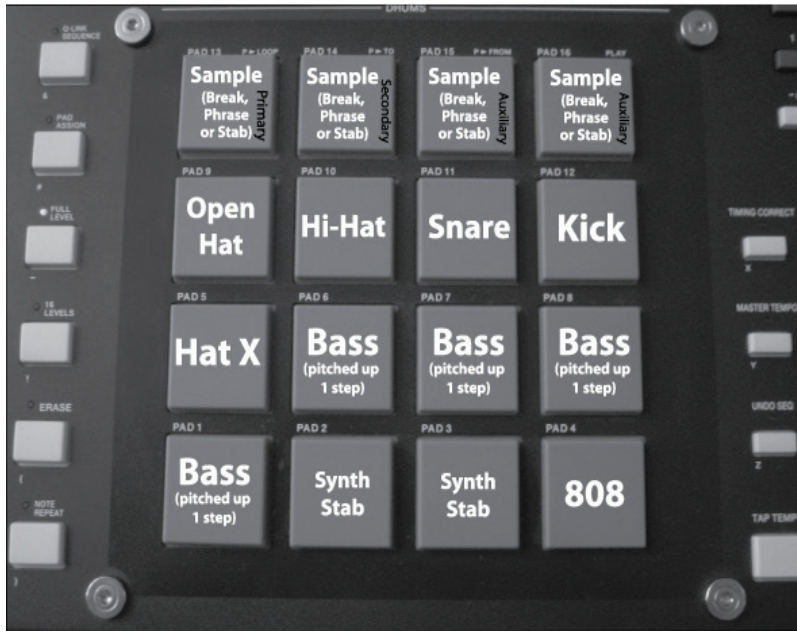


Figure 3 Front 16 Drum Pads—Primary and Secondary Drum Sound Assignment

For your main drums (kick, snare, hat), I recommend that you assign them to the top first-three pads or the bottom first-three pads. There are two practical reasons for this. First, drums are the backbone of a beat, so they get used more than any other element within a beat. Hence, it helps to have your drums mapped out and assigned in a position that complements their overall importance. Another reason why it's practical to assign your primary drums to the top first-three pads or the bottom first-three pads is because drums are generally tracked (recorded) into DAWs in the same order: kick, snare, hat.

After you've assigned your main kick, move over one pad and assign your main snare. What's the logic behind this? Well, when you're trying to create drum patterns from scratch, it helps to have the snare pad as close to the kick pad as possible. Is this a rule? No. I've seen some beatmakers (producers) who have their snares assigned directly underneath their main kicks. When I started making beats, I tried each of these ways, and what I found was that it was easier and more effective for me to slide horizontally from kick to snare than vertically from kick to snare. Moreover, I found that I could make faster pattern progressions. That is to say, with the snare placed one pad over (horizontally) from the kick, I was able to jab my middle finger to the snare pad faster. This improved my drum timing, my overall timing, and my arrangement capabilities.

Having assigned your main snare, I recommend assigning the main hat (or ride) to the next pad over from the snare. You have to be careful with hats, because at their best they're actually very subtle, but at their worst they can sound obnoxiously loud and distracting. Hence, the importance of hats and their role will vary from beat to beat. Even still, you should give hats (and cymbals) the same positional respect as the kick and snare. Again, pattern development plays a key role. So here's why hats deserve the same positional respect. Most beatmakers (producers) build the main drum framework by starting with the kick and the snare. Then, having successfully created a pattern, they then add the hat in over the top of the kick and snare, creating a basic drum sequence. (*Some beatmakers (producers) even begin with hats.*) After the individual kick, snare, and hat patterns are programmed and looped, the overall collective pattern becomes the main drum framework. And when a beatmaker (producer) plays back the drum framework (drum sequence), it is the hat that often gives you the most accurate indication of whether or not the pitch of the framework is right for the beat.

I also like to keep the hat within the first three pads for another reason: timing. I often use a hat in the same way that most beatmakers use the metronome tone. When I create beats, most of the time I actually don't even use the metronome tone. I know the tempos that I like to work within, usually 84-99 BPM so I have a

good indication of where things are supposed to land in the measure of the sequence. When the metronome tone is audible, it disrupts my flow and concentration. So if I ever have a timing issue, I simply make a quick 1-bar loop of hi-hat hits. Since I know that a standard hi-hat pattern (1, 2, 3, 4, on up to 8) lands on basically every 6th step or event within a 4/4 measure, a simple 1-bar loop of hi-hats helps me get the timing right. After that, I adjust that bar to the desired tempo by using the hat pattern as a guide. From there, I play the kick drum and snare in real time over the top of the hi-hat.

For the next pad over from your main hi-hat, I recommend that you reserve this pad for your open-hat or even a second hat sound. In fact, the additional hat on this pad can really be anything from an open-hat to a ride to sleigh bells to a tambourine. These second hats can be either used as layers, or they can be used more sparingly, like every other bar or every fourth bar, etc., for accentuation and emphasis.

The point I hope to make about drum sound assignments is that it's practical to assign your main drum sounds on neighboring pads (or keys). Having your main kick on the third pad, top row, and your main snare on the fourth pad of a middle row, and your main hat on the first pad, bottom row doesn't seem practical for programming your main drum sequences. Such an assignment, would require your hand position and fingers to move much faster than perhaps necessary. And this factor can increase the probability that your timing will be off, or at least it will make it difficult for you to achieve the timing that you want. However, on the other hand, if you assign your sounds in relative, pre-determined mapped out groups, especially your main drums, you undoubtedly will gain a number of advantages.

Group Map Assignments (GMA)

The most obvious advantages of Group Map Assignments (GMA), is the proximity that it allows and, ultimately, how practical it is. Presumably, the closer the pads (sounds) that you want to trigger (in conjunction) are to one another, the easier it will be for

you to move from one pad (sound) to another. Instead of making distant pad-strikes that force you to go from row 4 then back to row 1, you can simply assign the sounds of an entire *group* to either row 1 or row 4. The idea here is to narrow down your GMAs to three or four pads per group. For drums, this is easy. Kick, snare, hat are already a natural group, so it's practical to keep them that way. And you can add any other drum-related sound to this group to make it a 4-pad group, thereby taking up an entire row of pads. Simple, plain, easy, organized, and above all, practical.

Perhaps the biggest advantage of a GMA is rhythm organization. By mapping out your sounds into groups, you are in essence turning your sequencer/drum machine into a *de facto* rhythm section. The drummer, or rather the drum GMA is on one row, the guitar GMA is on another row, and the piano/strings GMA is on another row.

Finally, here it's important to note that the kind of music production I've been discussing is fundamentally electronic. However, my perspective is that as the beatmaker (producer), i.e. composer/programmer/producer, you alone actually make up the rhythm section. A beatmaker's (producer's) musical understanding is just as relevant as a traditional musician's understanding. The only difference between beatmakers (producers) and traditional musicians is that most beatmakers do not necessarily choose to play traditional music instruments. Instead, we most often use EMPIs to play, program, and sequence sounds, both in traditional and non-traditional ways.

The Significance of Timing Correct

To beatmakers (producers), timing correct is simply a steady hand and a mistake-proof measure for programming sequences. Timing correct automatically "corrects" time to the preset value that you choose. Here's how it works. Let's say you want to record a music sequence. First, you set a time correct value; beatmakers typically set this value to 1/16th Note or 1/16th TRPLT. Next, you put your sequencer into record mode and compose a pattern. While in your sequencer's record mode, you play sounds (either internally

or triggered from an external EMPI) in a pattern of your liking. Each "event-strike"[95] that you program lands anywhere within the measure that you choose. What happens with timing correct is that it *corrects* the placement of the event-strikes that you program. That is, it automatically shifts (moves) your actual event-strike performance (placement) to the nearest step in the measure that your timing correct value is set to. This means that a timing correct value of 1/16th will shift your event-strike over to the nearest 1/16th step in the measure. So for example, within a 1-bar measure in 4/4 time, if you play (program) a snare on the standard 2, then play it again on the 4, timing correct automatically places the hit two beats later on the exact same 1/16th step of where you programmed the first snare. In other words, timing correct not only corrects your timing, it essentially *perfects* your timing. This is why I refer to it as a mistake-proof measure for programming sequences.

Even though timing correct perfects the timing of the events in a sequence that you program, timing correct doesn't always help. In many cases, timing correct can make your timing *too* perfect and unnatural. For example, have you ever tapped in (played) a drum pattern on your drum machine or sequencer and it didn't play back exactly how you played it? That's because the timing correct value "corrected" your timing. Timing correct is a big-brother style function that automatically corrects your playing within a sequence.

But timing correct is very helpful when it comes to creating a standard repetitive event-strike such as a typical hi-hat pattern, which lands on every 6th event (step) within a measure. In a case like this, you can set the timing correct value to 1/8th, then casually tap out a standard hi-hat pattern without worrying if your timing is right because the timing correct will automatically move each hi-hat event-strike to the nearest 1/8th. However, as helpful as this may be, it's important to remember that timing correct does not distinguish between what events that you do or do not want to apply corrective measures to. Although you may want to employ timing correct to ensure that your hi-hat strikes are landing exactly 6 events apart,

[95] Every event that you program within a sequence is what I call an **event-strike**. For example, tapping a drum pad is an event strike, playing a key on a keyboard is an event-strike.

keep in mind that whatever timing correct value that you have set will also correct every event-strike that you initiate, which means that you can use multiple timing correct values for different parts of the same sequence. In this case, you can use timing correct to purposely create *offness*.

Choosing the Right Timing Correct Note Value Depends on the Goal of the Drum Pattern

Timing correct is just that: It's a corrective measure for your timing. So how you set your timing correct values should be determined by how good (or bad) your general sense of timing is. If your timing is excellent, that is, your drum event-strikes are comparable to the playing of a traditional drummer, meaning you strike *on time*, with little to no mistakes, then you really don't even need to have the timing correct function on. But if your timing is fairly decent and you want to put in some swing, then you're probably better off setting the timing correct note value to either the default 1/16th NOTE or perhaps even 1/32 TRPLT. (If you're using an Akai MPC, you also want to make sure that the shuffle % is set to: 50, and set the Shift timing to: LATER.) If your timing is poor, then you almost certainly want to use the timing correct note value of 1/16th NOTE or 1/16th TRPLT. The reason many well-known beatmakers (producers) set the timing correct to 1/16th and/or 1/16th TRPLT is not because their timing is poor, but rather their timing is so good, they know how to *manipulate* the corrective nuances of the timing correct function to their advantage. But when using the standard 1/16th NOTE value, you should be aware that if your timing isn't that good, and if you're not particularly skilled at note correction and the like, you run the risk of recording drum pattern sequences that sound stiff, robotic, or slow-dragging with an off-beat feel. But then again, sometimes you might *want* that slow-dragging effect; it depends on the style and sound of beat.

Generally speaking though, I recommend setting the timing correct to either 1/32 TRPLT (especially for vintage hardware sequencers like the Akai MPC 60 II or the E-Mu SP 1200), 1/16,

or 1/16TRPLT and leaving it as your default for all of your basic drum patterns. For instance, let's say that you have an arrangement of non-drum sounds looping nicely and you've just added the main kick and snare to the sequence, and everything's really starting to come together. All you need now to complete the drum pattern is the main hi-hat. Why stop the loop, change the timing correct, restart the loop, then play the hi-hat with the corrective protection? If you've got the loop going well and the main kick and snare are already in place, then just play the hi-hat right over the top of the existing pattern in real-time. In this way, you're forced to trust your own timing rather than merely rely on the time correct function. I also recommend that you get accustomed to programming your event-strikes exactly how your fingers play them in the sequence, mistakes and all. This way, you'll build up your timing strengths and neutralize your timing weaknesses. Finally, although it may be a good idea to keep a default timing correct value for your main drum sounds and patterns, there are occasions where changing the timing correct value makes sense. For instance, depending upon the rhythmic nature of the event that you want to initiate and drum pattern that you want to achieve (especially in the area of additional syncopation like stutter hi-hat, kick, or snare patterns), choosing the most effective timing correct value is essential.

Timing Correct with "Note Repeat"

Timing correct is a steady hand, but when used creatively with a sequencer's note repeat function, it becomes a stutter and roll maker. One of the most popular sound aesthetics in beatmaking is the stutter drum hit, i.e. rapid, successive syncopation. This sound aesthetic first appeared in beatmaking in New York in the early/mid-'80s, around the time the Roland TR 808 drum machine started to get its first heavy use in hip hop/rap music. Since then, the stutter drum hit has become a major cornerstone of the Southern Bounce sound, especially the trap sound. There are many methods and techniques for achieving this aesthetic, but if you use an Akai MPC or something similar like Native Instruments' Maschine or a

software program like Ableton Live or FL Studio, the easiest method involves simply adjusting the timing correct value, turning on the note repeat function, and recording the drum-hit (kick, snare, and/or hat) to spec. For example, in order to achieve the stutter-hat effect, simply set the timing correct value to 1/8th or 1/16th or 1/16th TRPLT, depending on the space and dynamics of the syncopation that you want to achieve.

Drum Programming (Drum Composing)

The Two Basic Forms of Drum Programming: Breakbeat Blend and Hit-Stab Drum Programming

In beatmaking, there are two basic forms of drum programming: breakbeat blend drum programming and hit-stab drum programming. **Breakbeat blend programming**, which is characterized by the use of wholesale sampled sections of the break part of songs (most often funk soul, disco, and rock tunes of the '60s and the '70s), was first popularized by Grandmaster Flash in the early '80s. It was then further extended by Marley Marl, Showbiz, DJ Premier, and the like in the late '80s and early '90s. **Hit-stab drum programming**, which is characterized by the use of unique, individual one-hit, drum stabs and hits that are played (programmed) in traditional drummer-like fashion, was initiated and first popularized by Marley Marl in the mid '80s and further pioneered in the early '90s by DJ Premier, Q-Tip, Pete Rock, Large Professor, Prince Paul, and RZA. Today, some beatmakers (producers) still employ the breakbeat blend drum programming form, but since the early '90s, the hit-stab form has served as the unofficial default drum programming for all beatmakers (producers).[96]

[96] In my interview with Marley Marl, he details how he came up with this form of drum programming. Although Marley Marl is rightfully credited with laying down the foundation for hit-stab drum programming, it must be noted that the form was further developed and extended during the Pioneers/Avant-Garde Period (1988-1994) by the likes of DJ Premier, Q-Tip, Large Professor, Dr. Dre, Pete Rock, and RZA. It's also worth noting that the hit-stab drum programming form was further developed and extended during the Post-Pioneers Period (1995-2000) by the likes of DJ Toomp, J Dilla, Just Blaze, Kanye West, Timbaland, and The Neptunes.

Basic Concepts of Traditional Drum Programming and Arrangement

The most basic drum structure and arrangement within 4/4 time (the default time signature of most hip hop/rap beats) breaks down like this. The kick (bass drum) lands on the *1* and *3* (1st and 3rd beats); the snare lands on the *2* and the *4*; and the hi-hat lands on every half beat. Regarding the placement of the hi-hat, it's worth noting that unlike electronic drum machines and sequencers, live drummers cannot play the hi-hat *uninterrupted* throughout any given drum pattern while they're playing other pieces of a drum set (e.g. snare, toms, and cymbals) because it's not humanly possible. So there are times within any given pattern where the steady hi-hat sound naturally drops out. A live drummer has human limitations, an electronic drum machine or sequencer does not. A drum machine can play whatever arrangement you program it to play, for as long as you program it to play.

Drum Patterns and How Drums Land in a Pattern/ Program: How the Main Kick, Snare, and Hi-hat Land

Generally speaking, kicks can either hit *flush* or *off*. A **flush-kick**, hereinafter represented by the symbol **fK** on the drum pattern diagrams presented in this section, is the main kick sound. "Flush" refers to a prominent kick sound that lands on a whole or half-beat within a measure (a bar of music). The flush-kick is one of the most pronounced and sonically important elements within any sequence or any beat. It's the lone kick sound that anchors the beat. The **off-kick**, hereinafter represented by the symbol **oK** on the drum pattern diagrams in this section, is the kick sound that is the least prominent kick sound. "Off" refers to the less prominent kick sound that lands on quarter and eighth beats within a measure. The off-kick's main purpose is to set up or accentuate the flush-kick.

The flush-kick can be doubled (paired), stranded, stretched, or stuttered. The off-kick can be *pinched in* before or *wrapped* around the flush-kick. The terms doubled/paired, stranded, stretched,

pinched-in, and wrapped all refer to specific event placements or steps in a sequence, the how and where the events take place. More often than not, the off-kick is pinched in 2 events (steps) before a flush-kick. When pinching in the off-kick, it's sometimes a good idea to decrease its velocity, especially when you're working with multi-sound samples. When you're creating new drum patterns and programs, the velocity level is usually (by default) at its full value for all of the drum sounds. So one way to make your drums sound more real, more natural, and more like a live drummer is to manipulate the velocity levels of some of the specific drum events within a beat's sequences. Since the flush-kick is more prominent than the off-kick, usually you don't want to tweak its velocity levels too much. However, decreasing the velocity of the off-kick often proves to be more effective. Remember, the role of the off-kick is to set up, accentuate, and generally play off of the lead role of the flush-kick. Therefore, decreasing the velocity of off-kicks helps you establish a live-drummer like texture.

Like kicks, snares either hit flush or off. A flush-snare, hereafter represented by the symbol **fS** on the drum pattern diagrams in this section, is the main snare sound. It's the sound that is commonly known to land on the ***2 and the 4***, the second and fourth beats of a bar. The flush-snare is the snare sound that is the most prominent and audible within any sequence or beat. It's the main snare sound that, in effect, *times* the beat. Imagine, if you will, the metronome playing throughout a beat. On every second and fourth metronome tone the flush snare would hit; hence the meaning of the 2 *and the 4*. The off-snare, hereinafter represented by the symbol **oS** on the drum diagrams in this section, is the snare sound that is the least prominent snare sound within any sequence. Like the off-kick, the off-snare's main purpose is to set up, accentuate, and generally play off the lead role of the flush snare.

Hi-hats, hereinafter represented by the symbol **H** on the drum pattern diagrams in this section, are generally flush. In the '90s, hi-hats played a more primary, default-like role in drum patterns. But since 2002 or so, they have increasingly been used in a more secondary percussive or featured role. Some beatmakers (producers)

are even experimenting with leaving out hi-hats altogether (Indeed, I sometimes make beats with no hi-hat hits at all). Still, basic 4/4 time tends to demand some sort of hi-hat construction. So it's important to know when and where hi-hats land in a typical drum pattern.

Shared Foundations of Drum Patterns

No matter what new drum pattern you create from scratch, the reality is that the new pattern most likely will not be too different from any other drum pattern or program that you've already created or will ever create, because all drum patterns share some kind of fundamental foundation. Moreover, there are a number of standard drum pattern clichés in beatmaking; and it's from these standard drum clichés that all new drum patterns emerge. In the diagrams that I've included in this section, I have catalogued the three most commonly used drum patterns (pre trap music era) in beatmaking, and I have demonstrated just how these patterns break down within a sequence, specifically the ways in which flush-kicks, off-kicks, flush-snares, off-snares, and flush-hi-hats land in fundamental beatmaking drum patterns.

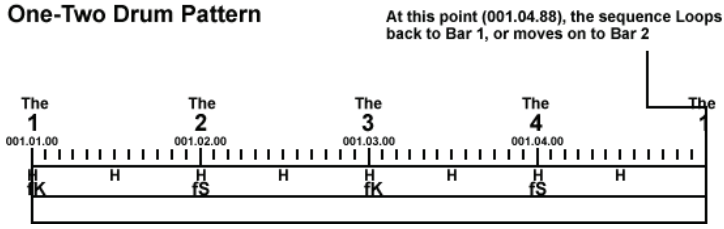


Figure 4 One-Two Drum Pattern

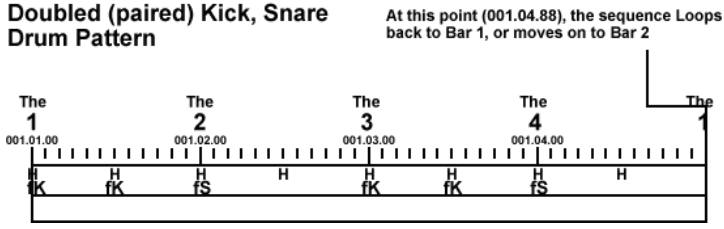


Figure 5 Doubled (paired) Kick, Snare Drum Pattern

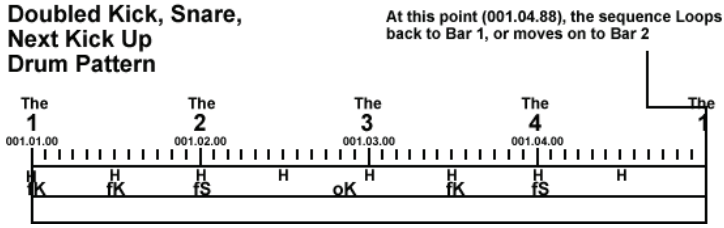


Figure 6 Doubled Kick, Snare, Next Kick Up Drum Pattern

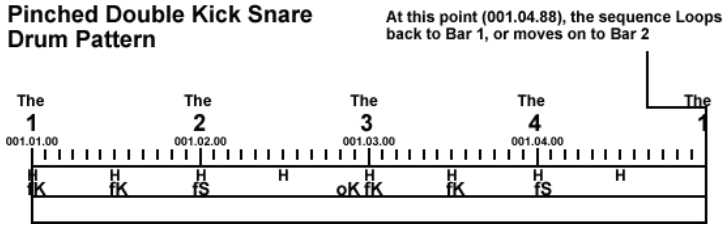


Figure 7 Pinched Double Kick Snare Drum Pattern

From these four diagrams, we can make a number of observations about drum patterns and the ways in which drum sounds tend to (and can potentially) land in drum patterns created in 4/4 time. First, we can see that a sequence is actually a chronological time line of events, a grid of programmed action. The sequencer grid of each of the diagrams contains measured parameters for which all events must be programmed, i.e. played in real time or placed in with your sequencer's STEP EDIT mode.

Second, we can see how each drum hit (event) plays off of the other. Looking at Figure 4, "One-Two Drum Pattern", we can see how the flush-snare (fS) plays off of the flush-kick (fK). The flush-kick within the bar occurs on the 001.01.00 step and the 001.03.00 step, twenty-four steps apart from itself. The flush-snare falls between each kick, exactly twelve steps apart from each kick and twenty-four steps apart from itself. This is what I describe as a **long spatial distance**, as opposed to Figure 7 where the flush-kick and flush-snare carry a **short spatial distance**. Understanding the spatial distance between the kick and the snare helps determine how the drum pattern can be further built up or stripped down. Furthermore, knowing the spatial distances between flush-kicks and flush-snares within typical drum patterns allows you to identify

whether you're working with a simple or complex drum pattern. One of the biggest mistakes that many beatmakers (producers) often make is that they mismatch or try to force simple or complex drum patterns to work with the wrong non-drum sounds and arrangements. But the reality is, most drum patterns should never be overly complex to begin with. Lastly, we must remember that the drums are critical to keeping time steady and holding the rhythm together. So a solid drum framework can't be too haywire or overly active, as this disrupts and undermines the entire flow and feel of the beat.

Spacial Differences Between Flush Drum Sounds

Knowing the spatial differences between the flush-snares and flush-kicks of typical drum patterns is key. Knowledge of spatial difference yields a better understanding of and feel for where the main drum hit events *should* occur within a sequence. This increases your sense of timing and feeling for rhythm, and it decreases your reliance on quantizing, time stretching, and other synthetic (machine-/software-based) timing correction measures. Further, although knowledge of spatial difference is key for all beatmakers (producers), it's particularly important for those beatmakers (producers) who who prefer to "draw" in their drum-hit events.

Identifying Simple and Complex Drum Patterns

So how do you know if a drum pattern is simple or complex? For example, how do you know that the "One-Two Drum Pattern" is simple, not a complex? You can identify it as simple because there are only four total drum-hit events (not including the eight hi-hat events) that occur within one bar. Likewise, how do you know that the "Pinched Double Kick Snare Drum Pattern" is a complex drum pattern? You can identify it as a complex drum pattern because it contains eight total drum-hit events (not including the eight standard hi-hat events) within one bar. Generally speaking, the higher the number of drum-hit events within a measure, in this case one bar, the more complex the drum pattern will be.

The recognition of simple and complex drum patterns is essential because not only does it save you time when creating drum patterns, it also broadens your understanding of the ways in which drum sounds can work together as well as the multiple directions drum patterns can potentially take. This is even more important when you're creating beats that feature complete-phrase samples, because they largely dictate what kinds of drum patterns are likely to fit. Moreover, this understanding increases your ability to program in rhythmic samples, melody lines, and other non-drum sounds in a much more creative and efficient manner.

Knowing Drum-Hit Event Placements

Another reason why it's helpful to know the event placements of basic drum patterns is because it helps cue in your loop methods. By understanding the most fundamental drum patterns, you increase your looping skills. Furthermore, there is a practical reason for learning the basic drum patterns: corrective editing. When you're building sequences, you tend to quickly get caught up in the creative moment. Ideas come to you quickly, right? So what happens when a drum sound seems to be off-beat or awkward? Well, by knowing where the hits *should* occur, you can isolate the section in the sequence in which the event is in question and check it out, then quickly correct it (or remove it) if necessary. For instance, let's look at the "Doubled Kick, Snare Drum." If the event, in this case the flush-kick, starts on the first step of the sequence, then any flush-kick placement not exactly on (or very near to) the 6th, 24th, or the 30th step will sound awkward. However, if your isolation of the events reveals that all the flush-kicks are landing where they're supposed to, then you know that it's something else that's generating the awkward sound. This is key because it helps you to troubleshoot your sequences and loops much more efficiently.

Understanding Drum Syncopation

In my discussion of how drum hits land in a drum pattern, specifically the concept of "flush" and "off" drum-hits, I've focused primarily on "flush-hits". Here, I want to focus on "off" drum-hits in particular, as they strongly represent syncopation. In all components of music, not just drumming, syncopation refers to the way in which music events deviate (unexpectedly) from the established succession of regularly spaced strong and weak beats in a measure. In other words, syncopation could be the result of *stress* (action, e.g. a drum-hit event) on a normally unstressed beat or *unstress* (no action, e.g. no drum-hit event) on a normally stressed beat. So if a part of the measure that is normally stressed is unstressed, then rhythm is syncopated. Likewise, if a part of the measure that is normally unstressed is stressed, then the rhythm is syncopated. By looking at any of the four drum pattern diagrams discussed earlier in this chapter, you can imagine how and where syncopation might occur within any given drum pattern.[97]

Building Your Drum Frameworks with Your Samples

As I mentioned before, building drum patterns from scratch is pretty much a rhetorical affair. What I mean is, no matter how differently you arrange your drum pattern, it will always be some variation of a drum pattern that you've already created or heard before. Even if you interchange the pattern with new drum sounds, the reality is that the patterns stay relatively the same. Hip hop/rap music, like blues, jazz, and rock 'n' roll, builds upon its clichés. Therefore, rarely will you ever hear a drum pattern that you've never heard some variation of before (this is especially true of trap music).

So when you're building a drum pattern from scratch, based around a primary sample, your goal should be to complement that sample, not disrupt it or distract attention away from it. In other

[97] Syncopation is a fundamental component of the Black (African American) music tradition and the styles that stem from it, including the blues, jazz, rhythm and blues, rock 'n' roll, soul, funk, and hip hop/rap. Syncopation is also used in many different music styles and pretty much all contemporary music.

words, when you use samples, let the samples stand out. The drums that you blend in should hold everything down. When you have a sample looping and you're getting ready to play in a drum pattern, keep your focus on building a drum framework that lets the sample *breathe* properly. Don't overpower the sample with drums that cloud or distort the sample. Drums can still have an effective sound and feel without having to sacrifice the sound and feeling of the primary sample. In fact, drums sound the best when the blend between the sample and the drum pattern is straightforward and not too busy or overly loud. So when it comes to creating a drum framework with your sample(s), a proper balance of power and subtlety is the key.

How Drum Sounds Are Often Used in Drum Frameworks and Sequences: Kicks, Snares, Hats, and Cymbals Working Together

Drum sounds work together in various ways; therefore, understanding the ways in which the different categories of drum sounds work together in drum frameworks (programs/sequences) is critical to a beatmaker's (producer's) ability to insert quality and effectiveness to the overall arrangement of a beat. Below I have outlined a set of parameters for how each sound category can most effectively be used in drum frameworks.

Kicks

Kicks are the *sonic glue* that hold both the drum framework together and the pulse of the entire beat itself. So knowing which types of kicks cause which effects within a drum framework and overall beat is important. For instance, hard kicks, i.e. heavier frequence and sonic impact, are best used with low bass-filtered driven or synthetic-sounds-based beats that aren't too active. Harder kicks are also very effective with beats that feature simple melodies and minimal changes. On the other hand, soft or medium kicks work best with more extensive compositional arrangements and sample-based beats that feature more complex (highly creative) uses

of samples. Softer kicks are also very effective for beats in which the frequency levels range mostly from mid to high. They also work well in sample-based beats that are dominated by texturally thick complete-phrase samples.

Snares and Claps: Pitch-Shifts

In hip hop's beatmaking tradition, there is more experimentation with drum phrasing than in other twentieth-century American popular music traditions. One key way that unique drum phrasing is achieved in beatmaking is through the use of what I call snare "pitch-shifts". Pitch-shifts simply refer to alternating pitch values of the same or multiple drum-hits. In the case of snare pitch-shifts, the process of alternating the pitch value of the main snare within a drum sequence not only adds in a subtle but very effective change, it also gives a *push and pull* effect to the various sections within the song structure. This is why snare pitch-shifts work very well within the verse section of a song, they add change without unnecessary distraction, i.e. something subtle that lyricists can use as an additional timing mechanism for their rhyme flow. Snare pitch-shifts are also helpful for keeping solid time in sample-based beats that utilize longer complete-phrase samples. Snare pitch-shifts also work well in the hook section because they offer the level of variety that can further set a hook apart from the other sections of a beat/song.

The Genius of the 2 and the 4

Understanding the *2 and the 4* means realizing that once the kick and the hi-hat are laid down, rhythm actually already exists. This is why snares don't necessarily have to be loud or extra compressed to be effective. With 4/4 time, our minds are already pre-conditioned to hear *something* land on the *2 and the 4*. This is precisely why low velocity claps often work well with high powered kicks. Incidentally, this is why the Atlanta snap sound works. At first glance, the snap sound seems redundantly simple. Musically, the sound appears to be devoid of any real feeling. However, the

snap sound does actually take advantage of the genius of the *2 and the 4*. Rather than emphasizing a heavy or unique snare, the snap sound focuses on building the track with a standard *snap* on the *2 and the 4*. By restricting the feature component of the snare and stripping down other music elements, beatmakers (producers) who create the snap sound can then build the track with more percussive collages, 808s, and other bass sounds. And although the snap sound is something primarily meant for synthetic-sounds-based beats (i.e. no samples featured), its philosophy does have its roots in the process of intuitive chopping.

Alternating Snares, Clap-Hits and Chopped Chimes, Velocity Modification, and Delayed-Snares

Another effective programming technique for snares involves the use of alternating the main snare-hit with clap-hits, chopped chimes, or other percussive-stabs or hits. Instead of using the same snare-hit throughout the song, you can program in a clap-hit and alternate it with the main snare-hit. You can let the clap-hit play through for the first 8 bars, then come in with the main snare or any other alternating pattern you can imgaine. Also, you can cut up some chimes and layer them over the top of the snare- or clap-hit. And whether you apply this technique throughout the entire beat/song or just in certain sections, it's effective because it helps to build ambiance, and it offers a lot of personal nuance to your drum frameworks and overall sound and style.

Modifying the velocity, the attack and volume level or impact-level of each snare- or clap-hit is a great way to *naturally* create swing. If you listen to traditional live drummers, you will notice that because of the "human factor", it's impossible for them to ever hit the same drum with the exact same velocity twice. This means that every time they strike a drum, there's a slightly different attack, sometimes harder, sometimes softer. To achieve or rather *retain* this nuance and naturalness in beatmaking, you can simply turn off the velocity function within the EMPI(s) that you use to craft your drum frameworks, or you can record your drum programs with the

velocity level at its full value, then afterwards go in and manually adjust (program) the velocity changes on specific drum-hits.

Finally, the use of "delayed-snares" is also another effective snare technique. Delayed-snares describes specific snare-hits that are purposely placed *off-time* within a drum pattern. Delayed-snares can be used to mask awkward pauses and gaps or minor glitches and other unwanted but unremovable blemishes within a beat. Also, delayed-snares can be used to create unique effects in the drum framework. For example, delaying the lead snare-hit for a bridge or a break-down. Furthermore, used correctly, delayed-snares can also conceal the short-comings of a less-than-perfect loop.

Hats

The use of different types of hi-hats can also serve multiple roles within the drum framework and the overall beat. Standard hi-hats (semi-closed), which are high in pitch, work to push the flow of the beat. Generally, standard hi-hats have a high pitch. Open-hi-hats are much slower pitched than standard hi-hats, so they can work to drag the pace or *temper* the rhythm of the beat. Closed-hi-hats, which are typically faster in pitch than both standard hi-hats and open hi-hats, work like a clear-cut metronome. Sometimes their tightness can make a beat sound too mechanically clean and unnatural. Each type of hi-hat can add shuffle and swing to a drum framework. However, achieving this effect does depend on the actual pitch and tone of the hat being used. Below, I have included some general standards regarding hats.

- Standard closed hi-hats help with a tighter sense of time, while semi-closed hi-hats are best if you want to *shuffle* the time along.
- Rather than using external processors, e.g. reverb, etc., hats and rides are also great for achieving additional warmth and clarity through unique arrangement and pronouncement techniques.
- The use of alternating hi-hats and hi-hat patterns is a

good thing when you want to change the flow of the hook section in a song.
- Hats give tracks extra depth; and hats work like the second hand on a clock.
- Unique hat arrangements can shade (mask) the loop points in a beat.

Cymbals and Bells

Cymbals play an important role in certain drum frameworks. For example, rides work well for ambiance; they also help balance out the impact of rumbling (i.e. bass heavy, muddy, or distorted) kicks. Bells work well as "treble managers", that is to say, they're good at meshing with (or handling) the high peaks of samples or synthetic sounds phrases. Cymbals are also useful at offsetting the flatness of low-filtered bass-driven beats. Further, cymbals can substitute for the role of hi-hat patterns. This substitution carries an array of effects. For certain drum patterns, it can make a drum framework sound jazzier. Then again with other drum patterns, it can make the drum framework sound aggressive, even eerie or haunting. Finally, cymbals can be very effective when they're layered over kicks at specific moments within each section of the song.

Taking Advantage of the Open and Hidden Spaces

Every drum pattern has *open* or *hidden* spaces. The open spaces of a drum pattern refer to those spots in the pattern where you can imagine (hear it in your head) a non-drum sound being placed (recorded) over the top. For example, take a look at the diagram in Figure 8.

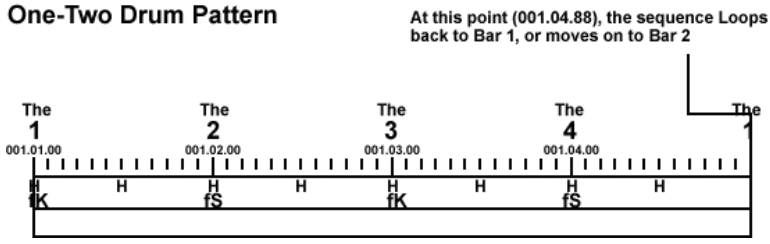


Figure 8 One-Two Drum Pattern

Imagine your favorite kick and snare in this pattern. Because of the spacing dynamics of this pattern, you will notice the *pause* that naturally stands out after each kick and before each snare. These spaces are *open* because they're empty; therefore they naturally stand out and seemingly invite a non-drum sound to be added.

On the other hand, hidden spaces are camouflaged by the drum pattern itself. That is to say, the hidden spaces are flush with the drum sounds. Again, look at the same diagram in Figure 8, imagine adding in a sample or bass line beginning on top of the kick, as opposed to between the kick and the snare. The results will be dramatically different for two reasons. First, keep in mind that the way in which a sequence loops is primarily determined by the particular placement of events within that given sequence. So for instance, if you insert a sample or bass line in the open space of the drum pattern, it will likely overlap in a way that doesn't coincide with how the sequence loops. However, if you insert a sample or bass line in the hidden space, i.e. on top of one of the flush kicks or flush snares, it will likely mesh better with how the sequence loops even if it overlaps.

The second reason the result of the beat will be different when you insert non-drum music in hidden spaces is because these spaces determine the degree to which the drums ultimately stand out or fade back. Remember, although drums play a central role in a beat, they can serve this role in two different capacities: Either in a featured capacity or as accompaniment capacity. Take for instance Jay-Z's song "Girls, Girls, Girls" (2001), produced by Just Blaze. In this song, Just Blaze uses the drums to *accompany* the samples; that is to say, the drum framework just works to keep the beat

steady. Now consider Gang Starr's "Same Team, No Games" (2003), produced by DJ Premier. In the latter song, Premier uses the drums in a *featured* capacity, that is to say, the drum framework is really the main component that drives the beat.

Matching/Fitting Drum Sounds and Patterns with Samples

One of the most difficult skills to develop in sampling is matching drum sounds and patterns to primary samples. So here, I want to discuss those things that lead to having a better understanding of this area of sample-based beatmaking. Probably the most important factor in matching drum sounds and patterns with samples is knowing your own drum sounds. As I discussed earlier in this chapter, knowing your drum-sound library, particularly your core set of sounds, is a critical part of effective beatmaking. And when it comes to matching drum sounds and patterns with samples, i.e. primary samples, knowing your sounds becomes even more important, as they provide the initial clues for the types of sounds that should go well with the samples that you're working with. Along with knowing your drum sounds, you should know the most effective combinations of your sounds. In particular, you should know which kick, snare, and hi-hat sounds fit and move best together.

Now, provided you know your drum sounds and *go-to* drum-sound combinations, you should have already developed a certain drum style. If you haven't, focus on doing so, as it will trim loads of time when it comes to creating new patterns to fit with the samples you choose. With your own drum style — whether it be heavy syncopation, a subtle accompaniment approach, or an out-front knocking style — whenever you work with the primary sample(s), you'll already have a decent idea of what will likely work, both in terms of sonic and rhythmic blending.

But even with a command of your core drum sounds and combinations and your own style and approach to drum programming, matching the drum sounds and patterns to samples

can still be difficult. So here are a number of factors to consider when trying to match drum sounds to non-drum samples. First, consider what kind of sample-based beat you're working on. Are you creating a beat in which you want the drums to knock or hang back? If you want the drums to knock, i.e. punch (bang) out in front of the sample, then you'll likely want to go with a sharp, distinct snare and a booming kick. If you're aiming for a subtle sounding beat, then you'll probably want your drums to just accompany the primary sample. In this case, a tucked snare that matches the feel and sonic quality of the sample will be a great place to start, and you'll want to go with a less boomy kick and a brushing hi-hat.

You also want to consider the type and sound of the primary sample itself. Is the primary sample loud and punchy? Is it smooth and jazzy? Is it soulful and funky? Are there gaps in the sample? Is one end of the sample louder than the other? Moreover, the primary sample that you use let's you know how how complex or stripped down the drum pattern will need to be. It should also be understood that each kind of sample will warrant some audition of different drum sounds and combinations, but with a good grasp of the primary sample itself, your audition period will take less time. Plus, if the sample comes from a song with drums, you might be able to use those drum sounds of yours that are similar. But this doesn't always work. In fact, sample-based beats are often created out by using drum sounds that sound nothing like the drums of the primary sample that was used.

The concept of matching drums to samples is often misunderstood because many people mistakenly take the word "matching" to only mean a *blending* of sonic quality and pitch. This is why I believe that the more appropriate word to use is *fitting* drums and patterns to samples because that is more often the fundamental aim. Certainly, blending sound qualities is important, but the rhythms that are created and sustained with the drums is what takes precedent. Drums either dictate or support the character of the beat; and in all cases, they should never sound out of place. This is why I recommend having a default drum sound combination that you can regularly use to start up a new drum pattern. Once

you've established the rhythmic pattern that fits and feels right with the primary sample, you can explore the idea of swapping out the kick, snare, or hi-hat. Plus, once the drum rhythm is set, the sound of the drums can always be further tweaked and blended through EQ, velocity changes, layering, and other modification techniques.

Finally, another important suggestion I have is that you start with a snare as a barometer for any drum sounds and patterns that you ultimately go with. This is because no matter what sound or pattern that you create, the snare tends to always sit with the kick and hi-hat even when tucked in the mix. So using the snare helps you not only find your drum sound sonic compass, it also clues you in to what type of syncopation or additional percussion will be most effective.

The Human Touch: A Note About Playing EMPIs Like Various Traditional Music Instruments

I see the drum pads on my Akai MPC 4000 (and MPC One) drum machine/sampler/sequencer the same way a guitarist sees the strings on his guitar; or the same way a keyboardist sees the keys on his keyboard; or the same way a drummer sees the skinheads on his drums. I don't merely *program* my MPC, I *play* it. This is the same way that most seasoned sample-based beatmakers feel. As Rsonist, one half of the production duo The Heatmakerz puts it, "The MPC is an *instrument*! Regardless… If I put 10 sounds in 10 pads and I gotta *arrange* it into a melody, I can do that. I don't know like… this is a C chord, or whatever it is. But at the end of the day, I know what's on key, what's off key, *what's right, what's wrong*…"[98]

Beatmakers (producers) are not simply clever electronic music production "programmers". All of us are performance artists much in the same vein of traditional musicians. But what distinguishes beatmakers (producers) from traditional musicians is the fact that, by and large, we are not limited to just *one* instrument in the same way that one-instrument capable traditional musicians are. For every

[98] Amir Said interview with Rsonist (2009).

beat, most beatmakers (producers) are responsible for playing (or providing) the drums as well as the string and wind instruments. So EMPIs, like the Akai MPC, represent for us a *multi-instrument* — an instrument that, in effect, allows us to play and tap into the essence of *any* instrument that we want. One moment a beatmaker (producer) can be crafting the drums; the next moment he can be laying down bass lines; and the next moment he can be flipping a sample or making a melodic synth phrase. This is one of the most liberating aspects of the beatmaking tradition. Because of this aspect, beatmakers (producers) have the potential to be much more versatile music producers than the average traditional musician.

EMPIs double as music instruments and production hubs that virtually give beatmakers (producers) endless instrumental and musical possibilities when choosing instruments and sounds. And because EMPIs are both instruments and computers, beatmakers (producers) who use software-based setups should be careful to remember the "human touch", because you can easily become more programmer than musician if you focus more on computing and less on composing. One area to safeguard against this is to use an EMPI with pads (for example a MIDI controller with pads) for triggering sounds; this gives off the feeling of playing something rather than *just* programming something. And note: One major characteristic of the Black (African American) music tradition, and all of the music traditions that stem from it, most notably rhythm and blues, rock 'n' roll, soul, and funk, is that all instruments, particularly the bass guitar, are played in a percussive manner. Thus, playing samples and other sounds on drum pads harkens back and pays homage to that tradition.

Default Workflow Systems: Default Drum Programs and Sequence Templates

To streamline your creative output, I recommend creating what I call **default workflow systems**. A default workflow system can be any stored beatmaking template, like a default drum sequence (pattern). It can also be a default method, style, and/or

technique that you utilize in your personal beatmaking process, like a systematic approach to sampling, or a systematic approach to sequencing, etc. The main theme of a default workflow system is *recycling*. That is to say, you want to consistently reuse and infuse those components and characteristics of your beatmaking style and sound that you find to be effective. The ultimate purpose of this being that it will help you create new beats much more efficiently, and it will help you develop your own unique style and sound.

A default drum sequence template or pattern is any pre-made/pre-used/previously programmed drum sequence that you use to create new drum patterns. Default drum sequence templates can be taken from beats that you've already made, attempted to make, or are currently making. Once you've created a beat, you can always scrap the non-drum music material and keep the drums. This leftover drum pattern, what I call a **drum shell**, can then be saved and used again. This is extremely helpful to your beatmaking process because it provides you with an arsenal of drum sequences that you can tap quickly for ideas every time you begin to create a new beat. By using default workflow systems you will not only improve your overall beatmaking efficiency, you will also streamline your entire beatmaking output. Hence, every new beat that you make is potentially a template for future beats. This does not mean that you should never make any new drum sequences from scratch. On the contrary, the idea of a default drum sequence (pattern) is to help you generate new ideas by incorporating some of your most successful old ones.

Finally, when it comes to drum shells, I recommend that you always keep at least fifteen drum shells — default drum patterns/sequence templates/programs — stored and ready for action. The more drum shells that you have, the more quickly you'll learn to process your ideas. Also, to help increase workflow efficiency, I recommend that you create default sequence templates that include alternating hi-hat patterns. I have 75 default drum sequences, ranging from 1-, 2-, 4-, 8-, and 16-bar sequences. This allows me to work much more efficiently. Moreover, it permits me to quickly extract my ideas and turn them

into new music. And consider this. When a live drummer in a band creates a drum scheme for a new song, he recalls and relies on patterns that he's already played before in the past, then he makes alterations and adjustments as the song changes and develops. So there's no big deal about making a new drum pattern from scratch, because 70%-90% of the pattern will be something that you've already created and programmed before.

Chapter 8

The Story of Rhythm In Black Music

The Origins of Rhythm In American Popular Music; Key Characteristics and Nuances of Rhythm and Groove; Rhythmic Feels; The Indelible Influence of James Brown on the Use Rhythm In Popular Music; and Four Critical Factors that Impact Rhythm in Hip Hop/Rap Music

"The truism that African music lays emphasis to rhythm than harmony, tone and its color reveals that the creative input of African music making is essentially embedded on rhythmic considerations – the hallmark of its musical identity."
—Sunday Ofuani

"The basis of Negro music, and the principal medium of black musical expression, is the drum. The variety of drums is almost unlimited in size and materials."
—David E. Vassberg

Having covered both the fundamental and advanced concepts related to drums in hip hop/rap music in the previous chapter, this chapter focuses on rhythm and its relationship to drums in hip hop/rap music. Because the story of rhythm in Black music is complicated, I start from the beginning: Enslaved Africans in the New World. In order to properly assess the extent of African musical influence in today's music culture, specifically by way of rhythm, it is necessary to first examine how the African rhythmic sensibility arrived in America.

Three Disclaimers Before Proceeding

The Relationship Between Rhythm and Drums in Hip Hop/Rap Music

This chapter builds on the previous chapter about drums and focuses on rhythm, which drums play a vital role in creating. While drums have always played an important role in hip hop/rap music, we should understand that hip hop/rap music is not a sound entirely defined by drums, but rather, like all Black music, it is a sound defined first and foremost by rhythm. That said, drums represent one of the chief *pathways* to rhythm. More specifically, this chapter discusses the origins of the African rhythmic sense in the Black music tradition, the fundamentals and key elements of rhythm and why the possibilities for creating new rhythmic feels are infinite, and how all of these factors impact the creation of new rhythms in hip hop/rap music.

Use of the term "New World"

Regarding the use of the terms "New World" and "North America"— This chapter is principally focused on developments in the United States. But the story of African slaves taken across the Atlantic is intertwined with underlying similarities that cover all of the Americas. As such, in this case, it's easier to reference "New World", while in other cases more specific to pre-colonial and colonial America and the United States, I simply use North America.

Sub-Saharan Africa

While the discussions related to Africa do sometimes include North Africa, it should be understood that emphasis is on Sub-Saharan Africa, with West and Central Africa being the main points of focus.

Note About Chapter Length

In the interest of continuity and keeping all of the dimensions of this topic conveniently in one place, this chapter, the second longest in this book, has been kept intact and not split simply for length's sake. However, readers will take note that I've placed an "Intermission" mark roughly mid-way through the chapter should a more traditional pause be needed.

Replying to the Quora question, "*Why are Black people so good with rhythm (music)?*," Deanna Greaux, a mid-20s Black woman from London, confirmed not only the widely known cultural association of rhythm and Black people, but also how this link comes from African ancestors. Greaux's Quora reply offers further proof of the differences between experiencing music in and *as* a Black cultural space, something I examine in greater detail in Chapter 11. But I include it here to demonstrate how important rhythm has long been to Black people around the globe:

> As someone who has spent time socializing with black and white people, I have come to the conclusion that it is a cultural thing and a meer (sic) difference in how we are socialised. Most black people I know don't do ANYTHING - chores, driving, exercise, socializing, cooking etc without music! **Culturally - we live and breathe music. Specifically *music with a Strong Rhythmic Interest.*** Music is more than a bit of fun for us - It's literally how we communicate with each other. *Interrupting a dance by walking through or pushing pass, is equivalent to butting into a conversation.* People of African Descent take it personally lol **Black Caribbean and Black Americans have developed this way of "communication" from our African Ancestors who had a dance/ritual for almost every social aspect of our lives.**
>
> When hanging around people of European descent, I have noticed that music doesn't hold as much weight as it does in black communities. I'm from the UK, so it may be different elsewhere, but I have noticed British White people are happy to sit around, chat and drink themselves silly with loved ones, *without the presence of music or at most, background music which usually doesn't have a strong rhythm.*
>
> **As someone who grew up in a Caribbean household, this was very foreign to me. EVERY black person I know started dancing a variation of music - reggae, dancehall, soca, jazz, RnB and Hip Hop from a very young age, thus giving us years and years of dance experience.**
>
> Also, sub-cultures within various black communities dance differently too: Caribbean people dance differently to West Africans, Black Americans dance differently to Southern Africans. It's all culture... I didn't grow up doing the Azonto, Shaku Shaku, and other West African dance moves, but admittedly, my natural rhythm helped me pick it up quickly. Additionally, many black people grew up in the church and were part of the choir or at least sang. White and Asian people who have been raised around black people develop

> this same rhythmic pattern. Indo-Caribbean and White Caribbean people are a good example of this. [emphasis mine and in the original][1]

Greaux's reply is an excellent prism through which we can ask two critical *why* questions? First, *Why* is rhythm so important to Black people? Second, *Why* are Black people presumed (rightly or wrongly) to be "naturally" rhythmic or "good" with rhythm? To answer these question, and to tell the story of rhythm and the Black music tradition, we must go back to the African roots of Black music.

Understanding the African roots of Black music; knowing the story of how Black music became to be; having a grasp of the numerous music genres that have originated from Black people doesn't prevent non-Black people from enjoying or participating in the furtherance of Black music forms. In fact, today, there is no greater example of this than what we find in hip hop/rap music, or more precisely hip hop/rap's beatmaking tradition. And we can't properly understand hip hop/rap music's own rhythmic tradition, without first understanding where it all came from.

***

Ethnomusicologist Alan P. Merriam noted that "[t]he sounds of music cannot exist in a vacuum; music is inevitably the result of social behavior by human beings for other human beings."[2] Expanding upon this, when we look at music culture through the prism of musical *choice*, it's clear that the choices people make are not arbitrary — These choices cannot exist in a vacuum. It's inevitable that people make choices based on the priorities of the music culture that they make music for. The reason *why* rhythm is "the most salient feature of black African music,"[3] is because in Black music, rhythm is prioritized above harmony and melody. So

[1] Deanna Greaux, "Why are Black people so good with rhythm (music)?," Quora (2019) https://www.quora.com/Why-are-black-people-so-good-with-rhythm-music.
[2] Alan P. Merriam, *The Anthropology of Music* (Chicago: Northwestern University Press, 1964), 319; republished in *Current Anthropology*, Apr., 1966, Vol. 7, No. 2 (Published by: The University of Chicago Press on behalf of Wenner-Gren Foundation for Anthropological Research) 217.
[3] David E. Vassberg, *Luso-Brazilian Review*, Summer, 1976, Vol. 13, No. 1 (University of Wisconsin Press), 37.

in Black music, rhythm is chosen as the guiding musical principle above all else.

Because of hip hop/rap music's popularity and undeniable global appeal, a number of commentators prefer to treat hip hop/rap music as if it has an *neutral* reality by and of itself. But hip hop/rap music cannot be divorced from its cultural context, nor can its emphasis on and preference for rhythm be disconnected from the rhythmic link that it shares with *all* Black music. And at the heart of this link lies the African rhythmic sensibility. In this chapter, I examine this link. More precisely, I tell the story of rhythm in Black music; in other words, I present an anthropology of rhythm in Black music and I trace its application in hip hop/rap music. In this way, this chapter is intended to acquaint readers with a fuller understanding of rhythm in Black music, and how it stands in stark contrast to rhythm in European music. Further, this chapter is intended to help readers obtain a fuller understanding of hip hop/rap music in general and drums in hip hop/rap music more specifically.

Rhythm In Black Music and the Legacy of Slavery

> There has been the intriguing suggestion that the West African languages, which have a musicosemantic structure (with pitch levels affecting word meanings) have influenced the musical abilities of the people.
> — David E. Vassberg

Polyrhythm: Linguistic and Rhythmic Combination – A Culture of Combination at the Bedrock of Black (African) American Culture

In chapter 3, I detailed the fundamental difference between the African approach to music and the European (Western) approach. Specifically, I highlighted the different approaches to rhythm, noting that in African music, rhythm is *prioritized* over harmony and melody. Within this spectrum or approach to rhythm, one important distinction between the African and European systems is the African use of complex polyrhythm. In African music, *polyrhythm*, an occurrence in which several different rhythmic patterns play simultaneously and repeat over and over, is standard.

More concisely stated, polyrhythms are the more complex rhythms that are created by the combination of simpler rhythms playing at the same time. For example, "[t]he simplest and most common example is a 3 against 2 polyrhythm, which is a superimposition of a 3 note rhythmic sequence onto a 2 note rhythmic sequence of the same duration." In this example, you can be "left with two identical, constant, and purely rhythmic sounds beating at different times, perhaps one at 120 BPM and the other

at 80, or one at 150 and the other 100."[4] Because of the Atlantic slave trade, this African rhythmic sense found its way to American shores, and it manifested itself mostly through syncopation.

Black (African) American culture is marked heavily by *combination*, multiple rhythms (literally and metaphorically) going at the same time. When enslaved Africans were brought across the Atlantic into the Americas, they carried with them their cultures, skills, religions, worldviews, and, most notably for our purposes here, their musical sense. In order to preserve important aspects of their pasts and retain pieces of their identity, as well as continue specific traditions, African slaves were forced to work *within* European systems. Language, religion, and music were three interrelated areas where this was especially the case. Arriving mostly from West Africa, where "that region alone was just as diverse as all of Europe, many African slaves could not communicate with each other." Further contributing to the horror of slavery, slave capturers purposely separated families and people from the same region, "so that ethnic and tribal communication would be even further limited amongst the slave population."[5] And since plantation owners feared that the slaves were plotting against them whenever they spoke African languages, slaves were forced to speak English exclusively.

Thus, enslaved Africans in the New World "**were challenged not only to learn the languages of their slave owners but to also create a form of speech uniquely their own."**[6]

Thus, slaves in North America not only had to learn the languages of their masters, they also had to create a new language, a form of speech uniquely their own. They were able to do so by combining words, dialects, and systems of grammar from their West African heritage with European words, dialects, and systems of grammar. As anthropologist Melville Herskovitz noted in his

[4] Adam Longman Parker (Afriqua), "Afriqua Presents Principles of Black Music: Polyrhythms" *Ableton* (March 15, 2022) https://www.ableton.com/en/blog/afriqua-presents-principles-of-black-music-polyrhythms/.

[5] Charles Burchell, "The Lasting Legacy of the Slave Trade on American Music," *Flypaper/ Soundfly*, March 25, 2019 https://flypaper.soundfly.com/discover/the-lasting-legacy-of-the-slave-trade-on-american-music/.

[6] "Language and Dialects," Encyclopedia.com https://www.encyclopedia.com/humanities/applied-and-social-sciences-magazines/language-and-dialects#:~:text=Slaves%20were%20challenged%20not%20only,be%20classified%20as%20black%20English.

book *The Myth of the Negro Past* (1941), "**black dialects used European words cast into an African grammatical mold."**[7] In other words, slaves **"picked up English words from their masters and then organized those words based *on the grammar they already knew*."**[8]

For enslaved Africans in North America from the seventeenth through the eighteenth centuries, this was the polyrhythm of language — a language made of several languages moving simultaneously, a language composed of combination of African words and/or phrases with English words.

In order to properly assess the impact of the linguistic system that enslaved Africans created, as well as its lasting impact, there are three attributes that we must recognize. First, we must recognize that enslaved Africans "labored — **for both practical and sentimental reasons—*to retain and promote* their African language."**[9] **Second, we must recognize that African slaves created their linguistic system to express separateness for their masters. Third, we must recognize that African slaves used their linguistic system as** "communicative devices to share elements of their culture as well as vital survival information."[10]

What I hope to show with this brief discussion of the linguistic system of African slaves in North America from the seventeenth through the eighteenth centuries is that polyrhythm is baked into the Black American experience. This is an important factor to consider while examining the broader aspects and nuances of Black American music.

[7] Kumari Devarajan, "Ready For A Linguistic Controversy? Say 'Mmhmm,'" Code Switch/ NPR, August 17, 2018 https://www.npr.org/sections/codeswitch/2018/08/17/606002607/ready-for-a-linguistic-controversy-say-mhmm Quoting Melville Herskovitz.
[8] Kumari Devarajan, "Ready For A Linguistic Controversy? Say 'Mmhmm,'" Code Switch/ NPR, August 17, 2018 https://www.npr.org/sections/codeswitch/2018/08/17/606002607/ready-for-a-linguistic-controversy-say-mhmm (emphasis mine).
[9] "Language and Dialects," Encyclopedia.com https://www.encyclopedia.com/humanities/applied-and-social-sciences-magazines/language-and-dialects#:~:text=Slaves%20were%20challenged%20not%20only,be%20classified%20as%20black%20English.
[10] Burchell.

Religion and Rhythm

Religion was another area that enslaved Africans in North America had to work from within a European system. But in contrast to Brazil[11], in the English colonies that would become the United States, African religious practices where strictly forbidden, and Christianity was forced upon enslaved Africans. Thus, there wasn't a merging of rituals between Protestant colonialists and their slaves in the way that there was the merging of religious rituals of Catholic colonialsts and enslaved Africans in Brazil. Music, however, was a different story.

With regards to music, enslaved Africans in the United States labored even harder to retain and promote their musical sense (*that effort would eventually become the foundation of American popular music*). And nowhere is this musical sense more apparent than in the area of rhythm and, by proxy, syncopation. In this light then, we should understand that rhythm is and has always been a form of resistance for Black people. It was not just about the preservation of the African rhythmic sense, it was also about guarding against the complete denial of Black people's — enslaved Africans' autonomy and dignity.

[11] Religion was another area that African slaves in North America had to work from within a system. For example, in Brazil — the last country to abolish the slave trade in 1888, and a country where today 56% of the population identifies as Black (the largest population of African descent outside of Africa) — many rituals of the "Catholic former colonialsts and their former slaves merged." This was possible because African slaves in Brazil were able to disguise their religion (just as African slaves disguised their language) and thus preserve key elements of it. That many of Brazil's Catholic saints are said to have African heritage speaks to this fact. See: Ciara Nugent and Thaís Regina/São Paulo, Brazil "How Black Brazilians Are Looking to a Slavery-Era Form of Resistance to Fight Racial Injustice Today," *Time* (December 16, 2020) https://time.com/5915902/brazil-racism-quilombos/.

There is No Single "African Music"

One important note to remember when observing the history of Black music is that even though we often speak of "African music", there is no single "African" music. To this point, David E. Vassberg has observed that:

> Black Africa is by no means a homogeneous musical unit. Just as it is impossible to speak of a single "African" language or culture, it is also impossible to speak of "an" African music. **There are many musical areas in Sub-Saharan Africa, each with its own characteristics, subdivisions, and variations.** Generally, it can be said that the northern part of black Africa is characterized by Islamic influences, and the ***West Coast is differentiated from the East Coast by its stronger emphasis on percussion instruments and the use of "hot" rhythm.*** The musical cultures of black Africa vary in sophistication, but none can be said to be *primitive*." [emphasis mine][12]

The African continent hosts more than 3,000 distinct cultural groups and practices and a myriad of different languages and dialects. Nonetheless, there are similarities and fundamental characteristics that underscore and link together all music of the African diaspora. And through these links, we can make certain general judgments concerning the musical heritage that enlsaved Africans from West Africa brought to North America.[13] "The rhythmic intricacy, the percussion, the vocal calls and hollers, and the communal style of performance that come to mind when considering the music of Africa do, in fact, define nearly every style of music endemic to the continent..."[14] Thus, for our purposes in this chapter, "African music" should be understood to mean the *most common* traits found in African music across the continent. In this regard, the two traits most prominent in West African (and East African) music are rhythm and the symbiotic relationship between music and dance.

[12] David E. Vassberg, "African Influences on the Music of Brazil," *Luso-Brazilian Review*, Summer, 1976, Vol. 13, No. 1 (University of Wisconsin Press), 37.]
[13] *Ibid*, 35-54.
[14] Adam Longman Parker (Afriqua), "Afriqua Presents Principles of Black Music," Ableton (February 1, 2022) https://www.ableton.com/en/blog/afriqua-presents-principles-of-black-music/.

Concerning rhythm specifically, Charles Burchell has aptly noted:

> **The African thread throughout American music can be most notably traced through *rhythm*.** As the blues migrated throughout the country and began affecting the way Americans rethought song form, singing styles, and storytelling, **the rhythms began to shift and permeate American music in other ways, slowly giving way to new styles such as rhythm and blues, jazz, rock 'n' roll, funk, and gospel. *Syncopation*, riffing, blue notes, and call and response are all elements of African music that have permeated the American mainstream, *thanks to the ingenuity and "kitchen-sink" musical mentality of African Americans during and after slavery."*** [emphasis mine][15]

Cultural Differences Between the Arrival of African and European Music Influence in America

In order to properly assess the ways in which African rhythm laid the foundation of the Black American music tradition — and, by proxy, fostered the music genres that would come to collectively represent Western popular music — it is first necessary to distinguish two key things that set apart the arrival and development of African musical influence in America from the arrival and development of European musical influence in America. First, the African cultural approach to music and the European cultural approach to music. Second, the Pan-African synthesis of music. These differences have greatly impacted the general development of the Black music tradition in Western culture, and no serious overview of rhythm can be made without examining these differences.

First, in traditional African society, music was not separated from everyday life or divided into spheres reserved for *professional* or *amateur* musicians — music permeated all aspects of traditional African social life. "**Whether in sacred religious ritual or day-to-day routines, music and the rhythms it evoked were constant,**

[15] Charles Burchell, "The Lasting Legacy of the Slave Trade on American Music," *Flypaper/Soundfly*, March 25, 2019 https://flypaper.soundfly.com/discover/the-lasting-legacy-of-the-slave-trade-on-american-music/.

energizing, engrossing partners."[16] Unlike in Western society, the performance of music in traditional African society functioned not so much as a feature of culture, but more as a quotidian component of it. Historian David E. Vassberg has noted that in traditional African society, "music was used in far more settings than Western society," and that "[m]usic and the other arts were not compartmentalized and divorced from the aspects of everyday life as they are in Western society. *The performance of music was not relegated to a few professionals who performed for the masses; but rather was a function of relatively large numbers of the members of society*."[17]

The result of music in Africa *not* being compartmentalized and divorced from the aspects of everyday life as it is in European society means that a larger segment of the population regularly performs music and engages in musical activity. One subsequent effect of this is that a larger number of talented musicians and gifted music artists are discovered and boosted in African society. In addressing the widespread impression that Black Africans, on average more than whites, have a generalized, "gifted" capacity for music, Vassberg has cautioned that this view is distorted precisely because it does not account for *why* there is a high ratio of participation in musical activity in Africa:

> "One must attempt to come to a dispassionate judgment about the alleged musical nature of the Negro. **Many authors have believed black Africans to possess a total and generalized capacity for music.** But this view is distorted; it reflects a lack of understanding of the place of music in primitive **African society.** While it is true that **there was a high ratio of participation in musical activity, some individuals were more talented than others, and acted as leaders, often in a strict hierarchical system based on musical abilities.** Nevertheless, **in a society in which music was regularly performed by a large segment of the population, the discovery and development of natural talents would be facilitated.** ***As a result, a larger number of naturally gifted individuals would become actively involved in music than in the compartmentalized society of modern Euro-America.*** This would cause the impression that the Negro was more talented than the white. In conclusion, perhaps it could be said that blacks

[16] Howard Dodson, "America's Cultural Roots Traced to Enslaved African Ancestors," *National Geographic* (February 5, 2003) https://www.nationalgeographic.com/culture/article/jubilee-america-culture-enslaved-africans (emphasis mine).
[17] David E. Vassberg, "African Influences on the Music of Brazil," Luso-Brazilian Review, Summer, 1976, Vol. 13, No. 1 (University of Wisconsin Press), 35 (emphasis mine).

> (whether in Africa or in America) *are* more musical than whites, **but the basis for this difference is *cultural* rather than genetic.**[18]

The high ratio of participation in musical activity in Africa is something that carried over with African slaves to North America and South America. And it remains a characteristic of Black music to this day.

The second thing that sets apart the arrival and development of African musical influence in America from the arrival and development of European musical influence in America is the Pan-African synthesis of music. European music influence was brought *willingly* to America by the settlers who colonized what would become the United States. In stark contrast, the Pan-African synthesis of music started on slave ships when enslaved Africans were brought to the New World against their will.

European settlers arrived in America on ships made for travelers, not for enslaved human beings. This facilitated the transfer of European culture and made it easier for Europeans to keep their culture intact. And for all intents and purposes, as free people, European settlers held their destiny in their own hands. By stark contrast, enslaved Africans, who were comprised of many different, distinct African cultures, were stolen — over 400 years — from their homeland and taken to America on slave ships; and their culture was deliberately fractured by their enslavers. Despite this cruel and inhumane practice, it was on slave ships that enslaved Africans first began the synthesis of music that laid the foundation of the Black American music tradition. Howard Dodson, historian and former director of the Schomburg Research Center for Black Culture, has written about how enslaved Africans first transformed rhythms that would eventually form the foundation of the Black American music tradition:

> **Singing, drumming, and dancing resurfaced in new, *transformed rhythms* and musics in slave communities and societies. *The Pan-African synthesis started on the slave ships evolved into even greater syntheses in the Americas.*…Africans from a number of different ethnicities and nationalities created something *new* out of the cultural and material**

[18] Vassberg, 36 (emphasis mine).

> **resources found in their new environment. They built their religious and secular rituals, festivals, and social gatherings on the foundations of song, dances, and *rhythms they invented* to cope with and express their New World realities."** [emphasis mine][19]

Thus, arriving in the New World in chains, with nothing more than their bodies, those enslaved Africans (who survived the brutal crossing of the Atlantic Ocean) brought with them their African cultural sense, which was *bound within* their African musical sense. And this tells us several things. First, as practically no part of traditional African daily life existed without music, we should understand then that it was through music, first and foremost, that enslaved Africans were able to also import their cultural *identity* to the New World. Second, here, we must also recognize then that African (Black) cultural identity has, in large part, always been driven by, lived in, and expressed through *rhythm*. (Seen in this light, to say that rhythm is in important to Black people is an understatement.) Lastly, it must be noted that it was this African music foundation that allowed enslaved Africans to filter their African cultural identity through the culture (music, language, religion, and cuisine) of their European enslavers.

Looking at the differences between African and European music influence in America through this prism, before all else, is essential to understanding the priority of rhythm in Black music, as well as how and why Black music became the bedrock of Western popular music.

[19] Dodson, emphasis mine.

Four Distinct Differences Between African and European Music

Telling the story of rhythm in Black music, and analyzing how rhythm is used in Black music as opposed to traditional European music, also requires an examination of four other areas that have distinguished Black music from the start: Dissonance, blue notes, call and response, and melisma.

African Music Prioritizes Dissonance Over Consonance

As I noted in Chapter 3, harmony reigns supreme in Western classical music. For centuries, European music was defined by its focus on harmony, and the advent of Western classical music — in which striving for harmonic homogeneity remains the goal — reinforced this priority. In fact, the standardization of various music practices and instrument making underscores the entire enterprise of European music's preoccupation with harmony. In this paradigm, the pleasantness and "sweetness" of consonance is favored over the tension, disruption, and "harshness" of dissonance. African music is the opposite.

The African sense of dissonance is another crucial element of the African musical identity that enslaved Africans brought with them to the New World. In African music, dissonance is especially prioritized. The grand composite in African music is not made by striving for smooth-flowing perfection. Inasmuch as "precision" is achieved in African music, it is done so with a more rhythmic heterogeneous focus as opposed to the more harmonic homogenous approach of European music. In African music, contrasting rhythms — *dissonance in permanence* — is prioritized, it is the fundamental means by which the composite (collective) sound is achieved. *It is how the groove is formed.*

Blue Notes

Finally, the African sense of dissonance also helps explain the distinctive "blue notes" that personify Black music. In Western tonal music, it is commonly understood that dissonance refers to notes (sounds) that are "unstable" and consonance refers to notes (sounds) that are "stable". So it has often been said that what makes music "interesting", or what the story of music is all about, is the relationship between the stable and unstable, the resolved and the unresolved, sounds and phrases. This, of course, is premised on the logical system of Western tonal music, which is preoccupied with stability. Therefore, in such a system, emphasis is placed on notes being played how they're *supposed* to be played, stable intervals (note relationships), nothing more, nothing less. In other words, nothing outside the plan or *in between*. But in Black music, the *in between* is prioritized and "instability" is often accentuated; in fact, this is a big part of what makes music interesting in the Black music tradition. And "blue notes" is one distinctive form that this accentuated instability often takes.

Simply stated, blue notes are the notes "in between the notes" on a scale. Western tonal music is based on a heptatonic scale, a musical scale that has seven pitches, or tones, per octave, and it is governed by the limits of Western music's 12-note, well-tempered system. However, African music, which is *not* confined to 12 notes, is typically based on pentatonic and hexatonic scales, five- and six-note scales. So for definition purposes, blue notes are often described in relation to the heptatonic scale and defined in relation to the "standard" scale.

The use of "standard" here calls into question what constitutes the "standard". As I noted in my book *The Beat Tips Manual* (2015), as well as in chapter 3 of this study, all music uses some sort of music theory as a means for expressing how and what musical events have occurred. While European music theory is perhaps the most well-known music theory in the world, it certainly isn't the only music theory in the world. Further to this point, in Africa, the Middle East and Asia, there are many different tonal systems that aren't heard

in Western music. Still, because of Western colonization and the dominance of Western media and culture, the Western conception of music composition and theory has become the predominant framework of musical understanding. And as such, when we say "standard", this is what we are referring to. That said, a blue note is a note played (or sung) at a slightly different pitch from standard. Naturally, each microtonal variation can change with the style of music and musical context, but the basic thing to understand is that the variation is played typically between a quartertone and a semitone. Further, since the spectrum of variation is so broad, blue notes are nearly imperceptible, at least to traditional music transcribers, and are not easily notated.

Unlike Indian music, where there is a way for classifying the kind of microtones that make the blue notes found in the blues, jazz, soul, and funk, there is no such definitive way for classifying blue notes in the Western tonal music system. And remember, the Western tonal system prioritizes how a thing *should* be played (or sung), so precision is the key in this paradigm. But blue notes are less about precision and more about *feel*. *Feel*, as it is commonly understood in Black music, is interpreted and expressed by the individual performer's *feel* for the music he is playing. Further to this point, *feel* is determined by a performer's connection to the music he is playing; and *feel* is governed by the ability (or lack thereof) to deliver a particular interpretation of the music he is playing. *Feel* is not something governed by, or encapsulated in, the written score. Nor is *feel* something attained through a strict deference to stability.

Sticking with the paradigm of *feel* and how blue notes help create and shape it, we can also look at some of the different ways that blue notes are played.[20] When and how blue notes occur is linked to an individual performer's unique musicianship and feel in the moment, but generally blue notes can include any number of

[20] Excellent examples of blue notes include: Hubert Laws – "Family" (Studio version) (1980); this is fantastic example of blue notes being played on the bass guitar by bassist Nathan East. Other songs to check out that illustrate blue notes in soul and funk include: Leon Ware"s "French Waltz" (1976), The Notations - "Gonna Get Ready," (opening guitar riff), Gladys Knight & The Pips - "The Makings of You" (1974).

pitch inflections, shakes, glides up or down, bends, slides, plucks, and slurs. Before enslaved Africans arrived in the New World, this was not a feature of Western music. Remember, on a guitar, the modern descendent of the banjo — which was invented by enslaved Africans in the seventeenth century — you can *bend* and *pluck* the strings. But on a piano or staff paper, you're confined to the limits of the 12-note, well-tempered system. Of course, these confines were destroyed once Black people started playing the piano. With the advent of the blues and jazz, Black music artists carried over the African tradition of blue notes that inform Western popular music performance to this day.

In any case, these microtonal variations, all rhythmic in nature, do not fit neatly within the European music tradition's sense of "stability". So while such microtonal alterations might sound "out of tune", messy, or disruptive to a Western classical musician, to a blues, jazz, soul, funk, or hip hop/rap musician these microtonal alterations sound good. Moreover, these microtonal alterations also help give African music its *feel* — and the *feel*, for all intents and purposes, *is* stability in African music. And how you arrive at the *feel* in African music is much more open and free, i.e. far less restrictive than in the European music tradition.

Unlike the music system of the European music tradition, where two notes in a stable relationship are said to be "pleasing to the ear", in African music two or more notes in an *un*stable relationship can also be pleasing to the ear. In other words, combining the right and "wrong" notes is a fundamental characteristic of Black music. Making "wrong" sound and feel *right* is an important aspect of Black music. Furthermore, tension and force are desirable characteristics in African music. African music is not docile, even its more subtle components poke out rather than remain entirely tempered. African music is forceful, aggressive even. And it is not ironic that we can say that hip hop/rap music is forceful and aggressive — after all, that's part of the point.

Further to this, while Western classical music is designed to make you *sit* (and think), African music, by stark contrast, is designed to make you *move*. This is certainly not to say that African

music doesn't make you think (I write to African music all the time, and it always makes me think). Rather, African music wants you to move, to feel, to be a part of the collective community all moving together in one rhythm. And by this design, the forcefulness, the aggressive polyrhythmic nature of African music, makes you move. Earth, Wind & Fire, one of the greatest soul/funk bands of all time, and a band who's music had a very heavy African flavor to it, has a wonderful song that exemplifies what I mean here: The ironically titled "Bad Tune" (1971).

Call and Response: A Definitive Black Music Trope with a Broad Spectrum

The African sense of call and response is another crucial element of the African musical identity that enslaved Africans brought with them to the New World. Call and response, the succession of two distinct musical phrases recurring in a conversational manner, is a standard technique in music. In call and response, one phrase of music or line acts as the "call" and a different phrase of music serves as the "response". What makes call and response unique to Black music is the form and prominence that it takes. As musician and writer Afriqua has noted, the ubiquity of call and response in Black music "reflects an essential aspect of the tradition; Black Music is a collective experience, not a fixed object."[21]

During slavery, call and response was first used in work songs before it found its way to spirituals, gospel, and the blues — the bedrock of Western popular music. What's further important to note is that call and response in these forms retained their rhythmic sense and underscored what would become commonly known as "groove".

What's also essential to know about call and response in Black music is that it is used in a number of different ways. In fact, call and response spans a spectrum that finds its earliest roots in the

[21] Adam Longman Parker (pka Afriqua), "Afriqua Presents Principles of Black Music: Call & Response," Ableton (March 15, 2022) https://www.ableton.com/en/blog/afriqua-presents-principles-of-black-music-call-response/ (emphasis mine).

participatory music practices of traditional (West) African music. In this setting, especially music rituals, call and response is when the leader *calls out* a line and the group (the collective) *responds* with an answer; sometimes this can even be a repeat of the same line as the caller. Readers familiar with gospel music and the Black American church will recognize this technique — The song leader calls out a line and the choir responds; or the pastor calls out a line and the congregation responds. Call and response in Black music has also been used as a way for performers to communicate and connect directly to audiences. In hip hop/rap music, we see this in the proverbial live-show call: "*Let me hear you say, 'Ho!'*"

There are many other examples of call and response as a vocal technique in Black music. One song noteworthy for how the vocalist sings a line and the musicians respond is James Brown's "I Got You (I Feel Good)" (1962). Another great example of call and response as a vocal technique and a force within a groove is James Brown's "Say It Loud (I'm Black and I'm Proud)" (1968). On "Say It Loud (I'm Black and I'm Proud)," James Brown sings (calls out) *"Say It Loud!"* and a children's chorus responds *"I'm Black and I'm Proud!"*

In hip hop/rap music, there are also plenty examples of call and response as a vocal technique. An easy, straightforward example of this is A Tribe Called Quest's "Can I Kick It" (1990). On this song, the leader calls out *"Can I Kick It"* and the group responds *"Yes, you can."* Another, more intricate (complex) and rhythmic example of call and response is Brand Nubian's "One For All" (1990). What makes "One For All" unique is that the members of Brand Nubian allow the vocal sample "*one for all*" to serve as the *call* and the group *responds* with the shout "*Brand Nubian!*"

Equally important to note is that call and response is not limited to a vocal technique; there is also an instrumental version. Which is to say that there can also be a call and response between musicians playing their instruments. Taken further, in beatmaking we might even say then that call and response can occur between sounds. For example, in the click-and-clock rhythmic feel (seasick time feel), we can hear how the dragging kick *calls* and the dragging snare *responds*.

Melismatic Music

Another important feature of Black music that made its way across the Atlantic with enslaved Africans was melismatic singing. In typical syllabic singing, each syllable of text is sung — i.e. matched — to a single note. However, in melismatic singing, a kind of vocal embellishment, a single syllable of text is sung while moving between several notes in succession. In Western popular music, this is also commonly known as a vocal run.

Melismatic singing is closely associated with old religious hymns and similar traditional vocal stylings like traditional Nubian music of North Africa. And while Gospel music personifies the distinct form of melismatic singing found in the Black music tradition (most Western popular music has been inspired by the gospel aspect of melismatic singing), we can hear melismatic singing practically all the time in every form of Black music. In fact, combined with the African sense for rhythm, particularly the use of syncopation, melisma is the core vocal technique of the blues, rhythm and blues, soul, and funk. This important to note as the blues, rhythm and blues, soul, and funk all come from the use of "blue notes" that were sung and transferred to the new world by enslaved Africans.

Some of the best examples of melismatic singing in Black American music include, but are not limited to: Aretha Franklin's "April Fools" (1972) and "When I Think About You" (1977) (virtually every song of Aretha Franklin's is an excellent example of melismatic singing); Donny Hathaway's "Someday We'll All Be Free" (1973) and "Magnificent Sanctuary Band" (1971); Stevie Wonder's "You and I (We Can Conquer the World)" (1972) and "As" (1976); and Chaka Khan's "I'm Every Woman" (1978) and "Papillon (aka Hot Butterfly)" (1980); Curtis Mayfield's "The Makings of You" (1970) and "Give Me Your Love" (1971).

The priority of dissonance over consonance, blue notes, call and response, and melisma — Individually and collectively, these features of African music do not simply speak to key differences between African and European music, they also reveal the dynamic relationship with rhythm in African music. A relationship so distinct and powerful that it prevailed through 400 years of slavery and fostered the bedrock of Western popular music.

***

The Basic Similarity Between African and European Music: An Underlying Musical Homogeneity

The differences between the African and European music systems have been emphasized by most observers who study this field, and rightfully so. But far less attention has been given to the actual similarities between the African and European music systems. The main reason is that some European thought-leaders (between the seventeenth and nineteenth centuries) believed that African music was "primitive" and not sophisticated in any way, and those writers who subscribed to this view of African music dismissed it as "noise".[22] (Sound familiar?) Still, why was it that enslaved Africans in the New World were able to work *within* the European musical system? The answer is that while there were (are) certainly major differences in some aspects between the West African and European musical systems, "particularly in the rhythmic element," in other aspects there was (is) some similarity. And this similarity made it possible for many aspects of African music to be preserved *by using* components of the European musical system:

> **[T]here was a remarkable similarity between the two musical cultures. In the use of harmony, the reliance on the diatonic scale, fundamental metric bases, and certain basic forms, Europe and Africa comprised a**

[22] David E. Vassberg has noted that [t]he Dutch- man William Bosman, who visited the Gold Coast of Guinea in the late 1600's, dismissed the music as a 'dismal and horrid Noise,' and 'Asses Musick.' His opinion was sustained by the early nine- teenth-century English explorers Richard and John Lander." Vassberg, 36.

relatively homogeneous area.

This underlying musical homogeneity permitted many aspects of African musical style and values to survive in America because they did not deviate too far from the accepted norms of white society. The similarity between European folk music and African tribal music was particularly striking, **the main difference being that the former was more complex harmonically, whereas the latter was *more complex rhythmically.***[23]

The Product of Blending: The Transfiguration of African and European Music Styles

Given the underlying musical homogeneity between basic African and European music forms, we can see how enslaved Africans borrowed European music forms and used them to create new works and musical styles; here, we can also see the roots of versioning in the Black music tradition. One example of this blending (an early form of *sampling*) is that African slaves "often used European folk tunes to create new songs-a hybrid or syncretized music."[24] Another key example of the blending of African and European music styles — an example paramount to the foundation of Black music — is personified in spirituals.

Conceived from Christian hymns, spirituals, which would later become known as Negro spirituals, were European in nature but infused with African rhythms and structure. As mentioned earlier, enslaved Africans, who came from tribes throughout West Africa, were not permitted to speak in their own languages. And although their enslavers taught them English, they were not allowed to read or write. Because of this, singing took on a greater significance for enslaved Africans in America.

Because enslavers insisted that enslaved Africans worshipped "God" and embraced Christianity, Sunday was considered a day of rest and most enslaved Africans in the South were given the day "off". This meant that enslaved Africans were allowed to congregate, which they did ostensibly to discuss and study scripture and practice worship. But enslaved Africans really used this time

[23] Vassberg, 38 (emphasis mine)
[24] Ibid.

to commune, which included playing music and singing songs. And while they were forbidden to chant or perform their tribal rituals openly, including the playing of drums in most but not all areas in the South, enslaved Africans retained a shared since of rhythm and melismatic singing nonetheless. Thus, using the hymns of their enslavers, was another way that enslaved Africans were able to keep their rhythmic sense alive. Singing without hymn books, they repurposed the words from the hymns that they'd heard from their enslavers, and they composed *new* songs or hymns they called *spirituals*, which emerged during the First Great Awakening (1730s) and grew in depth and sophistication during the Second Great Awakening (1790s) and the Third Great Awakening (1850s – 1900s).

These spirituals, which were culled from stories from the Bible and composed by slaves in the fields or elsewhere outdoors where they were allowed to worship or sing work songs, were originally sung *without* music; nonetheless, they still exemplified the African rhythmic sense and the African melismatic singing tradition. Another important distinction about spirituals is that they often held coded meanings that only enlsaved Africans understood. Thus, spirituals were not just a means for enslaved Africans to worship (*and some cases a way to mask their real religious worship*), they were also used as a critical mode of communication that only enslaved Africans understood — This is the seed of Black vernacular and coded slang. Most notably, the codes in these songs were about freedom. Songs like "Jordan," "Sweet Canaan," and "The Promised Land" referred to the northern side of the Ohio River; and other songs like "The Gospel Train," "Wade in the Water," "Swing Low, Sweet Chariot," and "Deep River" were expressly coded songs about freedom and escape. These songs, which made coded reference to "the Underground Railroad," were used to help slaves escape from slavery in the South.

Consider the lyrics from the spiritual "The Gospel Train":

The Gospel train's comin'
I hear it just at hand
I hear the car wheel rumblin'

And rollin' thro' the land

Get on board little children
Get on board little children
Get on board little children
There's room for many more

I hear the train a-comin'
She's comin' round the curve
She's loosened all her steam and brakes
And strainin' ev'ry nerve

The fare is cheap and all can go
The rich and poor are there
No second class aboard this train
No difference in the fare
[emphasis mine][25]

Ostensibly, this is a song about Christians, Black and white, rich and poor, being called to ride the "train" to heaven. But this spiritual was used to alert enslaved Africans when it was safest to escape and to help them make their way to the "Underground Railroad", an underground network of secret routes and safe houses that stretched from the South to free states in the North, Indian territories, Canada, Mexico, and the Caribbean. The Underground Railroad, assembled and supported by slavery abolitionists and others against slavery, helped enslaved Africans escape from the South to the freedom. The opening line of the song, "**The Gospel train's comin',"** called enslaved Africans to the network. As the Underground Railroad not only moved enslaved Africans by rail but by foot, wagon, boat, and horseback, the word "train" was understood by all who understood the code.

[25] Negro Spirituals https://www.negrospirituals.com/songs/the_gospel_train.htm.

Then consider the lyrics from the spiritual "Wade in the Water":

Wade in the water we dey
Wade in the water children
Wade in the water
God said He's gonna trouble the water

Verse 1
We are the sons and the daughters
We gotta stand up and make it loud
Just like our God told the Pharaoh
Let my people go (go)
We are a new generation
From the ones who have gone before
He's calling us out of bondage
Let my people go (go)
Chorus
Wade in the watr we dey
Wade in the water children
Wade in the water
God said he's gonna trouble the water

Verse 2
We are the sons and the daughters
We gotta stand up and make it loud
Just like our God told the Pharaoh
Let my people go (go) We are a new generation
From the ones who have gone before
He's calling us out of bondage
Let my people go (go)
We no go shy no go shake
E be our Papa God wey he make the heavens
If you no say you no want trouble
Let my people go (go)
The blood sweat and the tears
That we've gathered through the years
If you no say you no want trouble
Let my people go (go)

Chorus
Wade in the water we dey
Wade in the water children
Wade in the water
God said he's gonna trouble the water
[emphasis mine][26]

[26] https://notjustok.com/mp3-songs/lyrics/wade-in-the-water-lyrics-by-the-spirituals/ (emphasis mine).

While the lyrics of "Wade in the Water" reference the Biblical story of the Israelites crossing the river Jordan and therefore referenced freedom, the code in the lyrics reminded escapees to "walk in the rivers" so that slave tracking dogs and slave-catchers could not track their scent or follow their footsteps.

That spirituals were one of just a few ways that made it possible for enslaved Africans to congregate freely (and secretly). The fact that spirituals served as a critical form of coded communication for slaves, both in terms of ideas about freedom and in terms in the role that they played in alerting enslavved Africans to The Underground Railroad, is deeply significant. Additionally, to better understand the story of rhythm in Black music, as well as the full significance of spirituals, we must also remember that spirituals were created by enslaved Africans using the African rhythmic sense, *filtered through* European songs and structures. The result of this blending, syncretization, and recontextualization was a new a music form that laid the foundation for the Black music tradition as we now know it. And at the heart of this new music form was rhythm.

***

Acculturation and Rhythm as Continuity and Stability

As evidenced by field songs, call and response, and spirituals, music was the premier means by which African slaves coped with the harsh realities of slavery. But music also served as a conduit for the type acculturation that allowed enslaved Africans to create a unified culture, one that preserved a link to their African traditions, through an assimilation to European culture and a syncretization with the European music system. As Vassberg has observed, "[m]usic functioned as a socio-psychological safety valve. For the slave, it provided an emotional release from an essentially hostile surrounding culture. But ***music also acted as a powerful cohesive element, linking the slaves to their old African traditions,*** and contributing to the continuity and stability of certain African values."[27] The most prominent area that we find this continuity and stability of certain African values is rhythm.

[27] Vassberg, 39 (emphasis mine).

Congo Square: The Roots of Druming in Black American Music

> "The basis of Negro music, and the principal medium of black musical expression, is the drum. The variety of drums is almost unlimited in size and materials."
> —David E. Vassberg

As a number of commentators have observed, many enslaved Africans were not allowed to play the drums. This was because slave owners feared that enslaved Africans would use drums to mobilize and initiate insurrections. But most commentators have overlooked the fact that even when drums were outlawed, enslaved Africans preserved their rhythmic sensibility and drumming traditions by substituting hand clapping ("pattin' juba") and feet clapping in "polyrhythmic cadences" that reproduced "the complex rhythms of African drumming."[28] In Africa, people had long performed music with "a rich variety of percussive instruments;"[29]drums were not the only means for percussion, there was also rattles, bells, and gongs. So this was one way that enslaved Africans in America continued their musical heritage.

Further, while drums were outlawed in many slave communities in the United States (Brazil was a different matter), drums were *not* in fact prohibited everywhere or all the time. And in terms of the African rhythmic sensibility and drum tradition being kept alive, there was no more important place than Congo Square. Situated in New Orleans, Congo Square is the most important place in terms of the history of drumming in Black American music (later in this chapter, I detail the impact of various drummers from New Orleans). Moreover, as musician and educator Charles Burchell has noted, Congo Square in New Orleans was one of the most

[28] Dodson.
[29] Vassberg, 40.

important sites in regards to the evolution of American music in general. In Congo Square, enslaved Africans were *allowed* to play their drums every Sunday, both for worship services and their own gatherings. So in Congo Square, drums remained a central part the life of enslaved Africans. Moreover, as Burchell has further observed, **"[g]atherings in Congo Square provided the perfect environment for drummers of various backgrounds to share ideas and eventually incorporate European instruments;"** and that these gatherings "s**parked the rhythmic catalysts for what would eventually become dance-based musical forms such as ragtime, the boogaloo, *the backbeat*, and *the shuffle*."**[30]

Thus, it should come as no surprise that the fundamental developments in drumming in the blues, jazz, rhythm & blues, soul, and especially funk *all* originate from New Orleans. And we look at the primary Black recording artists who moved the needle in this regard, from Bobby "Blue" Bland to James Brown to The Meters, the connection to New Orleans drummers is confirmed.

***

The Dance Connection

"For blacks there is a symbiotic relationship between music and dance"

Having discussed the roots of rhythm in Black music through the prism of its *arrival* in the New World, I now turn to a discussion about the link between music and dance in Black music culture, and how rhythm is fundamental to that relationship. It's impossible to separate dance from the heart of West African music; the relationship between dance and music, a common thread that runs through all West African music, is so intimate that we cannot properly assess the history of Black music without considering the connection between music and dance in the Black music tradition.

[30] Charles Burchell, "The Lasting Legacy of the Slave Trade on American Music," Flypaper/Soundfly, March 25, 2019 https://flypaper.soundfly.com/discover/the-lasting-legacy-of-the-slave-trade-on-american-music/ (emphasis mine).

Vassberg has even said that "it would be would be superficial to speak of one without taking the other into consideration."[31] Yet many commentators have done just that.

One side effect of the popularity and "universality" of hip hop/rap music, and the subsequent dominance in the media and academia that white commentators still maintain in hip hop/rap music, is that lyrical analysis (especially through a political prism) is given preference, while the music and *dance* connection, the symbiotic relationship between music and dance in Black music culture, is usually given little more than a passing analysis — if even mentioned at all. This is nothing new. In their discussion of the relationship between music and dance in their review of the book *The Music of Africa* by J. H. Kwabena Nketia — the Ghanaian ethnomusicologist and composer who was considered Africa's premier musicologist, during his lifetime — John Blacking, A. M. Jones, and Hewitt Pantaleoni have noted that dance and dance drama, music related arts in Africa, are "important modes of African expression *usually given little if any attention by musicologists*."[32] (In the next chapter, I show how the absence of an examination of the symbiotic relationship between music and dance skewed the analysis of J Dilla's use of the click-and-clock rhythmic feel, and how and why some have used the same rhythmic feel after him.)

To obtain the fullest possible understanding of the relationship between rhythm and hip hop/rap music, we must properly assess the prioritized musical practices of hip hop/rap music, specifically how rhythm is usually expressed in hip hop/rap music. Which means that we must also reconcile the reality that despite the fact that hip hop/rap music is an art music, or despite the development of any present-day experientialist hip hop/rap off-shoot, hip hop/rap music is primarily *dance* music.

Thus, reconciliation in this regard means that we must further acknowledge that in Black (African) music, unlike European music, dance is inextricably linked to music — so much so that it even

[31] Vassberg, *Luso-Brazilian Review*, Summer, 1976, Vol. 13, No. 1 (University of Wisconsin Press), 37.
[32] Hewitt Pantaleoni, Review of "The Music of Africa by J. H. Kwabena Nketia," *African Music*, Vol. 5, No. 4 (1975/1976, International Library of African Music), 159.

reveals much about *how* Black people commune. In traditional West Africa, music and dance *together* played (plays) a fundamental role in society. From celebratory functions to religious rituals, this role was (is) both sociological and psychological in nature. And as with the African rhythmic sensibility, enslaved Africans brought this dance connection with them to the New World.

So in this scope, we also see the connection between dance and *rhythm*. Further to this point, we then better understand why dancing *to* and *with* rhythm has always been a priority in Black music culture. In fact, dancing *to* and *with* rhythm is equally pervasive in Black music as rhythm itself; the link is undeniable. "Virtually all observers agree that the most salient feature of black African music is its rhythm, which is far more prominent than either melody or harmony. ***This rhythmic preponderance is linked to the close relationship between music and dance.***"[33] This link is also critical to understanding the basis of African rhythms. In terms of theories explaining African rhythms, most commentators have attributed the nature of African rhythms to the "*physical articulation of the beat, whether by body movement or through percussive accompaniment.*" But the articulation of the beat, as "ethnomusicologist Richard Waterman has insisted," may be "purely mental." In fact, it has been widely observed that Africans have a "metronome sense," an "overall presence of a *mental* background pulsation," "**which consists of *conceiving music around a theoretical framework of regularly spaced beats expressed either in overt motor behavior or mentally.***"[34]

The "metronome sense" that Africans are said to have was inherited by the offspring of enslaved Africans in the New World during the 400-year period of slavery. So there is no question that this trait was passed onto the Black people who created the founding genres of Western popular music. *There is no better proof of this fact than the existence of the Black music tradition itself!* By contrast, as Waterman, Vassberg, and other musicologists, ethnomusicologists, and historians have observed that "[m]ost whites have not developed

[33] Vassberg, 37 (emphasis mine).
[34] *Ibid*, (emphasis mine).

this 'metronome sense.'" Vassberg has further noted that one consequence of this is that most whites "find African rhythms incomprehensible."[35]

If Vassberg, Waterman, and others are right, i.e. that most whites have not developed the "metronome sense" that most Black people of the African diaspora have, then this partly explains why hip hop/rap music continues to be dominated by Black people. But it also suggests that those white people who have been successful in hip hop/rap music's beatmaking tradition have a serious connection to Black music culture, expressed via close relationships with Black people and/or a deep appreciation for Black music, especially soul, funk, and jazz. For example, when we look at Paul C., Rick Rubin, DJ Shadow, DJ Muggs, Scott Storch, EL-P, The Alchemist, Jake One, Statik Selektah, Marco Polo, and Nicholas Craven, just to name a few well-known white beatmakers (producers) in hip hop/rap's beatmaking tradition, we see this bear out. In the case of Marco Polo, he expressly told me that his appreciation for Black music came first from his father's appreciation for Black music. Further, the majority of artists that Marco Polo has worked with are Black.

So another consequence of the missing "metronome sense" is that, in the area of hip hop scholarship and criticism, the relationship between rhythm and dance is given little attention despite its importance to Black music culture. Most white commentators who have written about hip hop/rap music and the art of sampling have either ignored the importance and prominence of rhythm in hip hop/rap music — favoring the more *melodic* elements of hip hop/rap music instead — or given it little focus if and when they've analyzed the *music* itself. While this is born out of bias is some cases, the more fundamental reason is simply that most whites do not share the same connection to rhythm as most Blacks; and so as one would expect, they are less sympathetic to centering rhythm, let alone the symbiotic relationship between music and dance. But the absence of an examination of this relationship, what many ethnomusicologists would consider to be a balanced approach, leads us to an incomplete understanding of rhythm in general and, more

[35] Vassberg quoting Richard Waterman. Vassberg, 37 (emphasis mine).

specifically, rhythm and drums in hip hop/rap music.

Finally, we must remember that enslaved Africans were *forced* to dance to music during the Atlantic slave trade:

> **"On board slave ships during the Middle Passage, *enslaved Africans were frequently forced to dance.* Once a day, some of them were brought up from the hold and encouraged to drum, sing, and dance.** Slave captains believed that dancing enlivened the captives' spirits and reduced their sense of pain, suffering, and longing. Dancing was also seen as a form of exercise, which helped to preserve and maintain the captives' health during the tedious voyage. *Ultimately, the slave captains were not really concerned about the health and wellbeing of their captives. Rather, they took whatever measures that were necessary to protect their human cargo to ensure that they would get a good return on their investments when the slaves were sold in the Americas.*
>
> **Unbeknownst to the slave-ship captains, the daily dancing and exercise regime *likely provided one of the bases for the continuity* of African-based expressive culture in the New World.** For the rhythms and dances preserved during the Middle Passage became the roots of New World African musics and dances.
>
> **Vernacular dances such as jigs, shuffles, breakdowns, shale-downs, and backsteps, as well as the strut, the ring shout, and other religious expressions, were danced to the accompaniment of these drum-less rhythms and to the fiddle, the banjo, bows, gourds, bells, and other hand or feet instruments—all New World African inventions by enslaved Africans."** [emphasis mine][36]

Taken together in the full context, we cannot observe the relationship between music and dance in Black music culture as a small thing. This dance connection isn't an inconvenient truth that can be sidestepped simply because a commentator holds no link to this connection (or because a commentator prefers a sub-genre of hip hop/rap music that perhaps lends itself less to dancing). Any serious discussion about rhythm in Black music must include the dance connection and take into account its roots.

***

[36] Dodson.

Far too many writers covering hip hop have not wanted to grapple with the issue of race and racism and their implications for hip hop/rap music, the art of sampling, and copyright law. For those who believe in the neutrality of music, or that *"music is just music, it has nothing to do with race,"* this section on rhythm through the legacy of slavery is, like much of this book, a direct challenge that.

If we want to understand how Black people originated the foundational music forms of Western popular music, we need to grapple with slavery in the New World, the through line within this grand musical event. The legacy of chattel slavery shaped the New World and it still shapes our society today. To not examine how it has shaped Western popular music, to overlook and ignore this reality, is an exercise in ignorance. A fuller understanding of rhythm in Black music; a fuller understanding of hip hop/rap music; a fuller understanding of drums in hip hop/rap music; and a fuller understanding of the art of sampling and copyright law require this kind examination.

Thus, having discussed rhythm through the legacy of slavery, I will continue with the story of rhythm in Black music, first with an examination of specific elements and definitions of rhythm as they are commonly defined today. Understanding the basics of rhythm and time signatures helps us to see how and where Black music in general, and hip hop/rap music specifically, bends the rules, literally and figuratively.

Key Characteristics and Nuances of Rhythm and Groove

The Fundamentals of Rhythm

The Four Parts of Rhythm

In its most basic sense, rhythm is defined as sound patterns — "the recurrence of notes and rests (silences)" — in time. Structurally, rhythm is composed of four parts: beat, tempo, meter, and accent. Thus, rhythm can further be defined as patterns of different long and short sounds and silences as they "fit with beat, tempo, meter, and accent."[37] Turning to the four parts of rhythm, we understand *beat* as the pulse, which can be steady or unsteady. It is on the pulses, the beat of music, that we tap our feet and clap our hands. In order for rhythm (sound patterns) to be organized, there must be a beat.

We understand *tempo* to mean the speed of the beat, how fast or slow the beat moves, measured in beats per minute (BPM). Tempo is commonly described as either fast (up-tempo), moderate (mid-tempo), or slow.

Meter is how many beats there are per measure; these beats can be made up of two or three little (micro) beats. We understand *meter* as the arrangement of rhythm in a repetitive pattern of strong and weak beats (stresses or accents). Meter suggests a repeated pattern of beats (pulses). (*Most Western popular music has simple, repetitive patterns of beats/pulses*). Meter, which can be classified by counting the number of beats from one strong beat to the next, is also classified as either simple or compound. "In a simple meter, each beat is basically divided into halves. In compound meters, each beat

[37] https://dynamicmusicroom.com/what-makes-up-a-rhythm/.

is divided into thirds."[38] Meter can be further broken down into five primary terms: Simple Duple, Simple Triple, Compound Duple, Compound Triple, and Complex. In simple duple, the macro (or bigger beats) exists in a 2-beat pattern — Strong-weak, represented as: + _ + _ + _ . Hence, the "duple" comes from this. Those macro/big beats are made up of 2 little beats, also called micro-beats: (+ – + –). Hence, this is where the "simple" comes from. The time signatures commonly associated with simple duple include: 2/4, 4/4 (the most common time signature in Western popular music), and 2/2. In simple triple, "there is a strong-weak-weak macro beat pattern, represented as: + _ _ + _ _ .

Note: The basic note values are: Whole Note = 4 beats; Half Note = 2 beats; Quarter Note = 1 beat; Eighth Note = 1/2 beat; and Sixteenth Note = 1/4 beat. Based on this, we understand that "the rhythm of a piece of music is also determined by the length of the notes used in each measure. If the notes in a measure are short, it will produce a fast rhythm, and vice versa."[39]

The macro-beats are still made of two micro-beats: (+ – + – + -). The time signatures commonly associated with simple triple include: 3/4, 3/8, and 3/2. In compound duple, "there is a strong-weak pattern of two macrobeats, represented as: + _ + _ + _ + _. In the case of compound duple, three micro-beats make up the bigger beat: + – – + – – + – -. This is where the "compound" comes from. The time signatures commonly associated with compound duple include: 6/8 and 12/8. In compound triple, the macro-beat's strong-weak pattern exists in groups of three, represented as: (+ _ _ + _ _). Here, the macro is made up of three micro-beats (+ – – + – – + – –). The time signatures commonly associated with compound triple include: 9/8 and 12/4. Finally, complex meter refers to an open-ended meter, i.e. it doesn't necessarily conform to any of the other categories. Complex meter may use a macro-beat that isn't 2 or 3, or they may have a micro-beat that isn't 2 or 3,

[38] "ER Services: Music 101" (Lumen Learning) https://courses.lumenlearning.com/suny-musicapp-medieval-modern/chapter/meter-in-music/#:~:text=The%20meter%20of%20a%20piece%20of%20music%20is%20the%20arrangment,a%20repeated%20pattern%20of%20pulses.]

[39] "Understanding Blues Rhythms & The Blues Shuffle," Happy Bluesman https://happybluesman.com/blues-rhythms-blues-shuffle/.

but in each case it can switch up. The time signatures commonly associated with complex meter include: 5/4, 7/8, and 5/8.[40]

Meter emerges when a series of equally spaced pulses imply a sense of hierarchy. "For example, 4/4 time, which most jazz is in, is a series of 4 quarter notes (equally-distant beats) in which beat 1 is most important, beat 3 less important, and beats 2 and 4 least important of all. 'Importance' here means that important things happen on beat 1: things like chord changes, key changes, and so on. These important things might also happen on beat 3, but are less common; it's relatively unusual to see chord changes on beat 2 or 4."[41]

Additionally, regarding time signature, we understand that a time signature "simply tells you how many notes there are in each measure, and which note counts for one beat." So looking at 4/4 time (common time), the 4 at the top "tells you that there are 4 beats per measure. The 4 at the bottom tells you that the quarter note counts as 1 beat. So there are 4 quarter notes per measure."[42]

Accent refers to the extra emphasis placed on a given rhythmic note. An accent is "dynamic", that is to say, an accent can vary in volume, velocity, articulation, attack, and duration. Further to this dynamism, an accent, which also involves the strong and weak beats of meter, can be altered through style. Like this, accent is one of the ways that musicians alter rhythms and distinguish them from other rhythms.[43]

Rhythmic Pattern and Rhythmic Feel

A *rhythmic pattern* is an isolated combination of long and short sounds along with their relation to beat, tempo, meter, and accent. A *rhythmic feel* is the way in which a rhythmic pattern *feels* and *moves*. The two most basic rhythmic feels — which *all* new rhythmic feels reference or are created from — are ***straight*** and

[40] Megan Lavengood, "Open Music Theory: Swing Rhythms" (Viva) https://viva.pressbooks.pub/openmusictheory/chapter/swing-rhythms/.
[41] *Ibid*.
[42] "Understanding Blues Rhythms & The Blues Shuffle," Happy Bluesman https://happybluesman.com/blues-rhythms-blues-shuffle/.
[43] https://dynamicmusicroom.com/what-makes-up-a-rhythm/.

swing. Straight feel is when beats are *evenly* divided; think of a metronome click playing up to 4 ticks — 1 - 2 - 3 - 4 — without any deviation. In 4/4 time, we typically find that the quarter note beat is subdivided in 2s and 4s. In this paradigm, this is where we get the 8th and 16th note *feels* from. However, straight feel is not limited to 2s and 4s, there's also the triplet feel in which the quarter note is sub-divided in 3 parts. When this occurs in 4/4 time, there will be "12 eighth notes and 24 sixteenth notes, respectively."[44]

Straight time is when beats are split into equal subdivisions, a ratio of 1:1. So in 4/4 time (common) time, we count: 1, 2, 3, 4 for each of the four notes. *Swing time* is less simple. Easier to understand by hearing it, swing is a bit more complicated. Where the straight rhythmic feel or straight time is personified by the *evenness* of time, the swing rhythmic feel or swing time is not constrained by evenness, rather it's loose and open to more *interpretation*. While a shuffle rhythm or shuffle rhythmic feel is more rigidly based on triplet subdivisions of the beat (rather than dividing each beat perfectly in half, as we see with the straight rhythmic feel), a swing rhythmic feel is not based on beat divided *precisely* into three, or four, or two; rather, the timing is less specific — as the beat is divided somewhere *in between* those points. With swing rhythms, there's more room for subtle variation, and such variation is determined by the musician (or programmer).

Finally, it must also be noted that a rhythmic feel is both a rhythmic device and a basic building block of music. And just as with other basic building blocks of music, like chord progressions, for example, rhythmic feels come in variety and are commonly used by musicians to make new music. Also like chord progressions, rhythmic feels are often linked to distinct music genres. Later in this chapter, I detail several well known genre-related rhythmic feels.

[44] "Understanding Rhythmic Feels," My Piano Riffs (December 10, 2009) https://www.mypianoriffs.com/understanding-rhythmic-feels/.

Rhythmic Qualities and Rhythm and Groove-Making Techniques

In all kinds of music, every song has a different rhythmic feel, i.e. a different rhythm and *feel* to it. And all genres in Western popular music have their own *general* rhythmic feel that we recognize immediately. We know the blues when we hear it; we know jazz when we hear it; we know rhythm and blues when we hear it; we know rock 'n' roll when we hear it; we know funk, soul, and reggae when we hear it; and, of course, we know hip hop/rap music when we hear it. All of these genres are distinguished by their own general rhythmic feels, which sometimes feature sub- or alternate rhythmic feels, like in the case of reggae and hip hop/rap music. And different but coinciding rhythmic events occur all the time in Black music; it's a staple of the Black music tradition and a fundamental marker of the legacy of the African rhythmic sense.

Fundamentally, the way in which rhythms are created depends on the various rhythmic qualities and rhythm and groove-making techniques. In this section, I examine some of the prominent qualities and techniques in this regard.

Rhythmic Qualities: The *One* and *Two*, *Three* and *Four* Proper and Precision (or Lack Thereof)

All straightforward drum timing in 4/4 observes what I call *proper time*. This means that the kick lands flush (i.e. more precisely) on the one and three, and the snare lands flush on the three and four. So think: 1, 2, 3, 4… 1, 2, 3, 4… Precision. Clean and easy with the snare always landing on the two and the four. With timing correct on, you can play out a basic one-bar pattern and proper time will be observed with precision. Turn timing correct off and play out the same basic one-bar pattern and *precision* becomes beholden to human capability and your own sense of timing. Without timing correct on, most of us can maintain proper-time precision for roughly one bar. But once we repeat that one bar in

a sequence, precision inevitably begins to slip. This is why samples of two bar phrases tend to speed up or slow down. Traditional — human drummers — are not as precise as a machine; every snare strike, for example, might appear to sound precise, but in reality each strike is never *exactly the same, it's a little off — a little faster, a little slower — each time. This micro-offness that occurs in manmade-drumming is barely noticeable (at least with decent drummers); and it can never be turned off. However, beat machines and software programs makes it possible for us to choose: Proper time, with zero offness (humanly impossible) or proper time *with* offness, either natural or programmed. It's the combination of the two that sets all electronic music a part. And it's the manipulation of the second option — proper time with *programmed* offness — that allows beatmakers (producers) to bend and stretch rhythms. Taken altogether, this is what makes precision, or lack thereof, a rhythmic quality.

Within the realm of bending and stretching rhythms around the one, two, three, and four, one of the most well-known categories is the click-and-clock rhythmic feel, which is basically one type of a huffle rhythm. The click-and-clock rhythmic feel (seasick time feel), whose origins I discuss in more detail in the next chapter, was most popularized in hip hop/rap music by J Dilla. The click-and-clock rhythmic feel is essentially achieved by placing the snare (or whatever sound that fills the same musical function) slightly ahead of the proper two and the proper four. Remember *proper* time is the reference (a "standard"), so this means that the snare is arriving slightly before or slightly after the proper two and four. This process, which is programmed, can be achieved in two ways. First, through micro-timing methods, i.e. free-hand playing with a combination of timing correct values on, step-edit/shift placements on beat machines, or visual step-edit/shift placements in software programs. Second, the click-and-clock rhythmic feel can be achieved through sound manipulation techniques. Either way, stripped down to its bear essence, the click-and-clock rhythmic feel, as it's typically performed in hip hop/rap music, is fundamentally just a matter of tweaking the basic hip hop/rap *one-two* (kick / snare)

drum groove to create a push and pull (stretched) feel. So it's the arrangement of late and early pulses with a focus on the lagging and leading relationships between them.

Deviation From The Time "Norm" as a Rhythmic Quality: The Impact of Micro-Timing and The Theory of Dynamic Attending

Discussing time as a "norm", "insofar as what it represents, i.e. listener expectations and familiarity, is useful terminology, particularly because 'some kind of nominal structure is necessary as a frame of reference against which to measure and explain the peculiarities of performed rhythm.'"[45] Notably, this refers to actual sounding events in a rhythm and the reference structure of a rhythm. What we actually *hear* in a rhythm and what we *feel* in a rhythm are not always the same thing. Thus, it is the qualitative expression of this relation between the sounding events of a rhythm and the reference structure of a rhythm that gives us a feel. So when speak of time as the "norm", in let's say, straight time in 4/4, we should understand that the concept of deviating from the "norm" is a bit misleading. This is because a deviation from the norm, a theoretical metric time point, is qualitative. As such, deviation from the so-called norm represents a rhythmic quality. And micro-timing is one important area where this rhythmic quality can have a significant impact on rhythm.

Musicologists Kristoffer Carlsen and Maria A. G. Witek have noted that micro-timing, "cannot be a deviation from a norm, because the norm is itself profoundly adaptive and inclusive."[46] In hip hop/rap music's beatmaking traditionn, this reality is well-understood. The "norm" is fluid, and inasmuch as straight time or swing time is concerned, what works to make the groove sound "good" is the only thing that matters. In other words, while there may seem to be a hierarchal relationship to time in a given rhythm, the truth is, time is *adaptive*. Thus, while dynamic attending theory

[45] Danielsen (Mats Johansson), location: 922 – 928.
[46] Danielsen (Carlsen and Witek), location: 922 – 928.

"suggests that predicting the timing of upcoming sounds can assist in focusing attention toward them,"[47] manipulating that focus through micro-timing (and of course syncopation) is an effective way to create engaging rhythmic patterns.

Further to this notion of the "norm" (when it comes to time), we should understand that terms like "broken time" are in reference to the assumption that Western music makes about time as a standard construct. The beauty of hip hop/rap music, particularly its approach to rhythm and groove, acknowledges this standard, but it doesn't always give deference to it. Instead, time is manipulated in deference to whatever feels (or sounds) "good". In hip hop/rap music's beatmaking tradition, there is no one way to approach time, even when a normative rhythmic structure is being employed.

Rhythm Punctuation: Syncopation, Swing, and Shuffle

Swing

Here, it's important to build on the definition of swing that I provided earlier in this chapter. Defining what "swing" is might seem hard to pin down, but a definition or, perhaps more accurately, *definitions*, of swing goes a long way in helping us understand the concept of swing or what is *meant* by the term swing. In music, the term swing is used primarily to described two things. Firsst, the movement — either propulsive, i.e. driving/pushing, or counter-propulsive, i.e. pulling — of a rhythm. Second, the "feel" of a rhythm.

[47] https://www.researchgate.net/publication/330634168_Time_Will_Tell_A_Theory_of_Dynamic_Attending#:~:text=Elana%20Zion%2DGolumbic-,Dynamic%20attending%20theory%20suggests%20that%20predicting%20the%20timing%20of%20upcoming,distractors%2C%20remains%20an%20open%20question.

Syncopation: The Preservation of the African Polyrhythmic Sense in a European Music System

Simply stated, syncopation is the *accenting* of a normally weak beat. In other words, syncopation occurs when the hierarchy of meter is subverted. So in 4/4 time, this means accenting the less important beats of the 4/4 meter. Another way of looking at this is that syncopation is the accenting of "off beats", i.e. placing a greater degree of emphasis on the off beats in a meter. In addition to accenting weak beats, syncopation can also be created through rests and ties; for example, avoiding downbeats. In addition to accenting weak beats, syncopation can also be created through rests and ties; for example, avoiding downbeats. Also, those rhythms that fit *in between* the beats of a bar are syncopated. The use of syncopation allows for the creation of complex rhythms — as such, it's the primary means through which the African polyrhythmic sense has been preserved in Black music.

Understanding Groove

The Essence of Groove

Groove is one of the most definitive characteristics of Black music. Yet groove is practically impossible to write down. It's not something particularly conducive to the written score, so it's not meant to be interpreted or understood that way. Rather, groove is the sum feeling of multiple musical interactions — different rhythms, lines, notes, and phrases — locking into one whole. This *composite of feel* is the mosaic intention of rhythm, the result of different musicians (or different musical parts) doing their own thing, but all in response to the *same* feel, which results in hypnotic repetition. This is the key to understanding the "loop" in hip hop/rap music. And it's one of the fundamental ties that connects hip hop/rap music to its polyrhythmic African roots.

I further like to define groove is as *the rhythm section on autopilot*. Which is to say, take away the intros and the bridges, look past the melody, and focus on the bare-bones repetitive rhythm, the part in the song that turns over and over and stays in the "pocket". In Black dance music, the groove — the rhythm of a song in its highest, tightest, funkiest articulation — is what makes people move; it's what makes people dance. The groove is the cohesive *sense*, *feel*, and *sound* of a song as articulated by rhythm — which includes a combination of rhythmic qualities and the rhythmic of the song (and genre more broadly — and as performed (or programmed) by the level of precision of the musician (or the beat machine). It is this cohesion that musicians are talking about when they say the "pocket". In other words, we could say that "groove" is the combined product of all rhythmic events (or rhythmic layers) and rhythmic qualities playing simultaneously. And this sensation forms the repetitive *pocket*.

Some excellent examples of in-the-pocket grooves that have recognizable rhythmic feels include: The Philly Sound as exemplified by Jean Carn - "Free Love" (1976); James Brown – "Get Up (I Feel Like Being a) Sex Machine" (1970)— Groove, call and response, Jabo Starks on drums; Jabo Starks also on drums on "On the Good Foot" (1970); The Staple Singers – "The Challenge" (1970)— Great example of polyrhythm at work in soul music, also shows how polyrhythm works to form the groove — the main groove is 4-on-the-floor with multiple rhythms going over the top. "Beenie Man's "Who Am I" (1998)— A dancehall track with a groove created by the push and pull between duple and triple rhythms; Drake - "Wants and Needs" (feat. Lil Baby) (2021).

***

As I mentioned earlier in this chapter, rhythm is the energy source that produces the main power of Black music. And groove is the power of rhythm unlocked in its tightest, most repetitive (finest) moment. Also within the spectrum of groove is where we locate *rhythmic feel*. A rhythmic feel (aka time feel) serves in deference to the groove; it's not the other way round. The central point of Black music, or more precisely, the *aim* of rhythm in Black music is, to find and lock in the groove, i.e. to merge all of the different moving parts into one musical mosaic, a whole represented by the interplay of the many.

Groove and Synchronization

Within groove, the level of synchronization, or precision, can be a kind of tightness that is *loose* or *rigid*. Synchronization with live musicians is more "loose" tightness than that of a beat machine, because it's not possible for live musicians, no matter how tight musicians play together, to match the level of "rigid" tightness of machine. Beat machines and DAWs are precise! They do what we program them to do. So here, both a loose and rigid level of tightness can be programmed. Note: Because of the

nature of sampling, where snippets of songs are used to create new compositions and sound recordings, synchronization is *always* a combination of loose and rigid. And thus, sample-based beats are always stretching time to some degree.

Groove as a Strict Metronomicity: The One as the Guiding Point

Even with a bend, push, or pull, the groove maintains a sort of a strict metronomicity precisely because these rhythmic elements are not haphazard but programmed, consistently, to land around a *guiding point* — the One. Slight variations of the bass drum or snare patterns, severely syncopated or not, will contribute to the *overall consistency* of the groove so long as those variations are consistent, i.e. regularly occurring at the same moments within the beat.

Groove and Precision

The precision of machines is not as perfect as one might think, and a program is more experimental science than exact science. On a drum machine or other beatmaking device, you can program the exact same event strike, at the exact same place within a sequence (using step edit or a shift), and yet depending on the actual drum *sounds* that you use, there can still be a slight drag if you record the sequence in 1/16th or 1/32 TRPLT. This is because the timbre and the duration of a specific drum *sound* affects the *feel* of time. For instance, a punchy, choppier kick drum sound moves faster than a fatter, rounder, longer kick, and a layered kick moves slower than a single kick. Same goes for snares. Same goes for hats and percussion. And how you combine all of these elements can also determine the feel and *sense* of time, i.e. the degree of drag, shuffle, or push.

Despite whichever time signature you program, the drums don't move the exact same way unless you intentionally copy the drum sounds *and* the pattern. Songs that illustrate this principle include: DJ Premier: "Change" (instrumental produced by DJ Premier)

(2011), also with vocals by Bumpy Knuckles – "Inspired by Fire" (2012); Pete Rock: "One Life to Live," "Soul Survivor," "Mecca & the Soul Brother" (1991), "Half Man Half Amazin" (1998), "Respect Mine" (1998) (*hi-hat/pattern pushes, kick is punchier*).

Capturing the Groove in Hip Hop/Rap Music

Hip hop/rap beats are personified by their "looped groove" nature. This is because in the hip hop/rap music tradition, rhythm (followed by melody and harmony) is always used in the pursuit of capturing the groove, the locked-in rhythm section, the natural feel, pulse, and main rhythmic moments — i.e. the main part of the beat that the rapper rhymes over. This is because in hip hop/rap music, the development of the groove takes major precedent. And in hip hop/rap music, the groove is primarily (but not always) lead and anchored by the drums.

Beatmaker (producer) D.R. Period has related how important the drums are to his overall approach to creating the groove:

> When I started producing— see, I think like a band. I didn't even realize what I was doing, you know what I'm sayin'. I was always taught that the drummer leads the band. Without the downbeat, you have no band! So everything I did, *I built around drum patterns.* That's why my drums was always so heavy and hard, *because I was thinking like a drummer*. Like you ever notice a band playing live on stage? There's nothing soft about that. So that's how I started producing tracks. So when the bass line come in, it's got to ride with the drummer; and when the guitar comes in, it's got to ride with the drummer; and when the keyboard comes in *its following the groove*. So that's how my style of production came about.[48]

[48] Amir Said interview with D.R. Period (2008), published in *The BeatTips Manual, 6th Edition* (New York, Superchamp Books, 2015).

Stability in the Groove and Why Repetition is Never "Boring" in Black Music

Groove is about stability made from an assortment of different musical (inter)actions playing against each other — or *on* each other depending how you want to look at it. In other words, groove is a stable musical force achieved through contrasting rhythms, sounds, and other musical elements locked into one solid flow. To the outsider and the uniformed ear, the groove may sound "boring" or extra repetitive. But the entire point of the groove *is* repetition; the *pocket*, the feel of polyrhythms interacting with one another, is the goal.

Once you listen carefully to a groove, isolating each separate rhythm within each polyrhythm, even the most simple groove reveals its complexity and brute force. A great example of this is Bo Didley's "I'm a Man" (1955), one of the most celebrated blues songs by one of the most iconic blues musicians of all time. "I'm a Man" is deceptively simple because its basic structure — its groove — repeats with no linear progression or noticeable key changes. But listen closely to "I'm a Man" and you hear what's really going on. The polyrhythm is in action, and Bo Didley's singing is engaging in call and response with the musicians' playing. *This is the progression!* And despite the fact that "I'm a Man" is a standard blues number, complete with the lyrical prowess and directness typical of blues songs, the song is also trance like, religious even, to the point where we can hear and feel the presence of distant African ancestors, and that's no accident.

As I mentioned in Chapter 3, the European conception of progression in music is guided by and achieved through *linear* progression. But the African worldview and concept of time in music is guided by and achieved through *cyclical* progression — repetition. *How* this repetition is created is not nearly as simple as it seems, because the repetition is constructed through the use of polyrhythms — the rhythms *between* rhythms.

Rhythm, Groove, and Drumless Loops

In Chapter 2, I noted the emergence of "Drumless loops" in 2010 as a popular hip hop beatmaking trend. Fast forward 14 years later, and the drumless loops style and aesthetic has evolved into its own hip hop sub-genre some have dubbed "drumless hip hop." In terms of beatmaking, drumless loops are distinguished by a minimalist, deceptively simplistic style, sound, and aesthetic. Typically with drumless loops — the seeds for which the present-day trend began with rapper/producer Roc Marciano (2010) — the beats are presumably *drumless*, i.e. without drums. More precisely, drumless loops beats are typically personified by one primary sample and the absence or minimal use of drums or percussion. Note, "drumless" doesn't necessarily mean that there are no drums at all; rather, it typically means that there are little to no additional drums *added*. In other words, it's very common to hear so-called "drumless" loops with drums actually *in* the loop. A great example of this is LORD JAH-MONTE OGBON and SadhuGold – "Yeshua" (2022), produced by SadhuGold.

Next, while there is sometimes focus on using samples of melody and harmony, this should not be taken to mean that rhythm is still not the guiding light for drumless loops. Understand something: Omitting percussion does *not* mean omitting rhythm! The loop (of the sample) makes the rhythm. In other words, even a sample of melody is the primary component of the beat, the melody is converted to a rhythm via the loop. One great example of this is Cam'ron – "Losin' Weight 3" (2019), produced by CAM & REK. Another great example of the *rhythmication* of melody in hip hop beatmaking is the song "The Return of the Crooklyn Dodgers" (Chubb Rock, O.C., Master Ace, Jeru the Damaja) (1995), produced by DJ Premier. Although not a drumless loop *per se*, the beat for this song exemplifies how melody and harmony are often converted to rhythm in hip hop beatmaking. Additionally, just as with other beats, the groove in drumless loops beats, which

are sometimes created by the looping of the sample, is always the anchoring presence of the beat. Here, the key thing to remember is this. Although drums more often than not play the most dominant role in a typical drumless loop groove, even with the drums removed, you still have the groove and, of course, the rhythm. Finally, it should be noted that drumless loops do not challenge or redefine the very essence of hip hop because the groove has always superseded the break. Moreover, hip hop beatmaking has always been flexible, particularly in terms of rhythm and groove. And drumless loops, of which the prototype actually dates back to the early '90s, and the conversion of samples of melody into rhythm, are mainstays of hip hop's beatmaking tradition.

Rhythmic Feels

Earlier in this chapter, I mentioned that a rhythmic feel is the way in which a rhythmic pattern *feels* and *moves*; and I added that the two most basic rhythmic feels — which *all* new rhythmic feels reference or are created from — are ***straight*** and ***swing***. In the sections that follow, I examine in more depth how rhythmic feels are created, and I highlight some of the most well known genre-related rhythmic feels in Western popular music.

The Creation of New Rhythmic Feels is Ubiquitous in Music, and Machines Make This Activity Even Easier

Generally, every rhythmic feel in Western popular music is some variation of straight and swing rhythmic feels, either alone or in combination; and each variation can be its own rhythmic feel. In other words, you can create new rhythmic feels in a variety of different ways. For instance, just by modifying swing ratios and time signatures or adding syncopation (accents). That the creation of new rhythmic feels is ubiquitous in music is something that must be noted. There is no finite number of rhythmic feels; the number of new rhythmic feels that can be created is unlimited. And today's recording technology makes the creation of new rhythmic feels (or popular old ones) easier than ever. As musicologist Anne Danielsen has noted, "digital editing software allows for the adjustment of individual tracks and events on a time axis with *millisecond precision*," and "[a]s a consequence, artists and producers *can create entirely new rhythmic feels* — for example, by creating overlapping layers of rhythms with multiple locations of their basic pulses at a microrhythmic level."[49] Fundamentally, the creation of new rhythmic feels comes down to musicians (programmers) being "able to evoke *a variety of rhythmic qualities, accents, or emotional*

[49] Danielsen, location: 116-151 (emphasis mine).

moods by playing notes slightly late or early relative to a theoretical metric time point."[50]

Structuring Figures and Schemes That Produce New Rhythmic Feels

All commonly known rhythmic feels have what I call "aesthetic groups", a set of characteristics that make the rhythmic feel immediately identifiable. For reggae, it's the One drop; for EDM, it's the pulsating 4-on-the-floor; for trap music, it's the combination of the syncopated hi-hats and 808 kick sounds. In the following sub-sections, I look more closely at the structuring figures, schemes, and other tactics for creating rhythmic feels.

Micro-Temporal Deviations

One common assumption that's associated with the creation of rhythmic feels is that a groove requires micro-temporal deviations from a metric grid in order to happen. But this assumption is wrong, rhythmic feels and grooves do *not* depend solely on micro-temporal deviations. Rhythmic feels and grooves can be achieved through a combination of timbral tactics and straightforward arrangement strategies. Still, unnatural micro-temporal deviations can be one way to create new rhythmic feels.

By 1990, electronic dance music was typically created with sequences wherein drum sounds, especially hi-hats, where programmed "'unnaturally', either too quickly or too evenly or both."[51] This was certainly the case in hip hop/rap music, where an assortment of techniques were used to create different drum patterns that featured both "natural" and "unnatural" events. Thus, the ubiquitous nature of unnatural programming — i.e. drum sounds placed early, late, or evenly on a grid — should not be treated as something novel or unique.

[50] *Ibid*, location: 231-244: Danielsen, quoting Iyer. (emphasis mine).
[51] *Ibid*, location: 116-151.

Further to this, conventional wisdom (held today by many musicologists and researchers) is that groove depends on human performativity. But the idea that groove, which relies in part on micro-termporal variation, can *only* be achieved through human *performance* is wrong. Groove, and by proxy a new rhythmic reel, does not depend on human performativity; groove can also be achieved through *programming* beat machines and other digital editing software.[52]

Actual Sounding Events vs. Virtual Reference Structures

Rhythm, and by a large extent rhythmic feels, are created by the relation of actual sounding events and virtual reference structures. That is to say, what sounds are *actually* present versus those sounds that are not present but *referenced*, i.e. the sounds we hear and *feel* that are not really there. A great of example of this is the song "Bussin" (2022) by Nicki Minaj feat Lil Baby. "Bussin" is not a song made using 4-on-the-floor, but it makes you tap your feet in 4-or-the-floor fashion; it's what you *feel*. Virtual reference structures "may range from the overall organizing principles of music in general (such as pulse, subdivision and so on), to learned stylistic gestures."[53] In this way then, we should understand that the click-and-clock rhythmic feel, best popularized in hip hop/rap music and neo-soul, is really a learned stylistic gesture.

[52] *Ibid*, location: 116.
[53] *Ibid*, location: 161-65 (emphasis mine).

Sound *and* Time Aspects of Rhythm

As I said before, the common misconception associated with the creation of groove, and by proxy rhythmic feels, is that groove is solely dependent upon micro-temporal time deviation (i.e. deviation from a time "norm"). But time deviation isn't the only way that grooves are distinguished. Likewise, the path to new rhythmic feels is not limited to *time* considerations; rhythmic feels can also be achieved through sound. The relationship between rhythmic structure and timing is also dictated by the timbre of individual drum sounds and the velocity (volume level) of each drum sound in the sequence. Which is to say that rhythmic feels and grooves can be achieved through a combination of *timbral* tactics even within straight-time arrangement strategies and without any micro-temporal time deviation.

Further, when regarding *time* as the most important structural parameter of a rhythmic contour, there remains the question if time should even be considered as an expressive and/or structural parameter. "*To what extent is the difference among motifs in overall rhythmic contour a result of rhythmic components being (actively) timed differently as opposed to being an intrinsic part of the motifs themselves?* I favour the latter…"[54] In any event, time is not necessarily *more* important than sound when it comes to creating rhythmic feels. More precisely, rhythmic delivery, *where/when* an element is placed on a time grid, is "just as important a parameter as, say, tone, pitch, or loudness."[55] In other words, *sound* is equally important to time, inasmuch as sound also can dictate rhythmic feel (time-feel). Thus, an over emphasis on time, the temporal aspects of rhythm or the temporal relationships within rhythm and groove, ignores the significant impact that sound has in popular music. Timbral aspects — i.e. aspects of sound, such as timbre, texture, dynamics, pitch, and tone — play an important role in

[54] Danielsen: Mats Johansson location: 1054-1058 (emphasis mine).
[55] *Ibid*, location: 231-244.

the creation of rhythmic feels. In fact, some rhythmic feels can be achieved through sound manipulation alone. Still, the best assessment is that rhythmic feel relies on a "mutually dependent relationship between timing information *and* timbral and dynamic features."[56] This certainly applies to hip hop/rap music, where there is a fundamental ebb and flow between the kick and snare drums. Slight timing disruptions and/or timbral modifications can stretch the character of this ebb and flow. But when it comes to creating new rhythmic feels, timbral tactics – sound manipulation – offer far more possibility than micro-temporal (time) deviations. This is why it's important to know the various sound-manipulation techniques that can create new rhythmic feels.

The Tradition of Sound That Hip Hop/Rap Music Was Built On

Before turning to an examination of sound-manipulation techniques and how they impact time, there's one background context that we should keep in mind about hip hop/rap music and its historical relationship to sound in general. The audience for rock music was "built on a tradition of live concert performance," the aim being to "recreate the ambiance of the concert hall or arena in the living room or bedroom of the listener," i.e. "to conjure up the sound of a large-scale acoustic environment in a small domestic space." By contrast, the audience for hip hop/rap music was built on a tradition of "the club"(nightclubs), and so the aim was (is) to recreate the booming, in-your-face ambience and sensation of the club in the living room, bedroom, or car. In other words, to conjure up the sound of a large-scale club sound and feel in a small domestic environment. (We certainly see a continuum of this with trap and drill today.)

[56] *Ibid*, location: 252-57.

Examples of Sound Impacting Time: Sound-Manipulation Techniques That Affect Movement and Therefore Time

Sounds always interact in intricate manners, thus rhythmic feels (time-feels) can be created through individual sound manipulation. In other words, placing snares, hi-hats, and kicks slightly early or late on a sequence grid is not the *only* way to achieve rhythmic feels like the click-and-clock rhythmic feel (think "Dilla Drums"). I have a hi-hat called "hi-hat 1dbl". It's a hi-hat composed of one hi-hat strike followed by one-half another hi-hat. The trailing hi-hat creates the illusion and rhythmic feel of "offness" even though I recorded every sound in straight time, timing correct set at 1/32 TRPLT, no changes.

A list of other examples sound manipulation techniques include:

1. Accentuating attack transients (sound event duration). This refers to the attack part of the note, the way in which an instrument is *struck* (piano and drums), *bowed* (string instruments), or *tongued* (brass instruments).

Regarding attack transient, musicologist Simon Zagorski-Thomas has noted that the attack transients of drum sounds, "the short bursts of energy that provide the percussive attack at the beginning of the note," produce "two principle perceptual results that flow from the accentuation of attack transients. The first is that the rhythmic pulse of a piece of music become more pronounced and the second is that, due to the fact that high-frequency sound dies away more quickly over distance than low-frequency sound, the accentuation of this high-frequency content suggests greater proximity to the listener."[57] In other words, the softening of the attacks (the start point) of sounds certainly have consequences for rhythmic feel. "Clean" or "dirty" attack transients of individual drum sounds (without the timing dynamics of the songs that they were sampled from) can certainly affect rhythmic feel.

[57] Danielsen: Simon Zagorski-Thomas) location: 2475.

A snare with short release and long attack, or snare with a wide cymbal layered on top, can produce a rhythmic feel that's akin to the click-and-clock rhythmic feel. One example of this is Mobb Deep's "The Learning (Burn)" featuring Big Noyd and Vita (2001). Same goes for Kick drums. Listen to Mobb Deep's "Get Dealt With" (1996).

Another great example of this technique is Gang Starr's "Doe In Advance" (1992). Here, the syncopated kick pattern uses a "pinched-in" kick (discussed in the previous chapter) in a one-two drum pattern.

Note: Accentuating the attack on drums is one way you can create "Punchier" drums.

2. Pitch manipulation of sounds, for example, bass drum sounds can be made to slow down or speed up a rhythm *without* changing time correct. Perceptible descending or ascending pitch movement of sounds can definitely affect rhythmic feel, again *without* having to use quantize.

Observing how it is "not always necessary" to make micro-temporal changes to affect rhythmic feel, and how pitch movement is one example of a timbral tactic — i.e. a sound-manipulation technique — that affect rhythmic feel, musicologist Hans T. Zeiner-Henriksen has observed that "[i]f a bass drum *sound with a descending pitch movement* is placed exactly on the downbeat, the pitch movement may in fact locate the lowest point of an undulating body movement *just after* the beat. **A hi-hat sound on the following upbeat will then be experienced as *'early'* in relation to the body movement, and this 'early' realization will produce a `push' or 'drive' forward, giving extra energy to the upward movement as it rushes to catch up. Thus, contrary to the common assumption in rhythm research that microtemporal deviations from a metric grid are necessary to a groove's drive or swing, *such a push can occur in a fully quantized track as well.*"**[58]

[58] Danielsen: Hans T. Zeiner-Henriksen, location: 1737-1742, citations omitted (emphasis mine).

2b. Pitching down (or up) a sample that contains a trailing hi-hat, kick, or snare at the end of the sample is another example of how pitch manipulation can affect rhythmic feel *without* changing time-correct. Perfect example of this is Bumpy Knuckles – "Turn Up the Mic (DJ Premier Remix)" (feat. Nas) (2012).

3. Adding greater definition of sounds, especially drum sounds.

4. Adding low-end resonance to drum sounds.

5. A variation of hi-hit patterns with short and elongated attacks and releases can drag or push the rhythm of the beat, again *without* manipulating time-correct.

6. Alternating rhythmic structures with high and low sounds.

7. Simultaneous rhythmic events with high and low sounds.

7b. Layering simultaneous rhythmic events, especially individual snares layered over the snare in the original sample. This produces a "stretch" feel with offness, again *without* manipulating time-correct. Gang Starr's "Doe In Advance (Original)" (1992) is an excellent example of this technique.

8. The use of sleigh bells as hi-hats is another sound-manipulation technique that can affect rhythmic feel *without* modifying time-correct.

9. Compression. This is when the dynamic *range* of a performance is reduced, i.e. the audio signal is processed so that the volume of loud sounds are reduced and quiet sounds are amplified.

10. Delay effects on hi-hats and snares can also drag the rhythm.

11. Equalization (EQ) that accentuates the higher frequency, which can also sharpen the attack note, which allows sounds to be

out in front in the mix. You can also accentuate low frequencies of sounds, which adds weight (and warmth) to sounds. Such techniques can "mask" or "push out" other sounds in the mix, and the blend of louder and higher sounds, especially hi-hats, kicks, and other percussion, can affect the rhythmic feel, particularly in terms of dragging and pulling.

Sound-Manipulation Techniques and Sequences

In most hip hop/rap music, typically the basic "sequence", or musical building block, is a unit of 2 bars long — one basic unit followed by the first bar of its repetition. Additional units are normally created by using this basic unit with minor or major changes. For example, doubling up (copying sequences to themselves) to 4 bars, 8 bars, and 16 bars. So a snare drum with a distinct, sharp timbre will move the rhythm at a speed differently than a snare drum with less distinction and a less sharp timbre, and the *arrangement* within each sequence contributes to the creation of the rhythmic feel. This is especially the case with samples, which include multiple sounds — even drum sounds that are *not* used as the backbeat.

Additionally, even a dull snare drum can be made more distinct. The combination of the specific kick drum and hi-hat can either send a snare *out front* or tuck it, i.e. couch it deeper in the mix. In each case, depending on the core samples involved, the snare will still add character because what always reigns supreme is the rhythm and the groove and the overall sound that delivers it.

Continuing from the previous list, here are some sound-manipulation techniques that can specifically affect sequences:

12. Adding low-end resonance will affect the way drum sounds move in a sequence. Even less or greater clarity of a drum sound can affect its *flow* in a sequence (program). Greater clarity and sharpness can work to *push* a rhythm, while lesser clarity and sharpness can work to *drag* a rhythm. Delay on snares and kicks also affect how these sounds move in a rhythm. Velocity on snares and kicks also affect how these sounds move in a rhythm. Panning of snares, kicks, and hi-hats also affect how these sounds move in a rhythm.

13. Kick strokes. The "boom" in boom bap is one of the most important developments in drumming in hip hop/rap music, and the elevation of kick strokes to booms is another sound-manipulation technique that affects rhythmic feel.

14. Velocity and tuning is another sound-manipulation technique that affects rhythmic feel. Velocity-sensitive drum pads. Modifying the sound dynamics of each drum sound. A legacy of the microphone placements of individual drum sounds.

15. Elongation of sounds. For example, longer and shorter hi-hats and rides. An open hi-hat can stretch any rhythm. For example, listen to Jean Carn's "Free Love" (1976).

Critical observation: When creating new time-feels with drums taken from old time-feels, the timbral dynamics and sonic frequencies are kept in place. Thus the machine time conversion performed by sample-based beatmakers (producers) means that sound and time manipulation is taking place on every new sample-based beat that is made. Further, with a greater understanding of sound-manipulation techniques, we can see what's really going on in the click-and-clock rhythmic feel: A lilting snare, kick, and/or hi-hat. Once you recognize this, you know that the click-and-clock rhythmic feel can be achieved by sound, not only through time.

Some hip hop/rap songs that exemplify some of the sound-manipulation techniques that I outlined include: Pete Rock & CL Smooth – "In the House" (1994), listen to the outro beginning at the 5:05 mark; and Pete Rock & CL Smooth – "I Get Physical" (1994), listen to the outro beginning at the 4:45 mark. On this song, you will notice the "drag" of the drums. Next, listen to Raekwon - "Ice Cream" feat. Method Man, Ghostface Killah, and Cappadonna (1995), produced by RZA. On this song, RZA uses sound-manipulation techniques, not quantize, to *drag* the snare, and the result is that this stretches the interval and feel. Also, Raekwon - "Verbal Intercourse" feat. Nas and Ghostface Killah (1995), produced by RZA. Here, the snare is not strictly on straight time; the offness is deliberate, the trailing hi-hat, which sounds like it's connected to the end of the snare, is intentional.

Using The Alternating-Pitch Technique On Drum Sounds

Even though "the drums" are fundamental in beatmaking, many beatmakers (producers) overlook the various ways to get the most out of their existing drum sounds. One way to get more out of your drums sounds is to alternate the pitch of each drum sound within various measures — if not all measures — of a beat. Changing the pitch of drum sounds is a commonly used *sound* technique in the creation of drum programs.

For instance, for snares, I typically play/program the same snare sound at three different pitch levels within the same beat. So I'll have one snare sound set at its original pitch level, the sames snare sound set at a faster or slower pitch (usually one eighth or quarter note faster or slower), and the same snare sound again set at a faster or slower pitch speed (usually one eighth or quarter note faster or slower). Sometimes I determine the right pitch-degree of each snare-hit in real time usually by assigning the same snare sound — at three different pitch-levels — to three different pads on my MPC. Then I play the snares while the rest of the beat is in play/record mode. (This is a similar concept to playing drum

sounds with different velocities.) There are other times when I play each snare at the same pitch, then I go back and program the pitch changes at the points that feel right to me.

For hi-hats, rides, and tambourines, I use the same alternating-pitch technique. But for hi-hats in particular, I usually only alternate the pitch at specific points within a beat. Otherwise, for the most part, I keep the pitch of my hi-hats the same. And when it comes to kick sounds, I use the alternating-pitch technique even more sparingly. With kicks, I only slightly change the pitch of the kick at certain times within the drum pattern.

Finally, I should point out that not only does the alternating-pitch technique allow you to get more out of your existing drum sounds, it also helps you create drum frameworks that really come alive. So in addition to creating unique textures and sonic impressions, the alternating-pitch technique allows you to make your drums come off more natural, and it helps decrease the mechanical feel that often occurs with electronic drum sounds. Alternatively, you can also use the alternating-pitch technique to create the click-and-clock rhythmic feel. Moreover, used in the right way — that is, for feel and sound, not just for the sake of using a technique — the alternating pitch technique also helps with the tightening up of the rhythm of your beats.

The Dynamic Power of Rhythmic Feels

What makes hip hop/rap music (or any genre) instantly recognizable? Answer: Rhythm and groove. I call this the "identifiable sameness" of Western popular music genres. Most music genres in Western popular music have their own associated rhythmic feels; and some, like reggae and hip hop/rap music, have *multiple* identifiable rhythmic feels. Identifying the general rhythmic feel of a music genre is relatively easy because rhythmic feels are often most characterized by their drum patterns. Typically, once you hear the drum pattern, you know the genre. And although the drum patterns may be different, the rhythmic feel is always clear. This is especially the case for the boom bap rhythmic feel in hip hop/rap music or the One drop in reggae.

Rhythmic feels are dynamic in their power. For James Brown, the One was a concept and musical philosophy, it wasn't just the placing of emphasis on the downbeat; it was as rhythmic feel that permitted him to build upon the New Orleans funk tradition and create a *funkier*, more urgent style and sound of music. It was also his pathway for expressing Black identity through music. This speaks to how rhythmic feels extend from the personalities of musicians and how rhythmic feels help define music styles and genres. But more than pathways to rhythm, rhythmic feels are articles of culture. This is why boom bap is both a rhythmic feel *and* a cultural signifier. Still, as pathways to rhythm, rhythmic feels give musicians a compass to follow, a direction to absorb that allows them to express their connection with the *movement* of a beat.

In the sections that follow, I examine boom bap as a rhythmic feel and detail some of the most notable rhythmic feels in popular music, including the One drop, Afrobeat, and Afrobeats.

Style, Sound, *and* Rhythmic Feel: The Triple Threat of Boom Bap

Conventional wisdom is that boom bap refers to a certain style and sound or era of hip hop/rap music popularized in the late '80s and '90s. But this is only partly true. Boom bap is actually a triple threat — it's a style, sound, *and* rhythmic feel. Further to this, the complete story is that boom bap, stripped away from any specific style, sound, or era, is *the fundamental* drum programming approach in hip hop/rap music, because it's the framework for rhythmic organization that practically *all* hip hop/rap music relies on. In this way, boom bap is the foundation from which most drum patterns in hip hop/rap emerge. As such, boom bap is not only the most popular rhythmic feel in hip hop/rap music, it's the most important organizing principle in hip hop beatmaking. And it is the most dynamic, most adaptable and flexible rhythmic feel in hip hop/rap music.

Additionally, the boom bap rhythmic feel accommodates different ways of articulating hip hop/rap music's core feel. In hip hop/rap music, there is a shared representation of the base structure of the music. That is to say, hip hop beatmakers (producers) share a similar representation of the structure and *aesthetic priorities* of hip hop/rap music. As such, all drum frameworks or patterns in hip hop/rap music are subordinate to the basic boom bap structure. Boom bap — the "boom" and the "bap" — is the referential structure and the hip hop attitude as one.

Next, boom bap, in its simplest rhythmic form, is a (rhythm) building block. In some ways, boom bap can be heard as exaggerated versions of typical funk, soul, and rock 'n' roll drum patterns. But the difference between boom bap patterns and standard funk, soul, and rock 'n' roll is that, within boom bap patterns, the drums are usually well out in front, representing a sonic quality distinct to hip hop/rap music. Also, because of the "beat machine" aspect of hip hop composition, within boom bap patterns we sometimes hear syncopation that's not easily replicated by a human drummer.

It's also important to point out that micro-temporal differences do not change a beat from its parent rhythmic feel. We still bob are head the same way to it, we still dance to it the same way. However, *major* micro-temporal differences and major framework changes can create deviations from the parent rhythmic framework. In this scenario, separate, independent rhythmic feels are created. Such is the case with the trap and drill rhythmic feels.

So how do we distinguish a style and sound from others? We do so through "cognitive schemas derived from our previous experiences with familiar sounds."[59] Because we're familiar with the style and sound, we recognize it immediately and we have expectations about how it's *supposed* to sound. If our expectations are disrupted, in a major way, we understand then that we are listening to a new style and sound. DJ Premier, RZA, Dr. Dre, Pete Rock, and J Dilla — all have styles and sounds that are distinct and immediately recognizable. Yet when we hear their music, we know that it's *still* hip hop/rap music, and one reason why we know is because of the drums, which in the case of each of their styles and sounds is working *from within* the boom bap rhythmic feel framework.

Slight Variations: Part of the Boom Bap Tradition's Musical Dialect

The larger base rhythmic feel of boom bap did, at least at one time, appeal to all hip hop audiences. And the core rhythmic aesthetics, qualities, and structures of the boom bap rhythmic feel — the booming kick kick snare / kick kick snare pattern and its numerous variations — was adopted by all beatmakers (producers) in the hip hop/rap music and used as a staple framework to create new rhythmic feels. Aside from the general aesthetic and sonic nature of boom bap, what made it (makes it) so appealing to beatmakers (producers) is how adaptable it is, particularly in terms of micro-rhythm. One important way that the rhythm of most songs in Western popular music is characterized is by how sounds

[59] Danielsen (Kristoffer Yddal Bjerke) location: 1139.

and their arrangement interact micro-rhythmically. When the basic rhythmic structure is fixed, as is the case with boom bap, "… even the slightest microrhythmic fluctuation becomes noticeable and meaningful."[60] When slight variations are repeated as part of a recurring rhythmic pattern, these variations, which "are not random occurrences but vital means of musical expression," are used "consciously to clarify certain specific structural features of the music." Like with other grooved-based musics, slight variations in rhythmic patterns are a fundamental part of boom bap's musical dialect; moreover, it's one area in which boom bap distinguishes itself as one of the most popular rhythmic feels in music to this day.

Boom Bap As Hip Hop/Rap Music's Most Dominant Rhythmic Feel

Despite the fact that the trap rhythmic feel is widely popular today, boom bap remains without question the most dominant rhythmic feel in hip hop/rap music. While trap is linked to a large but specific section of hip hop/rap music, boom bap permeates *throughout all* hip hop/rap music. Boom bap artists, both beatmakers and rappers, don't typically mingle with trap beats. By contrast, however, trap artists frequently engage with boom bap, and most trap-based beatmakers not only know boom bap structures, they often rely on them when building their beat frameworks. Moreover, some of the best boom bap-associated beatmakers (producers) are now making *hybrid* trap beats, i.e. beats that combine the dynamism of boom bap and trap. One of the best recent examples of this is Benny The Butcher's "Big Dog" feat. Lil Wayne (2023), produced by Alchemist, a beatmaker (producer) certainly not known for trap beats. Nonetheless, on "Big Dog," Alchemist laces the sample-based beat with the familiar trap hi-hat shuffle; and Benny The Butcher raps over the beat in the familiar

[60] Danielsen: Serge Lacasse) location: 1915 (emphasis mine).

triplet (trap-associated) rap style, while Lil Wayne takes a different rhyme approach on the same beat. Another recent song that relies on a sample-based beat that fuses boom bap and trap rhythmic feels is Drake's "First Person Shooter" feat. J Cole (2023), produced by Vinylz, Boi-1da, OZ, Tay Keith, Coleman, and FNZ. And yet another recent song that relies on a sample-based beat that fuses boom bap and trap rhythmic feels is Future's "Everyday Hustle" feat. Rick Ross (2024), produced by Metro Boomin. All three of these songs speak to the dynamism and the ubiquitous nature of boom bap in hip hop/rap music. Further to this point, the assumption that boom bap is a mainstream vs. underground thing, or that boom bap is absent from the mainstream, is patently false. One need only look at songs by top mainstream artists, like Jay-Z's "Marcy Me" (2017), Drake's "Pipe Down" (2021), Pusha T's "Diet Coke" (2022), Nas's "Store Run" (2021), Kendrick Lamar's "Duckworth" (2017), J. Cole's "Applying Pressure" (2021), 2 Chainz's and Tyler, The Creator's "LUMBERJACK" and "Hot Wind Blows" feat. Lil Wayne (2021)[61]

Here is a list of songs that present different examples of the boom bap framework that's not necessarily what many would consider boom bap. Pay careful attention to the variation of the basic pulse crack (smack) — the bass kick drum. The basic framework is present, what differentiates each song is the syncopation, the number of kick drum pulses and snare drum pulses and their arrangement:

Pusha T - "Diet Coke" (2022)
Nas - "The Message" (1996)
Saba - "Few Good Things" feat. Black Thought (2022)
Cordae - "Jean Michel" (2022)
DJ Premier feat. 2 Chainz - "Mortgage Free" (2021)
YG - "Scared Money" feat. J. Cole and MoneyBagg Yo (2022)
Vince Staples - "MAGIC" feat. Mustard (2022)
Dave East - "Unbelievable" feat. Method Man (2022)
Danny Brown - "Best Life" (2019)

[61] Won 2022 Grammy for Best Rap Album.

Black Star - “Brown Skin Lady” (1998)
Slum Village - “Players” (late ‘90s)
Common - “Street” feat. Sadat X (1999)
Slum Village - “Thelonious” feat. Common (2019)
Paula Perry - “Extra, Extra!!” (1998)
Large Professor - “I Juswanna Chill” (2009)
Jack Harlow - “Nail Tech” (2022)
Cardi B - “Up” (2001)
Busta Rhymes - “True Indeed” (2020)
A$AP Twelvyy - “Pissy Staircase” feat. A$AP Rocky (2020)
Childish Major - “Disrespectful” (2021)
Logic - “Celebration” (2020)
Kendrick Lamar - “DNA.” (2017)
Pete Rock & CL Smooth - “Straighten It Out” (1992)
Method Man - “Butterfly Effects” (2022)
Group Home - “Suspended In Time” (1995)

Four Other Rhythmic Feels in Hip Hop/Rap Music: Click-and-Clock, Grime, Trap, and Drill

The "Click-and-Clock" Rhythmic Feel

In the mid-'90s, an old rhythmic feel, one that dates back to at least the early funk and jazz fusion days, found its way to hip hop/rap music. In practice, this rhythmic feel has an overall *stretched feel* to it; a feel wherein the main drum sounds push and pull around the One to create a *dragging* effect, what musicologist Anne Danielsen has called the "seasick"[62] time feel. Because this rhythmic feel was best popularized in hip hop/rap music by J Dilla, it has sometimes been described by some beatmakers (producers), other musicians, and commentators as "Dilla drums" or "Dilla drunk drums" or "Dilla dragging drums," etc. But due to 1) The historical nature of this rhythmic feel —i.e. that it originated long before Dilla and was used by other musicians at least 30 years *before* Dilla incorporated it into his own style; and 2) Because "drunk drums", etc. is a reductive misnomer, I call this rhythmic feel the "click-and-clock" rhythmic feel.

I use the term "click-and-clock" to describe this rhythmic feel for a number of reasons. First, "click" is a reference to the click track that drummers and other musicians commonly recorded to, which began (more prominently) in the late '60s. A click track is used to maintain a steady beat, it's a way to maintain consistent time. (*In today's digital age of reproduction, where music is recorded and produced digitally and often made from a patchwork of different sources, consistent time is critically important.*) In this way I liken "click" — click track — to a grid of straight time. Second, "clock" is a double entendre. "Clock" represents a sense of steady, uninterrupted time, but it's not synced perfectly with the click track's straight time. Played together simultaneously, the "click" track and the "clock"

[62] Danielsen, location: 344.

will be slightly off because both are operating from within their own perspective "straight times". Third, the "clock" represents the *sound* aspect of this kind of rhythmic feel. Much attention is given to the role that time plays in creating this kind of rhythmic feel, but as I've pointed out earlier in this chapter, *sound* is a crucial structural parameter as well. In fact, this kind of rhythmic feel can also be achieved, at least on a beat machine, without having to make *any* micro-shifts in time but by simply modifying the timbre, tone, pitch and dynamics of drum sounds. Finally, I call this rhythmic feel the click-and-clock feel because "click-and-clock" said out loud is an audio representation of what this rhythmic feel actually *sounds* like in practice.

The Click-and-Clock Rhythmic Feel in Practice

In practice, a beat that uses the click-and-clock rhythmic feel, features a drum pattern that, despite varying degrees of offness, is pretty much a fairly straightforward syncopated rhythmic loop. The only noticeable differences are the slightly late or early snares, kicks, or hi-hats; typically, the time signature is common 4/4. In other words, the rhythmic events that form the click-and-clock rhythmic feel, especially in the way that J Dilla did it, are not so severe as to completely transform the parent rhythmic feel — boom bap — into something entirely different.

Once you recognize the basic characteristics of the click-and-clock rhythmic feel, which itself is simply a type of shuffle, you can hear it, or a variant of it, at play in different songs outside of hip hop/rap music. A couple examples include: Jamaican recording artist Ken Boothe's "Puppet On a String" (1968), listen at the 0:00 – 0:10 mark; progressive/hard rock Led Zeppelin's "How Many More Times" (1969) — there's a variant of the click-and-clock rhythmic feel, but it's being played *off* of the Two and not the One.

Grime Rhythmic Feel

Like trap and drill, the name "grime" doubles as the name for the rhythmic feel and the sub-genre itself. And like trap and drill, the grime rhythmic feel is also based on straight-time and it also includes exaggerated syncopation. However, the grime rhythmic feel is personified by much more rapid syncopation, much faster BPM (beats per minutes) — often upwards of 140BPM — and swing that pushes rather than pulls. One reason for this is because grime is a hybrid genre, which is it to say it's inspired by a combination of multiple genres, including hip hop, jungle, UK garage, dancehall, and other West Indian music influences. Still, there are two things that situate grime *within* hip hop/rap music, and thus qualifies its rhythmic feel as a rhythmic feel *in* hip hop/rap music as opposed to outside of it. First, there's the art of rapping. Grime's vocal performance style is unquestionably rap, and it's personified by the same characteristics as the art of rapping: rhyme flow and delivery. Just as the boom-bap, trap, and drill rhythmic feels dictate rhyme flow and delivery, grime's distinct high-BPM based rhythmic dictates its rapid-fire rhyme approach. Second, grime also shares the hip hop sensibility and hip hop attitude; this shows up in the types of raps depicted as well as in the rhyme flow, delivery, and style on intonation.

Trap Rhythmic Feel

Vastly more popular than the click-and-clock rhythmic feel, and almost a rival to the boom bap rhythmic feel, is the trap rhythmic feel. As the musical backbone of trap music, as a sub-genre of hip hop/rap that has dominated hip hop/rap music in recent years, this rhythmic feel is based on straight-time with exaggerated syncopation that's representative of a "rolled" rhythmic feel, and it is characterized by a rotating 808 bounce along with a stretch feel, percussive melodies, and stuttering (triplet/note repeats of) kicks and snares.

Drill Rhythmic Feel

The drill rhythmic feel is the third most popular rhythmic feel in hip hop/rap music behind the trap rhythmic feel. In drill, typically the snare drops out for periods longer than expected; when it reappears, sometimes it lands flush (precisely) on the Two, other times the Four. Simultaneously, there are often heavily syncopated hi-hats, shekeres, and other percussive sounds. In practice, the drill rhythmic feel is not necessarily late or early; rather, it's more of element of "stuttering," i.e. a controlled randomness of the snare: While the snare lands sometimes on the Two, sometimes before the Two, sometimes slightly before or after, the aim is not a *stretched rhythmic feel*. In any event, the drill rhythmic feel, like its sister rhythmic feel trap, is always danceable.[63] While drill music actually includes Chicago drill, UK drill, and New York drill, Chicago drill is really just trap music (sometimes with a slower tempo); there is no other distinguishable *rhythmic* feel. Instead, the term "drill" is used to describe the overall scene and subject matter of the sub-genre itself. By contrast, UK drill and New York drill represent a new distinguishable rhythmic feel. What's immediately apparent in UK and New York drill is their up-tempo nature and their Caribbean rhythmic influences. The UK and New York drill share a Caribbean (dance) heritage, especially Jamaican. Also, in the case of UK drill, there's a connection to the UK up-tempo styles of drum and bass and trip hop.

[63] Drill music, like its cousin trap music, is gangster music masquerading as dance music. I suspect part of the reason why the click-and-clock rhythmic feel, outside of Dilla's measured use of it, was not widely adopted in hip hop/rap music is because it's less conducive to dancing.

The Hip Hop & R&B Hybrid: Boom Bap, Melody, Other Traditional Music Motifs, and the Development of Neo-Soul

When we say that something has been influenced by hip hop or that something bears the markings, stylistically and aesthetically, of hip hop, what are we really saying? In Chapter 1, I discussed the hip hop sensibility and the hip hop attitude. So when hip hop is blended with any other music genre, the hybrid creation absorbs hip hop's sensibility and attitude. And this translates both sonically and vocally. Going deeper, in terms of rhythmic feel, what we're really talking about is the boom bap rhythmic feel. And since the boom bap rhythmic feel is embedded in the DNA of hip hop beats, it also becomes embedded in any music genre that uses hip hop as part of its creation. Boom bap is a force and an energy!

Thus, the move towards combining hip hop and R&B wasn't just an attempt by R&B artists to capitalize on the trend of hip hop in the late '80s and early '90s. It was a genuine attraction to the force and energy of hip hop. R&B artists in the early '90s understood what hip hop/rap artists had recognized at least 10 years earlier: That hip hop was the most dominant musical force in Western popular music since rock 'n' roll. And at the center of hip hop/rap music's force — non-vocally, I'm talking — was (is) the boom bap rhythmic feel.

The development of neo-soul is more proof of the power, influence, and adoptability of the boom bap rhythmic feel. Neo soul was (is) a catch-all moniker for a sub-genre of R&B that doubled as a soul revival movement. But for all of its renewed focus on and return to some characteristics and elements of classic soul of the '60 and '70s, neo soul was heavily influenced by hip hop. More specifically, in terms of hip hop's influence on neo soul, nowhere do we see this influence the most than in neo soul's common use of the boom bap rhythmic feel.

One Drop: A Rhythmic Feel Highly Instructive for Hip Hop/Rap Music

The "Train Rhythm," Jamaican Music, Ska, Rocksteady, Reggae, and The Origins of the One Drop Rhythmic Feel

Before discussing the One drop rhythmic feel in practice, it's important to describe its origins and mention the key role that Little Richard and one of his innovations played in the origins of Jamaican music. In the 1950s, Little Richard asked New Orleans drummer Charles Connor, a pioneer in the early beat of rock 'n' roll and then-drummer for Little Richard, if he "could produce *a rhythm that sounded like a train* — and he did. The train rhythm can be heard on many of Little Richard's earliest recordings including 'Good Golly Miss Molly.'"[64] The "train rhythm" that Little Richard instructed Charles Connor to play is also the same shuffle rhythm which Jamaican ska and rocksteady music was built upon. The key differences are that the Jamaican rhythm is laid back and it swings a little slower than the rhythm & blues of Little Richard; also, the kick thumps hard on the *Two*. This thumping kick on the Two and emphasis on the Three would soon become the foundation for the One drop rhythmic feel. A song that exemplifies this perfectly is The Valentines' "Sock It to Me Baby" (ca. 1967/1968); listen to how the guitar and the horns push while the hi-hat shuffles, drags, and pulls against the one. This push/pull dynamic was one of the most common features of Black music between the '40s and '70s. Also listen to Ken Boothe's "Crying Over You" (1974).

Ska

The seeds of the rhythmic feel known as the Jamaican One drop or reggae One drop or simply One drop go back to the 1950s.

[64] Charles Connor, NAMM interview (April 20, 2005) https://www.namm.org/library/oral-history/charles-connor.

The One drop originated with ska music, a Jamaican genre and style that also emerged in the 1950s. Ska — a punchy, up-tempo dance music — fused American rhythm & blues and jazz and pan-Caribbean genres calypso and mento. Ska was (is) characterized by offbeat "skank" rhythms (i.e. guitar chops or piano lines on the offbeat) in a 4/4 time signature with heavy syncopation, complete with a festive brass section of trombones, saxophones, and trumpets, a walking bass line, and accents on the off-beat. In ska, emphasis is on the second and fourth beats of a measure (the backbeat).

There are two interesting notes about the development of ska, particularly as ska relates to Black American music, the music form that served as the main musical well that ska drew from. First, Fats Domino's "Be My Guest" (1959) and "The Fat Man" (1949) is the blueprint for Jamaican ska. Second, Ska grew out of the popularity of the Jamaican sound systems of the late '50s and early '60s. These sound systems, popularized by Prince Buster, Clement "Coxsone" Dodd, and Duke Reid, were formed to play American rhythm and blues. As the sound systems grew, Buster, Dodd, and Reid began making their own songs based on American rhythm and blues with elements of Caribbean rhythms thrown into the mix. These songs were typically direct copies or covers of American rhythm & blues songs — songs that were powered by American "shuffle blues".

What prompted this American rhythm & blues connection? Radios and proximity! In the '50s, Jamaicans in large numbers purchased radios, and these radios were able to pick up the signals of radio stations in New Orleans and other cities in the Southern United States. This kept Jamaicans well fed on a healthy diet of the rhythm & blues of Fats Domino, Louis Jordan, and other rhythm & blues and jump blues pioneers. The early recordings of these artists featured the "train rhythm" (first pioneered by Little Richard) and the "behind-the-beat" feel that would eventually come to personify ska, rocksteady, and reggae.

Rocksteady

Rocksteady, the successor to ska and precursor to reggae, evolved from ska in the mid-'60s. It is a dance music that is characterized by several things. First, rhythms similar to ska but more relaxed. Second, accents (stresses) on beats Two and Four. Third, amped-up, booming backbeat basslines and a more pronounced One drop drumline. Further, in rocksteady, the horns are less present than ska, and the guitar, which is still on the offbeats, is louder.

Another important distinction between ska and rocksteady is that where ska is focused on the soloist, rocksteady is more focused on vocal harmony. As with ska, rocksteady copied the music of the Black American music tradition. Most notably, this emulation can be heard in the three-part harmony inspired by the harmonizing tradition of the Black American music tradition that was personified in the early '60s by the group The Impressions. In fact, The Impressions (featuring singer-songwriter Curtis Mayfield) served as the blueprint for Jamaican rocksteady recordings artists, like The Ethiopians, The Pioneers, The Melodians, The Wailing Wailers, and Derrick Harriott.

Also worth noting, the term "rocksteady" comes from a dance style Alton Ellis mentioned in his song "Rock Steady" (1967):

Better get ready,
come do Rocksteady,
you have to do this new dance,
hope you are ready

Better get ready
Come do rock steady, ooh
You got to do this new dance
Hope you're ready
You got to do it just like uncle Freddy
If you don't know
Just shake your head, rock your bodyline
Shake your shoulders, ev'rything in time[65]

[65] Transcription by mine.

While rocksteady used American rhythm & blues as its model just as ska had done, the key difference was that as ska evolved and gave way to rocksteady, the tempo slowed down and the One drop became much more pronounced. But rocksteady was *built* around the One drop drum beat.

Four great ska and rocksteady examples include:

Derrick Harriott – "The Loser" (1976).

The Pioneers – "Long Shot Kick de Bucket" (1968). Note on this song that the kick is late and the snare is "on time" and syncopated; also the hi-hat is syncopated, and there's a shuffling shekere along with the guiro (fish instrument) and cabasa and maraca.

The Pioneers – "Black Bud" (1969). Like a reggae and boom bap rhythmic feel hybrid.

The Gaylads – "Soul Sister" (1970). A straight copy and imitation of '60s Black American soul/rhythm & blues (3-part harmony). Really reminds you of The Impressions.

Reggae

Reggae, which first emerged in the late '60s, evolved directly from rocksteady. Much slower than ska and more laidback than rocksteady, reggae is built around the One drop as well. And it is also characterized by a laid back feel, simple chord sequences, syncopated and amplified bass lines, short "skanking" repeated rhythm guitar patterns on the two and the four, repeated off-beat 8th notes, and strong accents on the Two and the Four. Further, in reggae the skanking guitar (also found in ska and rocksteadly) is more prominenct, while horn lines are less prominent. Finally, in reggae the soloist stands out (a return to the *lead singer* days of ska), and harmony singers maintain background vocals.

The One Drop in Practice

The Jamaican One drop or reggae One drop or simply One drop is characterized by an emphasis on the Three, a heavy accent on the second and fourth beat of every bar, and the bass drum and snare drum playing *together*. The One drop is further characterized by the snare drum often being played as "a side stick '*click*'" rather than a full snare hit, an influence from Latin music. This differs markedly from the drumming styles in rhythm and blues and rock 'n' roll, which put the bass drum on the first beat, i.e. the One (the downbeat) and almost never on the second and fourth beats. Jamaican musicians sometimes refer to the second and fourth beats as the *"afterbeat"*.[66] As a rhythmic feel, the One drop is created by an emphasis on the 3rd beat (in a 4-beat measure in 4/4 time) and a de-emphasis on the 1st beat. In the One drop, the *expected* kick drum (bass drum) on beat 1 is *dropped* (i.e. not played), hence the name "One drop." In lieu of the missing kick on beat 1, the reggae One drop is defined by simultaneous kick and side stick (cross stick/rim click) or snare hits on beat 3. The One Drop rhythmic feel is further characterized by a swinging hi-hat and syncopated sidestick and hi-hat hits. With the One drop rhythmic feel, emphasis is on the bar *moving* to beat 3, not *beginning* with beat one. (Listen carefully to Ken Boothe's "Sandy" (1974)).

Theoretically, the One drop is "wrong". Yet it's absolutely one of the most beautiful and interesting rhythmic feels in Western popular music. Because of its movement, the simultaneous kick and side stick (or snare) arrive on beat 3 with a slight shuffle, a slight "drag", a laidback, "false offbeat" sensation. It's as if the kick and sidestick are going to miss the Three, and then, boom! they land at the last moment, not flush, but right on time. When you listen to the reggae One drop, you can better understand why the click-and-clock rhythmic feel works and why it can go off the rails if the offness is taken *too* far off.

[66] Jamaican Rocksteady Music - A Successor of Ska, jamaica-land-we-love.com/jamaican-rocksteady-music.html#:~:text=Rocksteady%2C%20even%20more%20so%20the,drum%20and%20the%20snare%20together.

Who's the Originator of the One Drop?

While it's pretty clear *when* and *how* the One drop originated, identifying who was the originator of the One Drop has been a source of controversy. Creation of the One Drop is usually credited to either Winston Grennan or Carlton Barrett, drummer for The Wailers (Bob Marley and The Wailers). In any case, there can be no doubt that it was Carlton Barrett who first popularized the One drop and brought to mainstream attention. *(There's a parallel here with the click-and-clock rhythmic feel. J Dilla was not the originator of the click-and-clock rhythmic feel, but the rhythmic feel was best popularized in hip hop/rap music and neo-soul by him. In the next chapter, I discuss in greater detail.)*

Using the One Drop in Hip Hop/Rap Music

In that there are certain familiar, oft-used drum patterns that every beatmaker (producer) uses in hip hop/rap music, boom bap is parallel to the tradition of Jamaican "riddims". In the previous chapter on drums, I examined the primary drum patterns used in hip hop/rap music, like kick kick snare | kick kick snare with hi-hats in straight 1/8ths. Basic "rhythms" like these are used all the time as the backbeat for new beats in hip hop/rap music. In this way, these basic boom bap rhythms enable boom bap's own *versioning* tradition.

Beyond the parallels with Jamaican riddms and the One drop, there are instances where the One drop itself can be instructive in hip hop/rap music. In my own music, I have incorporated ideas of the One drop numerous times, most notably on my song "The Hook Up," from my album *Soul Review* (2001). The beat for "The Hook Up" was directly inspired by and uses principles of the Jamaican One drop — The kick is on the third beat simultaneously with the floor tom (representing the snare), and the hi-hat swings by way of the train rhythm. My original idea for the beat was that I wanted to combine the Jamaican One drop with a soul loop. I used a similar idea and principle for another one of my songs, "Corner Crown"

(2000). And for my song "Cheater Town" (2016), from my album *The Best of Times* (2016), I amped up the complexity of some these principles. On "Cheater Town," I incorporated a shuffling snare landing on the 2nd, 3rd, *and* 4th beats, added straight-8ths hi-hats with an elongated triangle-hi-hat hybrid alternating with another elongated hat on the 1st beat.[67]

***

The connection between all these rhythmic feels is the African rhythmic sense that I discussed earlier in the "Rhythm in Black Music from the Legacy of Slavery" section of this chapter. The African rhythmic sense is so dominant in Black music that it persists with the creation of each new rhythmic feel within Black music, from drill to Afrobeats. Thus, the influence of the African rhythmic sense — which was first brought to the New World more than 400 years ago — is undoubtedly the most impactful element contributed by Black music artists to Western popular music. And among all of the Black music artists who have played a pivotal role in advancing the African rhythmic sense and prompting the overall *rhythmification* of Western popular music, as well as being the foundational guiding light for hip hop/rap music and its beatmaking tradition, none have had more influence than James Brown.

[67] Each of these songs discussed here are available on all major streaming services.

The Indelible Influence of James Brown on Rhythm in Western Popular Music

"The 'One' is derived from the Earth itself, the soil, the pine trees of my youth. And most important, **it's on the upbeat—ONE two THREE four—not the downbeat, one TWO three FOUR,** that most blues are written. Hey, I know what I'm talking about! I was born to the downbeat, and I can tell you without question there is no pride in it. The upbeat is rich, the downbeat is poor. Stepping up proud only happens on **the aggressive 'One,' not the passive Two,** and never on lowdownbeat. In the end, it's not about music—it's about life."
—James Brown[68]

"To Brown it was a heartbeat that connected him to the dancers and singers and timekeepers who came before him. The One put him on a timeline, though the way he talked about the beat, it put him at the end of the line: the ultimate expression of a heritage."
—RJ Smitth[69]

With the exception of Louis Armstrong, no single person has had more of an impact on rhythm in Western popular music than James Brown. But while Louis Armstrong's impact was more broad in this regard, James Brown's impact was quite specific and tethered to one rhythmic approach: The One. James Brown didn't

[68] RJ Smith, 5 (emphasis mine).
[69] *Ibid*.

invent the One, but his use of the One — as a guiding rhythmic force and the fundamental musical principle and philosophy that he built his music around — changed popular music forever. The sheer number of major musicians and recording artists that James Brown, and by proxy the drummers who played in his bands the Famous Flames and The JBs, influenced is astonishing. And James Brown's impact on hip hop/rap music is larger than previously considered. In this section, I explore James Brown's use of the One and the indelible mark that he has left on Western popular music, especially hip hop/rap music.

James Brown's Popularization of the One

Up until James Brown, the Two (not the One) was the prevailing preference in popular music. James Brown changed that. He moved the preference for the rhythm's emphasis on the second and fourth beats of a measure — the standard established by blues — to the *first* beat. In doing so, James Brown made the One the rhythmic North Star that all popular musicians followed. Largely because of James Brown, the switch to the One as the primary approach to rhythm in Western Popular music became permanent.

It's also important to note that while James Brown is without question most responsible for popularizing the One, it is something that he initially keyed in and picked up on from the two New Orleans drummers in his band between the late '50s and early '60s: Charles Connor and Clayton Fillyau. And Clayton Fillyau was the drummer most responsible for pushing James Brown to the One and *leading* him to funk.

The Influence of James Brown's Drummers

Today, Clyde Stubblefield often gets the most attention of all of the James Brown drummers, mostly because of his drum performance on one particular James Brown song: "Impeach the President," a song mostly noted for having been sampled many times in hip hop/rap music. However, Clayton Fillyau, James Brown's

drummer in the late '50s, was a critical precursor to Stubblefield.

Certainly, Fillyau was as essential to James Brown as Stubblefield, especially in terms of being the key to what James Brown was doing with regards to soul and rhythm. But in terms in of Western popular music more broadly, Fillyau was a much more important factor in the development of twentieth-century American popular music. It's Clayton Fillyau who taught James Brown the One! And Fillyau's own story of how he learned the One further cements the debt popular music owes to the city of New Orleans. Jim Payne's interview with Clayton Fillyau (republished in part in RJ Smith's *The One*) helps explain this:

> "Fillyau told Jim Payne, the only person to interview him, that **the most important rhythmic lesson of his life was taught by the drummer in Huey 'Piano" Smith's band The Clowns.** This protean New Orleans block party of a group was traveling with Silas Green From New Orleans's black minstrel show through Jacksonville in the late 1950s. Fillyau happened to be in Jacksonville, and he watched them play on the street there, then caught up with the drummer in his hotel room. 'Back then musicians were always in everybody's room playing," said Fillyau. They started jamming, and the older man, probably Charles 'Hungry' Williams, showed him a little lesson in ***New Orleans drumming*, taking him from standard stiff beat-keeping to secrets of the second line. Then he bore down, as if to say it all comes down to this, and told Fillyau, 'Now use your imagination. Only thing you got to remember is, *'Where is one?'* I don't care where you put it on those drums.'** Meaning you can hit it on the snare, bass, or cymbal. 'Remember where *one* is and you'll never lose time.'"[emphasis mine][70]

It's further worth noting that the New Orleans drummer Clayton Fillyau was the drummer on "I've Got Money" (1962), the song widely credited as the actual first funk track, which was the precursor to *funk* as we would come to know it in 1965 when James Brown released "Papa's Got a Brand New Bag (Part 1)."[71] Fillyau's drumming on "I've Got Money" is undeniably funk. And when all the other music is stripped away, you hear the quintessential funk drum break.

By the time Stubblefield met James Brown and joined his

[70] RJ Smith, 117 (emphasis mine).

[71] The Meters deserve some credit here, too. The Meters' first commercial release was in 1969, but as a known New Orleans "funk" band, they were undoubtedly performing the style and sound around the same times James Brown hit upon it.

band as the *second* drummer after Jabo Starks (who had joined just two weeks earlier) in 1965, James Brown had already been schooled in funk rhythms by Clayton Fillyau. Thus, James Brown was already dealing in funk prior to 1965, but he moved deeper in that direction with the additions of Starks and Stubblefield. But since James Brown had been learning from and studying under Fillyau for several years, by the time Starks and Stubblefield joined his band, James Brown already knew *how* to get the rhythm and sounds out of *any* drummer he chose for his band. And he chose Starks and Stubblefield precisely because they could play what *he* (James Brown) wanted.

Fittingly, by the mid-'60s, James Brown had regularly kept a handful of drummers on staff — as many as five at a time — including Starks and Stubblefield. A bit of revisionist history has created the legend that Starks and Stubblefield were "irreplaceable", but while both drummers were exceptional, for James Brown, they, too, were replaceable because James Brown always had an extra drummer. And between 1965 and 1970(1), the years that Starks and Stubblefield played with James Brown, both drummers themselves would have conceded this fact.

Two Mighty James Brown Drummers: Jabo Starks and Clyde Stubblefield
The James Brown School of Funk and Drumming

Having already discussed Clayton Fillyau, the drummer who taught James Brown the One and funk, and having set the record straight on at least one revisionist history concerning James Brown's drummers, here I want to distinguish a couple of misrepresentations concerning about Jabo Starks and Clyde Stubblefield, two of James Brown's most impactful drummers.

Jabo Starks

If Clayton Fillyau was James Brown's most critical drummer, Jabo Starks was James Brown's most *powerful* drummer. Jabo could do it all, especially shuffle rhythms. Because shuffle rhythms are ubiquitous in Black music, and because there are a number of rhythmic feels that it's impossible to assign credit or *invention* to, I'm opposed to assigning the name of any one musician to any time feel. That said, when it comes to studying the mastery of the specific shuffle rhythms that defined rhythm & blues of the early to mid-'60s, there's one drummer who stands out among the rest: Jabo Starks. Studying Jabo Starks's drumming — or "Jabo Time" — is a helpful way to learn swing rhythms and how to maintain steadiness within them.

To understand the indirect and direct impact of Jabo Starks (by way of James Brown), you have to begin with his work with Bobby "Blue" Bland. Although Bland was a product of Memphis, Tennessee, his band, which included trumpeter Joe Scott and trombonist Pluma Davis, had considerable influence on New Orleans musicians; more importantly for our purposes here, it was the band where Jabo Starks learned the most from. In a 1995 interview with Jim Payne, republished in part by Charles Farley's book *Soul of the Man — Bobby "Blue" Bland* (2011), Jabo Starks recalled that this band was the "best" he'd ever played with:

> Wayne Bennett was on guitar and Bobby Forte played tenor sax. Bobby was just a natural player. He was out of the "holiness" church. That was the Joe Scott Orchestra — **musically that was the best band I played with.**
>
> I was the youngest thing in the band and those guys taught me a lot — Joe Scott and Pluma Davis. Joe Scott, the trumpet player, was the bandleader, Pluma Davis, the trombone player, arranged for the band, too. Pluma had his own band when I met him. They taught me— ***"I don't care what you play, I don't care how you play, I don't care if you don't ever play fancy. I don't care if you don't ever play the greatest solos in the world, all I want you to do is remember this — play time. Play the time. Hold the time. You're the heartbeat. Once that time starts, you hold it right there. Whatever anybody else does, don't you go there. Make them come back to you."*** [emphasis mine][72]

[72] Charles Farley, *Soul of the Man — Bobby "Blue" Bland* (Jackson: University Press of Mississippi, 2011), 106-107, emphasis mine.

Jabo Starks played on Bobby "Blue" Bland's "I Pity the Fool" (1961). What makes this song a song a standout, especially for our purposes here, is Starks's alternating, *dragging* pattern of the snare, and his hi-hat playing against that rhythm. Further to this, a survey of other songs that Starks played on between 1961 and 1973 offer proof of Starks's use of shuffle rhythms as well as the full dynamic of the playing abilities that made him James Brown's most powerful drummer.

10 Songs that Jabo Starks Played Drums on That Should be Studied for their Rhythm

With Bobby "Blue" Bland:

"Cry, Cry, Cry" (1961), "Ain't Nothing You Can Do" (1964) — on this song, the swing is vicious, and the time is steady — and "St. James Infirmary" (1961).

"I've Been Wrong So Long" (1961) — on this song, we hear Jabo's unique time and slight click-and-clock rhythmic feel, "Who Will the Next Fool Be?" (1962), and "You're Worth It All" (1962) — on this song, it's not the click-and-clock rhythmic feel, but this song demonstrates how broadly Jabo Starks was working with shuffle rhythms, syncopation, and off timing.

"That's The Way Love Is" (1963) — here, even though Jabo's version of the click-and-clock rhythmic is not machine made, it's often more complex.

"Bobby's Blues" (1963) and "Poverty" (1966).

With James Brown:

"Get Up (I Feel Like Being a) Sex Machine" (1970). Catfish Collins on guitar and Bootsy Collins on bass. The rhythmic feel of "…Sex Machine" drags and grooves much harder than "Funky Drummer," the James Brown song that gets most attention when it comes to discussing hip hop/rap music and James Brown's drummers. One reason is because Bootsy Collins's bass playing: He plays the bass against the beat and the bass is out in front. The other reason is Jabo Starks's drums! Although steady and reliable,

Starks's drums on "...Sex Machine" have more shuffle (again, shuffle rhythms was the foundation of Jabo Starks's style). The addition of new, younger band members unlocked Jabo's real power. And I suspect that James Brown knew this would happen. Also on "...Sex Machine," note how the snare drops out at times, other times it's flush on the two, other times it's off, and other times it's replaced by a click stick (rim shot).

"Get On the Good Foot" (1970).[73] Jabo's shuffles!

"The Payback" (1973). On this song, the snare is slightly dragging, and the click-and-clock effect can be faintly heard. Starks alternates between hitting the snare on the two and four harder and less harder. Having studied Starks, whose shuffle playing was fundamental to his playing, these velocity changes on the snare were deliberate.

Interesting note: James Brown, who had been grooming The Pacesetters to replace his former band, fired every band member *except* Jabo Starks. As noted by biographer RJ Smith, James Brown was always 10 steps ahead. He planned for this moment. He had replaced band members before, and he knew that each time that he did, the music changed. And while he planned for this change, what he didn't account for was how powerful the change would be this time around. James Brown's funk had first reared its head almost a decade earlier, but "…Sex Machine" marked a turning point: This was a dirtier, deeper, harder funk that didn't just stay on the One, it swung and shuffled it. And <u>that</u> was because of Jabo Starks.

[73] "Get On the Good Foot" was sampled by BDP for the song "Jack of Spades" (1988) from the movie *I'm Gonna Git You Sucka* (1988).

Clyde Stubblefield

Clayton Fillyau was James Brown's most consequential drummer and Jabo Starks was James Brown's most powerful and dependable drummer. Where that leaves Clyde Stubblefield in the hierarchy of James Brown's mighty drummers, I'm not sure. When asked directly if Clyde Stubblefield was James Brown's "best" drummer of all, Questlove, renowned drummer of The Roots, was reluctant to agree with that assessment (and rightfully so). Still, he did have this to say:

> "I believe that Clyde was the most effective drummer that James Brown has ever utilized. **Jabo was his most *powerful* drummer**, but Clyde was the most effective."[74]

I'm not sure what Questlove meant by most "effective" when assessing Clyde Stubblefield, but I certainly agree that Jabo Starks was James Brown's most powerful drummer. Still, Clyde Stubblefield was no slouch; and his influence is indisputable, even if a little misplaced and greatly misrepresented. For instance, there are a number of James Brown songs that people assume that Clyde Stubblefield play the drums on when, in fact, it was Jabo Starks.

Clyde Stublefield and the Misconception of "Funky Drummer"

Today, out of all of James Brown's drummers, it's Clyde Stubblefield who gets the most shine. Even worse, some people even believe that Clyde Stubblefield was James Brown's *only* drummer. Much of the attention on Stubblefield centers around his performance on the James Brown song "Funky Drummer"

[74] "Questlove on Clyde Stubblefield," Crimes Against Music, March 29, 2011 http://charmicarmicat.blogspot.com/2011/03/questlove-on-clyde-stubblefield.html?m=1 (emphasis mine).

(1970). *The "Funky Drummer" sample*, as it's commonly referred to by many in hip hop/rap's sample culture, is just a short drum break. Because Stubblefield was the drummer who performed this break, he has been elevated to a status beyond James Brown's other drummers, including the great Jabo Starks. This is unfortunate for two reasons. First, Clyde Stubblefield was an excellent drummer; there was much more to his playing than the "Funky Drummer" break, so it's wrong to essentially reduce his work down to one drum break. Second, there's a serious misconception surrounding the "Funky Drummer" itself.

It has become cliché for some commentators to discuss "Funky Drummer" and Clyde Stubblefield with doting praise. Regarding the song's relationship to hip hop beatmaking and hip hop/rap music generally, the legend is that "Funky Drummer" is one of the most sampled records in history, and that Clyde Stubblefield is one of the most sampled drummer of all time. While these claims might be true — some estimates say that the song was sampled 1,400 times — ultimately, the claims can't be substantiated because when it comes to individual drum sounds, *not* drum breaks and loops, most source material in hip hop/rap music *cannot* be identified. And it's the individual drum sounds that have been the backbone of practically all hip hop/rap beats (save for drumless loop beats) since the early '90s. And of the source material that we do know of, the Winstons's "Amen Brother," aka the "Amen Break" (performed by drummer Gregory Sylvester "G.C." Coleman), has reportedly been sampled more than *4,000* times (according to WhoSampled). But as impressive as these numbers may be, these figures, as they are, do not speak to the funk rhythmic feel connection to hip hop/rap music.

Another view concerning the sampling of "Funky Drummer" is that it helped popularize sampling as a music process and technique, the primary evidence being the high number of times that it was sampled and its usage in three specific hip hop/rap songs from the '80s: "South Bronx" (BDP, 1987), "Eric B. Is President" (Eric B. & Rakim, 1987), and "It's A Demo" (Kool G. Rap & DJ Polo, 1989). But the claim that "Funky Drummer" helped popularize sampling is a myth.

Most of the cited uses of "Funky Drummer" actually occur well after sampling was *already* popularized by hip hop/rap music. A survey of hip hop/rap releases between 1990 and 1995 shows that samples of "Funky Drummer" were not prominent at all. According to *WhoSampled*, of the 1,750 total songs that sampled "Funky Drummer," only about *100* of these songs sampled "Funky Drummer" between 1987 and 1995. This means that the vast majority of hip hop/rap songs that contain samples of the "Funky Drummer" break were made *well after* hip hop/rap music had established its sampling tradition and popularized sampling. And looking at the major hip hop/rap songs between 1987 and 1990 that did sample at least snippets of the drum break from "Funky Drummer," it's clear that phenomenon was more about *versioning* than anything else. Which is to say, "Funky Drummer" did not convey any impact on the practices, processes, methods, and techniques of beatmaking in the hip hop/rap music tradition. Thus, the attention on "Funky Drummer" is greatly misplaced and misguided. Celebrating a song for the number of times that its drum break was sampled might be cool for trivia, but the exaggerated connections that are made between "Funky Drummer" and the development of hip hop/rap music's beatmaking tradition are wrongly assumed.

Still, because some commentators believe that "Funky Drummer" helped popularize sampling in hip hop/rap music, the thinking follows, then, that *Clyde Stubblefield* himself had a huge influence on hip hop/rap music. But both of these claims are misplaced. If we look closely at the connection between funk music, specifically James Brown's brand of funk music and its relationship to hip hop/rap music and, more precisely, hip hop/rap beatmaking, this link is not based on *one* oft-sampled drum break. Instead, the real connection is based on several other factors which I explored earlier in this chapter — notably the fact the core arrangement philosophy in the beatmaking tradition hip hop/rap music is based on using the One as a rhythmic anchor, the North Star of all timing elements.

The "Funky Drummer" legend is an easy, eye-catching access point for certain commentators because it's a numbers draw and oft-used namedrop to demonstrate their alleged insider status. The story sells itself: *It's one of the most sampled songs in hip hop/rap history*. But the commentary always stops there, as if the number of times that "Funky Drummer" was sampled is proof of its influence in hip hop/rap music. Except it doesn't work like that because this area isn't so cut and dry.

The assumption is that "Funky Drummer" was such a hot record that *everybody* wanted to sample it. The truth of the matter is that in sampling's nascent days, source material was trendy. As the earliest sample-based beatmakers (producers) heard songs with the "Funky Drummer" break, they, too, sought to sample it because they already had the record at home. In the mid- to late '80s, sample-based beatmakers (producers) — who were predominantly Black — were just beginning to unlock the potential of the record collections that they had at home, thanks to their parents, older siblings, or other family members. Testing out your skills on and showing that *you, too,* had "Funky Drummer" was a kind of thing, a novelty; for some, it was even a rite of passage. But that was it.

Also, for context, there are numerous songs that have been sampled thousands of times; for instance, Marvin Gaye's "I Want You," which, according to *WhoSampled*, has been sampled 1,186 times. But these numbers, as they're often presented in a *Guinness Book of World Records* flare, say nothing of the compositional impact that these songs — as source material — may (or may not) have had on the hip hop/rap music's beatmaking tradition.

Further to this point, as far as rhythmic feels go, "Funky Drummer" was not one of the main songs from the James Brown school of funk that would dramatically influence hip hop/rap music. That honor belongs to two other songs: "I Don't Want Nobody to Give Me Nothing (Open Up the Door, I'll Get It Myself)" (1969), on which Stubblefield performed, and "Get Up (I Feel Like Being a) Sex Machine"(1970), on which drummer Jabo Starks performed along with Bootsy Collins on bass. And while "I Don't Want Nobody to Give Me Nothing" gave a lesson in playing the One, it was "…Sex Machine…" that demonstrated *how* to make the One *loose*.

This development would have a huge impact on how grooves and loops would be constructed in hip hop/rap beatmaking. First, through hip hop DJ techniques. As I mentioned in Chapter 1, Kool Herc first learned DJing under the tutelage of DJ John Brown, a fellow Bronx DJ who spun, most notably, James Brown records. Herc zeroed in on the breaks and grooves of these records, and through his "merry-go-round" technique he formulated the foundation of the hip hop DJ style. Grandmaster Flash picked up on what Herc was doing, and within a few years he had added his own techniques, like the "spin back," the "quick mix theory," and the "punch phase". All of these techniques were based on the One, the downbeat of breaks and grooves. Second, through downbeat-led sequencing, i.e. starting a sequence on the downbeat — on the One — usually a kick first or the part of a sample that functions as a downbeat. Third, through the structuring of sample-based beats based on vamps, monochords, and reconceptualized "wrong" harmony.

While the drummers of James Brown are crucial to the origins of funk music, we must recognize that it was James Brown who recognized what the One *could* become. Under James Brown's direction, the One became a guiding force in Western popular music, something that did two important things. First, it laid the foundation for funk as a genre. Second, it shifted emphasis from the Two, and served as the basic rhythmic model that would be adapted by practically every musician in Western popular music after him.

Finally, there's something else that must be clarified with regards to "the Funky Drummer" – It was not the *only* James Brown song sampled in hip hop/rap music. Hip hop/rap beatmakers (producers) sampling James Brown in the late '80s and early '90s didn't say, "*Clyde Stubblefield* drums" or *"Jabo Starks drums*," they said "*James Brown* drums!" And the majority of these songs did *not* feature Clyde Stubblefied, but rather Jabo Starks. Additionally, some of the so-called "James Brown drums" records didn't even feature James Brown, but rather his style, sound, and aesthetic that he cultivated from his band The J.B.'s. For example, listen to Bobby Byrd – "Know You Got Soul" (1971), again Jabo Starks on Drums.

Even still, what mattered most were the individual drum sounds themselves; and it didn't matter *which* James Brown record — or any other recording artist's record for that matter — that the individual drum sounds came from or who was the drummer that played them. If the drums sounded dope, they were sampled and recontextualized into new beats, nothing more than that.

Other James Brown Connections to the Hip Hop's Beatmaking Tradition

James Brown Knew What a Trombone Sounded Like

"Does it sound good to *me*? Then it's not incorrect."
—James Brown[75]

When it comes to beatmaking, James Brown is uniquely instructive for a number of reasons. First, James Brown challenged the premise that one needs to be able to play a traditional instrument in order to get out of it the sound and feel that you desire. Do you *need* to know how to play a traditional instrument, in the *conventional* sense, in order to play it? What if you know what a trombone is *supposed* to sound like? Can you then instruct a trombonist to play the sounds and phrases that you hear in in your head? That's what James Brown did, and not only with trombonists, but with trumpet players, bassists, guitarists, *and* drummers. This is one of the things that made James Brown any particular instrument an extraordinary musician, producer, and recording artist.

Second, when we consider James Brown in this light, he serves as reminder that the premier instrument is the brain, followed closely by the heart. Traditional instruments and electronic instruments alike are a distant third. James Brown biographer RJ Smith has noted that while James Brown did not read music and could not always talk music to his musicians, he *knew* music. James Brown "quickly grasped the skills new instrumentalists brought to the

[75] RJ Smith, 130.

show. He reacted to them, and used them to challenge himself."[76] Knowing music, and more specifically the *know-how* for making music, particularly in regards to instrumentation, is not limited to simply whether you can play an instrument or not. Know-how extends to one's ability to create musical ideas, it extends to one's understanding of how sounds go together — even when logically the combination is "wrong" — and how instruments, via musicians, can bring those sounds, ideas, and arrangements together.

This understanding was transmitted from James Brown to hip hop's beatmaking tradition. James Brown is likely the most sampled recording artist in hip hop/rap music history. For the most part, this is because of the drums (mostly performed by either by Jabo Starks or Clyde Stubblefield) on James Brown songs from 1969 to 1973. But setting aside the direct nature of samples taken from James Brown songs, there's another direct (and rather powerful) connection that can be drawn between James Brown's approach to rhythm and the way hip hop/rap beatmakers (producers) approach rhythm. James Brown was the guide for early hip hop DJs; DJ Kool Herc has stressed the impact that James Brown had on him and the creation of the hip hop DJ style. Zeroing in from there, we can see how this connection grew stronger as the beatmaking tradition of hip hop/rap music came into bloom.

Throughout the late '80s and early '90s, the music of James Brown was sampled in hip hop/rap music more than any other single artist. Much attention has been placed on the drum breaks and individual drum sounds that were sampled from James Brown records, but a closer observation reveals that rhythms, riffs, and sound stabs were also sampled from James Brown records in equal measure. This education in *the sound of James Brown* taught hip hop/rap's early beatmaking pioneers about rhythm, arrangement, and sound design. Further to this, it taught these early beatmaking pioneers how to emulate such arrangements and phrases on beat machines. In this paradigm, James Brown rhythms were used as models for beatmakers (producers), with no single way being the absolute answer. Which is to say, beatmakers (producers)

[76] *Ibid*, 116.

developed a parallel "*whatever works*" aesthetic and procedural approach to beatmaking, much in the same way that James Brown had developed a the same approach with his drummers and bandleaders. In my interview with Marley Marl, who was first a DJ and never a traditional musician, he related that, while most of his drum sounds were not limited to James Brown records as many beatmakers (producers) and commentators have wrongly assumed, he did study the music of James Brown, and that what he learned had an impact on the way in which he arranged his beats. In other interviews, True Master, DJ Toomp, and DR Period echoed Marley Marl. And DR Period, in particular, spoke to me about the direct impact that Jabo Starks had on his understanding of arrangement, music making, and the "whatever works" mentality of beatmaking.

Other James Brown Connections to the Beatmakinng Tradition of Hip Hop/Rap Music

Never Lose Sight of the One

James Brown's popularization of the One rhythmic feel is most noticeable on the song "I Don't Want Nobody to Give Me Nothing (Open Up the Door, I'll Get It Myself)" (1970). It's also a clear blueprint to the hip hop DJ style — *the spin back started on and always came back to the One* — and the fundamental structure of the loop in hip hop beatmaking. Fundamental to James Brown's philosophy around the One was his steadfast dedication to it, the idea that no matter what you did *around* the One, it must be the center, the focus for which all other music patterns follow and

adhere to.[77] This means that there's always conversation going on, and rhythm is always the center of this conversation. In other words, we understand that a dialogue with the One is not only new but fundamental to drumming in groove-based musics. In a traditional band setting with traditional musicians, this dialogue is a conversation between bandmates; alternatively, on a micro-level, the drummer is engaging in a conversation with the kick, snare, and the hi-hat. This is highly instructive for hip hop beatmakers because rhythms are typically *programmed* and performed.

With few exceptions, apart from some experimentation here and there, the One has been a factor in practically every song (beat) in hip hop/rap music ever released. Noting James Brown's philosophy concerning the One, we understand that as long as you know *where* the One is, as long as you don't lose sight of it, as long as you respect it, you can perform or program changes — pulls, pushes, added syncopation — all around it. This is the essence of what makes the click-and-clock rhythmic feel work in hip hop/rap music; this is what J Dilla understood, which is what allowed him to stylize his use of the click-and-clock rhythmic feel.

[77] In terms of the One as a way to structure rhythm, James Brown's disciples include most notably: Stevie Wonder, Michael Jackson, Tower of Power, Kool & The Gang, Earth, Wind & Fire - "I Think About Lovin' You" (1971); "Help Somebody" (1971) "Moment of Truth (1971) (a b-boy anthem), 1973: Earth, Wind & Fire finds their sound, the sound that we would come to know them by. (Between '71 and '72, they were figuring their way around a jazz and funk fusion, the funk side being influenced by James Brown.) The Commodores, Bootsy Collins, George Clinton. Bootsy Collins brought James Brown's focus on the One with him when he joined George Clinton. So critical was this to George Clinton's music that RJ Smith described it this way: "In one of history's biggest cases of industrial espionage, *Bootsy had brought Brown's prime directive, the One, with him to the P-Funk camp, and Clinton delighted in the secrets it unlocked. The One became for him less of a way to structure rhythm and more like the Masonic secret of how everything worked.* It was the deal he presented to the audience. If you accepted the One into your life, you were one of us."(RJ Smith, 306-307).

Four Critical Factors That Impact Approaches to Rhythm in Hip Hop/Rap Music: Machine-Made Music, Dance Music as a Function of Hip Hop, Individual Drum Sounds, and the Nature of the Loop

Having looked at the origins of rhythm in Black Music, and having examined the fundamentals of rhythm and rhythmic qualities, the characteristics of rhythmic feels, and the impact of James Brown on rhythm in Western popular music, I turn now to four critical factors that impact approaches to rhythm hip hop/rap music.

Definition of "Machine-Made Music"

What is meant by "machine-made music" can be described simply as music that is made through the use of electronic music production instruments (EMPIs) and other digital music production tools, most notably Digital Audio Workstations (DAWs). Even though the term machine-made music may serve its purpose as a catch-all label or descriptor, we must recognize that the assumption that machine-made music is too rigid or

simple — or that "*human*-made music" is, by default, more flexible or more complex — couldn't be farther from the truth. First, the human factor exists in the machine-made music environment; programming, for instance, is a skill all its own, and every musician who makes music via a machine is also a programmer. Second, today's music machines are incredibly flexible. Essentially, there are no limits to what digital music production tools can achieve today. If it's rigidity that you want, the machine can do it. If it's unevenness or a combination of a little offness with a little evenness that you're after, the machine can do it. If you want the presence of the machine to be out front and noticeable, go for it! On the other hand, if you want to tuck the machine's touch and boost up the human feel, you can pull that off, too.[78]

Assumptions About Rhythm and Machine-Made Music

Up to the end of the twentieth century, conventional wisdom regarding rhythm was that things like *groove* and *feel* where only possible through *human performativity* in the traditional sense. The idea was that *feel* was the product of human touch, something that musicians could add to rhythmic structure only through their *performance* of it. Another assumption was that the groove qualities of rhythmic music, i.e. the characteristics that produce rhythmic feel, arise specifically from micro-temporal deviations from a presumed time norm. Yet another assumption was that machine-made music was devoid of groove qualities because it presumably lacked the micro-temporal variations added by a human in performance. Electronic music production, ergo machine-made music production, has proven all of these assumptions wrong. This is especially true in light of the fact that machine-made music, i.e. music made with drum machines, digital samplers, and DAWs, involves a remarkable level of experimentation with and manipulation of the micro-timing of rhythmic events.[79] The most

[78] Danielsen, location: 116-151.
[79] *Ibid*.

obvious proof against the (previous) conventional wisdom regarding rhythm, human performance capabilities, and machine-made music has been the evolution of electronic music, with hip hop's beatmaking tradition at the forefront of this evolution.

Sly Stone – Pioneer of Machine-Made Music and O.G. Beatmaker

Of all the early adopters of drum machines as part of the recording process, nobody used the drum machine like Sly Stone first did in 1969. His use of the drum machine is the precursor to what beatmakers (producers) in the hip hop/rap music tradition would eventually come to do and build upon. Sly Stone's own record label, Stone Flower, may have been short lived (1969-1971), but the innovations that appeared on his label's first and only compilation album still reverberate today. This is because the Stone Flower album, *I'm Just Like You: Sly's Stone Flower 1969-70*, represents the first time that a pop musician used a drum machine on an album.[80]

Sly Stone used the maestro Rhythm King MRK-2 drum machine, one of the earliest drum machines, which at the time, was originally created and used mostly for accompanying live organists or other musicians. But guided by what he saw as the Rhythm King's possibilities, Sly Stone reimagined the drum machine, *much in the same way beatmakers (producers) would do later with drum machines like the E-Mu SP 1200 and the Akai MPC 60 and 60 II,* and he programmed the sounds in a way that made the Rhythm King a *featured* instrument. The Rhythm King's sounds weren't real drums; in fact, the Latin presets that Sly Stone was drawn to were weak sounds — snares that were faint, barely registering an attack point; kicks that had no punch; hi-hats that sounded light and cheesy, more a metronome pulse than a proper hi-hat. Still, Sly Stone made it all work. And his experimentations with the

[80] DMasc, "Looking For The Perfect Beat Machine From Sly Stone to DJ Premier—how synthetic rhythm transformed music," *Cuepoint/Medium* (Nov 4, 2014) https://medium.com/cuepoint/looking-for-the-perfect-beat-machine-3c110417f81a.

Rhythm King would go on to put a stamp on his next album *There's A Riot Goin' On*.[81]

Sly Stone didn't use the Rhythm King on every song from *I'm Just Like You…*, but he did use it on most of the songs. Here, I highlight three of those songs and note the rhythmic patterns of each use of the Rhythm King. These three songs collectively foreshadowed the rhythm and drum patterns that would eventually become staples in the beatmaking tradition of hip hop/rap music.

Sly Stone - "Just Like A Baby." Notice the shuffling hi-hat, syncopated tom hits that skip through the song and the snare, which doesn't show up until halfway through the 4-minute song, lands flush on beats two and four except towards the latter half of the 4-minute song.

6IX - "I'm Just Like You." This is bascially a straight ahead boom bap construction: kick kick snare | kick kick snare | kick snare | kick kick snare with straight 8th hi-hats. Also, includes other syncopated percussion sounds.

Joe Hicks - "Life & Death in G & A (Pts. 1 & 2). On this song, the snare lands only on beat four, and the hi-hat sounds basically like a metronome. Also, this song includes a brush sound that shuffles throughout on beats one through four.

Sly Stone - "Africa." This song incorporates a sleigh bell sound for the hi-hat. This is something that would become a staple of some early boom bap beats. This, along with syncopated snares.

[81] *Ibid*.

Dance Music as a Function of Hip Hop

> "Just cause I dance don't mean I'm pussy."
> —Pop Smoke, "Christopher Walking"
>
> "She like the way that I dance, she like the way that I move."
> —Pop Smoke, "Dior"

One of the things that makes hip hop/rap music unique is that aside from being its own fully sovereign music culture and tradition, it's grounded in the Black dance music tradition *and* it's a form of art music. This duality, *dance music as art music*, has a long list of recording artists that personify this unique aspect of the Black music tradition — from Stevie Wonder to Curtis Mayfield to Earth, Wind & Fire to Kool & The Gang, just to name a few. And what we need to understand, something far too many hip hop/rap music writers either fail to recognize or outright ignore (because it doesn't suit *their* idea of hip hop/rap music), is that hip hop/rap music began as — and remains at its core — *dance* music.

As I noted in chapter 1, the hip hop DJ style, and by proxy hip hop/rap music, was inspired by and born from dancing. B-boying (the dance) was what the music was about, and hip hop DJing was about facilitating the objectives of b-boy dancers, giving them what they wanted, what they *needed* to dance. Even the heyday of avant-garde hip hop/rap "art music" of the late '80s and early '90s was deferential to this dance aspect. From Marley Marl to A Tribe Called Quest to Main Source to Gang Starr to Dr. Dre to Pete Rock & CL Smooth to DJ Quik to De La Soul to Luke Skywalker and The 2 Live Crew to Wu-Tang Clan[82] to The Pharcyde — The music kept a keen eye on giving people something to *dance* to. Consider some of the most beloved hip hop/rap classic songs, like: "The Symphony" (Juice Crew All Stars, produced by Marley Marl, 1989), "I Manifest" (Gang Starr, produced by DJ Premier, 1989); "Eye Know" (De La Soul, produced by Prince Paul, 1989); "They Reminiscence Over You T.R.O.Y." (Pete Rock & CL Smooht, produced by Pete Rock,

[82] "Protect Ya Kneck," Wu-Tang Clan's debut single, and one of the group's hardest tracks, was a dance-floor favorite — I was there, I lived it.

1993); "Runnin'"(The Pharcyde, produced by J Dilla, 1995). As much as all of these songs were (are) celebrated for their art, they were all still *danceable* toons. That was no accident. A danceable rhythm was fundamental to all of these songs. Party songs, hard core, extra lyrical, Miami bass, fun, gangsta rap — Whatever the category, all of these songs were danceable, and that wasn't a coincidence.

Dance was once so prominent in hip hop/rap music that rappers literally had backup dancers as official, credited members of the crew. For example, Big Daddy Kane, who was known for his *lyricism*, had Scoob and Scarp, two of the most well-known hip hop dance duos of the era. (Big Daddy Kane often joined with them on dance routines.) Kool G. Rap & DJ Polo had Shawn & Kenny (T.F.C Crew). EPMD had Steezo (who went on to record an hip hop/rap album himself). Hevay D. had The Boyz — Trouble T-roy and G-Wiz. De La Soul had China and Jett (two women). During this same era, hip hop/rap music videos routinely featured dancing. And today, with trap music and drill dominating hip hop/rap music releases, we continue to see how these styles and sounds are powered by (and remain in deference to) *dancing*. One only need look at the millions of viral TikTok dance videos to confirm this fact.

And in all dance music, *rhythm* is king!

But hip hop/rap music as *dance music* is not a neutral topic. Opinions about what is and isn't "real" hip hop/rap abound, and often hip hop/rap music's dance music dimension isn't properly discussed (if discussed at all), even with hip hop/rap music's obvious legacy as a form of dance music. Thus, the dance music dimension of hip hop/rap music can tell us a lot about how hip hop/rap music is covered in the press. More importantly, the dance music dimension reveals a lot about *how* hip hop/rap music is actually made and *who* actually makes it and, notably, which styles and sounds they make. Preference is never as simple as it may seem. In this way, the hip hop/rap music as dance music function reveals not

only considerations of individual taste, but also the inherent racial predilections and biases prevalent among many white hip hop/rap writers. Likewise, the hip hop/rap music as dance music function also sheds light on the different approaches to beatmaking — and subsequently rhythm — along racial lines.

As I've discussed in various parts of this book, race and its implications on politics, culture, and the arts, is inescapable. The idea, then, that race is a "neutral" factor in hip hop/rap media is absurd. It's no secret that the most prominent hip hop/rap media outlets are marked by editorial rooms that are dominated by white people. While this definitely has an impact on how hip hop/rap music is written about politically and culturally, it also has an impact on how the musicality of hip hop/rap music is discussed.

Similarly, the idea that race is a "neutral" factor in hip hop/rap beatmaking is simply not true. All music makers are a product of their influences as well as their aesthetic preferences and priorities, and of course their environments. Equally important, all musicians are guided by the goals and aims of the music that they make. This factor speaks directly to audience and function. *Which* audience are you making your music for, and *what* is the *function* that you hope your music will serve? From the mid-'80s to the mid-'90s, the audience and function motivators varied for beatmakers (producers), but giving people music to dance to remained a critical function for most beatmakers (producers) of the era. Making music that could be played in a club, ergo, making music people could dance to, was important to most notable beatmakers (producers) of the period. In my interviews with Marley Marl, DJ Premier, Buckwild, and DJ Toomp, each told me how important it was for them to "have music playing in the club," to have people "dancing" to their music — it was a fundamental part of their *aim,* not an afterthought. This goal, or the obvious consideration of making something to dance to (or not), is still present today. For instance, trap and drill is *intentionally* dance music, whereas the drumless loops style is *intentionally not* dance music.

This principle of giving people something to dance to (even when doing something avant garde) undoubtedly came from

experiences within Black cultural spaces, wherein a tradition of rhythm and groove-based music, a description that applies to '60s and '70s soul and funk music, was the norm and the constant aim. (For a review of Black cultural spaces and their implications for hip hop/rap music, See chapter 11.) Beatmakers (producers) who do not hold this principle (as at least a concern) do not focus on the dance function of hip hop/rap music. And there's nothing wrong with that. Hip hop/rap music is vast, it's not *limited* to its dance function. Still, it's among beatmakers (producers) in this category where you'll find more beatmakers (producers) flying under the "experimental" hip hop/rap music banner.

We can also make the connection that since most white beatmakers (producers) did not grow up in Black cultural spaces, ergo, did not go to or dance at Black clubs and Black house parties, the dance music function of hip hop/rap music is less of a concern for them. So it follows then that many of them tend to not focus on making beats that people can dance to. Not having the dance function as a concern when making beats is not an inherently bad thing for hip hop/rap beatmakers (producers). However, to divorce hip hop/rap music from dancing, its most fundamental function, is to distort what hip hop/rap music was born from and what hip hop/rap music has, on its base level, always been about. Moreover, the divorcing of the dance music function of hip hop/rap music, or support of the notion that dance has not always been central to hip hop/rap music, leads to a misunderstanding of how rhythm has historically been applied in hip hop/rap music. Moreover, divorcing hip hop/rap music from dance and the associated nuances that come with that makes it easier for some commentators to elevate certain styles, sounds, and sub-genres of hip hop/rap music, while downgrading and disregarding others. In the following chapter, one of my critiques of author Dan Charnas's discussion of J Dilla and the click-and-clock rhythmic feel is that he discusses the click-and-clock rhythmic feel as if it were the most important, most impactful rhythmic feel in hip hop/rap music history. Charnas's lack of discussion of boom bap as a rhythmic feel, and the implied disregard for the trap and drill rhythmic feels, bear witness to this.

The Impact of Drum Sounds on Rhythm in Hip Hop/Rap Music: From Breakbeats to Individual Drum Sounds

The drums of the '60s and '70s powered the drums of most hip hop/rap music from the late '80s and to the '90s; and these sampled drums carried with them the echoes of their rhythmic sense. Early on, these drums came typically in the form of the use of breakbeats. But by the early '90s, a serious shift had occurred. The move away from breakbeats to using individually sampled drum sounds was, for beatmakers (producers), about being able to have greater control and more creativity. Moreover, it was about the possibility of creating new rhythms that were not found (or possible) in the breaks of records that were typically sampled.

When beatmakers (producers) say "drum sounds", what we actually mean is drum *kits*. Our drum sounds represent our digital drum kits. Beatmakers (producers) sampled the kits and unique sounds from an unlimited number of drummers (most of which who were far less known than iconic drummers like Jabo Starks, Clyde Stubblefield, Bernard Perry, or John Bonham). These sounds were then modified, using various techniques, like pitch bending, reverb, compression, and EQ and then recontextualized in new hip hop/rap beats. Thus, the use of individual drum sound samples, as opposed to breakbeats, has dramatically impacted the approach to rhythm in hip hop/rap music.

The Nature of The Loop: In Hip Hop/Rap Music, Growth and Movement is Tied to the Loop

Rhythm is about reveling in the dominant present, a progression that emerges from *repetition* — i.e. a loop, a constant return that forms a groove. Rhythm in Black music, serving in its most fundamental role, is not preoccupied by linear progression, so while chord progressions — the succession of harmonies in a song — certainly occur in Black music, they are not prioritized. As I pointed out in chapter 3, the assumption of linear progression (the priority of Western classical music) is that growth or history's progress, i.e. *forward movement*, is based on a series of changes, and that only a *proper* sequence of chord changes "builds an arc, or a storyline, or somehow creates a sense of getting somewhere."[83] In this musical paradigm, harmony is king.

But this stands in stark contrast to hip hop/rap music, where rhythm is king and where "growth" and movement is tied to *the loop*. In hip hop/rap music, the loop (repetition of marquee music events) is the guiding arrangement structure around which every beat is made. The number of changes that may appear in a sequence is less important, what counts most is that things intentionally *loop back* to their beginning. In a typical rhythmic scheme in hip hop/rap music, all variations in a music sequence are in deference to the loop, i.e. repetition, not linear progression. Listen to Pete Rock & CL Smooth's "Straighten it Out" (1992) for an excellent example of a beat based on a one-bar loop with two main variations and minimal, strategically placed, changes. Here, it's also worth noting that for beatmakers (producers) who, to some degree, do prioritize linear progression, the loop tends to include *more* changes, or rather a higher number of successive changes before the loop repeats. But make no mistake, even in these cases the loop reigns supreme.

[83] RJ Smith, 173.

Putting it All Together

Some readers might find a discussion about the history of enslaved Africans and rhythm misplaced. But if we avoid the path of talking about slavery and how many of the fundamental tropes and characteristics of Black music were brought to the New World by enslaved Africans, we overlook the story of rhythm in Black music and we distort the reality of Western popular music as a whole. If we do not examine the story of rhythm in Black music, we dilute the power of this story and we misrepresent developments in rhythm in present-day music culture.

The story of the Black music tradition begins with the arrival of West African music characteristics in the New World. Having brought with them their musical culture, enslaved Africans filtered West African music characteristics and sensibilities through some aspects of the European musical system. Because rhythm is at the center of this story, and because rhythm remains the strongest cultural element and link to Africa that enslaved Africans brought with them and preserved when they were seized and dispersed as chattel in the New World, an examination of the importance of rhythm in Black music merits an extensive examination. For it is only through this examination that can we fully grasp how developments in of rhythm in Black music lead directly to the birth of the Black American music tradition, which is where all Western popular music arose from (see: the blues, jazz, gospel, rhythm & blues, rock 'n' roll, soul, funk, reggae, disco, and hip hop/rap music).

What I hope to have shown in this chapter are four things. First, that the African rhythmic sense survived slavery and manifested itself in Black music, mainly through syncopation and shuffle rhythms. Second, that the African rhythmic sense played a fundamental role in the origins and development of Western popular music, especially in the area of rhythmic feels. Third, that the evolution of drumming in Black music, most notably rhythm and blues, soul, funk, and reggae, shares the African rhythmic sense, and how the evolution of drumming in these genres has

been instructive to hip hop beatmaking. Fourth, that the art of sampling — i.e. borrowing, building upon, repurposing, and recontexualizing musical elements — has always been a mainstay of music making.

***

Like any major move that someone makes from one country to another, traditions travel with them. Normally, in this scenario, people bring as many valuables with them as they can afford to carry — including music instruments. This is the best context for understanding the move European settlers made to the New World. They *immigrated* by choice. Enslaved Africans, on the other hand, were seized and taken to the New World against their will. Stripped of everything that they owned, even their names, the valuables that enslaved Africans carried with them were entirely internal and expressed primarily through music and dance.

Once in the New World, enslaved Africans borrowed elements from the culture of their European captors, as well as their surroundings, and they refashioned these elements into traditions that preserved the priorities of their African roots. In regards to music specifically, this meant preserving the African rhythmic sense, a continuum that exists to this day. For enslaved Africans, the practice of borrowing and transformation was exemplified in language (for example, the development of patois and other coded language) and food, but nowhere was this transformative activity more apparent than in the area of music. And the defining element within this development was rhythm.

Such is the importance of rhythm to the Black American music tradition. And it is the reason why any serious examination of rhythm and its development in hip hop/rap music must include a full examination of the story of rhythm in Black music. To do otherwise is to overlook the fact that the use of drums in hip hop/rap music is well situated in this story. To do otherwise is to foster an inaccurate narrative about the continuum of rhythm in Western popular music. To do otherwise is to distort the story of rhythm in

Black music or to revise it in a way that it misrepresents the place that some figures hold in this story.

In the next chapter, I expand on the discussion of rhythm and drums in hip hop/rap music with a detailed response to *Dilla Time*, a book that misidentifies the origins of the click-and-clock rhythmic feel (seasick time feel), falls short of providing the full context of a number methodical developments in hip hop/rap's beatmaking tradition, and draws inaccurate parallels between J Dilla and Louis Armstrong, James Brown, and John Coltrane — three of the most important musicians in the history of Western popular music.

Chapter 9

The Missing Context for the Click-and-Clock Rhythmic Feel

Putting "Dilla Drums" in the Proper Context

As the compass of *The Art of Sampling* has been the sampling tradition of the hip hop/rap music tradition, not any single beatmaker (producer), there's an excerpt from T. S. Elliot's 1919 essay "Tradition and the Individual Talent" that is instructive for this chapter:

> [W]e might remind ourselves that criticism is as inevitable as breathing, and that we should be none the worse for articulating what passes in our minds when we read a book and feel an emotion about it for criticising our own minds in their work of criticism! One of the facts that might come to light in this process is **our tendency to insist, when we *praise* a poet, *upon those aspects of his work in which he least resembles anyone else.* In these aspects or parts of his work we pretend to find what is *individual*, what is the peculiar essence of the man. We dwell with satisfaction upon the poet's *difference* from his predecessors, *especially his immediate predecessors*;** we endeavour to find something that can be isolated in order to be enjoyed. **Whereas if we approach a poet *without this prejudice* we shall often find that not only the best, but *the most individual parts of his work may be those in which the dead poets, his ancestors, assert their immortality most vigorously.*** [1]

Now, replace the word "poet" with "beatmaker (producer)."

[1] T. S. Elliot, "Tradition and the Individual Talent," *The Egoist* in 1919. (emphasis mine).

The click-and-clock rhythmic feel was likely performed live in New Orleans before the 1950s, but it first appeared on a commercially released recording no later than 1969. And variants of the click-and-clock rhythmic feel first appeared on hip hop/rap recordings in 1992. Finally, with the DJ Premier produced "Intro" from Group Home's album *Livin' Proof* in 1995, we would have the direct precursor to and prototype for the way in which the click-and-clock rhythmic feel would be used in hip hop/rap music. But make no mistake, J Dilla is the beatmaker (producer) most responsible for popularizing the click-and-clock rhythmic feel in hip hop/rap music and other genres thereafter.

In *Dilla Time*, a book about the life and music of J Dilla, author Dan Charnas does a great job conveying the trajectory of Dilla's popularization of the click-and-clock rhythmic feel; at the same time he also notes some of the things that made Dilla one of the best hip hop/rap beatmakers (producers) of all time. But despite *Dilla Time's* overall quality, some of the areas within its music analysis parts are missing much needed context. As a result, these areas of the book contain some glaring omissions of facts, inaccurate statements, and misleading implications. So what follows in this chapter, which extends from the previous chapter on rhythm and drums, is the missing context to help readers gain a fuller understanding of the origins and popularization of the click-and-clock rhythmic feel (aka "Dilla Drums").

***

Before digging in, I have to make some disclaimers. First, this chapter is *not* about J Dilla, per se, and it's certainly not a critique of Dilla. I revere Dilla and, under my 40-year analysis of the beatmaking tradition of hip hop/rap music and hip hop/rap music in general, I rank J Dilla within the top 7 hip hop/rap beatmakers (producers) of all time. And I see his work as one of the most important forces in hip hop/rap music's beatmaking tradition. So none of my analysis in this chapter should be seen as an attack against Dilla or his musical legacy. Instead, what follows in this chapter is the *missing* context — not found in the book *Dilla Time* — for Dilla's use of the click-and-clock rhythmic feel, its impact, and where it sits in the mix of hip hop/rap's beatmaking tradition. Thus, this chapter is a comprehensive response to and critique of parts of Dan Charnas's musical thesis *about* J Dilla's use of the click-and-clock rhythmic in the book *Dilla Time* (2022). Further, the response that this chapter presents is also intended to serve as a defense against the erasure and revision of critical Black music history, particulary as it pertains to the story of rhythm in Black music, which I discussed in depth in the previous chapter.

Next, the study of rhythm has always been an important focus in my examination of hip hop culture and hip hop/rap music. Since 1996, I have indulged in critical and analytical inquiry in order to make out the principal attributes of hip hop/rap music that distinguish it as an exceptional music form and culture. Aside from the unique lyricism of hip hop/rap music — a powerful vocal performance style and tradition praised as much for its political dimension as it poetic aesthetic — the central aim of my inquiry has always been the beats and, more broadly speaking, the beatmaking tradition of hip hop/rap music. Hence, for more than 20 years, I have examined and documented the core hip hop/rap music motifs and the signature styles, sounds, and aesthetics of the primary pioneers of hip hop/rap music's beatmaking tradition. And the conclusion of my inquiry has, to a large degree, always come down to *rhythm*.

In his critical and analytical inquiry of African music, musicologist and lecturer Sunday Ofuani has observed a similar

conclusion: "The apt conclusion always settles to *African rhythmic nuance*."[2] As all Black (African) musics share this same emphasis on "rhythmic nuance" and replicate similar rhythmic tendencies, this connection is important to make with hip hop/rap music. So consider this link, along with the discussion from the previous chapter, as you read the following chapter. Then you'll understand why it's problematic to claim that J Dilla "*reinvited* rhyhm."[3]

Compulsion for the Corrective

Wole Soyinka, the renowned Nigerian playwright, novelist, poet, and essayist, has said that *mis*-teaching "fouls up the roots of the neophytes' resources and imprisons their imagination."[4] I believe this is what happens when authors leave out critical context or make bold claims against the backdrop of evidence that actually disproves their claims.

Next, there's the challenge of translating information for audiences. While reading some of the music analysis parts of *Dilla Time*, I was reminded of the issues that can arise with author *translations* of events and practices that certain audiences may not be aware of. Here, I thought of abolitionist and women's right activist Sojourner Truth and of the translation problem associated with her famous speech "Aint I a Woman" (1851). Today, the most-read version of Truth's speech is the one "recorded" by Frances Dana Gage, which was written and published in 1864, 13 years after Truth's speech. Gage's translation, which differs dramatically from published newspaper accounts just months after Truth gave her speech, includes embellishments, a mischaracterization of slavery as *only* a "Southern problem," and a mischaracterization of Sojourner Truth herself. Notably, Truth was *not* a Southerner; she was born

[2] Sunday Ofuani, "Traditional Rhythmic Patterns: The Source of Creativity and Identity of Original Nigerian Art Music Compositions," *International Journal of Humanities and Social Science*, Vol. 4, No. 9(1); July 2014 (Center for Promoting Ideas), 163.
[3] The sub-title of Dan Charnas's book *Dilla Time* includes this: "...the Man Who *Reinvinted Rhythm*" (emphasis mine).
[4] Wole Soyinka, "The Critic and Society: Barthes, Leftocracy, and Other Mythologies," *Black American Literature Forum* Vol. 15, No. 4, *Black Textual Strategies*, Volume 1: Theory (Winter, 1981), Published By: African American Review (St. Louis University), 140).

and raised in the North (in New York), and her first language was Dutch. But Gage's "folksy" version of Truth's speech bares the voice of an illiterate enslaved African from the South. Neither of things these were true about Sojourner Truth. Nonetheless, Gage had an agenda, thus the nature of her faulty (and racist) *translation* of Truth's speech. In noting Gage's embellishments and mischaracterizations, Maxine Leeds Craig has noted that:

> "[t]he phrase 'aren't I a woman,' which in many twentieth-century renditions became '*ain't* I a woman,' **was an embellishment by white feminist abolitionist Frances Dana Gage in her 1863 account of Truth's 1851 speech.** Neither the words 'arn't I a woman' nor 'ain't I a woman' were in Truth's speech. *Gage* wrote them and thus ***created her own image of truth***. Through an analysis of photographic portraits of Sojourner Truth, Painter shows that *in contrast to the strong and folksy ex-slave that emerges from abolitionist descriptions*, Truth preferred to represent herself to the world as a middle-class lady." [emphasis mine][5]

I don't cast Charnas's translation of J Dilla's music and its impact in the same vein as Frances Dana Gage's translation of Sojourner Truth's famous speech. Nonetheless, it's obvious that Charnas's focus (agenda), and the primary audience he has written for, affects his translation. Notably, this effect is seen in a number of mischaracterization, exaggerations, erasures, and incomplete context in some of the music analysis presented in *Dilla Time*. Thus, the compulsion I felt for a corrective of where *Dilla Time* leaves out critical context and fouls up the roots of understanding for neophytes and hip hop heads alike.

Accuracy and Context

There's no such thing as perfect research. Fundamentally, individual intereststs, personal biases, access to and knowledge of pertinent research elements — and the willingness to *thoroughly* examine them — is what determines *how* someone explores a topic

[5] Maxine Leeds Craig, *Ain't I A Beauty Queen: Black Women, Beauty, and the Politics of Race*, (Oxford University Press USA, 2002), 7.

or subject. Still, what makes the most compelling arguments about a topic or historical figure are accuracy and context.

In law, doing things "by the book" means following rules, procedures, and norms. In analytical writing, however, there are no rules; the procedures (especially with regards to research) that each writer follows may vary, even among trained historians and journalists. But there are some relevant norms, the most prevailing being that you provide sufficient evidence for the claims that you make. If much of your evidence is inaccurate, incomplete, or flawed in some other ways, your claims and arguments will be weak.

Essentially, the only thing that any analytical writer can do is keep trying to push the needle towards accuracy and context. The more accurate the details of the examination are, and the more extensive the context is, the more accurate the overall analysis will be. Conversely, the less accurate the details are, and the more incomplete the context is, the less likely the analysis — and the arguments that proceed from it — will hold up to serious inspection. The latter is the problem that plagues part of Charnas's analysis of J Dilla's music, particularly around the use of an old rhythmic feel that Dilla featured in some of his music.

Mischaracterizing and, at times, overstating the importance of J Dilla's style, sound, and aesthetic, or not properly situating Dilla's style and sound as a variation, is one thing. But raising the click-and-clock rhythmic feel that Dilla popularized *above* other critical rhythmic feels — by virtue of omission and direct implication — is another thing altogether. For instance, in no way and at no time was the click-and-clock rhythmic feel more influential, impactful, or popular as the reggae One drop rhythmic feel, just to name one well-known rhythmic feel.

Finally, I get why Charnas zeroed in on *time*. It's the main premise of his book; it's the organizing principle of his study and it serves well the purpose of his catch phrase title: *Dilla Time*. But a more comprehensive (or inclusive) examination of rhythm, the true origins of the click-and-cock rhythmic feel, and a detailed examination of drum programming in hip hop/rap music reveals that Charnas's most overstated claims do not stand up to scrutiny.

Charnas's Approach in Dilla Time

In *Dilla Time*, Charnas tries to make the case that J Dilla was the most influential hip hop/rap beatmaker (producer) of all time. He even argues that Dilla's influences goes beyond his "more famous peers." In support of this endeavor, the approach that Charnas takes in proving this claim can be sub-divided in three ways. First, he details multiple features of J Dilla's style and sound of beatmaking (production). Second, he attempts to show that J Dilla was the *creator* of an old rhythmic feel (time-feel) known to some musicologists as the *seasick* time-feel — what I call the click-and-clock rhythmic feel — a rhythmic feel that pre-dates J Dilla by at least 30 years. Third, he asserts that Dilla was "every bit as transformative and revolutionary as" as the musical giants Louis Armstrong, James Brown, and John Coltrane.

With respect to the first approach, while Charnas expresses multiple features of J Dilla's production method, including some techniques that may have been unique to Dilla, he doesn't discuss how these features are actually commonwealth-practices of hip hop/rap music's beatmaking and sampling traditions. With regards to Charnas's attempt to show J Dilla as being the originator of the click-and-clock rhythmic feel, Charnas was either unaware of or undeterred by the evidence that clearly proves otherwise. Finally, as to Charnas's attempt to equate the impact of J Dilla to that of Louis Armstrong, James Brown, and John Coltrane, Charnas doesn't properly discuss how each of these giants helped shape Western popular music, nor does he list some of the pivotal music artists that they directly influenced, nor does he show how J Dilla's influence was ultimately parallel to theirs. For example, James Brown is critical to the foundation of soul, funk, reggae, Afrobeat, and hip hop/rap music. The "influence tree" of James Brown is absolutely astonishing. Take a look at some of the recording artists that James Brown greatly influenced: Wilson Pickett, Earth, Wind & Fire, Kool & The Gang, New Birth, Sly Stone, Parliament, The JBs, Fela Kuti, Rick James, Ohio Players, Cameo, Zapp, Michael Jackson, Prince — and the list goes on. A parallel comparison, especially in

terms of influence and impact, simply cannot be made with J Dilla. This shouldn't be a controversial statement.

Further to this point, when we narrow this lens to genre, we see that *every* funk musician, *every* soul musician — really every musician in Western popular music — who came after James Brown was influenced (more or less directly) by James Brown. In stark contrast, not even most hip hop/rap beatmakers (producers) who came after J Dilla were influenced by J Dilla; and not even most contemporary R&B musicians who came after J Dilla were influenced by J Dilla.

The Framing and Premises of Dilla Time

Charnas's thesis and some of the subsequent claims made in support of it are bolder than they need to be. One effect of this is that the framing and premises in *Dilla Time* appear to be less about the advancement of beatmaking knowledge or a fuller understanding of rhythm and more about two other things. First, proving that J Dilla was a musical genius. Second, advancing the opinion that J Dilla is the greatest hip hop beatmaker (producer) of all time, or at least "beyond his more famous peers." In his attempt to advance this agenda, Charnas situates J Dilla among the likes of Louis Armstrong, James Brown, and John Coltrane. But for anyone who knows the story of rhythm in Black music, in particular the developments made in the blues, jazz, rhythm and blues, soul, and funk, this is hard to bear. And for anyone who knows the history of hip hop/rap music's beatmaking tradition — its early chief practitioners, its common methods, techniques, and processes — some of the things that Charnas implies were the sole province or ideas of Dilla are just flat out wrong.

A Very Good Biography, But its Beatmaking and Music Discussions are Flawed in Various Areas

As a tireless biography of one the icons of hip hop/rap beatmaking (production), and as a study of music in general, *Dilla Time* is a very good book. But as a study of music, while *Dilla Time*

shines in some areas, it comes up short in others. For instance, Charnas's reporting of how the click-and-clock rhythmic feel spread outside of hip hop/rap music via neo-soul producers is excellent. And even here Charnas concedes that J Dilla had his "partners" in popularizing the click-and-clock rhythmic feel *within* neo-soul. Elsewhere, Charnas errors by crediting Dilla as the "inventor" of this click-and-clock rhythmic feel and the "inventor" of a "new way of relating to musical time." So while there are certainly some spots worthy of praise, the major shortcoming of the musical analysis part of *Dilla Time* is that it often leaves out critical context. And sometimes its analysis is simply incomplete or inaccurate altogether.

In this chapter, I highlight where *Dilla Time* — in some of the music analysis parts of the book *only* — is less accurate (and less convincing) than the rest of the reporting found in *Dilla Time*. My purpose in highlighting these inaccuracies is not to strike at Dan Charnas, whose work I admire and respect; nor is it my intention to bash his book. My purpose with this chapter is to build upon the previous chapter's discussion of rhythm, and to shed a more accurate light on rhythm within hip hop/rap music and some of the foundational methods, techniques, and practices that all beatmakers (producers) use.

More specifically, the purpose of this chapter is twofold. First, I want to more thoroughly discuss the rhythmic nuances of hip hop/rap music and show how they are linked to composition and programming in the beatmaking tradition of hip hop/rap music. Given the scope of my critique and the interests of this chapter, my response to *Dilla Time* is also an additional conduit for further exploring and understanding important concepts of rhythm, hip hop/rap music's relationship to it, and how this relationship continues to impact hip hop/rap music today. Second, I want to provide the context that was missing from specific areas of Charnas's musical analysis in *Dilla Time*, including: some descriptions of rhythm, examinations of the click-and-clock rhythmic feel — its history and its popularity in Western popular music — and the contributions and innovations of J Dilla versus those contributions and innovations of other hip hop/rap beatmaking pioneers.

J Dilla's "More Famous Peers"

There can be no question as to whether or not J Dilla left behind a powerful catalog. Where this catalog ranks among the catalogs of his "more famous peers" (Charnas's words)[6] is fodder for personal debate. Objectively speaking, however, as the empirical evidence bears out, Dilla's catalog does not surpass that of the likes of Marley Marl, DJ Premier, RZA, Dr. Dre, Pete Rock, Large Professor, and Q-Tip. These aren't just "more famous peers." These are beatmaking and hip hop icons — beatmakers (producers) who individually and collectively helped shape the entire genre of hip hop/rap music and its beatmaking tradition before J Dilla arrived. To refer to this group simply as Dilla's "more famous peers" is dismissive. It's a statement that points to "fame" as the only thing separating them from Dilla. The suggestion being a wink, wink: "They *just happen to be* more famous than J Dilla is all," or "*If more people knew about J Dilla*…" In this way, Charnas uses this sleight of hand to push his argument that Dilla is *beyond* "his more famous peers."

But to agree with this argument, one would have to suspend reality and ignore what made this group of iconic beatmakers (producers) famous: Their catalogs and their mastery of various methods, practices, and techniques of hip hop/rap's beatmaking tradition — And in many cases, they pioneered those methods, practices, and techniques. This isn't a simple matter of *fame*.[7] The "more famous peers" statement ignores what they did to achieve that fame. And yet, Charnsas credits J Dilla with the "invention" of the click-and-clock rhythmic feel and presents Dilla, in some cases, as the originator of beatmaking methods, techniques, processes, and practices that were already commonwealth in hip hop/rap music's beatmaking tradition before his arrival. This is ahistorical, misleading, and divisive.

[6] Dan Charnas, *Dilla Time: The Life and Afterlife of J Dilla, the Hip-Hop Producer Who Reinvinted Rhythm* (Kindle version) (New York: Farrar, Straus and Giroux, 2022), 9.
[7] Fame is fleeting. Fame can fall upon anyone without doing much to really earn it. Reality tv stars are "famous". *Donuts* may be Dilla's most famous work, but is it his best?

A Central Argument Fraught With Problems

Despite the music analysis part of *Dilla Time* being generally good, it nonetheless contains a substantial number of faults, inaccuracies, or statements that lack critical context. In presenting his most ambitious claims — that J Dilla created a "third path" in rhythm; that *J Dilla's* rhythmic feel was "central" to hip hop; that J Dilla's actions were "every bit as transformative and revolutionary" as Louis Armstrong, James Brown, and John Coltrane — Charnas sidesteps the necessary context; in particular, he does not include the context that severely weakens his arguments.

Furthermore, some of the key evidence that Charnas presents for is argument is fraught with problems. I'm all for bold claims. But if you're going to make them, you need to include *all* the relevant context. And you have to make sure that none of your evidence actually contradicts your claims. On these points, the boldest claims made in *Dilla Time* fall short.

Next, it's more appropriate to situate Dilla's signature style, sound, and aesthetic within *boom bap*. Which is to say that Dilla's signature sound is a stylized version or variant of the boom bap rhythmic feel. Dilla's signature sound, which is built around the click-and-clock rhythmic feel, is sonically the same as boom bap because it *is* boom bap. *Dilla Time* offers no recognition or examination of this fact.

Lastly, the creation of new rhythmic feels, or versions of old rhythmic fields, happens all the time in music; it's not a new phenomenon in music making. Technically, any combination of drum patterns and cross rhythms has the potential to be a "new" rhythmic feel. And while a number of beatmakers (producers) and other musicians have copied or incorporated Dilla's signature style, sound, and aesthetic into their own sound, it is (was) boom bap that was "central to hip hop," not the click-and-clock rhythmic feel.

Co-Opting Rhythm

Because of the history of the African rhythmic sense in America and its dynamic nature, which is predicated in great part on the legacy of slavery and the countless musicians who contributed to the Pan-African synthesis of rhythm within the European music system, anyone who takes this history and dynamism seriously should take exception with Charnas's attempt to basically co-opt rhythm itself. Given the polyrhythmic nature of African rhythm, along with how the African rhythmic sense arrived in America and eventually proceeded to permeate throughout all of Western popular music, it's an injustice to present Dilla, or *any* musician today, as the "reinventor" of rhythm, especially where Black music is concerned.

Episodic vs. Thematic; Practices and Standards
(or Misrepresenting Foundational Hip Hop/Rap Beatmaking Methods and Techniques as Being Unique to J Dilla)

Every biography contains passages that work on more than one level, and every biography includes stories that require a reader to step out of the flow of events and ponder what the writer is revealing about the subject. In his descriptions of J Dilla actually making beats, Charnas is showing readers the diligence, intelligence, and creativity that went into Dilla's beatmaking. In these passages, Charnas is also making his case that J Dilla was a musical genius. But if readers of *Dilla Time* don't know the fundamental (basic) and advanced methods, processes, techniques, or common tricks of hip hop beatmaking's tradition, and if Charnas doesn't define and explain them, how can readers of *Dilla Time* separate *innovation* from *continuation*? That is to say, how can they make the distinction between Dilla doing what *all* beatmakers (producers) were doing, or Dilla simply copying and doing versions of what others were doing, or Dilla doing something entirely new?

In discussing beatmaking practices, Charnas takes an episodic approach as opposed to a thematic approach. Which is to say that

he focuses on J Dilla's beatmaking practices *apart from* the common thematic practices of beatmaking. I don't begrudge Charnas's focus on Dilla's specific practices; his book is about Dilla, so *Dilla* and what *he* did is supposed to be the focus. However, the problem is that Charnas doesn't always distinguish common beatmaking practices that *all* hip hop/rap beatmakers (producers) do from what were techniques better attributed to J Dilla alone. Because of this, reeaders of *Dilla Time* are left with the impression that practically everything Dilla did was an innovation or something unique to Dilla. And that's simply not true.

It was obvious — at least to me and I would suspect most other beatmakers (producers) in the hip hop/rap music tradition who have read *Dilla Time* — that Charnas wasn't providing the full context and background to help his readers distinguish between what was standard, routine beatmaking practices, processes, methods, and tricks, and what *may* have been J Dilla's innovations, or what may be better described as a specific aesthetic qualities related to specific beatmaking styles and sounds. While reading *Dilla Time*, I was astonished to see how often Charnas either credited (or implied credit for) commonwealth methods and techniques to Dilla. Further to this point, I found that some of the most fundamental aspects of the beatmaking tradition of hip hop/rap music were hidden behind Charnas's hyperbolic language and implications that Dilla was singular in areas that apply to all beatmakers (producers).

The effects of this kind of misrepresentation have an impact on other commentators. For example, in his review of *Dilla Time*, critic and author Christopher Pierznik observed that: "[*T]he writing [in Dill Time] can occasionally veer into hyperbole;*" and that "[I]t was clear how much Charnas revered his [J Dilla's] work;" and that *Dilla Time* "occasionally flirts with becoming *hagiography*." But it's the repeat of Charnas's wrong and misleading claims that is the most troubling. For example, Pierznik takes one of Charnas's claim as uncontested gospel: "Dilla was not only *reinventing* what was known, he was *inventing what was previously unknown*… The most amazing thing about J Dilla's music is that he used a drum machine like it was a live instrument that could be easily manipulated. *He*

was able to do by ear *what others that came after him were only able to do with computer software* so they could actually see the different musical elements that he simply heard and felt. "[8]

I've already stressed how wrong it is to credit J Dilla with a rhythmic invention that existed long before him, and later in this chapter I explain in greater detail why. But Pierznik's restating of Charnas's claims — like, that Dilla "invented something that was previously unknown" — as if they were facts illustrates the problem. Further, as I've noted in my book *The Beat Tips Manual* (2015), every beatmaker (producer) uses their beat machine as a live instrument! This is a fundamental part of the aesthetic and the nature of how beat machines function. Every beatmaker (producer) manipulates their beat machines *live*; every beatmaker (producer) improvises *live*. Any suggestion that J Dilla was unique in this practice (or the first to do it) is wrong and terribly misleading. To assess the mastery of Dilla's beatmaking skills — and there's no mistake about it, he was a master — we must properly consider where Dilla separated himself from and/or built upon common beatamking practices in the hip hop/rap music tradition. Doing less than that actually undermines the legacy of Dilla, as it assigns to him undue credit that he himself would have rejected as a devout member of hip hop/rap music's beatmaking community.

The modern beatmaking blueprint of hip hop/rap music had already been established by 1993 (*See* the Beatmaking Tradition map in Chapter 2). In other words, so much of what J Dilla was doing came from and built upon this previously established blueprint. More to the point, there's quite a difference between "inventing" something, doing a version of something, and building upon something. And for context, we must recognize that between 1994 and 1996, J Dilla hadn't yet developed his own style, sound, or aesthetic. In fact, his beats sounded a lot like Q-Tip's beats, with strong echoes of Pete Rock's beats for good measure. So it's not farfetched to say that Dilla was, in 1994, still copying Q-Tip

[8] Christopher Pierznik, "So Much More Than Just a Biography of a Man and a Movement — "Dilla Time" Reviewed," The Passion of Christopher Pierznik (January 27, 2022) https://christopherpierznik.com/2022/01/27/so-much-more-than-just-a-biography-of-a-man-and-a-movement-dilla-time-reviewed/ (emphasis mine).

and Pete Rock (among other pioneers of the period). By contrast, by 1994, Marley Marl, Easy Mo Bee, DJ Premier, RZA, Pete Rock, Q-Tip, Dr. Dre, Large Professor, and DJ Quik all had their own recognizable signature sounds. And Premier, specifically, was already at the beginning of expanding towards his second signature style, sound, aestehtic; it was an alternative sound that incorporated bass stabs, micro-chopping, and drums more out front.

While Charnas rightfully discusses Q-Tip's and Pete Rock's influence on J Dilla, he never discusses the integral techniques and processes that were pioneered by the early master drummers, like Marley Marl, Easy Mo Bee, DJ Premier, Pete Rock, Q-Tip, RZA, DJ Quik, Large Professor, Showbiz, and Buckwild. The foundational drum programming and patterns that they developed went on to be used by all hip hop/rap beatmakers (producers) who came after them. For instance, the drum style and pattern for The Pharcyde's "Runnin" (1995), prod. by J Dilla, is a near-identical riff of Pete Rock's drums on the outro beat of "In the House," from Pete Rock & CL's album *The Main Ingredient* (1994). Listen at the 5:06 mark. Listen carefully to the interplay pattern of the hi-hat and open hat. The pitter-patter hi-hat technique, basically a triplet hi-hat shuffle, was a common technique before J Dilla began producing. Also, listen to the introduction beat of "In the House" from the same Pete Rock & CL Smooth album. Listen at the 0:00 to 0:27 mark. Pay careful attention to that drum program. The drums are *dragging* due to the hi-hat. What was Pete Rock deliberately doing to make that rhythm? He was disrupting the time, doing overlaps, cuts, and ruptures, *and* blending different timbral elements (sound elements). All of this in '94, without present day mute-group technology.

Charnas declares that "facts and context" are needed when substantiating an argument. But what happens when some facts are misrepresented or omitted? Or when the proper or full context for the facts is missing? Charnas identifies as a "former" beatmaker, but in *Dilla Time*, he doesn't offer any examination of the standard beatmaking practices, methods, processes, and techniques known to *all* beatmakers (producers), nor does he offer any examples of how *he* performed them.

Rhythmic Feels Are Ubiquitous

Considering the number and popularity of different rhythmic feels that were introduced in the twentieth century, Charnas's presentation of the click-and-clock rhythmic feel doesn't hold up. If we are to properly assess impact or overall popularity of the click-and-clock rhythmic feel, we must acknowledge and compare it alongside other notable rhythmic feels. Within this context, the click-and-clock rhythmic feel, which, again, when incorporated in hip hop/rap music is a sub-variant of the boom bap rhythmic feel, is just *one* rhythmic feel (style) out of many; it's not the "third" rhythmic feel out of just three as Charnas claims.

Further to this, *Dilla Time* does not inlcude mention of the fact that there are an infinite number of rhythmic feels. Charnas states that there are essentially two rhythmic feels: straight and swing. But when put forth without critical context, this is not entirely accurate. Yes, straight and swing are the most basic, most fundamental rhythmic feels in Western music, but new rhythmic feels can be (and are) created from a combination of these two rhythmic feels all of the time. Charnas is also right when he points out that J Dilla wasn't the first musician to use shuffle rhythms or to drag and push musical elements over time. But he stops there and gives no further context.

As I discussed in the previous chapter on rhythm, all genres in Western popular music include songs that have different rhythmic feels. And most music genres have their own identifiable rhythmic feel. But Charnas's claims that there were essentially only *two* rhythmic feels before J Dilla came along, and that J Dilla created "a new rhythmic feel" is wrong and misleading. First, the click-and-clock rhythmic feel did not originate with Dilla (later in this chapter, I explore in greater detail the origins of this rhythmic feel.) Second, as I discussed in the previous chapter, the possibilities for creating new rhythmic feels are infinite, and some rhythmic feels personify specific music genres. For example, the Jamaican One drop (reggae), four-on-the flour (disco, EDM), the 5 beat pattern (Afrobeats), and of course, Boom Bap (hip hop/rap), trap (hip hop/

rap), and drill (hip hop/rap).

Finally, J Dilla didn't "reinvent rhythm" and he didn't create a new time signature. What he did do was create a signature style, sound, and aesthetic that was built around the click-and-clock rhythmic feel. Dilla's signature sound, regardless of the severity in which he sometimes dragged it, was based on straight time with micro-deviations of the kick, snare, and hi-hat, and a slight swing. Although these micro-deviations (from the straight time "norm" in 4/4) are certainly noticeable — they are of course what drives the "Dilla drums" sound. This does not, however, rise to a seachange event in Western popular on par with the contributions of Louis Armstrong, James Brown, or John Coltrane.

Other Rhythmic Feels in Hip Hop/Rap Music

In *Dilla Time*, Charnas privileges the click-and-clock rhythmic feel and presents it as if it's the only distinct rhythmic feel used in hip hop/rap music. It's not. Charnas further implies that this rhythmic feel is the most influential rhythmic development in hip hop/rap music's beatmaking tradition. It's not. But this doesn't erase the fact that a number of beatmakers (producers) have adopted the use of this rhythmic feel, nor does it erase the significance that this rhythmic feel has had on hip hop/rap music. Still, in order to properly assess the impact of the click-and-clock rhythmic feel, which requires that we properly assess the extent to which it was adopted by other beaetmakers (producers) in hip hop/rap music, we must first consider what qualifies as a rhythmic feel, and then we must survey the other rhythmic feels used in hip hop/rap music.

A rhythmic feel can be created from any number of different combinations of rhythmic (or percussive) elements and time signatures. A rhythmic feel isn't predicated uniquely on precision or the lack thereof, i.e. whether or not the snare lands precisely on the Two or the kick precisely on the One. Likewise, the specific dragging or pushing of snares and kicks doesn't make the click-and-clock rhythmic feel a superior rhythmic feel. With regards to other rhythmic feels used in hip hop/rap music, Charnas offers

no assessment of the work by 8 Ball & MJG, DJ Toomp, Mannie Fresh, DJ Paul, Shawty Redd, Zaytoven, Metro Boomin, and the like. Collectively, their music represents a distinct rhythmic feel known as trap. In order to properly ascertain the popularity and adoption of the click-and-clock rhythmic feel (aka "Dilla drums") in hip hop/rap music, or in order to see exactly where we should place the click-and-clock rhythmic feel in terms of influence in hip hop/rap music, we must took a comparative look at the trap rhythmic feel and situate its popularity, adoption, and influence. And here, we see that the trap rhythmic feel has dominated the national (and international) style and sound in hip hop/rap music for the past 16 years and counting. The number of beatmakers (producers) who have adopted the trap rhythmic feel dwarfs the number of beatmakers (producers) who have adopted the click-and-clock rhythmic feel, the rhythmic feel best popularized by J Dilla. This isn't a question of taste; it's an observation of fact supported by evidence. The overabundance of hip hop/rap music releases in the last 20 years, mainstream and underground, that feature the trap rhythmic feel, *not* the click-and-clock rhythmic feel, is glaring.

But Charnas overlooks the trap music rhythmic feel and its significance in hip hop/rap music. This is a critical omission, as trap music and its rhythmic feel have had a far greater impact on hip hop/rap music (and contemporary R&B) than the click-and-clock rhythmic feel ever had. A book that purports to cover the impact of *any* rhythmic feel on hip hop/rap music and Western popular music in general cannot disregard the significance of the trap music rhythmic feel (or the drill rhythmic feel for that matter). Further to this point, unlike the click-and-clock rhythmic feel, which originated *outside* of hip hop/rap music, the trap music rhythmic feel originated from within hip hop/rap music.

There's no doubt that the style, sound, and aesthetic that J Dilla created using the click-and-clock rhythmic feel was copied and adopted by a number of beatmakers (producers) in hip hop/rap music and contemporary R&B. That's no small thing, but neither is the spread and dominance of the trap rhythmic feel (and more recently, the drill rhythmic feel). Framing the click-and-clock

rhythmic feel as being "central" to hip hop/rap music even though it's really a non-dominant variant of boom bap, and even though it was never at any time as widely adopted or influential as the trap rhythmic feel, is wrong and misleading.

James Brown's Popularization of the One Stands Alone

In *Dilla Time*, Charnas presents the click-and-clock rhythmic as being on par with the 'One' in funk music, which was best popularized by James Brown. Charnas wants people to believe that Dilla's use of the click-and-clock rhythmic feel was "every bit as transformative" and "revolutionary" as was what James Brown did. In other words, Charnas wants people to believe that Dilla's use of the click-and-clock rythmic feel had a similar seachange effect on Western popular music. But this is simply not true.

James Brown's use and popularization of the One essentially changed *all* of Western popular music that followed it. Before James Brown's hardcore use of the One, R&B, rock 'n' roll, and soul was played primarily on the Two. James Brown is most responsible for that seachange. By contrast, the click-and-clock rhythmic feel (aka "Dilla drums") did not impact Western popular music in a similar fashion. And J Dilla's use of the click-and-clock rhythmic feel — which again, is a sub-variant of the larger boom bap rhythmic feel — was not picked up by *all* musicians in R&B, rock 'n' roll, and soul; it wasn't even picked up by most beatmakers (producers) in hip hop/rap music.

The Term "Click-and-Clock"

In the previous chapter, I introduced the term "click-and-clock" to describe the rhythmic feel that some today refer to as "drunk drums," "Dilla drums," "dragging drums," etc. Here, I will restate my reasons for the term, as well as why I don't believe "Dilla time" is a suitable descriptor for this rhythmic feel. When Charnas says that he wanted to come up with a name for what J Dilla was doing,

he either never heard of or simply ignored the term "consistent offbeat accent," which is the proper term for describing the relation of musical time that he was trying to describe. Beyond this, I use click-and-clock to describe this rhythmic feel for three reasons. First, "click" is a reference to the click track that drummers and other musicians commonly recorded to, starting (more prominently) in the late '60s. A click track is used to maintain a steady beat, it's a way to maintain consistent time. (In today's digital age of reproduction, where music is recorded and produced digitally and often made from a patchwork of different sources, consistent time is critically important.) In this way I liken the "click" — as in *click track* — to a grid of straight time. Second, "clock" is a double entendre. "Clock" represents a sense of steady, uninterrupted time, but it's not synced perfectly with the click track's straight time. Played together simultaneously, the "click" track and the "clock" will be slightly off because both are operating from within their own perspective "straight times." Third, the "clock" represents the *sound* aspect of this kind of rhythmic feel. Much attention is given to the role that *time* plays in creating this kind of rhythmic feel, but sound is a crucial structural parameter as well. In fact, this kind of rhythmic feel can also be achieved on a beat machine without having to make micro-shifts in time on a grid, but by modifying the timbre, tone, pitch and dynamics of drum sounds. Finally, "click-and-clock," said out loud, is an audio representation of what this rhythmic feel sounds like in practice.

Fundamentally, the click-and-clock rhythmic feel falls under the rubric of polyswing and polyrhythm. This is neutral. "Dilla" doesn't convey a musical term in the way that "polyswing" or "polyrhythm" does. Further, J Dilla is not the originator of the rhythmic feel that he's most associated with. For instance, this rhythmic feel was also used on Herbie Hanccok and The Headhunters song "Chameleon" (1973). While the "Chameleon" groove is perfect for describing the *groove* of the song "Chameleon," the specificity of the click-and-clock rhythmic *feel* is not tethered to *one* groove or *one* musician. We don't call the One the "James Brown" or "James Brown time," despite the fact that he's undoubtedly most

responsible for popularizing the One in Western popular music. Thus, I defer to that parallel logic, which is why I stick to a neutral term: click-and-clock (which actually describes the feel and time), not the name of one of the musicians who used the rhythmic feel.

There are two other reasons why the term "Dilla time" is inadequate as a descriptor for the rhythmic feel it seeks to describe. First, "Dilla *time*" prioritizes time over sound as the hierarchal determining factor in creating this kind of rhythmic feel. (In the previous chapter, I describe why this problematic.) Second, "Dilla" (not a musical term) actually says nothing about the relationship between straight and swing time and shifts and timbral elements (sound elements). Instead, the name is an homage to J Dilla. But even Charnas's homage is grounded in falsehood. Charnas states that, "*until* James Dewitt Yancey recorded *Fantastic, Vol. 2*, *no one* had tapped the true potential hidden in these key MPC features: not to make a machine beat sound more like that of a 'real' drummer, but **to make a kind of rhythm that *no drummer had ever made before.*"**[9] This is absolutely false. This kind of rhythm had indeed been made before. RZA made it in 1993 on Wu-Tang Clan's "Shame On a Nigga," and more instructive, DJ Premier made it in 1995 on the song "Intro," from the Group Home album *Livin' Proof*. And on the song "No Bullshit" (1992), from his album *Way 2 Fonky*, DJ Quik made the precursor to what RZA and DJ Premier did. Even more hyperbolic, as well as largely dismissive and inappropriate on multiple levels, Charnas further implies that other beatmakers (producers) and musicians before Dilla *lacked* Dilla's brain capacity:

> "[O]ne programmer in particular was the first to make a body of work and a new aesthetic out of that feature, **in ways that were heretofore inaccessible *to the minds* of other beatmakers and musicians.** In doing so, **James Dewitt Yancey cultivated a new time-feel, *a third path in rhythm.* This time-feel *resulted from a machine's ability*** to turn grid against grid, and from James Yancey's inspiration and willingness to use that feature and nurture its fullest expression. **That time-feel arose not from a musical scene, nor from the conservatory, nor from the avant-garde, but *from one man*** using a machine in a basement in Detroit. That time-feel

[9] Charnas, 186 (emphasis mine).

> cannot be understood as either straight or swung time. It is not the median or midpoint or gradation between the two. It is ***the deliberate juxtaposition of multiple expressions of straight and swing time simultaneously,*** a conscious cultivation of rhythmic friction for maximum musicality and maximum surprise. It is conflicted time. It is Dilla Time."[10]

First: "…heretofore **inaccessible to *the minds*** of other beatmakers and musicians." Say what?! This a terrible thing to say on so many levels, but what strikes me the most are the optics of such a statement. Historically, there's been an issue around white scientists and scholars saying what is or isn't in a Black person's mind. Apart from that, while Charnas is obviously trying to demonstrate J Dilla's genius and bolster his status, he's dismissing Dilla's "more famous peers" at the same time, essentially saying that new rhythmic ideas based on an old rhythmic feel was inaccessible to *their* minds. Second, this time-feel did *not* "result from a *machine's ability*;" this time-feel originated from traditional live drumming before beat machines like the Akai MPC even existed. Third, there isn't any "third path in rhythm." And inasmuch as there is a way to create new rhythms by combining straight and swing time, J Dilla didn't create this pathway — it existed more than 200 years before he was even born. The "deliberate juxtaposition of multiple expressions of straight and swing time simultaneously" isn't something that began with J Dilla.

Other Descriptors are Reductive

In a 2013 *Red Bull Academy* interview, Questlove (drummer of The Roots) said that the drums on the Pharcyde song "Bullshit" (1995) *"*sounded like the kick drum was played by like *a drunk three-year-old."*[11] And since then, one common descriptor for Dilla's use of the click-and-clock rhythmic feel has been known as

[10] *Ibid,* 191 (emphasis mine).
[11] Jeff "Chairman" Mao, "Questlove talks Drums, Dilla, and D'Angelo, Red Bull Music Academy," (May 16, 2014) https://youtu.be/yCxVzCe2N1Y. Elliot Sharp, "5 Things We Learned From ?uestlove at RBMA," *Red Bull Music Academy* (February 20, 2017) https://www.redbull.com/us-en/5-things-we-learned-from-questlove.

"Dilla *drunk* drums." But there are two problems here. First, most people have overlooked the fact that the drum style, sound, and feel on "Bullshit" sounds an awful lot like a slower BPM-version of the Crooklyn Dodgers' (Special Ed, Masta Ace & Buckshot) "Crooklyn" (1994), produced by DJ Premier. The main difference is that the "Bullshit" drums have a number of alternative mutes and more syncopation with the kick drum. But the style, sound, feel, and precision is relatively the same. Second, and more importantly for our purposes here, there's absolutely nothing "drunk" about the "Bullshit" drums. Whatever drag there is in the "Bullshit" drums, it's minimal. Moreover, those drums were *programmed*, which means there's precision where the drum sounds land. Precision is quite the opposite of "drunk."

As a descriptor for J Dilla's sound, "drunk drums" is misleading and useless. "Drunk," in the true sense of the word, conveys a severe loss of motor skills. "Drunk" drumming would be drumming that is entirely random, haphazard, completely off, and spiraling out control. This is entirely different than *programmed* offness where music elements are deliberately programmed to play (sometimes repeatedly). In other words, the offness is precise.

Next, in terms of the polyrhythm that's happening in the rhythmic feel that J Dilla built his signature style, sound, and aesthetic around, we don't need a new word for the combination of polyrhythm and multiple elements that include straight and swing time. We already have the base language.

Contextual History of the Click-and-Clock Rhythmic Feel
(Or, Who Really Originated "Dragging Drums"?)

Charnas's biggest oversight, which is the fatal flaw in his overall argument, is that he doesn't investigate whether or not the click-and-clock rhythmic feel actually originated with J Dilla. Instead, he *presumes* that it did, and his argument proceeds from this presumption. While Charnas does an excellent job of tracing the first usages of the click-and-clock rhythmic feel in neo-soul, especially in pointing out J Dilla's specific role within this story, he doesn't trace the contextual history of the click-and-clock rhythmic feel itself, nor does he properly locate *when* this rhythmic feel and style and sound, so-called "dragging drums," first appeared in hip hop/rap music.

For all intents and purposes, it's ill advised to say that *anyone* "invented" the click-and-clock rhythmic feel because, in general, there really isn't anything like a *first* song that included the click-and-clock rhythm in Western popular music. Nonetheless, we can identify the earliest known commercially-released recordings that included the click-and-clock rhythm and variants thereof. Given the vast and complicated history of rhythm in Black music — especially within the development of blues, rhythm and blues, soul, and funk — we should expect that the click-and-clock rhythmic feel (seasick time feel) was performed many times by the end of the mid-twentieth century. So the notion that this rhythmic feel was never performed before or didn't come along *until* J Dilla "invented" it in the mid- to late '90s is illogical.

Pinning down the exact date that the click-and-clock rhythmic feel was first performed live is virtually impossible, so in detailing the true origins of this rhythmic feel, I will focus on those instances where this rhythmic feel first appeared on commercially released recordings that are still available and easily searchable today. While

my investigation places the first commercially released recording of the click-and-clock rhythmic feel in 1969, I suspect that there are commercial recordings with the click-and-clock rhythmic feel that were released well before 1969. (*If and when I discover those recordings, I will update this study.*) Still, in the interest of accuracy, and in terms of providing provable facts, empirical evidence, and recordings that readers can go listen to for themselves, I will use 1969 as the starting point of the click-and-clock rhythmic feel on commercially released recordings.

I must mention something else before I detail the numerous instances that the click-and-clock rhythmic feel appeared *before* J Dilla used it. It's not a matter of the rhythmic feel (or drum technique) having being "invented" by any given person. What matters more is three things. First, properly locating the lineage of this rhythmic feel within Black music in general and the Black American music tradition in specific. Second, we must remember that Black music has always been about combining "right" and "wrong" (*blue*) notes as well as "right" and "wrong" time, i.e. so-called "wrong" sound combined with the feel that's *right* is a characteristic of Black music. Third, we must remember that Black music has always been about highlighting dissonance, the "seasoning" that gives a specific music form or style its distinct flavor. So naming any single musician the "inventor" of the click-and-clock rhythmic feel, a time-feel and shuffle no doubt en vogue among New Orleans drummers probably as early as the 1940s, is not only futile, it's misguided. Moreover, it's revisionist history, especially considering the countless formative developments in jazz, rhythm & blues, soul, and funk and the history of rhythm in Black music. But since Charnas insists on crediting invention of the click-and-clock rhythmic feel to J Dilla, despite overwhelming evidence to the contrary, it's necessary to show that this rhythmic feel originated long before Dilla, and that it was indeed performed multiple times — even in hip hop/rap music — before Dilla became known for popularizing it.

From a historical standpoint, Charnas rightfully locates micro-tonality in blues and jazz and pinpoints the peculiar nature

of African music tropes combined with European music tropes, noting that:

> "[t]he rhythm of the blues had acquired a particular *uneven* gait. And thus the emergence of jazz and blues did something else: they created an entirely new way — an African American way — of relating to musical time. **In European music, time was expressed, with rare exceptions, as a straight, even pulse. What emerged in the United States in the twentieth century was a practice of delaying the arrival of every other beat, creating an uneven, long-short-long-short pulse called swing….**
> Swing as a time-feel would permeate blues, jazz, and nearly every American musical genre to follow: from rhythm and blues to country and western, from rock to soul, from funk to disco, from punk and new wave to hip-hop and electronic dance music. Swing time is now an integral part of the American musical expectation, and thus our global musical expectation." [emphasis mine][12]

Also, Charnas correctly notes that "off" rhythmic feels and shuffles "are nothing new." On that admission alone his major claim is disqualified. In hip hop/rap music, for example, hi-hat cross rhythms have been common since the late '80s. Further, the programming of "offness" of snares and kicks has been happening in hip hop/rap music's beatmaking tradition since at least 1991. Despite these facts, Charnas presses on with his argument, pointing to Dilla as being the *first* to create this specific "off" rhythmic feel. But this is not true, and the evidence is overwhelming.

As far as commercially released songs are concerned, the origins of the click-and-clock rhythmic feel can be traced back to 1969 and the song "Cardova" by the funk band The Meters. This makes drummer Ziggy Modeliste, then the drummer of The Meters, the first known person[13] to perform the click-and-clock rhythmic feel on a commercially released recording in Western popular music. On "Cardova," the click-and-clock rhythmic feel is no doubt present, but the offness is less "broken" than what those familiar with the click-and-clock rhythmic feel might immediately recognize.

[12] Charnas, 34-37 (emphasis mine).
[13] It's likely that there was another drummer *before* Ziggy Modeliste. But my research, which spanned 60 years of drummers in jazz, R&B, soul, and funk, pointed to him.

The second time that the click-and-clock rhythmic feel appears on a commercially released song is in 1972, on the song "Chile Con Carmen" by Joe Thomas, from the deep funk album *Joy of Cookin'*. Bill LaVorgna is the drummer credited on "Chile Con Carmen," which makes him the second person to perform the click-and-clock rhythmic feel on a commercially released song. One interesting note about "Chile Con Carmen." The backbeat from the Slum Village song "Selfish" is a parallel to "Chile Con Carmen." "Selfish" was produced by Kanye West, who has mainted that he intentionally tried to make the drums for "Selfish" like "Dilla's drums."

The third time that the click-and-clock rhythmic feel appears on a commercially released song is in 1973, on the song "Chameleon" by Herbie Hancock's band The Headhunters. This makes Harvey Mason, then-drummer for The Headhunters, the third person (or second person if we discount Bill LaVorgna on the degree of brokeness) to perform the click-and-clock rhythmic feel.[14] We should also include Headhunters' "Don't Kill Your Feelings;'" again, Harvey Mason on drums. Unlike "Cardova," listeners will note the slightly more "broken" time, i.e. early/lateness of the snare.

The fourth time that the click-and-clock rhythmic feel appears on a commercially released song is in 1974, on the song "Sexy Mama" by The Moments. "Sexy Mama" was the product of All Platinum, the independent group of labels headed by Sylvia Robinson and her husband Joe. The house band for All Platinum, ca. 1972-1974 was The Rimshots. And the drummer for The Rimshots at that time was Ronald Smith. This makes Ronald Smith the fourth person to perform the click-and-clock rhythmic feel on a commercially released recording. Listen to the first 12 seconds of the song; it has open drums, so you can clearly hear the rhythmic feel. Not only that, you can hear how the rhythmic feel is created using time *and* sound tactics.

The fifth time that the click-and-clock rhythmic feel appears on a commercially released song is in 1975, on the song "Let the Drums Speak" by The Fatback band. This makes Bill Curtis,

[14] Listen to J Dilla's unreleased track "Zen Guitar" (samples "Watermelon Man"). Clearly J Dilla listened to "Chameleon" because he flipped a sample of "Watermelon Man," which is the second track from the same album.

then-drummer for The Fatback Band, the fifth person to perform the click-and-clock rhythmic feel on a commercially released recording. Listen at the beginning of the song, especially at the 0:14 – 0:18 mark. What we hear is the click-and-clock rhythmic feel clear as day. It's all there: The "seasick" time-feel, the lateness of the snare, the drag and push, the offness.

The sixth time that the click-and-clock rhythmic feel appears on a commercially released song, and perhaps the first time that it appears in hip hop/rap music, is on MC Breed & DFC'S "Job Corp" (1991). On "Job Corp," produced by Redbone (presumably)[15], the snare drum is late and the drums are dragging — the offness is clearly intentional. Also, the song "Get Loose," from the same 1991 MC Breed & DFC album, exhibits even more experimentation with cross rhythms and offness.

The seventh time that the click-and-clock rhythmic feel — or at least a clear variant wherein there's a stretch feel and snare/clap is slightly late (off) — appears on a commercially-released song, and the second time it appears in hip hop/rap music, is DJ Quik's song "No Bullshit" from his 1992 album *Way 2 Fonky*. In a 2022 interview, Quik revealed that he created a clap sound for his song "We Still Party" (1998) by sampling himself and his nephew clapping their hands in the shower; and he alluded that this was the type of creative method and technique that he'd used throughout his beatmaking (production) career. Quik programmed this sample of live human claps as layers, slightly off the One, over the top of the snare. This was intentional on Quik's part, and it refutes any argument that beatmakkers (producers) before Dilla weren't "thinking" about offness, shuffles, drags, pulls, and what was essentially the click-and-clock rhythmic feel. The layered and delayed clap effect was already a beatmaking technique by 1992. And Quik was already *four* albums deep by 1998, so this wasn't an instance of him following J Dilla, whose name was still rising in 1998.[16]

[15] As the credits aren't clear, I'm not certain who the producer of "Job Corp" is. But as Breed shouts on "Redbone" on the beat multiple times throughout the album on similar beats, I'm inclined believe that Redbone was the producer.

[16] Quik used the same layered/delayed-clap technique in 1995 on the song "Dollaz + Sense."

The eigth time that the click-and-clock rhythmic feel — or at least a clear variant in which there is a stretch feel and snare/clap that is slightly late (off) — appears on a commercially-released song, and the third time it appears in hip hop/rap music, is on Gang Starr's "Doe In Advance" (1992), produced by DJ Premier. The beat for "Doe In Advance" is a great example of how a variation of hi-hat patterns with short and elongated attacks and releases can drag or push the rhythm of the beat without manipulation of time-correct or Timestretch. In my 2006 interview with DJ Premier, he told me that he was working on these type of "stretch- feel" drum patterns since at least 1992. This lines up correctly with the release of Gang Starr's "Doe In Advance" in 1992. This song was the proto-type for the DJ-Premier produced "The Intro" in 1995.

The ninth time that the click-and-clock rhythmic feel — or at least a clear variant wherein there's a stretch feel and snare/clap is slightly late (off) — appears on a commercially-released song, and the fourth time it appears in hip hop/rap music, is on Wu-Tang Clan's "Shame On a Nigga" (1993), produced by RZA. With regards to offness and a clear variant of the click-and-clock rhythmic feel, "Shame On a Nigga" is an example of this type of intentional programmed offness. "Shame On a Nigga" features a snare that is not precisely on the One; instead, it's alternating and arriving late. In 1993, drum programming like this was already a fundamental part of RZA's style, sound, and aesthetic. And as with the countless examples of hi-hat cross rhythms (triplet hi-hat patterns for example) used in the late '80s and early '90s hip hop/rap music, this beat by RZA demonstrates that hip hop/rap beatmakers (producers) were not only experimenting with cross rhythms, shuffles, drags, and pulls, but also with and manipulating quantization before J Dilla.

The tenth time that the click-and-clock rhythmic feel — or at least a clear variant wherein there's a stretch feel and snare/clap is slightly late (off) — appears on a commercially-released song, and the fifth time it appears in hip hop/rap music, is on Gang Starr's song "Speak Ya Clout" (1994), produced by DJ Premier. "Speak Ya Clout" actually features three beats and three rappers. The first

beat, which Jeru the Damaja raps over, is important for our purposes here. This beat features a typical hi-hat cross-rhythm — but it's the sounds that matter here. The timbral relation of the sounds that form the cross rhythm, the two hi-hats, along with the snare's sound, also forms the click-and-clock rhythmic feel. This is consistent with the rhythmic experimentation that DJ Premier told me that he was doing on Gang Starr's 1994 album *Hard to Earn*.

The eleventh time that the click-and-clock rhythmic feel appears on a commercially-released song, and the sixth and most consequential time it appears in hip hop/rap music, is on the Group Home song "Intro" (1995), produced by DJ Premier. The "Intro" is essentially proto-"Dilla drums." Here's some added context about the "Intro" instrumental. First, when you listen to "Livin' Proof," the title track of the album *Livin' Proof*, it's clear that DJ Premier was experimenting with time and drag specifically. Multiple songs on *Livin' Proof* feature different variations of the same drag theme, and one song is even titled "*Suspended In Time*." Further, "Intro" is the first track on *Livin' Proof*, it's the literal *introduction* to the album — it's the first statement that DJ Premier wanted to make about the album. Also, "Intro" is 40 seconds of an open beat! It's not some obscure afterthought. Premier intended this; he wanted other beatmakers (producers) to focus on it. In Premier's words, he "wanted a dope intro." Thus, as Premier recalled to me, everything that went into the "Intro" instrumental was deliberate, intentional, and *calculated*. Finally, "Supa Star," the first single off the *Livin' Proof*, was actually released in 1994; but according to Premier, most of the songs on the *Livin' Proof*, including "Intro," had already been completed by *then*. Premier also recalls making the beats for *Livin' Proof* between 1992 and 1994. This indicates that "Intro" was made no later than September, 1994, when "Supa Star" was released as a single.[17]

The twelfth time that the click-and-clock rhythmic feel appears on a commercially-released song, and the seventh time it appears in hip hop/rap music, is on the Ghostface Killah song "Fish" feat.

[17] Author interview with DJ Premier (2006), first published in part in *The BeatTips Manual* (2015).

Raekwon and Cappadonna (1995), produced byTrue Master. In my interview with True Master in 2005, he told me that he made the beat for "Fish" in 1995. Given that *Ironman*, the album "Fish" first appeared on, was released in October 1996, we know then that the "Fish" beat could not have been made no later than October, 1996, which still puts it before J Dilla's first commercially released beat with the click-and-clock rhythmic feel.

In our discussion about drums and the "Fish" beat, True Master also had this to say:

> "[D]ums is the essence of the shit. You can have the illest sounds in the world, but the *drums gotta have* ***a certain feel*** to 'em… They gotta hit a certain way. Drums is the ***pulse*** and heartbeat…[18]

And turning to a more detailed description of how he made the "Fish" beat, True Master told me that he "*rocked* the feel of those drums, with like a little *shuffle* and *stretch*, a little *drag*, you know what I'm saying," and that he "*played* the drum pattern the way I *felt* it, the way I played all my drums *live*." What's more, True Master did *not* manipulate the quantize settings specifically for the "Fish" beat; he used the same settings that he had used for "all of his drums." That means that he didn't do anything with Timestretch. When I expressly asked True Master, "Did you use Timestretch?" he said, "Nawgh, I was never able to fuck with that. All those advantages that people was using, I don't even have those shits." Additionally, True Master didn't make his beats on an Akai MPC or an E-Mu SP 1200; he was an avid user of the Ensoniq EPS 16 Plus. On top of that, True Master was clear as to his use of shuffles and rhythmic feels and where he "learned" it from:

> "I give credit to Easy Mo Bee, as well as *RZA* for the drums and the *rhythms*. But Easy Mo Bee was the one who definitely showed me how to get 'em tight. He used the SP 1200. I never used the SP 1200, but nevertheless, I learned a lot from him and *RZA*…
> I used the EPS 16 Plus. I got ASRs and all that. I made joints on the ASR, like "MGM" [Ghostface Killah & Raekwon], you know, stuff like that. The EPS is an Ensoniq machine. They come in a rack

[18] Author interview with True Master, 2005.

> mount or keyboard version. The keyboard version is more simpler to use. Even though the ASR 10 is supposed to be an upgrade to that model, the EPS 16 Plus is killing the ASR!"[19]

So there are several critical things to note here. First, the language that True Master uses to describe what he did on the "Fish" beat. "*Rocked*" — as in a rocking back and forth motion — "the *feel*," "*shuffle*," "*stretch*," and "*drag*." This means that True Master was aware of what he was doing; he was making *conscious* decisions — not "random" choices — based on how he wanted the rhythmm of the drums to feel. And he learned this rhythmic aspect from RZA; while he learned customizing drum sounds, i.e. "getting 'em tight," from especially from Easy Mo Bee.

Second, on the "Fish" beat, True Master did *not* use step edit to individually place drum sounds on the grid. Instead, he *played* the drum pattern live, "the way I *felt* it." This, along with DJ Premier's and RZA's earlier examples of achieving the same click-and-clock rhythmic feel, also by playing it live, is further evidence that not only did the clock-and-clock rhythmic appear in hip hop/rap music before J Dilla first used it, but also that this rhythmic feel has always been achievablemthrough *live playing*. Again, the origins of the click-and-clock rhythmic feel date back to at least the early 1960s. And in his "Live Beats from the Studio | Soul Samples, Hip Hop, Live Drumming" YouTube video (2024), beatmaker (producer) and live drums instructor Datsunn can be seen playing the same click-and-clock rhythmic feel (aka "Dilla drums") *live* on his Native Instruments Maschine.

But whether Datsunn, or any other beatamker (producer), has taken his cue from Dilla or not, doesn't negate the facts surrounding the origins of the click-and-clock rhythmic feel. The point here is not to undermine J Dilla's influence. Dilla's influence and impact is undeniable. Still, if we are to respect facts and context, then we cannot ignore the facts that: 1) The click-and-clock rhythmic feel did not originate with J Dilla; 2) The click-and-clock rhythmic did indeed appear in hip hop/rap music *before* J Dilla; and 3) The

[19] *Ibid*.

click-and-clock rhythmic was never dependent on quantize or special grid placements; i.e. the click-and-clock rhythmic has always beeb achievable through *live playing* on a drum machine as well as a traditional drum kit.

J Dilla's *method* for achieving the same click-and-clock rhythmic feel as DJ Premier, RZA, and True Master doesn't cancel out the fact that those three hip hop beatmakers (producers) proceeded him in using the click-and-clock rhythmic feel. Likewise, the fact that DJ Premier, RZA, and True Master used the click-and-clock rhythmic feel before Dilla doesn't cancel out the fact that Dilla is most responsible for popularizing the use of the click-and-clock rhythmic feel in hip hop/rap music and other genres thereafter.

***

After *twelve* prior appearances of the click-and-clock rhythmic feel on twelve separate commercially-released songs, and after the *seventh* time in hip hop/rap music specifically, we arrive at J Dilla's first use of this rhythmic feel on his 1998 beat tape, *Another Batch*. *Another Batch* — which may have included beats that Dilla made using the click-and-clock rhythmic feel as early as 1997 — was never commerccially released *per se*. Nontheless, it marks the definitive moment when Dilla's most well known signtature style, sound, and aesthetic was made avaialbe to the public. Since the first known use of the click-and-clock rhythmic feel dates back to at least the 1960s, it is a fact that this rhythmic feel was not "invented" by Dilla, nor did its use originate with him. Furthermore, the fact that the click-and-clock rhythmic feel originated long before J Dilla, is another reason why Charnas's statement that J Dilla "changed the way drummers/musicians play" is misleading. Charnas's implication with this statement — which is based foremost on the claim that Dilla "invented" the click-and-clock rhythmic feel (seasick time-feel) — is that prior to Dilla, there were no traditional drummers playing the drums this way, i.e. using the click-and-clock rhythmic feel. But as the evidence shows, that's not true. If some traditional (jazz) drummers in recent years haved been inspired by Dilla to use the click-and-clock rhythmic feel, that's one thing. But jazz, soul,

and funk drummers had already been using the click-and-clock rhythm feel since the 1960s, at least 30 years before Dilla began making beats.

Lastly, to avoid any theories that Dilla was the first to use the click-and-clock rhythmic feel in hip hop/rap music, i.e. that he did the click-and-clock rhythmic feel before DJ Premier, RZA, and True Master did it, let's look at the contextual evidence. Before 1995, J Dilla wasn't a nationally known figure in hip hop/rap music. Before 1995, J Dilla wasn't even *J Dilla*, he was still Jay Dee. And a year earlier, he'd had a fateful meeting with Gang Starr. Charnas's account of this meeting helps shed light on the shape of Dilla's beats in 1994:

> "One day in early **1994**, Phat Kat drove to Shantinique, a local record store, to pick up *Hard to Earn*, the new album by New York rap act Gang Starr. It just so happened that the duo themselves – Guru and DJ Premier – were there to stop by Detroit' most important mom-and-pop record store in the midst of their promo tour. The store manager, Josie, introduced Kat to Guru and Premier as a great rapper; made him retrieve his demo from the car; and played 'Front Street' for them. Impressed by the beat and the MC, Guru pressed a phone number and address into Phat Kat's hand. *Send your demo to this guy, Guru said*. I promise he'll get back to you. The name on the paper was Dino Delvaille, a talent executive at Payday Records, the label owned by Gang Starr's manager Patrick Moxey. They offered Phat Kat a contract and a small advance to record a single; and James got his *first* production credit on a nationally distributed record, as *'Jon Doe.'* It would be a year before the single was released, under the artist name '1st Down.'"[20]

While "Front Street" had been J Dilla's first production credit on a nationally distributed record, his first big credit of national note came in 1995. He produced three songs on The Pharcyde's second album, *Labcabincalifornia*, which was released in *November*, 1995. "Runnin,'" the biggest of three singles produced by J Dilla, was released in *October* of 1995. None of the songs that J Dilla produced for the Pharcyde, nor 1st Down's "Front Street," featured the click-and-clock rhythmic feel (aka "Dilla Drums"), something

[20] Charnas, 135.

he would eventually become known for by 1998. And while Slum Village's *Fantastic, Vol. 1* does include songs that feature the rhythmic feel that Dilla would go on to popularize, it wasn't formally released until ca. *1996/1997*. Given this timeline, one might say that the earliest J Dilla *could have* possibly used the click-and-clock rhythmic feel was in 1994 on the Slum Village demo that Amp Fiddler gave to Q-Tip. But that's highly doubtful; Charnas's own reporting doesn't even place the "drag" in Dilla's beats until *after* 1996. Moreover, Charnas, who meticulously analyses J Dilla's beats throughout *Dilla Time*, describes the beats from the Slum Village demo that was given to Q-Tip. He details sample sources and how Dilla flipped them, but he does *not* note that the recognizable click-and-clock rhythmic feel (i.e. the dragging drums, aka "Dilla Drums") was present in any of those beats. And Q-Tip's reaction upon hearing the demo, which Charnas recounts, also does not include any mention of the noticeable rhythmic feel.[21] Thus, we can safely conclude that the click-and-clock rhythmic feel was not yet present in Dilla's beats at that time. Further, the click-and-clock rhythmic feel was not present in the Dilla beats that had powered his other big credits in 1996, which included work on albums by A Tribe Called Quest, Busta Rhymes, and Mad Skillz. I believe the reason the click-and-clock rhythmic feel wasn't there is simply because Dilla wasn't using it before November, 1995, ca. the time Group Home's album *Livin' Proof* was released. As I noted in the previous section, *Livin' Proof* included the song "Intro," produced by DJ Premier, and "Intro" *does* include the click-and-clock rhythmic feel. Even a cursory listen tells you that it's proto-"Dilla Drums."

Next, turning back to Phat Kat for a moment, I want to draw attention to another DJ Premier beat that appears to have influenced J Dilla. In March 1999, "Nas Is Like," the first single from Nas's album *I Am* and one of two songs on the album that was produced by DJ Premier, was released. Recording for "Nas Is Like" took place in 1998; Premier confirmed with me the year 1998 as the year that he made the beat, noting further that he "had the drumbeat" before he came across the primary sample that he chopped for the song.

[21] Charnas, 136-138.

So here's the deal. The first *20 seconds* of "Nas Is Like" is basically an open drumbeat with a "chirping birds" sample. This "open drumbeat" is something that Premier has done with a number of his beats. It's one of the ways that he "talks" to "other producers." For our purposes here, what further stands out is what Premier had to say about the drums on "Nas Is Like":

> I know with Nas, we make hot shit. I know it. I'm gonna make a good record regardless, but there's certain artists where it's like, YO!' "Nas Is Like," was like that! I almost threw the record away, the record where I found the sample. **For the drums, I already had that drumbeat. The *stretch* was on those drums, too.** Just the BPM was faster.[22]

At another point in my interview with DJ Premier, he shed some insight into how beatmakers (producers) often take inspiration and direction from the records made by other beatmakers (producers):

> Anybody that come with a banger. I'm like, fuck that, I'm going to the studio. When I hear a record that's dope, I'm going into the studio. Like, when I heard— I remember Rakim told me that Dre did the record that 50 did. It's on the *Get Rich, Or Die Tryin'* album. The song with the gun cockin', where it goes [he starts rhyming] "I'll kill you, I ain't playin', you know what I'm sayin'." 50 murdered that. He murdered it. *And I was like, aiight, I'm going in to make a joint.* And NOT bite that. DON'T BITE. [23]

This same message was echoed in my interview with beatmaker (producer) Bangout. Bangout produced 50 Cent's "In My Hood" (2005), incidentally, another hip hop/rap song that features an intentional "drag" on the drums — which Bangout made with his Akai MPC via *sound* manipulation, not *time* manipulation, i.e. quantize adjustment. When I met with Bangout, he spoke explicitly to the message of inspiration in hip hop's beatmaking community. And onee thing that came across clearly is this. There has long been a tradition of beatmakers (producers) hearing what another beatmaker (producer) did and then drawing from that to

[22] Author interview with DJ Premier (2006).
[23] *Ibid*.

make something similar:

> "Disco Inferno," I made that beat exactly for 50 Cent… Me and my wife was putting a bed together in the room… and the song "Lean Back" came on the radio. And I was like, "Yo! This shit right here is going to be big!." So the next day, I was like, "I'm going to go in the studio wild early." I didn't go into the studio with the intentions to bite off "Lean Back." It was my first time hearing it, it was out of my head. But I was like, "Yo, I'm gonna make a big fuckin' record *like that*"… Some up-tempo, party shit with doofy-ass drums, and the gutter shit still in it…And **to add on to that, I'm-a tell you some of my inspirations. First of all, DJ Premier is my #1 nigga. Because the nigga was way, way, WAY ahead of his time, as far as samples going, *drums* going.** Like yo, he was just in another whole world with beats. **He was that innovative nigga. After Premier, then when we got Dre. Dre is fuckin' phenomenal. Then The RZA is a fuckin' genius!**[24]

What DJ Premier is saying is that he made a new beat with *that* 50 Cent song — that Dr. Dre-produced beat — *in mind*. He's saying that he drew inspiration from Dr. Dre in that specific instance, but he "didn't bite" what Dr. Dre had done. Similarly, Bangout is saying the same thing with regards to how he made the beat for "Disco Inferno." I believe the same thing occurred when J Dilla heard the Group Home's "Intro," produced by Premier. Dilla didn't *bite* Premier, but I believe he was *inspired* by Premier to replicate the same rhythmic feel. Likewise, I believe the same thing happened again with "Nas Is Like." When you listen to Phat Kat's "Dedication To The Suckers," which was produced by Dilla and released in the fall of 1999, you can hear the DJ Premier influence on Dilla's drums on that song as well. Listen to the first 10 seconds. The BPM is slower, but the pattern and the feel, even the sound of the ambient samples in the background, are strikingly similar. This is why I believe that Phat Kat's "Dedication To The Suckers" offers more empirical evidence of Premier's rhythmic influence on Dilla.

Next, like all of the master beatmakers (producers) in the hip hop/rap music tradition, J Dilla was a student himself. More

[24] Author interview with Bangout, 2006 (full interview first published in The BeatTips Manual, 4th Edition (2007)]

specifically, it's widely known that his earliest production influences came from East Coast hip hop/rap beatmakers (producers), most notably Q-Tip, Pete Rock, and RZA. So there's no way that J Dilla, a venerable hip hop head and student of beatmaking himself, didn't hear — didn't *study* — Group Home's album *Livin' Proof*, an album produced entirely by DJ Premier, who, having already produced three Gang Starr albums and three songs off of Nas's classic debut album, *Illmatic*, was, *by 1995*, already one of the giants of hip hop production. And there's no way Dilla didn't hear — didn't *study* — *Liquid Swords*, an album produced entirely by RZA, who, having already created the Wu-Tang Sound, was, like Premier, already one of the giants of hip hop production by the same time. Lastly, there's no way that Dilla didn't hear — didn't *study* — Ghostface Killah's debout album, *Iron Man*, which included the song "Fish" feat. Raekwon and Cappadonna, produced byTrue Master, a well known Wu-affiliate beatamker (producer).

So viewed in this light, it's not a question of: *Why didn't anyone else do it — i.e. use the click-and-clock rhythmic feel — before J Dilla if it was that simple?* And it certainly has nothing to do with a lack of mental capacity! Remember, Charnas says essentially that no one else even *thought* of it before J Dilla, that it was "inaccessible to the minds" of others before J Dilla, that *only* "one programmer in particular was *the first* to make a body of work and a new aesthetic out of that feature, ***in ways that were heretofore inaccessible to the minds*** **of other beatmakers and musicians.**" Of course, in reality, we must consider two things. First, let's remember, the click-and-clock rhythmic feel *was* certainly *thought of* before J Dilla. This rhythmic feel was done outside of hip hop/rap music as early as 1969, and it was done by other beatmakers (producers) seven times in hip hop/rap music before J Dilla. Second, I suspect that a number of beatmakers (producers) — besides DJ Quik, Redbone, DJ Premier, RZA, and True Master — came across this rhythmic feel but opted not to develop anything further with it. Following Occam's razor, which states that the simpler explanation is more likely correct, most beatmakers (producers) before J Dilla did not adopt the click-and-clock rhythmic feel — despite having

the tools to do so — simply because they did not *prefer* to use this rhythmic feel.

DJ Premier, RZA, and True Master used the click-and-clock rhythmic feel before Dilla, yet none of them chose to make this rhythmic feel a defining component of their signature styles, sounds, and aesthetics. This simple explanation of preference is further supported by the empirical evidence found in hip hop/rap albums that were released before and after Dilla. Just as I had done for my book *The BeatTips Manual*, for the preparation (and during the writing) of this study, I listened to well over 700 hip hop/rap music albums — mainstream and underground, commercial releases and street mixtapes, SoundCloud and Bandcamp exclusives. And by my estimate, only *2%* of the hip hop/rap albums commercially released between 1988 and 2023 included at least one song that featured the click-and-clock rhythmic feel (aka "Dilla Drums"). This dearth of use of the click-and-clock rhythmic feel cannot be explained away by the lack of ability, the lack of mental capacity, the lack of an Akai MPC, or the lack of accessibility to old rhythmic ideas. Beatmakers (producers) before Dilla had the capacity to perform this rhythmic feel. And the formula for easily doing this rhythmic feel now is right there for any beatmaker (producer) to adopt. But just as during Dilla's time and directly after, most beatmakers (producers) today have *not* adopted the click-and-clock rhythmic fill. And that is simply a matter of preference.

If you want to show how influential J Dilla was, you can't just rely on reputable experts singing his praises (*which Dilla rightly deserves!*). You also need to put "impact" and "influence" in proper context, which includes simple numbers. For instance, while there were countless musicians who were undoubtedly influenced by Louis Armstrong, we can also point to the number of giant musicians that were directly influenced by him like, Dizzy Gillespie, Roy Eldridge, Lester Young, Charlie Parker, Miles Davis, and John Coltrane. Moreover, we need only listen to the music of Louis Armstrong's time and after to see how prevalent his ideas and innovations were in jazz and other music genres. When we listen to this music, *we can hear* whether or not the influence is there. The same sort of

empirical analysis must applied to hip hop/rap music. When we listen to hip hop/rap music during J Dilla's time and after, *we can hear* when his style, sound, and aesthetic *is* being copied or used as a building block within another beatmaker's (producer's) style, sound, and aesthetic. We can also hear when it's *not* being used. And while there have been a number of beatmakers (producers) who have used and built upon Dilla's style, sound, and aesthetic, including stellar beatmakers (producers), like Flying Lotus, 9th Wonder, Georgia Anne Muldrow (just to name a few), the truth is that Dilla's style, sound, and aesthetic did not (does not) have the same dominant influence over hip hop/rap music — and certainly not Western popular music more broadly — as Louis Armstrong's style, sound, aesthetic, and innovations had over jazz and Western popular music.

It's unfortunate that Charnas wasn't aware of all of the instances of the click-and-clock rhythmic feel being performed before J Dilla. It might have prevented him from going forward with his most tendentious claims and theories. Further to this, it's staggering that Charnas wrote extensively about the click-and-clock rhythmic feel and framed his entire argument for placing J Dilla among Louis Armstrong, James Brown, and John Coltrane around it, but he didn't learn about its true origins and place within the story of rhythm in Black music. Without this knowledge, you can't fully grasp the continuum of rhythm in Black music, nor can you properly situate Dilla within it.

A more persuasive account would embrace the fact that J Dilla was working from *within* a tradition, that he picked up the click-and-clock rhythmic feel performed by others before him — notably Ziggy Modeliste (drummer for The Meters), Harvey Mason (drummer for The Headbunters), Bill Curtis (drummer for The Fatback Band), DJ Premier, RZA, and True Master — and used this rhythmic feel to carve out his own signature, style, sound and aesthetic. Thus, after Dilla took his cue, others took their cue from Dilla. And that in and of itself is a testament of Dilla's greatness.

Styles, Sounds, and Aesthetics in Hip Hop/ Rap Music Rely on Borrowing

DJ Premier wasn't the first, nor the only beatmaker (producer), to use the scratch-hook technique. But he made it a key part of his signature sound. There's an instructive parallel here. J Dilla wasn't the first or only beatmaker (producer) to use the click-and-clock rhythmic feel, but he did make it a part of his signature sound. Overlooking things like this obscures the fact that signature styles, sounds, and aesthetics in hip hop/rap music have always relied on the borrowing of methods, techniques, and processes that belonged to hip hop/rap music's commonwealth. Someone in the hip hop/ rap music tradition introduces something — and it's not always immediately clear who actually was the first — then it becomes part of the canon of styles, techniques, methods, and processes. Depending on the beatmaker (producer), these styles, techniques, methods, and processes are adopted in minor or major ways.

In this sense, J Dilla adopted a rhythmic feel that was performed earlier in hip hop/rap music, most notably by DJ Premier, RZA, and True Master. The difference is that Dilla drilled down on this rhythmic feel; he stuck with it, developed his technique for doing it, and made it a critical force of his signature style, sound, aesthetic. It's also important to remember that what underscored Dilla's use of the click-and-clock rhythmic feel was *technique*. Which is to say, you can use the same technique and not necessarily *sound* like Dilla. (One great example of this is the work of Georgia Anne Muldrow.*)* And it's equally important to note that the technique can be done through different *methods*.

Finally, in pointing to J Dilla's influence, with regards to his use of the click-and-clock rhythmic feel, we should observe the fact that Dilla's style, sound, aesthetic helped lead to the emgergence of the lo-fi sub-genre. That's notable and deserving of honor. But what about the trap and drill sub-genres? See the point of *full* context? Of the three sub-genre beatmaking styles, sounds, and aesthetics, lo-fi is the *least* adopted of three by beatmakers (producers) today. This isn't a dismissal of lo-fi, nor is it praise for trap and drill; it's simply contextual fact. I find value in all three sub-genres. But we can't

raise the status of lo-fi because it often features the click-and-clock rhythmic feel. Conversely, we can't lower the status of trap or drill because they don't feature the click-and-clock rhythmic feel.

More Context For Drums

The flaw in one part of *Dilla Time's* drums analysis is that it doesn't situate its examination within hip hop/rap music's long tradition of hyper creativity with drum sounds and drum programming. Charnas presents J Dilla as an enigma "beyond" hip hop/rap's intensely creative tradition. Along these lines, Charnas offers no examination of *which* types of drum approaches and other characteristics were common ground in hip hop/rap's drum-programming tradition. For instance, by 1996, *100%* of the beats that I made using drum patterns created from my own customized drum sounds involved the use of at least *three* different Timing Correct settings (1/8, 1/16 Triplet and 1/32 Triplet most often). I certainly wasn't alone in this regard; every beatmaker (producer) that I knew in the early '90s used at least two different Timing Correct settings. These sort of things were so common that they were simply par for the course. J Dilla — like Marley Marl, Easy Mo Bee, DJ Premier, Dr. Dre, Pete Rock, RZA, Q-Tip, DJ Quik, Large Professor, and DJ Toomp before him — was indeed an enigma, a master beatmaker (producer). But Dilla's status as an enigma is owed much to his *mastery* of the common practices, methods, processes, and techniques of hip hop/rap beatmaking's tradition just as much as (and perhaps more) than the innovations that he helped pioneer. A focus on J Dilla's drum programming techniques is a worthy cause, and *Dilla Time* is made a better book overall because of it. However, readers of *Dilla Time* would have been better served if Charnas had broadened his scope and included more context about drum programming in hip hop beatmaking. The full context situates Dilla's drum programming *within* the history of drum programming in hip hop/rap music, which is linked to developments in traditional drumming in the second half of the twentieth century.

Experimentation with Drums is Common

In *Dilla Time,* there's a very revealing story about experimentation and drum machine programming that Amp Fiddler recalls:

> "'You don't have to make every measure four beats. You can loop around every three beats, or five, or six, or seven *if you want*. **The sequencer has a function called 'Timing Correct.' It will fix any little mistakes you make when you tap the finger pads. If you hit a drum sound too late, or too early, *it will automatically* put the sound right on time.** You *can* use it on all your sounds, or some of them, or none of them. If you use Timing Correct, you *can* also use some other functions. You *can* program the machine to "swing" your beats, to make them uneven.'" Amp went on, the options swimming in James's head. "I'm not going to give you a manual," Amp told him. Amp wanted James to learn like *he* had learned, ***by experimenting***.[25]

Here, Amp Fiddler reveals the fact that beatmakers (producers) have long been aware of the potential to manipulate the Timing Correct and Swing functions of beat machines. Dilla wasn't the first to "unlock this potential" of an Akai MPC. Experimenting with the settings and function of a beat machine was (and still is) a major part of beatmaking; and *Dilla* learned this approach first from another beatmaker (producer) before embarking own his own experimentation. This doesn't discredit Dilla's achievements. The point is to properly situate what Dilla did, free from hyperbole or misrepresentation. So in this regard, if we're to accurately describe what Dilla did, what must acknowlege that Dilla worked within an established tradition of standards and best practicees that inspired him to use the potential of unlimited possibilities — that were afforded by Timing Correct, Quantize, and Swing functions — to create a new style, sound, and aesthetic. That, however, is not a "reinvention" of rhythm.

Elsewhere in *Dilla Time*, Charnas implies that the impetus for J Dilla using the click-and-clock rhythmic feel may have come from Dilla's observation of human hand claps not lining up with

[25] Charnas, 100 (emphasis mine).

the instrumental track at the end of the movie *A Piece of the Action* (1977):

> But this version of the song, James noted, the one that played as the end credits rolled, was different from the first. In this scene, the sounds of handclaps had been added. ***Except the claps were not quite on beat.…***
>
> The claps had been added in the film editing process to give the party a "live" feeling, as if the dancers themselves were clapping. The claps were 'Foley,' in the terminology of film production—sound effects added after the fact.
>
> …handclaps may have been recorded by a group of people at some postproduction facility in Hollywood as they watched a screening of the scene. Their imperfect performance may have been intentionally loose, or a result of each of the performers' different sense of timing. But it is just as likely that the imperfections are an artifact of the recording and synchronization process; as in the predigital world, it was often common for machines to drift in and out of sync with each other.
>
> But those mistakes — man-made, machine-made mistakes — were thrilling to James. They reminded him of messy house parties, and the interminable rehearsals of his childhood, and the discord of musical devotion in the sanctuary of Vernon Chapel, the unity made from the chaos of humans interacting.[26]

While this story romanticizes and speculates about what Dilla may have done, there are a couple of things about this that offer more context and a better perspective. First, the hand claps were not "mistakes." Hand claps, by their nature, are never quite *on beat*. Handclaps are *always* loose. For example, listen to Chaka Khan's "Papillon" (1980) in which the handclaps were recorded as part of the original recording. Second, the *stretch effect* of a delayed snare was already a fundamental development in modern drumming by the 1960s; and by the mid-'90s, the layered, *off-set* clap method was already a well-established technique in hip hop/rap's beatmaking tradition.

Next, Charnas asserts that the reason why "producers looped breakbeats" was "to bring the ghosts of real drummers into their

[26] Charnas, 106-107 (emphasis mine).

machines," and that "*[t]here was no way a drum machine could re-create the subtle playing of Clyde Stubblefield's performance* on 'Funky Drummer.'"[27] But breakbeats — and there were plenty of them — where sought after because of the funky backbeat that they provided. Further, the goal was never to re-create the "playing of Clyde Stubblefield," or any specific drummer from the past. As hip hop drumming emerged, the drums were typically *out front* in the mix; so the the goal was to create your own drums — drums that sounded in part real, i.e. the subtleties of real drummers heard on reccords, but also in large part beefed up, i.e. punchy and in hip hop form. This was especially the case after the Electronic Drum Machine Period (1983-1987), where the goal was to create *your own* drum patterns and programs using sampled drum sounds from *any* record that you liked, famous drummer or not.

What mattered most, especially after the "James Brown drums" phase, was not *who* the drummer was. Hip hop beatmakers (producers) sampling James Brown in the late '80s and early '90s didn't say, "*Clyde Stubblefield* drums" or *"Jabo Starks drums*," they said "*James Brown drums*." (See Chapters 2, 7, 8). What mattered most was the individual drum sounds, and it didn't matter which James Brown record (or any other artist) they came from. If the drums sounded dope, they were sampled, recontextualized, and used as raw materials to make new drum patterns and backbeats.

Absent this level of context, Charnas tends to avoid mentioning the common-ground beatmaking approaches first done and pioneered by Marley Marl and built upon by Easy Mo Bee, Pete Rock, DJ Premier, RZA, Q-Tip, Showbiz, Large Professor, and other beatmakers (producers) from the Pioneers/Avant-Garde Period beatmaking period (1988-1994) that I detailed in Chapter 2. With such omissions, readers of *Dilla Time* are again left with the impression that *J Dilla* invented many of hip hop beatmaking's fundamental approaches and innovations. But the reality is that slices and "chopping" were already established by 1988, and such methods, practices, and techniques were made a standard part of hip hop/rap music's beatmaking tradition by 1990. Marley Marl

[27] Charnas, 105 (emphasis mine).

had already established making customized drum patterns, and in doing so, he was indeed able to re-create "the subltities" of "real drummers" from the '60s and '70s. Listen to Biz Markie's "Goin' Off" (1988), produced by Marley Marl. That song does *not* feature a break-beat; instead, it's Marley Marl's own drum programming of individually sampled drum sounds. And Marley's approach is exactly what DJ Premier, RZA, Dr. Dre, Pete Rock, Q-Tip, Large Professor, Buckwild, True Master, and others from the same period all built upon.

Critical Context on Polyrhythm

With regards to polyrhythm and other musical elements crucial to the African sense of music, Charnas makes some accurate points, but he also gets a couple critical things wrong:

> "But in the Protestant English colonies that became the United States, religious practices from Africa were forbidden, and ***polyrhythm vanished***. **Musical expression outside Christian hymns was *suppressed*; drumming, especially, was seen as clandestine communication and tantamount to insurrection. Wherever the African retentions and inheritances surfaced, they did so most often in a European frame:** the seven-note scale, but breaking the rules just a bit; the performance word-for-word and note-for-note, but deviating just a bit. In North America, **the greatest African inheritance — *that polyrhythmic sense — was restrained* by the European practice of one even pulse counted in either twos or threes,** but never both at the same time. How polyrhythm began to peek out, just a bit, is in a phenomenon called syncopation.[28]

Yes, musical expression outside of Christian hymns was suppressed, and drumming was seen as clandestine communication and tantamount to insurrection. But this wasn't the case *everywhere* that slavery existed in the South, or certainly not to the same extent across all slave states. Polyrhythm never "vanished," as Charnas claims that it did. To the contrary, polyrhythm continued forcefully. As I pointed out in the previous chapter, the African rhythmic

[28] Charnas, 32 (emphasis mine).

sense — polyrhythm — was one of the traditions staunchly guarded and preserved by enslaved Africans in the Protestant English colonies that became the United States. This is critical context because where drums were *not* suppressed, the African rhythmic sense was present. And in one place particular, Congo Square, this is crucial. Congo Square was situated in New Orleans, the birth place of the shuffle rhythms that would eventually develop into the basis of the New Orleans style and sound known as funk — The same funk that drummer Clayton would introduce to James Brown.

Lastly, I wouldn't describe the African rhythmic sense as being "restrained." Stolen and brought to a new land meant that it was impossible for enslaved Africans to retain every aspect of their musical sense. Nonetheless, enslaved Africans developed ways to work within the European musical system. This is how they were able to develop new music forms. Syncopation was the main pathway for combining the African rhythmic (polyrhythmic) sense with elements of the European music system.

An Overemphasis on the Math

A number of commentators have examined complex polyrhythms from a mathematical perspective, and I can see the allure in that, especially for those who prioritize harmony over rhythm or those whose own relation (connection) to rhythm is less important for them. But rhythm is the heartbeat of African music, and geeking out over the "math" in African rhythms misses the point of polyrhythms in African music. As I noted in the previous chapter, the use of polyrhythms is a defining characteristic of African music, and this feature of African music is *not* a phenomenon in which the math, in an abstract sense, is the force behind the action, nor is it a particular focal point. African music doesn't rely on or celebrate the written score; it's much more nuanced than that, particularly as polyrhythms in African music are driven by *feel*. And math does not guide *feel*.

An overemphasis on the math, and by proxy, *time*, makes the discussion of rhythm and polyrhythm more accessible, more palpable to audiences that have less of a *feel*-based connection to rhythm. To

use an analogy, it's the difference between learning dance moves from the *feel* of the music versus learning dance moves by looking at literal numbers printed on the ground, outlining each dance step in written form. The numbered instructions on the ground will get you there *technically* because you're following the "math," i.e. the technique that the precise math dictates. But without the *feel* — which is never precise — and other nuances, it will never be quite same.

This is part of the problem with Charnas's analysis in one regard. There's too much focus on the math and the individual "genius" factor, to such an extent that Charnas completely misses the fact that DJ Premier, RZA, and True Master performed the same rhythmic feel *without* manipulating the math, i.e. programming the time functions of their beat machines in specific ways to create the specific push, drag, and pull of the click-and-clock rhythmic feel. Instead, DJ Premier, RZA, and True Master achieved the clock-and-clock rhythmic feel through *sound* manipulation and performance and arrangements that were not governed by step edits or extra manipulation of the Timing Correct, Quantize, or Swing functions on their beat machines. What links Premier, RZA, True Master, and J Dilla, however, is that all four were guided by and relied on the continuation of a well-established collective rhythmic tradition in African music. And that has always been guided by *feel*.

Over Emphasis On *Time*, No Context On *Sound*

The creation of a rhythmic feel is not limited to mircro-temporal deviations. That is to say that *time* is not the only aspect that can determine the creation of a rhythmic feel. In fact, as I established in the previous chapter, time may not even be the most important factor. This is because sound is another crucial aspect when it comes to creating a new rhythmic feel.

In *Dilla Time*, Charnas places much stock in his emphasis on and analysis of time. It's not surprising given that he's working towards his theme: That J Dilla "invented" a new rhythmic feel, which Charnas calls "*Dilla Time.*" But putting aside the significance

of micro-timing in machine-made rhythms, sound is equally (perhaps more) important, inasmuch as it also dictates rhythmic feel (time-feel). An over emphasis on time — the temporal aspects of rhythm or the temporal relationships within rhythm and groove — ignores the significant impact that sound has in popular music. Timbral aspects — aspects of sound, such as timbre, texture, dynamics and pitch — are equally important in any examination of rhythm and groove. But Charnas's analysis in this area seems to miss the point that time is only *one* aspect of the rhythm/groove framework. Sound — more precisely, timbre, texture, dynamics, and pitch — is equally important to rhythmic musics, and it's especially important to hip hop/rap music. Charnas does discuss sound, but when doing so he frames it as a subordinate to his emphasis on time. He isn't alone in this regard. As musicologist Anne Danielsen has observed, "most scholars privilege only attack-point rhythm and *ignore the potential impact of sound* or *any other non-timing aspects*."[29] Doing so overstates the importance of the time aspect and makes micro-temporal deviations out to be more important than they are.

The relationship between rhythmic structure and time is also dictated by the timbre of individual drum sounds and the velocity (and volume level) of each drum sound in the sequence. Which is to say that rhythmic feels and grooves can be achieved through a combination of timbral tactics even within *straight*-time arrangement strategies and *without any micro-temporal time deviation at all*. Further, in placing emphasis on time as the most important structural parameter of a rhythmic contour, Charnas failed to consider an important question: Should time even be considered as an expressive and/or structural parameter? Music and folk culture professor Mats Johansson has asked, "[t]o what extent is the difference among motifs in overall rhythmic contour a result of rhythmic components being (actively) timed differently *as opposed to being an intrinsic part of the motifs themselves?*" Johansson's response: "I favour the latter…"[30]

[29] Anne Danielsen, *Musical Rhythm in the Age of Digital Reproduction*, Kindle Version (Farnham and Burlington: Ashgate, 2010), location: 236 (emphasis mine).
[30] Danielsen, *Mats Johansson* location: 1054-1058 (emphasis mine).

In any event, time is not necessarily more important than sound when it comes to creating rhythmic feels. More precisely, rhythmic delivery, where or when an element is placed on a time grid, is "just as important a parameter as, say, *tone*, *pitch*, or *loudness*."[31] In other words, sound is equally important to time, inasmuch as sound also can dictate rhythmic feel. Thus, Charnas's over emphasis on time, the temporal aspects of rhythm or the temporal relationships within rhythm and groove, ignores the significant impact that sound has in Western popular music. Timbral aspects — i.e. aspects of sound, such as timbre, texture, dynamics, pitch, and tone — play an important role in the creation of rhythmic feels. In fact, some rhythmic feels can be achieved through sound manipulation alone. Still, the best assessment is that rhythmic feel relies on a "mutually dependent relationship between timing information *and* timbral and dynamic features."[32]

Next, much of the problem with Charnas's argument can be found in its framing. First, Charnas's treats J Dilla's placement of sounds (late or early) as a unique practice in music, but it's not unique at all. In hip hop/rap music, like all dance music, beatmakers (producers) "often move sounds slightly back and forth to find their best placements."[33] Second, Charnas doesn't discuss the timbral factors that can go into creating the click-and-clock rhythmic feel, or any shuffle-/-based rhythmic feel for that matter. Instead, he goes all-in on the more traditional temporal approach to rhythm research and focuses primarily on one factor: *Time*, i.e. the programmed micro-shifts of the kick, snare, or hi-hats. He does not, however, expand and comment on the fact that pulse bending or rhythmic stretching can also be achieved through sound manipulation or temporal shaping — i.e. musical features such as tempo modification, sound parameters and sound combinations, as well as other beatmaking techniques, like cutoffs (now commonly known as mute groups) and sound layering.

Point is, time is always being manipulated by all beatmakers (producers) in the hip hop/rap music tradition. That J Dilla

[31] Danielsen, location: 231-244 (emphasis mine).
[32] Danielsen, location: 252-57.
[33] Danielsen (Hans T. Zeiner-Henriksen) location: 1737-1742.

created a new style, sound, and aesthetic around a sub-variant of the boom bap rhythmic feel s*hould* be celebrated and it's worth of examination. But such a celebration and examination should not be done in an overstated manner. Moreover, such an examination must include the most critical context, i.e. the context that more accurately situates the achievement for what it really was. That Dilla deliberately increased the exaggeration (slightly) of micro-temporal deviations (itself a technique) more severely than most had done before him does not mean that it's a superior rhythmic feel, nor does it mean that it's a rhythmic feel *more* impactful than other recognizable hythmic feels in Wesstern popular music, like the reggae One drop, boom bap, or the 5 Beat Pattern.

***

In the previous chapter, I identified *15* different sound-manipulation techniques that can affect rhythmic feel and, more precisely, be used to create the click-and-clock rhythmic feel. Charnas's focus on time and temporal (micro-time) deviation avoids the discussion of how timbral (sound) tactics are just as, if not more, important as temporal tactics when it comes to creating rhythmic feels. As such, in relation to the creation of rhythmic feels, more specifically the click-and-clock rhythmic feel, he doesn't mention any of the *sound*-manipulation techniques that I outlined in the previous chapter.

Melorhythm

Here, a word about melorhythm — and what it tells us about sound and time — is helpful. To further demonstrate the significance of sound as an aspect of rhythm that's perhaps more important than the time aspect, but certainly critical to traditional African approaches to rhythm, the dual conception of melody in African music is highly instructive. In African music, melody comes in two streams, i.e. "the dual conception of the melodic in Africa is thus rationalized in one stream as the melodic, deriving

from absolute *pitch* levels; and in the other as **melorhythm**, deriving from *tone* levels." *Melorhtyhm*, as the term implies, "is a melodic conception that has strong rhythmic inflection. It defines the African-peculiar melodic formulation on *toned* music instruments such as membrane *drums*, wooden slit *drums*, *bells* [single, twin, quadruple], pot *drums*, and plosive tubes and shells…"[34]

Combining Straight and Swung Time is Quite Common in Music

A combination of straight and swung time is always present in hip hop/rap music, in fact, it's a typical characteristic of hip hop/rap music; every beatmaker (producer) knows this. And those musicians outside of hip hop/rap music know this. Musicologist Kristofer Yddal Bjerke has noted that "[t]o the listener, even identifying this pattern as `straight' or `swung' would be a challenge. As mentioned above, this sense of ambiguity is *typical* for the genre to which this song belongs."[35] The "ambiguity" that Bjerke is talking about references the fact that straight and swung are never quite clear in hip hop/rap music because they are combined as a matter of course.

Once you understand this, then, two things become clear about Charnas's analysis — And both things ultimately undermine his overreaching argument. First, J Dilla was neither the first nor the only beatmaker (producer) to combine straight and swung time. Charnas either knows this and purposely ignored this key detail and misrepresented his analysis to put forth his argument in the best light, or he simply didn't know this. Either scenario is alarming, especially when you consider the breadth of Charnas's main claims. Second, if Charnas did know that the combination of straight and swing time is ubiquitous, and it has obviously been this way long before J Dilla arrived in 1994, then what becomes

[34] Meki Nzewi, Odyke Nzewi, *A Contemporary Study of Musical Arts: Informed by Indigenous Knowledge Systems*, Vol. 3: The foliage: consolidation (Centre for Indigenous Instrumental African Music and Dance, 2007), 136 (emphasis mine).
[35] Danielsen (Kristoffer Yddal Bjerke) location: 1193 (emphasis mine).

apparent is that Charnas is basing his biggest claim simply on the *severity* with which Dilla combined straight and swung time, i.e. how severely Dilla moved the kick, the snare, or hi-hat *around* the One. As such, that's not a persuasive argument, and it certainly doesn't warrant the statement that J Dilla"s "innovations" are "every bit as transformative and revolutionary" as Louis Armstrong, James Brown, and John Coltrane. And again, given the fact that straight and swung time have always being combined, or that time is *always* bending in sample-based hip hop/rap music, Charnas's claim is highly misleading.

Further, looking at the design of the Linn Drum, the first fully programmable drum machine, we should understand that the built-in functionality for blending ("ccolliding") time-feels — straight and uneven time, or straight and swing time — was exactly what Roger Linn designed the Akai MPC (and before it the Linn Drum) to do. Linn designed these drum machine samplers to function in this way not because the concept was *new*, but rather because the concept (and practice) was old.

So you can see the problem with Charnas announcing the common practice of blending time-feels as an "invention" of J Dilla. It's an overstatement. But to his credit, Charnas rightfully points out that shuffle rhythms are nothing new. Still, he stops short of clarifying that things like "backbeat delay," the phenomenon in which "drummers strike the snare drum slightly later than the metronomically precise locations of beats 2 and 4,"[36] is nothing new. Moreover, Charnass seems to want to have it both ways. On one hand, he acknowledges that the combination of straight and swung time has occurred before J Dilla. On the other hand, he mispresents J Dilla as the person who first "collided" straight and swung time, particularly in hip hop/rap music. How are readers of *Dilla Time* supposed to reconcile this?

[36] Danielsen, *Ives Chor*, location: 569-573.

J Dilla Did Not "Invent a New Way of Relating To Musical Time"

In the book trailer for *Dilla Time*, Charnas claims that "Dilla *invented* a new way of relating to musical time."[37] This is false. And this claim is made worse by the fact that Dilla did not "invent" the rhythmic feel that he's most associated with. Moreover, there's an infinite number of ways to "relate" to musical time. Worse still, Charnas claims that, "*[b]efore* J Dilla, musicians had *two* ways of relating to rhythm, straight time, where every beat's even, and swung time, where the beats are uneven. *Dilla* took these two time fields and collided them, straight and swung simultaneously, creating something new. *Dilla's* ideas *now permeate every area music*…"[38] This is absolutely not true. Musicians long before Dilla were combining ("colliding") different time fields and indeed relating to rhythm via straight, swing (swung), and straight/swing (swung) time simultaneously; such ideas have long permeated "every area of music" and did not originate with Dilla. The level of erasure that Charnas commits here erases every New Orleans drummer who contributed to twenieth-century Western popular music!

Inasmuch as a beatmaking style, sound, and aesthetic, J Dilla did create something new. But the idea of blending time fields — straight and uneven time — is certainly not something that Dilla invented. The concept of cross-rhythmic patterns was established long ago, well before hip hop/rap music and the art of beatmaking even existed. For example, "[t]he most commonly used key pattern in sub-Saharan Africa is the seven-stroke figure known in ethnomusicology as the standard pattern. The standard pattern, composed of two cross-rhythmic fragments, is found both in simple (4/4 or 2/2) and compound (12/8 or 6/8) metrical structures;"[39] and countless musicians have used blended time-feels before. Charnas could counter that he was only speaking about

[37] https://youtube.com/shorts/j2VFEHLkZQI?si=2V7KToEHE9rRS1ys
[38] *Ibid*.
[39] A.M. Jones, *Studies in African Music* ([1st ed., repr.]. ed., 1971) (London: Oxford University Press).

beatmakers (producers), but that's not the qualifier that he used, nor what he was implying. He said, "before Dilla, *musicians* only had two ways of relating to musical time." That means all musicians. But whether he meant beatmakers (producers) or not, the point is moot, because what he said is simply untrue.

Next, African music is *isometric* by nature. It's three dimensional. In African music, blending ("colliding") time fields is standard stuff. This African practice of blending time fields found its way to the New World and became an integral part of the blues and jazz (the prior being the foundation of all twentieth-century American popular music). Moreover, polyrhythm is another standard of African music. In fact, African music "tends to feature complex polyrhythm; in which, several different rhythmic patterns are played *simultaneously* and repeated over and over, a*nd each instrument goes its own rhythmic way*."[40]

Further to this point:

> **"From ancient times, Africans have expressed its sonic-visual culture in unprecedented multi facets that integrate to holistic music or performance.** These sonic-visual traits are seen and perceived from its tonality, harmony, vocalism, timbre, instrumentation, dance, mode of performance among others. And, ***rhythm*** **serves as the creative** ***nucleus*** **or** ***cement*** **that binds them together. Consequently, of the entire musical elements with which traditional Africans have expressed its musical culture/ heritage, their rhythmic ingenuity is the foremost element that transverses, appeals and attracts music audience and researchers/ writers across the globe.** This is simply because the art of rhythm in Africa is fascinating and it eludes the Europeans (and other worlds') rhythmic skills and considerations. Hence, the quintessence of rhythm in African music *was long ago* noted by Senghor in Chernoff (1979) who confirms that, 'Rhythm is the basis of all African art', and Jones (1959) who points out that *"Rhythm is to the African what harmony is to the Europeans."* Roger (2002) corroborates the assertions, as he certifies that 'Rhythm and percussion are highly emphasized in African music, *reflecting the close link between music and dance.* African music tends to feature complex polyrhythm;

[40] Sunday Ofuani, "Traditional Rhythmic Patterns: The Source of Creativity and Identity of Original Nigerian Art Music Compositions," *International Journal of Humanities and Social Science*, Vol. 4, No. 9(1); July 2014 (Center for Promoting Ideas), 162 (emphas mine).

> in which, several different rhythmic patterns are played *simultaneously* and repeated over and over, and ***each instrument goes its own rhythmic way***.'"
>
> This indicates that even though timing is obviously an important structure parameter in the creation of a rhythm, **what's really driving rhythm is not necessarily time but rather *sound.***[41]

Next, all rhythms in Black music are *deliberately* created. So of course J Dilla's actions were "deliberate." But without pointing out that Dilla was working from and within a tradition where deliberate rhythmic creation is the norm, the emphasis is placed on the deliberate nature of what *Dilla* did, the implication being that Dilla alone was making deliberate choices. Thus, this tract of incomplete analysis, which ignores the standards and practices in hip hop beatmaking's tradition that were established *before* Dilla, singles out a musician for doing something that all musicians within his tradition were doing. This is misleading because it doesn't provide the full picture. If Dilla deserves praise for the rhythms within his beats that he created, that praise should be based on the unique qualities of those rhythms and the final results of the beats he made, not necessarily the methods and techniques that he used to create the beats. In other words, if the methods and techniques are commonwealth to hip hop's beatmaking tradition, those methods and techniques shouldn't be presented as processes *unique* to Dilla. Conversely, if the methods, techniques, or processes *were* unique to Dilla, then they should be qualified as such with an explanation as to *how* they differed from the already established norms within hip hop's beatmaking tradition.

Then there's also this:

> **"[M]ost essentially, rhythms often prevail according to its role in any African traditional music ensemble. Some of which are rhythmic pattern(s) that projects/initiates timeline, gravity, balance, dance, onomatopoeic imitation, indigenous musical structures/forms, societal sonic-rhythmic codes, theatrical and communal sentiments and signal orientations.**"[42]

[41] Ofuani, 162 (emphasis mine and in the original).
[42] *Ibid*, 163 (emphasis mine).

In Black music, rhythms prevail according to their role within the specific music tradition that they are referencing. The click-and-clock rhythmic feel worked for Dilla precisely because he was working within, referencing, and playing off of *boom bap*. In other words, Dilla was creating boom bap rhythms, not rhythms that were separate from or counter to the boom bap rhythmic feel. While the snares, kicks, and hi-hats may have arrived slightly late or early in the framework in those Dilla beats that featured the click-and-clock rhythmic feel, Dilla was still using rhythmic patterns that projected boom bap, especially boom bap's sonic-rhythmic codes. Dilla was "employing various rhythmic patterns" derived from boom bap "as the rhythmic basis/theme" of his music. This "derived rhythmic motif" provided him with an "ample creative rhythmic environment, because assorted rhythms always emerged as *consequence* of subjecting *the prototype rhythm* to his personal creativity." And it was Dilla's simulation of traditional boom bap rhythmic patterns that allowed him to achieve new rhythmic patterns — patterns with a clear undertone that replicated and suggested its prototype: boom bap.[43]

Consistent Offbeat Accent

Finally, with regards to the relation of musical time specifically, what J Dilla was actually doing already has a name. It's a technique called **consistent offbeat accent**. In consistent offbeat accent, "a significant aspect of *offbeat timing*," "**offbeat strokes are equidistant and regular, thus establishing the feeling of *a contrasting stream of accents* that *pulls* against the main beats.**" And "[o]ne primary principle of offbeat timing is that '[o]n-beat and offbeat accents within rhythm patterns may be *asymmetrical*

[43] Ofuani, 163: In his discussion of rhythmic motifs in contemporary Nigerian art music, Ofuani has noted that "[s]ome contemporary Nigerian art music composers *employ various rhythmic patterns derived from* indigenous music of Africa *as the rhythmic basis/theme* of their art music composition. One of such composers is Christian Onyeji, who in his drummistic-piano technique utilizes indigenous rhythmic patterns. But then, *the derived rhythmic motif usually provides him with ample creative rhythmic environment*, because assorted rhythms always emerged as consequence of subjecting the prototype rhythm to his personal creativity." 163 (emphasis mine).

and irregular, or equidistant and regular."[44] Under consistent offbeat accent, accents **have the same duration as the main beats, but are located in *shifted* positions"** within the basic pattern, and "[s]ometimes…*the same offbeat position* is accented through an entire pattern."[45] Offbeat timing?! Contrasting accents?! Pulls?! Located in shifted positions?! Does this sound familiar?

It should also be noted that consistent offbeat accent further demonstrates that musicians were certainly relating to straight and swung time feels long before Dilla began his own experimentation. That Charnas doesn't even mention consistent offbeat accent in *Dilla Time* is another example of the kind of critical context that's missing from his analysis. But *Dilla Time*'s absence of this kind of critical context isn't merely an issue of missing context. Nor is it simply an issue of an incorrect claim or ill-advised opinion. Charnas is entitled to his opinions. He is not, however, entitled to his own facts. When he presents his claims *as facts*, he wanders into misinformation. J Dilla didn't "*invent* a new way of relating to musical time;" and the "colliding" of straight and swing (swung) time happened in music long before him. Any claim to the contrary is misinformation.

Severity of Late and Earliness
(or Degrees of "Brokenness")

In describing James Brown's approach to the One, in particular James Brown's focus on steadiness, RJ Smith noted that "*nothing was more important than steadiness,* because everybody from the singer on down was lost without it."[46] J Dilla also observed a level of "steadiness" when using the click-and-clock rhythmic feel. And this is the biggest misconception of J Dilla's use of the click-and-clock rhythmic feel (aka "Dilla Drums"): The *degree* of brokenness that Dilla applied. In reality, the degree of brokenness or "drag," though

[44] David Locke, "Principles of Offbeat Timing and Cross-Rhythm in Southern Eve Dance Drumming," *Ethnomusicology*, Vol. 26, No. 2 (May, 1982: University of Illinois Press on behalf of Society for Ethnomusicology), 243 (emphasis mine).
[45] *Ibid*, 227, 230 (emphasis mine).
[46] RJ Smith, 167-169.

noticeable, was minimal. Thus, the true genius of Dilla's use of the click-and-clock rhythmic feel was *steadiness*, not brokeness, ergo not "drunkenness."

When you really listen to Dilla's music, what becomes immediately clear is how *unbroken* most of his rhythms actually were. And even when he used the click-and-clock rhythmic feel, the severity of the lateness and earliness — or degree of brokenness — was never severe. Still, a number of commentators and musicians exaggerate when discussing the timing that Dilla used in relation to his incorporation of the click-and-clock rhythmic feel. Again, see comments like Questlove's *"sounded like the kick drum was played by like a drunk three-year-old."* But there's no steadiness in *drunkenness*. To be drunk is to lose control of your motor mechanics; your brain is impaired and everything from your sense of timing to depth perception diminishes uncontrollably. Dilla's drums were never out of control, they remained steady. Even when Dilla used drag (or push) and pull, ergo, the click-and-clock rhythmic feel, he never let go of the steadiness. Dilla knew, like all great drummers, that nothing was more important than steadiness! Without steadiness, you can't create a solid groove (which Dilla was masterful at doing) or create and *maintain* second- and third-line rhythms. Hence, Dilla's drums were never "drunk" or "all over the place," they were precise and programmed in deference to steadiness.

"Brokenness" and Dance

The more "broken" — the more *off* — the click-and-clock rhythmic feel is, the more pronounced the dragging is and the less *danceable* the music becomes. When J Dilla used the click-and-clock rhythmic feel, he never made it overly pronounced. This because Dilla never lost sight of the dance function of hip hop/rap music. Dilla even expressed once on record: "*This for y'all to dance to...*"[47]

By contrast, today, among the numerous beatmakers (producers) who use the click-and-clock rhythmic feel, there seems to be a race to the bottom of brokenness. The levels of offness not only being

[47] Slum Village - "Fantastic 3," from the Slum Village album Fantastic, Vol. 1 (1997).

undanceable, but sometimes just absurd. This hyper-brokenness may be appealing to some, but it's a far cry what Dilla was doing. Time is never lost with the click-and-clock rhythmic feel when it's broken *within reason*. However, when it's broken excessively, time is lost, or rather sight of the One is lost. Dilla's use of the click-and-clock rhythmic feel demonstrates that he understood this very well.

But today, there are two camps that build off of what J Dilla did. In one camp, you have the likes of Georgia Anne Muldrow, who follows Dilla's lead and tempers the degree of brokenness. And then there are those who exaggerate the degree of brokenness seemingly just for the sake of brokenness. In the latter camp, the beats are not danceable and far more experimental than the steady designs of Dilla.

J Dilla and the Dance Zone of Offness

In the previous chapter, I mentioned how experimental hip hop/rap music does not lend itself to a danceable rhythm. Zeroing in on this specific aspect of experimentalism in hip hop beatmaking, we can see in one specific area that the experimentalists picked up on J Dilla's use of the click-and-clock rhythmic feel and *broke* it (increased the offness) even more. Of course, this is also revealing because it confirms the reality that the less one is concerned with a danceable rhythm, or even just a rhythmic feel that lines up with a consistent head bop, the further out there one can go with *offness*. While this doesn't mean the final results of this approach are pleasing (or displeasing) to *all* ears — no style of beat is, aside from certain tracks produced by specific hip hop icons — it should be remembered that "looseness," i.e. playing off of "straight time" (swing time playing off straight), has its limits in terms of what *most* people will find pleasing to the ear. A beat, a rhythm that's steady or more steady is typically more pleasing to the ear than a beat that's not steady or less steady. What made Dilla a master of the click-and-clock rhythmic feel is that he understood this zone of offness. The degree to which Dilla's beats dragged was never obscene, nor ever out of the realm of fundamental boom bap.

Rapping and Rhythm

An analysis of rhythm in hip hop/rap music generally — and an analysis of distinct rhythmic feels used in hip hop/rap music specifically — also requires an analysis of the significance of rhythm as it relates to the art of rapping in the hip hop/rap music tradition. Unlike other vocal performance styles that rely more on and are typically powered by melody and harmony, *rhythm* is the key to the art of rapping. Rhythm is the phenomenon that moves rappers to do what they do. When rappers are motivated by a beat, why is that? What attracts them? What are they looking for? The answer is rhythm. More precisely, the arrangement of the pulses within a rhythmic pattern. (Even when just a melody is looped, as is sometimes the case with drumless loop beats, rappers still locate the rhythm with the loop.)

It's the rhythmic pattern and its specific pulses that draw rappers in and allow them to flow to a beat and create their own cross rhythms with their rhyme flow. This is what is meant by "riding the beat." When a rapper rides a beat, he's in fact riding not just the whole beat as a single composite, but also the pulses, the *multiple beats* of the track's rhythm. And all long, he is adding his *own* rhythm and rhythmic nuances — what he's hearing in his head and *feeling* in his body — which creates a cross rhythm, two or more distinct rhythms moving simultaneously (crossing each other).

"African indigenous music cultures recognize vocal music as a distinction of *the music-making mouth* among other aspects of music making. Some African cultures have terminology for categorizing and discussing *vocal music*," and some, like the Igbo, have "many terms for categories, styles, qualities, and *creative intentions*."[48] The parallel to the art of rapping couldn't be more clear. Rapping, as a vocal music, is quite distinct and it's treated as its own art form within the hip hop/rap music tradition. And just as African music cultures have terminology for categorizing and discussing qualities, styles, and creative intentions of vocal music, so does hip hop's rapping tradition. From timbre to rhythmic

[48] Nzewi, 133 (emphasis mine).

nuance to breath control to word transition — what collectively is recognized as *flow* — to voice to inflection to projection to creative stylization — what collectively is recognized as *delivery* — rapping, hip hop's vocal music, is a distinct music-making mouth operating among other aspects of hip hop/rap music making.

Further, as its own musical component, rapping has been developed with and *without* accompanying instrumental music. Historically, terms like *freestyle* and *cipher* were associated only with the *vocal* aspect of hip hop/rap music, i.e. no accompanying beat or instrumental. In the freestyle and cipher traditions, which continue today, rappers developed their own sense of *vocal rhythm* and learned how to use their voices as instruments in every sense of the word. It is the rap-rhythmic nuance that makes rapping one of the world's most dynamic vocal-performance styles.

This understanding of rapping as it relates to rhythm is crucial to the discussion of the use of the click-and-clock rhythmic feel and the severity (degree) of brokenness. The more severe the "dragging" and "pushing," i.e. the higher degree of "brokenness," the less conducive the beat will be to the art of rapping. J Dilla understood this very well. Which is why when he used the click-and-clock rhythmic feel, he stayed within a zone that was both conducive to dancing *and* rapping.

It's Still Boom Bap

The Click-and-Clock Rhythmic Feel is a Stylized Sub-Variant of the Boom Bap Rhythmic Feel

The click-and-clock rhythmic feel, as performed in hip hop/rap music, is a sub-variant rhythmic feel of the boom bap rhythmic feel. How else do we know it's boom bap? Here, again, dance is key. The use of the click-and-clock rhythmic feel in hip hop/rap music hasn't resulted in any *new* dances. The same dances that align with boom bap — even down to the proverbial head nod — align with the click-and-clock rhythmic feel. Dances and head nods for trap and drill are distinctively different; and dancers do not move to those rhythmic feels in the same way as they move to straight-ahead boom bap.

Slight deviations from boom bap don't mean that the rhythmic feel isn't boom bap because such temporal deviations do not defy the rhythmic characteristics of boom bap. It's not just playing around at the margins of the boom bap style, it *is* boom bap! Further to this, let's consider the importance of the kick drum. What changes about the kick drum in the click-and-clock rhythmic feel? Not the sound, not the genre of sounds, not even the *type* of basic drum patterns. The only thing that changes is a degree of lateness or earliness of the kick or snare drum. This does not constitute substantial changes in the boom bap framework, because slight variations in rhythmic patterns is a fundamental part of boom bap's musical dialect.

The base rhythmic feel of boom bap did, at least at one time, appeal to all hip hop audiences; and the core rhythmic aesthetics, qualities, and structures of the boom bap rhythmic feel — the booming kick kick snare / kick kick snare pattern and its numerous variations — was adopted by all beatmakers (producers) in the hip hop/rap music tradition and used as a staple framework to create new rhythmic feels. Aside from the general aesthetic and sonic nature of boom bap, what made it (makes it) so appealing to beatmakers (producers) is how adaptable it is, particularly in terms of micro-rhythm. One important way that the rhythm of most popular music is characterized is by *how* sounds and their arrangement interact micro-rhythmically. When the basic rhythmic structure is fixed, as is the case with boom bap, "…*even the slightest microrhythmic fluctuation becomes noticeable and meaningful.*"[49] Again, slight variations in rhythmic patterns is a fundamental part of boom bap's musical dialect, and it's one area in which boom bap distinguishes itself.

Again, why does the click-and-clock rhythmic feel still sound and feel like boom bap? Because it *is* boom bap. Boom bap is the style, the motif from which the click-and-clock rhythmic feel is operating. From this perspective, the conclusion that *timing* can be singled out as an expressive and/or structural parameter that is separate is incorrect. Instead, *timing* is an intrinsic part of the motif itself. The click-and-clock rhythmic feel doesn't disturb

[49] Danielsen: Serge Lacasse, location: 1915 (emphasis mine).

its *inherent* style, which is boom bap. So it's boom bap's — hip hop's — influence that represents the *major* influence on neo-soul and other music genres that employ the click-and-clock rhythmic feel. And the click-and-clock rhythmic feel is the *minor* because it's inherently boom bap. It's working from the conception of a musical structure — as well as the expressive means by which to make this style and sound — that is set by *boom bap*. In other words, boom bap accommodates different ways of articulating hip hop/rap music's core feel.

By contrast, looking at the trap and drill music rhythmic feels, we do see a substantial change. Still, the sonic aesthetic of boom bap is still present in trap and drill. In boom bap, the drums are out front in the mix. Sonically, trap and drill are relatives of boom bap. The pulse in boom bap and trap is unambiguous; we know instantly that it's boom bap or trap when we hear it. When we hear a typical J Dilla beat, we don't split categories or invent new ones — We *know* we're hearing boom bap, much in the same way when we hear a typical RZA beat or a typical DJ Premier beat or a typical or a typical Alchemist beat, and so many others whose music falls under the same base rubric of boom bap. Likewise, when we hear a typical DJ Toomp beat or a typical Shawty Redd beat or a typical Metro Boomin beat, we know we're hearing trap. The lateness or earliness of the snare and kick, in beats with the click-and-clock rhythmic feel, is simply more pronounced. But these slight temporal deviations do not, however, make the drums of the beat sound like a "drunk toddler playing the drums." Such exaggerations present the use of the click-and-clock rhythmic feel in hip hop/rap music as something more than it really is. In hip hop/rap music, the click-and-clock rhythmic feel is guided by the boom bap rhythmic feel, only with slight disruptions of straight and swung time.

In order for a boom bap rhythmic feel variation to be independent of or different from boom bap — to the point that we no longer recognize it as boom bap — the deviations in the structure of the drum framework must not only be noticeably *outside of* a standard boom bap framework, they must also be substantially

different. The way that J Dilla used the click-and-clock rhythmic feel was not substantially different from what we hear in standard boom bap frameworks. The slight disruptions (deviations) in the placement of the kick and snare are not so disruptive that they break from the standard arrangement of the kick on the One, snare on the Two. That the kick and snares arrive slightly off of the One and Two is of no major consequence. Even though there is a noticeable drag, as I've made clear elsewhere in this chapter, drag, push and pulling, stretching, etc. is always happening in hip hop/rap beats. "Dragging drums" is not limited to one type of drag, offness, or arrangement. For instance, listen to Papoose's "License to Kill (Remix)" feat. Mobb Deep (2014), produced by DJ Green Lantern. In this song, the drag — the offness — is accented on the loop point of every second bar. In terms of the click-and-clock rhythmic feel being used in hip hop/rap music, the degree of severity or placement of the drag isn't sufficient enough for separating click-and-clock rhythm patterns from its parent rhythmic feel: boom bap.

Fundamentally, it's not difficult to recognize the click-and-clock rhythmic feel as a sub-variant of boom bap. So it's surprising that Charnas doesn't situate Dilla's use of the click-and-clock rhythmic feel within boom bap. Worse still, Charnas elevates the click-and-clock rhythmic feel *above* the boom bap rhythmic feel altogether, especially given boom bap's obvious dominance and the fact that there's no "Dilla drums" *without* the boom bap rhythmic feel. The click-and-clock rhythmic feel, as used in hip hop/rap music and elsewhere, is a manifestation of boom bap. And as Johansson has noted, "**a rhythmic style *remains recognizable across all of its potential manifestations*** and how people consistently interact with it."[50]

Finally, turning to corporeal movement/corporeality, i.e. the relating to the movement of the body, we can further observe that even though the click-and-clock rhythmic feel that Dilla best popularized relied on the micro-offness of snares, kicks, or hi-hats. This rhythmic feel makes one nod their head (i.e. move their body) much the same way that *all* boom bap music does, because

[50] Anne Danielsen: Mats Johansson, location: 1096 (emphasis mine).

it *is* boom bap. Put another way, the click-and-clock rhythmic feel, as Dilla performed it, doesn't make us move *differently* than straightforward boom bap.

As I mentioned before, when performing the click-and-clock rhythmic feel, some beatmakers (producers) hyper-exaggerate the offness to extreme levels, making it difficult to move to the beat in the same way as the original style prompted one to move. By contrast, the trap rhythmic feel makes one move and dance markedly different than what the standard boom bap rhythmic feel provokes. The parallel to movement is the way in which rappers rhyme (perform) to aforementioned rhythmic feels. A rapper can rhyme the same way (same basic flow) over a beat with the click-and-clock rhythmic feel as he can over any other boom bap beat. But this is not so with the trap rhythmic feel, where rappers typically rhyme some version of a triplet rhyme scheme.

Total Concept and Feel

One of the substantial similarity tests that courts turn to in determining copyright infringement is known as the "total concept and feel" test. This test looks at contextual, abstract concepts rather than specific details. "Total concept and feel" is instructive for our purposes here because the click-and-clock rhythmic is actually a contextual, abstract concept that is used to make to something specific. The click-and-clock rhythmic feel is abstract because it's not tethered to a single genre of music; it can be used to create hip hop/hop just as much as contemporary jazz, R&B, or blues. In this vein, it's no different than how other rhythmic feels are contextual, abstract concepts that musicians use to make specific musical aesthetics. For example, you can use the 5 Beat Pattern to a make an Afrobeats song or a reggae-Afrobeats hybrid song. Or you can use the One drop rhythmic feel to make a reggae song or a British ska song or new wave song. Once a musician chooses a rhythmic feel, they can build around it to create their own style, sound, and aesthetic. Which is exactly what J Dilla did. Dilla didn't "invent" the click-and-clock rhythmic feel, he *used* it and built a unique

style, sound, and aesthetic around it. Similarly, when you compare, for example, True Master's use of the click-and-clock rhythmic feel in Ghostface Killah's "Fish" (1996) you notice that the "total concept and feel" of True Master's beat is dramatically different from those Dilla beats that incorporate the same rhythmic feel.

Basic Building Blocks of Music and Why the "Originality of Rhythm is a Rarity, if Not an Impossibility"

As I noted in the previous chapter, a rhythmic feel is a basic building block of music; this is a long held truth. And since a rhythmic feel is a basic building block of music — something commonly used by musicians to create new music with — it, like a backbeat, cannot be copyrighted. In fact, this truth is so well recognized that, in copyright infringement cases, courts have often noted this. In *McRae v. Smith* (1997), the court found "'chord progression and **rhythmic feel'** to be 'used in thousands of other songs' and thus '*non protectable*.'"[51] In *Batiste v. Najm* (2014), the court found that **"the basic harmonic and *rhythmic building blocks* of music, especially popular music, have long been treated by courts as well-worn, *unoriginal elements* that are *not* entitled to copyright protection,"** and that **"the basic beats and chord progressions used in"** popular music "are customary throughout" different genres, "making them unprotectable *scènes à faire*."[52] In *Jarvis v. A & M Records*, 827 (1993), the court found that ***"[e]asily arrived at* phrases and chord progressions are usually non copyrightable..."]**[53] In *Batiste v. Najm* (2014), the court found, as did the court in ***Northern Music Corp. v. King Record Distributing Co.*** (1952), that **harmony "is *achieved* according to rules which have been known for many years."**[54] Here, the word "achieved" is key.

[51] *Batiste v. Najm*, 28 F. Supp. 3d 595 - Dist. Court, ED Louisiana 2014, quoting *McRae v. Smith*, 968 F.Supp. 559, 566-67 (D.Colo. 1997) (emphasis mine).
[52] *Batiste v. Najm* (emphasis mine).
[53] Batiste v. Najm, 28 F. Supp. 3d 595 - Dist. Court, ED Louisiana 2014, quoting *Jarvis v. A & M Records*, 827 F.Supp. 282, 291 (D.N.J.1993) (emphasis mine).
[54] *Id.* (emphasis mine).

In *Dilla Time*, Charnas is preoccupied with *how* one aspect of Dilla's music was *achieved*; i.e. how one particular rhythmic nuance — the click-and-clock rhythmic feel — was "approached" by J Dilla. But *how* a musician *achieves* (arrives at) — a rhythmic feel doesn't make him superior to other musicians who achieve (arrive at) the same rhythmic feel, nor does it make his *use* superior to other uses of the same rhythmic feel. Likewise, *how* Dilla *achieved* the click-and-clock rhythmic feel doesn't make him the "inventor" of the click-and-clock rhythmic feel. More significantly, originality doesn't exist in the click-and-clock rhythmic feel in and of itself, nor does originality exist in the mere use of the click-and-clock rhythmic feel. What determines originality — with regards to the click-and-clock rhythmic feel or any other rhythmic feel for that matter — is *how* the click-and-clock rhythmic feel is *used*.

In *Swirsky v. Carey* (2004) and *Batiste v. Najm* (2014), the courts found that **"although chord progressions may not be individually protected," "*they could combine with* rhythm and pitch to support a finding of infringement),**" and that "it is theoretically possible that *a common chord* progression **could be "*exploited in an original* (and thus, protectable) manner"**[55] "[O]riginality of rhythm is a rarity, if not an impossibility" because it's a basic building block of music. Consequently, as a basic building block of music, a rhythmic feel, like a common chord progression, can be *combined with other musical elements* and "exploited in an *original* manner" or "**expressed in an original and innovative way."**[56] For instance, DJ Premier, RZA, and True Master used the same click-and-clock rhythmic, yet the overall results of the songs in which they used it were different precisely because they exploited the rhythmic feel in a different manner.

[55] *Batiste v. Najm*, 28 F. Supp. 3d 595 - Dist. Court, ED Louisiana 2014, quoting *Jarvis v. A & M Records*, 827 F.Supp. 282, 291 (D.N.J.1993) (emphasis mine).
[56] *Northern Music Corp. v. King Record Distributing Co.* 105 F.Supp. 400 (S.D.N.Y.1952); *Batiste v. Najm*, 28 F. Supp. 3d 595 - Dist. Court, ED Louisiana 2014, quoting Jarvis v. A & M Records, 827 F.Supp. 282, 291 (D.N.J.1993) (emphasis mine).

INTERMISSION

A List of Direct Claims and Statements From *Dilla Time* That are Inaccurate or Lacking

Once again, I want to point out that Wole Soyinka, the renowned Nigerian playwright, novelist, poet, and essayist, has said that "*mis-teaching*…fouls up the roots of the neophytes' resources and imprisons their imagination." I believe this also happens when authors leave out proper context. And as I pointed out in the Introduction of this book, I go heavy on context — *proper* (full) context, not incomplete context, not biased context, not misleading context. Whatever benefits a better understanding of the topics that I cover in *The Art of Sampling* is my only concern. I'm not narrowly focused on whatever serves any argument that I may have.

Based on my overall reading of *Dilla Time*, I believe that Charnas shares this approach in principle. However, there are some areas within his musical analysis where his narrow focus departs from this approach and creates the biggest problems. Because it's here where he often leaves out proper context when discussing music tropes and processes, particularly the methods, processes, and techniques that J Dilla used. And even more disappointing than the lacking or improper context is the presence of a number of claims and statements that are inaccurate altogether.

In this section, I examine some of the most alarming claims and statements that Charnas makes in some of the music analysis parts of *Dilla Time*, and I provide the context that he did not. With the complete picture — the proper context — I trust that readers will be able to distinguish where J Dilla *should* be singled out and where he shouldn't. Also, when you observe this list, the pattern becomes clear. In areas where proper context would *not* single out J Dilla and place him above "his more famous peers," the context is missing. As to whether the omission of this context — in some cases, obvious to beatmakerss (producers) and other musicians, musicologists, and music historians — was deliberate, I offer no

opinion. Did Charnas actually know the context and thus choose to overlook it or neutralize its importance? Or did Charnas's focus on his case for J Dilla as the beatmaker (producer) *beyond* "his most famous peers" lead him to inadvertently disregard this critical context? I don't know. But the pattern is what it is, and when looked at closely, it's hard not to see what it reveals.

***

"J Dilla transformed the sound of ***popular music in a way* that his *more famous peers have not.*** *He is the* ***only*** *producer-composer* ***to emerge from hip-hop*** *and, indeed, all electronic music* ***to fundamentally change the way so-called traditional musicians play.*** *And the core of Dilla's contribution is* ***a radical shift in how musicians perceive time.***"[57]

I've already discussed how J Dilla was *not* the originator of the rhythmic feel, so by the default the "only producer-composer..." statement is false. So, here, I'll turn my attention to: "J Dilla transformed the sound of popular music in a way that his *more famous peers* have not." What are the implications of this deceptively simple phrase? Charnas doesn't directly say that J Dilla's more famous peers did *not* change the sound of popular music; he knows that he can't make that claim. But given the central focus of *Dilla Time* and Charnas's inclusion of J Dilla among the ranks of Louis Armstrong, James Brown, John Coltrane, et. al., Charnas is suggesting that the *way* that *Dilla* changed popular music is more significant than the way "his more famous peers" changed the sound of popular music. But considering the fact that hip hop/rap music *overall* (ca. mid '80s to mid '90s) changed the sound of popular music, such a suggestion is easily disproven. J Dilla's "more famous peers" all made significant contributions to the hip hop/rap music

[57] Charnas, 9.

blueprint that changed the sound of popular music. Nonetheless, Charnas places J Dilla on a pedestal above and beyond them; and he validates this placement based on two things. First, Dilla's use of the click-and-clock rhythmic feel. Second, the fact that a number of beatmakers (producers) and other musicians in hip hop/rap music and neo-soul, a sub-genre of contemporary R&B, copied and built upon Dilla's signature style, sound, and aesthetic. If Charnas had simply aimed to distinguish J Dilla and his work, he would have been on more solid ground. But it's precisely his forced placement of Dilla beyond "his more famous peers" that taints various aspects of the music analysis part of *Dilla Time*.

My approach to analyzing or ranking the top hip hop beatmaking (producers) is not influenced by the prospect of placing *any* of the hip hop's beatmaking icons on a pedestal above and beyond another. Instead, my approach considers, first and foremost, an examination of the catalogs of each beatmaker (producer); followed by their mastery of hip hop beatmaking's commonwealth practices, methods, techniques, and aesthetics; followed by their individual innovations, influence, and impact. Within the spectrum of individual innovations, influence, and impact, I don't credit innovations to the *individual* beatmaker (producer) that were in fact developed collectively. Nor do I overstate (or understate for that matter) their individual influence and impact on hip hop/rap music. Of course, people have their personal favorites. J Dilla is obviously Charnas's personal favorite; he doesn't hide this. Dilla is also one of my favorite beatmakers (producers), and I don't hide it either. But personal preference cannot, *should not*, overshadow empirical evidence. And personal preference should not narrow our scope within investigating (and offering opinions on) macro developments in hip hop/rap music and Western popular music more broadly.

Charnas's analysis of J Dilla's contributions to neo-soul is first rate. Still, he presents this analysis as additional support for his fundamental argument: That J Dilla was in same the league as Louis Armsrong, James Brown, John Coltrane, et al., and thus, he was *beyond* "his more famous peers." But here, again, critical

context is missing. One of the ways that Charnas attempts to prove his argument is by presenting J Dilla's role in the origins of neo-soul. But neo-soul existed prior to J Dilla, and it was at no time personified by the click-and-clock rhythmic feel. Furthermore, neo-soul isn't the only sub-genre born from the creativity and innovations of hip hop/rap beatmakers (producers). There's also trap and drill, the prior being much more widespread and popular than neo-soul. And in the case of trap, what do we say of 8Ball & MJG or DJ Paul and Juicy J — the proto-trap creators? And what do we say of DJ Toomp and Shawty Redd, widely recognized as two of the main pioneers of the trap music rhythmic feel, style, sound, and aesthetic? Are we to ignore that they exist? Are we to ignore Mannie Fresh's contributions to the origins of trap? Regardless if one likes trap, regardless if some detractors do not consider it to be "real" hip hop (a common opinion among many purists or '90s hip hop heads), recognizing trap as a powerful rhythmic feel, style, sound, aesthetic, and sub-genre of its own means acknowledging that J Dilla was certainly not alone in this area of impact and influence. Moreover, it means acknowledging that Dilla was not beyond "his more famous peers," he was *among* them.

Since J Dilla was not the originator of the rhythmic feel that Charnas gives him credit for; and since musicians were already relating to rhythm and musical time in an infinite number of ways; and since musicians have long "perceived time" through straight and swing combinations; by default Charnas's "*radical shift in how musicians perceive time*" claim is also false. So, here, I'll turn attention to: "*change the way so-called traditional musicians play,"* more specifically, the notion that J Dilla changed the way traditional *drummers* play.

I understand the examination of neo-soul in relation to J-Dilla. That's where his popularization of the click-and-clock rhythmic feel was more broadly adopted outside of hip hop/rap music. That said, pointing to neo-soul musicians or some musicians in New York's contemporary jazz scene as measuring sticks for the broad popularity of the click-and-clock rhythmic feel — or as proof that J Dilla "changed the way so-called traditional musicians play" — is

insufficient. Dilla has perhaps changed the way *some* drummers play in certain limited contexts, i.e. an alternative style of drumming, not a default approach to drumming. But as far as "...changed the way so-called traditional musicians play," what makes this statement problematic is what it says, what it *implies*, and what it *doesn't* say. As is, readers of *Dilla Time* are essentially made to believe that J Dilla changed the way "traditional *musicians*" play, which is to say, the statement isn't qualified. It's not stated that J Dilla changed the way *some* musicians play — and by some musicians, it must be noted that these were (are) mostly drummers within one small particular corner of music. That's not a slight or commentary on preference of genre or style, rather it's a reality. For instance, outside of the neo-soul wing of contemporary R&B and one very small pocket of modern blues and jazz, Dilla's style, sound, and aesthetic have not been adopted in or had any influence on a number of popular music genres, like reggae, punk, Afrobeats, alternative rock, K-pop, grunge, country, folk, heavy metal, indie rock, or EDM, just to name a few. We do see, however, that hip hop/rap music has been adopted (to varying degrees) by *all* of these aforementioned genres. Which indicates that hip hop/rap music (collectively) has changed the way traditional musicians play. But with his "...changed the way so-called traditional musicians play" claim, Charnas elevates Dilla above hip hop/rap music's influence — and the collective efforts of some of its most celebrated beatmakers (producers) — and credits Dilla with not only having had an impact on traditional musicians *more broadly* than his "more famous peers," but having had an impact on traditional musicians that's "on par" with Louis Armstrong, John Coltrane, and James Brown (particularly James Brown's use of the One). And that's simply not true.

Some musicians have altered, in certain contexts, the ways that they play music in response to J Dilla's music, and that's impressive. Still, Dilla is not the "only" beatmaker (producer)-composer to have had such impact. Charnas focuses on the click-and-clock rhythmic feel as the *only* example of how hip hop production prompted a "fundamental change" to the way traditional musicians play. However, by the late '80s, hip hop/rap music, *overall*, was

already influencing how traditional musicians play. From loose drum patterns to syncopated schemes to tight rhythmic approaches to arrangement schemes to percussive playing to phrase- and stab-sound playing to hip hop-inspired loop arrangements, hip hop production had impacted the way traditional musicians play before the mid-'90s. And this influence continues today with the added beatmaking schemes of trap and drill influencing how traditional musicians play.

For instance, the bands The Black Keys, Badbadnotgood, El Michels Affair, and Menahan Street Band have all expressed how hip hop/rap music changed the way they play music. And among this spectrum, RZA and DJ Premier have often come up in the conversation. One song that illustrates how hip hop beatmakers (producers) had already changed the way traditional musicians play music is Grand Puba's 1992 song "Lickshot," which featured the band The Brand New Heavies. More recently, we can hear a strong DJ Premier influence on Steve Lacey's song "Sunshine" (2022). This song features a boom bap backbeat and a DJ Premier-style drum program and riff. "Sunshine" is boom bap with a dope melody over the top! But putting aside any single beatmaker (producer), the critical thing to remember is how hip hop/rap production *overall* — hip hop beatmakers (producers) *collectively* — has influenced how traditional musicians play music today. The use of the click-and-clock rhythmic feel that J Dilla popularized, the rhythmic feel that some musicians employ today, doesn't rise above this fact.

Lastly, J Dilla's contribution with regards to his use of the click-and-clock rhythmic feel was not a "radical shift" in how *musicians* perceive time. It was simply the use of a rhythmic feel that had already been performed before. Musicians have always perceived time in a flexible manner, and this includes the combination of straight and swing (swung) time.

Part of a Larger Trend of Musicians Trying to Sound More Like Machines

When considering Charnas's claim that "J Dilla changed the way so-called traditional musicians play," the inference being mostly drummers, we also have to situate this development as part of a larger trend — since the 1970s — of drummers trying to play more like machines. In fact, in today's studio recording environment, where songs are often stitched together at different moments, machine time has become the norm for drummers. "[F]rom the early 1980s onwards *machine time* became the prominent form in popular music and, even before hard-disk [sic] recording, playing to a click track became the norm both for reasons of consistency and so that MIDI sequences could be combined with live performance."[58]

Yes, *some* drummers have incorporated the use of the click-and-clock rhythmic feel à la J Dilla, and, in doing so, have, to some degree, employed Dilla's style, sound, and aesthetic. But modern drummers, overall, have consistently been emulating machines for 50 years now. And since the late '80s specifically, musicians have been emulating the machine-made music of hip hop/rap music. Further, changes in technology, specifically the adoption of music production tools like digital samplers and drum machines, have changed the way drummers (and other musicians) play overall.

The Affordance of Drum Machine Samplers and the Experimentation It Provokes

Why Singling Out J Dilla's Use of the Click-and-Clock Rhythmic Feel Doesn't Tell the Whole Story

The affordance of the MPC (and other drum machine samplers) was so that you could experiment with quantization and swing in an infinite number of ways. I know personally because I began making beats in 1993 on an Emu SP 1200 before moving to the AKAI MPC 60 II in 1994. I experimented, doing whatever it took to capture

[58] Danielsen: Simon Zagorski-Thomas, location: 2527 (emphasis mine).

the sound and rhythm that I wanted. And I wasn't unique in this kind of experimentation. Every beatmaker (producer) from the Pioneers/Avant-Garde period that I interviewed — from DJ Premier to Buckwild to Large Professor to DJ Toomp to Rsonist — did the same thing. There were various tactics for deliberately creating "offness" and imperfection.

Charnas acknowledges the MPC's unique affordance and the capacity for all beatmakers (producers) to manipulate it in different ways. But in singling out J Dilla as the sole beatmaker (producer) to have had the foresight to program the MPC to produce a specific combination of settings that could render the click-and-clock rhythmic feel, he's basically asking, *"Well, if it was so easy, why didn't anyone do it before J Dilla?"* Well, first, as I've pointed out earlier in this chapter, other beatamkers (producers) *did* do it before J Dilla — DJ Premier, RZA, and True Master most notably. Second, Charnas doesn't consider the possibility that others had indeed experimented with the same rhythmic feel but simply didn't prefer to make it a mainstay of their style, sound, and aesthetic. I see this as no different than beatmakers (producers) passing over a record where another beatmaker (producer) finds gold in it. All beatmakers (producers) are not attracted to the same styles and sounds, the same rhythms, the same melodies, or the same aesthetics. As a matter of preference, beatmakers (producers) lean towards the styles, sounds, aesthetics, *and* techniques that they relate to the most. Empirical evidence stongly suggests that the use of the click-and-clock rhythmic feel was (is) a matter of taste. While the click-and-clock rhythmic feel was adopted by some beatmakers (producers) in hip hop/rap music after Dilla popularized it, it was not adopted by *most* beatmakers (producers) in hip hop/rap music.

Hip hop/rap music is very trendy at times, and beatmakers (producers) are quick to adopt new styles and sounds. Certainly, this is what occurred after J Dilla developed his signature sound using the click-and-clock rhythmic feel. Some beatmakers (producers) copied Dilla outright, others incorporated the style, sound, and aesthetic that Dilla popularized into their own style and sound. But *most* beatmakers (producers) neither copied Dilla

nor incorporated the key elements of his signature style and sound. Here, again, the empirical evidence is overwhelming. Pick any hip hop album after 1996, look at the top 50, 100, 200 hip hop/rap music releases — underground, mainstream, whatever. What's clear is that the click-and-clock rhythmic feel is not present on the vast majority of those releases. Even among most of Dilla's own biggest records, the click-and-clock rhythmic feel is absent! The Pharcyde's "Runnin'" (1995) doesn't feature this rhythmic feel, Common's "The Light" (2000) doesn't feature this rhythmic feel; and *Donuts* (2006), Dilla's most well-known album, doesn't prominently feature this rhythmic feel. My aim in pointing to the empirical evidence isn't to downplay J Dilla's influence and impact, but it's also not my goal to overstate or misrepresent it. Rather, my focus is to offer a balanced perspective and to bring the full context and historical accuracy to this discussion.

Rza's "Aesthetic Was *Random*," But J Dilla's Was "Cultivated"

One of the more unfortunate passages in *Dilla Time* is Charnas's commentary about RZA's style, sound, and aesthetic:

> "In the mid-1990s Robert Diggs, a producer from Staten Island who called himself the RZA, ***pioneered a more raw, rough, and low-fidelity sound*** in his work with the Wu-Tang Clan. **Where hip-hop producers before him obsessed with aligning the junctures of loops with the time grid — making everything seamless and perfect — *the RZA found charm in rhythmic imprecision;* in songs** like "Cuttin Heads" by Ol' Dirty Bastard, **the *RZA didn't seem to care* that the sequencer was running too fast for the drum loop of Melvin Bliss's "Synthetic Substitution" to catch up to it. The *RZA's aesthetic was more random than cultivated*, an artifact of coarse looping**."
>
> "Jay Dee / J Dilla's methods of *rhythmic sabotage* were ***created by deliberate,*** *severe* displacement of elements, expressing multiple pulses of straight and swung."[59]

[59] Charnas, 193-94 (emphasis mine).

Charnas is correct when he points out that Kanye West and Madlib were "creative progeny to the RZA."[60] But Charnas is less direct in making the same claim when it comes to J Dilla, who was also the creative progeny to RZA. While conceding that RZA preceded Dilla, Charnas presents what he says is the *difference* between the two beatmakers (producers). He presents Dilla as a musician of "deliberate" choices. He presents RZA as a musician of "random" occurrences: "The RZA's aesthetic *was more random* than cultivated, an artifact of coarse looping."

In other words, according to Charnas, RZA, one of the founding architects of hip hop beatmaking as we know it, was just "randomly" doing things? No "deliberate" choices? *His* style, sound, and aesthetic were just *happenstance,* an "*artifact*" left over from imperfect looping? But J Dilla, a beatmaker (producer) who followed, studied, and *copied* RZA was "deliberate" and creative in his methods, techniques, processes, and aesthetic? No, full stop. First, let's be clear here, all musicians improvise as a part of the creative process. Ideas arrive, often randomly, during the course of creativity. But "random" ideas are the residue of experience, experimentation, and deliberate direction. Moreover, the inclusion — or removal — of the expressions of ideas *is* calculated. So even if RZA himself said something like, "I sample *random* sounds," it's not an indication that his techniques and methods are random, haphazard, or uncalculated to him. Finally, the word "random" is often used in sampling as another word for "variety" or "obscure." It doesn't mean *lack of calculation*. J Dilla, like lots of other beatmakers (producers) sampled "random" sounds. In any case, the calculation is always manifested in the final result of the beat.

Next, Charnas describes the *imprecision* of RZA's work — a feature of RZA's work in 1993 — as finding "*charm* in rhythmic imprecision." "*Charm*." What does that even mean? That RZA found rhythmic precision to be *cute*? But J Dilla found rhythmic impression to be *serious*? What a far cry from the high esteem that Charnas bestows on J Dilla in comparison. When describing Dilla's own imprecision, Charnas sees it as something cool, romantic,

[60] *Ibid*, 341.

forceful, and intentional: It's "*rhythmic sabotage*," it's the genius of *deliberate* creativity. Recall that Charnas also said this: "*[O]ne* programmer in particular was *the first* to make a body of work and a new aesthetic out of that feature, ***in ways that were heretofore inaccessible to the minds of other beatmakers and musicians."*** Hence, Charnas doesn't assign the same level of intelligence to RZA that he reserves for J Dilla. He suggests instead that RZA's style, sound, and aesthetic, specifically RZA's drum programming, were *not* "cultivated" but "random," something that was just left over residue from "coarse looping." In other words, for Charnas, Dilla's style, sound, aesthetic was the direct result of "cultivation," intelligent, decision-making and clever programming. But RZA's style, sound, aesthetic — from which J Dilla borrowed — were the direct result of random acts. Clearly, Charnas is hung up on the "deliberate, severe displacement of elements." But deliberate displacement also occurs when one *deliberately* programs drum patterns loosely or *off* — the imprecision, the *offness*, is a deliberate feature, not something random or left over by accident.[61] Here's renowned beatmaker (producer) Prince Paul *in 1995* talking about working with RZA in the studio and witnessing RZA program drums:

> "Yo, RZA's the type of brother — *he brought me back down to earth on a lot of stuff*, like we'd be in the studio, and I'd be like "Yo, you wanna loop up [that drum]?" And he's be like "Naw." He'll just hit a snare like this [*makes repeated bashing sounds*] — hittin' all the keys. "Okay let's do the kicks now," [*makes more repeated bashing sounds*] and they'll be all *off*. Loops don't match. He'll just sit back "Yeah, that's phat, son." And I'm like "Yo?!?" And it took me back, 'cause he took the technology out of it, and that's kinda of fat. If it *feels* right to him *that's what he goes for*…'[62]

Readers will note that Prince Paul's eye-witness account affirms that RZA was deliberate in how he programmed his drums. RZA

[61] Is improvisation "random"? Even if you program your drums with the quantization off, you're still accounting for your imperfections; it's a part of your style and sound, which you've built your set approach and feel for.
[62] Chairman Mao, "Prince Paul: Skits-O-Phrenic," *Ego Trip* (November, 1995) (emphasis mine).

knew exactly what he was doing and what he was going for. He was "going for" a specific rhythmic *feel*. However, RZA didn't "take the technology out of it." That's an oxymoron. RZA was sampling and programming drums on a drum machine sampler, so of course technology was very much a part of it by default. Thus, it's better to say that RZA *used* technology in the specific manner that permitted him to achieve the rhythmic feel, style, sound, aesthetic that he was after. And here is RZA in his own words from his own book, which published in 2005, 15 years before *Dilla Time* was published:

> "If you take my music and separate it track by track, you'll find **a lot of *it's not on beat*. I'm *intentionally* messing it off the beat—but when it all meshes together *it makes another rhythm* of its own."**[63]

Thus, in comparison to J Dilla's approach and aesthetic, RZA's approach and aesthetic weren't "random," they were intentional! RZA was quite methodical and tech savvy, and he was systematic in manifesting his intentions. Claiming that RZA's "aesthetic was *random*" is unfortunate for two reasons. First, it discredits the genius of the RZA. (Charnas is occupied with the genius of Dilla, but he doesn't afford RZA the same genius status.) Second, it's hypocritical, as it does the very thing that Charnas doesn't want people to do when considering J Dilla's work. Charnas wants people to know that Dilla's music was *not* haphazard. Charnas wants people to know that Dilla's music was *not* the product of merely turning off the quantize feature; that it was *not* a set of "random" acts; that it was intentional; that it was the direct result of a set of deliberate, intelligent decisions made by Dilla. But Charnas would have his readers believe that this was *not* however the same case with RZA, whom Dilla studied closely, learned from, and, in some cases, copied.

Turning a more careful ear to at least four of RZA-produced beats (songs) is equally revealing here, inasmuch as it confirms that not only had RZA been using shuffle rhythms and offness as a part of his style, sound, and aesthetic, but that clearly J Dilla had been

[63] The RZA, *The Wu-Tang Manual* (Riverhead, New York 2005), 203-04 (emphasis mine).

studying the RZA. First, "Cold World," a song off of GZA's classic album *Liquid Swords* (1995). The drums are off and dragging, and the hi-hat's timing is *intentionally* not precise. Actually, the drums from "Cold World" are similar to the so called "drunk drums" that people now mostly associate with Dilla. At the time of its release, "Cold World" was a topic among New York-based hip hop/rap beatmakers (producers). In 1995, I had the fortune to be a part of this community, knowing and spending time with beatmakers (producers) in Brooklyn, the Bronx, Manhattan, and Queens. The "*'Cold World' drums*" were not lost anyone. Given that *Liquid Swords* was a bona fide classic produced entirely by one of the icons of hip hop/production, there's no way that J Dilla, a student and master of hip hop/rap's beatmaking tradition, didn't listen — didn't study — the "Cold World" drums. Throw in the songs "4th Chamber" and "Killa Hills 10304" from *Liquid Swords*, and it's not hard to hear that the so-called Dilla drunk drums were, at least in part, inspired by RZA's drumwork on *Liquid Swords*.

Before continuing, it's worth noting here that DJ Premier and RZA both can more rightfully lay claim to be the pioneers of the use of the click-and-clock rhythmic feel in hip hop/rap music. DJ Premier's use of the click-and-clock rhythmic feel is the more clean, stretch feel that J Dilla exhibited, while RZA's use is the more loose, "drunk," "sloppy" feel that J Dilla also exhibited.

Next, Wu-Tang Clan's "Triumph" (1997) features a snare that is not precisely on the Two and the Four, it's alternating and arriving late, a trait that, by 1997, can be heard in a number of RZA's beats. Next, there's "Impossible" (1997). On this RZA-produced beat (song), the snare is dragging and landing *off* the Two and Four. Then, there's "Samurai Theme" (1999) a song from the *Ghostdog* movie soundtrack that RZA produced. "Samurai Theme" features the click-and-clock rhythmic feel and, interestingly enough, "Samurai Theme" was the reference beat for the J Dilla-produced Wu-Tang Clan song "House of Flying Daggers" (2009). Some commentators have praised Dilla for making a quintessential Wu-

Tang kind of beat. But few commentators know — or overlook the fact — that Dilla essentially made a RZA "type beat." The "House of Flying Daggers" beat produced by Dilla uses the exact same sample as RZA's "Samurai Theme." And "House of Flying Daggers" follows the same arrangement structure as RZA's "Samurai Theme." While Dilla makes some minor, but nonetheless impressive embellishments, a comparison of the two tracks clearly reveal that Dilla was following RZA's lead, not the other way around. Further to this point, the "Samurai Theme" beat (like much of RZA's earlier work) serves as more evidence that Dilla studied RZA and was as much a RZA disciple as he was a Pete Rock, Q-Tip, or DJ Premier disciple.

Final observation around this. Today, J Dilla's signature use of the click-and-clock rhythmic feel, especially with wonky Fender Rhodes melodies, is often imitated precisely because of the *formula* itself is easily duplicated. On the other hand, even while the formulas of early RZA beats or prime DJ Premier beats (ergo, minimal number of phrases, micro-chopping, ruptured sound-stabs, and a scratch hook), is well-known, duplicating their styles, sounds, and aesthetics — or even building upon them — is *not* easy. Many beatmakers (producers) have tried making knock-off RZA and Premier beats, and they always sound like knock-off RZA and Premier beats.

Ironically, this speaks to a critical fact: The J Dilla beats that are most difficult to copy don't even feature the click-and-clock rhythmic feel. Listen to the following J Dilla produced songs: The Pharcyde - "Runnin'" (1995); The Pharcyde - "Drop" (1995); De La Soul - "Stakes Is High" (1996); Q-Tip - "Let's Ride" (1999); Erykah Badu's "Didn't Cha Know" (2000); Busta Rhymes - "Show Me What You Got" (2000); Common - "The Light" (2000); J Dilla - "Fuck the Poilice" (2001); J Dilla - "Welcome to Detroit" (2001); J Dilla - "African Rhythms" (2001)[64]; J Dilla — "B.B.E.

[64] That the title of this song is "African Rhythms" should not be lost on any listener of J Dilla's music. The first 12 seconds of this song is an open drum beat. Then Dilla comes in with these vocals: "*These are African rhythms. Passed down to us* through ancient spirits. Feel the spirit. A unifying force. Come on, move with the spirit. Stand up, clap your hands. Move with the rhythm. *Let's get down*." Obviously, Dilla knew where he got his rhytms from. And he never lost sight of the dance function of hip hop/rap music.

(Big Booty Express)" (2001); Guilty Simpson "As Serious As Your Life" (Jay Dee Remix) (2003); Raekwon - "Baggage Handlers" (Feat. Busta Rhymes) (2004); J Dilla - "Heroin Joint" (ca. mid-2000s); J Dilla - "Baby" feat. Guilty Simpson & Madlib (2006); J Dilla - "Time: Donut of the Heart" (2006); J Dilla - "Sleeping Like A Dog" (ca. mid-2000s); J Dilla - "Walkinonit" (2006); Phat Kat - "Cold Steel" (feat. Elzhi) (2007); Mos Def - "History" (feat. Talib Kweli) (2009); and MF DOOM - "GAZZILLION EAR" (2009). Listen to all of these songs, and I defy you to say that they're not classic, superb, unadulterated examples of *boom bap*.

"Prevailing Explanation" of J Dilla's Methods

Charnas claims that the "prevailing explanation of" J Dilla's methods "— and the most *misleading* — is that *his* time-feel is exclusively the result of his playing freehand, without timing correct or 'quantization.'" He further adds that:

> "A sequencer with its correction features defeated is merely a replication device. At its full resolution, it records and reproduces a programmer's input quite faithfully. **At that point, a programmer becomes *just a drummer*,** and a drummer is only as good as his or her sense of rhythm and reflexes. **If J Dilla's methods are reduced to good reflexes, then anyone with a drummer's reflexes** — when placed in front of a drum machine with the 'quantize' function turned off — should produce beats that sound like Dilla's. *That is not what happens.* What actually happens is a beat that sounds like the reflexes and proclivities of that particular user. Many beatmakers before James Yancey had great reflexes. If the 'J Dilla feel' could be achieved simply by turning off timing correct, *it stands to reason that another producer might have arrived at that feel long before James Yancey.* ***Nobody did***."[65]

First, one more time, this rhythmic feel did *not* originate with J Dilla's, it existed long before him. Second, "*his* time-feel..." No. A time-feel does not belong to any musician, so the click-and-clock rhythmic feel isn't "his." What can be assigned to Dilla are his

[65] Charnas,194 (emphasis mine).

style, sound, and aesthetic. Third, who says that "freehand," i.e. quantization turned off, is the "prevailing explanation" for J Dilla's methods? Sure, *some* people have come to this conclusion, and that conclusion is warranted. DJ Premier, RZA, and True Master all played the same rhythmic feel freehand. Additionally, most of J Dilla's beats do not feature the click-and-clock rhythmic feel, so for the bulk of his beats, we can infer that he played the drums freehand for the majority of his beats. Hence, it's not as far fetched or "misleading" to assume that Dilla played the click-and-clock rhythmic feel freehand. Fourth, other beatmakers (producers) *did* arrive at using the click-and-clock rhythmic feel before J Dilla. Again, as I noted earlier in this chapteer, under the section header "Contextual History of the Click-And-Clock Rhythmic Feel (Or, Who Really Originated "Dragging Drums"?)," DJ Premier, RZA, and True Master arrived at this rhythmic feel *before* Dilla. Fifth, Charnas makes a logical fallacy because, conversely, if J Dilla's methods are reduced to *timing* manipulations made through quantization, well, then anybody with quantization features should be able to reproduce the same *rhythmic feel* that Dilla did. And that is in fact what is clearly possible today just as it was in the late '90s. But as for Charnas's statement "...produce beats that *sound* like Dilla's," here, Charnas is conflating two things: A rhythmic feel vs. the signature style, sound, and aesthetic of a given beatmaker (proudcer). If one beatmaker (producer) uses the same rhythmic feel — and even the same technique and methods — of another beatmaker (producer) who did it before hime, that is never assurance that latter's beatmakers' (producers') beats will *sound* like the prior's.

What distinguished Dilla's beats *overall* — and here, I'm only refeencing beats which Dilla built around his use of the click-and-clock rhythmic feel — isn't the click-and-clock rhythmic feel, but rather two other things. First, the inclusion and arrangement of the other musical elements around it, i.e. *Dilla's* sense for arrangement. Second, *Dilla's* sampling ear — every beatmaker (producer) has his own unique sampling ear. The click-and-clock rhythmic feel is easy to replicate on a beatmachine or inside a DAW; anybody can do it. A Dilla beat, however? Well, a *Dilla* beat is a *Dilla* beat!

People *can* duplicate the rhythmic feel that Dilla used and people cam copy Dilla's style, sound, and aesthetic, but no one can fully replicate Dilla's style, sound, and aesthetic.

Similarly, why can't people duplicate the signature styles, sounds, and aesthetics of DJ Premier, RZA, and Havcoc (of Mobb Deep) the way that they *can* duplicate the click-and-clock rhythmic feel-based sound that J Dilla is most known for? Because the overall feel of all of their styles, sounds, and aesthetics is not about *timing,* it's about three other things. First, it's about *their* individual sound selection and sound manipulation techniques. Second, it's about *their* arrangement scopes and programming abilities. Third, and certainly not the least, it's also about *their* sampling ears and the frequencies that each of them are drawn to. As beatmaker (producer) Minnesota has noted, for every beatmaker (producer), there is a "frequency" that they are attracted to, a frequency that they provide to rappers. "I'm always more for the feeling of the music, or more for the ***frequency.*** Producers have always been the ones who have had a burning passion to keep **a certain frequency** alive... **Producers…we provide a frequency** to a poet. We're **frequency providers**, you know what I mean…"[66] As a frequency provider himself, J Dilla was attracted to "certain frequencies," just like all beatmakers (producers) — and all rappers — are attracted to certain frequencies. This is another reason why *timing,* in terms of a beatmaker's (producer's) overall style, sound, and aesthetic, is actually a less important element than *sound*. Again, a beatmaker (producer) *can* play the click-and-clock rhtymic feel (aka "Dilla drums") freehand. But a beatmaker (producer) cannot have, nor provide, the exact same "frequency" of another beatmaker (producer).

Because of this, even if you work within the same time frameworks, even if use the same quantization values, even if you use the exact same methods and techniques, you can't duplicate the overall *feel* of the beats made by DJ Premier, RZA, or Havoc. You can make a "Premier type beat;" you can make a "RZA type beat;" you can make a "Havoc type beat;" you can make a "Dilla type

[66] Author interview with Minnesota (2014).

beat." But those beats will never sound quite like Premier's, RZA's, Havoc's, or Dilla's — Something will be missing! You need *their* sampling ears, you need *their* sounds, you need *their* chopping skills, you need *their* sense for arrangement, and you need their specific feel for and relationship to music.

To further illustrate this point, let's take for example the use of silence or cut-offs or drop-offs in shaping the groove. This is a common technique in hip hop/rap music's beatmaking tradition. DJ Premier perfected and used it to formulate his own style, sound, and aesthetic. You can't copy DJ Premier's cut-offs (mutes) or silences with the same precision and feel because you'd need to have Premier's ear for samples — and you need to know-how to blend them — to do so. You can emulate the structural approach that Premier takes; that is, you can incorporate the cutoffs (mute groups, drop offs, etc.) in the structural framework of your beat. You can't, however, program his style and sound *mathematically* the way that you can easily program the click-and-clock rhythmic feel. The prior requires performance and a knack for DJ cutting and scratching; the latter requires no performative skills, you need only adjust the degree of shift in step edit mode on beat machines or draw in the placements (visually) in software programs.

Before "mute group" technology, this technique was achieved by creating "empty" pads, i.e. adding "silence" to a pad, a sample of no sound/dead air with the volume set to zero, and assigning that pad to the same output of the pad that you wanted to cutoff. I first learned (and began practicing) this technique in 1993. In my interviews with DJ Premier, Buckwild, and D.R. Period each confirmed that they were using this technique in the early '90s and that it was commonly known as using "cut-offs." Also with this technique, the attack and decay of sounds are cut off. Usually, the way for cut-offs to operate with the precision of a DJ, timing correct either should be turned off completely or set to 1/16th 1/32 TRPLT. Below 1/16th, the cut off would typically be over corrected and stiff, not nimble and swift as the beatmaker's (producer's) hands. Today, many beatmakers (producers) use mute groups to achieve the cut-off effect, but because they do so under 1/16th quantization, their cuts are often stiff to the point where you can *hear* the mute-group pads being pushed. The difference, of

course, with Premier employing the cut-off technique, is that the cuts are seamless even with 1/16th quantization, because they are a product of Premier's mastery of micro-chopping and around sound arrangement. Finally, this technique is percussive in nature and contributes a great deal to the shaping of rhythm. Because cut-offs silence other sounds abruptly, *silence* is being used to help shape the groove and rhythm. Thus, this is also a *sound* aspect of rhythm, not simply an aspect of time.

Rick Rubin Was *Not* the First to "Envision Recorded Hip-Hop As Collage Art;" and the Bomb Squad Did *Not* "Take A Cue From Rick Rubin"

> "Took a test to become an MC, and ***orange krush*** became amazed at me, so ***Larry*** put me inside the cadillac, the chauffeur drove off and we never came back." —Run-D.M.C. - "Sucker M.C.'s (Krush Groove 1)" (1984)[67]

Another curious claim and loaded implication that Charnas makes revolves around Rick Rubin:

> Rick Rubin *had already envisioned* **recorded hip-hop as collage art,** and more specifically a collision of sonic elements, *even before the advent of the sampler/sequencer*. **Marley Marl was arguably the first to employ the sampling drum machine in service to that end.**
> **From there onward, two different styles began to coalesce.** Public Enemy and their production crew, ***the Bomb Squad, took a cue from Rick Rubin,*** the man who signed them to Def Jam, cultivating an aesthetic of collision, chaos, and noise, layering samples and creating jarring transitions in their song structures.
> This **"Beats + Noise" approach was contrasted by another one, call it "Beats + Beauty,"** wherein the power of the digital sampler was employed to find and recombine harmony and melody, not just rhythm and sonic texture. *This lineage* attracted beatmakers like DJ Jazzy Jeff and DJ Premier, the first to employ samples of jazz music in hip-hop."[68]

67 "Orange Krush" refers to Larry Smith's band Orange Krush. This is where the name "Krush Groove" comes from.
68 Charnas, 123 (emphasis mine).

Ok, what gives here? Why is Charnas crediting Rick Rubin in this way? Because Rick Rubin used a drum machine? DJs in the Bronx used drum machines before Rick Rubin. And Rick Rubin first learned hip hop production from DJ Jazzy Jay. Moreover, Grandmaster Flash envisioned hip hop as "a collage art" long before Rick Rubin. Flash's album *The Adventures of Grandmaster Flash on the Wheels of Steel* (1982) is a testament to this fact. And It's also an album that both DJ Toomp and DJ Premier point to as a seminal influence on their beatmaking (production) careers. If The Bomb Squad took a cue from anybody in this regard, they took it from Grandmaster Flash, who blended and cut actual snippets from songs (in DJ form), not sparse drum machines sounds like Rick Rubin did. The Bomb Squad did not take their cue from Rick Rubin. And there's not a single hip hop/rap beatmaker (producer) that I've interviewed or talked to in the past 20 years that credits *Rick Rubin* with having created the "template" for hip hop production, or having influenced the way that they make beats. Instead, many have cited Larry Smith — DJ Premier was particularly adament about this when I interviewed him — and DJ Jazzy Jay (Buckwild discussed him as an early pioneer for what we do now).

Rick Rubin's first officially acclaimed hip hop/rap beat, which was a co-production lead by DJ Jazzy Jay, was the instrumental for T La Rock's "It's Yours" (1983) — a year *after* Grandmaster Flash's *The Adventures of Grandmaster Flash….,* and the same year the Larry Smith produced "Sucker MC's (Krush Groove 1)" was recorded. And "Sucker MC's (Krush Groove 1)" was *not* an early Def Jam release as many have assumed; Rick Rubin had no hand in this song.

Further, it was with Run-D.M.C. — and later LL Cool J, and then later still Beastie Boys — that Rick Rubin would distinguish himself in hip hop/rap music's beatmaking tradition. But even here, it must be noted that Rick Rubin was clearly influenced by Larry Smith's earlier work with Run-D.M.C. And the production credit that Rubin gets for albums like *Radio* (1985), *Raising Hell* (1986), and *Licensed To Ill* (1986) is in great debt to Larry Smith. It must be further noted that when Smith produced Run-D.M.C.'s song "Rock Box" (1984), *he* became the first to fuse hip hop/rap

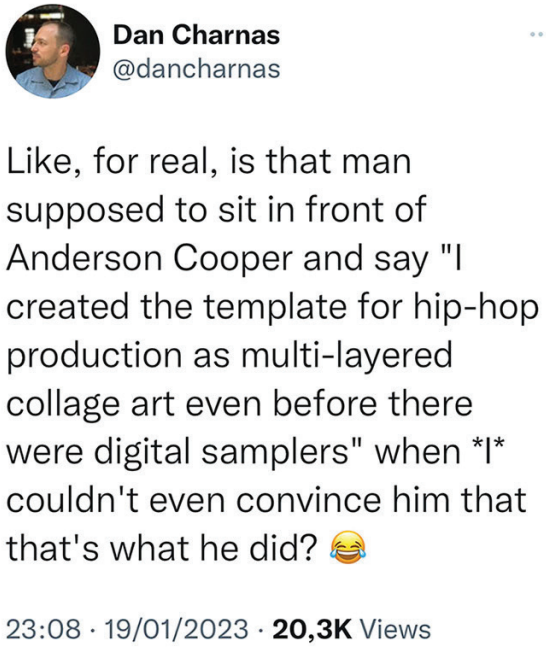
and rock, not Rick Rubin as many wrongly insist. So Rick Rubin took his cue from Larry Smith. But neither Larry Smith's nor Rick Rubin's work in this area was the prototype for The Bomb Squad.

So why is Charnas centering Rick Rubin in this way? Why is Charnas positioning *Rick Rubin* as the father of one of two major "beat" sounds? Rick Rubin's sampling style, if you can even call it that, was sparse and relied mostly on stock drum machine sounds. Rick Rubin never cultivated "an aesthetic of collision, chaos, and noise, *layering samples* and creating jarring transitions in their song structures." This is a just a purple prose description of basic drum-machine-sound stuff. Go listen to Rick Rubin's early beats for yourself. Rick Rubin was not creating beats as rich, dense, and rhythmically funky as the Bomb Squad. Rick Rubin never sampled like that! Rick Rubin never made arrangements nor drum programs in the same manner. The Bomb Squad incorporated micro-samples of various funk and soul records, Rick Rubin did not.

Finally, the two descriptors that Charnas uses for what he calls the two approaches that emerged — "Beats + Noise" and "Beats + Beauty" — are awkward at best. But whatever styles and sounds that emerged during the early to mid-'80s, Rick Rubin wasn't the father of them. Credit for that lineage deservedly goes to Larry Smith, The Bomb Squad, and Marly Marl.

***

In January 2023, a year after the publication of *Dilla Time*, Charnas continued to publicly push the Rick Rubin beatmaking origins narrative:



"*...I couldn't even convince him that that's what he did?*" This tweet by Charnas is quite revealing. Here, he's pushing an inaccurate narrative, even when the subject at the center of this nararive disagrees. Rick Rubin *can't* be convinced because Rick Rubin knows this narrative isn't true. Rick Rubin knows that he can't accept Charnas's assessment because it would mean accepting undue credit for the origins of hip hop/rap's beatmaking template; and it would also mean the erasure of the Black music artits who came before him and those who emerged around the same time that he did.

Signature Sound Means Signature *"Sound"*

Another error Charnas makes involves his misrepresentation of what a "signature sound" means:

> When Tre told James that he had a "signature,'" he meant it in the same way that jazz players have distinctive *approaches to their instruments*, like how Grant Green has a different *approach* to the guitar than, say, Wes Montgomery. Tre was saying that Jay Dee had a distinctive *approach* to his instrument, the drum machine.[69]

This is not what is meant by "signature sound" in hip hop beatmaking. A "signature" sound means just that: A signature *sound*. The elements, style, and aesthetic that we *hear*. This is commonly understood among hip hop/rap beatmakers (producers). When beatmakers (producers) talk of someone's signature, we're not talking about a specific "approach." We often don't even have any way of knowing exactly which approach that another beatmaker (producer) has used. Moreover, beatmakers (producers) can be working from the *same* approach in the creation of their signature. For instance, Pete Rock, Statik Selektah, and DJ Premier, just to name a few, are all DJs, and all have useed the scratch-hook before, which is a specific but common approach, yet when you hear a DJ Premier beat with a scratch-hook, you know it immediately it's DJ Premieer because you know Premier's signature *sound*. Thus, signature sound is a specific *sound* (and the style and aesthetic that comprises it) associated with a particular beatmaker (producer). When we say Dr. Dre's signature sound or The Neptunes' signature sound or RZA's signature sound or J Dilla's signature sound, we're talking expressly about their *sounds*. Even when they switch up the style, we can still hear their *sound*; we know it's them, from song to song, year to year. This has always been well understood in hip hop beatmaking. How beatmakers (producers) *arrive* at a signature sound, what *approaches* they take, is a different conversation altogether.

[69] Charmas, 145 (emphasis mine).

I suspect that Charnas knows very well what a signature refers to hip hop beatmaking. So his misrepresentation of a signature sound as a "distinctive *approach*" is a sleight of hand. I understand why he does this; he wants to draw further attention to J Dilla's "approach" to a drum machine. But a mis-translation of a common hip hop beatmaking term doesn't fulfil this aim. It's misinformation. On this point, recall what I mentioned earlier in this chapter about the challenge of translating information for different audiences; notably, how issues can arise when authors, looking to paint a specific narrative, intentionally *mis-translate* events, practices, etc. that certain audiences aren't aware of.

"Several Important Techniques" *Not* "Cultivated" By J Dilla

> ***He'd already cultivated*** several important techniques: **decelerating samples** *to exaggerate their timing errors* and make them lag against the other sounds that were glued to the stiff sequencer clock; or turning off that "glue," the timing correct function, and playing freehand, sometimes placing sounds one by one, exactly where he "felt" them; **and he also began displacing sounds by sampling and chopping them in ways that altered their position in time.**[70]

Here again, Charnas is assigning credit to J Dilla for "several important techniques" that were already established in hip hop/rap music's modern beatmaking blueprint by 1993, *before* J Dilla's emergence. An excerpt from my interview with DJ Clark Kent describing how he made the beat for "Brooklyn's Finest" (1996) by Jay-Z and the Notorious B.I.G. is instructive in this regard:

> When you give somebody 30 to 40 minutes of sampling time, stereo, what do they have to be creative with, if they got all that time? Like I can take [just] two bars of a song and create 8 different musical loops with it. I can create you 8 sections to make off of a 2-bar loop. And the best part about this interview is that my engineer is right here. He's seen me do it, hundreds of times. Look at "Brooklyn's Finest [Biggie and Jay-Z], it's a five-bar loop. First of all, everybody

[70] Charnas, 184 (emphasis mine).

> was lost on how I made that beat. But if you listen to the beat, *I did things inside of the beat, inside of the five bars.* It wasn't a loop!!! It was *pieces* that I had to put together so it would go without the singing." [emphasis mine][71]

As Clark told me, he decelerated and accelerated samples to make it work.

Next, when Charnas says that J Dilla was decelerating samples "to exaggerate their timing errors…," I believe this is *Charnas's interpretation* of why J Dilla decelerated (or accelerated) samples. While this interpretation may fit neatly into Charnas's *time* narrative, I think it's an overreach. Decelerating/accelerating samples was common practice by 1993. Beatamkers (producers) typically used this technique mostly for pitch manipulation, but it was also used for sonic and aesthetic qualities. Short of a direct statement from J Dilla himself on this, I don't believe this was the primary reason for why J Dilla decelerated samples.

"What Parts of a Record Can You Use to Make a Beat?" Was *Not* a "Question *First Posed* by Madlib (or in a Different Way by Kanye West)" – And Neutralizing Vocals In a Sample Was Not New

Charnas claims that, prior to Madlib, there was a "question" as to what part of records you could sample to make beats:

> "Making beats is always a conversation between producers, and between the present and the past. James's tracks in the 1990s were an answer to a question posed by Tribe, Pete Rock, and DJ Premier: Could a beat be beautiful and banging at the same time? **Now James found himself answering *a new question, posed by Madlib* and, in a different way, by Kanye West: What parts of a record can you use to make a beat? When beatmaking began, the game was simple: find the breakdown section of a record, the "open" place where the vocals dropped out, and loop it so an MC could rhyme over it.** Often beatmakers would find a great

[71] Author interview with DJ Clark Kent, August, 2008, first published in *The BeatTips Manual*, 4th Edition (2010).

> piece of music to use but find that the singer's lyrics were always in the way of a "clean" sample.[72]

Again, Charnas's claims here are inaccurate. Since the late '80s, there has been no hard rule that you could only sample certain parts of records. Every beatmaker (producer) from the Pioneers/Avant-Garde Period (1988-1994) sampled different parts of records; intros, outros, breaks, bridges, solos, sound-stabs, *any* part of the record, it didn't matter. Further, the neutralizing (removal) of vocals from samples had been happening since the early '90s.

[72] Charmas, 359-40.

Taste Metrics: An Accurate Assessment of the Adoption and Popularity of the Click-and-Clock Rhythmic Feel

If you're going to raise the specter of popularity of a thing, or you're going to claim something was very popular and widespread, then you're going to have to look at popularity *in context*. In other words, *how* are you measuring popularity? On a macro or micro level? On a mass appeal level? Charnas points to the Grammys — the recording industry's biggest, most recognized awards event and demonstration of commercial appeal — as one indicator of popularity. He also points to the adoption of the click-and-clock rhythmic feel by some musicians around the world as another indicator. Hence, we can conclude then that Charnas is talking about *mass appeal* popularity. If he's not talking about mass appeal popularity, then his claim of widespread adoption of "J Dilla's ideas" suffers by default, as "widespread" wouldn't necessarily mean as widely adopted as Charnas projects. But let's proceed under the context of mass appeal popularity, which doesn't just include the Grammys as a major indicator, but other things like adoption by peers and, of course, the empirical evidence of albums that did and didn't feature the click-and-clock rhythmic feel.

Charnas doesn't get into any of the taste metrics that govern some of his representations (or mis-representations). But since he makes sweeping claims about the actual use of the click-and-clock rhythmic, and how Dilla's use of it "changed the way so-called traditional musicians play," etc., then we are obliged to open up his sample size, no pun intended, and measure more accurately the popularity of the click-and-clock rhythmic feel in hip hop/rap music and other genres.

***

In the end, are we really judging popularity, value, influence, or impact on the number micro-chops that a beat has, or the rhythmic feel that a beat does or doesn't use? Or, more appropriately, are popularity, value, influence, and impact judged on a composite assessment of the beat, as a whole, and the overall number of beatmakers (producers) who adopted a similar style sound, style, and aesthetic? And then there's the rhyme (rap lyrics) and the rapper who is performing over the beat. Are we to ignore the art of rapping — the 2nd dimension of hip hop/rap music — in evaluating popularity, impact, and influence? No, we can't do that because hip hop/rap *songs*, in their most fundamental nature, contain *two* primary elements: The beat and the rap (the rhyme). So in this vein, when we consider the beat, as a whole, we must recognize what the beat provokes and how it inspires the rapper who rhymes on it. Hence, we're not talking about a popularity contest. We're assessing what typically happens when a given rapper rhymes on the beat of a given beatmaker (producer). What do we say of the lyrics that the beat inspired the rapper to write? What do we say of the performance that the rapper delivers over the beat? What do we say of the *complete song* that the beat and the rhyme combined to make? Any consideration of influence or impact that measures *only* the beat, or *only* concepts, ideas, methods, and techniques used in making of the beat, is incomplete and devoid of the proper context. An accurate assessment of popularity, influence, and impact requires an examination of the popularity, influence, and impact of rap songs — as a whole — i.e. the beat *and* the rhyme.

What About the 5 Beat Pattern Rhythmic Feel and the Popularity of Afrobeats?

And then there's Afrobeats, which not only represents its own rhythmic feel but its own music genre. Afrobeats is more powerful and influential than neo-soul ever was. It's not only that Afrobeats rhythmic feel lends itself to R&B in ways that neo-soul did not (does not), it's that the Afrobeats rhythmic feel invites cross collaborations with various Black (African) music rhythmic feels.

The click-and-clock rhythmic feel that J Dilla built his signature style, sound, and aesthetic around does not figure into Afrobeats in any way. Moreover, the *worldwide* appeal of Afrobeats dwarfs that of neo-soul. So to offer analysis on the impact of *any* rhythmic feel (or its chief practitioner) on Western popular music without even considering Afrobeats' place in this conversation is yet another example of the missing context in *Dilla Time*, as well as Charnas's unwarranted elevation of the click-and-clock rhythmic feel above other more prominent and "popular" contemporary rhythmic feels in Western popular music.

J Dilla's Signature Sound Was Never "Central" To Hip Hop/Rap Music

Charnas misrepresents the level of adoption of the click-and-clock rhythmic feel in hip hop/rap music *and* R&B. He says that "[t]hese ideas were *everywhere* now. **James's sound had become *central* to hip-hop and R&B**..."[73] Sampled drums sounds are "central" to hip hop; every hip hop beatmaker (producer) uses them. The click-and-clock rhythmic feel, which Dilla sometimes used and best popularized, is not "central" to hip hop/rap music, *every* hip hop beatmaker (producer) does *not* use it; in fact, not even most. Charnas is overstating things here, and more than 30 years of hip hop/rap releases makes that clear. J Dilla fashioned a style, sound, and aesthetic around a rhythmic feel that originated prior to him. This style, sound, and aesthetic remains popular among a number of beatmakers (producers) in hip hop/rap music. But to call it "central" to hip hop/rap music, as if most hip hop/rap beatmakers (producers) were using it, is overstating its significance. The click-and-clock rhythmic feel was never more significant than boom bap rhythmic feel. (*For a similar parallel, we can look at the Jamaican One Drop rhythm, which was "central" to reggae music.*) There's no doubt that the click-and-clock rhythmic feel that J Dilla used — but did not invent — has been adopted by a number of beatmakers (producers) worldwide. But that's not the same thing as

[73] Charnas, 311 (emphasis mine).

every or even *most*, and therein lies the rub.[74] Even J Dilla himself didn't always use the click-and-clock rhythmic feel; and the majority of his hits don't feature it.

Simply stated, we can determine the appeal of something — a technique in music, a trend in fashion, a scheme in sports, etc. — by the level of its adoption by others. Generally speaking, if something is widely adopted, then we understand that its appeal is broad and popular. Conversely, if something is less widely adopted, then we recognize that its appeal is less broad and less popular. Using this loose metric, when it comes to the click-and-clock rhythmic feel that J Dilla used and the trap music rhythmic feel, how do we treat this? In hip hop/rap music, the trap music rhythmic feel has certainly been widely adopted and it's quite popular today. From the number of beatmakers (producers) who deal exclusively in the trap music style and sound to the number rappers (major and independent) who deal exclusively in the trap music style and sound to the street-level and commercial significance of trap music, every relevant point of empirical evidence supports the fact that it has been almost as broadly adapted as boom bap itself. However, the same cannot be said for the click-and-rhythmic feel; the same dominance that we see in boom bap and trap is not seen with the click-and-rhythmic feel (aka "Dilla drums") or the Dilla style, sound, and aesthettic that's built around it. Any claim or framing that suggests otherwise is inaccurate and misleading.

And when we look at R&B, the biggest stars of contemporary R&B, like Mary J. Blige, Beyoncé, Rihanna, Alicia Keys, Christina Aguilera have all factored in, at one point or another, the boom bap and trap music rhythmic feels. On the other hand, the click-and-clock rhythmic feel used by J Dilla has never been a major factor in the music of these recording artists or their closest peers, even if it has been incoporated by some artists in neo-soul.

[74] See "Hip Hop Albums and Rhythmic Feels Used" in Appendix.

Lo-fi: A Niche Inside a Niche, Inside a Niche

If you point to J Dilla as being the greatest hip hop/rap producer of all time because his music helped foster so-called "lo-fi" hip hop, you are discounting the significance of the art of rapping in this discussion— Again, music catalogs cannot be ignored. Further, lo-fi hip hop is a niche *inside a niche*. Just like nerd-hip hop/nerd-rap is a niche inside a niche. Just like neo-soul that features the click-and-clock rhythmic feel is a niche inside a niche. And a niche inside a niche is not the same thing as a seachange event in Western popular music.

Lo-fi hip hop is not as big of movement as the drumless loops (drumless hip hop) movement. (And J Dilla has not figured in the drumless loops movement, or at least not prominently as some other beatmakers (producers). One big reason why is because drumless loops (drumless hip hop) includes rappers, whereas lo-fi is mostly an instrumental affair; in other words, rappers don't really figure into the lo-fi scene. Roc Marciano, Westside Gunn, Alchemist, Billy Woods, Mach-Homy, Mavi, KA, Boldy James, Earl Sweatshirt, Sharif, ELUCID, Quelle Chris, OME— These are leaders of a hip hop/rap style, sound, and aesthetic that has solidified itself as major force in hip hop/rap music.

Neo-Soul and the Fact that Hip Hop, *Overall*, Has Had Massive Influence Over Contemporary R&B

Charnas's analysis of J Dilla's impact on neo-soul is accurate for the limited investigation that he offers. However, he inflates neo-soul above the broader contemporary R&B genre and he does not present any investigation of the origins of neo-soul, which is critical context. The truth is, neo-soul developed in the late '80s and early '90s as a soul revival movement. It was a response to the direction that contemporary R&B had taken both in terms of style and substance. With regards to style, neo-soul was a revolt against the digital, producer-driven approach of contemporary R&B; the emphasis being on traditional musicians and traditional soul music

stylings. While Neo-soul had its run, there's no doubt that its mainstream presence saw a decline in the mid-2000s. By contrast, the conventional hip hop/R&B hybrid endured and continues to thrive today.

So let's consider five facts that give us fuller context. First, the origins of neo-soul pre-date J Dilla by at least 8 years; in other words, J Dilla's style, sound, aesthetic did not birth neo-soul. And unlike what we see in reggae, Afrobeat, grime, and Afrobeats — where the rhythmic feels of those genres were so identifiable that they doubled as the name of the genres themselves — the click-and-clock rhythmic feel (aka "Dilla Drums") was never a central focus or dominant identifier of neo-soul. Second, stylistically, neo-soul was mostly a rejection of the digital, producer-driven (producer centered) approach of contemporary R&B, with the emphasis being placed on traditional musicians. Third, the vast majority of neo-soul's most popular artists did not use the click-and-clock rhythmic feel. Moreover, most neo-soul music did not feature any semblance of J Dilla's signature style, sound, and aesthetic. Fourth, the popularity of neo-soul (or at least its mainstream presence) declined dramatically by the mid-2000s. Fifth, at the same time neo-soul was declining, the conventional hip hop/R&B hybrid endured and continues to flourish today. Yet given these five facts, Charnas argues that J Dilla's influence and impact on Western popular music was in line with a handful of the most celebrated music artists of all time? That what J Dilla did was "*every bit as revolutionary and transformative*" as what Louis Armstrong, James Brown, and John Coltrane did?

One problem here is that, on the most basic level, Charnas is confused about what J Dilla actually did. Dilla did build a signature style, sound, and aesthetic around an old rhythmic feel (the click-and-clock rhythmic feel). And this style, sound, and aesthetic, which was adopted by a number of hip hop beatmakers (producers), was absorbed and furthered developed by a number of popular musicians.

The other problem is that, in addition to miscalculating what Dilla actually did, Charnas doesn't properly situate his examination

within the context of contemporary R&B music itself, let alone Western popular music more broadly. Neo-soul had already been brewing for years before J Dilla came along. Some artists in the latter phases of neo-soul, or what we might call "alternative soul" or "progressive soul," adopted elements of J Dilla's style, sound, and aesthetic on *some* of their songs. But if we were to look at neo-soul in waves, we could say that the second wave of neo-soul followed conventional R&B: Hip hop beats, singing, and added melody. And we could say that the third wave of neo-soul represented a return to '60s and '70s soul stylings and move away from the digital, producer-led approach of conventional R&B. And we could say that the fourth wave of neo-soul saw the inclusion of the click-and-clock rhythmic (and elements of Dilla's style, sound, and aesthetic). But looking at every wave of neo-soul, from first to last, it is a fact that neo-soul is not, nor was it ever, personified or dominated by the click-and-clock rhythmic feel.

There's no need to detail the full orgins of neo-soul or engage in an in-depth discussion of the debut albums by Sade (*Diamond Life*, 1982), Tony! Toni! Toné! (*Who*, 1988), Soul II Soul (*Club Classics Vol. One*, 1989), as obviously all of these albums were recorded and released well before J Dilla began making beats. Still, it's important to mention these albums as they represent the early marker of what would later be coined as "neo-soul." But turning to the mid-'90s and the 2000s, when the sub-genre really takes off under the umbrella term neo-soul — and when J Dilla emerges on the production scene — we can easily identify to what extent Dilla's signature style, sound, and aesthetic were adopted with within neo-soul. Again, empirical evidence is instructive here. I listened to 100 of the top neo-soul albums of the 1990s and 2000s, many ranked and presented on Rate Your Music's "Top Neo-Soul albums of the 2000s" list. What I found was the vast majority of these albums were influenced by hip hop/rap music *as a whole* and often dominated by the boom bap rhythmic feel. However, the click-and-clock rhythmic feel (aka "Dilla drums") were scarcely present on any of these albums. And when we look at smash hit and genre-defining albums, like: Sade – *Love Deluxe* (1992); Mary

J. Blige – *What's the 411?* (1992); Tony! Toni! Toné! – *Sons of Soul* (1993); Me'shell NdegéOcello – *Plantation Lullabies* (1993); Zhané – *Pronounced Jah-Nay* (1994); Groove Theory – *Groove Theory* (1995); Maxwell – *Maxwell's Urban Hang Suite* (1996); Aaliyah – *One in a Million* (1996); Tony! Toni! Toné! – *House of Music* (1996); Erykah Badu – *Baduizm* (1997); Missy Elliott – *Supa Dupa Fly* (1997); Lauryn Hill – *The Miseducation of Lauryn Hill* (1998); D'Angelo – *Brown Sugar* (1999); D'Angelo – *Voodoo* (2000); and Alicia Keys – *Songs in A Minor* (2000), we can clearly see the dominant influence of hip hop/rap music *as a whole*.

Today, in 2024, contemporary R&B, which includes neo-soul and so-called alternative progressive soul, is still dominated by the conventional hip hop/R&B hybrid model. Which means the boom bap rhythmic is still the most-used hip hop-based rhythmic feel in contemporary R&B. Since 1993, this dominance has not diminished. So even in the late '90s and early 2000s, when J Dilla's signature style, sound, and aesthetic were adopted in whole or part by some musicians who fell within the neo-soul category of contemporary R&B, the boom bap rhythmic feel continued to dominate.

J Dilla's style, sound, and aesthetic did not lead to the creation of neo-soul. The name "neo soul" was coined in the late '90s, and, again, the origins of neo-soul actually predate J Dilla. And although Dilla's signature style, sound, aesthetic are heavily linked to neo-soul today, especially via his membership in the Soulquarians collective (Questlove from the Roots, D'Angelo, and James Poyser), it was not the defining sound of the entire neo-soul genre. Of the 100 or so greatest "neo-soul" albums, fewer than *2%* included at least one song that featured the click-and-clock rhythmic feel or any semblance of Dilla's signature style, sound, and aesthetic.

And when we dig deeper into Lauryn Hill and D'Angelo's most prominent works, *The Miseducation of Lauryn Hill* (1998) and *Brown Sugar* (1999) respectively, we gain even more context. *The Miseducation of Lauryn Hill* is most certainly boom bap; Lauren Hill's a rapper and a singer, so the album contained a blend of both elements; and the boom bap rhythmic was in full effect on

this album. "Singing over hip hop beats" was the point! And the song "Ex-Factor" literally samples a hip hop/rap song, Wu-Tang Clan's "Can It Be All So Simple" (1993). And *The Miseducation of Lauryn Hill* also includes the Fender Rhodes sound that would later become a popular trope in neo-soul.

Turning to D'Angelo's *Brown Sugar* (1999), an album D'Angelo made before he and J Dilla met, it's clear that D'Angelo was already performing the Rhodes and bass aesthetic that J Dilla would later incorporate into his own style, sound, and aesthetic. Further, *Brown Sugar* was heavily hip hop influenced. In fact, this album was the epitome of the "hip hop & R&B" hybrid. And at the center of this style, sound, and aesthetic was the boom bap rhythmic feel. For example, the backbeat of songs: "Brown Sugar," "Jonz in My Bonz," "Shit, Damn, Motherfucker," "Lady" (less so, but still clear), was straight boom bap. And other songs like, "Playa, Play," "Left and Right," and "The Root," had the wobbly, dragging drums — i.e. the click-and-clock rhythmic feel — combined with Fender Rhodes bass lines. But this wasn't inspired by Dilla; D'Angelo had already *arrived* at the same area rhythmically and aesthetically. Bottom line: Neo-soul was (is) a niche inside a niche. That J Dilla (and his "partners") added a new style, sound, and sub-aesthetic to a niche inside a niche that already had a sub-aesthetic does not make this something that is tantamount to changing Western popular music— Certainly not on the level of Louis Armstrong, James Brown, and John Coltrane.

***

Next, Charnas doesn't properly investigate hip hop/rap music's *overall* influence on contemporary R&B. Instead, he simply says that before Dilla, "much of ***popular*** R&B had ***devolved*** into singing over hip hop beats."[75] So then what does that tell us about hip hop/rap music's overall impact on R&B as opposed to J Dilla's specfic impact on (late) neo-soul, a sub-genre of "popular" R&B? Alos, Charnas's "*devolved*..." description is equally telling. Why is

[75] Charnas, 205 (emphasis mine).

"singing over hip hop beats" a *devolution*? Despite the popularity of this aestthetic among many reputaable R&B artists of the time, why is Charnas implying that this aesthetic was a devolution in modern R&B?

Looking at the evolution of modern R&B from 1994 — roughly around the time that J Dilla first emerged as a professional beatmaker (producer) — to 2024, the empirical evidence is overwhelming. Since Charnas points to Grammy nominations as a marker for "popular" or proof of influence and impact, I examined the R&B Grammy nominations each year from 1994 to 2023. And the empirical evidence is clear: Hip hop/rap music *as a whole* had a serious impact on modern R&B, J Dilla (or the click-and-clock rhythmic feel that he sometimes used), as a singular force, did not. The R&B artists who Charnas points to as having been influenced by Dilla represent one sub-section of a sub-section of modern R&B, not the more dominant style and sound of modern R&B that was influenced by hip hop/rap music *as a whole* for nearly 20 years. And with regards to artists like D'Angelo and Erykah Badu, it's not as if their sounds are based on the use of the click-and-clock rhythmic feel. And Erykah Badu, more specifically, doesn't even *feature* the dragging drum style and sound at all. In fact, "Didn't Cha Know," the biggest song she released that was produced by J Dilla — *the* song everybody cites when speaking of Dilla's work with Erykah Badu — is based on a sampled loop of Tarika Blue's "Dreamflower;" Dilla adds minimal additional drum programming, but the click-and-clock rhythmic feel (aka "Dilla drums") is not present on that song.

Singling out neo-soul and so-called progressive R&B makes it easier for Charnas to highlight J Dilla's influence in these sub-genres. But without a full examination of contemporary R&B's relationship — or debt — to hip hop/rap music, readers of *Dilla Time* are left with an incomplete picture. The sheer number of R&B songs from 1994 to 2023 that have relied on basic hip hop/rap beat structures that do *not* include the click-and-clock rhythmic feel is overwhelming. Outside of recording artists specifically working within the neo-soul aesthetic, few R&B artists have adopted the use

of the click-and-clock rhythmic feel or any simulation of J Dilla's signature style, sound, and aesthetic that was built around it. Just as I examined hip hop/rap music releases over a 30-year period, I did the same thing for R&B releases. I examined 125 of the leading contemporary R&B acts (based on a combination of billboard charts and name recognition) of the last 25 years, along with the main acts that defined neo-soul. What I found was that outside of neo-soul and newly created progressive R&B genre, the click-and-clock rhythmic feel was not a feature in the music of these acts even 1% of the time! Put another way, *99%* of the leading contemporary R&B acts outside of neo-soul did not feature the click-and-rhythmic feel or any version of Dilla's signature style, sound, and aesthetic. Expanding my examination to 300 R&B albums that were released between 1990 and 2022, I found that less than *1%* of those releases included the use of the click-and-clock rhythmic feel or any version of Dilla's signature style, sound, and aesthetic. In other words, *99%* of the most popular and/or critically acclaimed R&B albums of the last 30 years did *not* feature the click-and-clock rhythmic feel or any simulation of Dilla's signature style, sound, and aesthetic that was built around it. Given these numbers, it's abundantly clear that Dilla did not have anywhere near the level of impact on contemporary R&B music as Charnas argues.

Audience Matters

Another area of context that Charnas overlooks is audience. As a grouping, names and associated styles, sounds, or genres appeal to different people in different ways. The names J Dilla, D'Angelo, Questlove, and Common, mean different things to different audiences. Just as the names DJ Premier, RZA, Dr. Dre, and Nas mean different things to different audiences. Just as the names DJ Toomp, Shawty Redd, Metro Boomin, and Future mean different things to different audiences. Each grouping appeals to different audiences for different reasons. So when discussing the true impact and popularity of the click-and-clock rhythmic feel that J Dilla used, we must take into account, as Anne Danilesen

has noted, "the fact that different microrhythmic designs ***appeal to* (*and signify differently for*) different audiences."**[76]

But Charnas doesn't take into account that different micro-rhythmic designs appeal to different audiences. Instead, he argues that Dilla's signature sound was "central" to hip hop. That's an overstatement. "Central" means *essential*, *fundamental*, and *dominant*, i.e. that it appealed to *all* hip hop audiences. Moreover, "central" also suggests adoption, at one point or another, by all if not most beatmakers (producers) in the hip hop/rap music tradition. But this was never the case with the click-and-clock rhythmic feel. For comparison, the same could be said for G-funk; it was (is) a style, sound, and aestheetic more popular than the "Dilla drums" sound. Still, even G-funk was never adopted by most beatmakers (producers) in hip hop/rap music. On the other hand, the boom bap rhythmic feel *is* central to hip hop/rap music. The larger foundational rhythmic feel of boom bap did, at least at one time, appeal to all hip hop audiences; and the core rhythmic aesthetics, qualities, and structures of the boom bap rhythmic feel — i.e. the booming kick kick snare / kick kick snare pattern and its numerous variations — was adopted by all beatmakers (producers) in the hip hop/rap music and used as a building block of music to create new rhythmic feels.

Next, we can measure the appeal of a micro-rhythmic design (or any stylistic gesture or aesthetic trend for that matter) both by tracking the audience(s) that it appeals to and by observing how often it is used and *who* used (uses) it. This is not commentary on or a measure of "good" or "bad" taste; rather, it's an accounting of what the empirical evidence makes clear. Again, in my close examination of 700 commercially released hip hop/rap albums (mainstream and underground) released between 1988 and 2022, I found that *98%* percent of those albums did *not* feature the click-and-clock rhythmic feel or any simulation of J Dilla's signature style, sound, and aesthetic. This dearth of use is not explained away by the lack of ability or accessibility — beatmakers (producers) before Dilla had the capacity to do it, and the formula for easily doing it now

[76] Danielsen, location: 236.

is right there for any beatmaker (producer) to adopt. The truth is, audience *preference* was (is) also a factor.

"Hits," Whether Mainstream or Underground, It Matters

The narrow focus at work in *Dilla Time* (which is by the author's design) doesn't adequately account for where J Dilla stood commercially. Charnas gets out in front of this, he makes it clear that Dilla had few "hits." But left alone, this statement doesn't tell whole the story. J Dilla had few *mainstream* hits, this is the obvious point that Charnas wants to make; that's the easier road to take. But what about *underground* hits? Generally speaking, as a term, "underground" is nebulous because it provokes a narrow focus on "perceived non-mainstream and cultural and economic space."[77] But in hip hop/rap music, the term underground can be misleading because just as there exists a hierarchy within the mainstream, there's also a hierarchy within the underground. For instance, Gang Starr, Black Moon, and Slum Village, just to name a few, all represent the underground. Yet Gang Starr is clearly the bigger act among the three; that's no slight against Black Moon or Slum Village (or J Dilla), it's a fact. And we could even say that Gang Starr was part of the *mainstream* of the underground.

Throughout his career, J Dilla existed among his peers, not outside of them. And underground hierarchy applied to him just as it did to his peers. Broadly speaking, DJ Premier, RZA, DR. Dre, Timbaland, Buckwild, J Dilla, and Havoc (of Mobb Deep), and other notable beatmakers (producers) working between 1994 and 2006, were all well known and highly respected. But each worked within different corners of the mainstream and the underground. If you zero in on J Dilla, that's perfectly fine, if you do so *within context*. And context means focusing on J Dilla while being expressly mindful of the contributions of his peers.

[77] Kai Fikentscher's definition of the 'underground', as "a nebulous and problematic term that inhibits a comparative exploration across a wide range of genre and styles in favour of a narrow focus on 'perceived non-mainstream cultural and economic space." Danielsen, *Kai Fikentscher* location: 2160.

Remove their contributions, and Dilla's contributions rise above theirs — collectively and individually — by default. And this is what Charnas is after. Remember, Charnas's argument isn't just that J Dilla is the greatest *hip hop* producer of all time, it's that J Dilla is *beyond* hip hop and therefore *beyond* "his more famous peers" "in ways" that place him *among* acclaimed music geniuses Louis Armstrong, James Brown, and John Coltrane. A hefty argument to say the least. But what's more astonishing than the argument itself is that Charnas attempts to make the case for his argument while bypassing a proper investigation of where J Dilla actually stood among his peers in hip hop/rap music, especially during his prime.

Perhaps some readers of *Dilla Time* are willing to overlook the absence of such an investigation and accept Charnas's argument on face value. However, if you're a knowledgeable beatmaker (producer) who favors a more complete history of hip hop production, you're not so easily persuaded. I've said it before, I'll say it again: I believe that J Dilla is absolutely *one of* the greatest hip hop beatmakers (producers) of all time! And he's one of my personal favorites. But I can't ignore the fact that Dilla's music catalog, in terms of sheer number of "hits" and overall impact in the underground and mainstream, doesn't match up with the catalogs of "his more famous peers."

And this speaks to two things. First, an examination of J Dilla's music catalog, along with the catalogs of others during and after the same era, reveals that his use of the click-and-clock rhythmic feel had no influence on "his more famous peers." This also reveals that far fewer musicians adopted the same rhythmic feel — or copied Dilla's style, sound, and aesthetic — than Charnas implies. Yet Dilla should be placed among Louis Armstrong, James Brown, and John Coltrane based on this? Second, an examination of Dilla's catalog speaks to the point of popularity and hierarchy within the mainstream and the underground. But putting aside Dilla's catalog and overall popularity (*"popularity" is a subjective metric that neverless presents clear consensus points, for example, A Tribe Called Quest and Gang Starr were more popular and had more longevity than Slum Village and Hieroglyphics*) the signature sound that Dilla is most

known for (and rhythmic feel that he built it around) is not enough to make him the greatest hip hop/rap beatmaker (producer) of all time, nor is it nearly enough to place him among Louis Armstrong, James Brown, and John Coltrane. Moreover, I don't even consider Dilla's use of the click-and-clock rhythmic feel to be his greatest talent. I believe Dilla's greatest talent was his mastery of *multiple* beatmaking styles, sounds, and aesthetics.

Appeal and Music Catalogs

You can't dismiss a catalog. Likewise, you can't inflate a catalog. When it comes to hip hop/rap beatmakers (producers), there's no secret society of music releases that only a handful of people know about. *All* well-known beatmakers (producers) have lesser-known releases. And while super fans (of any artist) tend to be more aware of rare or lesser-known releases, this group does not represent the median of fans. For all fans, for all music researchers, the music must, in the end, speak for itself.

J Dilla's music catalog must speak for itself (which it does). But in the same vein, Marley Marl's catalog must speak for itself; DJ Premier's catalog must speak for itself; RZA's catalog must speak for itself; Pete Rock's catalog must speak for itself; Dr. Dre's catalog must speak for itself; Q-Tip's catalog must speak for itself; 8Ball & MJG's catalog must speak for itself; Large Professor's catalog must speak for itself; DJ Toomp's catalog must speak for itself; Madlib's catalog must speak for itself; Alchemist's catalog must speak for itself. Get the point? The significance of a music catalog cannot be minimalized or explained away. And if we're making objective comparisons on music catalogs, there certainly is a difference amongst all of these beatmaker (producer) giants. An acknowledgement of this fact is neither a dismissal or undue praise of any single beatmaker (producer) that I've mentioned here.

But music is not released into a void. The appeal of the music of any beatmaker (producer), as with any other musician, matters to a music researcher; it speaks to tastes and trends just as much as is provides insights into how or why a music culture or aesthetic

advanced or didn't. Appeal can be complicated to measure, but not impossible. Appeal isn't measured by record sales or hit songs alone, although record sales and hits can give us insight. For instance, Maxwell has sold lots of records, so has Usher. But even though there may be overlap in fan appeal, these two contemporary R&B artists are operating in two different lanes. Appeal can also be measured by popularity, which certainly doesn't always translate to record sales. That one musician may be more popular than another does not negate or diminish the work of the less-popular musician. Similarly, where one musician is more famous than another, the achievements of the less-famous musician cannot be erased, nor inflated.

Like J Dilla, Marley Marl, DJ Premier, RZA, Dr. Dre, Q-Tip, Prince Paul, Large Professor, 8 Ball & MJG, DJ Toomp, Madlib, and Alchemist were all change agents. Their influence and importance to hip hop/rap's beatmaking culture and hip hop/rap culture in general cannot be contested. Each has provided inspiration and knowledge paths for beatmakers (producers) to follow; each has contributed innovations that will continue to inspire future generations. Because of this, we cannot overlook where each of their music catalogs stand.

J Dilla's music is an acquired taste situation. Many people who like J Dilla's music, *love* J Dilla's music; and they tend to be diehard fans. And this doesn't always lead to the most objective or comprehensive discussions whenever such fans discuss Dilla *in relation to* other hip hop/rap beatmakers (producers). Many diehard Dilla fans believe that *no* beatmaker (producer) could or should ever be compared to Dilla. But such a position is unreasonable. Dilla is an elite beatmaker (producer) *among* other elite other beatmakers; no beatmaker (producer) is above objective comparisons. Which is why it's also easy to say that the music of DJ Premier and RZA do not appeal to *everyone* either. Still, when it comes to appeal, there are medians to observe if we're being honest. And examining these medians, i.e. the overlaps of appeal, is one way that we can better understand the beatmaking tradition of hip hop/rap music. It allows us to determine the commonwealth compositional methods, processes, techniques, and practices. It allows us to see the vast variety of styles, sounds, and aesthetics in hip hop/rap's beatmaking

tradition. And it allows us to see how those styles, sounds, aesthetics have helped to advance hip hop/rap music. But such examinations require that a music researcher take a step back from their personal favorites.

Charnas's analysis of Dilla's music, as well as his overarching narrative of the impact of Dilla's music on the whole of Western popular music, is unreasonable and largely misplaced. No one could deny that Dilla had an impact on hip hop/rap music, or that the combined ideas within Dilla's signature style, sound, and aesthetic influenced late developments in neo-soul. But it is within the framing of his translation of Dilla's impact where Charnas goes awry.

Charnas also misses the point of popular appeal or that music means different things to different people; and thus, he doesn't really hide his disdain for *Donuts* being the most popular, most easily recognizable J Dilla project. In fact, because of this disdain, Charnas mentioned that, in his discussions about the cover design for *Dilla Time*, his main instruction to the cover designer was to *not* to do anything *Donuts* related. For Charnas, *Donuts* is not the album that we *should* think of when we think about J Dilla's music.

But why not? Because *Donuts* was a competitive response to Kanye West's alleged dominance of the soul samples beat style? According to Slum Village member Young RJ, J Dilla was gassed up into making much of the music that ended up *Donuts*. As the story goes, Slum Village was shooting the video for their song "Selfish" featuring John Legend and Kanye West (2004), produced by Kanye West. J Dilla, who had just gotten out of the hospital, tells Young RJ that he's coming to the video shoot:

> "He shows ups to the video. We're sitting back there. A guy named Scrap Dirty, like, 'Man, this yo' group! And you gon' let Kanye come through and do this? He killin' the soul shit!" Dilla sitting up in the stands, he like, 'Oh, word? That's what you think?' He go back, that's when you get *all* of the stuff you heard on *Donuts*. That's why you hearing all soul stuff. He was making his point that 'I'm unfuckwithable.'"[78]

[78] "Kanye West Charged $90k for Slum Village's "Selfish," Shirley's Temple YouTube Channel, Feb 25, 2024 https://youtu.be/sEJ6JJHMFP4?si=r77EahOj_Jj5PKL-.

In *Dilla Time*, Charnas corroborates this moment at the "Selfish" video shoot:

> James sat with Young R. J. and one of Kanye's associates, Scrap Dirty, a fan of J Dilla's **who nonetheless needled James about Kanye "Killing him" in the production game at the moment, particularly in his use of samples from soul records.** 'You think he's better than me?' James asked. It was a question, *but it was also a threat*. James would not forget the moment. [emphasis mine][79]

In terms of appeal and popularity, there are two things we can draw from this story. First, clearly J Dilla was aware of the appeal and popularity of the soul-samples based beat style, sound, and aesthetic. Second, the fact that Kanye West had emerged as a prominent, highly visible figure in this soul-samples space was not lost on Dilla. Third, Dilla wanted to prove that he could do the soul-samples style *better than* Kanye West. All three of these things underscore appeal and popularity and to the extent to which these things mattered to Dilla.

Despite *Donuts* being the most broadly appealing of Dilla's albums — in large part because of its accessibility — Charnas wants us to cherish Dilla's lesser-known 1998 beat tape *Another Batch*. It's on this beat tape that Dilla displays his signature style, sound, and aesthetic that are built around the use of the click-and-clock rhythmic feel, so the significance of this beat tape is not lost on me. But I'm not persuaded that the music on *Another Batch* has greater appeal, even if it does contain all of the elements of Dilla's signature style, sound, and aesthetic. To my ear, *Another Batch* is less dynamic, less moving than *Donuts*. *Another Batch* is certainly a demonstration of a consistent, well-defined style, sound, and aesthetic. But it's a style, sound, and aesthetic that's not for everyone. But then again, neither is *Donuts*. However, the dynamism of *Donuts* stands out more, and its appeal has much further reach.

J Dilla made the beats that would be collected together as *Donuts* some time before he died. I imagine that he had no illusions about his fate when he was making those beats, which included some of

[79] Charnas, 356.

his most incredible work. As such, he was conscious that he was making his *last* project. That he didn't make an album in the same vein of *Another Batch* is revealing. It's not like Dilla forgot how to make his signatture style, sound, and aesthetic. Rather, he chose a micro-chopped and minimalist, groove-based style and sound as his final opus. So I believe Dilla's final word — Dilla's final *music* — in this regard should speak more loudly in terms of what appealed to him, and what he believed would appeal to others after he was gone.

In terms of appeal, readers can listen to the music for themselves and form their own opinions. From Slum Village's *Fantastic, Vol. 1* and *Fantastic, Vol. 2* to *Another Batch* to *Donuts*, readers can decide what holds more appeal for them. Further to this, readers can decide for themselves how these albums compare to, i.e. shape up against or do not shape up against, the albums from A Tribe Called Quest (Q-Tip), Gang Starr, Pete Rock & CL Smooth, Wu-Tang Clan, Main Source, NWA, Showbiz & AG, De La Soul (Prince Paul as producer), and 8Ball & MJG. All of these groups/duos were pivotal to the development of hip hop's beatmaking tradition and hip hop/rap music more broadly.

"J Dilla's Music Was an Act of Calculation As Well as Feeling; Two Legitimate But Different Kinds of Intelligence."[80]

The full context is that the acts of *all* beatmakers (producers) are "acts of calculation as well as feeling." Consider Marley Marl, DJ Premier, RZA, Easy Mo Bee, Large Professor, Dr. Dre, Q-Tip, DJ Quik, Mannie Fresh, Madlib, and Havoc (of Mobb Deep). All of their music was, in part, the result of acts of calculation as well as feeling. By default, programming musical sequences, customizing beat styles, sounds, and aesthetics, thinking through arrangment schemes, tailoring drum sounds to match other sounds — It all requires intelligence. And in this regard, what separates each beatmaker (producer) is not a matter of intelligence — they all

[80] Charnas, 11.

possess intelligence and specific music-making know-how — but rather the level of *their* know-how and *their* unique talent for infusing *their* feeling in *their* music. If Charnas is presenting J Dilla in this way to make the case that the acts of *all* beatmakers (producers) are acts of calculations and feeling, or to make the case the that hip hop beatmaking is a "legitimate" music-making process, I'm with that. But left unqualified as Charnas does, it suggests that J Dilla's actions alone were calculated and comprised of feeling. That's inaccurate.

"I argue that his work is *every bit as transformative and revolutionary* as acclaimed geniuses like Louis Armstrong, Billie Holiday, Thelonious Monk, John Coltrane, and James Brown."[81]

Because Louis Armstrong, James Brown, and John Coltrane are the most shocking names that Charnas lists here, that's where I will focus my attention. And since I've already discussed James Brown's work and its undeniable impact on music as we know it today in the previous chapter, I'll mainly focus on Louis Armstrong and John Coltrane. I will also make note of the difference in career trajectories of James Brown and J Dilla, particularly in terms of the use of the rhythmic feels that they were closely associated with.

Sagan Standard

Sagan standard, a philosophical razor (rule of thumb), says that extraordinary claims require extraordinary evidence. Regarding Louis Armstrong, James Brown, John Coltrane, et. al, Charnas makes an extraordinary claim, yet his evidence is *not* extraordinary; moreover, his evidence is based on the incorrect assertion that J Dilla "invented" the click-and-clock rhythmic feel. I have already presented evidence disproving this in previous sections of this

[81] Charnas, 13.

chapter. In this section, I will address Charnas's most extraordinary, most controversial claim and the resulting implications that it makes. The fact that the click-and-clock rhythmic feel did *not* originate with J Dilla is reason enough to conclude that Charnas's most extraordinary claims are erroneous. But for the sake of completeness, I will discuss some factors that separate Louis Armstrong, James Brown, and John Coltrane from J Dilla.

First, I must note that Charnas does explain the significance of Louis Armstrong:

> So much of what pop music became, Armstrong established: the improvised solo; the bluesy, bent way of singing and playing; even the archetype of the Black performer "crossing over" to white audiences. **But Armstrong's delaying of time had the greatest influence. *Almost every performer in jazz and pop, whether peer or protégé, took something from him:*** Billie Holiday and Duke Ellington, Bing Crosby and Frank Sinatra.[82]

Charnas correctly asserts the significance and importance of Louis Armstrong, and he indicates that Armstrong's innovations were so critical and widespread that they place him above *all* other musicians in the history of Western popular music. The parallel implication that Charnas is trying to draw — the grand argument that he's making — is that *J Dilla's* use of the click-and-clock rhythmic feel, and the signature style, sound, and aesthetic that he built around it, not only places him above *all* other beatmakers (producers) in hip hop/rap music history, but places him *among* Louis Armstrong, James Brown, and John Coltrane.

Next, Charnas states that "Armstrong's delaying of time had the greatest influence." This is correct. But more context is needed to really understand what is meant by "influence." So, here, I will provide a list descriptions about timing in jazz, as a general observation, and the specific timing innovations that are attributed to Louis Armstrong. All of these descriptions quote various writers and were cited by Geoffrey L. Collier and James Lincoln Collier in their article "A Study of Timing in Two Louis Armstrong Solos"

[82] Charnas, 37 (emphasis mine).

(2002). Readers will note that the first of these descriptions goes back as early as *1917*. This underscores the fact that discussions of rhythm and the nature of shuffle, delays, drags, pulls, and offness — i.e. the combination ("colliding") of straight and swing time — go way back:

> *From the beginning*, it has been understood that **a key characteristic of jazz is a certain rhythmic property that has generally been termed 'swing.'….**
>
> **As early as 1917,** when jazz was barely a decade old and Americans were just beginning to learn about it, a Columbia University professor said that it involved 'the progressive *retarding* and *acceleration* guided by his sense of 'swing'"….
>
> ***In 1925*** another early writer on jazz said that "the rhythm is angular, like the *sporadic skidding* of an automobile on a wet pavement"….
>
> ***In 1939,*** in the first good general book on jazz, the author said that **i*n jazz most of the instruments "are playing rhythms variously suspended around* the beat—** as it were eccentric to it"…
>
> **A writer in the 1940s** in a book highly regarded at the time said, **"The subtle '*dragging*' or '*pushing*' of the beat is another characteristic of the 'hot style'"**… "Another important writer from the same period said that **"the gifted player tends to place his *notes a little away from the actual beat*;** he anticipates or ***lags behind*** while the real beat tries, like a magnet, to draw the brass note [of melody instruments back] to its own center of force"….
>
> The author of one of the most widely used textbooks today says, "Syncopation often takes the form of **accenting** notes that occur ***just before*** or ***just after*** a beat**. . . . *Playing slightly after the beat can lend the music a soulful or laid back feeling* . . ."**….
>
> This is now the received wisdom in jazz studies: the jazz musician places his notes ***"around the beat."*** Inevitably, **students of the work of Louis Armstrong have taken the same approach.** Armstrong was playing "around" the beat, anticipating some notes, delaying others. The first important European jazz critic announced that **"Louis has always surpassed other musicians in the manner in which he places and rests his notes," doing so by "slightly delaying or anticipating a few notes"**… A leading authority on

> New Orleans jazz says, **"Armstrong has the right rhythm instinct and sense of time in 'swinging around and away from the regular beat' as he expresses it."** A much-cited writer says that **Armstrong would "condense or displace the melodic phrase a bit, rush this cadence, delay that one. . . . He would 'dance around the beat"**. A more recent writer said that **he "alternately played *ahead* or *behind* a plodding, steady beat"…**One of the most venerated of jazz writers spoke of **"the behind-the-beat delays and accents on which Armstrong based his innovations. . . ."**
>
> There is widespread agreement among jazz authorities that **Armstrong plays either around the beat, behind it, or in the case of the venerated jazz writer, both.** [emphasis mine][83]

In sum, I have cited these passages to show two things. First, rhythmic feels in Western popular music that were developed from a combination of straight and swing time are more than *100 years* old. Thus, Charnas's claim that J Dilla was the first to combine ("collide") straight and swing (swung) time is false. Second, the concepts and practices of "dragging" behind the beat, being "late," and/or "pushing" and "pulling" musical elements along a specific time field are also not new; thus, presenting such practices as "innovations" in hip hop/rap music, *80 years after* such practices were already common in jazz, is misleading at best.

A final point to this. In their exhaustive analysis of two of Louis Armstrong's well-known songs, "Potato Head" and "Chop Suey," Geoffrey L. Collier's and James Lincoln Collier's analysis confirmed (what had always been repeated but never *scientifically* analyzed): That Louis Armstrong was playing ahead of the beat and sometimes behind it, on a median average of 2 and 4 milliseconds respectively, and that his "swing ratios" were "*not* even." ***"As far as the off-beat notes are concerned, we can safely conclude that as a general rule Armstrong places these notes significantly behind the beat, rather than in some fashion "around" it, at the 1.6 to 1 ratio, with considerable variation."***[84]

[83] Geoffrey L. Collier and James Lincoln Collier, "A Study of Timing in Two Louis Armstrong Solos," *Music Perception: An Interdisciplinary Journal* , Vol. 19, No. 3 (Spring 2002) (University of California Press), 464-465.
[84] Collier, 479.

Having established that Louis Armstrong's playing (style) was not random, we still have to concede that with a live band, a *human* band, "random variability in entry points will occur on the order of several milliseconds, if not more…"[85] But this is not the case with beat machines. Beats programmed on beat machines, like the Akai MPC 3000 or E-Mu SP 1200, are never random, they follow the exact instructions of the programmer. This is critical to note, because in this very specific regard: 1) J Dilla was not the first beatmaaker (producer) to program "drags," "pulls," and "pushes" in hip hop/rap music; and 2) J Dilla was not the first to use the click-and-clock rhythmic feel in hip hop/rap music. Instead, what sets apart J Dilla in this regard is that he is mostly known for being the beatmaker (producer) who best popularized this rhythmic feel. And this is due in large part to the fact that he created a signature style, sound, and aesthetic around it. In other words, he did his *version* of an old rhythmic feel. This is certainly not "every bit as transformative and revolutionary" or influential as what Louis Armstrong did.

"Almost every performer in jazz and pop, whether peer or protégé, took something from him [Louis Armstrong]…"[86]

Charnas is right, almost every performer in jazz and pop, whether peer or protégé, did take something from Louis Armstrong. But if Charnas is attempting to draw a parallel by association, we can't ignore the fact that almost every beatmaker (producer) in hop/rap music did not take something from J Dilla — certainly not prior to his arrival, ca. 1993/1994, not during his peak years, ca. 1996-2001, and not after his death, post-2006. If we're to say that Marley Marl, DJ Premier, RZA, Easy Mo Bee, Dr. Dre, Pete Rock, Q-Tip, Large Professor, Prince Paul, Timbaland, and DJ Toomp, are Dilla's peers, based on status, not era, then we must accept the fact that they did not take something from Dilla, as they

[85] Collier, 464-65.
[86] Charnas, 37.

were all already established — each with signature styles, sounds, and aesthetics — before and after J Dilla emerged. That said, a number of beatmakers (producers) did take from J Dilla during his time, and many certainly continue to do so today, but not on a level of anywhere near what occurred with Louis Armstrong. For instance, Louis Armstrong influenced practically every jazz *giant* that followed him, including: Roy Eldridge, Dizzy Gillespie, and Miles Davis. Of those who proceeded Dilla (or arrived just about the same time as he did), the marquee names that he influenced include: Madlib, 9th Wonder, Flying Lotus, and Kanye West, perhaps the most "famous" sample-based beatmaker to emerge after J Dilla. But with regards to Kanye, we should note that he was influenced first and foremost by fellow Chicago beatmaker (produer) No I.D., then Pete Rock, RZA, and DJ Premier — All before Dilla's influence.

J Dilla's work is transformative, inasmuch as it built upon the boom bap rhythmic feel and used a sub-boom bap variant to create a new signature style, sound, and aesthetic. But that's *not* on par with what Louis Armstrong, James Brown, and John Coltrane did.

Louis Armstrong, the "Father of Jazz"

Louis Armstrong is recognized arguably as the "father of Jazz." J Dilla is not recognized as the father of hip hop/rap music or its beatmaking tradition; he isn't even the father of the rhythmic feel that Charnas attributes credit to him. Further to this, jazz legend Dizzy Gillespie has famously said of Louis Armstrong: "No him, no me." Of course, this same statement could be made by *every* jazz trumpet player that came after Louis Armstrong. Louis Armstrong "demonstrated that it was possible to have both impressive technique and a strong feeling for the blues." And Louis Armstrong's influence over *all* of "his contemporaries was so powerful that *nearly every* trumpeter to record between 1927 and 1940 sounded like one of his followers!"[87] *Every* trumpet player after Louis Armstrong took something from him. By contrast, there was never a period during

[87] Louis Armstrong Society Band, https://www.larmstrongsoc.org.

J Dilla's lifetime (or after) where *nearly every* beatmaker (producer) in hip hop/rap music sounded like one of his followers. Dilla did not have this influence over his contemporaries. To be fair, neither did any of his "more famous peers."

Almost every beatmaker (producer) in hip hop/rap music, peer or protégé, did *not* take something from J Dilla. In fact, up until early 1994, his most famous peers weren't even aware of his work at that time. This can't be overlooked because by 1994, nearly every beatmaking pioneer in hip hop/rap music had already released or been a part of at least one classic hip hop/rap album. This list includes: Marley Marl, The Bomb Squad, Easy Mo Bee, Dr. Dre, Q-Tip, DJ Premier, Large Professor, Pete Rock, RZA, and DJ Quik. Another critical point is this. Louis Armstrong was "at the forefront of changing jazz from ensemble-oriented folk music into *an art form*..." The evolution of the beatmaker (producer) as an artist distinct from the rapper, and the evolution of beatmaking as an art form, had already occurred before J Dilla arrived.

Again, I carefully listened to 700 commercially released hip hop/rap albums (mainstream and underground) released between 1988 and 2022. If J Dilla's style, sound, and aesthetic were truly dominant in or even "central" to hip hop/rap music, then we should expect to hear his influence reflected in most (or a substantial number) of the hip hop/rap releases between 1997 (around the time Dilla begins to use the click-and-clock rhythmic feel) and 2022. But that's simply not the case. What I found was that *less than 1%* of hip hop/rap music releases between 1997 and 2022 featured any semblance of Dilla's signature style, sound, and aesthetic or any variant of the click-and-clock rhythmic feel.

Next, Louis Armstrong permanently altered not only jazz but Western popular music in general; and he did so in ways that were incredibly consequential. In terms of rhythm, Louis Armstrong's "swinging rhythmic momentum of his playing was a major influence on soloists in *every* genre of American popular music." Also, it was Louis Armstrong who introduced the extended solo, a feat that reshaped the focal point of jazz performance and the way musicians in jazz (and later rock 'n' roll) approached composition

and arrangement. But Louis Armstrong's impact and influence were not limited to his trumpet playing, his rhythmic singing was just as influential. Louis Armstrong "popularized scat singing, the technique of vocal improvisation using nonsense syllables."[88]

J Dilla's use of the click-and-clock rhythmic feel did not revolutionize "the *world* of music." And inasmuch as Dilla's unique use and popularization of the click-and-clock rhythmic feel did help lead to further developments in neo-soul, Dilla was not alone in that area; even Charnas concedes that he had his "partners" in this regard. And inasmuch as some contemporary jazz musicians have been inspired by Dilla to incorporate the click-and-clock rhythmic feel into their playing, this certainly does not qualify as "revolutionizing *the world* of music" or reaching anywhere near the impact of Louis Armstrong.

As great as a musician as he was, Louis Armstrong didn't "invent" shuffle rhythms. Still, when we look at Louis Armstrong as having affected a *revolutionary* level of change in Western popular music, we see that there's no doubt. But when we consider what J Dilla did by comparison — i.e. used the click-and-clock rhythmic feel to fashion a new beatmaking style, stound, and aesthetic — we observe that it's not only *not* "*as* revolutionary" as what Louis Armstrong did, but that it's not actually revolutionary at all, espeically given the fact that Dilla was preceded by traditional musicians *and* other beatmakers (producers) who used the same rhythmic feel. Additionally, when we consider that Louis Armstrong introduced things like the extended solo — and this is aside from the influence of Louis Armstrong's swinging rhythmic momentum on all of Western popular music — we observe that all traditional musicians in Western popular music followed Louis Armstrong's lead. In fact, every trumpet player, every guitarist, every drummer — *every* traditional musician — who takes an extended solo today is still imitating Louis Armstrong! So when Charnas draws a false equivalent between J Dilla and Louis Armstrong, perhaps it's in the vein of *imitation* that he believes he's on solid ground. But even here he'd be wrong because every beatmaker (producer) does not

[88] Smithsonian Music (2016) https://music.si.edu/story/louis-armstrong.

imitate Dilla; not even most. That's no slight against Dilla, that's just reality. There is no beatmaker (producer) that *every* beatmaker (producer) imitates. The only thing even remotely close is how all beatmakers (producers) in effect followed Marley Marl's lead in sampling, programming, and arranging individual drum sounds.

Furthermore, in terms of rhythmic feels, it's boom bap that revolutionized hip hop/rap music, not the click-and-clock rythmic feel that originated long before J Dilla. Every hip hop beatmaker (producer) adopted — imitated — the boom bap rhythmic feel; and it still remains as the primary building block for creating new rhythmic feels in hip hop/rap music. Prior to Dilla, boom bap had also already existed. So Dilla didn't introduce or popularize boom bap like Louis Armstrong introduced and popularized his swinging rhythmic momentum or the extended solo — Something that *all* traditional musicians in Western popular music thereafter adopted.

And as far as the click-and-clock rhythmic feel in hip hop/rap music specifically, J Dilla followed DJ Premier (and perhaps DJ Quik before him) RZA, and True Master. Hence, Dilla picked up on what DJ Premier did on the Group Home song "Intro" (1995), as well as what RZA did on the Wu-Tang Clan song "Shame On a Nigga" (1993), and what True Master did on the Ghostface Killah song "Fish" featuring Raekwon and Cappadonna (1996). And *then* he built something new around the same rhythmic feel that they'd performed before him. This is similar to how Dr. Dre picked up on what Cold187um did with G-funk and ran with it.

The Most Transformatitve and Revolutionary Act in Hip Hop Beatmaking

As I've already discussed, J Dilla's work — and here the emphasis is on his work (beats) that used the click-and-clock rhythmic feel — was *not* "every bit as transformative and revolutionary" as what Louis Armstrong, James Brown, and John Coltrane did. Moreover, Western popular music aside, Dilla isn't responsible for even the most transformative and revolutionary act in hip hop beatmaking. That credit goes to Marley Marl.

Up until Marley Marl, drumming in hip hop/rap music was either live drumming, stock drum sounds from early drum machines, or looped break-beats *unaltered*. Marley Marl was the first to sample individual drum sounds (one shots) — any kick, snare, hi-hat, or other drum sound — from records and use them to create (program) and arrange original drum patterns. Here's an excerpt from my interview with Marley Marl where he details the seminal moment he first came upon the technique and had the epiphany that changed beatmaking forever:

> "My whole premise of getting into production was because I didn't like the representation of rap that was on wax [ca. 1979-1981]. Once rap was on cassettes, and everybody was running around with the latest Flash [Grandmaster] tape, that was DOPE! Because there was cutting, there was scratching, there was echoes, and it was original beats they was rhyming off of. That's what…as a kid, that's what I was brought up on, you know, the scratching element, the echoes, the break-beats, the RAWNESS, the rub-a-dub scratching. But I noticed, by the time rap hit records, it was BANDS…It was bands *re-playing* break-beats! [Laughs]. I remember the first record I heard with a rap on it. I was so disappointed, because as I was growing up, I was always hearing all of these Breakout [DJ Breakout] cassettes from the streets; the Grandmaster Flash tapes, and [starts to mimic a popular break-beat]… the echo, the energy. Aw, man, what a disappointment when rap records first came out. I was like, 'NO! This is not what it is…This is not a great representation of what I was brought up on.' That wasn't what rap was. That's not what everybody used to go up in Harlem and in the Bronx [and] get the tapes for. So how did I go about changing that?… My first step was I got my break-beats up [ccollected records with the known breaks on them]. All the songs I used to hear them cutting up…I got my break-beats up. And then after that, I would go out into the park and have my crew rhyme over it. After that…***I kind of discovered sampling*** by accident. That's how I got into looping… I was getting another part of the record, and we didn't truncate it yet. The snare was there and the vocal. I was playing a beat that I made on the drum machine, and I heard the sampled snare playing with it. ***Then I realized…*** I was like, **"Yo, I can take any kick and snare from ANY of my break-beat records on how rap should sound."**[89]

[89] Said, 449 (emphasis mine).

Before Marley Marl, *no one* in hip hop/rap music did this. No one sampled individual drum sounds and programmed new drum patterns with them. But after Marley Marl, *every* beatmaker (producer) did this, and it remains a common practice today. What's also essential to note is that every hip hop/rap beatmaker (producer) after Marley Marl soon understood that this — i.e. the sampling, modification, and arrangement of individual drum sounds — was a fundamental means to creating a unique style, sound, and aesthetic. Marley Marl's act of sampling individual drum sounds — eschewing the use of break-beats only — and using them to create entirely new drum patterns was the most transformative and revolutionary act in the history of hip hop/rap's beatmaking tradition. And because this method, technique, and practice eventually spread to other forms of electronic music, it's arguably the most transformative and revolutionary act in beatmaking in every genre of electronic music, which also makes it one of the most transformative and revolutionary acts in the history of Western Popular music.

An Important Note on "Genius"

Looking at Louis Armstrong, James Brown, and John Coltrane, the musical genius of each is evident because there's a bevy of evidence that easily permits us to arrive at this conclusion. Each has a robust and powerful music catalog; each did numerous interviews wherein they discussed their innovations and ideas; and each has books written about them. This same level of evidence is not present when we consider J Dilla. He didn't do many interviews, and the ones that we are left with were limited in detail (in terms of music process, ideas, and intention), and prior to *Dilla Time*, there were no books written about Dilla. Thus, in the absence of the evidence, Charnas's approach is to try to establish J Dilla as being a *among* these "acclaimed geniuses." The sleight of hand of course is in the wording: "…*as acclaimed geniuses* like…" But while Charnas places J Dilla *among* Louis Armstrong, James Brown, and John Coltrane, et. al, in an effort to demonstrate that Dilla was a genius, he doesn't

properly juxtapose the influence and impact of J Dilla's work with that of these iconic recording artists.

John Coltrane and the Learning Tree of Rhythm: Implying J Dilla's Genius via John Coltrane's Genius, and Learning to Keep Rhythm "Free"

Ironically, choosing John Coltrane as a parallel for J Dilla actually works, but not because of something "transformative and revolutionary" as Charnas asserts. Instead, it's a great parallel because of something actually quite common. You see, J Dilla and John Coltrane — like many other musicians before them — developed through their understanding and use of the same learning tree of rhythm. To show what I mean, and because of how it confirms long-held rhythmic concepts in Black American music and Western popular music generally, in this section, I call attention to John Coltrane's famous creative "Circle of Tones" diagram, and I examine some of John Coltrane's own commentary on rhythm. Together, these two things further debunk Charnas's most egregious overstatement: That what J Dilla did was *"every bit as transformative and revolutionary as"* what Louis Armstrong, John Coltrane, and James Brown did.

When considering the influence and impact of a musician, the best evidence that we have to go off of is the musician's music catalog and sometimes the commentary of other musicians/recording artists whom they influenced. Of course, this also applies when weighing whether a musician is or isn't a genius. But with the *genius inquiry*, if you will, we must also look at what the musician himself had to say. In other words, the genius inquiry also requires that we examine the oral or written documentation of the musician's ideas. Otherwise, we're left only with what commentators say about or

read-into the music of the musician at question. And in that case, there can often be projection or other suggestive analysis that doesn't line up with what the musician actually did or was thinking or was aiming for. For example, Marley Marl told me exactly what he did when he produced Kool G Rap & DJ Polo's song "Road to the Riches" (Cold Chillin'/Warner, 1989). Marley Marl was fully aware of what he was trying to do rhythmically and structurally, and he had a specific style and sound that he was aiming for. He also told me my *why* he did it, as well as his "rule" for sampling:

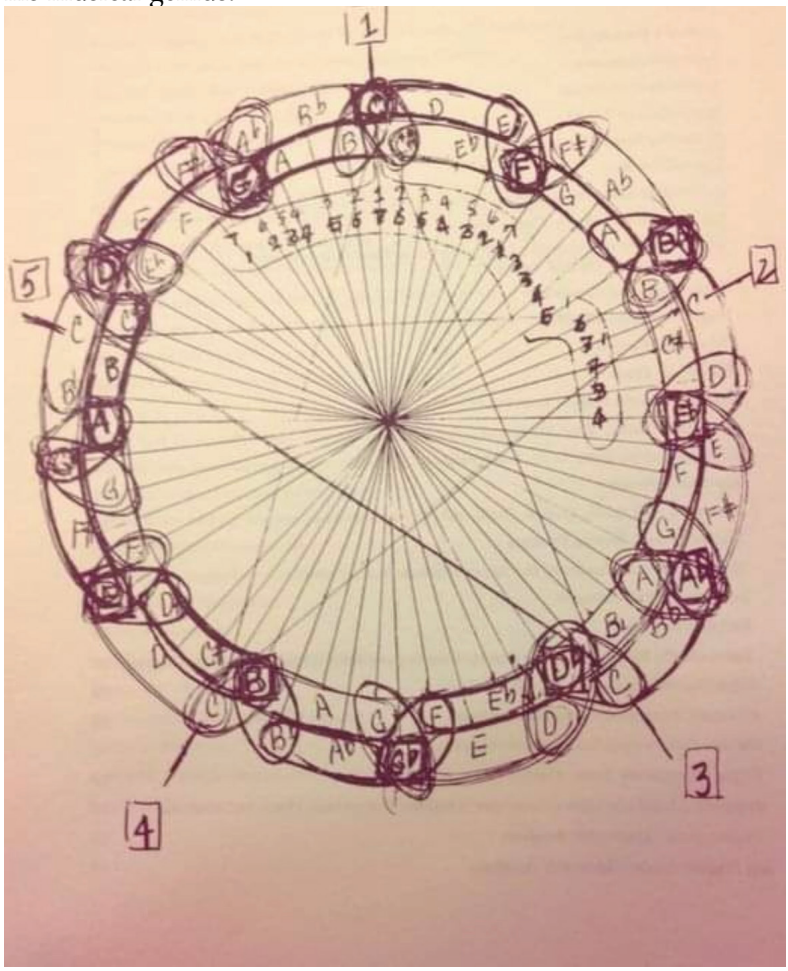
> It was the fusion of *where I was trying to take the music*. I guess it was the fusion of hearing break-beats, and scratching', and echos, and all of that on earlier tapes that came to my attention. So I think the fusion of all of that. And the reason I even used, went back to the break-beats, was because I remembered. When I went back and started making records, **after what I realized with sampling what I could do!** [M]y rule was to never sample too much. ***My rule was to get snippets, pieces, fractions of seconds cuz that's all the time I had to work with.*** **My rule was to not sample too far, to just get little segments and seconds of snippets and manipulate it into my own pattern.**[90]

What I hope to show here is that these are Marley Marl's own words, not my interpretation or suggestion of what Marley Marl was doing or thinking; I'm not *mis*reading into Marley's words, because they speak for themselves. Are Marley's descriptions the sort of things that qualify him as a musical genius? Maybe, I'm not sure. But this is Marley Marl's own oral documentation of his ideas and approaches. And from his own oral documentation, we can gauge that what he did was indeed an "act of calculation."

Now let's look at John Coltrane under the genius inquiry. John Coltrane's music catalog is loaded, one of the most impressive and influential music catalogs in the history of jazz and Western popular music. So there's no need to cover that. But turning to what John Coltrane documented *himself* about his music, there are a number of things that immediately stand out. And perhaps there is nothing more impressive, in terms of John Coltrane's own written documentation, than his "Circle of Tones" illustration.

[90] Said, 455 (emphasis mine).

John Coltrane literally drew a diagram (a beautiful piece of art in and of itself) illustrating not only the mathematics of music, but the possibilities for "jumping" between whole-tone scales. John Coltrane's "Circle of Tones" illustration demonstrates the pathways that he took to achieve his ideas. Moreover, his illustration demonstrates that what he was doing was certainly "an act of calculation." Finally, John Coltrane's illustration was a visual representation of what some of his musical aims were based upon. Hence, John Coltrane's "Circle of Tones" is one proof of his musical genius.



A careful reading of Charnas's argument that J Dilla was a musical genius — *and to be clear, I also believe that Dilla was a musical genius* — reveals Charnas's investment in proving Dilla's genius through "math," "time," and "intelligence," etc. So looking at John Coltrane's Circle of Tones above, is this the type of musical genius that Charnas wants his readers to consider when they think of Dilla? I'm not sure. Either way, Charnas wants *Dilla's* genius to be affirmed via placement next to one of Western popular music's most influential musical geniuses in history. But genius is not affirmed *by association*. You can't put Dilla's name (or any other musician's name) next to John Coltrane's name and expect that to bolster *Dilla's* genius. The ploy here is thin. Take John Coltrane — one of the most influential musicians in the history of jazz and popular Western music in general and a proven, well-established musical genius — then say that another musician, one without parallel accomplishment or the same level of notoriety, was a genius *just like* John Coltrane and even "every bit as transformative and revolutionary" as he was. The veiled suggestion is that J Dilla and John Coltrane were both geniuses *of the same ilk*. And thus, the implication then is that J Dilla is *beyond* "his more famous peers."

Look, let me say this again: J Dilla is one of my favorite beatmakers (producers). I believe he is indeed a musical genius, just like some his pioneering peers. And his influence and impact on hip hop/rap music's beatmaking tradition, on hip hop/rap music in general, and on some areas of neo-soul can't be denied. But John Coltrane and J Dilla are not musical geniuses of the same sort. This isn't a put down of J Dilla; in the history of Western popular music, there are very few musical geniuses of the same sort as John Coltrane. The simple fact is that there's only a small handful of musicians that are in the same league as John Coltrane. This is because few musicians have been as visionary and influential as John Coltrane. And when you consider the handful of musicians who *are* in John Coltrane's league, like Charlie Parker, Stevie Wonder, and of course Louis Armstrong, it's painstakingly clear that the parallel Charnas attempts to make between John Coltrane, et. al is an overreach. Still, this doesn't mean that Dilla wasn't a visionary

or greatly influential in his own right or that he didn't infuse his music with *his* genius and feeling.

The genius inquiry applies to J Dilla just as it does to any other musician. In this regard, one must look at Dilla's music catalog as well as Dilla's own documentation of his ideas. Dilla's music catalog wasn't as large as John Coltrane's; plus, Dilla didn't do much documentation of his aims and ideas. And that's ok. But in answering the question of whether or not Dilla was a musical genius, or simply appreciating Dilla as a musical genius, requires full context, not *genius by association* and other forced intellectual suggestions.

Next, a couple more things about all of this. First, J Dilla doesn't *need* to be grouped with three of the most incredible musicians in the history of Western popular music in order to prove or legitimize *his* musical genius or his level of talent. Second, John Coltrane, who pursued the study and practice of music with a religious-like fervor, was outspoken about his complex concepts and ideas around music. (Coltrane gave numerous interviews.) In terms of explaining *what* he was trying to do musically or *why* he did things the way he did or the nature of his musical philosophy or the struggles he had in bringing his ideas to life, the record is quite clear. Here's one example of John Coltrane himself documenting the aims of his ideas and the reason why he plays his instrument in the manner that he does:

> The reason I plays so many— It sounds, maybe it sounds angry because I'm trying so many things at one time, you see. Like I haven't started them out. *I have a whole bag of things that I'm trying to work through and get to one essential… There are some set things that I know.* **Some *devices* that I know, harmonic devices that I know, that will take me out of the ordinary path,** *you see, if you use these.* But I haven't played them enough, and I'm not familiar with them enough yet to take the one single line through them. So I play *all* of them.
>
> **[T]one wise**, I would like to be able to produce a more beautiful sound. ***But now I'm primarily interested in trying to work what I have, what I know down, into a more lyrical line.*** You know, **that's what I mean by beautiful.** More lyrical, *so it'll be easily understood.*"

> Interviewer: "John which tenor players do you think have influenced you, if any at all?"
> John Coltrane: **All of them! I would say all of them.**[91]

Note, here, that John Coltrane was aware of the "devices," *harmonic* devices, that he "*used*" to take him on a different path. John Coltrane knew that he didn't "invent" those devices; it would have been absurd for him to have said that he did. Instead, John Coltrane was pointing out his *awareness* of specific harmonic devices. And he was noting that he knew that these devices — i.e. these building blocks of music — *could* be used to take him on a different path. Additionally, John Coltrane was openly conceding that he hadn't yet figured out (entirely) *how* to use these harmonic devices. This is instructive for our purposes here, because as I noted in the previous chapter, in addition to being a basic building block of music, a rhythmic feel is a rhythmic *device*. Hence, in the paradigm of development — through the *use* of rhythmic devices, — once J Dilla *became aware of* the click-and-clock rhythmic feel, he learned *how* to use it; and he used it to take a different path. This path wasn't the rhythmic feel itself. Rather, the rhythmic feel was just a means — a device — for going on that different path. Charnas misses this critical point entirely, and in doing so, he not only miscredits "invention" of the click-and-clock rhythmic feel to Dilla, he also mischaracterizes and overstates what rhythmic feels actually are, how they are commonly formed, and how, as music devices and basic blocks of music, they are simply something that musicians commonly use to make new music.

And here's John Coltrane discussing rhythm in particular:

> Now, **I prefer the rhythm to be *free***. I had to get it beat into my skull. *I except this principal now.* At first, I wasn't sure, because I was ***delving between*** sequences, and I felt that I should have the rhythm play the sequences right along with me, and **we all go down this,** you know, [inaudible] road. **But after several tries, and failures**

[91] Carl-Erik Lindgren, "John Coltrane interview" (March 22, 1960, Stockholm) https://www.youtube.com/watch?v=K0sru1t6YpE.

> **and failures, it seems better to have them free to go. As free as possible, then you superimpose whatever sequences *you* want over the rhythm.**"[92]

Here, John Coltrane — *speaking as much as a master of music as a student of music* — notes his struggles with rhythm, specifically his reluctance to not leave the rhythm "free." John Coltrane learned, by having it "beat into his skull," to leave the rhythm "free" enough to "superimpose" whatever sequences (syncopation, melody, arrangements, etc.) he wanted over the rhythm. Hence, John Coltrane learned how to combine straight and swing (swung) time. More specifically, John Coltrane learned — through "several tries, and failures and failures" — that the more "free" this combination is — the less rigid, i.e. not strictly on a given beat — the more it affords musicians the possibility to superimpose whatever sequences (arrangements) they want over the rhythm. Charnas failed to recognize that this long-held principle has governed rhythmic concepts in Black American music for more than 100 years. Because of this, Charnas failed realize that J Dilla simply learned — from the same learning tree of rhythm — what John Coltrane, and other musicians before him, had already learned. Consequently, this critical context is missing from *Dilla Time*; as a result, readers of *Dilla Time* are made to believe that J Dilla was the "first" to come up with the concept of combining "straight and swung time," and that Dilla "*invented* a *new way* to relating to musical time." But that's simply not true.

***

[92] https://learninglink.oup.com/access/content/bierman-dashboard-resources/john-coltrane-on-playing-in-free-rhythm

In contrast to John Coltrane, J Dilla didn't do many interviews; and Charnas didn't interview Dilla at lenghth about his creative processes. Thus, much of Charnas's assessment of *why* J Dilla did what he did relies on *Charnas's* interpretations,[93] or, in limited cases, the recollections of those who were in the basement or recording studios with Dilla, *not,* for the most part, J Dilla's own words and explanations. And I know of no such interview in which Dilla was as outspoken and detailed — or expressed similar concepts and ideas about the making of his music or music in general — as John Coltrane. For instance, to my knowledge, Dilla didn't do any interview in which he spoke extensively about rhythm or the ideas that he incorporated with the click-and-clock rhythmic feel, or for that matter, where he first got the ideas from or who inspired him with specific regard to this rhythmic feel. I would assume that if such an interview did exist, Charnas would have been aware of it and cited it in *Dilla Time*. What Charnas does report, however, is that Dilla was upset that other people "were taking his *style*." But that's not the same thing as Dilla giving a detailed discussion of his methods, processes, or intent behind his style, methods, and processes. And it's certainly not the same thing as John Coltrane discsussing commonwealth struggles with rhythm or talking up the benefits of keeping rhythm "free" or "delving in between" rhythmic sequences.

Additionally, Charnas steps awkwardly into conjecture when he twists an aside from a Dilla interview into something that it's not. In referencing the out-of-sync human hand claps with the instrumental track at the end of the movie *A Piece of the Action* (1977), Charnas implies that there was a direct connection that Dilla made between that "sound of error" (Charnas's words) and the click-and-clock rhythmic feel that Dilla would later come to use.

[93] One common pitfall in interpretation or guessing what a beatmaker (producer) did is that sometimes you find out that what you *thought* they did was actually only a loop. Ergo, you ascribe chops and other arrangements to the beatmaker (producer) when everything was already present in the loop. One example of this is Erykah Badu's song "Didn't Cha Know," produced by J Dilla. This is one of Dilla's most known and successful productions (the song was nominated for Grammy Award for "Best R&B song" in 2001.) But the song does not feature the click-and-clock rhythmic feel; and aside from the straight-forward backing drum track, it does not feature additional complex arrangements as some believe. Instead, it's a loop of Tarika Blue's "Dreamflower" (1977).

But Dilla never expressly told Charnas that the out-of-sync hand claps from *A Piece of the Action* were the impetus for what he was doing rhythmically with his signature style, sound, and aesthetic. And Dilla never expressly said that in *any* interview. Instead, Charnas uses an aside from an interview and romanticizes how Dilla arrived at the click-and-clock rhythmic feel. So Charnas speaks *in place of* Dilla and intentionally presents something to readers of *Dilla Time* that Dilla himself never said or intimated:

> "But those mistakes-man-made, machine-made mistakes — ***were thrilling*** to James. They reminded him of messy house parties, and the interminable rehearsals of his childhood, and the discord of musical devotion in the sanctuary of Vernon Chapel, **the unity made from the chaos of humans interacting**. **The *sound of error* stayed with him. It remained until he found a way to make those errors on purpose.**
>
> It remained beyond that, *into a future that he could scarcely imagine*, a future in which much of popular music would sound uncannily like that last scene from *A Piece of the Action* simply because musicians and composers around the world wanted to sound like James." [emphasis mine][94]

These aren't J Dilla's words. These aren't Dilla's expressions or summations of the source of his rhythmic pursuits. These are *Charnas's* words, a sort of hagiographical speech designed to praise Dilla and serve Charnas's narrative that Dilla "invented" the click-and-clock rhythmic feel. This passage is not intended to actually elicit a deeper understanding of the true origins of the rhythmic feel that Dilla would go on to popularize. And what's worse about this "sound of error" narrative that Charnas imposes is this. The combination of straight and swing (swung) time has never been a concept of "error." Playing off or on beat and everywhere in between has always been *a matter of individual feel*; standard stuff, in the Black American rhythmic tradition and Western popular music more broadly.

None of this means that there wasn't any complexity or innovation in J Dilla's music. It's clear that there was! But was it

[94] Charnas, 108-109.

complexity and innovation on par with that of John Coltrane's music? Was is it musical genius? If we're talking about Dilla's micro-chopping and knack for making beautiful arrangements — a talent also posessed by Marley Marl, DJ Premier, Pete Rock, and RZA — maybe. But if we're only talking about Dilla's *use* of a rhythmic feel whose origins preceded him, then no. Much of J Dilla's work was grounded in and founded upon the commonwealth ideas of hip hop's beatmaking tradition. Inasmuch as he expressed original ideas, he created a new style, sound, and aesthetic. It's here where we might find a valid comparison with John Coltrane. Both musicians created new styles, sounds, and aesthetics. But this is more of a surface-level comparison that could be applied to many well-known musicians. Moreover, the creation of a new style, sound, and aesthetic is not automatically synonymous with genius. Plus, the creation of a new style, sound, and aesthetic is not uncommon in hip hop/rap music. RZA created a new style, sound, and aesthetic. DJ Premier created a new sound, style, and aesthetic. Tricky created a new sound, style, and aesthetic. Timbaland created a new sound, style, and aesthetic. Pete Rock created a new sound, style, and aesthetic. Q-Tip created a new sound, style, and aesthetic. The list of names, large and small, goes on. Genius *may* have been at play in all of these examples, but it's neither automatic nor a requirement for such creations.

Next, while J Dilla's work may have been transformative, to a certain degree, it was not "revolutionary"— Certainly not "every bit as transformative and revolutionary" as Louis Armstrong's, John Coltrane's, or James Brown's work. By way of the style, sound, and aesthetic that he created — and the rhythmic feel he popularized but did not invent — Dilla's work was pioneering, similar to the pioneering work of "his most famous peers." Dilla brought into vogue a go-to rhythmic feel that a number of beatmakers (producers) and other musicians still use today. And Dilla's use of the click-and-clock rhythmic feel also helped expand the experimental wing of hip hop/rap's beatmaking tradition. These things are big. But these accomplishments were not necessarily deferential to musical genius, and they shouldn't be framed as such.

One need not be a musical genius to have an impact on hip hop beatmaking or Western popular music in general. In this regard, the possession of musical genius is not inherently superior to the lack thereof. Chicago drill pioneer Young Chop may or may not be a musical genius, but it's hard to discount his impact on Chicago's drill scene specifically and hip hop/rap music more broadly.

Next, J Dilla was not beholden to just one style, sound, and aesthetic. He could — and often did — do various styles, sounds, and aesthetics. This is also what made him a master beatmaker (producer). I think this speaks more loudly to his musical genius. In any case, what it shows is that Dilla's influence and impact aren't tethered to the *one* style, sound, and aesthetic or rythmic feel that he's perhaps best known for.

Lastly, if we're comparing John Coltrane and J Dilla, and this is really an unfair comparison, we have no choice but to temper our assessment of J Dilla's contribution to, and transformation of, hip hop/rap music. There's no question that John Coltrane helped transform jazz music, first on the bebop scene and later on the hard bop, modal cool jazz, *and* avant-garde experimentation scenes. Dilla did not transform hip hop/rap music exactly in the same way. Still, in the area of avant-garde experimentation and beatmaking's "lo-fi" scene, Dilla is certainly one of the forefathers.

Difference Between the Trajectory of James Brown and J Dilla

Turning now to James Brown. In the previous chapter, I discussed James Brown's invaluable contributions to and influence and impact on Western popular music. So in this section, I'll briefly draw attention to the different career trajectories of James Brown and J Dilla, specifically in terms of how they featured (and in J Dilla's case, did not feature) the rhythmic feels that they were closely associated with.

After James Brown began using the One, he used it in *all* of his music thereafter. The One was James Brown's mainstay; to

him it was a trade secret, and he drilled it into the mind of his band members. To say that James Brown was hyperconscious of his use of the One and what it meant is an understatement. By contrast, J Dilla didn't even use the click-and-clock rhythmic feel on most of his beats; in other words, it wasn't a mainstay of his music. Here, the empirical evidence makes this quite clear. There are far more J Dilla beats that don't feature the click-and-clock rhythmic feel than do. With James Brown, we note that he had perfected his style and sound and "between 1969 and 1971, *17* of his songs cracked the top 10 on the R&B charts."[95] But none of the J Dilla-produced songs that featured the click-and-clock rhythmic feel can claim a parallel achievement. Dilla didn't enjoy a similar commercial success as James Brown, so it follows that Dilla didn't have an impact on Western popular music in the way that James Brown did. Sure, Dilla's style, sound, aesthetic were copied (and continue to be copied) by a number of beatmakers (producers). But they never became the dominant style, sound, aesthetic in hip hop/rap music, nor was it ever the dominant rhythmic feel in hip hop/rap music, nor was it ever the dominant rhythmic feel of Western Popular music.

[95] Elias Leight | | "The One: The Life and Music of James Brown," Paste (September 25, 2012) https://www.pastemagazine.com/books/james-brown/the-one-the-life-and-music-of-james-brown-by-rj-sm/.

Coda

Before concluding this chapter, it's essential to place all of this in the larger context of the story of rhythm in Black music and the beatmaking tradition of hip hop/rap music. This will show us where J Dilla truly was an outlier; conversely, it will show us where Dilla was *not* an outlier or exception but part of a powerful, larger tradition that demands our attention — especially if we're to have a fuller grasp of hip hop beatmaking. This, in turn, tells us a great deal about *how* hip hop/rap music advanced, in large part, because of its chief compositional method: Beatmaking — which has always been manifested fundamentally through the art of sampling. When viewed in this broader context, it becomes even harder to dismiss J Dilla's achievements just as much as it is to elevate those achievements to a level parallel to those of Louis Armstrong, James Brown, and John Coltrane.

The fatal flaw in Charnas's argument is this. The rhythmic feel that he credits invention to J Dilla did not actually originate with J Dilla. And it's precisely this error that leads Charnas down a path of erasure, exaggeration, and revision. A similitude might be Charnas claiming that James Brown "invented" the One. James Brown didn't invent the One, but his particular use and popularization of it did change Western popular music forever. J Dilla may have been most responsible for popularizing the click-and-clock rhythmic feel in hip hop/rap music, a sub-section of neo-soul, and some other music sub-genres, but his use of it in hip hop/rap music and his popularization of it in neo-soul (along with his "partners") did not "transform" Western popular music, at least not to a level that's on par with Louis Armstrong, John Coltrane, and James Brown. Charnas wants people to believe that J Dilla is *beyond* "his more famous peers,"that Dilla "transformed the sound of *popular music* in a way that his more famous peers have not."[96] That's the focus: *beyond*, not *among* "his more famous peers."

[96] Charnas, 9 (emphasis mine).

Thus, this is Charnas's core framing: That Dilla isn't among the likes of DJ Premier, RZA, Marley Marl, Pete Rock, Q-Tip (and notable others) when it comes to hits, but he's *beyond* them when it comes to impact on Western popular music. This is the second biggest flaw in Charnas's argument. In terms of contributions made to hip hop beatmaking, hip hop/rap music more broadly, and Western popular music in general, a dicussion of the likes of DJ Premier, RZA, Marley Marl, Easy Mo Bee, Pete Rock, Large Professor, Dr. Dre, Q-Tip, Buckwild, 8Ball & MJG, Mannie Fresh, DJ Toomp, and Timbaland should be respectful to them all. This discussion should include observations of what makes each beatmaking pioneer stand out, i.e. what distinguishes their styles, sounds, and aesthetics and what they each contributed to hip hop/rap music specifically and Western popular music in general.

But once you change the conversation to who's "*beyond*" whom, you arrive on shaky ground. Aside from total catalog numbers, like the number of official production credits or number of chart-topping hits, which is empirical evidence that can be checked and proven, there's not much else you should even try to make a case for being "*beyond*." Yet, Charnas argues that J Dilla was beyond them all! What's worse? His argument is based on Dilla's *use* of a rhythmic feel that was performed before by at least 3 of his "more famous peers." A rhythmic feel that originated *at least 40 years* before Dilla made his first beat. A rhythmic feel that DJ Premier, RZA, and True Master laid down the blueprint for in hip hop/rap music.

Through his argument, Charnas tries to strongarm music history in a way that I've never seen before. First, he assigns "rhythmic innovations" to J Dilla that precede Dilla by at least 40 years. Second, he insists that the click-and-clock rhythmic feel that Dilla used was "central" to hip hop/rap music. But it never was, even if it was popular among a certain corner of hip hop/rap music. Next, Charnas maintains that Dilla's influence and impact on Western popular music approach the same level of influence and impact as Louis Armstrong, James Brown, and John Coltrane. This is simply not true by any metric. Next, Charnas credits Dilla

with cracking a "new" rhythmic code, i.e. the "colliding" of straight and swing (swung) time, and creating a "new path to rhythm." No musicologist, no one with any serious knowledge of the history of Black music or the historical context of rhythm in Black music, or Western popular music more generally, would ever say that Dilla, or any musician in the *1990s*, was the *first* musician to combine straight and swing (swung) time, or that Dilla "*invented* a new way to relating to musical time," or that "*before J Dilla*, there were essentionally *only two* time-feels." And no one with a serious knowledge and understanding of hip hop's beatmaking tradition would ever say that J Dilla sits *beyond* the hip hop beatmaking (production) icons who he himself studied, learned from, and, in some cases, *copied*. Dilla is *among* these icons, and that in of itself is a tremendous achievement and proof of a lasting legacy.

J Dilla created a signature style, sound, and aesthetic that remains to this day a source of inspiration primarily in hip hop/rap music and neo-soul. J Dilla helped popularize the use of a specific rhythmic field. J Dilla made incredible music and demonstrated his mastery of beatmaking. In doing so, Dilla firmly etablished himself as one of the all-time greats of hip hop/rap music production, neo-soul production, and music production in general. These facts do not represent an overstatement (nor an understatement) of Dilla's impact or influence. Rather, they more properly situate Dilla's impact and influence.

***

As a biography of J Dilla's life, *Dilla Time* is great body of work, first-rate reporting! However, with regards to the main musical thesis of *Dilla Time* and the central aim of its music analysis, *Dilla Time* is much more concerned with what it wants to do than recognizing the pitfalls, drawbacks, and ahistorical tendencies associated with actually attempting to do it. Making the click-and-clock rhythmic feel out to be more revolutionary, radical, or popular than it was, and then attributing credit to J Dilla as its originator — thereby attempting to put him on par with Louis Armstrong, James Brown, and John Coltrane — is terribly misguided. The evidence, which is

overwhelming, does not support Charnas's main claims.

If, in 2024, Charnas refuses to: 1) Accept the reality that the rhythmic feel that he credits invention to J Dilla did not in fact originate with Dilla; and 2) That musicians before Dilla had indeed combined straight and swing (swung) time, then that's a function of Charnas's own choices, not of reality. The damage in this, of course, is that Charnas's choices, as documented in his book *Dilla Time*, will undoubtedly lead others to make the same choices, and these factually incorrect statements, and the misinformation that they foster, will spread.

The story of rhythm in Western popular music is complicated. Musically, rhythm is multi-layered in terms of practice, execution, and philosophy. Then there's also the hierarchy of harmony in European music theory — which does not align with the African prioritization of rhythm above harmony. Socially, rhythm in popular Western culture has always been a racially charged subject because the privileging of rhythm over melody has been more closely associated with Black people than white people. Historically, the development of rhythm has seen a long list of musicians who've pioneered the fundamental rhythmic feels that musicians still rely on today. Thus, repeating the Dilla absolutisms that Charnas presents dumbs us all down.

Charnas ultimately wants to have it both ways. First, his implicit (not so subtle) suggestion is that J Dilla is arguably the greatest hip hop beatmaker (producer) of all time. The problem with this implicit claim is twofold: 1) Dilla simply does not have the music catalog to be the greatest; 2) Much of Charnas's argument in support of this claim relies on Dilla's influence *outside* of hip hop/rap music. So the stretch that Charnas is making here is that even if J Dilla lacks the catalog of "his more famous peers," and even if Dilla is not the best hip hop/rap beatmaker (producer) of all time, he is indeed the greatest hip hop/rap beatmaker (producer) of all time because of his impact *outside* of hip hop/rap music. But this makes no sense. To use a basic sports analogy, that's like saying a player is the most valuable player in the league, even though he's

not the most valuable player — or even the second, third, or fourth most valuable player — on his own team.

Another issue complicating Charnas's larger argument is that Charnas wants J Dilla's influence on music *outside* of hip hop/rap music to take precedent over hip hop/rap music's collective influence on other music genres. But this is an impossible argument to make because Dilla's individual influence on other music genres, notable as it may be, is nowhere near as big as hip hop/rap music's influence *as a whole*. And this influence is shared by a collective, a core number of hip hop/rap beatmakers — A group in which J Dilla's inclusion doesn't take place until the late '90s.

Next, Charnas wants what J Dilla did, i.e. the use of the click-and-clock rhythmic feel, to be more complex than it really was (is). Charnas is so committed to this proposition that he blocks out obvious counterpoints. First, that this rhythmic feel was not widely popular in hip hop/rap music, but rather something adopted by a minority. Second, that even *most* of J Dilla's own beats did not feature this rhythmic feel. Third, that this rhythmic feel was always easy to emulate, even before software programs made it quickly possible. In fact, this rhythmic feel reamains easily programmable today, yet its adoption in hip hop/rap music is still not dominant.

***

Impact, A Comprehensive Overview

By the late '90s, all of the "Critical 26 albums" (the 26 cornerstone sample-based hip hop/rap albums that I noted in Chapter 2) had been produced. J Dilla didn't have production on any of these seminal albums. And by 1993/1995, the click-and-clock rhythmic feel had already appeared in hip hop/rap music. This doesn't discount what Dilla brought to the table *after* the Critical 26 albums, but it does go to show that his presence, like those of Kanye West and Just Blaze, both Post-Pioneer icons as well, was missing from these critically and commercially formative hip hop/rap albums. This is simply reflective of the timeline and

the output and impact of the albums that were released by the late '90s. As hip hop/rap music continued to advance after the '90s, new hip hop/rap music sub-genres were created, like trap and drill, but there were no *new* (major) techniques introduced into hip hop/rap's beatmaking tradition. Rather, all of the core methods, techniques, practices, and processes had already been developed by the late '90s; this includes methods and techniques for performing the click-and-clock rhythmic feel. And with the advent of DAWs, many of these methods, techniques, practices, and processes were updated and made even easier.

***

Turning from hip hop/rap music specifically to Western popular music more generally, there's something else that must be noted. Charnas argues that J Dilla "changed *music*." But that's a sweeping generalization. First, this narrative is intentionally more abstract than precise, a kind of technical semantics. Technically, one could say that Dr. Dre *changed music*. Or that Stevie Wonder *changed music*. Or that Prince *changed music*. Or that Curtis Mayfield *changed music*. Of course, this would call for serious context, and no one would say that those changes applied to or impacted *all* of Western popular music. Louis Armstrong changed Western popular music, James Brown changed Western popular music, John Coltrane changed Western popular music. *Every* musician in Western popular music after these three giants felt their impact. But the same simply cannot be said of J Dilla, and it's unfair to him to even try to make that case.

Second, Charnas's "J Dilla changed music" narrative upgrades a sub-genre micro event, albeit dynamic, to the level of the kind of macro event that affected *all* of Western popular music. Just because some musicians from other music genres experimented with a rhythmic feel and aesthetic that Dilla helped popularize does not mean that Dilla "changed music." John Coltrane experimented with Indian music and was influenced by Ravi Shankar (as were countless others), but we don't say that Ravi Shankar changed Western popular music as a result of this. Even Ravi Shankar's

influence on Western popular music does not rise to the level of Louis Armstrong's, James Brown's, and John Coltrane's. And you'd be hard pressed to name *any* musician who has had an impact on Western popular music that is similar to theirs. Also, with regards to drumming, just because some traditional drummers (mostly those within small pockets of contemporary jazz, blues, or R&B) now occasionally perform the click-and-clock rhythmic feel doesn't mean that J Dilla "changed the way" traditional musicians, ergo, *drummers*, play. Again, the click-and-clock rhythmic feel pre-dates Dilla; drummers Ziggy Modeliste (The Meters), Harvey Mason (The Headhunters), Bill LaVorgna, and Bill Curtis (The Fatback Band) performed it four decades before Dilla first began using it.

None of this detracts from J Dilla's contributions or their impact. J Dilla added a new style, sound, and aesthetic to hip hop/rap music's beatmaking tradition and compositional lexicon; and many beatmakers (producers) continue to build off his style, sound, and aesthetic today. Further, J Dilla helped develop a new area of neo-soul, a sub-genre of contemporary/progreessive R&B, that remains popular in many circles. These are tremendous accomplishments that need not be inflated nor misrepresented. But when Charnas does just that, he's playing loose with his translation of events. Within his agenda to place Dilla among Louis Armstrong, James Brown, and John Coltrane, and to situate Dilla beyond his "more famous peers," there lie fundamental problems with some of Charnas's analysis, which includes mischaracterization, incomplete research of the click-and-clock rhythmic feel itself, and the misrepresentation of one small corner of music as being representative of *all* Western popular music.

Other Rhythmic Feels

Trap and drill are also rhythmic feels. The Reggae One Drop is a rhythmic feel. The 5 Beat Pattern — aka the "Kpanlogo" or Ghana Bounce — the backbone of Afrobeats, is a rhythmic feel. Has the click-and-clock rhythmic feel (aka Dilla "Drums") had more impact on Western popular music than those rhythmic feels?

No, it hasn't. Moreover, should those who help popularize a rhythmic feel be considered on par with Louis Armstrong, James Brown, and John Coltrane? No, they shouldn't. And if we turn our eye to hip hop/rap music and "popularity," which is always subject to taste but nevertheless easy to ascertain, the trap rhythmic feel is without question more dominant *within* hip hop/rap music today. And this isn't just some mass-appeal statement. There are many trap-based hip hop/rap music songs that are as rhythmically impressive as any forward-leaning hip hop/rap song. One example: Nicki Minaj & Lil Baby - "Bussin" (2022).

It's not that the rhythmic feel that J Dlla best popularized *isn't* important; it is, and it merits examination. The problem is that Charnas misplaces its significance. He places the significance of the click-and-clock rhythmic feel *above* other, more prominent modern rhythmic feels, and he presents it as if it were the sole, most consequential new rhythmic feel to emerge in Western popular music since James Brown's popularization the One. Here, Charnas doesn't even acknowledge the One Drop rhythmic feel (reggae music) or the trap music rhythmic feel in hip hop/rap music or the 5 Beat Pattern (Ghana Bounce) of Afrobeats or the Afrobeat rhythmic feel that preceded it. In doing so, Charnas fails to situate the click-and-clock rhythmic feel *among* these other more prominent rhythmic feels. This inflates the significance of Dilla's use — *not creation* — of the click-and-clocck rhythmic feel. Consequently, it omits the significance of those other rhythmic feels that continue to have far more impact.

Listen to the Music

When judging the accuracy of my findings, don't take my word for it. Check the evidence that I provide. This means, most importantly, listen to the music for yourself. Further to this point, in selecting examples, especially rhythmic feels, I have tried to show how rhythmic feels, in the abstract, are not new. And in the specific, I have aimed to show the major rhythmic feels that are well known in Western popular music. Highlighting these rhythmic feels makes it easier for readers to judge for themselves how popular the

click-and-rhythmic feel that J Dilla used is or the level of impact that its actually had on Western popular music.

When teaching, historians often select examples based on their biases. Where this can become a problem in researching music, especially in hip hop/rap music, is when those examples are insufficient for the scope of the lesson. In other words, the bolder the claim — the more ground a teacher seeks to cover and lay claims upon — the broader the examples must be. For instance, you can't discuss the true impact of hip hop/rap music (and by proxy hip hop/rap beatmakers (producers)) on post-'80s R&B by only looking at neo-soul. Likewise, you can't claim that a development or trend is "central" to hip hop/rap music without tracking whether or not that trend was widely adopted by most hip hop/rap beatmakers (producers).

There is No Automatic Par Excellence

One of the unfortunate side effects of the popularity of boom bap and the general expansion of hip hop/rap music from the late '80s to the mid-'90s is that it has left a number of hip hop/rap fans with the impression that "real" hip hop/rap music is indicative of that era. Thus, what came before, ca. 1973 - 1985, literally the origins of hip hop/rap music from the streets to the recording studio, is overlooked or rendered to the often condescending status of "old school." As for the chief developments in hip hop/rap music that came after the '90s, and here I'm mostly talking about trap music, hip hop/rap music purists discount it outright — Even though its party and dance-music attributes are well in line with hip hop/rap music's street origins.

In this paradigm, a researcher might be dissuaded from seriously examining trap music, casting it off as cookie cutter or not "real" hip hop/rap music. But that's absurd. The aesthetic of trap is calculated and intentional; those who make this style and sound of music are engaging in the tried and true Black music tradition of versioning. Moreover, the rhythmic nuances and musical aesthetic of trap is quite clear and distinct. Perhaps Charnas's failure to frame J Dilla's

use of the click-and-clock rhythmic feel as *one* rhythmic feel out of multiple rhythmic feels in hip hop/rap music is the result of his personal preference for a certain kind of hip hop/rap music. Whatever the reason, such a grand omission renders his major claims obsolete. The rseality is, when considering the full spectrum of hip hop/rap music, and J Dilla's place within that spectrum, we can't treat trap or drill as pariahs of hip hop/rap music no more than we can treat J Dilla's use of the click-and-clock rhythmic feel as *automatic* par excellence hip hop/rap music.

Narrow Lens and Small Sample Size

With regards to *some* aspects of the music analysis in *Dilla Time*, Charnas looks through a narrow lens. Here, the first problem isn't simply that Charnas uses a narrow lens, it's that he also projects this lens to be much wider than it actually is. And within this scope, he uses a small sample size. Again, Charnas offers no consideration of other rhythmic feels in hip hop/rap music to allow readers of *Dilla Time* to weigh his claims in full context. Second, he focuses on neo-soul but not contemporary R&B in general. Third, he takes his personal preferences and tastes and aims this limited lens at a robust parcel of Black music culture. In doing so, he elevates the work and contribution of *his* preferred Black musician(s) while de-emphasizing, and therefore downgrading, the contributions and innovations of Black music artists that were far more consequential to Western popular music.

Rhythm is serious to Black people. It's not a minor subject easily assessed or summarized. Historically, rhythm is one of Black people's main forms of resistance. Thus, championing Black music artists who have expanded upon the Black (African) rhythmic tradition is a worthy cause. But calling J Dilla "the man who *reinvented* rhythm" (literally part of the sub-title of *Dilla Time*) — simply because he used a beat machine to conjure up a rhythmic feel whose origins predates him by at least 30 years — is not only absurd, it's dismissive of the numerous Black music artists that performed and pioneered the click-and-clock rhythmic feel long before Dilla.

***

Here, I'm compelled to say more about a small sample size. While neo-soul is now known around the world, it's not on the same level as reggae music (here, I include ska and rocksteady, the precursors to reggae). I point this out because Carlton Barrett and Winston G, the drummers that most consider to be the originators of the One drop rhythmic feel — and the drummers central to the popularization of the One drop rhythmic feel — have had a much more powerful impact on Western popular music just by virtue of reggae music's existence alone. A similar thing can be said generally of New Orleans drummers. Drummers from New Orleans collectively (and individually) shaped how we hear rhythm in blues, jazz, rhythm and blues, rock 'n' roll soul, funk, reggae, and hip hop/rap music, all of Western popular music really. But Charnas doesn't even mention them. Point is, there are more drummers who have had far more of an impact on Western popular music than J Dilla. But Charnas elevates Dilla above them all, and he justifies this on a *sometimes-used* rhythmic feel that is perhaps more popular in one corner of neo-soul than hip hop/rap music?

Next, an examination of common rhythmic elements and common rhythmic practices in Black music (that go back more than 100 years) is required in any serious study of rhythm in Western popular music. To Charnas's credit, he does offer some examination in this area. But his focus on J Dilla's "pushing" and "pulling" of music elements takes precedent, and he presents it as "revolutionary." But just listen to some of the early recordings of Bo Didley, for example, to see how push and pull shuffles (performed at varying degrees) were already at work more than 30 years before J Dilla first began using the click-and-clock rhythmic feel. And these ideas were not considered to be "revolutionary," but rather a part of the Black music commonwealth, particularly in the area of rhythm. Yet Charnas would have people believe that just because J Dilla increased (more or less) the *degree* of offness of a push and pull shuffle — on a drum machine — he: 1) "reinvented" rhythm; 2) "created a *new* path to rhythm;" and 3) originated ideas that were

"*every bit* as transformative and revolutionary" as Louis Armstrong's, James Brown's, and John Coltrane's work? No. Simple and plain. I'm aware of no musician in the latter half of the twentieth century, including J Dilla himself, who has ever made such claims. And I believe that were J Dilla alive today, *he* would reject those claims.

Furthermore, "revolutionary" is not automatically synonymous with "good" or "popular" as Charnas seems to imply. Louis Armstrong, James Brown, and John Coltrane brought seachange to their respective genres (jazz/blues, soul/funk, and jazz respectively) and Western popular music in general. Few musicians have had similar impact on their respective music genres and Western popular music in general. J Dilla's impact, or better stated, the impact of J Dilla's *use of the click-and-clock rhythmic feel* on Western popular music was not as profound or transformational as the impact of Louis Armstrong's, James Brown's, and John Coltrane's impact on Western popular music.

Additionally, the signature style, sound, and aesthetic that J Dilla created was not adopted by the vast majority of beatmakers (producers) of the hip hop/rap music tradition. Still, there's no doubt that a number of beatmakers (producers) and other musicians copied him. But given the empirical evidence, it's not difficult to see how far this copying spread. In other words, we can measure the true level of adoption of Dilla's signature style, sound, and aesthetic primarily by its level of appearance on hip hop/rap releases, as well as by *who* copied or adopted it — and by *who didn't*. If you were a jazz musician who came along after Louis Armstrong, you followed in the footsteps of Louis Armstrong. If you were a funk musician after James Brown, you followed in the footsteps of James Brown. If you were into hard bop, free jazz, or avant garde, you followed in the footsteps of John Coltrane. If you were a hip hop/rap beatmaker (producer) after Marley Marl, you followed in the footsteps of Marley Marl. If you were a hip hop/rap beatmaker (producer) after J Dilla, you didn't necessarily follow in the footsteps of J Dilla. Thus, the specific parallel that Charnas draws with Louis Armstrong, James Brown, John Coltrane, and Dilla doesn't add up.

And this is not the case of people *not knowing* of J Dilla's music. Sure, J Dilla was overlooked by many during his lifetime. Perhaps we can chalk some of this up to where Dilla lived in the late '90s. In terms of hip hop/rap music, Detroit never had the same advantages of New York, Los Angeles, or Atlanta. Unfortunately, we also could say that lack of notoriety during his lifetime was due to the musical alliances that he formed or was unable to form. In any event, his notoriety wasn't perhaps where it deserved to be during his lifetime. But J Dilla's level of notoriety during his lifetime also contradicts Charnas's claim that the sound that he popularized was "central to hip hop." On the other hand, many beatmakers (producers) *did* know of Dilla's music; and many of them (including me) held a deep respect for it. Most, however, did not adopt Dilla's style, sound, and aesthetic on a level parallel to the way in which many beatmakers (producers) adopted what Marley Marl, Easy Mo Bee, RZA, DJ Premier, Pete Rock, Dr. Dre, Large Professor, Q-Tip, Eightball & MJG, and DJ Toomp did. Or even for that matter what post-pioneers beatmakers (producers) like Just Blaze, Bink, Kanye West, Roc Mariciano, and Alchemist did.

As I noted earlier in this chapter, Charnas's work will be widely read. And some readers will take it as gospel. I'm less concerned about musicologists and ethnomusicologists, as I believe most of them will see through some of the same holes in Charnas's argument that I have examined in this chapter. Still, the damage is done.

J Dilla is Distinguished; No Need to Present Him as *Beyond* "His More Famous Peers"

There is no doubt that J Dilla is *one of* the most influential hip hop/rap beatmakers (producers) of all time. But we must recognize that, based on a substantial amount of empirical evidence, J Dilla isn't the most influential hip hop/rap beatmaker (producer) of all time. For that to be true, we would have to place Dilla's work, contribution, and influence ahead of Marley Marl's, DJ Premier's, RZA's, Pete Rock's, Q-Tip's, Dr. Dre's, and Large Professor's. And

given the phenomenal dominance of trap music, we would at least have to consider the contribution and influence of 8Ball & MJG, the progenitors of the trap style, sound, and aesthetic.

I take no delight in making any of these type of comparisons, especially since I revere *all* of these great musicians. Top 10 or "Greatest Lists" are fun and cool for the barbershop or online debate. But when it comes to historical accuracy — and the prevention of revisionist history — I see these things more as games between super fans and hip hop heads. What tells the clearest, most distinct story, is the music catalog that each musician leaves behind. And it is there that we must first start our investigation. After that, any contributions or innovations that we ascribe to a musician must be properly fact checked. This is the approach that I've taken to studying the musical legacy of Louis Armstrong, James Brown, John Coltrane, and every other musician that I've studied seriously. And I applied the same approach to my study of the musical legacy of J Dilla. And it's there that I find that Dilla's influence on Western popular music — if it we must view it within that prism — is *not* comparable to the influence on Western popular music of Louis Armstrong, James Brown, and John Coltrane. That said, J Dilla is already a distinguished musician, one deeply respected and revered in hip hop/rap music especially, so there's no need to present him as being "*beyond* is more famous peers" to prove his musical genius or importance.

Micro-Chopping as One Key Difference Between DJ Premier and J Dilla

Inasmuch as J Dilla was a highly talented musician, I believe that one important way that this talent was expressed most profoundly was through his micro-chopping skills, not through his use of one specific shuffle rhythmic feel that essentially any beatmaker (producer) could (can) replicate. In fact, compared to the click-and-clock rhythmic feel, Dilla's hyper micro-chopping skills, remain difficult to replicate, even with today's auto-chop functionality. But Dilla wasn't the first to micro-chop. Marley Marl was the first to

micro-chop, i.e. peform the process of taking small (micro snippet) samples and fashioning new beats with them. Following Marley, this became a go-to technique for many beatmakers (producers), most notably DJ Premier, Pete Rock, RZA, Large Professor, and DJ Clark Kent. Dilla took the technique to another level in one big way that built off what DJ Premier was doing.

DJ Premier created (creates) unmistakable, in-your-face grooves. And the principal difference between the ways that Premier and J Dilla use micro-chopping can be heard in they grooves that each producer (beatmaker) made (makes). When you listen to Premier's beats, you get the impression that his sole occupation is the groove. That every element is locked into a hypnotic repetition, with rhythm being the guiding light to how (where) he cuts and loops samples. A survey of J Dilla's work, especially as evidenced on his album *Donuts*, gives you a similar impression. On *Donuts*, Dilla is more focused on developing one solid groove; and this is a deceptively simple prospect that Premier has long focused on. Still, in terms of micro-chopping, there is a difference in much of Dilla's work.

The degree to which Dilla sometimes micro-chopped was more extensive. Micro-chopping sound-tones, elongated sound stabs, and/or short musical phrases and playing new rhythms and grooves out of them was (is) a technique perfected by DJ Premier. J Dilla mastered this same technique, often sampling sound-stabs and one-shots and playing them into new grooves and rhythmic patterns, much in the way that a bass player or keyboard player "walks" up and down the strings of a bass guitar or the keys on a keyboard. (Think of Stevie Wonder playing the keys on the song "Black Man.") In this way, Dilla's micro-chopping was, like DJ Premier's micro-chopping, multi-dimensional and multi-layered.

Also like Premier, Dilla's phrasing was never predictable or stagnant. The main difference between these two iconic beatmakers (producers) is best told as a jazz musician's analogy. Where DJ Premier's approach was more like a tenor saxophonist, Dilla's approach was more like an alto saxophonist. Rhythm played a role in the feel and clarity of both Premier's and Dilla's micro-chopping, but the key difference between the two was in the spacing of their

micro-chop patterns. Premier's spacing — or intervals in the patterns — was (is) often a bit longer, Dilla's spacing was shorter. So when micro-chopping, Premier often used (uses) a fewer number of sound-tones, sound-stabs, or short phrases, while Dilla often used more; and in Dilla's case, this resulted in quicker, choppier (but still seamless) transitions.

Another important observation is that while most beatmakers (producers) were accustomed to sampling and micro-chopping *around* sounds, i.e. manipulating *open* sounds — sounds not obscured by other sounds, like an open snare, kick, or musical note — Dilla, like DJ Premier, micro-chopped *unopened* sounds, *any* sound. And even though all beatmakers (producers) play there beat machines as instruments to some degree, Dilla used his hyper micro-chop technique to play rhythms like a bass player or guitarist, with seamless transitions and beautiful ruptures.

J Dilla began doing all of this before auto-chop and mute-group technology existed. Which means that the sounds he assigned across the MPC pads were *not* auto-loaded and auto-filled for him. In other words, Dilla didn't simply turn on the "16 regions" function and blindly stab the MPC pads until something sounded like hip hop/rap music. Rather, the sounds were micro-chops as *he* heard, reimagined, repurposed, and arranged them. Then he played them on the MPC pads like musical notes, another common practice in the beatmaking tradition that was established before Dilla.

Finally, I must point out that auto-chop does *not* develop your ear for choosing, chopping, blending, and arranging samples. Instead, there are only two paths for developing an ear for samples. First, playing and listening to lots (and LOTS) of music; I'm talking hours on end. Second, DJing, which naturally includes searching for, listening to, and playing lots of music for long, concentrated periods, as well as developing a skill for matching music — most notably different rhythms, melodies, harmonies, and other distinct sounds. One reason that J Dilla's skill with micro-chopping was hyper developed was precisely because of his ear for samples. The other reason, of course, was his own musical perspectives.

Micro-Chopping and An Ear for Music

While Charnas points to chopping/micro-chopping as another one of J Dilla's master skills, he doesn't expressly cite it as an example of Dilla's genius (even if the clear implication is there). Nevertheless, it must also be noted that micro-chopping is strongly linked to having a developed ear for music, a connection that Charnas doesn't discuss in *Dilla Time*. Take, for example, Gang Starr's song "Full Clip"(1999), produced by DJ Premier. The beat is built around a 2-second sample of Cal Tjader's song "Walk on By," which was an instrumental cover version of the Burt Bacharach composition/song that was written for and performed by Dionne Warwick in 1963. The sounds that Premier samples, and subsequently micro-chops, do not appear in the intro, nor the outro, or even the middle of Tjader's song. And to the unassuming ear, those brief 2 seconds add up to nothing. But what Premier was able to do with this brief snippet speaks to *his* ear for beats, i.e. what *he* hears that *he* can make a beat out of.

An ear for music, or more precisely an ear for beats, is itself a talent and skill that must be developed. And there's no "timing" or editing technology that's going to help you develop this skill. It can only be developed by listening to music, building up a catalog of references and frequencies in your head and connecting those references to your understanding of the fundamentals of beatmaking and hip hop/rap music, *and* your relation to rhythm.

Micro-chopping was already a common beatamaking technique by 1993. The limited sampling time on beat machines like the E-Mu SP 1200, the Akai MPC 60/MPC 60 II (precursors to later MPC models like the MPC 3000 and the MPC 2000), and the Ensoniq EPS-16 and the Ensoniqu ASR-10 made micro-choppers out of every beatmaker (producer) between the late '80s and the early '90s — from Marley Marl to Paul C. to DJ Premier to RZA to Pete Rock to Large Professor to Buckwild and more.

Any implication that micro-chopping originated with or was personified *best* by J Dilla is misleading. In terms of the latter point, "best" is a subjective descriptor, so it's more appropriate to

recognize that every beatmaker (producer) who used the micro-chop technique did so in their own unique way for the purposes of *their* style, sound, and aesthetic. As I mentioned in Chapter 6, "intricate" sampling, which is based on micro-chopping, is the most sophisticated (complex) form of sampling. And within this spectrum, making beats from just sound-stabs and sound-tones is the most difficult of all. Principally, the sound-tones method of micro-chopping involves assigning one note, i.e. a sample of a sound-tone or sound-stab, to multiple pads on a beat machine (or keys on a keyboard) and pitching the note differently, i.e. placing the pitch of each pad (sound-tone/note) in chromatic order. Then you *play* each pad, creating a rhythm and/or a rhythmic melody, in some cases like playing chords on a keyboard.

J Dilla was an absolute master at this! He sometimes sampled single notes from the Fender Rhodes electric piano and/or songs and built beats around these notes. Two examples of this include: "Intro" from Slum Village's *Fantastic, Vol. 1* (1997) and "Don't Cry" from off of *Donuts* (2006). Similarly, DJ Premier has multiple examples of this type of micro-chopping. Take, for instance, Jay-Z's "A Million and One Questions" remix (1998). On this song, Premier uses a sound-stab of Latimore's "Let Me Go" (1976). In the case of both J Dilla and DJ Premier (as well as Pete Rock and other beatmakers (producers) who use the micro-chop technique), genius is at work; but I also see this as the product of a good, well-developed ear and an appreciation for the music that you sample.

Along these lines, DJ Premier has noted that:

> ***[w]hen, we chop,*** we do it in a way that even the artists who are really against how rappers use shit would appreciate how **we put it into a different form,** out of respect! *All of that pours into the way that I make beats*….
> **I'm always a consumer first. Then I'm a DJ. *Then* I'm a producer. And then I'm an artist!**
>
> You just saw what I bought. [Premier pull's each CD out of bag] I just bought Ray Cash, I just bought the new Dogg Pound, I just bought Shawna; I bought Field Mob; and I bought Mr. Lif! I knew about J Dilla, I know about Stones Throw; I know about the underground,

> and I still know all about the major people. And that's what keeps me fresher than most producers, because they don't go outside a certain realm of their craft. **I was raised on the '70s and the '60s and all the good '80s music.** I was into Punk Rock, New Wave — Duran Duran, Susie and the Banchies, The Smiths. You know, groups that you'd be like, "Damn, Premier listens to that shit?" Hell yeah! 'Cuz it was good music. Good music is good music! But when it comes to hip hop, I'm really, really adamant about keepin' it hard. That's the way I was raised on it.
>
> …**it's good to listen to other forms of music, so that you understand what made hip hop great.** Hip hop borrowed. This is why we sample. *We're borrowing from music that was already here* and just, like Rakim said, we *converted* into hip hop form. **Hip hop can take anything and just make an ill beat. It's just about who's constructing it and understanding the science of it** and **understanding *how* to listen to it.** A lot of people don't even know *how* to listen to records![97]

***

The story of rhythm in Black music is intertwined with the story of enslaved Africans being taken to the new world. This story links Black people around the world; and it's as much a story of perseverance and persistence as it's a story of musical development. This is another reason why Charnas's claim that J Dilla "reinvented" a rhythmic feel that originated long before him is additionally harmful and disappointing. It dismisses the work and developments of previous Black music artists; it distorts the historical record of rhythm in Western popular music; and it leads people to believe that an old rhythmic development in Black music — a rhythmic feel that had been brewing *at least* 30 years before J Dilla began producing — didn't emerge *until* Dilla and his use of an MPC. This isn't just hyperbole, this is wrong, reductive, and damaging.

[97] Author interview with DJ Premier (2006).

Genius or a Developed Ear?

In *Dilla Time,* Charnas points out that: "Every day, no matter how late Jay stayed up, he rose at 7:00 a.m. From 7:00 to 9:00 a.m. he swept, wiped, and dusted every inch of his studio ***while listening to music,*** usually records that he had recently purchased, listening for sections to sample and manipulate on his Akai MPC 3000 drum machine. **He didn't just skip through the records 'needle dropping' for interesting parts. *He* listened to *entire songs*, listened and listened."**[98] First, J Dilla should be commended for taking his craft as seriously as he did. Still, in the same vein, most beatmakers (producers) have maintained strict, daily times for listening to and making music. Every beatmaker (producer) that I interviewed prior to 2008, including DJ Toomp, Marley Marl, Rsonist, Buckwild, and DJ Premier all expressed as much. Second, Charnas doesn't mention that J Dilla's habit of cleaning and listening to music was a common practice in Black American households; it was not something unique to Dilla. All things considered, when Charnas presents Dilla's habit of listening to music while he cleaned as something unique to Dilla — or something that sets Dilla apart from other beatmakers (producers) of his era — it's misleading. Not only did most Black hip hop/rap sample-based beatmakers (producers) have a similar habit, the activity itself was practically a tradition in Black American homes throughout the 1970s and 1980s.[99] I don't know if Charnas was aware of this tradition, or if he was why he chose not to mention or situate Dilla within it. In any case, it's missing context like this that appears throughout the music analysis part of *Dilla Time*. And every time, because of this missing context, Dilla is projected doing something unique that was really something routine.

Third, and most importantly for our purposes here, Charnas doesn't discuss how listening to the "whole" record was (is) an invaluable practice for developing your ear, i.e. an ear for samples.

[98] Charnas, Location: 219, (emphasis mine).
[99] Cleaning the house while listening to music was a regular activity — usually Sundays — done by my mother, my grandmother, my uncles, my aunts, my cousins, and me.

It was a common practice maintained by all of hip hop/rap music's sample-based beatmaking icons prior to J Dilla.

To really develop an ear for music, and samples more specifically, you have to listen to lots of music. No matter how well you know your beat machine. No matter how much you've mastered the fundamental and advanced methods of beatmaking. To truly master sampling you must listen to lots of music, as much as you can whenever you can. This is especially important if you didn't grow up in cultural spaces where music was *always on*, always part of daily life. Without an ear for music or, more precisely, an ear for the kinds of samples that make for dope beats, you will always be limited. And the only way to develop an ear for samples is by listening to music.

Here, I'm not talking about merely listening to hip hop/rap music, although that is obviously something that you must do as well; you can't advance your beatmaking skills without listening to and studying the greats of hip hop/rap's sampling tradition. I'm specifically talking about the music that serves as the main source material in hip hop/rap's sampling tradition: Soul, funk, and jazz of the '60s and '70s.

Like other prominent beatmakers (producers), DJ Premier listened to lots of music growing up. He told me that he "was *raised that way*." And he credits this foundation, as well as his DJ background, as the fundamental reason for why his "ear for music" is so good — and "always developing." Premier also pointed out how he never takes any record for granted, that you "**have to listen to the *whole* record.**" Fellow beatmaker (producer) Buckwild echoed what Premier said, and noted that "he was *raised listening to music*" and that he learned about *how* to listen to music from his older sister:

> I was always into music. Music was always in the house. Everybody says that, you know, but it's a difference. I think my type of music in the house was different from everybody else… When I first wanted to start DJing, taking the records *that we had in the house.* We had like, The Meters in the house. So even hearing my brother and them who had the hand clap song and all that other stuff like that, "Devil's Gun," all that other stuff. We had a variety…My sisters. My

> sisters had wild [a lot of] records… Like, one of my sisters used to listen to the Beatles. So it's like, when you have all these different types of music just around, it's like— people always tell me that I ***have an ill [great] sampling ear***. **But it's like, put *in you* from that.** If this is what you're used to, then the type of music that you really— you can listen to something differently than anybody else.
>
> That's the musical appreciation. **Listening to a *whole* record.** You're always looking for the Holy Grail, the ultimate beat. Looking for the ultimate beat, that's what I think kept hip hop alive.[100]

Echoing Buckwild and how he developed his ear for samples, DJ Toomp had this to say:

> I used to just listen to records until I'd fall out on the floor. My sister would still be going through hers [records she'd bought from the record store]. So it's like the love for music, man, *was just ALWAYS in the household.* **On a Sunday, *when we cleaned up*,** we might let a Heat Wave album play all the way through, or Earth, Wind and Fire. Temptations…. Believe it or not, the way the music had an effect on me in the class room was, I wanted to get home, just get home and listen to music.[101]

In *The BeatTips Manual* (2015), I pointed out the importance of listening to the full song, the "*whole* record," not just quick listens, and I expressly stated that listening to music should be a major down-time activity. And in Chapter 5 of this study, I discussed how the only way to really develop an ear for music, and samples more specifically, is to listen to lots of music. I further mentioned how it's better to give "full listens" to records. "Needle dropping," the process of picking up the turntable's needle from a record and skipping around listening for parts to sample, is a common practice in hip hop/rap music's beatmaking tradition. But it's not the most effective way to find things to sample, and it's certainly not the best way to listen to music. Every beatmaker (producer) from the Pioneers/Avant Garde Period (1988-1994) knew this. All

[100] Author interview with Buckwild (2007), published in part in *The BeatTips Manual* (New York: Superchamp Books, 2015).
[101] Amir Said interview with DJ Toomp (2008), published in The BeatTips Manual (New York: Superchamp Books, 2015).

things considered then, why is this context missing from Charnas's observation, especially when Charnas states early on in *Dilla Time* that he's committed to providing proper context?

Providing context would mean noting that J Dilla, when listening to music or listening to the "whole record," etc., was *following* tradition. This has to be pointed out, not framed as if Dilla was the only one to listen to music while he cleaned or the only one who listened to "entire songs" when looking for samples. Likewise, where Dilla did stand out must also be recognized. The problem is that Charnas often blurs the lines in this regard, leaving readers of *Dilla Time* with the impression that Dilla stood out in areas where he was simply following tradition. These types of moments in *Dilla Time* — "*he* listened to entire songs," *he* cultivated filtered bass lines, *he* cleaned while listening to music, etc. — might seem like small oversights, but once added up they collectively form a pattern. Charnas uses these moments to paint a picture of Dilla as a unique musician. But Charnas didn't need to do this. J Dilla *was* a unique musician, truly among the elite of hip hop/rap's beatmakers (producers). All of that can be proven without attributing things solely to Dilla that can be easily attributed to many other musicians as well. Fundamentally, if you're going to point out where Dilla (or any beatmaker (producer) set himself apart from tradition, you must also show when and how he was following tradition.

Chapter 10

Sampling Techniques

Extended Sampling Techniques, Notes, Tips, and Analysis

Having thoroughly covered rhythm in the previous two chapters, I will close out the Composition and Instruction part of this study with a focus more advanced sampling techniques.

Sample Blending, Multi-Sampling, Spot-Note Sampling, and Shading Samples

There are four commonly used sampling techniques or methods that shape the way that a beatmaker (producer) samples. They include: **sample blending**, **multi-sampling**, **spot-note sampling**, and **shading samples**. Like it sounds, **sample blending** is simply the process of blending samples together. There are a couple of ways to go about this. You can *splice* multiple samples, for example splicing a snare and tambourine so that the snare strikes, followed by the sound of the tambourine. You can also do manual blends, similar to layering, where you actually play in (program) the samples to play together or in chronological variations.

Here, it's worth mentioning that front and end sample-fades, created through the use of the Attack and Sustain functions of a sampler, help make the sample blends even more effective. A front sample-fade refers to how a sample begins after it's been chopped. That is to say, how much of the beginning of the sample is audible? Does it come in hard, heavy, or flush? Does it slide in? Does it blend in? An end sample-fade refers to how a sample ends after

it's been chopped. That is to say, how long does a sample *sustain* itself after it reaches its end? Decreasing the sustain of a sample gives the effect of a fade. So the right decrease of sustain at the beginning of a sample and the right decrease of attack at the beginning of another sample allows two (or more) samples to blend together more seamlessly, sounding as if they were just one sample. Sample-blends composed of sound-stabs are an excellent example of how front sample-fades and end sample-fades can be used. For an example of a great sound-stab sample blend, listen Gang Starr's "The Ownerz" (2003), produced by DJ Premier. This song has a bass-stab underneath a baritone horn-stab.

Sample blends can be complete-phrases and sound-stabs that are fused together by your sampler's splicing function. They can also be two spare-part-phrases played together with sound-tones and other pieces of sound. Chopping samples and then blending the "new" samples — what remains of the sample after the cuts — together into one cohesive measure of music is one of the most creative ways of developing your own production style and sound.

Multi-sampling is the process of sampling the same sound (phrase, instrument, stab, etc.), multiple times, each at a different pitch. This neutralizes the awkwardness of short semitones. Here, the idea is to then assign the samples to the same limited area of drum pads or keys. Once assigned, you can play the various "versions" of the same sample.

Spot-note sampling refers to the process of sampling pieces of a musical phrase that *can* be sampled while replaying the minor tones of the phrase that can not be sampled. For instance, the notes of a phrase that can not be sampled clean, i.e. clear and free from the surrounding sounds in the portion to be sampled (for example, vocals). Using the spot-note sampling method, you can sample the part of the phrase that can be sampled clean, then you play the "spot-notes". This can be done using a keyboard, synth, VST, or sound module to play the spot-notes as close as sonically possible. For example, if it's a bass phrase that's cut off by vocals, drums, etc., simply replay (emulate) the spot notes, i.e. the bass parts that you're not able to sample.

Finally, the process of layering samples with matching or non-matching notes, tones, frequencies, percussion, voices, etc. is what I like to call **shading samples.** It's a valuable sample editing technique that can be used to disguise a sample without having to forfeit the feeling and mood of the sample being disguised. Shading a sample can also be used to accentuate or punctuate the depth, texture, and feeling of a sample.

Adding Bass Fill-Ins

From the time that beatmakers first began aggressively sampling vinyl records, the most sought after record samples have been extracted from records that were recorded and released between the mid-'60s and mid-'70s. Things are no different today. Soul, funk, R&B, and rock 'n' roll music of the '60s and '70s still offers the most sought after source material for beatmakers to flip. Aside from the organic rhythms of that era, rhythms that were typically underscored by funky drums and smooth bass lines, the other appeal of the music of the mid-'60s and mid-'70s is the way in which it was recorded.

Although the recording and mixing techniques of this bygone era may seem quirky compared to today's recording practices, the reality is that they produced perhaps the warmest, most organic music ever recorded. Certainly, this fact has not been lost on many beatmakers. Plus, more often than not, it's the *sound* and its accompanying *feeling* that beatmakers are after. But while that '60s/'70s sound shines, typically when it comes to overall warmth and feeling, it often doesn't suit the sonic demands of today's audible standards. More specifically, it lacks the level of bass amplification that's usually associated with hip hop/rap music. Therefore, in order to maintain the warmth of a sample, while at the same time satisfy that deep bass sound that hip hop/rap music warrants, beatmakers often attach bass fill-ins or accents to their samples.

A **bass fill-in** is any bass phrase, tone, or sound that is deliberately blended into a beat. Bass fill-ins are usually added to beats in which the primary sample, the main sample that the entire

beat is built around, is devoid of a *fat* (thick) bass line or bass part. For example, let's say you sample a guitar lick that dissolves into an organ sound. You loop that sample — maybe one bar, maybe two bars — then add in a backing drum beat. Now, the framework might be good as it is. But remember, this is hip hop/rap music: It's a bottom heavy genre. So most of the time, you're going to need some sort of bass element, e.g. 808 kick drum or a bass line. Hence, you throw in a bass fill-in right on top of the gaps, the parts in the loop where the sound is *thin*, where the musical events are diminished and lower in sound.

Typically, beatmakers use the bass sounds from their keyboards, sound modules, or software VSTs as bass fill-ins. But this is a very tricky process, because when you attempt to combine synthetic-bass sounds that adhere to today's audio standards with samples that adhere to the audio standards of more than a quarter century ago, the sonic nuances of the sample can be diminished, if not outright destroyed. If the bass fill-in is too thick and dominant, it will disrupt (if not totally consume) the warmth of the main sample. Remember, the wrong bass sound or the wrong pitch and texture of the bass sound can result in the entire beat sounding uneven and overpowered by an awkward bass element. To guard against this, tweak the resonance of the bass fill-in that you've added. This will smoothen it out and warm up its ambiance. You can also lower-pitched elements from the primary sample, filter them, and the convert them to bass tones (notes) you can play as bass fill-ins or full bass lines.

Bumping the Sample

There are times when you come up against a sample that has *something* good or promising, but you can't figure out exactly what that is. Then there are times you come across samples that you know are very recognizable. Situations like these may call for what I've dubbed "bumping the sample." **Bumping-the-sample** describes the process of neutralizing the main sonic elements of a sample, then using the newly modified sample together with your own

enhancement: your own "bump." To bump a sample, the first thing you do is "remove" the bass frequency of the sample. Technically, you can't really *remove* the bass if it's actually within the sample. But you can neutralize it, i.e. make it inaudible by burying its sonic quality to an indistinguishable level. To do this, you have to filter down, i.e. flatten, the bass. Once you've *neutralized* the bass, add in your own bass line (bass parts/framework), either from a set of sampled bass tones or synthetic bass sounds from a synthesizer or sound module or software VST. This bass line (bass part) can be any pattern. When you bump the sample, I recommend taking your bass line (bass part) in a new direction. After you've added your own bass line (bass part), pull back the treble of the sample. Again, here, you want to employ some filtering techniques, but you don't want to remove the treble entirely, you want to pull it back just enough to let it breathe some; this allows you to keep some of the color and character of the sample that you're bumping. This is also effective because it enables you to beef up the sample further with your own treble sounds, accents, or percussion parts. Moreover, you can play new high-pitched keyboard parts or high sample chops right over the top.

Sampling Live Instrumentation and Other First-Generation Sounds

Sampling live instrumentation is an extension of sampling records. The major difference is that you're sampling "live" instruments. Whether you're a trained musician or a keyboard "finger-stabber", you can still come up with your own effective riffs and other things to sample. In hip hop/rap music, it doesn't take much for something to bang, provided you know how to flip it. There are lots of hip hop/rap songs that use only one or two chord piano (or guitar) licks. Point is, once you have the drums and the drum programming down the way that you like, there's no limit to the ways in which you can sample live instrumentation.

Here's where studying music comes into play. The more you study/listen to music, the more you will pick up things. Music, like

all forms of art, is predicated upon a number of fundamental themes and clichés. For example, look at note progression on a piano. The right side has the *highs*, i.e. the higher pitched notes; the left side has the *lows*, the bass, i.e. the lower pitched notes; and the middle has the *mids*. Thus, the further to the right that you progress on the keyboard, the higher the notes will be. Conversely, the farther left that you progress on the keyboard, the lower the notes will be.

Granted, this example of note progression is a crude one. So I'm not stating that someone *without* piano lessons or a strong understanding of traditional music theory has the same chance of mastering the keyboard as someone who takes a regular regiment of lessons. But hip hop/rap music is a fast medium. So to those beatmakers (producers) who opt for taking music lessons, I say: More power to them; that's a good thing. But the fact is, at the end of the day, those beatmakers (producers) will still be competing for production work with other beatmakers who have *no* formal training with traditional instruments or music theory at all. Beatmakers (producers) who have been fortunate enough to have music lessons will always run the chance of being passed over by beatmakers (producers) without formal training. Sounds ironic? Hear me out.

Take this scenario: Let's say two people decide that they want to go into the beat trade at the same time. Beatmaker X gets a keyboard and an MPC, and he also signs up for piano lessons. Beatmaker Z gets the same keyboard and the same MPC, but he doesn't takes any piano lessons. One year later, both beatmakers submit their beats to the same rapper. Whose beats do you think that the rapper is going to pick? The answer is, it's a toss up. That's because the rapper couldn't care less if either beatmaker took piano lessons, or if either knew how to play the piano or any instrument for that matter. The rapper doesn't care *how* the beat was created. The only thing that supercedes process and method in hip hop/rap music is the overall result of the final product. In this regard, it always comes down to one concern: Does it sound *good* to whom you want it to sound good?

Let me further clarify what I'm saying. Can traditional music lessons help you improve your live instrumentation skills? Of course they can. Incorporating the ability to play a traditional instrument, especially the keyboard, will definitely add to your entire beatmaking skill set. Still, there will always be beatmakers who bang out beats on the keyboard *without* any formal musical training or without any prerequisite requirement for beat completion other than *does it sound good*.

Some of the dominant sounds in hip hop/rap music (at the time of this publication), do not require that beatmakers actually *know* how to play Western classical music, let alone rudimentary chord structures. And what about someone like Scott Storch or Pharrell Williams, you might ask? Well, Scott Storch is *Scott Storch* and Pharrell *is Pharrell*. They're both traditionally trained musicians; and if I had to guess, I'd say they've had more than a few music lessons as well as some kind of consistent study in traditional music theory. But whether they did or didn't, it doesn't matter. In the broader picture, anyone can come up with their own live instrumentation to sample. It certainly helps to know how to play, but it doesn't hurt if you don't.

Either way, sampling live instrumentation is about sampling the sound-stabs and riffs that you (or the other musicians that you work with) play. The method adheres to the aforementioned process of sampling. But where sampling live instrumentation differs is in the texture and feel. Old songs offer second-generation sounds to be sampled, "second generation" in that they have been played within the context of a recorded song and mixed in accordance with the recording and mixing standards of their time. On the other hand, live instrumentation sounds are "first generation" sounds, i.e. they are *live* sounds. Hence, the management of these sounds gives you more control. But this control comes with several obstacles.

The first obstacle is the signal chain. In order for first-generation sounds — like those that emanate from keyboards, VSTs, sound modules, guitars, drums, etc. — to hold their full sonic value, they should be routed and mic'd the best way possible. If you don't have an elaborate assortment of microphones, you can still route

instruments in a way that will enable you to sample them directly into your DAW. Essentially, you just record what you want to sample onto a track as if you were tracking a sound from a beat. This is actually another instance where having a mixing console comes in handy. The signal chain: *instrument to mixing console, mixing console to sampler*, gives you a greater flexibility over the sound of the original source instrument than the signal chain: *instrument to mic, mic to sampler*. Here, even the smallest mixing consoles, for example, an 8-channel model, gives you an advantage because a mixing console offers you amplification and sound coloring capabilities. Moreover, it gives you the opportunity to further color the sound of the original instrument source.

Combining Samples and Synths

Samples — sampled "breaks," various tones, and sounds, etc. — are typically made up of a collage of sounds. As such, the concept of matching synth sounds to the same "key" (pitch) of samples isn't as definite as some would like to believe. Combining synth sounds with samples, i.e. samples of pre-existing recordings, is not necessary, but it is certainly useful in some situations. Either way, if you do decide to do a synth-sample blend, remember this. When blending a synth sound with a sample, keep in mind that you are trying to match the synth to the sample, not the other way around. That being said, here are some other important factors to consider when matching, blending, or combining samples and synths.

The Matter of Atonality and Sampling

There are many reasons why the art of sampling cannot be understood (fundamentally) under the auspices of traditional music-making practices. But perhaps the biggest and most ignored reason is the fact that sampling has no partiality to traditional musical tonality. In the sampling process, samples of recorded source material are modified and arranged without deference to the

tones of the chromatic scale. In sampling, there is no deference (or reference) to key or a tonal center. On the contrary, sample-based beatmakers are concerned with three things. First, whether or not a sample *sounds and feels good*. Second, whether or not the sample(s) fit with the drum framework (program). Third, whether or not the sample(s) and drum framework together ascribe to the aesthetics, priorities, and principles of hip hop/rap music. Sample-based beatmakers are not necessarily concerned with adhering to music theory or concepts and principles of traditional musical tonality.

Many traditionally trained musicians often fail at sampling, precisely because they attempt to approach sampling through the guise of traditional music practices. As such, they attempt to apply the rules of music theory to a compositional process that has no deferential regard for music theory at all. If there is anything that must be understood about sampling it's the fact that sampling seeks, technically and theoretically, to simply use whatever works. If it uses any principles or concepts of music theory, it's not out of deference, but out of prudence.

What Do Tone, Matching, Blending, and Combining Mean?

In beatmkaing, there are a lot of terms that may carry several meanings. But without specific clarification, use of these terms can create some confusion. Hence, in this section I will discuss the terms "tone," "match (matching)" "combine (combining)," and "blend (blending)" and all of their different meanings.

When beatmakers (producers) speak of "tone," there are two meanings or concepts that we can actually be describing. There's "tone" as in sound, and there's "tone" as in *feel*. Sound and feel are two entirely different concepts. "Tone," in regards to sound, refers to notes, timbre, sustain, etc. "Tone," in regards to feel, refers to variations of mood, like soulful, happy, sad, etc.

When beatmakers (producers) speak of "matching" something, there are two meanings or concepts that we can actually be describing. There's "matching," as in *matching the sound*, and

there's "matching," as in *matching the feel or mood*. Matching sound and matching feel are two entirely different concepts, and each usually requires a different approach. In beatmaking, "matching" is commonly used to describe the process of working with sounds in the same pitch (key). But as I've just made clear, it's not the only description, nor is it any more or less important than the other description of "matching". It all depends on the beatmaker (producer) and the beat that is being made.

When beatmakers (producers) speak of "blending" something, there are two meanings or concepts that we can actually be describing. There's "blending," as in mixing or layering two or more sounds of the same pitch (key) together, and there's "blending," as in complimenting or accentuating two or more sounds that are not necessarily in the same pitch (key). Blending sounds of the same pitch (key) is a different concept than blending sounds that are *not* of the same pitch (key). Therefore, each concept/process usually requires a different approach.

Lastly, when beatmakers (producers) speak of "combining" something, we're not necessarily speaking about *blending* something. In fact, we're usually talking about *adding* two or more things (sounds or feelings) together, which is different from *blending* something together into one new sound. For instance, you can combine or add a 808 kick drum and basic kick drum to a drum pattern, but that doesn't mean that you're *blending* those two sounds together as one.

Arrangement Scope

The arrangement scope of your beat/song is another important factor to consider when you're combining synths with samples. What are the scopes of your verse and hook sections? How different is your verse section from your hook section? What about the framework of your sequences? That is, what bar-framework is your verse section based on? Is it a 2-bar, 4-bar, or 8-bar loop? What about the sample scheme that you're using? Are you using just one main sample that is heavily chopped? Are you using multiple

samples that are woven together? Are you using a relatively unmodified break of one or more bars? Each one of these factors will help determine what sort of synth combination is likely to work with your samples.

When I use a combo of synths and samples, I never try to play a synth in the same key as the sample(s) I'm using. This is because whenever I add in synth sounds to a sample-based beat, I usually do so for one or two reasons. First, to boost or "beef" up the sample, sort of like stacking synth sounds. Second, to accentuate or emphasize a moment or element of the sample(s) I'm using. So when I'm making a sample-based beat, I'm not concerned with simply reinterpreting a sampled break with synth sounds of the same pitch. Why? Because then the focus would be more on the synth sounds, and that would essentially make it more of a synthetic-sounds-based beat, not a sample-based beat.

Also, you must remember that in most sample-based beats, the primary sample itself contains multiple instruments. So if you want to match the sound of the synth to the sound of the sample, then sure, you can try to play the synth in the same overall pitch (key) of the sample. But for me, if I'm aiming to match the sound of the sample, it becomes an issue of manipulating the pitch (higher or lower) of the particular synth sounds that I'm using. More specifically, it's an issue of manipulating the pitch of the synth sounds higher or lower than the pitch of the primary sample and the sample scheme that I'm using.

On the other hand, if it's a matter of matching the *feel* of a sample, then I take a different approach. For instance, if I'm working with a low-pitched sample (something with a bass tone), I usually try to offset its sound with some level of brightness. In cases like these, I'll add in some synth sounds. This contrast makes for a unique, unforced change or accent. Here, one thing I want to point out is that matching the synth closely to the "feel" (not necessarily the key) of the sample typically works better for the overall impact of the sample-based beat. Keep in mind that synth sounds (which are first-generational sounds) have a completely different sonic quality than samples from old songs. So whenever

the synth sound is made to match the key of the sample, what typically happens is that the synth sound winds up *competing with*, if not outright dominating, the sample. This transforms a sample-based beat into a synthetic-sounds-based beat.

Now, here's how I combine samples and synths. Either I play a phrase(s) straight up (from my Roland Fantom Keyboard) and record it through MIDI into a sequence on my Akai MPC 4000 or Akai MPC One, or I play a phrase(s), sample it, then assign the phrase(s) to one drum pad or more. More often than not, I do the latter, because sampling the synth phrase(s) allows me more flexibility over the tone and timbre of the synth sound. And once I've sampled the synth sound, I can filter it, compress it, add reverb, whatever it takes to match the feeling (not the pitch) of the sample and the overall beat. For those times where I sample the synth sound, I run my Roland Fantom keyboard through my Akai S950 sampler or my MPC 4000, depending on the feel and sound of the main sample. If I want more clarity and a bit more brightness, I sample the synth phrase(s) with my MPC 4000. If I want a warmer, perhaps "thicker" sound, I sample the synth phrase(s) through my S950. One more thing. In cases where I'm using synth sounds for slight emphasis or accents and changes, I focus in on the softest part of the sample, then I add in the synth sounds. And sometimes when I have a sample cut off right at the loop point of a sequence, I'll throw some light (soft) stacked synth sounds right at the point of where the end of the sample drops out.[1]

Playing Synths in the Same Key of the Sample

A member of the BeatTips Community (forums) once asked me the following:

> I'm kind of confused. You're supposed to make everything in the same key and in tune. If you don't play in the same key as the sample, your beat is going to sound out of tune. So you're saying you play whatever notes on top of the sample?

1 When working exclusively with my Akai MPC One, I typically customized stock synth sounds and play (record) the phrases directly into sequences. Sometimes I play (record) the synth phrases into Pro Tools, then I sample them and add them back to my Akai MPC One.

Here's my answer in full:

Whoever said that you *have* to play synth/keys in the same key as the sample? That's not a rule. First and foremost, when attempting to combine synths/keys with samples, always remember the subtle nuances that samples have and that synths/keys do not. Again, samples are second-generation sounds, meaning that they are digital copies of pre-recorded composites of music (sound). On the other hand, synths/keys are first-generation sounds, in that they are generated from *sound generators*, etc; so they are not digital copies of pre-recorded composites of sound. For me, this fact alone tells you that matching up synths/keys with samples most likely will never be achieved using the "exact same key." Sure, in some cases it *might* get the job done. However, if you really want to "match" synths/keys with samples more effectively — and by match, I mean timbre, color, weight, and feel — then more than likely off-tuning the synths/keys from the sample will be your best plan of action. The thing is, samples present a sonic quality that can simply never be matched *exactly* by first-generation sounds. And more often than not, when beatmakers attempt to force an "exact-key" synth-match with a sample, the sonic dynamics change. This in turn prompts a raise in the volume level of either the sample or the synth. In this case, the original feel and nuance of the overall beat changes dramatically.

Here, I also want to point out that whether you combine synths with samples or not, always remember this. Each beat defers to the style and sound that you made it in. That is, if it's a sample-based beat, the synths that you add in should support the sample-based framework, not dominate it. And if it's a synthetic-sounds-based beat, then the samples that you add in should serve to support or accentuate the synthetic sounds. So before you make additions and subtractions to a beat, it's important to always give deference to the style, sound, and scope of the beat that you're making. Moreover, make sure that you consider the rhythm quality and structure before you modify the major sonic (sound dynamics) qualities of the beat.

Having considered the style and sound aspect, whenever I use keys/synths I don't view it as playing any notes *over the top*. Never. If I played keys over the top of the sample, I'd essentially kill the sample's power. So instead, I view it as supporting the sample or playing keys to compliment the sample. Here, again, I must point out that hip hop/rap music is much more about rhythm than melody. Since keys/synths are often better used for developing melody as opposed to rhythm, and since samples are mostly used for establishing rhythm and groove, you have to be careful how and when you combine them with samples. Plus, combining synths with samples is not merely a matter of playing notes over the top. However, many beatmakers confuse "playing synths over the top" with simply making a sample fuller or thicker. But the fullness and thickness of a sample is not a melody or rhythm issue, it's a sonic issue. Yet many beatmakers make the assumption that playing synths over the top will make the sample sound better. Wrong. It will completely kill the sample at worst, or it will neutralize the sample's true impact, nuance, and sonic quality at best.

So there are two things I want to make clear about this. First, if you want to increase the fullness or thickness of a sample through the use of synths, then I recommend that you sample the synths, chop them down into tones, then use the chopped synth tones to beef up the weaker points of the sample. And second, consider the length of the primary sample that you're using. For instance, if you're working with a 4-bar sequence, how long does the primary sample play for? If it doesn't play for the full 4 bars, you can add in synths on the "free" bars or "free" spots, i.e. the bars and spots where the sample is silent. In cases like these, you can play in (add in) synth patterns in whatever key that you like, as long as it sounds good to you. In fact, playing in a different key often works best here, because it will give your beat more balance and an increased dynamic quality.

Don't Overcook the Beat
Quality Parameters and Choosing the Right Ingredients

Beatmaking is not only an art form, it's also a musical science. However, some beatmakers get too carried away with the "science" part. The science of beatmaking is a robust one because it contains technical, logical, and creative spheres. The following section is about the creative science of beatmaking and, more specifically, the science of arrangement and how it effects the quality of a beat.

No matter how we differ in our initial approach to getting a new beat started, we all set out to find relatively the same thing: A base (primary) rhythm framework that has the right drums and the right overall sound. Now, having achieved this framework, through a number of creative applied sciences that are mostly unique to beatmaking, a familiar dilemma sets in: What to add next?

Within the beatmaking lexicon, these "add-ons" are commonly known as "changes" or "switch-ups." For those more familiar with music theory, a change or switch-up in beatmaking parlance is actually most comparable to a motif or motive and an embellishment or ornament. In beatmaking, changes are typically worked in somewhere on 4th, 8th, 12th, or 16th bar, with a significant switch-up thrown in somewhere at the mid-point of the beat. But here's the thing: A beat does not require a significant change, and certainly not a major switch-up, in order for it to sound dope.

Consider this. Let's say that you sample a 4-bar measure of any given soul or funk record from the 1970s. Now, depending on *where* on the record that you sample the measure from, you should remember that, contained in within that one sample, there can actually be a wide assortment of individual sounds; and combined together, those sounds form a wall-of-sound. There could be the bass drum, the snare drum, a ride, a cymbal, a hi-hat, an open hi-hat, bass guitar, rhythm guitar, lead guitar, electronic keyboard/piano, tambourine, timbales, horns, and the like. This is the typical sound-wall found in most complete phrases. And since drums are

the most fundamental component of hip hop/rap beat structure, beatmakers are naturally drawn to those parts of the record that have the least amount of collective sounds.

Remember, this part in a song is known as the "break." But while I recognize what a traditional break is — the section where all of the music drops out, save the rhythm section, namely the drums and bass — I consider *any* fragmented musical phrase to be a break. (Those leading the current loop or lo-fi drumless movements operate from a similar understanding and approach.) Fundamentally speaking, I believe that the quest for the perfect beat is really the quest for the perfect break. That being said, after this ultimate break is achieved, many beatmakers then do something counterintuitive to the beat itself: *Over*-produce it, usually by adding in unnecessary changes and switch-ups.

Creating beats is meticulous and very cathartic, so usually the way we feel about a beat we've just made has a lot to do with what actually went into the making of it. For beatmakers, the process itself holds a lot of meaning. We value the unique processes, practices, and methodologies of our craft in a way that often borders on obsession. And as I mentioned earlier, we take great pride in our particular brand of musical science. Because of this, we're always surveying a beat, thinking about how can we make it better. This (sometimes unhealthy) preoccupation with perfection can sabotage many of the beats that we make. Somewhere in between a beatmaker carving out that ultimate break and officially calling a beat complete is where this preoccupation with perfection tends to go way out of proportion. Thus, the best way to avoid over producing a beat is to acknowledge that it can happen. Being mindful of quality means being tuned into what the beat that you're making actually needs.

Sampling and Improvisation: Sample Vamping and Understanding the Relationship Between Impromptu and Scripted Elements of Beatmaking

The ways in which each beatmaker scopes out or plots a new beat may vary, but for the most part we all improvise until something strikes us. And when it does, that's when our creativity goes into overdrive. For this reason, I've always maintained that one of the biggest keys to high-quality beatmaking is understanding the relationship between the improvisation and prepared (i.e. scripted) elements of beatmaking.

Each beatmaker's own unique understanding of this relationship is one of the main factors that determines not only the processes and methods that each chooses but also the frame of workflow and, ultimately, the dimension of creativity that each can access. Although the relationship between the improvisation and prepared aspects of beatmaking shares a number of common characteristics in both sample-based and synthetic-sounds-based styles, there are certain realities and key differences in how this relationship manifests itself in both compositional styles.

For beatmakers working from the sample-based compositional style, improvisation is actually not a choice but a necessity. Sampling is as much about one's penchant for rare musical discovery as it is about one's ability to transform — to reconceptualize, recontextualize, and transgress — that discovery. This means that sample-based beatmakers must rely on their ability to adjust to and *improvise* off of whatever the source material presents to them. So in this way, sample-based beatmakers are limited by the source material that they discover. On the other hand, sample-based beatmakers are also liberated by the relative unpredictability of that very same source material. And one of the biggest keys to unlocking this unpredictability is improvisation.

Although the most often preferred source material of sample-based beatmakers comes from songs recorded between the mid-'60s and mid-'70s, there is the strong sense among sample-based

beatmakers of reacting to and connecting with the "known unknown." That is to say, that even though sample-based beatmakers who favor this specific source material may know, *per se*, what sort of sounds, textures, and musical constructions to expect, they don't actually know how these elements will coalesce and manifest themselves on a given recording. Which means that their improvisational skills are put to test each time they work with new source material.

But while sampling offers a unique sense of "knowing the unknown," the same type of connection does not exist in the synthetic-sounds-based compositional style. For beatmakers working from the synthetic-sounds-based style, improvisation is also a necessity, but not to the same degree as it is in the sample-based style. In both compositional styles of beatmaking, improvisation is used as a creative process that compliments the elements that a beatmaker already knows. And herein lies the major difference in the way in which improvisation works in both styles.

In the synthetic-sounds-based style, improvisation takes on a different context, especially for traditionally trained musicians, because of the nature of the "known" elements is based on raw notes rather than samples. In other words, a preexisting knowledge of notes, in terms of tonal quality and mood conveyance as well as chords, common chord progressions, and the like, presents traditionally trained musicians with prepared (scripted) material upon which to improvise.

But isn't the source material that sample-based beatmakers use also prepared material? Yes, it's prepared inasmuch as it has already been arranged and recorded. But to a sample-based beatmaker, the potential of the source material can only be determined by the willingness to actually listen to and engage with the source material. From there, a beatmaker improvises using pieces of the source material's framework along with other sounds from his sound libraries. This form of sample vamping is similar to the process of traditional musicians vamping until they find the core groove or foundation for a new song. I should also point out, however, that the prospects of such improvisation, i.e. sample vamping, are also governed by each beatmaker's (producer's) arrangement and programming skills.

By contrast, non-sample-based beatmakers, particularly those who possess a decent knowledge of note architecture (music theory), aren't necessarily locked into the process of having to mine source material for the basis of their beats. Where musicians who sample are required, by the very nature of the sample-based compositional style itself, to actually listen to any recording that they would potentially like to sample, non-sampling musicians do not have to adhere to a similar obligation. For instance, non-sample-based beatmakers are not, necessarily, required to listen to what a chord in the key of A or D sounds like each time they want to compose something in the key of A or D. Presumably, they already know what an A or D note sounds like. In this way, notes are known to them much like a sampler's stored drum sounds are known to them. Therefore, in beatmaking, this connection exists as a prepared element from which they can repeatedly draw upon and improvise, albeit within some of the rules of music theory.

Thus, an understanding of the relationship between impromptu and scripted elements of beatmaking will open up the ways in which improvisation can be utilized in the sample-based compositional style as well as the synthetic-sounds-compositional style. Furthermore, having a firm understanding of this relationship improves your creativity, workflow, efficiency, and overall quality, as it helps you gain a better grasp of what works and what doesn't within your particular style and sound.

It's Never Just a Loop

The Main Decisions Made Before, During, and After a Sample is Looped

What Should You Sample?

What to sample is usually the first question. The decision depends on everything from one's mood to motive (purpose) to style and sound preference to imagination and individual work ethic. For the purpose of this discussion of sampling, creating a loop, and building a beat, I will break down a beat that I made using a sample of the song "This Place Hotel" (a.ka. "Heartbreak Hotel") (1980) by The Jacksons.

I chose "This Place Hotel" for a number of reasons. First, it's a well-known hit, one with a great groove by a popular group; and it's a song easy enough for you to find online. Many people are familiar with the record, so coming up with a beat and song that borrows a piece of such a hit, while still creating something "new" and appealing, is a bit of a challenge. Second, I wanted to choose a vinyl record that could readily be found in used record shops or at online vinyl record stores or in a relative's basement or attic. Third, "This Place Hotel" has been sampled before and I wanted to demonstrate the versioning tradition that runs deep in hip hop/rap music's roots and offer up *my* version. Fourth, because "This Place Hotel" has a dominant drum pattern, and as such I wanted to show how even a sample with drums can be tailored to your style and sound. Also, every seasoned beatmaker knows the type of obstacles drums in a sample can present.

What Section or Part Should You Sample?

Having settled on the song, what section of the song should I sample? The beginning? The middle? Near the end? Either way, it's gotta be a part of the record where the groove is "open" — well, as open as possible with a record like this. That said, it comes down to

either the intro, the lead-up, or the bridge. I ruled out the bridge, simply because I heard someone else's beat with that part before, and the strings intro isn't the part of the song that most people are familiar with.

So I went for the "2nd intro," or what I'm calling the "lead up," as in lead up to the first verse. But exactly where in the lead up? There are approximately 35 seconds between the beginning of the lead up and where Michael Jackson's first verse vocals begin. Within those 35 seconds, there are slight embellishments on the basic groove of the song, not to mention that at one point in this lead up, we hear one of Michael's signature vocal exclamations. No one wants that in there, right? Wrong. *I* do! I think it's dope, so I decided that no matter what, it had to be in the phrase that I would sample. Note: If I was using "This Place Hotel" as source material for a beat for another rapper, I'm not sure what section I would've used. But since *I'm* rapping on this beat, I know which part of the song will suit my style, delivery, and flow.

So, How Do You Sample It?

Now that I've chosen the section of the record that I want to use, I have to decide *how* to sample it. There's no one way how to sample a record. Some beatmakers sample in stereo, some in mono. Some sample wet, i.e. with effects, while others sample dry, no effects. Some sample in 24 bit, 16 bit, even 12 bit. For starters, I usually sample in mono. Next, I usually sample wet. I almost never sample any audio without its signal first flowing through my Numark DJ mixer. Aside from the EQs on my mixer, a DJ mixer makes me feel linked to the earliest roots of the beatmaking tradition. (With my MPC One, the process is different, as I'm importing WAV and MP3 files directly into my computer.) My DJ mixer routes into my Mackie mixing console, where I do further EQing, like "beefing up" the sample (making a sound heavier or warmer). Then I run the signal from the DJ Mixer's output on the Mackie into either my Akai MPC 4000 or my Akai S950. For the sample below, I sampled a portion of "Tthis Place Hotel" into my Akai S950.

What about the pitch question?

Do you sample the audio leaving the pitch as is, or do you turn it up or down? This decision, like others in the creative process of sampling, mostly depends on the ultimate beat/song that you envision. For my "Heartbreak Hotel Remix," I turned the pitch up a bit before I sampled it, then I fine-tuned it as I arranged my drums; and note: NO timestretch function was used in the making of this beat/song.

What About Chopping?

How to chop something is one of the big decisions in the sampling process. But the more complete a phrase is, the less difficult it is to loop, right? Not always. In fact, depending on what's actually in the phrase, getting it to loop "correctly" (according to your own rhythmic standards), it can be rather difficult finding and fine tuning the best start and end points. Let's remember that all of these aforementioned creative decisions have been made before the drum arrangement enters the picture. As those above decisions are being made, you should already be thinking about the ways in which to arrange the drums.

Which Way to Go with the Drums?

Even if you skip most of the aforementioned processes, you must still come up with a suitable drum framework. To pull this off, it takes a decent arsenal of drum sounds, a knack for choosing the right ones, and the ability to arrange those drum sounds into a drum pattern that works effectively with the so-called "loop" (sample). With audio that already has drums in it, you can fall back and let the drums in the sample do the work, only adding in light touches of your own drum sounds. Or you can add your own drums to completely "mask" (cover up) the drums in the sample. You can also match your drums with the drums in the sample; but this can be very difficult, especially if you don't have the right kind of drum sounds.

With a song like "This Place Hotel," who could blame someone for going easy on the drums, that is to say, not doing much at all? I never sample anything without a base idea of how I'm going to arrange the drums. Moreover, depending upon the extent of the groove (i.e. the feel and the level of kick and snare drums) that I've sampled and the ultimate groove that I'm going for, I will usually mask and match the drums, then I flank everything with my own customized percussion sounds. And this is exactly what I did with my "Heartbreak Hotel Remix" song.

Lastly, I should note that the construction of the sample(s) is only part of the equation. Also, never forget the matter of the overall sound design. Here, I'm referring to the "color" of the sample that's achieved through sound modification techniques like filtering and EQ'ing, etc.

To hear my complete "Heartbreak Hotel Remix" song, go to: https://soundcloud.com/saidmusic/heartbreak-hotel-remix

When to Chop and When to Loop?

While context and feeling are critically important, so is one's individual philosophy on sampling. Nothing will determine when, why, and how you chop or loop more than your philosophy on sampling. Depending where your knowledge, understanding, and preference are situated on the overall spectrum of hip hop/rap music, you could be more or less devoted to the "break,"really the core compositional element of hip hop/rap music in its traditional form.

When you're devoted to the break, everything that you do in a sample-based beat (even a non-sample-based beat) is going to defer to the development of a central break (or loop) that everything else is based on. And in that case, if you find a record with a "ready-made loop," you typically use it without disturbing its feel and sound with useless, unnecessary chops. Conversely, if you find a song with musical phrases that appeals to you — in terms of feel, tone, and timbre — but is not in a "ready-made loop," then you typically turn to chopping to develop a break that contains chops and arrangements that you make to fit as a loop.

Coming from this philosophy (or approach), the context and feeling of the parts of a song that you want to sample make you immediately think about *Where's the break in this?* What will allow for the tightest, most grooving break? Here's what's important to understand. The word "loop" draws its meaning from two things. First, "loop" or "looping" comes from the engineering world, where reel to reel tape was "chopped" (cut), rearranged, and often "looped" (repeated) for drum fills, dubs, etc. Second, the break was made to repeat by hip hop's earliest DJs using methods like the "needle drop" and more popularly the "spin back." So what hip hop's earliest DJs were doing was spinning back certain parts of a record, typically the break, and repeating, i.e. *looping*, those parts. This is where the evolution of what looping something means in hip hop/rap music.

Special note: Remember, it was considered a hip hop DJ skill to be able to find new records and unleash unheard breaks and other interesting parts on records. And while DJs would spin back (repeat/loop) these parts, they would let them play, but they would not cut them unnecessarily.

Given that historical context, as hip hop/rap music and beatmaking grew it attracted more people. Naturally, people bring with them their own biases and preferences about and knowledge of music and the musical process. So while some may adhere to a philosophical approach to sampling that fundamentally defers to the break, others may defer to a philosophy that minimizes the importance of the break, a philosophy that places emphasis on more changes or linear progression within an arrangement. Perfectly fine either way. But it's worth noting that the latter philosophical approach tends to lead to more unnecessary levels of chopping, particularly because it grants more control to someone who's devoted to developing more extensive arrangements. This is completely understandable, especially if you're less influenced by the historical importance that the break holds in the hip hop/rap music tradition and more influenced by arrangement schemes that prioritize chord progression, melody, and the like. Furthermore, the philosophical approach that's further away from the idea of the break gives one the feeling and satisfaction that they're doing more

than "just" looping something that they sampled. But I never like to think of anything as *just* a loop. Finding a record with a dope part, looping it perfectly and matching it with dope drums is a skill of its own.

Again, where you stand on the overall spectrum, the knowledge of and deference (or not) to the break, is the thing that's going to signal to you what to do every time you hear a new record. The more committed you are to the break, the less likely you are to think about evasive chopping or rigid ideas related to when or where to chop. Moreover, you'll probably want what you're hearing on the record to be left in tact as much as possible while still give it a new context: a hip hop/rap context. Conversely, the less focused you are on the break, philosophically speaking, the more interested you'll likely be in breaking up — chopping up — the sounds that you hear, as it will be less important to you to keep what you heard on the record more in tact. In this case, these chopped-up samples become individual sound tones that you can meld in any number of ways. So as you develop as a sample-based beatmaker, your musical sensibilities will, at times and for certain beats, lead you to move around the philosophical spectrum I described in this section.

Finally, it's worth looking at the career arcs of RZA, DJ Premier, Pete Rock, and J Dilla for guidance with this question. RZA's style and sound were predicated more on the break approach. Yet as his music career grew, he expanded his approach; but he never gave up his core approach. He can still make those classic Wu joints whenever he wants. Premier's style, which uses a chop-style that he first developed (and which has now often been poorly copied), is also predicated on the break approach. In Premier's catalog of beats, you can hear many "straight loops," as well as many creatively chopped works. Pete Rock, while predicated on the break approach, used more chops as his career progressed. And Dilla, who mastered a number of different styles and sounds, became more minimalist and predicated upon the break approach towards the end of his career.

Standards and Best Practices of the Sampling Tradition of Hip Hop/Rap Music

There are no written rules of creativity. All sample-based beatmakers can make beats in whatever manner that they choose. Nevertheless, in the sampling tradition of hip hop/rap music, a set of **standards and best practices** has evolved over the years. Although these standards and best practices have been informally shared (understood) among many beatmakers, they have never been formally organized or uniformly promoted until now. What follows here is a discussion of these standards and best practices.

Standards and Best Practices – Transformation: Substantial Transformation, Reconceptualization, and Recontextualization

Creative, well-conceived chop arrangement schemes, no matter the number of chops that are made and used, constitute standards and best practices. Chop arrangement schemes that effectively enhance the overall arrangement of a beat constitute standards and best practices. Excessive chop arrangement schemes that sound overly forced, particularly those cases where the multiple *triggering* sounds can be heard in the arrangement, fall below the threshold for standards and best practices. Chop arrangement schemes that serve no musical purpose (i.e. rhythm, melody, harmony) or sonic purpose (i.e. layering, sound design) also fall below the threshold for standards and best practices.

Chopping that relies more on the beatmaker's own ear and creative sense of arrangement and less on auto-chop functionality constitutes standards and best practices. Chopping that relies *solely* on auto-chop functionality, rather than the beatmaker's ear and arrangement skills, falls below the threshold for standards and best practices.

Although transformation may be subjective, when considering how transformative a beat is or isn't, ask yourself these three questions. First, is the way in which the sample(s) is(are) used conceptually different from its source? Second, is the way in which the sample(s) is(are) used a change in context from its source? And third, how much does the sample(s) used sound substantially similar to the sound recording(s) from which it borrows?

Extended Note: The Limitations of Auto-Chop

Auto-chop *auto-slices* one song/sound at a time. Auto-chop can't sample and auto-chop other samples from *other songs* all at the same time. In other words, auto-chop can't teach you how to blend, combine, or match other samples from other songs. Auto-chop can't teach you how to build arrangements using multiple samples from multiple songs. Auto-chop can't teach you how to pick pieces from *different* records and other sound recordings. Auto-chop will not develop your ear or help you build your own sample library. Auto-chop cannot replicate the total recall of DJs or someone who has, for years, listened to the kind of specific source material that has always been popular in the sampling tradition of hip hop/rap music. Auto-chop only auto slices the sounds that you load up to be auto-chopped. That's it. Understanding the limitations of auto-chop keeps you from over relying on auto-chop, but it also helps you understand when it's best to use auto-chop.

Standards and Best Practices – Amounts Used: Sound-Hits, Sound-Stabs, Parts, Phrases, and Low Number of Bars

Sampling less and doing more with it constitutes standards and best practices. Sound-hits and stabs, which are both de minimis (i.e. minor in amount borrowed) usages by default, are well within standards and best practices. Short music phrases and parts thereof (e.g. riffs, drum fills, drum rolls, parts of melodies), used

in contexts different from their source, constitutes standards and best practices. The lower the number of bars sampled and used, for example, 1-4 consecutive bars (the best practice), the deeper the sampling and use fall within the parameters of standards and best practices. However, a higher number of bars sampled and used does not automatically disqualify the sampling and use from standards and best practices. For example, 5-8 consecutive bars sampled and used constitute standards and best practices when substantial transformation takes place or when the sample is used in a substantially different context. The sampling and use of 9-16 consecutive bars may possibly fall within the parameters of standards and best practices, provided transformation is high and the new context of the sample is different. Sampling 17 consecutive bars or more is generally below standards and best practices, unless there's a deeply transformative vocal element, let's say, like vocals written and performed to a song that was only an instrumental in its original form. (Think of a film score instrumental.)

What's important to remember when considering amounts is that the less that is sampled and used, the more highly regarded the instance of sampling. Further, creative transformation, reconceptualization, or recontextualization must always be a central aim of a sample-based beatmaker (producer). No matter the amount used, the level of creative transformation, reconceptualization, and recontextualization determine whether an instance of sampling qualifies as standards and best practices or not. Finally, I advise against sampling the whole "heart" (main melody, etc.) of any well-known song. But if you do sample some or all of the heart, be sure to increase the level of transformation, reconceptualization, or recontextualization.

Standards and Best Practices – Substance of Sample(s) Used: Using the Heart of a Recording or Parts Less Significant

The sampling and use of less significant parts of a sound recording fall well within the parameters of standards and best practices. Sampling the whole or parts of the heart (the main theme) of a sound recording constitutes standards and best practices only when the use of the sample is substantially transformed, or when the sample is sufficiently reconceptualized or recontextualized.

Standards and Best Practices – Original Drum Work or Drum Breaks in New Contexts?
Original Drum Patterns and Transformative Uses of Drum-Break Samples

Original drum patterns created using individual drum sounds, especially a beatmaker's own customized drum sounds, constitutes standards and best practices. The use of drum breaks, either from break-beat compilations and other songs, instead of or in addition to individual drum sounds also constitute standards and best practices, especially when drum breaks are used in new contexts.

Standards and Best Practices – The Nature of "Loops" Used: Obscurity, Familiarity, and Transformation

Transformation always falls deeper within the standards and best practices. However, *ready-made* loops should be considered by a different transformation metric. For example, obscure ready-made loops (e.g. a couple of bars of a sample from a lesser-known soul song) with less transformation to the original sample but added original drum work (or no drums at all) qualifies as standards and best practices. However, ready-made loop samples of very familiar songs (i.e. well-known hit songs) are less likely to meet the standards

and best practices threshold. But ready-made loops of such familiar songs that effectively transform the context of the use may fall within standards and best practices. Also, when using ready-made loops, i.e. complete 2-4 bar phrases with little to no transformation to the sample itself, obscurity is favored over familiarity. The more obscure a sample (song) is, or the less known a sample (song) is, the more it falls within the standards and best practices.

Live-Instrumentation Sampling Revolution

For years, live-instrumentation sampling was all about coming up with passable re-plays of samples from records. The problem with this approach was that it was widely understood that re-plays could never match the sound and feel of the original sample. But in recent years (beginning aroud 2012), there has been a live-instrumentation sampling revolution. The biggest development in this space has to do with the basic philosophical approach to sampling live instrumentation. Previously, the trend was to use live-band instrumentation *as is*, i.e. as the substitute for a beat. (Here, the stellar live-band hip hop group The Roots comes to mind.) But the tactic of using a live band as is — or, more specifically, the method of trying to merely replicate the sound and nuance of particular samples from old records — has given way to a different scheme, one where brand new live instrumentation, not re-plays of old works, is created for the sole purpose of being sampled. Pioneers of this new wave of live-instrumentation sampling include most notably Adrian Younge, DJ Premier, and Marco Polo.

In this new paradigm of live-instrumentation sampling, the aim is not to do re-plays that closely match actual samples of records from the '60s and '70s, but rather to use the sound, feel, and nuances of these eras of music as a guide and reference for creating new music (i.e. instrumentation) to sample. In effect, this new approach to live-instrumentation and sampling is dispelling, to some degree, the long-held notion that replays can never be a true substitute for the original's sound and feel.

Adrian Younge, who was once a sample-based beatmaker before successfully embarking on a mission to learn how to play multiple traditional instruments, has been scoring films since 2009. In 2013, he produced *Twelve Reasons to Die*, a concept album that featured Ghostface Killah rapping over Younge's instrumentation. In 2016, Younge, together with Ali Shaheed Muhammad, created the original soundtrack for the Netflix series "Luke Cage." While his

style and sound — unabashedly soulful and psychedelic — mirrors the sonics and vibe of the '60s and '70s, it's the arrangement of his compositions that mostly stands out.

Younge's arrangements lend themselves to sampling primarily because of the rhythm and melody structures that he uses, along with the drum patterns (backing beats) that he creates. Because he has a sample-based beatmaker's sensibility (he's an Akai MPC alumni), and because he aims to make music reminiscent to something that sample legends like DJ Premier, RZA, J Dilla, or Madlib would want to sample, his music often features wide open soulful grooves, funky drum breaks, and warm sound phrases and stabs. In 2014, Younge teamed up with DJ Premier and Royce da 5'9 for the *PRhyme* project. Fantastic for the music alone, the *PRhyme* album represents a major breakthrough in the live-instrumentation sampling space, as all of the beats were made by DJ Premier using samples of songs from Younge's catalog. That the beats on the *PRhyme* album sound like they were sampled from older records is a major achievement for both Younge and DJ Premier. For Younge, it's validation that his music does indeed hold up to the eras of music that inspire him. For DJ Premier, not only does it further cement him as one of the grand pioneers of beatmaking, it marks him as one of the chief architects of this new form of sample-based music.

While Adrian Younge has been steadily forging his sample-ready live-instrumentation sound, and while DJ Premier has been developing a new but familiar approach to modern source material (he's added the Akai MPC Renaissance to his production setup presumably to aide with this new method of sampling), Marco Polo has been pioneering a similar style and sound of his own. A long-time sample-based beatmaker who once swore to only use vinyl records, Marco has emerged as one of the chief architects of the sample-based method that features instrumentation made using sound packs, .i.e. stand alone sound libraries.

Sound packs full of soul, funk, jazz, and rock inspired grooves, licks, and stabs have been around for years; and for the most part, they have always tended to sound cheezy and nothing like the eras

they purported to emulate. But the quality of modern sound packs have improved greatly. Taking advantage of the improvements of sound and sample packs, like Native Instruments Kontakt and Komplete, Marco has developed a method for creating new instrumentation — entirely within the box — that he then samples and flips using his MPC and Pro Tools as he would with any record or other source material.

Certainly, self-sampling has long been a technique practiced among sample-based beatmakers like Pete Rock, DJ Premier, J Dilla, Jake Uno, and others. But it's normally been an auxiliary method of theirs, not a featured component of their styles. For Marco, this new method has become his main style. And what's most impressive about what he's doing is that, while he hasn't stopped using the traditional method of sampling records, the difference in sound and feel between his new method and the traditional method of sampling records is slim and often unnoticeable. In fact, when he produced the intro music for the Brooklyn Nets professional basketball team, many thought that the music — an intricate, hard-hitting and soulful beat — was a sample. It wasn't. Well, not exactly. It wasn't a sample in the traditional sense, i.e. the sample didn't come from an old record. Instead. it was multiple samples of Marco's own live instrumentation made through the use of sound libraries.

When I interviewed Marco at his home studio in Brooklyn, he shared with me his thoughts on live-instrumentation and sampling as well as his personal approach, philosophy, and process. I have included an extended excerpt of that discussion below.

> First of all, I did something with Adrian [Younge] on my last album, on *Newport Authority II*. He asked me to do a remix off the Delfonics album he did. And I flipped the beat, and then Tragedy rapped on it and Lil' Fame. So shouts to Adrian, he's incredible at what he does. My whole thing— I incorporate that type of sampling. **I use Komplete to compose my own music,** and to me it's all a learning process because I do know this: You can over analyze the approach of like, "Yo, let me get a band and we'll make it sound like records," and I've heard people do that and fail miserably. And on paper, it's like, "Yo, it's all live instruments. And live drums…" You think like,

"Yo, this is dope." Or it should be dope. But a lot of times, to me it's not! It's not! There's something missing. Something's missing. I don't care technically what you did. Yes, you have a Fender Rhodes through the amp that they used in the '60s and through this board, and like… But that doesn't mean shit if it doesn't sound right and give you that feeling, you-know-what-I'm-saying.

I don't get excited when someone's like, "Yo, I'm going into the studio with a live band…" I've heard people say that, then I heard [the music] and it failed my expectations. *After all of these years of breaking things down, to me I just keep it really simple: Is it dope, or is it not dope? That's how it should be.* But I think people get like, caught up in the whole pitch of, "Yo, but he used this band…" A lot of times, these newer bands that recreate that sound are extremely dope, but what I think needs to happen is producers need to take that shit — like they did records — put it in the damn sampler and add their drums to where it knocks. Because a lot of these live drummers are playing funky breaks all day and it sounds incredible how it's recorded, but the knock is not there. And as far as I know, when I came up with hip hop, shit knocked. Drums were the driving force.

The shit that I do these days is I sample myself essentially. I accumulate a lot of music — live instrumentation like you say. I'll buy sound libraries, like a soulful guitar pack with people playing riffs in different chords. Here's people playing keys and chords. Here's some horns. I take that shit like I do with vinyl, I put it into Komplete or Kontakt or my MPC, and I FUCK IT UP with compression, and take these luscious, highly recorded, 42-bit shit— I don't care about all that. I want it to sound dusty. So I put it in here [MPC, Komplete, or Kontakt] and I mess with it, then I add my own shit on top of it. As long as you got a wav file, you're good. You can put it into many programs. Absolutely. You're limitless with things. I was making music with some musicians and something wasn't happening. It wasn't working. And I was like, "Yo, we're making these ill things in the studio," then I'm like, "Yo, this is going to be a crazy beat." Then I sit down to make it and it was WACK! [laughs]

[But] **You have to have an ear. Absolutely it comes from the influence of the music I get off my vinyl, 'cause I know how shit's *supposed* to sound.** I'm trying to make shit sound like if I went to a record store, and it sounds dirty, and I put amps on shit. And the reason I'm doing that is because I know that's what they did back

then. But I don't have those same tools, so I gotta attack it from different ways. And whatever I can achieve that sound with, I'm going to use it. **It all starts from me buying music and records, that's the foundation of all this shit. And that's why I'm able to achieve beats that don't have samples in them because I've studied what they do sound like, and I'm still learning about it.** So, if I didn't start by digging, you know, you can't just— You gotta understand.

[And now] It's unlimited the options that I have now. Now, I'm able to time stretch on new levels; I'm able to pitch down [in new ways]; I take a bunch of shit and individually tweak it. I have effects — I never got the effects board in my MPC, mostly because I heard it was wack. And the effects, to be able to pre-process and put reverbs on drums; dumb shit that people probably have and are like, "Why didn't you have that all this time?" "'Cause I didn't!" Now, I can take melodies and extend them. And you know when you hear a record and you're like, "Aw, man, the first bar of that is crazy, then it gets super wack on bar 2." Now I can be like, let me replay it and play what I want to be there. Or have someone do it. And then records really become inspiration because a lot of times I try to replay something that I hear on a record, *but I'm not a classically trained musician, so it'll just end up becoming my own thing anyways. An original idea inspired by something that just goes in a whole other direction.*

Before Preem [DJ Premier] did what he did with PRhyme — which, by the way, he resisted doing it at first. Before he did it, there was this sort of slant, people in the shadows like, "I don't really want to fuck with that." But now, there's a before and after. Now that *he* did it — that *DJ Premier* did it — it opens it up. It's still the same process. It's still sampling and flipping something.[2]

[2] Amir Said interview with Marco Polo (2014).

The New Sampling Frontier: What the Live-Instrumentation Sampling Revolution Means for the Future

There are a number of things that we can take away from the live-instrumentation sampling revolution; all things that give us a good idea about the future of sample-based music. First, the role of traditional source material from the '60s and '70s has taken on a new significance. Since the inception of the sample-based tradition of hip hop/rap music, this was the primary source material that was sampled. Looking ahead, however, this source material will also more directly serve as a reference guide for the creation of compositions that are made intentionally for sampling. This means that listening to and studying the music of the '60s and '70s will become even more critical. Further, this will undoubtedly place a greater premium on digging in the crates; and it will likely familiarize new beatmakers (especially younger ones) with a wealth of music that they would have missed otherwise. Certainly, this residual effect will bode well for the future of hip hop/rap music.

Second, live-instrumentation sampling will extend the shelf-life of all sample-based beatmakers. With a fresh and infinite supply of copyright-free source material in the form of made-to-sample live instrumentation, sample-based beatmakers will more aggressively pursue production and collaborative opportunities that were all but withheld from them due to sample-clearance concerns. Sampling wasn't in threat of dying, but now it has a new frontier. One that's as equally unlimited as the source material. Further, if more traditionally trained musicians take this approach seriously and study (and master) the art of sampling, as I suspect will happen, this will be an area of music making where traditionally trained musicians can potentially excel. So I have no doub that this will be an important space in the future.

Third, live-instrumentation sampling will soon come to distinguish a major beatmaking period (perhaps the 9th or 10th). As a kind of hybrid of the Studio-Band Period and the Pioneers/Avant-Garde Period, the Live-Instrumentation Sampling Period

will mark the time that live-instrumentation first exploded on the scene, prompting a level of interest in sample-based beatmaking not seen since the major sampling era.

Lastly, while the live-instrumentation sampling revolution is a good thing overall, as a result of its very nature it may have one adverse effect: A widespread move away from the actual use of the source material used to inspire the made-to-sample compositions. I don't believe that live-instrumentation sampling will ever completely overtake the traditional form of sampling. But if it reaches the point to where some deem it the superior sampling method, I believe some critical sampling nuances will be lost to those musicians who raise it to that level.

Part 3
THE CRITICISM SURROUNDING SAMPLING

University Diversity Figures to Consider When Reading Scholarship On Sampling and Copyright Law

Scholarship done on the history of sampling and copyright law in America is overwhelmingly conducted by whites. This is no accident. In fact, historic pracitices in academia ensures it. For years, statistics have shown exactly *who*, is authorized by academia to chronicle culture and history. To see how distorted these figures are and how they impact how culture and history are written about, here are some detailed citations that look at the racial/ethnic make up college faculty.

From the report "Race/ethnicity of college faculty" conducted by the National Center for Education Statistics (NCES): "Of all full-time faculty in degree-granting postsecondary institutions in fall 2017, 41 percent were White males; 35 percent were White females [76% white in total]; 6 percent were Asian/Pacific Islander males; 5 percent were Asian/Pacific Islander females; and 3 percent each were Black males, Black females, Hispanic males, and Hispanic females.1 Those who were American Indian/Alaska Native and those who were of two or more races each made up 1 percent or less of full-time faculty."[1]

[1] U.S. Department of Education, National Center for Education Statistics. (2019). The Condition of Education 2019 (NCES 2019-144), Characteristics of Postsecondary Faculty. https://nces.ed.gov/fastfacts/display.asp?id=61

From Colleen Flaherty: "A new analysis from Pew Research Center says that while racial and ethnic diversity has increased among U.S. college faculty over the past two decades, *professors are still much more likely than their students to be white.* In 2017, according to data from the National Center for Education Statistics and looked at by Pew, 76 percent of all college and university faculty members were white, compared to 55 percent of undergraduates. By ethnic group, just 5 percent of faculty members were Hispanic, compared to 20 percent of students. Six percent of professors were black, compared to 14 percent of their students. Asians were the exception, making up 11 percent of professors and 7 percent of students."[2]

From Richard Adams: "*1%* of UK university professors are black, figures show This article is more than 1 month old Among 21,000 academic staff at professorial level only 140 identify as black...Fewer than 1% of the professors employed at UK universities are black and few British universities employ more than one or two black professors, figures show."

"The Higher Education Statistics Agency (Hesa) figures show UK *universities continue to increase academic and non-academic staff numbers to record levels but progress on employing more staff from ethnic minorities remains sluggish.* Only 140 academic staff at professorial level identified as black, equating to 0.7% out of a total of more than 21,000 professors. Nearly 18,000 or *85%* identified as white, 1,360 as Asian, and more than 2,000 as unidentified or from other ethnic backgrounds."[3]

Again from Colleen Flaherty: "[M]ost racial and ethic minority groups are underrepresented throughout the professor ranks, both in terms of reflecting the makeup of the students they teach and the population at large. According to 2013 data from the National Center for Education Statistics, *just 6 percent of full-time faculty members were black and 5 percent were Latino.* Within the academy, minority professors are also overrepresented in the non-tenure-track ranks, something some critics have said reinforces

[2] Colleen Flaherty, "Professors Still More Likely Than Students to Be White," Inside Higher Ed, August 1, 2019 https://www.insidehighered.com/quicktakes/2019/08/01/professors-still-more-likely-students-be-white (emphasis mine).

[3] Richard Adams, "Fewer than 1% of UK university professors are black, figures show," *The Guardian*, February 27, 2020 https://www.theguardian.com/education/2020/feb/27/fewer-than-1-of-uk-university-professors-are-black-figures-show (emphasis mine).

what's been called ***a 'presumption of incompetence.'"***[4]

From Matt Krupnick: "*Faculty of color are underrepresented on most college campuses, especially African American faculty.* According to federal data analyzed by our partners at The Hechinger Report, fewer than seven percent of tenure-track professors at college campuses nationwide are African American. It can be isolating for those professors who end up working at predominantly white institutions. They become one of just a handful of non-white people in authority on campus."[5]

Janice Gassam, "Why Are There So Few Professors Of Color?," *Forbes*, Jul 23, 2019, https://www.forbes.com/sites/janicegassam/2019/07/23/why-are-there-so-few-professors-of-color/#267fb3533e2e: "One way that many applicants of color get weeded out, Gasman asserts, is by using the word "quality" to dismiss qualified candidates from the talent pool. The pipeline myth may be used to conceal the real reasons behind the lack of diversity in higher education, research suggests. The criteria used to evaluate candidates during the application process may eliminate talented candidates of color and may reinforce inequality."[6]

From Ryuko Kubota: "[R]acial inequalities influence our knowledge production and consumption in academe."[7]

From Matthew Lynch: "According to the National Center for Educational Statistics, just 16 percent of full-time professors at post-secondary institutions are minorities. That means that 84 percent of those in full-time professorships are white, 60 percent are men and 25 percent are white women."[8]

[4] Colleen Flaherty, "Separate and Not Equal," *Inside Higher Ed*, November 29, 2016https://www.insidehighered.com/news/2016/11/29/book-argues-faculty-members-color-going-tenure-are-judged-different-standard-white (emphasis mine).

[5] Matt Krupnick, "Despite decades of pledging to hire more black faculty, most universities didn't," *Hechinger Report*, October 2, 2018 https://hechingerreport.org/despite-decades-of-pledging-to-hire-more-black-faculty-most-universities-didnt/ (emphasis mine).

[6] Janice Gassam, "Why Are There So Few Professors Of Color?," *Forbes*, Jul 23, 2019, https://www.forbes.com/sites/janicegassam/2019/07/23/why-are-there-so-few-professors-of-color/#267fb3533e2e

[7] Ryuko Kubota, "Confronting Epistemological Racism, Decolonizing Scholarly Knowledge: Race and Gender, *Applied Linguistics*, Volume 41, Issue 5, June 2019 https://academic.oup.com/applij/advance-article-abstract/doi/10.1093/applin/amz033/5519375?redirectedFrom=fulltex

[8] Matthew Lynch, "Nearly 90 Percent Of Full-Time Professors Are White By Matthew Lynch," *The Edvocate* https://www.theedadvocate.org/study-nearly-90-percent-of-full-time-professors-are-white/



9th Wonder
@9thwonder

To all of my young sample choppers out there.

Do NOT let ANYONE, come in OUR House (Hip-Hop), a genre that has influenced EVERYTHING, and tell us how to cook our food.

NO ONE. I don’t care WHAT they say, or play.

18:22 · 01/10/2023 from Earth · **284K** Views

Chapter 11

The Function and Value of the Art of Sampling

The Influence of Race, Cultural Background, Musical Hierarchies, and Other Factors On Perceptions of the Art of Sampling – and Why Sampling is a "Useful Art"

"If you're going to discuss African dance, it's like the Bolshoi Ballet teacher doing criticism of African dance."
—Ron O'Neal

"I also found myself digging into Moms's record collection, getting back into the classics. I started examining the music I'd heard all my life with a deeper respect."
—Raekwon

Growing Up Black in America: '70s, '80s, and '90s – A Cultural Backdrop

"There was something so unique about the Black experience between the 70s-90s. Probably a world with segregation (cultural and otherwise). Blackness and the multiple cultures we birthed were so potent back then.

[T]he uniformity of Blackness; untainted by the alternative pathways of cultural integration. We lived life like we were all raised the same way. It manifested like an inside joke only shared amongst those who looked like us."
—@iamMelSmiths

One unique thing about growing up in Black America between the '70s and '90s was the way in which we experienced Black culture against the backdrop of post-'60s-style segregation. In the '70s, '80s, and '90s, segregation — in terms of demographics, public society, and culture (especially language and the arts) — boosted our autonomy and confirmed our instincts about cultural self-empowerment. We were deliberate in the cultures and sub-cultures that we created, and we were hyper protective of them.

While we are never monolithic, as some commenters and politicians have implied about Blacks in America, in the '70s, '80s, and '90s there was however a level of cultural uniformity that was hard to deny. Much of this was due to the fact that most Black Americans lived in an interconnected network of family, extended family, and friends that were linked in the North, South, East, and West. This meant that Black Americans, even with a few variations on (or versions of) key upbringing themes, were raised in the same familiar way in the '70s, '80s, and '90s.

In this atmosphere, Black culture was less prone to being compromised by outside cultures, or, for that matter, second guessed by those within the culture. And as throughout the history

of the Black American experience from slavery to today, language and music played major roles in shaping (and preserving) this atmosphere. At the turn of the '90s, the beginning of the internet age, and the dawn of fractured media, some of the uniformity of this atmosphere began to splinter, particularly along the lines of language and music. As key Black cultural spaces of the '70s, '80s, and '90s faded, they were replaced by a new kind of cultural integration, a type of cultural integration that absorbed Black culture while playing down its uniqueness and influence on popular culture around the world.

This chapter explores the primary Black cultural spaces that have helped to shape the sampling tradition of hip hop/rap music. This chapter also seeks to demonstrate how criticism of hip hop/rap music has historically been misaligned with Black American cultural spaces, particularly by writers and commentators either unfamiliar with or misinformed about these Black cultural spaces.

***

There are four distinct but intertwined issues when it comes to criticism around the art of sampling. First, the vast majority of criticism is produced, written, edited, and published by white people — particularly those outside of hip hop/rap music culture — despite the fact that the art of sampling, first popularized and still dominated by hip hop/rap music, is inextricably linked to Black music artists. Traditional media and academic structures have historically shut out diverse voices. Couple that with the construction of racial hierarchy in America, in which whites preside at the top, and the result is that whites writing about the art of sampling are the privileged, "authorized" commentators — despite the fact that sampling, which was first popularized by, and continues to be mostly associated with, hip hop/rap music is a modern music process and art form substantially developed, led, and advanced by Black music artists. All of this has meant that diverse voices have not been able to build influence in the discussion around the art of sampling and copyright law, and this has stifled the inclusion of

new perspectives and insights about sampling and copyright law for the last 35 years. More specifically, this has made it practically impossible for Black music artists and others to inject their analysis and commentary into the public debate.

Second, the vast majority of criticism around sampling has been written by those with a limited understanding of the art of sampling and a serious misunderstanding of copyright law and its objectives. As the discourse around the art of sampling has been dictated by a single group, other critical voices and perspectives have generally been excluded. This means that in mainstream criticism, attitudes towards the art of sampling and the implications that it holds for copyright law have been shaped by the preferences and biases of one group. This has resulted in significant inaccuracies and misrepresentations about the art of sampling and copyright law, often with a great deal of context and nuance missing.

Third, the discussion of the art of sampling has been influenced by a musical hierarchy that places hip hop/rap music (and the musicians that make hip hop/rap music) at the bottom. This has led to the framing of hip hop/rap music as an illegitimate music form, and it has cast doubt on whether beatmakers (producers) are "real" musicians.

Fourth, criticism around the art of sampling has generally privileged the rights of copyright owners without any focus on the objectives of copyright law or concern for the public good. This has helped promote the fallacy that the sole purpose of copyright law is to protect the rights of copyright owners. As such, this privileging of copyright owners has misrepresented the true purpose of copyright law as stated in the Constitution: "To promote the Progress of Science and useful Arts;[9]" and at the same time this privileging of copyright owners has omitted from the discussion the objectives of copyright law, which are: To stimulate, motivate, and influence the creation of new works; to prompt, foster, and provoke innovation; to offer reward for such innovation and creativity; and to give incentive to create and innovate. The focus of all of these objectives is the public good.

[9] U.S. Const. art. I, § 8, cl. 8. See also 17 U.S.C. § 102 (1976).

Aside from detailing the function and value of the art of sampling, what I hope to show in this chapter is the *why's* and *how's* of the four aforementioned issues with criticism around the art of sampling. In doing so, my aim is to inspire the best path towards alleviating them. Going forward, criticism around the art of sampling must be less reliant on one group of commentators and more inclusive of other voices, especially from those at the center of the art form's popularization and other experts in the field. Equally important, criticism around the art of sampling must balance the function and goals of a "useful Art" against the practical realities of art, technology, and creativity.

In order to properly understand the criticism that surrounds the art of sampling in the hip hop/rap music tradition, we must first understand the criticism against hip hop/rap music more generally — and this requires a broader examination of cultural spaces, musical hierarchies, orientations, and rankings of taste.

The Influence of Cultural Spaces On Perceptions of the Art of Sampling

Despite the way American media and entertainment have historically depicted Black life — in film, in television, on the news — it must be stated that Black American life is not an *alternate to* white American life. Black American life does not exist as the "other" to the supposed universal white *norm*. Black American life is rich with its own dimensions, its own stories, and its own cultural spaces. All too often, however, it is these cultural spaces that are ignored, distorted, misunderstood, or misrepresented whenever Black art, especially Black music, is covered in mainstream media. We see this same effect in the area of criticism, which presents a serious problem since most writing about hip hop/rap music is done by white people. And this has historically been the case. As hip hop/rap music journalist Dart Adams has noted, one problem with early hip hop/rap music journalism was that the white writers who dominated the space struggled to understand the music:

> The fact that so many white rock writers were tasked with critiquing Rap early on and the resentment & racism leaps off the page as you read the reviews when these same men supposedly revere Robert Johnson, Chuck Berry, Jimi Hendrix, etc. but when there's no guitar player around? "Those early days we had [Black music journalists] Greg Tate, Havelock Nelson, Nelson George & Barry Michael Cooper *amidst a sea of white rock writers who had no clue of what they were listening to.* **They tried to find 'value' in it** *whereas Tate, Nelson, George & Cooper didn't need to struggle to comprehend.*[10]

In academia and the music journalism industrial complex, white writers have historically been privileged to write about Black music. Commenting on the growth of scholarship around the blues, Paul Oliver noted in his book *Blues Fell This Morning: Meaning in the*

[10] Dart Adams, Twitter, 2/2/2021 (emphasis mine and in the original).

Blues (1960) that "[t]he bulk of the work, whether historical or discographical, empirical or theoretical, has been done by white writers from outside the culture."[11] A similar pattern continued with the advent of hip hop/rap music. As a result, racial bias and aesthetic preferences counter to hip hop/rap music meant that many white writers covering hip hop/rap music didn't comprehended it — neither its compositional aesthetic forms or its lyricism, which was often loaded with slang and vernacular that they could not decipher. Owing to this, these white writers deemed hip hop/rap music inferior to other music genres (especially rock 'n' roll), muted the essence of hip hop/rap music, and doubted sampling as an art form and legitimate music process right from the start.

This pattern of whites doing the bulk of writing about Black music has remained largely unchanged today, as most writing about Black music — including books, academic papers, articles in mainstream publications — is still written, edited, and published overwhelmingly by white editors, writers, researchers, and other commentators. In this paradigm then, there are a number of reasons why criticism around Black music forms and the creative processes they employ, like sampling in hip hop/rap music, are typically lacking in accuracy, context, and nuance. So throughout this chapter, I examine all of these reasons and how they relate to attitudes towards the sampling tradition of hip hop/rap music more specifically. Because discussions of Black cultural spaces — how they function and the value they serve — are most typically absent from the criticism around hip hop/rap music's sampling tradition, I began here.

***

[11] Paul Oliver, *Blues Fell This Morning: Meaning in the Blues*, Cambridge University Press; 2nd edition (July 27, 1990), xxi. (emphasis mine).

Most Blacks born in the United States between the late 1950s and early 1980s were brought up in a vast cultural space wherein important Black identity tropes — embedded in music, dance, food, language, and fashion (style of dress) — were familiar to all. Aside from a few minor differences here and there, a Black kid born in the 1970s in New York City would recognize the same fundamental elements at a party, barbecue, picnic, family reunion, or similar social gathering that a Black kid born in Chicago, Raleigh, Los Angeles, Philadelphia, Detroit, or Atlanta would have. Even with some hometown stylistic differences, the food would be familiar to him; the dance moves would be familiar to him; the language and laughter would be familiar to him; the fashion styles would be familiar to him; and the music would, of course, be familiar to him. This is because these elements were all part of a common popular Black American culture at that time — one set of shared cultural spaces and meanings.

For Black Americans like me, a lot of the music we grew up listening to, the music our families imparted to us — the music we *lived* to — is the sort of music that we gravitate to and tend to sample. Naturally, we have an affinity for this music; it's not only our heritage, it's a mirror of our lives. To sample this music, to borrow from this music and to extend, transform, and reconceptualize its essence in new contexts and directions is not only a means for engaging and commenting on history, it's a means to tapping into a lost frequency and feel of our culture. It's also a means for expressing ourselves through an art form that's aesthetically pleasing. We know the records, all of the musical cues and nuances and feelings precisely because we were reared on the music. (For later generations who did not live this music, a connection to family members who were reared on this music maintains this continuum.) This speaks to the Black cultural spaces that influence perceptions of the art of sampling. In the following sub-sections, I take a close look at the primary Black cultural spaces that influenced the art of sampling early on, and I'll show how a lack of familiarity with these Black cultural spaces affect the criticism of the art sampling, which is still largely written and published by white people.

Black Celebratory Party Culture

House Parties, Barbecues, and Family Reunions

Throughout the struggles that Black people have faced in America, Black Americans have always been celebratory. House parties (given for everything from birthdays to graduations to fundraisers for rent) barbecues, and family reunions remain an important Black cultural space for Black Americans. This Black American cultural space, with its well-understood social cues, meanings, and reminders of identity, persists as Blacks grow older. For instance, it was not uncommon for the so-called "music of our parents" to be played by the DJs at the teenage parties that we went to. When I was 13 years old, one of my favorite songs that I heard at *every* Black house party, barbecue, and family reunion that I went to was Deniece Williams's "Free" (1976). One thing that I remember about "Free" is how much my mother, father, grandmother, extended family (young and old), friends, and I *all* knew and enjoyed it. I never questioned why that was, I just understood the connection with this song. I also recognized that there were lots of other songs like "Free" that shared the same vocal and rhythmic aesthetics. It was this shared Black American cultural space, one with its own concepts of art and originality, creative nuances and priorities, and metrics of excellence, that was the preeminent cultural history of the first hip hop DJs and the most influential sample-based beatmakers of the Pioneers/Avant-Garde and Post-Pioneers beatmaking periods.[12]

By contrast, white Americans did not typically experience this Black American cultural space, so their cultural spaces in the same vein, i.e. house parties and the like, depart significantly from what we see in the Black celebratory party cultural space. While music, food, and dance are certainly features of white American cultural spaces, house parties offer an excellent example of how these features differed. In addition to the many house parties thrown by Blacks that I attended in the late '80s as a teenager, I also went

[12] For a detail examination of the primary beatmaking periods, including the Pioneers/Avant-Garde period, see Chapter 2.

to white parties as well. But the scenes couldn't have been more different. The music at the Black parties (at this time) was strictly soul, funk, R&B, hip hop/rap, reggae, and soca. The music at the white house parties during the same period[13] was dominated by rock — '80s pop, new wave, some British ska, and sometimes a little reggae, sometimes a little hip hop/rap. Further, DJs were at *every* Black house party that I went to in the '80s, and everybody danced at these parties; it was expected. There were always impromptu dance-routine showcases and dance battles going on at these parties. The food at these parties was always cooked by the host or other family members. In contrast, there was never an official DJ at *any* of the white house parties that I went to (both in the inner city and suburbs); and there was absolutely no dancing — i.e. no serious, or non-drunk dancing — at these parties either. And, more often than not, when there was food, it was pizza delivery or other fast food.

The other big distinction between Black and white house parties was booze.[14] Drinking was never an integral part of any of the teenage Black house parties that I went to. Typically, these

[13] Today, you're more likely to hear hip hop/rap music at white parties — a testament to hip hop/rap's dominance in pop culture.

[14] Studies show that when it comes to drinking, there is a great disparity between Black and white American youth. "Fewer African Americans compared to Whites reported alcohol use, binge drinking, drunkenness, peer alcohol use, and encouragement of alcohol. These results support and extend previous findings, and suggest that contextual influences may help explain alcohol use differences and similarities between African-American and White youth," Susan C. Duncan, Ph.D., Lisa A. Strycker, M.A., and Terry E. Duncan, Ph.D., "Alcohol Use of African Americans and Whites From Ages 9–20: Descriptive Results From a Longitudinal Study," *Journal of Ethnicity in Substance Abuse* (Volume 11, 2012 - Issue 3), "Typically, studies find that White adolescents report greater alcohol use than African Americans (Bryan & Stallings, 2003;" https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3432983/. "But black teens may succumb to at least one temptation disproportionately less often than their white or Hispanic counterparts. Aggregated Gallup Youth Survey findings from 1999 to 2001* reveal that just 8% of black teens say they ever drink alcoholic beverages, as opposed to 25% of white teens…," Aggregated Gallup Youth Survey, "Black Teens: Better at Just Saying No?," Gallup News (November 5, 2002), https://news.gallup.com/poll/7126/black-teens-better-just-saying-no.aspx.] Of course, there are exceptions to almost any pattern, I'm sure there were a number of whites raised up on the same music as Black Americans. For instance, in my interviews with Marco Polo and Paul Cantor, both white and beatmakers (the latter also a renowned music journalist), each related stories to me about the jazz, R&B, and soul that their fathers introduced to them. Furthermore, I'm certain that there were some teenage house parties thrown by white Americans that included dancing along with some of the same music typically heard at Black house parties of the time. I'm also convinced that some of these parties even had official DJs. However, by and large such parties are the exceptions, not the norm.

parties were birthday or graduation celebrations, so there were usually parents and other adult family members around. The adults drank, and there may have been a group of kids that would drink outside before they came into the party or after, but alcohol was simply not a feature at Black house parties. By contrast, the teenage white house parties that I went to, the sort of parties immortalized in '80s films like *Sixteen Candles* and *Weird Science*, were usually prompted by parents being *gone for the weekend* and sometimes even just for the night. This meant that there was typically no parental supervision at these parties. And these parties always included drinking. Moreover, it was the drinking, not music, that remained the center of attraction of every white house party that I went to.

The description of my experiences as a teenager at white house parties in the mid- and late '80s are consistent with the stories and experiences that were shared with me by many white Americans. Having interviewed hundreds of my white peers in music, art, and literature (who lived in all corners of the United States during the mid- to late '80s), I found that my experiences were in line with theirs, with *zero* exceptions. So while my initial view of sampling could be seen as a celebration of a music tradition that I was reared on, as well as my strong support and appreciation for the continuum of this music tradition, this was not the initial view of any of my white friends or the white musicians that I spoke with on and off record. Their initial views of sampling, both good and bad, included considerations based on the specific cultural spaces that they grew up in, *not* the shared Black American cultural spaces (especially the Black celebratory party cultural space that I described in this section) that were (are) familiar to me and most other Black Americans. So by this discussion, do I mean to show that Blacks are more likely to have a favorable view of the art of sampling than whites? Not necessarily. But what I do want to point out is that the cultural spaces that you grew up in, your cultural background and racial identity, do indeed influence your view of the art of sampling and the nature of your criticism about it.

'60s and '70s Soul and Funk Music As a Cultural Space

A Lineage with Black American Music Traditions and the Significance It Holds

As sampling expanded as an art form in the '90s, so did the source material. So we must acknowledge that sampling in the hip hop/rap music tradition is not limited to one genre as source material. However, further context about cultural spaces demands that we recognize the music (and pop culture) that was (is) *predominantly* sampled in the hip hop/rap music tradition. And here, make no mistake, it was '60s and '70s soul and funk that served as the foundational source material for Black American sample-based beatmakers (producers) and for the sampling tradition of hip hop/rap music itself. (This music still remains the genre *most* sampled within the tradition today.)

For Black American sample-based beatmakers (producers) who were born between the 1960s and 1980s, sampling '60s and '70s soul and funk holds a number of significant cultural meanings and connections that go beyond the music's aesthetics. The act of exploring cultural heritage; the practice of adding to this cultural heritage and creating a continuum of said cultural heritage; the act of linking their music to revered Black musicians of the past; the act of reliving a shared cultural memory; the act of commentating on a shared history; and the act of proclaiming a shared Black cultural feeling and voice. All of these actions serve as critical links for Black American sample-based beatmakers (producers). These cultural meanings connections were (are) embedded inside of a generation of Black Americans. Speaking about the RZA-produced beats that he selected for his debut album, *Iron Man*, Ghostface Killah has said: "That sound came together on that album based on *the soul that I got inside of me*. From growing up as a baby. Listening to your mother and them play, like, the Chi-Lites and The Stylistics.

It just carried with me. *That soul just came*."[15] What Ghostface is describing — this embeddedness of soul music that comes from growing up in the soul music cultural space — is something that I and many other Black Americans of our generation strongly identify with.

By contrast, most white Americans born between the 1960s and 1980s did not grow up or participate within *at any time* the Black American cultural spaces of twentieth-century America that I described earlier. So these whites knew little about the cultural spaces where this music was consumed and celebrated.[16] And even though many white Americans did listen to and were ultimately influenced by twentieth-century Black American music (notably the music of Motown), by and large they did not participate in Black cultural spaces. As such, it should be expected that most of their social experiences and cultural memories regarding food, language, style of dress, dance, and music tracked differently as well. While there were perhaps a number of parallels in specific areas, generally the experiences were quite different, especially in terms of music and its related experiences.

This is also to say that there is a different *link* to the music, particularly '70s soul music. The period between the late '60s and late '70s represents a time when Black identity in America coalesced in a more prideful (in some cases more militant) manner. James Brown's song "Say It Loud — I'm Black and I'm Proud" was released in 1968, just four months after the assassination of Dr. Martin Luther King, Jr. As a danceable, soul-funk number with an incredible a groove, "Say It Loud — I'm Black and I'm Proud" was a direct call to Black Americans to embrace and reclaim their identity. It served not only as a signal to stop using terms like "negro" and "colored", but as an overt plea to start using the more powerful expression of *Blackness*. The message of "Say It Loud — I'm Black

[15] Certified Presents "25 Years of Ironman" with Ghostface Killah Listen to Ghostface Killah: https://GhostfaceKillah.lnk.to/listenYD (emphasis mine).

[16] It must be noted that white sample-based beatmakers (producers) in the hip hop/rap music tradition (not just in America but around the world) are not parallel to most white critics is this regard. Typically, white sample-based beatmakers (producers) in the hip hop/rap music tradition pay careful attention to soul and funk music; in fact, they study it and develop both an appreciation for it, which directly leads to a skill for sampling it.

and I'm Proud" resonated with Black Americans immediately, and the song (along with other Black art of the same period) helped usher in a new vision of Black identity.

Harvard Law Professor Randall L. Kennedy has called "Say It Loud — I'm Black and I'm Proud" one of the "landmark cultural texts of the 1960s." Noting that the Black Liberation Movement had a variety of fronts, including the outward facing challenge to white supremacy, Randall positions "Say It Loud — I'm Black and I'm Proud" as an critical tool in civic protest, mainly as it related to *"the inner struggle in black America to rehabilitate itself, reclaim itself."*[17] Randall has also related how impactful James Brown's "Say It Out — I'm Black and I'm Proud" was on other Black American music artists and Black music itself:

> Various musicians in the 1960s tapped into yearnings for *black assertiveness, autonomy and solidarity.* Curtis Mayfield and the Impressions sang "We're a Winner." Sly and the Family Stone offered "Stand." Sam Cooke (and Aretha Franklin and Otis Redding) performed "A Change is Gonna Come." **But no entertainer equaled Brown's vocalization of African-Americans' newly triumphal sense of self-acceptance.** [emphasis mine][18]

Principally as it was expressed through '70s soul and funk music, this sense of Black pride — i.e. this asserting of Blackness, this reclaiming of one's Blackness from the negativity caused by white supremacy — did not (does not) hold the same significance for white people. So here, we can see at least one key difference in the motives for sampling '60s and '70s soul and funk music. While this music may be *aesthetically* pleasing to all, we can't ignore the fact that this music holds additional meanings for Black people. However, because most criticism and scholarship about sampling are written and published overwhelmingly by white people, it's easy to see why this critical context is missing from most criticism

[17] "'Say It Loud': 50 Years Ago, James Brown Redefined Black Pride," WBUR/Radio Boston, July 24, 2018 https://www.wbur.org/radioboston/2018/07/24/james-brown-black-pride.

[18] Randall Kennedy, "How James Brown Made Black Pride a Hit," *New York Times*, July 20, 2018 https://www.nytimes.com/2018/07/20/opinion/sunday/james-brown-say-it-loud-50-years.html.

surrounding the art of sampling. I do not suggest that this omission is intentional; rather, I believe that it's caused by three things. First, the reality that trade and academic publishing is controlled by white people, with specific topics seemingly being the province of white writers. Second, a lack of awareness of and participation in Black cultural spaces by the white scholars and critics who cover the art of sampling and copyright law. Third, the evolution of white American cultural spaces *as the norm*; it is from this vantage point that white commentators proceed with their analysis.

But no matter who's doing the criticism, whether it be a Black commentator or a white one, we must acknowledge that comprehensive and accurate criticism of the art of sampling requires that we include Black American cultural spaces *within* the criticism. Still, if a commentator is less familiar with Black cultural spaces, he is less likely to include its features in his criticism; and even when such features are included, he is less likely to view them favorably or from their proper contexts and meanings.

'70s Black American Cinema – aka "Blaxploitation" Films – As a Cultural Space:

The Truth About '70 Black Cinema and Hip Hop/Rap Music

1970s Black cinema, aka blaxploitation films, is another Black American cultural space that has left an indelible mark on the sampling tradition of hip hop/rap music. To understand the nature of this impact, not just in terms of the aesthetics of sampling, we have to examine what blaxploitation films meant to Black people at the time. And for this examination, we begin with the term "blaxploitation" itself.

The term blaxploitation, which is now used unilaterally to describe Black American films of the '70s[19], emerged from controversy. After the popularity of Black films *Shaft* (1971) and *Super Fly* (1972), Black civil rights organizations CORE and the NAACP took exception with the images portrayed in these films.

[19] Derogatory term. See Ron O'neal YouTube interview. https://www.youtube.com/watch?v=Rn56tnMmQOY.

Ostensibly, they saw Hollywood's production of these films as "*Black exploitation*," i.e. the exploitation of Black characters and stories that purportedly showed a negative image of Black people. In reality, however, the controversy was about power, influence, money, and the right to define Black identity in American cinema.

Ron O'neal, star of the film *Super Fly*, recalled the controversy surrounding the advent of "blaxploitation" this way:

> Every Black person with an axe to grind, with a point of view, with a platform…Everyone with a point of view jumped on the bandwagon of criticizing *Super Fly* **in order to get the press that they could not get otherwise.** By this, I mean CORE, the NAACP. Roy Innis actually told me this. **He said, 'I have to raise money for my organization.' He said, 'Ron, I liked the film.** I took my daughter to see *Super Fly*, we understood what the film was about. **But I'm going to take you on *The Today Show*, and I'm going to cut your mouth out.'** … Anyway, 'blaxploitation.' *Super Fly* was released by Warner Bros. ***The term blaxploitation was not an accident*, and it was not a term created by white people. Blaxploitation was a term created by a Black person. A Black press agent named Junius Griffin,** who was, at the time, the head of the Beverly Hills NAACP. Which at the time, that sounded like an oxymoron to me…And he had tried everything in his power to get the Warner Bros. account, to handle the PR for *Super Fly*. And he didn't get it. And there's a big bru ha ha, and he was either fired or he quit, I'm not certain which. So he formed his own press agency…His first account was *Sounder*, starring Cicely Tyson. Lovely family film, admittedly made for the mental age between 8 and 13. It was from a children's book about a dog barking all the time, you know. And it's a very nice little Walt Disney kind of — it was a very mild version of slavery; of what the South was like. There were no heavies. It was an interesting film because *no one* was at fault. And it was just, 'Life is just terrible for some people sometimes.' *SOMETIMES*? But there was no villain. OK, *Sounder* died in New York when it opened. I know because I went to the opening; they asked me to go to the opening, which I did. So, keep in mind, there was no criticism of *Super Fly* whatsoever up until this point. *Sounder* opened; we did more in an hour than they did all week! Ok, *Super Fly*, the film. We did more in a day then they did all week…
>
> So, all of sudden out came, in the *New York Times*, the entertainment section, a vicious attack on *Super Fly* by Cicely Tyson, star of

> *Sounder*. Who then admitted that she hadn't seen *Super Fly*, but she knew it was piece of junk. That what she said in the article. And then, on the heels of that, from the pen of Junius Griffin, came the term blaxploitation. He was very tight with Johnson Publications. And that's where the term was popularized, through *Ebony* and *Jet Magazine. BLAXPLOITATION*.
>
> And Johnson Publications was particularly unkind to *Super Fly*. Mostly because — and I had nothing to do with it…Well, it seems that *Ebony Magazine* — it's a Black film, they wanted an account. They wanted like, some $10,000 ads. [the producer of *Super Fly*] having rudely declined this $10,000 ad, Johnson Publications made it an editorial policy — I was told this by one of their staff writers who was a friend of mine. He said, "Ron, I'm sorry, but I have to do a hatchet job on you because Johnson Publications has an editorial policy concerning you and the film *Super Fly*. You're in a little special place. And we can't say anything good about you." So, through the thrust of that, Johnson Publications publicized Junius Griffin's little jingle word, "*blaxploitation*." And to the utter damnation of all Black films and Black artists and hopefully to himself, as far as I'm concerned. If that's personal, I'm sorry. But that's the way I feel. Because this changed not only my life, it changed a lot of people's lives, and unfairly so. Because I — I'm not ashamed of anything that I did in *Super Fly*. [emphasis mine][20]

And here's Ron O'Neal in another interview giving more crucial context; this time he's speaking with acclaimed actor James Earl Jones and filmmaker Hugh Robertson:

> James Earl Jones: "How do you explain the popularity of *Super Fly* in spite of the criticism you received — I mean the adverse criticism?"
>
> Ron O'Neal: "Well, it goes back to that duality again. You see, you have the masses of people, Black and white… It's the duality between what the man in the street *really* wants to see and **what people keep saying what the man in the street wants to see.**
>
> Hugh A. Robertson: "It's my personal opinion that the reason that there's been a rash of so-called Black films on exploitation level **is because we have been basically invisible**. *And Black people have*

[20] Interview: "Ron O'Neal interview - part 1 of 4" badazzmofo YouTube channel: https://youtu.be/Rn56tnMmQOY.

naturally starved, in terms of seeing their own image other than a stereotype role on the screen. So the motion picture industry, which is a business, will continue to make these films until the mass of Black people stop going to see them. It's all what works in the box office, as far as I'm concerned. And I think that's where all of the Black organizations who's been against this one-dimensional type of filmmaking should direct their attack to.

James Earl Jones: "In terms of that duality problem that Ron mentioned, you might call it, on one hand, the need for image therapy. That is, for Black people to see themselves in good light. And the other need is to see reality for what it is.

Ron O'Neal: "If we are to judge what Black people truly want to see — Here's what I'm trying to say…I have yet to find any basis of proof for me that these so-called Black leaders, who insist on making these statements in the media, that they have — they are responsible, I mean, that they have a right to say anything about Black movies. I mean, you take all those organizations — the membership of CORE and the NAACP and put it in 10 square blocks in Harlem. The *entire membership*, you know, wouldn't take up 10 square blocks in Harlem… How all of sudden — what makes these people, where do they get the platform from? They're not artists, they're not psychiatrists, I suppose they're politicians of a sort. I mean, I don't lay out the plans for political organizations. They don't submit their political plans to me for approval, their political stance, their decisions. And if I suggested that, they would say that I was silly and I didn't know anything about politics. I suggest the same thing may be true about movies. **What seems to me to be a 5-year old mentality, at work here, that takes *all* Black films, which is a mistake in the first place, and tries to lump them altogether.** I mean, *Super Fly* has as much to do with Melinda as a film as *Melinda* and *Buck and The Preacher* have to do with each other. They're very different films, with different approaches and different intents. [emphasis mine][21]

***

[21] "Blaxploitation Backlash | Ron O'Neal and Hugh Robertson in 1972" | "Black Omnibus" show hosted by James Earl Jones (1972) https://www.youtube.com/watch?v=S7WkW2PT0e8.

Meeting at Chicago's PUSH Expo in 1972, Black civil rights leaders argued that movies like *Shaft* and *Super Fly* were examples of Hollywood's exploitation of Black people. Writing for the *New York Times* in an article bluntly entitled "Black Movie Boom — Good or Bad?" (December 17, 1972), Junius Griffin — press agent, head of the Beverly Hills branch of the NAACP, *and* the man who coined the term blaxploitation — recalled that many Black organizational leaders, those "concerned with black movies," "came together" at the PUSH expo "knowing that 'blaxploitation' must stop immediately;" that "such exploitation in films must be rooted out now just as other forms of segregation and racism are being rooted out in our society." In truth, however, Griffin's remarks and the stance taken by his fellow Black organizational leaders weren't really about projecting a positive image of Black people. On a philosophical level, it was about asserting *who* had the right to represent Black people. On a hustler's level, however, it was about raising money for and bringing attention to these Black leaders and their organizations. They wanted their piece of the pie, and they embarked on a campaign, led by Junius Griffin and CORE's Roy Innis, to force Black filmmakers to give it to them.

In the same *New York Times* article from 1972, Junius Griffin, who considered these films to be "cultural genocide," offered a scathing view of Black cinema that did little to hide the money grab that he and other Black leaders were attempting:

> "**At present, black movies are a *'rip off'* enriching major white film producers and a very few black people. These films are taking *our* money while feeding us a forced diet of violence, murder, drugs and rape.** Such films are the cancer of *"Blax ploitation"* gnawing away at the moral fiber of our community. Some attempt to justify the portrayals of pimps, prostitutes, dope pushers and super-studs, but the **constant bombardment** of those images on the minds of our children **is a theft far more damaging than *economic loss***…
>
> **If black movies do not contribute to building constructive, healthy images of black people and to fairly recording the black experience, we shall have lost *our money* and our souls. We shall have contributed to our own *cultural genocide*** by only offering our children the models of degradation, destruction and dope.

> Now the contest has turned to determining ***who* is going to benefit from the millions of dollars spent and collected at the box offices of the nation's movie theaters.** Though still in poverty, black people have escaped the despair and moral bankruptcy that would permit **the continuing exploitation of our minds and *our money*.**
>
> Now that the movie industry has discovered the black market, we have the obligation to insist that the door be opened all the way. **We must work in the creative and production part of the industry, as well as participate in the distribution of films. Our contribution must be more than consumption at the box offices to see a few black actors.** Our rewards in return should be **strong images of a proud people** and increased purchasing power from our investments, our creative energies and our employment. [emphasis mine][22]

It's worth noting that at the time Junius Griffin made his attack in the *New York Times*, there were only three Black films released that would become part of the blaxploitation canon — *Sweet Sweetback's Baadasssss Song* (1971), *Shaft* (1971), and *Super Fly* (1972). So there wasn't any "constant bombardment" of images of Black people on the big screen. Further, none of these three films actually featured rape; and none of these three films presented violence or murder in a gratuitous manner, but rather within the context of self-defense or murder of Black people committed by white cops. As far as drugs go, the depictions of drugs (mostly in the film *Super Fly*) were reality-based and in-line with what was happening in the 1970s. Lastly, these three films were broadly respected by critics, especially *Super Fly*. Roger Greenspun's 1972 *New York Times* review reflects the multi-dimensional nature of *Super Fly*:

> The film's gut pleasures are real, and there are a lot of them. But, they always connect with one another in a world so precisely, cruelly, excitingly ***balanced*** that there is no movement without countermovement, no pressure without a greater pressure in return. It is a world of the most limited options—all leading to the question of being in or getting out. [emphasis mine][23]

[22] Junius Griffin, "Black Movie Boom — Good or Bad?," *New York Times*, December 17, 1972. (emphasis mine).
[23] Roger Greenspun, "'Super Fly': Ron O'Neal Has Lead as Narcotics Dealer," *New York Times* Aug. 5, 1972.

Junius Griffin's assessments that Black people deserved to work in "the creative and production part" of the film industry and that Black people's contribution to film merited more than box office consumption were correct. However, once you know that Griffin was angling to create a Black film review board — likely staffed by himself and other Black leaders from the '72 PUSH Expo meeting — you can see this shakedown for what it really was.

In addition to their coordinated smear campaign, the PUSH-Expo collective of Black leaders *insisted that there must be a Black review board to "approve proposed scripts and to 'pre-edit' completed films before they reached theaters."*[24] Gordon Parks (director of *Shaft*) and other Black filmmakers and actors like Ron O'Neal rejected this idea outright. Black filmmakers saw CORE's proposed Black film review board for what it was: censorship. The other issue with the concept of a Black film review board was that it raised several important questions. First, *who* gets to decide what Black people *want* to see about themselves? Second, should Black filmmakers hide the realism of Black life, particularly in the ghetto, to fit the *idea* of Black identity that some (double-dealing) Black civil rights leaders have? And is such an effort ultimately an attempt to appease the white gaze? Third, what constitutes a "healthy" image of Black people?

Writing in the same 1972 *New York Times* article, "Black Movie Boom — Good or Bad?," Gordon Parks offered this view:

> I haven't seen many black films. So I do not pass judgment upon them. I did see "Sounder." It was a beautiful and important film. And I would like to feel that I could say the same of "The Learning Tree." But both films speak of an era that **young black people, now in the heat of revolt, tend to reject. They do not want to endure again the cruelties and indignities inflicted on black people in the past; *they cannot identify with the men and women, however gallant, who suffered that voiceless time.* They refuse to look back. Their eyes are on the future…. The most important thing to me is that young blacks can now, if they work hard enough, enter an industry that has been closed to them for so long.**
> [emphasis mine][25]

[24] "Black Movie Boom — Good or Bad?," article introduction, *New York Times*, December 17, 1972. (emphasis mine).
[25] *Ibid* (emphasis mine).

Gordon Parks's response to the attack by Griffin and the other PUSH-Expo collective of Black leaders is instructive. First, Parks points out that *Sweet Sweetback's Baadasssss Song*, *Shaft*, and *Super Fly* weren't the only three Black films released by 1972; they were, however, the only Black films that the PUSH-Expo collective singled out. Here, Parks is making the case that Black film was not limited to one genre or image of Black people, but representative of a multidimensional spectrum of Black experience. Parks further cautioned that at a time of "revolt," *young* Black people were less inclined to show up to movies that depicted "the cruelties and indignities inflicted on black people in the past." The point here being that young Black people wanted to see *action*! They wanted to see images of themselves fighting back. Further, what one must then understand is that blaxploitation films also represented a fight to define Black identity. This fight was particularly relevant to the Black youth of the '70s because they had rejected fantasy (*Sounder*) and softer, more complacent images of Black people in favor of realism and strength. And it is this realism and strength of blaxploitation films that carried over to the hip hop generation of the late '80s/early '90s.

Next, Parks sympathized with young Black people who wanted (*needed*) to see not just images of strong Black people but, more importantly, Black people that they could identify with. In many cases, this meant presenting the realism of Black life, especially as it occurred in the inner city.

Finally, Parks stressed access to the film industry for young Black people. (A foreshadow of how hip hop/rap music gave young Blacks access to the music industry.) These three themes that blaxploitation films represented — a reclamation of Black identity, access to a major entertainment industry, and representation of realism through art — would prove once again to be a beacon for young Blacks, as 20 years later the blaxploitation cultural space would be used by the Black youth who pioneered the sampling tradition of hip hop/rap music.

It's against the backdrop of the blaxlpoitation controversy of 1972 that I'll continue my examination of blaxploitation films collectively. Also, here, I would like to add a disclaimer: *Super Fly* is my favorite movie of all time, not just my favorite *blaxploitation* movie. I can't stress how much influence this film has had on my life, personally and professionally. It's unfortunate that a fine film such as this has been reduced to the term "blaxploitation". My second favorite film is *Let's Do It Again*, and my third favorite film is *Claudine*. This means that my *top three* favorite films of all time are so-called *blaxploitation* films. I believe that this context is critical to the discussion in the following section because it demonstrates the respect, admiration, and affection that I hold for '70s Black American cinema. And this is something that's embedded in me; it's not a residual appreciation that comes about perhaps while researching a topic one knows little about. Like many other Black Americans born in the '70s, I'm attached to these films because they have always been much more than entertainment for us. It's because of my deep connection to '70s Black American cinema, and my reverence and appreciation for it, that I've given considerable care to this section.

My examination of these films and the significance that they hold for sampling in hip hop/rap music doesn't come from the perspective of a researcher doing fieldwork. As most Black American sampling pioneers of the '80s and '90s *I lived in the field* that I'm examining. I was raised on a steady diet of these films. And the first time viewing these films was a rite of passage. I didn't encounter these films for the first time in the mid-2000s as the subject of an academic article. Nor am I an *invited* participant observer. My "firsthand" insight, my "insider's look" exists because I've always been on the inside. I believe this demonstrates my level of familiarity with the meanings, messages, and nuances of these films. And I'm confident that it shows a level of comprehension of (and connection to) these films that a scholar without this familiarity does not have. All of this bodes well for the following examination.

***

Principally, blaxploitation films were about the reclamation of Blackness. By the end of the '60s, the Black liberation movement had made serious headways, and Black music had become more direct and upfront in its messaging about Blackness. Before James Brown's "Say It Loud — I'm Black and I'm Proud" (itself an overt action for the reclamation of Blackness), the use of the term "Black" was frowned upon, a direct reflection of how many Blacks at the time had internalized our society's derogation of Blackness.[26] In 1971 — seven years after Sam Cooke's "A Change Is Gonna to Come," three years after "Say It Loud — I'm Black and I'm Proud," five years *before* Stevie Wonder's "Black Man" — the seminal film *Sweet Sweetback's Baadasssss Song* was released. Written, directed, edited, scored, co-produced by, *and* starring Melvin Van Peebles, *Sweet Sweetback's Baadasssss Song* was the first film to come to market that would bear many of the familiar characteristics that collectively defined blaxploitation films. It was also *the* film that kick started the new path for the reclamation of Blackness through cinema.

Sweet Sweetback's Baadasssss Song tells the story of a poor Black man from Los Angeles who, after being orphaned and having grown up in a 1940s brothel, works as a sex-show performer. (The name "Sweet Sweetback" was given to him by the women in the brothel in honor of his large penis and sexual prowess with women.) One night, two LAPD officers show up at the whorehouse to arrest Sweetback for a murder he didn't commit. On the way to the police station, the officers arrest a member of the Black Panthers named Mu-Mu, and they hand cuff him to Sweetback. After Mu-Mu insults the officers, they take both men out of the car, uncuff Mu-Mu, and beat him. Seeing this, Sweetback turns his cuffs into brass knuckles and beats the officers unconscious. The rest of the film follows Sweetback's life on the run, depicting his cunning in escaping both the authorities and other threats.

Sweet Sweetback's Baadasssss Song was shot in just 19 days on a budget of $150,000. It grossed *$15.2 million* at the box office,

[26] Randall Kennedy, "How James Brown Made Black Pride a Hit," New York Times, July 20, 2018 https://www.nytimes.com/2018/07/20/opinion/sunday/james-brown-say-it-loud-50-years.html.

103 times its production budget[27], proving to Hollywood that films featuring Black people, particularly with militant themes and a Black hero, could be profitable.

As a genre, most Blaxploitation films shared fundamental location, character, story, and plot elements. The stories in these films were typically situated in the inner city, most often the ghettos of New York, Los Angeles, Chicago, Oakland, and Detroit. The characters in blaxploitation films usually included four primary groups. First, everyday Black people just getting by in an oppressive and racist system. Second, hustlers — drug dealers, pimps, prostitutes, and thieves — who survive (and prosper temporarily) by preying on other Blacks in the same ghetto. Third, white villains, usually in the form of dirty cops and corrupt politicians. Fourth, Black heroes, aka "super Blacks". Usually, the super Blacks were not straight-laced, and often they were not beyond crime themselves; in fact, sometimes they are the heroes *because of* their criminal activity. Fundamentally, these films, even the ones that seemingly glamorized crime and bigger-than-life criminals, sought to show Black people as multidimensional human beings, somethhing that was a welcome change to the stereotypical images of Blacks that appeared in the movies up to then. And the specific stories of blaxploitation films focused on unity, love lost and gained, reconciliation, revenge, and even horror. Typical blaxploitation plots included: big drug deals (aka "scores"); *fighting back* against "the man" (shorthand for corrupt, racist white people who controlled the unjust system that oppressed Black people); hilarious capers that revealed the inner workings of Black ghettos; and Black love against all odds.

Notably, blaxploitation films depicted socio-economic disparity and explored race relations, especially racism against Blacks, typically showing how everyday Black people lived throughout the country. Finally, what the quintessential blaxpotation film was perhaps most successful at was its ability to accurately portray Black American cultural spaces on the big screen *in spite of* any negative images or story scenarios. Even in the films with "Super

[27] Box office numbers according to The Numbers, https://www.the-numbers.com/movie/Sweet-Sweetbacks-Baad-Asssss-Song#tab=summary.

Blacks" — *Shaft* (1971), *Super Fly* (1972), *Cleopatra Jones* (1973), *Slaughter* (1972), *Truck Turner* (1974) — there was a level of realism that exemplified the way things actually were for Black people living in the ghetto. Speaking in an 1972 interview on the "Black Omnibus" show hosted by James Earl Jones, Ron O'Neal, the star of *Super Fly*, attested to how he and many others actually saw *Super Fly* as a positive thing, and how the controversy around the film was misplaced:

> Obviously, I consider it a positive one or I never would have done the film…When we begin to discuss the criticism of Black films, you have this duality involved. This two-level thing, you see. You have **the man in the street**. **His *actual* condition**, **the way he *actually* lives**. The way we *actually* live in America. And then you have all the things people keep going around saying, you see. And when we made *Super Fly*, we made it about the way things *actually* are. [emphasis mine][28]

As a cultural space, blaxploitation films lead to many different inside references among Black Americans in the '80s and '90s. These references included jokes, oft-repeated dialog, and street philosophies; and all of these references, in some form or fashion, made their way into hip hop culture and then into hip hop/rap music. The blaxploitation films cultural space doubled as a community that allowed Black Americans to see many different things about ourselves and to come to deeper terms with the actual conditions that we lived (live) in. This realism made its way into hip hop/rap music and led directly to what we now commonly recognize as "reality rap," a raw style of hip hop/rap music that *keeps it real* and tells how it actually for "the man in the street."

Blaxploitation films were culturally, historically, *and* aesthetically significant to the Black American pioneers of sampling, and this undoubtedly contributed to how they sampled the music and dialogue of these films. It must be noted, however, that this parallel didn't exist for white American sampling pioneers, like Arthur

[28] "Blaxploitation Backlash | Ron O'Neal and Hugh Robertson in 1972" | "Black Omnibus" show hosted by James Earl Jones (1972) https://www.youtube.com/watch?v=S7WkW2PT0e8.

Baker, Rick Rubin, Double Dee and Steinski, Paul C., and DJ Shadow, because they didn't participate in the Black cultural space of blaxploitation films, even if they did see any blaxploitation films.

Sampling '70s Black American Cinema, aka "Blaxploitation" Films, is About Sampling a Piece of Blackness

It's the Feel, Aesthetic, and "Hard Life" Message – Not The Political Message

The literal political message was often just the surface of why hip hop/rap artists sample blaxploitation films. And note: The sampling of blaxploitation films that took place in late '80s and early '90s was only done by Black hip hop/rap artists. So as a topic, the political message component is far less revealing than some commentators may think. Musciologist Joanna Demers's analysis and conclusion that hip hop/rap artists sample blaxploitation films because of the *political* dimension of these films is not entirely (or often contextually) indicative of what's really going on.[29] For one thing, sample-based beatmakers (producers) often sample the music and dialogue directly from the film itself, *not* the soundtrack.

When Black American sample-based hip hop/rap musicians sample, they're sampling the very essence of this time period. Speaking as a Black American sample-based hip hop/rap musician, I can tell you that this permits us to stay connected to this time, to relive our connection to this Black cultural space, and to assert our collective identity.

Further to this, Demers has said that there are "[t]hree elements" that "explain blaxploitation's allure in contemporary hip-hop: its use of theme songs or anthems, its overt politicisation, and its fascination with the ghetto or 'hood'."[30] But are these the only three elements? Demers does not properly identify other, more critical elements, such as the connection that hip hop/rap artists who grew

[29] Joanna Demers, "Sampling the 1970s in Hip-Hop" *Popular Music*, Jan. 2003, Vol. 22, No. 1 (Jan., 2003), (Cambridge University Press), 43-51.
[30] Demers, 48-49 (emphasis mine).

up with these films held with them, or the hood-life lessons and messages that these films gave young Blacks. For instance, *the rules of the ghetto*, *survival of the fittest*, *racial inequality*, *having style in what you do* —All of these things still serve as guides in the hood today.

Wu-Tang Clan has a song called "Ron O'Neal" (2014); this is less about a "fascination" with the ghetto or "hood," as Demers puts it. Blacks, like myself, who've lived in the ghetto/hood are not "fascinated" by it. Inasmuch as we value where we live and come from, we honor both our celebratory life within the hood and our survival of the hood. For Black American sample-based hip hop/rap musicians (late '80s – mid-'90s), '70s Black films reinforced the ebbs and flows, the soulful dynamics of our lives in the hood. In this regard, we were not thinking about "theme songs or anthems," or "overt politicization" of the '70s Black films. We understood well the messages of these films. And no message was more important than the message that Black people are multidimensional people who love, have fun, and fight (right or wrong). Historically, this multidimensional portrayal of Black people has not been a feature in American cinema. So for white writers writing about Black music who aren't familiar with this systematic dismissal, one-dimensional rendering of Black life often miss or fail to recognize the importance of this message. Thus, for us, sampling '70s Black films was (is) about sampling our lives, the *feeling* of a time that made us feel good about ourselves, a time that made us feel seen. And crucial to '70s Black cinema was the connection that it made between Black music and everyday Black life, especially in the ghetto/hood.

A Crystalized Connection

In the movie *The Mack* (1973), the story of an Oakland ex-con turned super pimp, the "Players' Ball" scene stands as one of the most majestic, alluring, regal, real, and, unfortunately, misogynistic scenes in American cinema. It's also a primary point in the film where reality imitates art. An annual gathering in Detroit to celebrate pimping and the "Mack" (pimp) of the Year seems like something invented for the cinema. But the Players' Ball was a real event. And

it's this sort of unflinching reality about and commentary on ghetto life that powered 1970s Black American cinema, otherwise known and poorly mislabeled as "blaxploitation" films.

'70s Black American cinema crystalized the connection between Black music — mostly soul, funk, and jazz — and everyday survival in a country dominated by systematic racism. As a distinct genre of film made overtly and unapologetically for Black people, '70s Black American cinema — which emerged during a time of incredible civil strife in America and a rise of militant Black pride — featured themes that riffed on Black unity, Black love, Black joy, Black pain, Black struggle, and Black deliverance. Typically, these themes were expressed through plots wherein Blacks where the heroes, Black villains were traitors to the community, and whites were cops (usually dirty) or basically just bad people all around.

'70s Black American cinema was the first real widespread representation of Black American people on the big screen. And while it was a powerful force throughout the '70s, its impact on Black Americans born between the late '60s and late '70s cannot be overstated. All of the Black sample-based beatmakers of the Pioneers/Avant-garde period and post-pioneers periods bear a connection with these films. The music of '70s Black American cinema was sampled, first and foremost, *because* of this connection — not nostalgia or the "overt politicization" found in these films.

Demers's commentary doesn't illustrate how important these films were to Black people, or the role that these films played as a Black American cultural space. As such Demers's analysis of blaxploitation films is void of critical context and therefore incomplete. Although her examination (criticism) of the link between sampling in hip hop/rap music and blaxploitation films is accurate in some areas, her analysis is ultimately flawed. The main reason for this is that she grounds her analysis in the belief that the impetuous for sampling blaxploitation films and Black American funk and soul music of the '60s and '70s is owed to *political* Blackness, or a yearning duplicate Black political life of this era:

> the music of **this period, 1960s and 1970s funk and soul, is credited as being the unique utterance of resistance, *hence***

> **its recycling as hip-hop rhythm loops and accompaniment.** Sampling has contributed to the belief that 1970s politically minded musicians were the first to code 'blackness' acoustically as a free, *resistant identity* rather than a willing victim to governmental oppression. [emphasis mine][31]

While a link between the political message of 1960s and 1970s music can certainly be made, hip hop/rap's recycling of this music is far less about uttering an overt political statement as some scholars like Joanna Demers have implied. As previously mentioned, Demers, draws, in some cases, incomplete and exaggerated conclusions about the link between sampling in hip hop/rap music, 1960s and 1970s funk and soul, and blaxploitation films. By cherry picking hip hop/rap groups like Public Enemy — who, despite being commercially successful, functioned as an overtly political act — and by not offering a deeper survey of the sample-based hip hop/rap music that existed during the same era as Public Enemy, she overstates the significance of the "political message" as a primary reason why 1960s and 1970s soul and funk was sampled by hip hop/rap music artists. This was one reason for *some* hip hop/rap recording artists; and really it was more of an auxiliary reason. This was not, however, the predominant reason for *most* sample-based hip hop/rap music artists between the late '80s and mid-'90s, the time of hip hop/rap music's sampling heyday. But for *all* of these artists, the primary reason was *they grew up with this music*, and they still had this music at home in their families' record collections. In this light, then, we should understand that what underscores the sampling of 1960s and 1970s soul and funk music for Black American sample-based hip hop/rap musicians (still even today) is the desire to remain connected to a specific musical heritage, to serve as the continuum of that heritage.

Next, regarding the "departure" from the political message of 1960s and 1970s funk and soul,[32] Demers does not factor in that the use of this music by *non*-political street artists like Smoothe Da Hustler and Snoop Doggy Dogg (whom she cites) was a choice

[31] Demers, 52.
[32] Demers, 48-53.

based on feel and aesthetic. Marley Marl, N.W.A., A Tribe Called Quest, King Tee, EPMD, Main Source, Gang Starr, Ice Cube, Brand Nubian, Pete Rock & CL Smooth, De La Soul, Nas, Wu-Tang Clan, Black Moon, The Notorious B.I.G., The Pharcyde, Mobb Deep, Jay-Z — *ALL* of these hip hop/rap acts sampled 1960s and 1970s funk and soul. Yet, *their* choice to do so was not, by and large, political decision. The recycling of the music from this period was predominantly about capturing the *feel* for this period, both emotionally and aesthetically. And it was about maintaining a connection to the Black cultural space from which this music was created and nurtured.

To the specific point that the recycling of 1960s and 1970s soul and funk music is more about capturing the feel for this period, both emotionally and aesthetically, my song "4 Years In Paris" (2023) illustrates this point, so it's worth detailing how I built the beat around a sample from a song from the soundtrack to the movie *Truck Turner* (1974). There's a scene in *Truck Tucker* where Dorinda, a "mama" who oversees a "stable" of prostitutes, hosts a gathering. On the *Truck Tucker* movie soundtrack, this score music is listed as the song "Dorinda's Party." However, the scene is not really a "party," it's actually a business meeting for big-time pimps. Dorinda's pimp, Gator, a hard-nosed criminal has just been killed by Truck Turner (Isaac Hayes), and she wants revenge. She promises the entire staple of prostitutes to the pimp who kills Truck Turner and avenges Gator's death. During this scene, where some pimps take the offer and other refuse, the song "Dorinda's Party" plays in the background as score music. Notably, there's nothing *political* about this song. I sampled a snippet (roughly 4 bars/8 seconds of this score music), then added drum programming and additional percussion. The song, about my life in Paris after moving from New York, completely reccontextualizes the "Dorinda's Party" sample, resulting in a new work with a completely different meaning and purpose that's helpful to anyone who's made the challenging decision to leave their country and live abroad. Because of my strong connection to the movie *Truck Turner*, I was able to recall the "feel" of that scene; and that led me to sample it. Other Black American

sample-based hip hop/rap musicians have made their music drawing on similar connections. All of this is critical context for properly situating the link between the sampling tradition of hip hop/rap music, 1960s and 1970s funk and soul, and blaxploitation films.

Here, it's necessary to mention that Demers's analysis reveals two critical points of accuracy when covering this topic. First, a commentator who does not recognize that '70s Black cinema ("Blaxploitation" films) was a specific Black cultural space will also fail to recognize how these spaces function(ed) for Black Americans. Typically, then, in this scenario the commentator relies on areas and themes most accessible to *them*; in doing so, they elevate such themes (and sometimes distort them from their true context in Black cultural spaces) above other critical themes within these Black cultural spaces that they are not privy to. As such, the commentator, who may accurately assess some other areas of the subject, are limited in his capacity to properly asses the *value* of such Black cultural spaces, and how they are used to foster new Black art forms. In Demers's cases specifically, this means that her hypothesis for *why* hip hop/rap musicians sample '70s Black cinema ("Blaxploitation" films) is mostly flawed.

Second, Demers's analysis shows, without the critical context of the blaxploitation cultural space that was collectively experienced by hip hop/rap artists, it's difficult to depict the impact of '70s Black American cinema on sampling in hip hop/rap music (and hip hop in general). Further, Demers's commentary reveals that even with a slight *awareness* of a Black American cultural space is not enough when writing about it. Without the *experience* of a Black American cultural space, or at the very least without the included insight of those who have experienced it, any attempt to fully comprehend such a space will be flawed.

Demers also gets keys facts wrong about some of the details in the movies that she cites. In discussing the movie *Super Fly*, for instance, she remarks that Freddie, an underling of Priest, the central character of the film, "is murdered by his boss's rival." This is misleading and inaccurate. In *Super Fly*, Freddie, who's been arrested and is facing sure prison time, flees the police and is struck

and killed by a random car. At another point in her article, Demers writes: "…**the connection between Priest, a 1970s *pimp*,**"[33] again, another critical detail that's wrong. Priest was not a "pimp," he was drug dealer. The difference, particularly in the context of these films, is significant, particularly as these films often established a crime sor "evil" hierarchy that still rings true in the hood today: That a drug dealer is the worst, and a pimp is the lesser of two evils. This understanding is vital to Priest's character and his arc in *Super Fly*.

But more egregious than getting key details in *Super Fly* wrong is Demers's description of a pivotal scene in the *Mack*:

> On the Mack soundtrack album, 'Brothers Gonna Work It Out' **includes a brief dialogue from the film in which the brothers — Goldie, a pimp, and Olinga, a Black Panther — *argue about how best to survive on the streets.*** Olinga says to Goldie, 'You really don't understand, do you? Hey man, don't you realise that in order for us to get this thing to work we've got to get rid of the pimps and the pushers and the prostitutes, and then start all over again clean?' Goldie responds, 'Hey look, nobody's pushing me anywhere, okay? Not you, not the cops, not the pushers'." [emphasis mine][34]

First, the argument between Goldie and Olinga was *not* about "how to best survive on the streets." Olinga, Goldie's younger brother, was the leader of a militant Black nationalist organization, and he wanted Goldie to join his cause: To fight a racist and unjust system that kept Black people down. Goldie's actual and *full* response is this: "Hey look, nobody's pushing me anywhere, okay? I mean, Not you, not the cops, nobody, man. ***I mean, you wanna get rid of the pushers, I'll help you.*** But don't send your people after me"(*The Mack*, 1973).

It's essential to understand that Goldie *agrees* with his brother Olinga when it comes to the drug pushers, and that he also recognizes the problem with "the system." As such, Goldie is willing to help Olinga (in part) by getting rid of the pushers. But Goldie refuses to give up the pimp game because it's *his* "business" and what he considers to be a lesser evil. Olinga responds by telling

[33] Demers, 49.
[34] Demers, commenting on and quoting the film *The Mack* 53.

him: "Aw, come on, John [Goldie's given name]. Can't you see that we can't get rid of one without getting rid of the other? We have to come down on both of 'em *at the same time* in order for this whole thing to work for the people." Goldie and Olinga's discussion is not an argument about "how best to survive in the streets," as Demers describes it. It echoes the serious debate that was being had in Black American ghettos at the time; and the message was clear: Drugs, prostitution — *all* of the crime created by "the system" was bad, and it all had to go in order to clean up the ghetto and help Black people. Because Demers's criticism lacks this critical context and meaning, her criticism is flawed and misleading in key areas. Further, even the title of the song, "Brother's Gonna Work It Out" was lost on Demers. "*Work it out"* is colloquial term that roughly means "to find a resolution to a disagreement between two or more parties." The title of Willie Hutch's song — which serves as double entendre for the biological brothers Goldie and Olinga in *The Mack* and "brothers" in general, i.e. Black men (Black people) — foreshadows Goldie's arc and evolution by the end of the film. An arc and evolution that parallels Priest's arc and evolution in *Super Fly*.

Because Demers has a narrow view of blaxploitation films, no doubt due to her limited experiences with the full spectrum of these films, she misses a critical point about blaxploitation films as a Black American cultural spaces. That while these films belonged to the same era and cinematic landscape, Black Americans did not lump all of these films together as if they didn't have their own depth and dimension. Black Americans processed these films separately, even though we understood that they represented collective aspects of the Black American experience. Lacking this understanding, Demers (and any commentator without this understanding) is limited in her ability to comprehensively analyze the connection between blaxploitation films, hip hop culture, and sampling in the hip hop/rap music tradition.

Next, the filmography that Joanna Demers relies on does not exemplify the depth of '70s Black American cinema (blaxploitation films). There weren't just "a dozen films;" there were at least *36*

films that personified the recognized collective '70s Black American films. Moreover, Demers listed only blaxploitation *crime-action* films. Missing from her list are important Black films of the period, including: *Claudine* (1974), *A Hero Ain't Nothin' But A Sandwich (1978)*, *The Education of Sonny Carlson* (1974), *The Wiz* (1978), *The Bingo Long Traveling All-Stars & Motor Kings* (1976), *Cornbread, Earl and Me* (1975), *Lady Sings the Blues* (1972), *Melinda* (1972), *Detroit 9000* (1973), *Buck and The Preacher* (1972), *Cotton Comes to Harlem* (1970), *J.D.'s Revenge* (1976), *The Spook Who Sat By the Door* (1973), *Let's Do It Again* (1975), *Mahogany* (1974), *Water Melon Man* (1970), *Hammer* (1972), *Black Sister's Revenge* (initially released as *Emma Mae*) (1974), *Thomasine & Bushrod* (1974), *A Piece of the Action* (1977), *Brothers* (1977), *Aaron Loves Angela* (1975), *Short Eyes* (1977), *Penitentiary* (1979), *The Black Six* (1974), *Black Samson* (1974), *The Legend of Nigger Charley* (1972), *Black Shampoo* (1976), *Trick Baby* (1972), *Willie Dynamite* (1973), *Dr. Black, Mr. Hyde* (1976), *No Way Back* (1976), *Blind Rage* (1978), *Death Journey* (1976), *Leadbelly* (1976), *Car Wash* (1976), and *The Fish That Saved Pittsburgh* (1979).[35]

Finally, Demers claims that in their sampling of blaxploitation films, hip hop/rap artists "conflated" the "allure of anti-heroes" within these films:

> …the blaxploitation era is remembered as a time when *soundtrack artists* were conflated with the movies for which they composed.
>
> Works such as 'Rat Tat Tat Tat' and 'Smoothe Da Hustler', in which a theme song is used to epitomise the mood of a blaxploitation film, **err in *conflating the allure of its anti-heroes* with the political commentary of the artists who actually recorded the songs.** The few instances of critical self-reflection that are to be found in blaxploitation reside in the soundtracks, whose messages are usually obscured by the larger-than-life caricatures who dominate the screen. [emphasis mine][36]

[35] We see a similar thing at work when looking at the scholarship of many white writers covering sample-based hip hop/rap recording artists. In that spectrum, groups like De La Soul, the Beastie Boys, and Public Enemy get much of the attention, while other pivotal acts and producers like Gang Starr (DJ Premier), Wu-Tang Clan (RZA), A Tribe Called Quest (Q-Tip), Main Source (Large Professor), and Buckwild get little to no attention.]

[36] Demers, 48, 53.

Demers assumes that: 1) Hip hop/rap music artists lacked the intellectual capacity to understand the political messages (and their contradictions) of the blaxploitation films that they sampled; and 2) That these hip hop/rap artists *did not know* that they were eliciting contradictory messages in the ways that they used the samples of blaxploitation films. Here, it's Demers who lacked the understanding of what was really going on with the motives of artists like Dr. Dre, Snoop Doggy Dogg, and Smoothe Da Hustler. All three of these hip hop/rap artists understood the references of the blaxploitation films that they sampled, which is precisely *why* they were successful in *intentionally* drawing the contradictions that resonated with and appealed to each artist's *intended* audience. This was lost on Demers, a white woman writing about the connection between sampling in hip hop/rap music and blaxploitation films in 2003. She was not the intended audience, and she made a literal assessment, *missing entirely the joke*. Dre, Snoop, Smoothe Da Hustler, and other hip hop/rap artists understood their source material, and they knew that their primary audience (Black Americans ca. 1988 - 1997) did, too. To claim that their "error" was in conflating the message, that *they* didn't get the political messages of (some) blaxploitation films is to claim that they didn't know what they were doing when they were *intentionally* mixing the messages and flipping the messages on their heads at times. It's like saying that an artist who *set out to* make a parody of a work they know very well didn't understand the work to begin with, and therefore, the parody failed.

In sampling songs from the soundtracks of blaxploitation films, these hip hop/rap artists weren't concerned with whether or not they were "conflating the allure of its anti-heroes with the political commentary of the artists who actually recorded the songs." Rather, they played off of the references and moods of these films in ways that suited their artistic, aesthetic, and emotional goals.

I, like many of my Black American contemporaries, grew up on '70s Black cinema (blaxploitation films). And to experience blaxploitation films as a Black American cultural space is to *live* with these films. It means having seen these films *many* times

growing up, memorizing the lines, and recontexttualizing both the funny and dramatic moments of these films; it means using the lines of these films as sources of guidance *and* jokes; it means understanding *all* of the Black American cultural references in these films; it means having an appreciation for the music of these films and the emotional connection that it fostered. Once you understand this, you recognize that the reason why hip hop/rap artists sampled the music *and* dialogue of blaxploitation films was not, first and foremost, about tapping into or departing from their political message. It was about maintaining and expanding the connection to this Black American cultural space, both emotionally and aesthetically.

Lastly, it must be pointed out that '70s Black television shows, which were all sitcoms, also figured into this '70s Black cinema cultural space. Black '70s shows like "Sanford and Son" (1972), "Good Times" (1974), "The Jeffersons," (1975), "What's Happening!!" (1975), "Baby, I'm Back" (1978), and "That's My Mama" (1974) formed a critical piece of the '70s Black cinema cultural space. And like Black films of the '70s, these '70s Black television shows have long been sampled in hip hop/rap music. But unlike blaxpoitation films, where the music of the films and their soundtracks are (were) sampled as well as dialogue, when it comes to '70s Black television shows, it's typically only the dialogue that is sampled. Still, as with the sampling of blaxpoitation films, the primary reason for sampling Black '70s television shows was not merely political. Rather, it's also about sampling the feel, the vibe, the mood, the aesthetic, and often the messages of Blackness that still resonate to this day. A great recent example of this is Kareem Idris, SadhuGold, and Dark Lo – "Illustrious Zap Guns" (2020), produced by SadhuGold. This song features samples of dialogue from one of the most intense episodes of "Good Times."

Source Material As a Cultural Space

The Records Were Already There

Marley Marl, the father of hip hop/rap's music modern beatmaking tradition and the man who spearheaded hip hop/rap music's major sampling era, remembers his early source material for sampling this way:

> [T]he reason I even used, **went back to the break-beats was because I remembered. When I went back and started making records, after what I realized with sampling what I could do! *They made me go back to my brother and them records. I started digging in my brother and them crates.***[37]

What stands out about Marley Marl's account is that he "remembered" and went "back" to his brothers' records for source material is not that it represents a unique occurrence, but rather it represents the typical scenario for all of the early Black American pioneers of hip hop/rap's sampling tradition. Marley's account speaks to the fact that, before "digging in the crates" inside of used record stores became a staple of the sampling tradition of hip hop/rap music, the first "digging" occurred *at home* because the source material was already there.

Part of the reason why James Brown records became a popular source among sample-based hip hop/rap musicians isn't merely because of their drums but simply because James Brown records were a constant stronghold in the record collections of many Black Americans of the '60s, '70s, and '80s. Soon after Marley Marl first began sampling James Brown records, others followed; and they were aided by the fact that they already had the very same James Brown records at home.

This digging in the crates at home was its own Black cultural space. If you had the records, if you *lived* with the records in other Black American cultural spaces, you knew the source as soon as you

37 Author interview with Marley Marl, first published in *The BeatTips Manual, 6th Edition* (2015), (Superchamp Books, New York).

heard the sample. This level of familiarity — and subsequently the kind of sampling that it lead to — simply did not exist for those outside of this Black American cultural space.

Revered lyricist Rakim has also testified to this Black cultural space and the advantage that it gave pioneering sample-based hip hop/rap artists:

> [T]he beats were probably what first caught my attention. **I already knew a lot of the original tracks that the beats came from, because my moms and pops had a real deep record collection,** but hearing those breaks spun… But now you had a way to make music without a four-, five-, or ten-piece orchestra backing you up. If you knew how to spin, cut, and sample, *it was all right there*."[38]

DJ Toomp, one of the pioneers of trap music and a founding figure in Atlanta's hip hop/rap sound, paints an even vivid picture of what it was like to be immersed in the music that would become the primary source material for the early sampling pioneers in hip hop/rap music:

> It was just a natural thing. Like I can almost paint the picture, man. Just imagine 1975. Between '73 and '76, or just the whole '70s and '80s era, mostly '70s. **Man, we were the type of family, you know, me, my mom and dad and my sister, we'd jump in the car on a Saturday night or a Friday night and go to this big record store, Peaches Records and Tapes,** they used to stay open real, real late. Man, whatever record I'd been listening to on the radio, they'd buy me a 45, and whatever my sister had been loving, she'd get her a set of 45s. My dad would get his albums, Earth Wind & Fire and all that, and my mom would get her Minnie Ripperton. So if you got a family of four people in the '70s going to the record store on the weekends, just kicking it. And I used to— My sister had a little record player in her room and my mom and dad had theirs, so me and my sister had to take turns. But then when mom and dad get tired of playing records, we go down there and play on the big speakers, you know what I'm sayin'…So we'd go down there and play it on the big speakers. And I used to just listen to records until I'd fall out on the floor. My sister would still be going through hers. **So it's like the love for music, man, was just ALWAYS in**

[38] John O'connor, "An Interview with Rakim," *The Believer* (April 1, 2020) https://www.thebeliever.net/an-interview-with-rakim/.

> **the household.** On a Sunday, when we cleaned up, we might let a Heat Wave album play all the way through, or Earth, Wind & Fire. Temptations. Christmas time, we'd play that famous Temptations album, just let it play.[39]

One of the reasons that the sampling tradition of hip hop/rap music exploded in the way that it did is precisely because the chief architects of the art form already had the source material at home. Having literally lived with this music, they knew exactly where to look; and they knew the rhythms, melodies, and *feels* of this music by heart: It was all recall and rediscovery! And as competition among these chief architects took hold, they — notably Marley Marl, Easy Mo Bee, DJ Premier, RZA, Large Professor, Pete Rock, and Q-Tip — attacked every stitch of the records that they already had, either in their own household or secondary households, like their uncles', cousins', and grand parents' homes. This was another pre-existing Black American cultural space that was not experienced by white pioneers of sampling, like Arthur Baker, Rick Rubin, or even Paul C.

As household record collections became exhausted, "digging in the crates" became a primary practice for finding new source material for all sample-based beatmakers. In other words, as the hip hop/rap and beatmaking traditions expanded in the United States, so did cultural diversity among its regular practitioners. Within the hip hop/rap community, especially the sub-community of beatmaking, the interconnections between Blacks and whites increased, resulting in broad, tight-knit multicultural networks where many cues, meanings, social and creative priorities of Black American culture were picked up by whites. For many whites, this cultural exchange was encouraging, as they were able to successfully tap into the same canon of Black American creativity that their Black contemporaries were able to. But for some whites, particularly those well-grounded in their own personal cultural memories — memories that prioritized different aesthetic and creative principles as well as different interpretations of originality and metrics of

[39] Author interview with DJ Toomp, first published in *The BeatTips Manual, 6th Edition* (2015), (Superchamp Books, New York).

excellence — this cultural exchange was less motivating.

Over the years, I've found that people raised within or more familiar with the Black American cultural space that I described earlier are generally less hostile towards the art of sampling. On the other hand, in various conversations that I've had on and off the record with white recording engineers, musicians, other creative professionals, and acquaintances, I've found a number of them to be condescending, and sometimes quite hostile, towards sampling as an art form. This is certainly not to say that there aren't any Blacks who aren't hostile towards sampling, or that there aren't any whites who look very favorably upon sampling. After all, perceptions of sampling have as much to do with race as they do with concepts of originality, authorship, and creativity; and there's also the issue of class among traditional musicians and electronic-based musicians. Still, race and cultural background are serious factors that can't be ignored if we're interested in discussing the misconceptions and negative perceptions of the art of sampling in an honest manner. (In chapter 15, I provide a detailed examination of the role that race plays in music, copyright law, and attitudes towards the art of sampling.)

Lastly, although hip hop/rap music is squarely a part of mainstream American culture, with participants representing a number of different races and ethnic groups, it is still largely a Black music form driven predominantly by Blacks. As such, this provokes a racial bias against hip hop/rap music itself, especially by some critics of the art of sampling.

Continuum Record Collections As a Black Cultural Space: A Distinct Dimension

Recalling his time with Wu-Tang Clan on their first tour bus in 1993, Raekwon had this to say about the Clan listening to music together:

> "Best of all, we shared the music we loved and discovered that we all loved the same shit. ***This was music we'd heard as kids,*** **all the great soul music that brought back memories….** it was nothing but oldies and classics on the stereo: Marvin Gaye, the Jacksons, the Stylistics, the Delfonics. **All of us would reminisce and share stories,** then we'd play a show at night and party after." [emphasis mine][40]

Even when going to record shops and digging for records (samples) became en vogue and an activity more broadly experienced by white sample-based beatmakers (producers), the continuum of Black record collections, the special connection to Black record collections, was something that set Black sample-based beatmakers (producers) apart. This connection was never (could never be) the same for those who didn't grow up with the music in the same way that Black people did. Engaging with the music you grew up with provokes a number of nuanced effects that are associated with and triggered by personal memories. These effects — collectively a heightened sensibility for everything from sound frequencies to lyrics — influence *what* you sample and *how* you sample and arrange it.

Every Black beatmaker (producer) in the late '80s and early '90s, just like Raekwon, had heard the music they sampled all of their lives. At times it may have been different songs, but it was the same *feeling*, the same themes, the same sonic vibes, the same frequencies, the same *memories*. This music guided and shaped us; and from our collective memories, it forged a collective psyche. Turning to this music, as source material to sample, meant reconnecting with our

[40] Raekwon, *From Staircase to Stage: The Story of Raekwon and the Wu-Tang Clan*, Gallery Books, New York (2021) Amazon Kindle version, 166.

collective cultural history. In many ways, beatmakers (producers) like Marley Marl, DJ Premier, RZA, Pete Rock, Q-Tip, and J Dilla, *already knew* how to sample precisely because they knew *what* they were sampling. They understood how the arrangements worked and what powered the grooves; the intricacies of the intros, breaks, and bridges; the improvised sounds within unique grooves. And above all, these beatmakers (producers) shared a sense of rhythm with this music.

By contrast, with no such record collection at home to dig in and live with, with no such connection to offer the same kind of guidance, it's impossible to duplicate the impact of growing up in this Black cultural space. Fortunately, however, what *is* possible is to study the music of this Black cultural space. There's no substitute for an experience that existed before one's time. No one can go back and relive the '60s, '70s, '80s, and '90s. But if you want to have even the slightest chance of getting a *feel* for the music, you have to study the rhythm from where it came. In other words, having the knowledge of an era means that one can still study the era and learn from it. And equipped with this knowledge, any sample-based beatmaker (producer) can make beats with the same soulful feeling.

To be good at sampling in hip hop/rap's sampling tradition, you have to know and have a feel for the core music that sampling was built upon. Knowing this music guides you in your approach in sampling *any* form of music. This is a central principle that many sample-based beatmakers (producers) fail to absorb. Focusing too much on the functionality of beat machines and technical processes, they miss the essence of connecting with the music. As a result, their beats sound technically correct but lack *feeling*.

And further with regards to feeling, you have to study the feeling of the music of the musicians that you admire. This means tracking their creative pathways. You want to be like the greats, you need to understand what the greats were doing. Not in the sense of romanticized theories, but in the sense of how they all approached the music in a *collectively similar* fashion and *why*. Again, music and race are never neutral. Being honest about this fact helps us to learn. Turning to empirical evidence, if we're honest about the

dominance of Black beatmakers (producers) in this space, we can recognize the most well known white sample-based beatmakers (producers) in hip hop/rap music. In no specific order, the names that should come to mind include: Double Dee and Steinski, Paul C., Rick Rubin, The Dust Brothers, DJ Shadow, RJD2, DJ Muggs, Alchemist, Jake One, Marco Polo, Statik Selektah, Paul Dukes, Daringer, Stu Banger, and Nicholas Craven.

Now, think more specifically about an all-time list of hip hop/rap sample-based beatmakers (producders). Let's say, top 10. Or top 50. From that list, objectively speaking based on catalog and impact, where would these afformentioned names be reasonably placed? An equally revealing question would be, what were the kinds of samples that they typically used and what was the sound and feel of their beats; are there any collective patterns that we can observe? For example, when we think of the names like Marley Marl, DJ Premier, RZA, Pete Rock, Q-Tip, Dr. Dre, J Dilla, Large Professor, Prince Paul, Buckwild, Havoc, Kanye West, Just Blaze, The Heatmakerz, etc., we can observe at least one collective pattern: An overall soulful sound and feel, even when the source material is not soul or funk. I believe the correlation is obvious. Reared in the same cultural space, raised on the same music, it's no coincidence that their music share this large collective feel and pattern.

By contrast the aforementioned white sample-based hip hop/rap beatmakers (producers) didn't grow up in the same Black cultural spaces that I've described. So it's understandable that the correlation doesn't *naturally* apply to them. Still, when we compare the catalogs of Rick Rubin and Double Dee and Steinkski with the catalogs of Paul C. and DJ Shadow, we do see a contrast. Rubin was rock-'n'-roll or sparse drum-machine-sounds based; Rick Rubin wasn't soulful or funky. Double Dee and Steinksik were experimental, not soulful or funky. Paul C., however, was soulful and funky! DJ Shadow was funky! DJ Muggs? Soulful! Alchemist? Soulful! Jake One? Soulful! Statik Selektah? Soulful! Marco Polo? Soulful! Daringer? Soulful! Nicholas Craven? Soulful! The difference with the latter group of nine names is that it's obviously clear that they all have a feel for the core music that sampling was built upon.

Blind Spots: Race, Racism, and Copyright Law – Sampling Criticism's Catch 22

Any serious criticism of the history hip hop/rap music can't ignore the role that race and the art of sampling have played in its development and dominance in culture today. To discuss race, perhaps more specifically, to discuss Black people and the race issues that surround us, you need knowledge of these issues. Without serious knowledge of these issues, you can't write accurately about them. If one writes criticism about an art form first popularized and still dominated by hip hip/rap music *without* discussing the elephant in the room, one's criticism of sampling and hip hop/rap music, no matter how comprehensive it seeks to be, will ultimately be incomplete, lacking critical context, and likely misleading.

If we exclude the significance of race and racism and how they have historically impacted Black people, there can be no comprehensive discussion about the art of sampling, hip hop/rap music, and copyright law, especially when you consider that Black music artists remain at the center of this very discussion. This is not a "pro-Black" statement; it's a statement of historical and cultural fact. And this is the "catch 22" of sampling criticism. The commentators and authors who have written about (and are still writing about) hip hop/rap music and sampling are predominantly white; and in most cases, they have blind spots in the areas of race, racism, and copyright law. This makes for criticism that is lacking both in key facts, critical context, and indispensable nuance.

If a commenter does *not* discuss race as a factor in sampling in the hip hop/rap music tradition and the implications that it holds for copyright law, we have no choice but to see this act for what it is: An implicit denial of the role that race plays in hip hop/rap music, sampling, and copyright law. Therefore, while the absence of a serious discussion about race, within the broader topic of hip hop/rap music, sampling, and copyright law, does not necessarily render

a commentator's research irrelevant as a whole, it does however render his research incomplete, and in some cases misleading. Remember, hip hop/rap music is never on an equal playing field in terms of the American musical hierarchy paradigm; and it is naïve to believe that race and racism do not impact this paradigm.

In this vein, when we talk about inherent biases and how they shape a commentator's research and subsequent hypotheses, we must also be honest about a commentator's inherent blind spots and how they affect their research and dissemination of that research. Said differently through the prism of an analogy, if a white commentator sees Eminem as the best hip hop/rap lyricist of all time, we can't expect then that this commentator's discussion of the history of lyricism in hip hop/rap music will be informed by an appreciation for, or serious study of, the lyricism and impact of hip hop/rap lyricists like Melle Mel, LL Cool J, Rakim, Kool G Rap, Big Daddy Kane, KRS-One, Nas, Raekwon, Prodigy (of Mobb Deep), O.C., Mos Def, Ghostface Killah, and Jay-Z.

Blind spots aren't limited to race, but in the case of copyright law, it's a compounded blind spot. The history of copyright law, how it's taught and observed in practice, means that knowledge of copyright law is often a blind spot for most commentators, regardless of race. Still, there's a difference that suggests that Blacks have more blind spots in this area than whites. In America, *85%* of all lawyers are white, just *5%* are Black; *73%* of active federal judges are white — 83% of the court's sitting judges are white); 71% of law professors are white, 62% of law students are white, just 7.8% are Black.[41] We can infer a number of different things from these figures, especially when we factor in copyright ownership in traditional media, but key to our discussion is this. White commentators are much more likely to know a lawyer, have a favorable experience with the court system, and know someone who owns intellectual property. Combined, however, with a lack of understanding of how copyright law in America has historically worked against Black music artists, and combined with an incomplete understanding of the sampling tradition of hip hop/

[41] ABA 2019 Report: Lawyer Demographics.

rap music, white commentators writing about hip hop/rap music, sampling, and copyright law are less likely to include, or account for, the role that race and racism plays in shaping the discourse around sampling.

The Commonwealth of Tradition: *Communal Creativity and the Concept of Originality in the Black Music Tradition*

Originality, which is not often a definable aspect of a work, has always been a minimum requirement for a work to receive protection under copyright law. In this spectrum, *originality* implies that an author or artist has created the work through his own skill, labor, and judgment. But that being said, *how* is originality actually defined, and more importantly, *who* gets to define it? Chapter 16 provides answers to this question more broadly and from a historical perspective. This section, however, examines the notion of originality in the Black music tradition, and shows how most criticism about the art of sampling never includes any mention of it.

When most commentators discuss sampling and copyright law, they typically ignore how originality actually works, specifically this means not acknowledging the role that the communal creativity has played (and continues to play) in shaping American culture for more than 200 years, especially so in the Black (African American) music tradition. This is unfortunate because such notions of originality and communal creativity are at the forefront of what fair use is supposed to be: A recognition and protection of communal creativity. Moreover, communal creativity is not a new concept; in fact, it's one of the fundamental ways in which Western classical music developed.

To properly examine notions of originality within the Black music tradition, one must first understand the role of communal creativity. In the Black music tradition, the concept of music *as community* (common) property is crucially important. From field songs to the advent of the blues tradition, the foundation for nearly all forms of twentieth-century American popular music has

one common creative psychology: The idea of borrowing other people's music and creating new musical expressions on top of it. The goal of creating new musical expressions through such processes as versioning, improvisation, and the like is paramount to Black music tradition. Moreover, this central focus on and process of communal creativity in the Black music tradition is more in line with the objectives of copyright than has previously be observed.

Musicians and singers in a culture that prioritizes communal creativity draw freely from the culture and creative environment that surrounds them. They inhale common musical themes, styles, and attitudes, and then rework and transform what they've taken in, all in accordance with their own style, sound, and other creative influences. This means that transformativeness, which is a defining element of the first and most important factor of fair use, is central to music cultures that engage in communal creativity.

In the Black music tradition, once musical expressions and ideas are introduced to the community, they flow into a common well, where the most pivotal and popular musical practices, priorities, aesthetics, elements, styles, and expressions form a musical canon or what I like to call "the mix." And it is the mix — the grand communal musical canon, the *commonwealth of tradition* — that all musicians (artists) are encouraged and expected to draw new streams of musical expressions and texts from. And the mix (i.e. the communal musical canon) is not treated as private property. So for example, the jazz musician who borrows a well known blues melody to build something new never feels encumbered but rather empowered to do so because he's fully invested in a shared cultural system; he's borrowing from the commonwealth in order to *add* to the commonwealth. In this way, musicians (artists) of the Black music tradition are rewarded for their mastery of the canon as well as the uniqueness of their own individual contributions.

Further, in the Black music tradition, the terms "new" and "original" are associated with the concept of using the Black musical canon while *adding* something to it, particularly through one's own individual style, creative instincts, ingenuity, and influences. This is entirely different than the mythical notion of originality that sees

originality as something that does not constitute the practice of borrowing. In the Black music tradition, something "brand new" really means a new individualized *extension* of what already exists in the musical canon. This is the heart of sampling in the hip hop/rap music tradition, and yet most writers offering criticism about sampling and hip hop/rap music fail to recognize this.

Historically, in the Black music tradition, musicians have simultaneously relied upon using, exploring, revising, and extending the common aesthetics, tropes, and ideas from within the tradition. In other words, what constitutes originality and creativity in the Black music tradition is one's ability to add their individual take — their own style, version, rendition, signature, flavor, etc. — to the works and ideas (especially within the canon) that already exist. Aside from sampling in the hip hop/rap music tradition, there are two other excellent examples of the priority of communal creativity within the Black music tradition. In the jazz tradition, the aforementioned use of blues "standards" (well known blues songs) as the foundation or inspiration for new jazz compositions is not only common, it's expected. To the jazz pioneers of the 1930s and 1940s, some blues standards were seen as common source stock — "raw material" as Justice Story would call it[42] — that is available for all to create on top of, i.e. to use as the foundation for new works. In thoses cases, there were no overriding concern for *authorial* originality as many commentators mistakenly define it.

When we look at the earliest days of hip hop/rap music, we must remember that Kool Herc picked up a new style of funk DJing from John Brown, an older DJ and fellow South Bronx resident. Having gotten his cue from John Brown, Herc began showcasing the new

[42] "In his 1990 Harvard Law Review article, Toward a Fair Use Standard, 172 Judge Leval encouraged courts to attend more closely in their fair use analyses to the degree to which a defendant's use was 'transformative.' Judge Leval argued that in weighing "the strength of the secondary user's justification against factors favoring the copyright owner," 173 the court should consider if 'the secondary use adds value to the original-if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings,'174 because **'this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.'** Barton Beebe relating Patry, see Barton Beebe, "An Empirical Study Of U.S. Copyright Fair Use Opinions, 1978-2005," *University of Pennsylvania Law Review* Vol. 156, No. 3 (January 2008), 622.; Pierre N. Leval, Toward a Fair Use Standard, 103 *HARV. L. REV.* 1105, 1106-07 (1990) (footnotes omitted) (emphasis mine).

style at his parties and park jams. Soon, other DJs, most notably Grandmaster Flash and Afrika Bambaataa, keyed in on what Herc was doing and followed suit. Each DJ brought something new to the mix. For instance, Flash brought his technical precision and new style of blending record breaks, and Bambaataa brought his dubious style of imploring record breaks from a more extensive collection of records. In all three cases, Herc, Flash, and Bambaataa added their own individual style to the mix that was already there. In doing so, they *added to* the mix, *extended* it, and created a *new* music tradition. A music tradition, it must be remembered, that was based on the key tropes and sensibilities of an older music tradition.

It must also be noted that originality in the Black music tradition is very different from the standard European model and the Romantic concept of originality, i.e. the mythical concept of originality that many still like to believe in to this day. In the Black music tradition, distinction is achieved through one's individual mastery and unique exploration of the musical canon. Unlike the European model (as best observed in the Western classical tradition), where originality is grounded in the abstract knowledge of the composition, the Black music tradition has historically considered originality also in the context of *value added to the whole*, often without any emphasis on the composition.

Finally, because copyright law is so embedded in Western literary tradition, it doesn't appropriately address the Black music tradition's *oral* tradition. Orality is central to American culture in general, but it is and has always been particularly important to Black culture, especially because of slavery in America. Lest we forget, the peculiar institution of slavery in the United States made it *illegal* for enslaved Africans to read or write. Thus, the significance of the oral tradition in Black (African) American culture is deeply rooted in the history of American slavery, the Reconstruction period, and the Jim Crow South. As such, orality has always been vital to the Black music tradition, not the written composition.

In his discussion of Western assumptions about music notation, scholar Olufunmilayo B. Arewa has noted that:

> "**[t]he origins of musical copyright law are rooted in a particular, restrictive notion of the musical work (defined as a combination of melody and harmony) and its fixation in graphic form (the musical score).** Thus, from the outset, copyright law *valorised composition* (and by extension, the composer) over performance as a form of musical practice ... and, as a result, many forms of music not based in notation-including various types of folk music, jazz, and indigenous people's music-**have not been well served by copyright.**" [emphasis mine][43]

And in oral traditions, style matters a great deal; it's a big part of what ultimately determines originality. Along with sound, style is one of the primary ways in which individuals distinguish themselves. Further, notions of authorship in oral traditions are grounded more in individual stylization than anything else. A contemporary extension of this notion of originality can be found within the use of auto-tune, a popular vocalization technique. No one can say that auto-tune *belongs* to rapper T-Pain. In fact, T-Pain was certainly not even the first person to popularize the vocoder (a device that pre-dates auto-tune); that distinction perhaps is better reserved for the late R&B singer Roger Troutman. However, T-Pain is a pioneer of auto-tune because he is considered to be one of the recording artists who used this vocalization technology and technique best in hip hop and R&B. T-Pain's use of auto-tune stood out because of his individual stylization of it. Therefore, T-Pain was rewarded because he was one of those who used the auto-tune *style* the best. Others have borrowed from and built upon T-Pain's style and sound. Similarly, in sampling tradition of hip hop/rap music, beatmakers (producers) have borrowed from and built upon the styles of Marley Marl, DJ Premier, RZA, Dr, Dre, Q-Tip, Large Professor, Buckwild, Madlib, J Dilla, Bink, Just Blaze, Kanye West, Roc Marciano, and Alchemist. In both cases, communal creativity is at play. Any comprehensive criticism of the art of sampling,

[43] Olufunmilayo B. Arewa, "From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context," *North Carolina Law Review*, Vol. 84, No.2, 1/1/2006, 554.

especially in hip hop/rap music, requires mention of communal creativity and the notion of originality in the Black music tradition.

Finally, in describing what he calls the "originality paradox" and exploring the relationship between community, the individual, and tradition, Thomas McFarland has noted that:

> "**[t]he problem of *individual* and *tradition*…always is perceived as a vertical effect in time.** To be sure, the relationships of a cultural figure to his contemporaries form a part of this problem; yet even those relationships are perceived in terms of temporal precedencces[sic], however minute their intervals may be. The complication is thus properly schematized as an ordinate, and its **cultural spatiality is created by its opposed relationship to the abscissa, that is, to *individuality in tension with* communality.**" [emphasis mine][44]

Communal creativity in the Black music tradition, however, has always meant recognizing and embracing the "paradox" of originality. Further to this, communal creativity is an example of how in Black art, particularly Black music, individuality is never in tension with communality. Rather, Black music openly celebrates and draws from the communality; and in this paradigm, Romantic notions (false notions) of originality hold no weight.

The Influence of Music Training On Perceptions of the Art of Sampling

In addition to the cultural spaces that you participate in, your music training also plays a role in how you're likely to perceive the art of sampling. Most formally trained musicians approach the art of sampling with their embedded biases and assumptions about music, which tends to lead them to look at the art of sampling less favorably. Still, there are some formally trained musicians, particularly those who want to learn about sampling, who immediately appreciate sampling for what it is: A unique, transformative music process that has its own tradition and complexities. And then there are

[44] Thomas McFarland, "The Originality Paradox," *New Literary History*, Spring, 1974, Vol. 5, No. 3, History and Criticism: I (Spring, 1974) (The Johns Hopkins University Press), 449.

other formally trained musicians, even some who venture to learn a little about sampling, who view the art of sampling as a *non*-art or a music process unfit for "real" musicians.

Everyone's opinion and perception about art (anything in culture really) is the product of their individual perspective, which is born out of their personal cultural history and their subsequent experiences. So it's easy to see why a formally trained musician who is unfamiliar with the art of sampling — its compositional intricacies, its history, and its place in popular culture — could have a negative view of the art of sampling. This doesn't mean, however, that all trained musicians have an innate negative view of the art of sampling. For example, acclaimed beatmaker (producer) and professor 9th Wonder, a traditionally trained musician before he gravitated towards hip hop beatmakinng, related to me that he was in a band and studied music theory throughout grammar school and high school. Yet he also made it clear that when he discovered sampling as a music process and technique, he was hooked:

> I played clarinet, I played the saxophone. My band teacher was just throwing instruments at me, "Try this. Try this," because I was playing stuff by ear. And by the time I got into marching band, I was playing drums. So you know, doing that in the daytime...From 1986 to 1993 was my middle and high school years. You know the albums that came out during that time. So I'm playing — and my mom bought me a keyboard for every Christmas — **I'm playing stuff, overtures at school, but I'm coming home [at night] listening to rap records, not really understanding that the music the cats was using in the background were *samples*, you know what I'm saying. I'm thinking everybody's playing it [Laughs]. But they're sampling people that played instruments...So I was trying to replay it on my keyboard....**
>
> So I decided that I wanted to learn how to DJ...that made me really understand the importance of BPMs and how stuff speeds up and how some beats are faster and some beats are slower. You know stuff like that, and drum tracks. All that type of stuff. Knowing what songs go with what.... understand [how to do it]. **You either had to grow up around it or you had to be there, one of the two. To be authentic, you just can't wake up in the morning, man, and be like, "I wanna sample," *without understanding the art of***

> ***sampling. You just can't do it.*** **You gotta— If you wanna sample, you gotta study...**.
>
> **You gotta understand all of that aesthetic first.** Either you decide that this is something that you really want to do.... And I had to learn what all of the samplers [sample-based beatmakers] before me were doing before me, before I decided what sound that I wanted to go for.[45]

9th Wonder is particularly interesting because he *did* grow up within the Black American cultural space of twentieth-century America. Thus, in his case, we have an example of someone who is a formally trained musician, someone who was attracted to the aesthetic of sampling itself, *and* someone who was also inclined to the cultural heritage and connection that the art of sampling offers.

Hip Hop/Rap Music as the "Other"

What Is Music and How Perceived Definitions of It Influence Our Tastes and Attitudes Towards Music Genres and Traditions

Before detailing how hip hop/rap music has been *otherized*, i.e. treated as a *non-music*, here, I want to discuss how our personal definition(s) of music shapes our music tastes, attitude towards music, and, of course, our criticism of music. So let's set the floor. What *is* music? Often people confuse the definition of what music is with their own particular music *tastes*, preferences, and/or prejudices. But technically speaking, what *is* music really? Can it not be simply defined as "the organization of sound?" So then, what is it that distinguishes music from other forms of organized sound, for instance, the sound of a telephone ringing? One useful definition of music describes it as being "*the art, the craft, and the science of* organizing sound and silence in the framework of time."[46] To that definition, I would add that music is distinguished by the

45 Author interview with 9th Wonder, first published in *The BeatTips Manual, 6th Edition* (2015), (Superchamp Books, New York).

46 Michael Miller, *The Complete Idiot's Guide to Music Theory*, Second Edition, (New York: Alpha, 2005), 3 (emphasis mine).

conscious and willful *intention* to make music through the use of pre-established musical elements and properties. And it is in the area of *pre-established musical elements and properties* where the biggest discrepancies — about what exactly is or isn't music — have often been found. And what actually constitutes an established musical element or property? Perhaps a more important question is, *who* decides which musical elements and properties are important and which ones are not? Fundamentally, the answer is determined by one's background, which includes: cultural sensibilities, values, and prejudices; musical training and orientation; and the range of knowledge of music history in general.

However, as musicologist J. Peter Burkholder has aptly pointed out, there has been "no consensus for a new style, for a shared approach to music, or even for a common understanding of what music should sound like or do." Music comes in various forms and is the product of various traditions. There is so-called "serious" music, which is what we commonly understand Western classical music to be, and there is music that doesn't pretend to continue the tradition of "serious" music; this music includes *all* forms of popular music, even when popular music is serious nonetheless.[47] Finally, beyond the *musical properties* of music, we can also say that music is two other things: 1) A kind of learning (a form of knowledge); and 2) An art form. When we consider all of these definitions together, how can any recognizable music ever be described as *non*-music?

The Impact of Cultural Prejudice Against Hip Hop/Rap Music

There are three fundamental things that determine what we *hear* and appreciate as being musical. First, where we live and where we're from — the culture we know. Second, our knowledge of the traditional "rules" of music, i.e. rules and pre-set ideas about and preferences for musical approaches to harmony, melody, and

[47] J. Peter Burkholder, "Museum Pieces: The Historicist Mainstream in Music of the Last Hundred Years," *The Journal of Musicology*, Spring, 1983, Vol. 2, No. 2, (University of California Press), 115, 129.

rhythm. Third, *Who's* making the music. Reverence for music genres and the musicians who fortify them is never free of bias. And in America especially, reverence (or disdain) for music is never lacking in its consideration of race. In this paradigm, white is the "universal" and Black is always the "other"; this is particularly the case the further away elements of Black music go from the priorities and predilections of European music. Most notably in this regard is the fact that rhythm and repetition are the central focus in Black music, while harmony and linear progression are the central occupation of European music.

Music has always been conceived in different ways, especially as it relates to culture. In Chapter 3, I touched on the contrast in world views that influence how music is made and received by the culture which produces it. Music discourse, like many systems in America, is a product of cultural bias. In this regard, the Western classical music, wherein composers are seen as geniuses (often akin to mathematicians and scientists), is considered to be the pinnacle of music achievement in the Western culture. By contrast, Western *popular* music — all of which is rooted in the Black (African-American) music tradition that stems from West African cultures — is considered to be merely the work of craftsmen who are nowhere on the spectrum genius. But such a view discredits the true power of music. The true power of music is that it always celebrates the commonalities of mankind. Yet we can not accurately decipher and highlight these commonalities if we examine any music tradition from an *improper* context. And this is often the case when it comes to criticism surrounding the art of sampling. Therefore, to truly understand the nuances, priorities, and other fundamental elements of the hip hop/rap music, from its beatmaking and sampling traditions to its rap (vocal) tradition, we must always be mindful of its place squarely within the broader Black (African-American) music tradition. By examining the hip hop/rap music tradition from within the framework of both its parent tradition, the Black (African-American) music tradition, and its own distinct tradition, we gain a better understanding of its sampling tradition.

But in terms of the typical criticism associated with the art of sampling, the "otherism" cultural context is typically missing from the discussion. This is problematic because it's necessary to point out that it's precisely because of the fact that the hip hop/rap music tradition is grounded within the Black (African American) music tradition that it has, throughout most of its history, received a negative bias in American mainstream criticism, which is still overwhelmingly produced, written, edited, and published by whites. Only recently has hip hop/rap music began to be "accepted" (tolerated) as a legitimate art form by traditional music institutions and the gatekeepers of American pop culture alike. Before, these traditional spaces of criticism were only interested in hip hop/rap music as a *political* subject. And one big reason for this was because hip hop/rap music was not, by and large, actually seen as a "real" music in these spaces. But let's be clear: Today's acceptance of hip hop/rap music, and by proxy hip hop/rap music's sampling tradition, is due more to the pop-culture co-opting of hip hop/rap music than it is to a true acknowledgement or recognition of hip hop/rap's sovereign creativity and/or its canon of compositional methods and aesthetics.

Beatmakers (Producers) Are Musicians ***and*** Programmers

Just as our attitudes towards music are determined by our definitions of music and our cultural biases, our attitudes towards music are also determined by our definition(s) of a *musician* or *whom* we consider to be a musician. Thus, when it comes to hip hop/rap music, where the vast majority of music is made by *beatmakers (producers)*, this presents a serious challenge to most critics and commentators, as most tend to favor a more traditional — and subsequently incomplete — definition of a musician. Beatmakers are not "musicians" in the sense that is familiar to most critics; nonetheless, beatmakers are, by the truest definition of the word, musicians. Critics who lack this understanding are handicapped in their analysis and discussion of hip hop/rap music's music-making

processes in general and the sampling tradition of hip hop/rap music more specifically.

There's also another element that distinguishes beatmakers (producers) from other musicians, an element that represents another challenge for commentators writing about sampling: Beatmakers (producers) are also *programmers*. As I noted in Chapter 4, all beatmakers (producers), those who actually make beats, are musicians *and* programmers. The same can't be said for most so-called traditional musicians. Programming, especially in the case of drums, requires a separate set of skills. More importantly, programming does not imply less intelligence or less musicality. On the contrary, programming reflects an intelligence outside of mere musicality. Further, in the art of beatmaking, programming doubles as arrangement. And in sampling specifically, programming is the seventh component of what I call "the sample equation," a term that I use to describe the core set of processes that make up the compositional tract of the art of sampling. In Chapter 6, I pointed out that in order to really understand the concept of sampling, you must understand how arrangement works and how to weave samples (fragments of recorded music) into a montage of sound. There are two ways you can look at arrangement. You can look at it as the order and measure (length) of sounds and sequences within a song (composition), and you can look at it as the pattern in which sounds correspond sequentially within any song (composition).

In the beatmaking tradition, the compositional process is closely linked to the programming process. In fact, in beatmaking, the term "programming" can at times refer to several different processes all at once, it just depends on the context. Programming can refer to the technical organization of the compositional components; it can refer to the technical organization of the arrangement components; or it can simply refer to the process of inputting technical instructions into EMPIs, like the values for certain functions and the like. Drum programming, which is actually drum composing, specifically refers to the program (compositional) approaches beatmakers take to create their drum frameworks (drum patterns and overall designs).

Commentators who don't consider beatmakers to be "real" musicians and dismiss beatmakers, specifically sample-based beatmakers, as *just* "programmers" ignore two serious points. First, music is defined, in the simplest and most accurate of terms, as *the art, the craft, and the science of* organizing sound and silence in the framework of time. Thus, anyone who engages in this art, craft, and science is a musician. Full stop. Second, the programming activity of beatmaking is not void of intellectual vigor; in fact, one needs to understand music *and* programming to make music via the art of beatmaking. In sum, knowledge of the sample equation, and the fundamentals of beatmaking and the art of sampling as music processes, is essential to any criticism of the art of sampling or hip hop/rap music as a "serious" music form.

Musical Hierarchies

While musical value is not determined by popularity alone[48], we must also remember the inverse: That musical value is not determined by its *intellectual* nature alone. Some music is serious, some music is fun, some music can be serious *and* fun at the same time. Here, much of the dance music produced and written by the Philly soul production duo Gamble and Huff comes to mind. Or how about Pete Rock & CL Smooth's "They Reminisce Over You (T.R.O.Y.)" (1992). Point is, musical value is not limited to any one form of music or compositional method. Nonetheless, there are hierarchies, and these hierarchies are typically established and gatekept by whoever dominants a given culture.

In art, music, and literature alike, hierarchies of *perceived* superiority and inferiority, or simply rankings, are well-established and recognized in any culture. In Western music culture, Western classical music remains at the top of the pyramid, despite the fact that, today, it can't compete with popular music in terms general audience appeal. Western classical music is followed by twentieth-century American popular music forms, notably the blues, jazz (America's true "classical" music), rhythm and blues, rock 'n' roll,

[48] Burkholder, 134.

soul, country, and funk. Hip hop/rap music, which the music industry considered to be *just a fad* in the 1980s, has been relegated the bottom of the Western musical hierarchy by the mainstream music press and mainstream media in general. But keep this in mind as you read on: Today, in 2024, hip hop/rap music is the most popular music genre in the world.

The best way to understand Western music's hierarchies and rankings, and subsequently how hip hop/rap music arrived at the bottom of these rankings, is to examine how Western classical music arrived at the top. Within this investigation, the first thing we must recognize is that Western music's hierarchies or rankings, what law professor and author Olufunmilayo B. Arewa describes as "hierarchies of taste," are not based on music alone, they are based on "historical, political and cultural assumptions, categories and hierarchies" and are "underscored by the idealization of artistic production *based on a conception of Romantic authorship*."[49]

Assumptions about Western classical music, and the music forms that defer to or see it as "serious" music, revolve around what I call the *genius myth*. I use the genius myth as a coded term that represents a bundle of assumptions about music creativity, including, but not limited to, the Romantic-bred notion that the originality is free of borrowing, that authorship is divine-like and an entirely individualistic process, and that creativity is the product of divine inspiration and *not* necessarily mastery of craft. Given the obvious level of borrowing, collaboration, and cross-genre inspiration that took place in twentieth-century American popular music, we can easily see the genius myth for what it is and draw practical conclusions about originality, authorship, creativity, and performance. But what happens when we apply the genius myth to Western classical music, does the myth become reality? No, it doesn't. (*In Chapter 16, I take a more closer look at the genius myth as it was ushered forth in Europe durinng the Romantic period.*)

[49] Olufunmilayo B. Arewa, "From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context," *North Carolina Law Review*, Vol. 84, No.2, 1/1/2006, 583-84, 88, 89 (emphasis mine).

Assumptions about music process and method, assumptions about *who* is making the music, and assumptions about musical hierarchies distorts the way that critics write about music. In the case of hip hop/rap music, then, we could readily see why criticism has historically been hostile towards it. These hierarchies are further formulated by additional factors (or cultural hierarchies), such as: elitism, popularity, intellectualism (highbrow vs. low brow), race, and demographic location (big city vs. small city, uptown vs. downtown, modern suburbia vs. rural town). Taken all together, it becomes even more clear why hip hop/rap music has long been negatively evaluated and treated as the "other" by many mainstream music and culture critics. Arewa has noted that:

> **[v]iews of hip hop reflect the general use of nineteenth century *hierarchies* in describing music. Such hierarchies are also evident in the commonplace division of music into categories such as folk music, popular music, religious music and art music.** *As a result of such hierarchies, certain categories of music are depicted in light of their "otherness" in relation to the European classical music tradition.* **In the case of hip hop, 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.*** [emphasis mine][50]

Under this hierarchy paradigm, Arewa further notes that certain types of borrowings are preferred and accepted over others. So it follows that sampling, an art form fundamental to hip hop/rap music and a music compositional method practiced more in hip hop/rap music than in any other music genre in the world, is not widely accepted or seen as a *legitimate* form of permissive borrowing by the vast majority of those who have written about sampling. Naturally, then, to such critics, sample-based musicians aren't "real" musicians; so the status of their music *as music* is lowly regarded.

This slant in the criticism against sampling is furthered by the Western musical hierarchy in another critical way: Authority and guardianship. Critics and Western classical and traditionally trained musicians (especially some of the major rock acts of the '60s, '70s,

[50] Arewa, 583-84 (emphasis mine).

and '80s) tend to see themselves as guardians of Western musical culture. And as musicologist Robert Walser has observed:

> Classical musicians and critics often see themselves as guardians of musical culture, and **for most of them hip hop is beneath notice, barely worth dismissing.** But popular musicians, too — from heavy metal (Lita Ford, Ozzy Osbourne) to jazz (Wynton Marsalis, Henry Threadgill, Al DiMeola) — **have characterized rap as simply not constituting "music"**. The musicians who have wanted to deny rap the status of "music" differ greatly in the sounds they produce, *yet all share certain fundamental assumptions about what music is*: it is based on melody and harmony; it depends on a laborious process of learning to sing or to use a "musical instrument"; it is produced when human beings cause objects to vibrate. ***People who believe deeply in these premises are sometimes offended by the very idea of rap.*** For rappers don't "sing" in the usual sense of that word, and ***hip hop's reliance on sampling, whereby producers extract, manipulate, and reassemble bits of music from many sources, means that the people who make it don't play "musical instruments,"*** in the usual sense of that term; instead, they use sophisticated studio equipment to manipulate sound, often the sounds of others playing traditional instruments. In many ways, there is nothing new about criticisms of rap that spring from such assumptions, and **the debate over *rap's status as music should be seen in the light of a centuries-old tradition of cultural authorities and rival musicians missing the point of black music,*** popular music, rhythmic music, or timbrally complex music, and *concluding that such musics are "primitive."* [emphasis mine][51]

Running parallel to the musical hierarchy paradigm, and cultural hierarchies more generally, we find that there is also a hierarchy of *taste*. Where critics are concerned, the hierarchy of taste may perhaps be the most dangerous element of criticism. It's not only that critics often see themselves as guardians of music culture, they also tend to believe that their *taste* is superior to others. So as a matter of course, some critics dismiss hip hop/rap music *because* it features sampling. In their view, absent of "real" musicians playing *real* instruments and incorporating *real* compositional methods,

[51] Robert Walser, "Rhythm, Rhyme, and Rhetoric in the Music of Public Enemy," *Ethnomusicology*, Spring - Summer, 1995, Vol. 39, No. 2 (University of Illinois Press on behalf of Society for Ethnomusicology), 195.

their taste filters reject sample-based hip hop/rap music out of hand. Conversely, this taste hierarchy sometimes works in reverse. That is to say, there are some critics who do like sample-based hip hop/rap music and see it as a legitimate art form; often, they see it as "real" hip hop/rap music; at the same time, however, they look down upon other forms of hip hop/rap music like trap and drill. The irony in all of this (or perhaps not) is that as these critics are often deemed to be the authorities on music culture, they typically get the first crack at writing about — or editing those who write about — *sampling and hip hop/rap music*. In such a paradigm, it's not difficult to see how *their* taste serves to sacralize the music and musicians they choose, or how their taste serves to delegitimize the music that they reject.

Arewa offers an excellent analysis of how sacralization impacted the Romantic period:

> "**Hierarchies of taste were marked in the musical arena, where '[t]he enhanced prestige of the composers and the sacralization of their work changed ... long-standing attitudes toward them and their compositions that had prevailed throughout most of the nineteenth century ... and [meant that] singers and soloists were obliged increasingly to stick to the sacred text of the great masters.'** *As such, the sacralization process reflected the influence of Romantic author concepts in music.* The sacralization process also reflected the increasing influence of commercial forces such as the sheet music industry and the increasing commercial focus of composers more generally. Prior to the nineteenth century, composers' names were not always included in programs. **One consequence of sacralization in music was thus to enhance composers' prestige through a process akin to deification.**" Although such sacralization and hierarchies depicted ideal types, they nonetheless became **a significant cultural force. The power of such hierarchies ultimately rested in *their potential to legitimize* the social hierarchy, thus marginalizing 'the voices of all musicians who stand outside of the canon, representing those who stand at the margins of social power.'** These ***hierarchies of culture and taste are intimately and inescapably intertwined with the notions of authorship upon which copyright laws are based.***
> [emphasis mine][52]

[52] Arewa, 588-89.

Through Arewa's analysis, we can see how the sacralization of certain music forms and musicians is still a cultural force today, and how this cultural force impacts music criticism in general and the criticism surrounding hip hop/rap music and sampling more specifically.

Still, there's more than just sacralization that we have to factor into the way hip hop/rap music is *otherized* and how, by proxy, the art of sampling is devalued by many critics. Musical hierarchies also raise questions of what is and isn't "true" *art*. Further situated in the musical hierarchy paradigm are concepts of art. The more critics deem a music form to be "true" art, or the more critics deem a musician to be a "true" artist, the higher up the pyramid the music form goes, and the higher up the pyramid the musician (who makes that music) goes. Of course, this means that the inverse is true. So if hip hop/rap music isn't "real" music, then those who make hip hop/rap music (overwhelmingly Black people), aren't "real" musicians. And if they are not "real" musicians, then for many critics they can't possibly be "true" artists.

The Connection Between Music, Social Status, Blackness, Whiteness, and Criticism

This "real" music fallacy, sometimes overtly expressed by commentators, other times implied, reveals something about music criticism that dates back to the eighteenth and nineteenth-centuries and the rise of classical musical: The connection between music and social status. While the rise of American popular music certainly shares parallels with the rise of Western classical music in this regard, there's one critical difference between the elements related to status in both periods. During the rise of Western classical music, race and racism were not an issue, all of the European master composers were white and primarily from five European countries: Austria, England, France, Germany, and Italy. Put another way, race was never a factor in the *music* status of composers and musicians because race was never factor in the *social* status of these white composers and musicians. By contrast, in America, race has always been a factor

in the music status of Black music artists, because race has always been and continues to be a factor in the *social* status of Black music artists, as is the case with all Black people in America.

Because of this relationship between status and race in America, there are additional perceptions of status, *within* the hierarchies of taste, that are hardwired into most of the critics who have written about hip hop/rap music and the art of sampling to this day. I concede that in recent years, attitudes have generally turned favorable towards the status of hip hop/rap *as* music, just as attitudes towards the art of sampling have evolved among some critics. In 2000, I published the first edition of *The BeatTips Manual*, the first study of the beatmaking tradition of hip hop/rap music; it included a chapter called *The Art of Sampling*, upon which this present book has been built. Later in 2000, Joe Schloss published *Making Beats*, an ethnographic study of hip hop/rap beatmakers. In 2011, Kembrew McLeod and Peter DiCola published *Creative License*, not necessarily a deep dive on the *art* of sampling, more of a "both sides" treatise on the subject of digital sampling and copyright law. In 2013, I published the first edition of *The Art of Sampling*, followed by the revised second edition in 2015. In 2020, Nate Patrin published *Bring That Beat Back*, again *not* a study on sampling as an art form and music process, or the status of hip hop/rap music *as* music. Rather, it was more of a descriptive roundup of a multitude of the sample sources that were used in making some of the songs that helped drive hip hop/rap music's popularity. And in 2022, Dan Charnas published *Dilla Time*, a study that clearly puts the art of sampling in favorable light, but as the book is primarily focused with its subject, J Dilla, it, too, was not necessarily focused on the study of sampling as an art form, nor on the status of hip hop/rap music as music.

Except for my books, all of the other books that I've listed here were written by white people. This doesn't cancel out the work of these writers. Instead, it's empirical evidence of a larger point that I've hoped to make throughout this chapter about *who* has mostly written about hip hop/rap music and sampling and Black music generally. As I noted at the beginning of this chapter, in his book

Blues Fell This Morning: Meaning in the Blues, originally published in 1960, Paul Oliver noted that "[t]he bulk of the work, whether historical or discographical, empirical or theoretical, has been done by white writers from outside the culture."[53] In terms of Charnas, Patrin, and Schloss (who wrote a great blurb for the fifth edition of my book *The BeatTips Manual*) I wouldn't characterize them as being "outside the culture." With regards to McLeod and DiCola, however, I know less of their associations with hip hop/rap music to make an assessment one way or another, but my search for more hip hop/rap related content from these two came up short. Still, whether these writers are outside of hip hop/rap culture or not speaks little to the fact that, like most white critics, they have all come to hip hop/rap music with a social status that's higher and less complicated than the musicians foremost at the music culture and topics that they're writing about. So even operating under the belief that these five writers all consider hip hop/rap music to be "real" music and its musicians "real" musicians, and that all view sampling favorably as an art form, there's still going to be some critical context or nuance missed or distorted for the same reasons that I outlined previously in this chapter: Lack of access to specific Black cultural spaces *and* the effects of the musical hierarchy paradigm, cultural hierarchies more generally, and hierarchies of *taste*.

Turning back to those critics who display unfavorable or neutral attitudes towards hip hop/rap music and sampling, which, when it comes to sampling specifically is still substantially more than those who show favor to the art of sampling, are we to ignore the relationship between status and race in America? Are we to look away from the *additional* perceptions of status, *within* the hierarchies of taste, that are hardwired into most of the critics (and not just white ones)? Should we not consider the primray things that inform and influence their taste as well as which music genres (and sub-genres) and types of musicians that they value most? Are we to say that this has no bearing on their criticism whatsoever?

[53] Paul Oliver, *Blues Fell This Morning: Meaning in the Blues*, Cambridge University Press; 2nd edition (July 27, 1990), xxi. (emphasis mine). Note: Today, nothing has changed. The bulk of the work — articles and books about Black music — is still written and published overwhelmingly by white writers and researchers.

So much of who we are is embedded in the status and value that we give to music. Naturally, then, the status and value that critics attach to a given music form or musician affects their criticism. The idea that criticism is simply a matter of taste is misleading because taste is complicated. Taste is dictated by multiple factors, and in America, this most certainly includes race. White people in America tend to not account for race and racism in their music criticism because they don't have to account for race and racism in their everyday lives. Not surprisingly, then, most white people writing about the art of sampling and the implications that it holds for copyright law invest little to no time in examining how race and racism factors into not only the very discussion itself, but their own views and attitudes towards sampling and copyright law.

White people who listen to hip hop/rap music are not ignorant to the fact that it's a music form and culture that was created and still dominated by Black people. And despite hip hop/rap music's universal appeal, should we ignore the fact that most of the mainstream criticism written about hip hop/rap music is still written, edited, and published by white people? Are we to believe that this factor has *no* impact on criticism of hip hop/rap music and the art of sampling? Even when we consider those white writers who are "neutral" on the issue of race in music, we'd be wise to remember that whiteness isn't *inherently* fragile or sensitive when it comes to race. However, historically, whiteness has been about protecting and preserving societal power structures that place white people at the top; this has also led to many white people being uncomfortable with the topic of race and racism. Seen in this light, then, the "neutrality" that these white writers project is not due to a lack of awareness of the impact of race and racism, but rather an intentional decision on the part of these music critics to avoid their discomfort in discussing race and racism.

All writers are conscious of *who* they are; all writers understand that they are the sum of their beliefs, experiences, and ideas. And all writers know that the views and attitudes that emerge from their beliefs, experiences, and ideas shape their writing. We are who we are in *total*, which is to say that the significant parts of

our stories collectively define us as a whole; we our never defined by a single factor. Take, for instance, Dan Charnas, whose story is particularly instructive here because he is unquestionably a true hip hop head and an ally to Black people. He's also white, Jewish, and a New Yorker with some Mid-Atlantic leanings. All six of these facts contribute to who he is and influence his writing. In fact, Charnas has revealed much about himself that points directly to this multicultural, multidimensional element of who he is:

> [A]fter my parents' divorce… after I moved with my mother to Utah and then to Maryland… I lost my childhood connection with Judaism, which was inextricably linked with my father's family, with New York. When I would return for the Seders, I felt like a bit of an exile among the extended family who, by their accents and attitudes, seemed to be more plugged in to Jewish life somehow. Although born of Manhattan, I had become more a *creature* of mid-Atlantic culture. Not quite North, but not quite South. Not quite *Black*, *but not quite White* [sic]. It was that cultural ambivaland [sic] that made me who I am: Jewish, but not quite.
>
> **Jewish culture took a back seat to African-American and pop culture**. Religion took a back seat to Politics. By the time I returned *as a young man* to make my life in New York, hip-hop was my religion and my spirituality." [emphasis mine][54]

Dan Charnas is no lightweight when it comes to hip hop culture, he's within the culture and his reputation as a champion of hip hop is well-recognized. As for the "African-American" culture taking on more importance for him than Jewish culture? I'm not qualified to speak on Jewish culture, so I have nothing of value to add there. But concerning Black culture, I know very well that whites do *not* experience Black cultural spaces in the same way or from the same axis points as Black people. Further, Charnas mentioned that his childhood was split between being engulfed in New York Jewish culture and raised in Utah. Neither of these cultural dimensions bear witness to or conveys what it means to grow up in — *to be raised in* — Black cultural spaces or "African

[54] Dan Charnas, "Happy New Year, Part Two," dancharnas.com https://www.dancharnas.com/2005/10/13/happy-new-year-part-two/.

American" culture. This is an important to point to make because, while Charnas may straddle two *cultural* worlds as a white hip hop historian commenting on hip hop/rap music, his whiteness still means that he enjoys the same privilege and social status afforded to other whites. Therefore, no matter how strong he may feel his connection is to Black culture, he is still potentially liable for making some of the same errors that other whites writing about Black music have made. And indeed, as I detailed in Chapter 9, that's exactly what he did in some areas of his book *Dilla Time*.

White privilege notwithstanding, Charnas — or any other white person — is not defined *only* by whiteness; likewise, I — or any other Black person — am not defined *only* by Blackness. Nonetheless, whiteness and Blackness, especially in the contours of culture and social status, dictate many of the experiences that we have and, therefore, help shape who we are. So it's wrong and misguided to believe that this fact does not attribute to our attitudes towards music and how we discuss or write about it.

The Role of Education In Musical Hierarchies

Education is another important element within the musical hierarchy paradigm that influences the criticism around hip hop/rap music and the art of sampling. But this cuts both ways, as formal education, say academia, and practical education gained in the field, are two different but not mutually exclusive forms of education. Yet these two forms of education can have dramatically different effects on music criticism. For example, consider the following comparison.

Let's say you have two "educated" people writing about rhythm in hip hop/rap music. One is a musicologist who studies rhythm by means of traditional academic scholarship, the other is a hip hop/rap DJ who studies rhythm by means of trade. Of course, there's nothing that says thatt the experiences of these two educators can't overlap. A musicologist can also be a hip hop/rap DJ, and a hip hop/rap DJ can also be a musicologist. Here, DJ and Cornell professor Rich Medina comes to mind. But this is more the exception than

the rule. So for comparison's sake, let's operate under the norm, i.e. that typicaally (today) most musicologists are not hip hop/rap DJs, and most hip hop/rap DJs are not musicologists, at least not formally trained in traditional academia. So what should we expect the musicologist to include in his criticism when discussing rhythm in hip hop/rap music? Perhaps more importantly, what should we expect the musicologist to *exclude* (perhaps not intentionally) from his criticism? Conversely, what should we anticipate that the hip hop/rap DJ to include or exclude?

From the musicologist we should certainly expect him to reference and cite other notable *musicologists*. And we should expect the musicologist to discuss concepts and ideas well-known in the study of musicology, but less known to the general public. From the hip hop/rap DJ we should expect hin to reference and cite other notable DJs. And we should expect the hip hop/rap DJ to discuss concepts and ideas well-known to hip hop/rap DJs and those who make hip hop/rap music. Now, at first glance, this seems like a pretty straightforward parallel. And maybe it would seem like the criticism of the musicologist and the hip hop/rap DJ should arrive at similar points when discussing rhythm in hip hop/rap music; certainly, in some areas that would be case. But fundamentally the criticism will be quite different. Both the criticism of the musicologist and the hip hop/rap DJ will come up lacking in some area. Still, once you strip away terminology that's native to musicology and hip hop/rap music respectively, who will likely have *more* context and a *better* pulse on the nuances of rhythm in *hip hop/rap music*? If you said to yourself the musicologist, you now understand the problem with mainstream criticism surrounding hip hop/rap music and sampling. Mainstream cultural criticism *defers* to formal education, as formal education suggests a level of thoroughness that's associated with serious academic study. But this cannot erase that the value of experience-based education or, more importantly, the reality that the closer we are to a culture — i.e. the more we *participate* in a culture — the more information, context, and nuance we'll have to offer about that culture.

This doesn't mean that the musicologist in this scenario has no value to offer in a discussion about rhythm in hip hop/rap music; of course they do. But since one form of education is valued above the other in this scenario, as is most often the case in mainstream American culture and media, we are much more likely to read or hear from the voices of those formally educated on this subject. This is not a complicated equation. Academic publishing is dominated by academics. Trade Non-Fiction that explores topics that are primarily covered by academia defers to academia. Academic writers are (typically) formally educated. Formal education is valued above all forms education in mainstream American culture. Add all of this up and what do you get? An echo chamber? A lack of diversity? Incomplete analysis? In many ways, you get all three!

What I hope to show, then, is that, historically, criticism surrounding hip hop/rap music and sampling has always had a diversity problem. Not merely in terms of *who's* doing the writing, but also in terms of the kind of analysis being made and the ideas being put forth from that analysis. If the echo chamber continues to loop (no pun intended), attitudes towards the art of sampling remain generally the same as they did twenty years ago. If criticism is produced by the *same* set of characters — with the *same* backgrounds, embedded biases, and privileges — and they're quoting, referencing, and *advancing* the same culturally, intellectually, and socially-defunct arguments, then such criticism is, at best, incomplete and, at worst, unreliable. Fortunately, however, the works of Schloss, McLeod and DiCola, Patrin, and Charnas point towards a promising change in trend, all be it slowly, and with key context and nuance missing in some cases. To fortify this trend, then, to make criticism around hip hop/rap music and the art of sampling, those additional voices that have historically been kept out of the discourse are greatly needed.

I'm certainly not alone in my call for additional voices (particularly the voices of experts in the field) in this discussion. In 2018, "[a]n interdisciplinary group of musicians and producers, social scientists and lawyers gathered in Berlin to discuss what sampling means to musicians and consumers, and in what way

this practice challenges copyright law. Prof. Dr. Susanne Binas-Preisendörfer reflected the history of ***sampling as transformative art*** in her lightning talk about sampling as a cultural technique…," and "she reminded the participants *how long sampling has been an issue in music* and implied that it is still as relevant as it used to be." At the same gathering, DJ and Producer Hans Nieswandt noted the cultural value of sampling and "**the need to include experts from the field into the discussion."** Observing the heart of the discussion, writer Jana Leusing commentated that, "[a]fter a four-hours debate, it became clear that sampling is an essential form of transformative art and has been used as an artistic expression for more than three decades."[55] But even with shifts in attitudes towards sampling, part of the reason that the art of sampling continues to remain controversial is because of legacy attitudes towards sampling. And the legacy attitudes have just as much as to do with the question of art as they do with the questions of social status and musical hierarchies. Remember, sampling still remains, by far, most prominent in hip hop/rap music.

"True Art" and the Associated Value Assumptions

Although the concept of "true" art has changed dramatically since the nineteenth century, a time when "Western popular culture and art" became "entirely distinct from high art in the minds of the public,"[56] notions of what *is* or isn't true art is another factor that prompts negative attitudes towards sampling. In this spectrum, the first issue is that sampling is a widely accessible art form. As musicologist/ethnomusicologist Robin Moore has noted, **"[o]ur culture promotes the idea that any art form accessible to large numbers of people is in some way inferior to those which are**

[55] Jana Leusing, "The future of sampling – transformative art or copyright infringement?" *Digital Society Blog* (March 27, 2018) https://www.hiig.de/en/future-sampling-transformative-art-copyright-infringement/ (emphasis mine).
[56] Robin Moore, "The Decline of Improvisation in Western Art Music: An Interpretation of Change," *International Review of the Aesthetics and Sociology of Music*, Vol. 23, No. 1, (Jun., 1992), (Croatian Musicological Society), 76 (emphasis mine).

more difficult to understand."[57] So regardless if the art of sampling has its own complexities, its own intricate compositional practices, its own ideologies, and its own aesthetic, it's largely dismissed *because* it's accessible to large numbers of people. But isn't paiting accessible to large numbers of people? Anyone can buy a canvas, some paint, and paint brush and have at it. The difference is that painting is considered to be "true" art, so the value associated with painting assumes two things that reflect poorly against sampling. First, that there are tiers of talent in the art of painting, i.e. an *obvious* degree of difference in the level of talent between painters. Second, that painting is transformative.

As sampling has not been considered to be an art form by most critics who've written about it, the general assumption (that remains to this day) is that there are *no* tiers of talent in sampling; which is to say that all sample-based musicians are the same: *talentless* hacks who do not (*cannot*) create anything "original". This is why one common refrain from critics of sampling is that sampling is nothing more than cut and paste. Even among less hostile critics, the idea that the art of sampling is *tainted* in ways that other art forms and other music processes are not. Critics who believe deeply in these premises subscribe to pre-set **"[c]onceptions of what 'true art' should be,** and how the ***average*** individual should relate to it."[58] Implicit to such conceptions, however, is that the "average individual" shares a *universal* experience with the critic; and this universality is based on elements of social status, sometthing that has long influenced our view of life and art:

> *"The exaggerated antithesis between art and life, between the aesthetic and the Philistine, the worthy and the unworthy, the pure and the tainted, embodied in the host of adjectival categories so firmly established at the turn of the century,* ***has unquestionably colored our view of culture ever since"*** (LEVINE 1988:232).[59]

[57] *Ibid*, (emphasis minne).
[58] Robin Moore, "The Decline of Improvisation in Western Art Music: An Interpretation of Change," *International Review of the Aesthetics and Sociology of Music*, Vol. 23, No. 1, (Jun., 1992), (Croatian Musicological Society), 76.
[59] *Ibid*, Moore quoting Levine (1988).

There are some who'd like to believe that criticism surrounding the art of sampling has nothing to do with much of what I've outlined in the previous sections about race, musical hierarchies, social status, education, "true" art and the value assumptions associated with. Some critics of sampling say that sampling is just an ethical issue involving a process that's less about music making and more about "plagiarism." (*This latter criticism actually personifies that point that I've been making.*) But one example of how race, musical hierarchies, social status, education, concepts of "true" art and the associated value assumptions has everything to do with mainstream criticism sampling is the double-standard style commentary around the recording artist known as Girl Talk.

In his prime (ca. 2008 – 2010), Girl Talk (Gregg Gillis), a white sample-based beatmaker (producer), loudly boasted that his music was a form of art, and that it was also fair use. Some critics went right along with this, describing what Girl Talk did as "collage," "pastiche," "post-modern," all well known art terms that legitimized Girl Talk's sample-based music as "true" art. Thus, these critics ascribed "meaning" to Girl Talk's work that is usually not applied by critics to sampling in hip hop/rap music. For example, Peter DiCola, co-author of *Creative License: The Law and Culture of Digital Sampling* (2011), a book that features Girl Talk "**as the star in the introductory section of**"their book, has said that "Girl Talk is *creating collage*," and that "there are *patterns and meaning* in Girl Talk's selection and arrangement of samples."[60] A 2010 *Village Voice* article referred to Girl Talk as the "mash-up *artiste* extraordinaire" who served as "inspiration for award-winning think pieces."[61] Conversely, some critics have attacked sampling via Girl Talk, while at the same time praising *Girl Talk's brand* of sampling. And notably, what's clear is *how* these critics dismiss sampling from the complexity and legitimacy angles, but they elevate Girl Talk at the very same time.

[60] Peter DiCola, "What We Talk About When We Talk Girl Talk," *Sounding Out* (April 18, 2011) https://soundstudiesblog.com/2011/04/18/what-we-talk-about-when-we-talk-girl-talk/ (emphasis mine).

[61] Rob Harvilla, "Girl Talk's New Album, All Day, Is Available For Free Download," *Village Voice* (November 15, 2010) https://www.villagevoice.com/2010/11/15/girl-talks-new-album-all-day-is-available-for-free-download/ (emphasis mine).

To this point, Tim O'Neil wrote this in *Pop Matters* in 2008:

> [t]here is no doubt that the more *complex* these mixes become, the more rarified their appeal. At some point, much as modern composition alienated mass audiences (at least in part) by elevating the critical vocabulary of the academy to such prominence as to represent a prerequisite for basic comprehension, these type of *postmodern pop collages* risk sacrificing their legibility in exchange for intricacy.
>
> **That's the *beauty* of Girl Talk: it's not just a gimmick.** Totally by coincidence, just last week I happened to be listening to Night Ripper for the first time in a while, and I realized that the album was still as good as the first time I'd heard it, if not better. It wasn't just the surprise of hearing all the familiar hits rubbing up against each other — that wears off quickly. On the contrary, ***the canny musicality*** that I had detected on first blush shone through even after the gimmick had faded. **Girl Talk's *collages* are so effective because they work with the music itself…**
>
> Girl Talk is contributing to a very long lineage of conceptual *innovators* **stretching back all the way to Thomas Edison,** a stream of *engineers* and *musicians* dedicated to liberating music from the tyranny of direct representation of physical sounds. [emphasis mine][62]

Notice the key words reserved for Girl Talk? *"Complex," "postmodern," "collages," "comprehension," "beauty, the canny musicality," "conceptual," "innovator"* (no, seriously?) *"Thomas Edison"* (Thomas Edison???). O'Neil even seems so self-aware and self-conscious of his gushing praise of Girl Talk's sampling that at one point he writes, "but don't take ***my pseudo-intellectual pontification*** as proof of anything."

Praise or not, discussions of Girl Talk's music sometimes include discussions of sampling that aren't entirely accurate or lacking in the proper context and nuance. Take for instance how DiCola defines sampling: "Sampling means using existing sound recordings as part of new sound recordings." This is *technically* correct but

[62] Tim O'Neil, "Girl Talk: Feed The Animals," *Pop Matters* (June 22, 2008) https://www.popmatters.com/girl-talk-feed-the-animals-2496143268.html.

still somewhat misleading. The choice of the word "existing" is a curious one. Overwhelmingly, what is understood when we talk about sampling, especially in hip hop/rap music, is the use and transformation of "old" songs (and other sound recordings). Sure, *old* is also *existing*; but this is not a game of semantics. Sampling, especially as it's done in hip hop/rap music, is a story, in part, of subtle and direct implications. "Old" is always implied; that's a major part of the aesthetic. Although "existing" is technically correct, it doesn't really capture the essence of what sampling is widely understood to be. Anything recorded and released is "existing." But "existing" implies the present, and sampling is much more about interacting with the past, even if does at time sample the present. Therefore, DiCola's choice of the adjective "existing" is bit of a misdirection that pulls the eye away from the focus on history.

Next, DiCola's use of the phrase "as part of new sound recordings" is, again, technically correct, but it doesn't really get at the heart of the "raw materials" aspect of sampling most often found in hip hop/rap music's sampling tradition. But to be fair, the "raw materials" model is only one transformative use model. Still, this model is a bit misleading if readers are interested in understanding the art of sampling as it's done in hip hop/rap music.

Turning to DiCola's definition of mash-ups, however, he's spot on:

> Mash-ups, in my parlance anyway, are ***a sub-category of sample-based music.*** **A mash-up artist usually does not distort the samples too much;** mash-up artists tend to combine just two or three samples at any one point in time—the samples remain recognizable to the listener. ***And mash-up artists tend to add very few (if any) sounds generated originally by themselves.*** I leave musical quotation, allusion, and other forms of musical borrowing (or appropriation, if you prefer) out of this definition. In other words, sampling means using sound waves recorded at an earlier time—perhaps (1) editing or manipulating them, (2) combining snippets of multiple existing recordings, and/or (3) adding sounds generated by the sampling artist herself—but **using *the literal sound waves* as basic material nonetheless**.[63]

[63] Peter DiCola, "What We Talk About When We Talk Girl Talk," *Sounding Out* (April 18, 2011) https://soundstudiesblog.com/2011/04/18/what-we-talk-about-when-we-talk-girl-talk/]

But even here, DiCola wanders into a cold, lifeless (merely technical) description of what sampling is. Contextually, sampling is *not* about using "sound waves" as basic material. A sample of a snippet, from say, Donny Hathaway's "Little Ghetto Boy," a song about life growing up in the ghetto, is certainly about much more than just capturing a "sound wave." Samples have literal, contextual, and conceptual meaning.

In Chapter 5, I stated that by the coldest, technical definition possible, sampling is simply the act of digitally recording a sound. I further noted that in my interview with musicologist Dr. Lawrence Ferrara, he described sampling as "taking a portion of an existing sound recording and inserting that portion of the sound recording, either exactly the same way or manipulating it some way, but the point is taking that [portion] of a sound recording and inserting it into a new sound recording." In parting from the bare-metric definitions of sampling, I pointed out how, in its most fundamental context in the hip hop/rap music tradition, sampling is the *artistic process* of extracting fragments of pre-recorded music from old songs (usually vinyl records but nowadays any audio format, including mp3s, wav files, YouTube, and more) for the use of making new beats (music).

Also in Chapter 5, I outlined *nine* different definitions that can apply to sampling: 1) Sampling Is Sound Collage; 2) Sampling Is A Technique, Method, and Compositional Style; 3) Sampling Is Versioning; 4) Sampling Is Fine Art; 5) Sampling Is Referential Music-Making; 6) Sampling Is Digitally Recording a Sound; 7) Sampling Is Referential Music-Making; 8) Sampling Is *Musique Concrète*; and 9) Sampling Is Musical Recycling.

Finally, under the literal heading "What Is the Art of Sampling? Consider the Context first, then the Meaning, Purpose, Value, and Conceptual Understanding," I stressed the importance of defining sampling, first and foremost, contextually and by its meaning, purpose, value, and conceptual understanding before anything else. The point that I'm making is that it's important that we do not focus on overly simplified definitions of sampling. The kind of definitions that detach meaning from the art and function of

sampling. The other reason why I argue that sampling should be defined more comprehensively is because most commentators who discuss the art of sampling lack a comprehensive understanding of what sampling actually is, so they tend to defer to the simplest, most technical, reductive definition of sampling. And this is no coincidence.

To understand the misrepresentation that's going on here, consider what commentators — all of us really — typically do *not* say when defining what music is. Nobody ever simply says, "Music is the arrangement of sound over time," even though, *technically*, that's true. But that's too reductive, and we know that. Instead, we add more context and meaning to the definition of music, and we include the purpose, value, and conceptual understanding in our descriptions of what music is, precisely because we know more *comprehensively* about what music is. Our experiences and participation with music leads us to make these *value-judgment* based definitions of music. On the other hand, this means that the converse is also be true. When an individual is limited in their understanding of a music form or music-making process, not only is he limited in *how* he defines it, he also tends to ascribes a lower value judgment to it, or at least he describes only the value judgment that *he* thinks that it has.

When DiCola says, "[i]n other words, sampling means using sound waves recorded at an earlier time," he's not wrong, but his definition is incomplete. These types of reductive, technical definitions are not meant to really inform readers about what sampling actually is, but rather what sampling is in terms of a technical process. While the technical process is also important — I devote a number of chapters in this book to the technical and compositional sides of the art of sampling — a fuller, more accurate definition must be paired with sampling's functional, contextual, and conceptual meanings.

Sampling "*means* using sound waves…" Left alone, unpaired with no additional discussion of the function of sampling or how sampling can be at least nine different things at once, this reductive definition of sampling (and others like it) allows commentators to

focus on the technical and frame sampling in a way that reinforces musical hierarchies and social status. All commentators know the audiences that they are writing for, so it also follows that they know what appeals to and what is more accessible for those audiences. Defining what sampling is in mere technical terms benefits people who prioritize such definitions in the absence of a real-feel, more comprehensive definition. Moreover, being reductive about what sampling is and short cutting its definition in this way strips the art of sampling from its undeniable connection to those most responsible for shaping and popularizing it. And in that case, it permits commentators to avoid having to discuss this aforementioned connection, which allows for the whitewashing and revisionist history that typically follows.

Let's not forget, DiCola and his co-author Kembrew McLeod "risked adding to the overexposure by featuring Girl Talk *as the star* in the introductory section" of their book.[64] In other words, although DiCola and McLeod were very much aware of the fact that Girl Talk was already talked about a lot — and that even with some negative criticism of his work, he was often misrepresented as the best example of what the art of sampling is — they *still* made him "the star" of the introduction to their book about "the law and *culture* of digital sampling." So in a book about the "culture" of sampling and the implications that it holds for copyright law, *their* star, the sample-based musician they lead with and presented to the world as the *best* example for understanding this topic, was a white sample-based musician *not* from hip hop/rap music, the music form and genre that first popularized and still dominates the art form? *Their* "star" and best example was not Marley Marl, DJ Premier, RZA, Pete Rock, J Dilla, Large Professor, Q-Tip, or Madlib — All icons from hip hop/rap music, all sample-based musicians who were making music at least 15 years before Girl Talk, *and all Black*. Instead, the "star" featured in *their* introduction to the "culture" of sampling was a white biomedical engineer who makes mashups. Got it.

[64] Peter DiCola, "What We Talk About When We Talk Girl Talk," *Sounding Out* (April 18, 2011) https://soundstudiesblog.com/2011/04/18/what-we-talk-about-when-we-talk-girl-talk/]

DiCola and McLeod knew exactly what they were doing. They knew the audience that they were writing for, and is so often the case with criticism around the art of sampling, they centered the white sample-based musician and framed him as the *legitimate* artist who's raising questions about copyright law. But as for a history of Black music artists who built the art form, popularized the art form, defined its compositional practices, established its working vocabulary, *and* first raised (most thoroughly) the questions around sampling and copyright law — remember, the *only* copyright infringement case involving sampling to reach the Supreme Court involved the hip hop/rap crew 2 Live Crew — there's no "star feature" in the introduction about the "culture" of sampling and the implications it holds for copyright law? Make it make sense.

Perhaps a more neutral, less innocent view might be that DiCola and McLeod's privileging of Girl Talk over more deserving sample-based hip hop/rap musicians had nothing to do with race or "category" of sampling. That it was a decision merely based on the fact that there was lots of "talk" around Girl Talk when DiCola and McLeod were developing there manuscript. But I would counter this view with two points. First, *why*, again, was there already a lot of talk around Girl Talk in the first place? To answer this question, we need only review much of what I've detailed in this chapter about *who* overwhelmingly has written about Black music and the art of sampling, and how musical hierarchies, social status, education, concepts of "true" art and the associated value assumptions factor into all of this. Second, where Black music artists and innovations are concerned, this pattern of elevation from white writers is as old as rock 'n' roll. Little Richard, Chuck Berry, Ivory Joe Hunter, Arthur Gunter, and Otis Blackwell. Same nag, different jockey.

The very reason that most people aren't aware of these names, outside of Little Richard and Chuck Berry, is because Elvis Presley, the white singer who copied them and did cover versions of their songs, was elevated above them and turned into "the star" and misrepresented as the "innovator" of the style and sound that he copied from Black music artists.

So none of this is innocent. Whether intentional or the natural, unobserved product of the complicated social hardwiring of the American psyche, this is political. All criticism is, to a lesser or greater degree, political. It's a political act to uphold the status quo, to reinforce the rules of the status quo, to project the biases of the status quo, and to maintain the privileges conferred on certain groups who benefit from the status quo. Whether this political act is the *intent* of the commentator, or whether the commentator is aware of what they're doing (and many commentators know very well what they're doing), is a moot point. What matters most is that this political act is committed, then it is repeated by others who benefit from *and have a vested interest in maintaining* the same status quo. With regards to criticism, there are two unfortunate (recurring) consequences caused by the political act that seeks to uphold the status quo.

First, this political act devalues those groups that the status quo places at or near the bottom of the social hierarchy. This means that the ideas and innovations of the group are also devalued or, as is more often the case, misrepresented and miscredited. Second, this political act inevitably leads to nearsighted or incomplete research and faulty analysis, which is exactlly the sort of thing that pollutes the discourse around complicated topics like the art of sampling. When bad analysis is advanced by those in authority, and then picked up and further advanced by others in authority, such bad analysis becomes *the truth* for many. An excellent example of this is the *Bridgeport* ruling, which, based on the Sixth Circuit Court of Appeals' illogical reasoning, advanced a bad analysis of the application of the de minimis doctrine to sound recordings. Just as the Sixth Circuit serves as an authority in constitutional law, commentators empowered by Academia, traditional publishing, and mainstream media outlets are serve as *cultural* authorities. Given the socio-demographic makeup of the vast majority of cultural authorities, we should understand then that the mainstream mindshare on the subject of the art of sampling and copyright law is produced disproportionately by one group. This scenario makes it incredibly difficult for additional voices, particularly experts from

the field, to be included in the discussion. All things considered, this political act does a disservice to the public, who would otherwise stand to benefit from a fuller understanding of the art of sampling and the implications that it holds for copyright law.

Of course, all this said, it's also a political act to fight against the status quo whenever the status quo disfavors the public. And with this chapter, as with the rest of this book, this is a fight that I intentionally and overtly assume.

***

All Criticism Is Political

(And It's No Coincidence That Girl Talk is Presented As the Face of "Legitimate" Sampling)

Finally, there is no better example of the Girl Talk double standard and the role that race, musical hierarchies, social status, education, concepts of "true" art and the associated value assumptions play in the criticism of the art of sampling than Congressman Mike Doyle's 2006 statement. Speaking in the House Subcommittee on Telecommunications and the Internet at "The Digital Future of the United States: Part II — The Future of Radio," Congressman Mike Doyle read a prepared statement that focused on Girl Talk:

> Mr. Chairman, I want to tell you a little story of **a local guy *done good.*** His name is Gregg Gilliss, and by day, ***he's a biomedical engineer*** in Pittsburgh. At night, he DJs under the name Girl Talk. His latest mashup record made the top albums from 2006 lists from Rolling Stone, Pitchfork, and Spin Magazine, amongst others. "His shtick is," as the *Chicago Tribune* wrote about him, is quote, "based on the notion that some sampling of copyrighted material is, **especially when manipulated and recontextualized into a new art form, is *legit* and deserves to be heard."** In one example, Mr. Chairman, he *blended* Elton John, Notorious B.I.G., and Destiny's Child all in the span of 30 seconds. **And while the legal indie music download site emusic.com took his stuff down for possible copyright violations, he's now flying all over the**

> **world to open concerts and remix for artists like Beck [social status: affiliation]**. *The same cannot be said for Atlanta-based hip hop mixtape king DJ Drama.* Mixtapes, actually made on CDs or sold at Best Buys and local record shops across the country. And they're seen as crucial to make or break new acts in hip hop. But even though artists are paying DJ Drama and others to get their next mixtape, the major record labels are leading raids and sending people like him to jail.
>
> **I hope that everyone involved will take a step back and ask themselves is mashups and mixtapes are really different or if it's the same as Paul McCartney admitting that he knicked the Chuck Berry bass riff, and used it on the Beatles's hit "I Saw Her Standing There."** Maybe it is, and maybe Drama violated some clear bright lines, or maybe mixtapes are a powerful promotional tool. ***And maybe mashups are transformative new art*** that expands the listener's experience and doesn't compete with what an artists has made on iTunes or at a CD store. And I don't think that Sir Paul asked permission to borrow that bassline, that every time I listen to that song, I'm a little better off for him having done so.
> [emphasis mine][65]

Let's unpack this, because it has everything. First, there's the social status reference: "*a local guy done good*." Right off the bat, Doyle is presenting Girl Talk (Gillis) as the *norm*; he's a local, he's one of us, and he's done "good." In other words, Girl Talk is the type of guy the whole town knows and respects, somebody we can all trust. Next, there's the education reference: "*he's a biomedical engineer."* Here, Congressman Doyle is pointing that Girl Talk is not only a local and someone we should trust, he's also *intelligent*, the type of person who regularly engages in intellectual activities; Doyle's implication being — the implication that members of Congress should all understand — that Girl Talk does things that requires intellect. Having established Girl Talk's intelligence, a critical factor in the American musical hierarchy, Congressman Doyle reinforces Girl Talk's social status via praised bestowed on

[65] House Subcommittee on Telecommunications and the Internet at "The The Digital Future of the United States: Part II — The Future of Radio," https://youtu.be/AD3ndhIcbuo (transcription by author) (emphasis mine). Congressional hearing held to discuss the future in terms of digital audio of the United States. Ostensibly, Congressman Doyle's statement was meant to speak against the RIAA raid of the Aphilliates studio in Atlanta.

Girl Talk by the mainstream music media: "His latest mashup record made the top albums from 2006 lists from *Rolling Stone*, *Pitchfork*, and *Spin Magazine*, amongst others."

Next, Congressman Doyle makes the case, via a *Chicago Tribune* reference (again, another coded social status representation) that what *Girl Talk* does is a "legit" ("true") art form that merits recognition: "'His shtick is,' as the *Chicago Tribune* wrote about him, is quote, 'based on the notion that some sampling of copyrighted material is, especially when *manipulated* and *recontextualized* into a new art form, is *legit* and *deserves* to be heard.'" Notice Doyle, like the *Chicago Tribune,* uses the word "quote" in place of "sample."

Next, Congressman Doyle name drops (another social status reference) and highlights an example of what he believes is Girl Talk's skill at "transformative art": "In one example, Mr. Chairman, he blended Elton John, Notorious B.I.G., and Destiny's Child *all in the span of 30 seconds*." Following this, Congressman Doyle makes yet another social status reference: "…he's now flying all over the world to open concerts and remix for artists like Beck."

Now, here's where it gets really interesting, as Congressman Doyle sets up a huge false equivalent when he invokes DJ Drama into all of this: "*The same cannot be said for Atlanta-based hip hop mixtape king DJ Drama.* Mixtapes, actually made on CDs or sold at Best Buys and local record shops across the country. And they're seen as crucial to make or break new acts in hip hop. But even though artists are paying DJ Drama and others to get their next mixtape, the major record labels are leading raids and sending *people like him* to jail." First, Congressman Doyle mucks up key details about what mixtapes are. A CD is just a capture media, it has no bearing on the essence of what a mixtape is. A mixtape can be a number of things, it can be an old school blend tape of songs where the songs are *blended* (mixed) together in an artful sequence, instead of songs simply finishing and starting. A mixtape can be all original, never-heard-before songs, or a collection well-known hits. What a mixtape *is* has nothing to do with a mixtape possibly being sold at Best Buy, a place that most mixtapes have *not* been traditionally sold at. Congress Doyle is partially right, however, in one aspect,

mixtapes *can* be "crucial to make or break new acts in hip hop." But even here, the context is incomplete. For instance, there is a difference between an unsigned artist who makes a mixtape — an unofficial album — of his music as vehicle to promote a buzz and get a record deal. 50 Cent's 2000s mixtape run is a notable example of this. But this type of mixtape is entirely different than a mixtape full of songs *supplied by major-label acts* who aim to promote their careers with "exclusive" songs by having them showcased on the mixtape of a DJ known for breaking hip hop/rap acts.

From here, Congressman Doyle goes off the rails with the false equivalent: "I hope that everyone involved will take a step back and ask themselves *is mashups and mixtapes are really different or if it's the same as Paul McCartney admitting that he knicked the Chuck Berry bass riff,* and used it on the Beatles's hit "I Saw Her Standing There."

Ok, first, yes, mashups and mixtapes are different. Very different. The error that Congressman Doyle makes here — the kind of conflation errors found in a lot of commentary written about hip hop/rap music from people outside the culture — demonstrates the basic lack of understanding of sampling, especially sampling in hip hop/rap music. (*Incidentally, this is exactly why I do not want Congress to make a compulsory license for samples. I do not have faith that they would ever get it right! But more on this in Part 5 of this book.*) Second, Congressman Doyle's question doesn't address the reality that permissive borrowing changes which each context, and that the transformative element of fair use is not wholesale, it depends on the actual use in question.

Finally, the most troubling thing that Congressman Doyle did was that he superseded the art of *sampling* with mashups. In other words, he elevated mashups *above* sampling, defining "mashups" as the transformative art, *not* sampling: "**And maybe *mashups* are transformative new art."** You see the sleight of hand?

In sum, what makes Congressman Doyle's statement so interesting is not that it was a statement presented before Congress, but that it was actually *criticism* about the art of sampling presented before Congress. This criticism masquerading as a political commentary. Once you understand why this is the case, you can

better understand why, historically, criticism around the art of sampling has actually been political commentary masquerading as criticism.

Finally, what I've hoped to have shown by dissecting Congressman's Doyle's statement is that it literally checks off *all* of the elements of Black cultural spaces and musical hierarchies that I describe in this chapter. Further to this, Congressman Doyle's statement (criticism) demonstrates exactly how easily errors are made about the art of sampling because of these aforementioned elements.

***

One piece of irony about Congressman Doyle pointing out how Girl Talk's album *Night Ripper* made 2006 lists from *Rolling Stone*, *Pitchfork*, and *Spin Magazine*, amongst others, is the fact that, that very same year, J Dilla's *Donuts* — one of the most well known sample-based hip hop/rap albums and one of the best demonstrations of the art of sampling — was released. Yet it's Girl Talk that Congressman Doyle points to as "transformative art" that is fair use. I wouldn't expect anything else.

The Functions of the Art of Sampling

In terms of sampling as an art form and music process, criticism has largely been about what sampling *isn't,* i.e. that sampling really isn't "music" making at all, that it's not a "legitimate" music process, nor is it a "real" art form. Of course, the irony of such commentary is that it overlooks the interconnectivity of all popular recorded music and what sampling actually *does*. Sampling, especially in the hip hop/rap music tradition, affirms the interconnectivity between all music forms, and it uses this interconnectivity to create a new music form that is at once every bit new as it is old. Thus, the sampling tradition of hip hop/rap music created a music form that didn't merely echo music of bygone eras (an activity at play in all music forms one way or the other), it stitched the actual music into the aesthetic itself. But this critical function of the art of sampling has largely gone unnoticed by most critics of sampling.

Historically, the fundamental reason that the art of sampling has received negative criticism is largely because most of the people authorized to comment on it have seen little to no value in it. Here, let's remember a of couple of things. First, there's the premise that sampling isn't art or music making at all. Then there's the perception that sampling is an activity only for those with lower social status. This perception is due to sampling's perceived illegitimacy, which is due in large part to sampling's close association to hip hop/rap music, which was created and dominated by Black youth from the streets who primarily used older *Black music*. Finally, there's America's musical hierarchy, which places hip hop/rap music at the bottom. Under these circumstances, we can see why many critics question the value of the art of sampling. But in terms of *value*, there's another component to this.

Musicologist Thomas A. Regelski has noted something critical about the value of music that speaks to the value of the art of sampling in hip hop/rap music:

> "To ask *why* people value music is to ask what *functions* musicking [sic] is 'good for'! That is to say, music is unavoidably praxial. **It is inextricably concerned with questions of 'right results' for individuals, groups and society. To remark on *the musical values of an individual or group* is simply to note *the functions of music in the life of that individual or group.*** Such functions encompass an unbelievably wide range, from the most esoteric intellectual interests of academic musicians to the most mundane of daily enjoyments of the untrained; from religion and ceremony, to dancing and all kinds of entertainment. **All forms of musicking, then, are valuable, each in its own way *relative to its function(s)* in human life."**
> [emphasis mine][66]

I agree with Regelski that all forms of "musicking" (music making) are valuable, each in its own way relative to its function(s) in human life. But therein lies the rub. If a commentator doesn't recognize the art of sampling as a form of music making, then he doesn't recognize that the *activity presenting itself to be* music or music making has any function. Further to this, if a commentator refuses to identify, overlooks, or *mis*-identifies the function(s) of a music form (some commentators propose that the only function that sampling serves is to provide a means for untalented hacks to "steal" from the "real" musicians who make "real" music), then the real functions of that music form will not be adequately discussed if at all; and therefore, the notion that this music form, and its music making processes, serve no value will persist.

However, hip hop/rap music and its sampling tradition is rich with functions. In Chapter 1, I discussed the functions of hip hop/rap music; in Chapters 3 and 4, I discussed the functions of the chief compositional method of hip hop/rap music; and in Chapters 5 and 6 I discussed the aesthetic and stylistic functions of the art of sampling. Still, assuming that a commentator doesn't know *any*

[66] Thomas Regelski, "Musical Values and the Value of Music Education" *Philosophy of Music Education Review* 10 (2002), 49-55.

of the functions of hip hop/rap music and its sampling tradition, how is it still possible that a commentator could dismiss a music form that obviously has functions for the individual or group that it serves? I say obviously because if it can be noted that an individual group is actively engaging with a music form, it's illogical to reason that this music form has no function. But you see, this is where social status comes screaming back into play.

To remark on *"the musical values of an individual or group,"* as Regelski notes, is simply to note the functions of music in the life of that individual or group. What happens if the music values, or any other values for that matter, of an individual or group are not valued or even considered by the commentator to begin with? I've already outlined the reasons *why* this is often the case. I have not shied away from discussing race relations and racism in America and how that has shaped American culture, especially American popular music. And as I have previously stated, we should not be surprised that the same factors are at work when it comes to analysis of Black music, Black music artists, and the music forms created and dominated by Black music artists.

Again, the vast majority of criticism surrounding the art of sampling is *still* produced, written, edited, and published by white people. I don't suggest that every white commentator that writes about or discusses hip hop/rap music or the art of sampling is racist, or that every white commentator who writes about the art of sampling has a negative attitude towards it; increasingly, we see attitudes towards the art of sampling changing in the right direction, even if slowly. The point I'm making in this regard is that *any* commentator, white *or* Black, writing comprehensively about hip hop/rap music, the art of sampling, and copyright law will always be confronted, in part, with the issue of race and racism, because race and racism is inextricably linked to the history of American popular music. And for our purposes here in this sub-section, this fact goes a long way in helping to explain why the "functions of music in the life" of one group are so often dismissed, devalued, or not accounted for by another group, which also is the group that is often authorized to comment (the most) on the prior group.

Thus, to help expand this discourse and offer all commentators an additional (and critical) prism to include in their criticism, in the next sections I will speak more explicitly about the functions and value of the art of sampling. I'll begin with a review of the functions of hip hop/rap before turning to the widely held misconceptions about what the art of sampling actually is, and I will finish by explaining the ultimate value of the art of sampling.

***

The Function of Hip Hop/Rap Music ("Gonna Make You Move")

> "Above all, music in the African tradition is functional."
> –Eileen Southern

Since its inception, there have always been five fundamental functions or purposes of hip hop/rap music: (1) To make people move — dance and provide "party music;" (2) To entertain; (3) To inform and teach; (4) To serve as an "art music;" and (5) To provide a coping mechanism for some of the trials of daily life. The original function or purpose of hip hop/rap music was to make people move, i.e. dance at parties. The proverbial "park jam" was a major cornerstone in the early development and spread of hip hop/rap music. And when the pioneering DJs moved from the parks and rec rooms into to the clubs, the park jammers migrated with them. Thus, the park-jam era subsided and gave way to the club era that still exists today.

Fittingly, hip hop/rap clubs are still ruled by the DJ, who still has the essential task and purpose of "moving the crowd." Next, as hip hop/rap music developed, spread, and grew more complex, it also became a form of entertainment, a powerful means for teaching listeners, *and* a form of art music. In addition to providing the vibe for dance parties and social gatherings, songs in the hip hop/rap music tradition were (are) also used to chronicle everyday life, give "street reports," and even decipher political information. Equally important, these same songs were (are) used to serve as art music,

i.e. music to be listened to and appreciated for its artistic merit.

But of all the functions and purposes that hip hop/rap music serves, perhaps the most critical one is the function of providing a "coping mechanism" for some of the trials of its listeners' daily lives. All of the independent music traditions within the broader Black (African American) music tradition, have always been primarily function-based. For enslaved Africans in America, music meant cultural and psychological survival. The very presence of music enslaved Africans to hold out for hope, even in the face of incredible despair. Hence, music functioned as a means to deal with the daunting experiences of a tragic daily life.

Fast forward to the twenty-first century, and we still see a similar function factor in hip hop/rap music. Throughout the 1970s and on up to the present day, hip hop/rap music has functioned in much the same way that it always has for oppressed Blacks and Latinos and other minorities. Of course, the conditions of slavery cannot be appropriately compared to the conditions of contemporary America; even the worst oppressed Blacks, Latinos, and other minorities of today do not live in the horrendous social and legal conditions and environments of slavery. Still, it's important to note that by today's living and social standards, many Blacks and Latinos and other minorities do indeed live through the rigors of other racially-influenced ills, such as disproportionately high level poverty, institutional racism, inadequate social services, de facto segregation, and disproportionately high level of unemployment, and the like.[67]

Hence, while the hip hop/rap music tradition serves the five aforementioned functions for its primary constituents, there aren't many comparable functions that the Western classical tradition serves. Western classical music is *not* meant for partying, at least not in the same sense as hip hop culture is. Furthermore, Western classical music isn't meant to *make people move*, i.e. dance, at least

[67] Certainly, one can understand where much of the underlying anger that exists in hip hop/rap music comes from. It's actually the manifestation and expression of the collective frustration of a consistently oppressed community. Likewise, one can also see where much of the fantasy rap and escapism that manifests itself in hip hop/rap music is generated from. Escapism not only helps one to ignore the present reality of one's ill fate, it also serves as a means to redefining a life that society at large deems worthless.

not in the same manner that hip hop/rap music. Also, Western classical music doesn't have the function of providing news and information in the way that hip hop/rap music does. Moreover, Western classical music isn't expressly intended to serve as a coping mechanism for a target minority of people faced with the harsh daily realities of a system that is culturally, institutionally, politically, and socially against them. And although I concede that many of those who enjoy Western classical music also find it therapeutic, I maintain that the function that Western classical tradition has most in common with the hip hop/rap music tradition is in the area of art music.

Hip Hop/Rap Music Is a Social Art

Hip hop/rap music is a social art; it's concerned with the audience that interacts with and hears it. Even though hip hop/rap music certainly has its own aesthetic qualities, hip hop/rap music is not art for art's sake. Hip hop/rap music has a social purpose; it promotes a shared social experience, it's unapologetically accessible to mass culture, and it not only welcomes the "new," it *inspires* it. Classical music, in stark contrast, is not a social art; it's not concerned with a shared social experience but with the individual "pursuit of a *musical ideal* inherited from historical models, engaging in an almost ritual purification of the art." Classical music is, as Burkholder has rightly called it, "museum music;" it's intentionally walled off from and hostile to the masses. And not only does classical music *not* welcome the "new," it discourages it.[68]

Classical music, like all art music, nonetheless does have social *roles*. One social role of classical music is to keep eighteenth- and nineteenth-century European music (and its assumptions) atop of the Western music hierarchy. The other social role of classical music is to maintain the barrier between what we consider to be "high" and "low" art and the class of people who presumably has access to "high" art and the class of people who presumably only have access to "low" art. In this way then, the "high" art social role

[68] Burkholder, 118. (emphasis mine).

of classical music is to enforce the idea that "true" art is "serious" art and that "serious" art is to be "understood." Thus, the idea goes, that which cannot be understood, particularly by those who promote classical music's hierarchical status, is neither "true" art nor of any lasting value.

How Misconceptions of the Art of Sampling Affects Criticism of It

To date, most commentators who have written about the art of sampling, especially the opponents of the art of sampling, have lacked a serious understanding of what sampling actually is. Moreover, they have often maintained a mythical view of originality and creativity; so naturally, they have tended to ignore the concept of permissive borrowing and how it works (necessarily) in all art forms. Further still, most commentators who have written about the art sampling have demonstrated that they know very little of sampling's history or the unique processes that make up the art form. (This is another reason why the Instruction Part of this study is critical.) Thus, what follows in this section is a rebuttal of some of the most common criticisms lobbied against the art of sampling.

Is Sampling an Intellectual Appropriation or Just a "Physical" Taking?

When it comes to borrowing, authors of literary works are treated differently than musicians who borrow (sample) from sound recordings. This is because when a literary author samples — ergo, appropriates, borrows — something, it's acceptable because the taking is considered by many to be an "intellectual" appropriation rather than a "physical" appropriation. By contrast, when a musician *digitally* samples a sound recording, the taking is considered by some to be a "physical" appropriation, not an intellectual one. But to draw such a distinction is illogical. Literary works and sample-based beats are both, at all times, the results of art processes that involve some level of creative borrowing from pre-existing works.

The main difference between these two types of works, literary works and sample-based beats/songs, lies in the level of appropriation and transformation. But the borrowing that occurs in either form is not any more intellectual or less physical. Moreover, creative borrowing is a necessary and inevitable process that has long been practiced in literature and music. There is no such thing as a literary author or musician who has not or does not *intellectually* sample (borrow) and draw ideas, influence, or inspiration from other literary authors and musicians or practitioners of some other art form, or for that matter any other creative or informative medium.

Whether consciously or subconsciously, literary authors and musicians borrow from other literary authors and musicians all the time. And while musicians who sample may appropriate actual sounds from sound recordings, literary authors often appropriate actual words from various publications as well as sound recordings. Yet the sampling that literary authors engage in, which often exceeds the level of what the best sample-based beatmakers typically do, is still regarded as "intellectual" activity. Meanwhile, the sampling that sample-based musicians engage in is regarded as a merely a "physical" activity, something presumably absent of any intellectual fervor. But we must be careful not to forget that there is no conceptual difference between the intellectual copying and the physical (digital sampling) copying of someone's work. Both involve copying and intellectual transformation.

Still, with little to no requirement, other than in some cases an open citation of the author and work that was appropriated, literary authors have long been known to appropriate (sample) and incorporate passages from pre-existing literary works into their own works. However, unlike the relatively easy path to appropriation for literary authors, the road for would-be samplers of sound recordings has been mostly contentious. In the obscure realm of sound recordings, even the most minute, inaudible sampling of a sound recording is contested.

Reality Hunger: An Example of Validated Sampling

When it comes to literary works, conventional wisdom states that permission is not needed by authors to borrow single lines or brief excerpts from the works of other authors. When the appropriation is recognizable, all that is required is a citation of the author and the work appropriated. This point of disparity has rarely been raised in the contentious debate about sampling and copyright law. But author David Shield's book *Reality Hunger: A Manifesto* (2010) exposed the discriminatory view of sampling as a non-intellectual appropriation.

On the surface, *Reality Hunger* certainly isn't about the art of sampling; however, it is, in large part, explicitly about the art and practice of borrowing in any art form, particularly in the literary environment of fiction and non-fiction. But that isn't the big draw for me and other supporters of the art of sampling. What stands out to me, and I'm certain even the most rigid literary types, is *Reality Hunger's* peculiar twist. The book is comprised entirely of appropriated passages from the pre-existing works of other authors.

Reality Hunger comprises more than 600 numbered (and indexed) paragraphs, each containing appropriations (samples) from other authors. What's more? The appropriations (samples) do *not* appear as quotes; and some appropriations (samples) are edited by Shields, while many are left *as is*. Needless to say, for sample-based beatmakers, Shields's book, which writer Elissa Schapell hailed as a "rousing call to arms for all artists to reject the laws governing appropriation,"[69] not only demonstrates the safe harbors that copyright law provides for permissive borrowing, it also does a great job of exposing the false double standard that exists when it comes to copyrighted literary works and copyrighted sound recordings.

I can't say for certain if Shields had hip hop/rap music and its tradition of sampling in mind when he wrote *Reality Hunger*, but I'd like to think so. The book is explicitly about the future of fiction and non-fiction, specifically as it's situated somewhere between the

[69] Elissa Schapell blurb for *Reality Hunger*, The Shipman Agency https://www.theshipmanagency.com/david-shields.

puffed-up and outdated assumptions about fiction and non-fiction. The book also illuminates the new ways in which art is now being created and the effects that these new forms of creativity are having on literary works. But given the depth and aggressive charge of *Reality Hunger*, I am compelled to believe that Shields consciously borrowed the bravado of a sample-based musician when he set about the task of lifting and surgically incorporating lines and passages from other authors into his own original work.

Reality Hunger also includes an extensive appendix, wherein the appropriated authors and their works are summarily cited. This indicates to me that the publishers did not beforehand "clear" all the usages; i.e. they did not get the permission of the publishers or authors who own the copyrights to the works that Shields appropriated for *Reality Hunger*. More importantly, it further indicates to me that perhaps the publishers saw no legal reason (rightfully so) to seek such permission. So it would appear that, aside from giving perhaps more context, the appendix, which was added at the insistence of the publisher, serves one primary purpose: To protect the book from any copyright infringement challenges. Absolutely genius. Clearly, the publisher was empowered by fair use and did not see any need to contact the copyright owners of the appropriations used or to negotiate fees for the usages.

And what about the treatment of Shields for the way in which he created *Reality Hunger*? For the most part, the book was well received, with many book critics praising its intellectual authenticity. In other words, even with clear and open appropriations, Shields's takings were considered to be "intellectual."

Is Sampling Creative and Original?

My question to the "creative" or "original" critique of sampling is this. How can an art form and music process that gave rise to a music tradition that has sustained itself for more than 50 years and counting *not* be creative or original? But to really get at this specific criticism, you have to first look at the types of groups who tend to make these sort of uninformed claims. For the most part, there are roughly five groups who attack the creative sensibility and originality characteristics of sampling. First, there's the popular music press, which covers hip hop/rap music but often authorizes many writers who know little about the history and intricate elements of the art of sampling in the hip hop/rap music tradition. (*Some* hip hop/rap bloggers are knowledgeable about sampling, but surprisingly, most aren't.) Second, there's those music industry "insiders" and lawyers who distort the facts of copyright law and who lack a sound understanding of the aesthetic preferences that comprise the hip hop/rap music tradition. Third, there are those musicians — the ones entirely outside of the hip hop/rap tradition — who are ill-informed as to what the art of sampling actually is and the meticulous processes it entails. Fourth, there are some non-sample-based beatmakers (producers) *within* the hip hop/rap tradition.[70] Lastly, there is a broad crop of new-generation beatmakers (producers) that have arrived at a time when the most essential and celebrated characteristics of the hip hop/rap music tradition are being openly vilified and when trap music is the most popular mainstream hip hop/rap style, sound, and aesthetic.

The biggest misconception that each of the aforementioned groups holds about sampling is that there is no artistic skill,

[70] Most beatmakers (producers) who dismiss sampling as unoriginal, lazy, or uncreative usually fall under three categories: (1) They do not posess any sampling skills; (2) They do not, nor have ever tried to, understand sampling, nor do they understand or sincerely appreciate its fundamental role in the history of hip hop/rap music; and (3) They are more inspired by the potential financial gain of not using samples. Often, the third group of sample naysayers are actually envious of well-sampled productions. In fact, they even concede that their own beats often lack the fullness, feeling, and power of the works of their sampling adversaries. Thus, in order to suppress the competition from producers who feature sampling, they dismiss it.

creativity, or originality involved in sampling, and that sampling is merely the "re-recording of a sound recording" or nothing but "cut-n-paste." Even worse, some commentators refer to sampling as "piracy." In his article, "A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution," Michael L. Baroni asserts that "samplers *pirate* and exploit the labor, talent, and uniqueness of another's musical expression, and may adversely effect [sic] potential markets for the sampled artist's sounds."[71] But piracy describes the wholesale, verbatim copying and distribution of copyrighted works. That's a big difference from what the art of sampling is. There is a "crucial difference between pirating or counterfeiting anothers[sic] work straight across in order to profit from the saleability[sic] of that single source, and the creative transformation of material from multiple sources into new, 'original' works."[72]

Another glaring misconception about sample-based beatmakers (producers) is that they seemingly expend little personal time or money developing their craft, and that they have no talent or "original artistic creativity" whatsoever. Again, Baroni best exemplifies this misconception, as he summarily dismisses sample-based artists, claiming that "producers who use samples reap huge benefits, both financially and through increased creative reputation, at little or no personal expense of time, talent, money, or original artistic creativity."[73] This character assassination of sample-based recording artists is typical of critics of sampling, particularly those critics who have very little or no real understanding of the art of sampling or of its function and value.

Baroni's claims demonstrate just how little he, and others who follow the same premises, actually understands about sampling, the sample clearance system, how permissive borrowing works and how copyright law protects it, and the actual benefits associated with

71 Michael L. Baroni, "A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution," *U. Miami Ent. & Sports L. Rev.*, no. 11 (1993-1994), 89.]

72 "DO WE REALLY HAVE TO SUE THE RIAA????" http://www.negativland.com/archives/014riaa/, (Accessed March, 2012).

73 Baroni, 89 (emphasis mine). *See also*: "DO WE REALLY HAVE TO SUE THE RIAA????" http://www.negativland.com/archives/014riaa/, (Accessed March, 2012).

the art of sampling. First, sampling is an art form wherein much technical skill is required and tremendous thought and artistic skill is involved. As anyone who's truly studied the art form will tell you, sampling is certainly not easy, and sample-based beatmakers (producers), who often spend countless hours digging through records for "fragments" of sound, are not *lazy*. In fact, the art of sampling demands much of those who seek to develop a skill for it. It requires lots of time, research, and a commitment to the study of older music.

Here, it's also worth noting that sampling is not about "recreating" the essence of an era, it's about the use of the *actual essence* of an era itself. No one will ever be able to truly duplicate, recreate, or replicate the conditions (i.e. the actual essence) of a particular era. Moreover, the individuals responsible for creating that sound can never be cloned. So the nuances, which are subtle, obscure, covert, and overt, can never be completely revived. Lastly, many sample-based beatmakers (producers) feel an affinity for and a connection to a particular era in music and are therefore drawn to it. Moreover, the sound of this particular era ('60s and '70s) possesses the sound aesthetics (timbral, tonal, mix qualities) that have been valued in hip hop/rap music since its inception.

The simple take on sampling by critics like Baroni is that it's merely the digital recording of a sound (echoes of DiCola's *"sampling means using sound waves"*), followed by the cutting and pasting of that sampled sound into a drum program. But if it were that simple, there would be far more beatmakers (producers) who've mastered it. Truth is, as with any art form, sampling is part creativity, part knowledge and experience, part design, part intuition, part accident, part constructive patience, and part improvisation. The art of sampling prompts musicians to use all of their musical know-how and related intelligence, then it challenges them to reconfigure what they sample into a new music. In fact, the art of sampling is so dynamic that, when it is practiced to its fullest extent, the new composition can either reinforce the same mood and/or feeling of the original source material, or it can invoke an entirely new feeling, structure, overall sound, and aesthetic.

Finally, it must be understood that people don't sample because they're unoriginal or lazy. Musicians who sample choose to do so because they like the aesthetic, and because they enjoy the process, and because they like the idea of making something new out of something old. Sample-based beatmakers (producers) like the idea of interacting with history and fusing it with the present. Just like historical fiction writers, for example. Hence, by its very nature, the art sampling is creative and original.

For Most Critics of Sampling, Ignorance is Bliss

The people who often criticize sampling the most are, not surprisingly, the ones who know the least about it. As I've noted previously in this chapter, critics of sampling attack it on three main fronts: creativity, originality, and piracy. Fundamentally, copying from other pre-existing works, in any art form, medium, or industry, is the bedrock of all creativity. In fact, creativity, originality, and innovation are inseparable in this way. But most critics of sampling overlook this fact when it comes to the art of sampling. Why? Well, for one thing, the prejudices inherently built up from their cultural histories and musical orientations (some of which I explored throughout this chapter) have a lot to do with it. But also, I find that most critics of sampling are terribly uninformed about what sampling actually is and what its mechanics entail. Unfortunately, many critics of sampling don't even see it as a music process. Instead, they see sampling as nothing more than a one-dimensional, cut-and-paste music-making gimmick that thrives on "stealing." By refusing to even consider sampling as a music process, many critics of sampling provide coverage for themselves for not giving sampling a serious exploration. So naturally, they fail to see just how multidimensional sampling is.

Also, most critics of sampling are not familiar with the works of sampling's most recognized practitioners. So they have a very limited scope of sampling's deeper creative nuances. More often than not, published reports that both criticize and support sampling point to Beastie Boys or Public Enemy as beacons of the sampling tradition of hip hop/rap music, leaving out critical names that paint

more distinct, more complete picture of the art of sampling. In the various interviews and conversations that I've had with music insiders, music lawyers, music writers, musicologists, and other scholars, almost none were well-acquainted with DJ Premier, RZA, Marley Marl, or Pete Rock, and almost none had ever heard of Large Professor, Madlib, J Dilla, The Beatnuts, Buckwild, Alchemist, and the like; yet nearly all cited Beastie Boys, Puff Daddy (Diddy), De La Soul, and Biz Markie as proof of their understanding of sampling. Not coincidentally, Beastie Boys, De La Soul, and Biz Markie were at the center of copyright infringement cases, and Puff Daddy's associated brand of sampling is considered by most sample-based beatmakers (producer) to be the most basic, non-complex variety of sampling there is.

Furthermore, I've found that most critics of sampling tend to ignore or conflate common, long recognized notions of creativity and originality when it comes to sampling. The most vocal critics of sampling tend think of sampling as an easy-button music-making scheme that requires no intelligence, time, or creative energy on the part of the sample-based musician. Therefore, for these critics, sampling can never meet the common threshold of creativity and originality that is reserved for all other art forms, mediums, and industries. This is why I believe that if more critics of sampling were more informed about the art of sampling, they would see things differently. To that end, I hope that this book goes a long way in helping to educate not just champions of the art of sampling but also the most ardent critics of sampling.

On Sampling and Thievery

Putting aside the transformative art justification, there are some critics who see sampling as one monolithic form of non-transformative copying; an act that, by its nature, is not only uncreative but morally questionable — an act of "theft". But sampling is not a morally questionable conduct. Sampling does not involve the activity of stealing information or committing fraud. Hence, the *thievery* language that surrounds sampling is misguided

and excessive. And there are few accusations hailed against sampling that makes sample-based beatmakers (producers) more irate than the slander of thievery. In my interviews with DJ Toomp and 9th Wonder, each were quite adamant in making it clear that sampling is *not* stealing:

> "'***Thievery?' NO!*** ....what we do is recycle when we sample. Any producer who takes time to chop it, to where you be like, Oooh, that song don't go like that, you know what I mean. And that comes from DJing, too. Like when I used to beat juggle, change beats around. That's when I started getting into sampling, like, Aw, man, it's the same thing....So when I sample, for me, I chop it up and get *creative* with it..**you do something else and add more music to it, now THAT shows more creativity."**[74]

> I say it's like when you go to the Louvre in Paris, and you walk down the hall and you see this big mural of somebody who took a whole bunch of *Time Life Book* magazines and made a big mural of *Time Life* magazines of the years and call it a collage. What's the difference? They didn't contact every person from every book that they snatched a page out of and get permission. What's the difference? You know what I mean, I just don't understand that. And **collages happen all of the time in art. Sampling *IS* art.…** We're just really trying to create a bridge. It's not about trying to "take" (steal) your record and just make a profit off of it. **There is really an art form to this. All that we do — from chopping a record, taking a song that's 3/4 time and turning it into 4/4 time. All of that is art.**"[75]

[74] Author interview with DJ Toomp, full interview first published in The BeatTips Manual, 6th Edition (2015), (Superchamp Books, New York).
[75] Author interview with 9th Wonder, full interview first published in The BeatTips Manual, 6th Edition (2015), (Superchamp Books, New York).

Why Some Non-Sample-Based Beatmakers (Producers) and Other Musicians Dislike Sampling as a Music Process

I want to shed some more light on that ridiculous accusation that beatmakers (producers) who sample are lazy, or worse, not *really* creative. As I've previously discussed, sampling is a very meticulous, arduous, and often frustrating process that requires great amounts of creativity, patience, endurance, and ingenuity. Not only is sampling perhaps the most daunting beatmaking process that beatmakers (producers) face, it is the strongest link that we still have to the original hip hop DJ style, the original compositional process of hip hop/rap music.

That any opponent of the art of sampling would directly or indirectly claim that the sample-based style of production somehow denotes an air of laziness or lack of creativity is absurd. Moreover, a brief examination of such claims reveals several points that are rarely ever discussed candidly today. For instance, since the explosion of the hip hop/rap production medium began in the late 1990s and early 2000s, more and more new beatmakers (producers) have opted to work with keyboards, sound modules, and software applications (full of stock sounds) rather than survey and flip pre-existing songs. Why is that? Is it because one process is superior to the other? No. It's up to each beatmaker (producer) to choose the compositional style that suits him best. I believe it comes down to two simple things: speed and access. Many beatmakers (producers) want to capitalize on the misguided notion that there's some awesome financial opportunity awaiting them for their production services. To that end, they are often very anxious to make "hot beats," so much so that they routinely employ whatever tool or electronic mechanisms they believe will help them reach their goal the *fastest*. And because this particular ilk of beatmakers (producers) typically lack an understanding of the art of sampling, or the patience and discipline required to mine for and sample records, they tend to want to write it off as some short-cut, second-rate production process.

Thus, the negative view that some non-sample-based beatmakers (producers) have of the sample-based compositional style is unfortunate for two reasons. First, musical intuition is best built from listening to music; and having a good music education, like the kind of education that is naturally imbued to those beatmakers (producers) who regularly dig and sample, is highly critical to the development of one's musical intuition. Second, many seasoned beatmakers (producers) have joined the frenzy towards live instrumentation. Although I acknowledge that sample-clearance has played a big role here, I still believe that the underpinning catalyst for this move has been based on speed, accessibility, and a misguided belief that a more-likely payday awaits prospective beatmakers (producers) who do not sample.

Other compositional forms of beatmaking, such as the use of live instrumentation, keyboard, and soft-synth generated instrumental sounds, are further being legitimized not primarily because of their own merits but for two other reasons: access and sample clearance concerns. Moreover, the explosion of easily accessible instrumental sounds, especially the sort that come with software applications, has made it more possible than ever for anyone to gain access to beatmaking and instantly deem themselves a beatmaker (producer). There's nothing inherently wrong with this. In fact, I embrace technology and the role that it is playing in helping to bring more quality beatmakers (producers) to the field. That being said, there are a lot of new beatmakers (producers) who are repulsed by sampling, even though they have little to no actual experience with sampling or what it has and will always mean to the hip hop/rap music tradition. Here, the simple notion of strength in numbers applies. That is to say, the higher the concentration of new beatmakers (producers) who elect not to sample, the easier it is to push the idea that sampling is a weaker, less legitimate music-making method. In lieu of the fact that sampling played a vital role in the development of the hip hop/rap music tradition.

Sampling Is the Main Event, Not a Sideshow

Sampling Can't Be Displaced, It's an Autonomous Art

Even while sampling is currently enjoying what some would describe as a reemergence or renaissance, there are still many people within the beatmaking and hip hop/rap music communities who hold a hostile view to the music process that helped fuel an entire music tradition. There are a number of reasons for this disdain and I previously highlighted some of them in detail. In this section, I'd like to discuss one particular criticism that's commonly lobbied against sampling: The opinion that sampling is an *outdated*, non-music process that was (is) doomed by "evolution."

When beatmakers (producers), of all people, criticize sampling like it's some 2-bit, non-music gimmick, they are really (knowingly or not) demonstrating a deep disrespect for what half of the essence of hip hop/rap music is about. Ask some slightly less hostile, passive aggressive critics about sampling, and you're likely to hear that beatmaking has simply "evolved," or something along those lines. The wanton dismissal for the music process that built hip hop/rap is disheartening by itself. But it's the "evolution" narrative that many have come to endorse that troubles me the most.

As a vocal-performance medium, the durable nature and sheer flexibility of hip hop's rap vocal style lends itself to a number of different audio palettes and structures. From fists banging on lunch room tables to human beat boxes to live bands to sample-based beats, rap's flexibility makes it possible for rappers to sound decent with virtually any rhythm backing them. And when it comes to audio backing, lest we forget, rapping in hip hop culture — in its earliest incarnation and core manifestation — is about the marriage of the rap vocal style with older music. But I have no problem with rhymes over non-sampled-based beats, trap beats (which often include samples), or any other kind of beats. But over the past decade, there's been a great deal of chirping, overwhelmingly by non-sample-based beatmakers (producing), against sampling. As the theme goes, some maintain that sampling is an old, unoriginal crutch that was tossed on the side of the road as hip hop/rap music

'evolved." But to situate the art of sampling as some sort of relic, pre-"evolution" music process grossly misses the point.

Sample-based hip hop/rap music is its own main event; it's not a sideshow. Moreover, non-sampled-based hip hop/rap music is not some natural, *inevitable* "evolution" to sampling. Nor is non-sample-based hip hop/rap music the rightful heir to sample-based hip hop/rap music. Non-sample-based hip hop/rap music is merely another music process, one with its own methods and metrics of quality. Furthermore, non-sample-based hip hop/rap music has not displaced sample-based music as the superior compositional style in the hip hop/rap music tradition. Both compositional styles have their own tract and distinct pedigrees within beatmaking. And while today there may be more people who opt for the non-sample-based style (synthetic-sounds-based style) than there were 20 years ago, we must be careful not to view this as one compositional style being superior to the other.

There are a number of reasons and circumstances that led (and continue to lead) some people away from sampling. Conversely, there are number of reasons that have led some people towards sampling. Either way, the notion that sampling lacks feeling, and that sampling is not synonymous, both literally and symbolically, with hip hop/rap music are not among these reasons. Further, no reasonable beatmaker (producer), proficient in any style of beatmaking, disputes the fact that sampling delivers an entirely different feel and sonic aesthetic that's hard to match without, well, sampling.

Finally, within the "inevitable evolution" narrative, lies a "pushing the envelope" sub-theme. "Pushing the envelope," a common phrase used in all art forms, generally means expanding the limits of a given form, style, or tradition. With regards to sampling, "pushing the envelope" is used passive aggressively in hip hop/rap music to mean *moving on from* sampling — i.e. the *graduating* from sampling — and stepping up to live instrumentation; as if live instrumentation is superior to sampling. This is terribly misguided. The sampling tradition of hip hop/rap music is its own art form, representing its own space. It is an autonomous tradition. As such,

it has its own standards, customs, and aesthetic qualities that need not defer or adhere to any other music process. So if someone from the sampling tradition of hip hop learns to play guitar or the piano, etc., they are not *graduating* from sampling, they are simply adding to and improving upon an existing music skill set and sensibility. So the only evolution any musician ever really experiences is the acquisition of new skill and understanding. But the accumulation of new music skills doesn't render obsolete the music processes from which they came.

Sample-Based Beatmakers (Producers) Are Musicians

A "musician" is simply one who creates (makes) music. It's someone who is conscious of the notion of music making as well as at least one music-making processes. Whether one likes a particular music form or prefers the methods used to make it doesn't disqualify the creator of that form of music as a "musician."

With regards to sample-based musicians and traditional musicians, we must remember that traditional musicians don't exactly generate music from out of thin air. Instead, *they use instruments to grab* from the same bag of notes (potential sounds) that every other traditional musician does. In turn, they take these notes (tones, sounds) and reconfigure and arrange them in ways that suit their musical objectives and creative ingenuity. Isn't that what sample-based beatmakers (producers) do? Even so, some commentators do not consider sample-based beatmakers (producers) to be "real" musicians because they use pre-existing music and sounds, typically sounds from old songs, ergo sounds that have already been used before. But every musical note has been used before as well! In fact, musical notes are one of the most recognizable public domain sources, which technically means that every live musician borrows (samples) from the same well of musical notes.

I recognize the fact that using a dormant assortment of public domain music notes is one thing, and that sampling old songs is

yet another. But is one form of *sampling* inherently superior to the other? I mean, I've never heard an *entire song* sampled and looped in hip hop/rap music. On the contrary, sample-based beatmakers (producers) use segments, fragments, chipped music pieces and tones that usually measure between 0.5 to 4 seconds. Regardless of how much and/or what section beatmakers (producers) sample from, the purpose, structure, and/or scope of their recreation is different than the purpose of the artist(s) who originally created the composition and sound recording that's being sampled. Isn't this what separates musicians from each other? If all musicians have to rely on the same bag of sounds, if you will, then what are the primary variables that distinguish each musician? Is it not their purpose, structure, transformation, and overall creative scope?

Furthermore, the idea that sample-based beatmakers (producers) simply press a button, and presto! a beat (song) is *automatically* created is wrong. Like any other musician, sample-based beatmakers (producers) must arrange, identify tonal matches, reconcile time changes in the rhythm, and more. While traditional musicians use electric guitars, horns, pianos, and the like as their instruments, sample-based beatmakers (producers) mainly use samplers, sequencers, drum machines, and other EMPIs (and sometimes traditional guitars, horns, and pianos as well) as theirs. Today, both groups of musicians rely heavily on electronic recording processors and equipment and modern software applications for minor or major tweaking. So even here the claim of superiority by traditional musicians and their supporters holds no weight.

The foundation of originality and creativity, within any artistic medium, is predicated upon arrangement. For instance, writers use words to tell stories and convey feelings and insights that have all been conveyed and told before ("*There's nothing new under the sun*"). Further to this, writers use words that have been used over and over again. So how do they avoid exhausting the use of these words and stories, and at the same time offer new insights and fresh commentary on "old" feelings and ideas? It's through their unique arrangement of words and their meanings, that's how. Thus, all musicians, like writers and other artisans, distinguish themselves

through the purpose, scope and structure of the arrangement of the raw materials used, be it samples of words from literary works, music notes, or sounds from old songs.

Why Sampling Is So Threatening?

Sampling is threatening to some people, especially the institutional gatekeepers of mainstream culture, for a number of reasons. First, sampling reexamines and challenges traditional (mainstream and classical) ideas and presuppositions about the music-making process as well as concepts of composition and the use and reliance of technology. Moreover, sampling — and beatmaking in general — closes the gap between those who can create and those who *presumably* cannot, effectively increasing the number of producers in culture and commerce while reducing the number of consumer-only persons in society. Sampling also keeps a cultural and musical past, specifically a vast Black American music culture and heritage, relevant; this is something that many modernists would otherwise prefer be left alone. Finally, sampling exposes the inequity of the twentieth-century corporate perversion of American copyright law. (A theme I explore more deeply in the Copyright Part of this study.) These threats collectively contribute to the criticism against the art of sampling.

The Function and Value of Sampling

Sampling in the hip hop/rap music tradition has an emotional depth and richness that can't be duplicated or convincingly imitated. Beatmakers (producers) who use sampling as their primary compositional process do not do so *just* for the sound that sampling renders — But make no mistake, it is indeed a major factor in their decision. Sample-based beatmakers (producers) also use sampling for the emotional effect that it offers and the historical connection that it provides. In this way, sampling appeals to a fundamental part of the human condition. This is ultimately the most important function of the art of sampling.

Another importatn function of the art of sampling is that it reintroduces old (forgotten) songs to new audiences, this in turn creates an appreciation for sampling itself. But for Black sample-based artists, it has always been deeper than that. It was not just an appreciation, nor just an aesthetic. Black music artists want to be connected to their musical heritage, their common history. One reason for this desired connection is because they want to make their contribution to the canon of Black music. Another, more pressing reason is that this connection helps Black music artists cope with the pain of the Black experience in America.

Sampling is also good for absorbing the traditional music education process that accompanies DJing, which was once a pivotal, seemingly mandatory step in becoming a beatmaker (producer). The single biggest factor that made many music groups so successful throughout the twentieth century is the fact that musicians of those incredibly rich eras were able to witness and draw from one another. As such, they were able to continuously tap into a powerful collective music ethos. With that ethos gone, the art of sampling is one of the only tools left that's capable of allowing modern musicians to tap into that very same ethos. In fact, most of the "teachers" who represented that ethos are no longer alive. Furthermore, the number of possible teachers who can actually teach people about the styles, sounds, and cultures of the ethos of bygone music eras have dramatically decreased. So the act of passing down this widespread music heritage is rapidly vanishing. Sampling directly addresses this void of conventional music education, as it helps make up for the current lack of teachers who traditionally taught this kind of music education.

Next, the oral tradition that has passed down music heritage for hundreds of years has all but evaporated. Although sampling could never take the place of the rich oral tradition of passing music heritage on to later generations, I do believe that the art of sampling stands as one of the most viable means of continuing the tradition of passing on music heritage. Further, the art of sampling is not simply a method or a process for making beats. As an educational aid, sampling teaches musicians a number of methods for and

approaches to making music. For instance, I learned more about the dynamics of sounds through sampling than from any other music process I know.

And what of the historical preservation of twentieth-century American popular music, particularly Black (African American) music of the '50s, '60s, and '70s? How many institutions (aside from a handful of elite academic institutions) or popular (non-academic) publications are in place that realistically and regularly attempt to preserve the vast canon of Black music and the most critical principles, tropes, and structures of the Black (African American) music tradition? Without such instruments to help preserve key components of the Black (African American) music tradition — *a tradition that was fundamental to every popular American music form* — the link to a vastly significant music heritage and culture will be neutralized, and twenty-first century music forms will be further at risk for diluted creativity. In this way, the art of sampling functions as a defense against diluted creativity because it keeps important, meaningful music from the past in the public square of the present.

This is not to say that sampling is the absolute solution to stopping the erasure of the link to an important cultural and music past. But it is one valuable tool that contributes to the broader solution. More specifically, in the hip hop/rap music tradition, the art of sampling bridges a gap between a musical heritage that once nourished a people and a new music heritage that is becoming more and more foreign to the tradition from which it came.

All things considered, the art of sampling functions as a music-making process, a cultural force, and an indispensable communication tool, one that teaches and instructs while underscoring the importance of history. This is the fundamental value of the art of sampling.

Chapter 12

A Critique of David Sanjek's Essay "'Don't Have to DJ No More'"

Detailing the Primary Problems with Scholarship and Criticism Surrounding the Art of Sampling and the Implications that it Holds for Copyright Law

"Why do You Send Fools To judge My Work?"
—Michelangelo

On December 12, 2023, *Spin* announced its choice for album of the year 2023: Killer Mike – *Michael*. Bob Guccione, Jr., *Spin* founder and acting editor-in-chief, began his review of *Michael* this way: "I'm not a fan of most rap…"[1] Historically, this level of tone-deaf arrongance is not uncommon when it comes to commentators writing about hip hop/rap music. Guccione's admission is just one recent example of the problem with some commentators being authorized to cover hip hop/rap music when not only are they not familiar with hip hop/rap music, they are openly not fans of it. So if this is a common sentiment with regards to hip hop/rap music in general,

[1] "Album of the Year: Killer Mike, 'Michael,'" *Spin* (December 12, 2023) https://www.spin.com/2023/12/album-of-the-year-killer-mike-michael/.

imagine how things play out where sampling, hip hop/rap music, and copyright law are concerned, and when we factor in the privileging of white commentators.

In a field dominated by white scholars and commentators, scholarship surrounding the art of sampling is often lacking in context, detailed facts, accurate interpretations of key moments in hip hop/rap music history, *and* recognition of the primary figures in the development art of sampling. There are a numbere of interrelated reasons for this. First, there's virtually no diversity in this space, so, historically, voices coverging this subject have been, with few exceptions, limited to one group: scholars, critics, and other commentators who are white. Second, since white scholars, who are privileged over Black scholars and who make up more than 80% of all full-time professors,[2] are authorized first and foremost to cover the art of sampling, there are several issues that arise. First, the bulk of these commentators have shown a serious lack of familiarity with the roots of hip hop/rap music. Second, the bulk of these commentators have proven to be less capable, less willing, or less inclined to comment truthfully (or even at all) on the effects of racism in academia and its impact on Black music studies. Third, the bulk of these commentators have shown no understanding of (or have been less interested in) the realities of communal creativity; instead, they have been more biased in their support of European notions of creativity and originality, and more supportive of the notion of superiority of Western music theory.

Thus, three important notes are warranted here. First, I'm not suggesting that white people are inherently incapable of writing about hip hop/rap music and sampling because they're white. I'm pointing out the fact that race is an important, inescapable factor when discussing Black music, the art of sampling, copyright law, and

[2] Scholarship done on the history of sampling and copyright law in America is overwhelmingly conducted by whites. This means that not only is the whole story of modern sampling and copyright law not being told, the portrait of some of the central players — i.e. Black music artists — in this story is barely being sketched, and this leaving loads of critical analysis on the side of the road.

the media that covers all of these subjects. When white commentators ignore race or, more precisely, ignore the impact of racial privilege and racism on these subjects, their analyis is obstructed by their blind spots and they present commentary that's, in way or another, tainted with bias against Black music artists and Black music history. And since white commentators have an "enhanced ability" (a privileged position) when it comes to covering pop culture in general, this historical problem of whites having proprietary claim over the study of Black music and related subbjects has persisted. As such, Black commentators have been shut out from having little claim to this area of study, despite Black people being at the very center of the subject. Scholar Randall L. Kennedy has spoken about this phenomenon:

> "One reason why many black intellectuals feel moved to assert proprietary claims over the study of race relations and the cultural history of minorities is the perceived need to react defensively to the **enhanced ability of whites**, because of racial privilege, to exploit popular interest in these subjects. Even at the height of popular interest in the Black Power Movement, the conditioned reflexes of many editors and publishers produced a veritable bonanza for white commentators. Moreover, **the privileging of whites in cultural enterprise is pervasive.** In the I950's, for instance, when 'rhythm and blues' played a major role in transforming the sensibilities of many young whites, the color bar prevented black musicians from capitalizing fully on the popularity of a genre they had done much to establish; instead white cultural entrepreneurs typically reaped the largest commercial rewards58 - a pattern still visible today, albeit in less dramatic form. Given the pervasiveness and tenacity of racial prejudice in American culture, it is readily imaginable that current practice and discourse in legal academia could be tainted by biases of the sort that some commentators claim to have identified." [emphasis mine][3]

[3] See: Randall L. Kennedy, "Racial Critiques of Legal Academia," *Harvard Law Review*, Vol. 102, No. 8 (Jun., 1989), 1758-1760. Kennedy, further notes that: "[t]he paradox of blackness in American society [is that in] white hands, blackness can be converted into sizable commercial . . . value"). At the same time, black academics specializing in racial affairs received a boost not only from the groundswell of interest in their specialty, but also from demands insisted upon by black power activists. **Still, it is striking the degree to which major institutions, including those controlled by whites of a decidedly liberal bent, evinced a strong preference for white commentators on racial issues."**(Kennedy, 1758-1760 [emphasis mine]). Thus, a large part of the reason that the discussion around sampling and copyright law has been slow to advance is that the people "authorized" to write about this subject are overwhelmingly white. This lack of diversity informs Sanjek's work.

Next, I'm not saying that there aren't any white commentators who are knowledgeable about hip hop/rap music in general and sampling more specifically. Of course there are! But this doesn't negate the fact that for more than 30 years, most white hip hop commentators have *not* included in-depth discussions of race and racism in their analyses of hip hop music culture. To be very clear, I'm not against any group, racial or otherwise, writing about hip hop/rap music. I'm for, however, commentators making the most comprehenisve, bias-free analysis that they can offer. And this requires that commentators deal head on not only with their own blind spots, but also with the role that race, racial privilege, and racism play in the perceptions and criticism of hip hop/rap music, the art of sampling, and copyright law.

Finally, my point here in this chapter is to show that the commentary surrounding sampling and copyright law, especially in academia, is indeed dominated by white people, and this has lead to scholarship that is incomplete, mischaracterized, or just plain inaccurate. Getting at the origins of the *type* of criticism that dominates the dialogue that surrounds sampling and copyright law requires that we factor in the bias in this field and the pervasive racism in higher education, publishing, and the media.

To see how all of the aforementioned factors play out in the scholarship surrounding sampling and the implications that it holds for copyright law, as well as to show how and why certain inaccuracies about sampling and copyright law persist today and to demonstrate how to properly address these inaccuracies, this chapter examines David Sanjek's seminal essay "'Don't Have to DJ No More': Sampling and The 'Autonomous' Creator."

I cite here the primary difficulties of Sanjek's work because he is considered an exemplary pioneer of scholarship on sampling, and his essay "'Don't Have to DJ No More'" is seen as a reliable model for other scholars and commentators — Many scholars and commentators have since adopted a number of its ideas and arguments as gospel. Specifically, with my critique of Sanjek's essay, there are four areas that I hope to illuminate. First, why musicianship supersedes technology. Second, why hip hop/rap

music's role in the development of sampling can't be diminished. Third, why a comprehensive understanding of copyright law is critical to any discussion about sampling. Fourth, why the solution to the so-called sampling "problem" begins with de minimis and fair use, not sample clearance or a special amendment to copyright law — i.e. the broadening of protection for sound recordings and compositions.

Fundamentally, this chapter is crucial for understanding some of the illogical arguments raised against sampling and logical fallacies associated with copyright law. In effect, this critique of David Sanjek's "'Don't Have to DJ No More'" serves as critique of contemporary commentators who echo Sanjek's same biases and inaccuracies.

***

Overview of "'Don't Have to DJ No More': Sampling and The 'Autonomous' Creator"

First published in 1991 in the *Cardozo Arts & Entertainment Law Journal* (10 *Cardozo Arts & Ent. L.J.* 607, 1991-1992), then updated and republished in 1994 in *The Construction of Authorship* (Durham and London 1994, David Sanjek's "'Don't Have to DJ No More': Sampling and The 'Autonomous' Creator" (hereinafter referred to as "'Don't Have to DJ No More'") has since been cited as a reference in at least 129 different works, including books, academic journals, and various articles; most recent citations being in 2023. Because "'Don't Have to DJ No More'" is considered to be an important work in the field of sampling and copyright law, and because Sanjek is considered both an exemplary pioneer of this field and a reliable model for new researchers, commentators, and historians (many scholars and commentators have since adopted a number of its ideas and arguments as gospel), I will cite here in this chapter some of the difficulties (inaccuracies, problems, etc.) of his essay as well as those few areas in which he is on solid ground.

Fundamentally, the problem with "'Don't Have to DJ No More'" is that it rests on the presumptions related to Sanjek's biases and it proceeds from two things. First, Sanjek's lack of understanding of the very culture that he's examining; this is one reason why he spends less time investigating sampling in the hip hop/rap music tradition than is warranted. Second, Sanjek's incomplete and inaccurate understanding of copyright law. Furthermore, most of Sanjek's analysis is based on assumptions that are not in line with reality, both in terms of sampling and copyright law. And all of these assumptions are challenged by evidence that he either overlooks or misinterprets.

We also can see in "'Don't Have to DJ No More'" the insistence with which modern scholarship has probed the art of sampling and the implications that it holds for copyright law; which is to say that the probe has mainly prioritized the paradigm of what harm is being done to copyright owners, rather than what benefits and harms the public. We can also see in Sanjek's work the minimization and significance of the contributions of Black music artists to art forms where whites are the minority. In this regard, Sanjek relies implicitly on the common assumption that sampling is essentially all the same; that there are no distinctions to be drawn within hip hop/rap music in particular and other music forms in general; and that there is no difference between the compositional processes, aesthetics, and motives of sample-based musicians working in different music traditions. Insofar as Sanjek explores the capabilities of modern recording technology in his essay, he does a good job at describing how modern technology enables the art of sampling, but he raises technology above musicianship where sampling's involved.

"'Don't Have to DJ No More'" also reveals biases and inaccuracies that are still prevalent today among many scholars, musicians, commentators, and members of the media. These biases point to a limited grasp and distorted understanding of hip hop/rap music and its history. Another takeaway from Sanjek's essay is that it demonstrates that even when there's presumably objective commentary about sampling, there still remains the tendency of many commentators to minimize the role that hip hop/rap music

played (and continues to play) in the development and popularization of the art of sampling. Often this is done in an effort to center recording artists who are not at the heart of the art form. Equally striking, with regards to copyright law, one big problem of Sanjek's essay is that it plays up the rights of copyright owners over the public.

"'Don't Have to DJ No More'" provides us with an important example of how a combination of the same critical factors often leads to problematic examinations of the art of sampling and copyright law. In this light, my point is to call for a revision in the way we explore the art of sampling and the implications that it holds for copyright law. Above all, we must first look at sampling as a well-established art form and afford it all of the customary associations that comes with that. Second, we must acknowledge that the art of sampling relies on permissive borrowing, just as all art forms necessarily do. Third, we must look at copyright law from the view of its stated purpose: "to promote the progress of the Sciences and useful Arts." This means that we must always bear mind that the right of the public is prioritized over the limited monopoly of copyright owners. This also means that we must remember that the public has limited access, in the form of de minimis and fair use safe harbors, to all copyrighted subject matter without the need of permission from copyright owners.

Musicianship (Creativity) Above Technology

The mythology of music making gives cover to those who make music. Put another way, most musicians benefit from the aura of authority and perceived genius, whether they are geniuses or not. People perceive composers and musicians as having a unique talent, which they often do; but the mythology sets in when people respond to musicians in much the same way that an audience responds to a magician's trick: *"How'd he do that?"* Today's technology, which can turn anyone with a smart phone into a musician, is providing some of the answers. This upsets the status quo because suddenly some secrets are laid bare and the work of so-called geniuses are demystified.

Sanjek is correct when he states that it "should be evident that the elevation of all consumers to potential creators thereby denies the composer or musician an aura of autonomy and authenticity."[4] Still, even if technology enables a music process, such as sampling, the aura of autonomy and authenticity doesn't vanish entirely. Musicianship (creativity) always exists above and beyond technology. The piano, itself a technological advancement, is played by millions of people the world over, yet each pianist is as talented as their own musicianship and creativity. In other words, musicians are not necessarily bound by the limitations of the technology that their instruments offer; there is always a case to be made for those musicians whose musicianship, creativity, and ingenuity surpasses the technology at their disposal.

In "'Don't Have to DJ No More,'" Sanjek implies that technology doesn't just enable sampling, it *leads* the sample-based musician, or at least technology renders the musician *less* autonomous and authentic. But this is inaccurate and misguided. If Sanjek had a more comprehensive understanding of the sampling tradition of hip hop/rap music, he would have known that sample-based beatmakers (producers) were far ahead of the technology that was available to them. When we look closer at the sampling tradition of hip hop/rap music, we notice that even with more advanced digital samplers, which now come with virtually zero sampling limitations in terms of time (how much you can sample) and an endless number of effects, today's leading sample-based beatmakers (producers) have not outpaced the fundamental strides that were made by the sampling pioneers from the Pioneers/Avant Garde beatmaking period from 30 years ago. Nevertheless, technology — specifically more powerful digital samplers — has changed the mythology surrounding sample-based beats. One example? The minimalist, drumless loops, one-sample-loop beat style, sound, and aesthetic that has been revealed for what it is; there is not (or there should not be) an aura of "genius" around these types of beats. But that doesn't detract from the value and appeal of these style of beats and the

[4] David Sanjek, "'Don't Have to DJ No More': Sampling and The 'Autonomous' Creator," in The Construction of Authorship (Durham and London 1994), 345.

raps that they inspire. And while today's music production devices and software programs have, like their digital sampler forefathers, made everybody into potential sample-based musicians, hip hop/rap music, as a tradition and genre, continues to offer the fastest track to respectability in this regard.

A Sampler: Musical Instrument or Commodity?

Sanjek misidentifies the digital sampler as simply a commodity, not a musical instrument. Pointing to the fact that "[it is a longstanding practice for consumers to customize their *commodities*, command their use of meaning before they are commanded by them,"[5] he implies that sampling is merely the result of the longstanding practice for consumers to customize their "commodities." Building on his premise that sampling, in terms of music making, is mostly a matter of technology, autonomy, and authenticity, Sanjek — who's more occupied with the idea of sampling as a personalized commodity experience, something that grew out of consumers' desire to manipulate the technology that they bought and owned, not sampling as an art form and founding aesthetic of hip hop/rap music — misses a number of key points. Chief among these points are: 1) Communal creativity and how the de minimis and fair use doctrines apply to it; 2) The musicianship at play in the sampling tradition of hip hop/rap music; 3) The heritage connection that sampling provides for Black music artists in hip hop/rap music; and 4) The connection to and engagement with history that sampling offers all sample-based musicians.

According to Sanjek, "'[w]hen the metal is yours you put your mark on it, buying something is only the first step, what you do to it is your name, your history of angles, your exaggeration, your mad paint for the grand scope of humanity.'"[6] Here, tinkering with or hacking consumer products is what Sanjek is really describing. But if tinkering with or hacking samplers is part of the equation when it comes to sampling, this is certainly not the defining feature of

[5] Sanjek, 343.
[6] *Ibid*.

sampling in the hip hop/rap music tradition. Effectively, Sanjek strips the sample-based musician of musicianship and reduces sampling to nothing more than tinkering with a "commodity." Sanjek's focus on technology and his reluctance to credit sampled-based musicians with the characteristic of musicianship is dismissive. Moreover, with this dismissal, Sanjek is saying that there is no intellect, creativity, skill, ingenuity, or science involved in the art of sampling.

To understand Sanjek's dismissal of the musicianship and artistry that is present in the art of sampling, consider that a piano is a musical instrument *and* a commodity; yet, it would be absurd to describe a pianist's work as tinkering with his commodity. What's at play here then is bias, the perception that sample-based music is made via tinkering, a separate, non-musical process. Therefore, what comes forth is the idea that music made via sampling is in effect "non-music" because the process by which it was produced is grounded less in musicianship and more in "commodity" hacking. Sanjek's focus on sampling, not as a music process or an art form but rather the work of tinkerers and hackers, allows Sanjek to distance the art of sampling from other art forms that traditionally rely on permissive borrowing, like writing, photography, dancing, etc. This *otherizes* sampling and casts suspicions over how permissive borrowing works in sampling.

Even when Sanjek accurately describes the capabilities of modern recording technology, he frames it from the perspective of a consumer, not a musician, and he describes the various recording processes as technology hacks. The notion that the creation of new music *is the intention* of electronic-based musicians working with modern technology is not even an afterthought for Sanjek:

> "Similarly, the **consumers** of recorded music possess a range of options for the recontextualization of preexisting compositions: they can take material from one format and transfer it from a given context to another, creating their own 'mixes'; alter speed or pitch or juxtapose distinct recordings through mixers, variable speed turntables, or filters; or manipulate the recording on an adaptable turntable."[7]

[7] *Ibid.*

In my book *The Beat Tips Manual*, I described the democratization of modern recording technology and music composition tools as leading to advent of the beatmaker, whom I call the "common composer." Sanjek correctly draws the connection between modern recording technology and the advent of this new kind of composer:

> "The range of options available either to **consumers** or the creator for the recontextualization of existent recordings has been substantially enlarged by computer technology, specifically the Musical Instrument Digital Interface, or MIDI. A MIDI converts any sound into a series of retrievable signals which, since they can be stored on a computer, may be manipulated as one would manipulate any computer program. **In effect, if one can type, one can compose; the programmer and the composer are now synonymous.**"[8]

While this may be technically correct, for Sanjek, it starts and ends there. Because of his limited focus on the technology, we lose sight of the human connection that we typically afford to other art forms. Thus, Sanjek downgrades sampling as something that not only relies on technology but is presumably *inspired* by it. Of course sampling relies on technology — so does playing the piano, the piano is also technology — the crucial point that Sanjek misses, however, is that musicianship, creativity, and artistry inspires all music processes and music forms, regardless of the technology being used.

Pressing further with his theme of technology above musicianship, despite properly noting one of the skills that sampling requires, and despite quoting John Leland's assessment that digital samplers have made everybody a potential "musician," Sanjek still arrives at the premise that sampling is ultimately much less about "musicianship" and much more about "fandom":

> "Since one is able to retrieve any compositional element at will, as well as store any musical phrase, rhythmic device, or vocal effect one desires, the range of compositional possibilities is endless. This has undeniably enlarged, if not 'democratized,' the ranks of potential creators. Instrumental dexterity is no longer a prerequisite for

[8] *Ibid*.

> creators. As John Leland has written: 'The digital sampling device has changed not only the sound of pop music, but also the mythology. It has done what punk rock threatened to do: made everybody into a potential musician, bridged the gap between performer and audience…. Being good on a sampler is often a matter of knowing what to sample, what pieces to lift off what records; you learn the trade by listening to music, **which makes it an extension more of *fandom* than *musicianship*.**'" [emphasis mine][9]

Knowing what to sample *is* a part of the art of sampling. But for the pianist, isn't knowing which notes to play part of the equation of musicianship? You can know what to sample and still not know how to arrange the sample(s) and create a dope beat. Likewise, you can know which notes to play on the piano and still not know how to arrange them properly into a beautiful composition. Sanjek's disregard for the musicianship that takes place in the sampling tradition of hip hop/rap music is common. And given the fact that "'Don't Have to DJ No More'" has been referenced as much as it has since 1994, it's clear that Sanjek has helped to push this terrible perception. But with his assessment of sampling as mostly the product of "fandom," Sanjek suggests that since anyone can do it, the art of sampling lacks musicianship. But anyone can play the piano, no? There's no law against anyone taking up any instrument, regardlesss of how complex one instrument may be versus another. But we don't remove the capacity for musicianship from pianists or other musicians because of this fact. Regardless of the instrument that's being played or the degree of complexity associated with it or the technology it employs, what remains, what separates all musicians is their musicianship, their creativity, their ingenuity, and their skill on their chosen instrument. Sanjek fails to recognize this and his analysis suffers as a result.

Sticking with his bias against the idea of sample-based musicians as *musicians* with the capacity for musicianship, Sanjek oversimplifies sampling. Equating access to source material with artistry, he continues his mischaracterization of sample-based musicians as mere "consumers" who have simply developed a talent for "collage":

[9] *Ibid*, 345.

> "However, it should be evident that the elevation of all consumers to potential creators thereby denies the composer or musician an aura of autonomy and authenticity. If anyone with an available library of recordings, a grasp of musical history, and a talent for ingenious collage can call themselves a creator of music, is the case that the process and the product no longer possess the meanings once assigned to them?" [emphasis mine][10]

Sanjek clearly has a problem with identifying sample-based musicians as *musicians*. First, he's not willing to accept that the definition of musicianship has always been fluid. A steady pace of technological advancement has always led to the invention of new instruments, which has always led to more people becoming musicians; in turn, this has always led to the evolution of new music forms and traditions. There was once a time, for instance, that rock 'n' roll — which Sanjek privileges over hip hop/rap music — was not considered "real" music by classical artists.

This leads to my second point: Ideas. Suppositions about musicianship (any artistry really) have always been class related and, in many cases, race related. Nowhere in "'Don't Have to DJ No More'" does Sanjek account for this fact. Instead, he proceeds with his analysis as if we're all working from the same universal conceptual standard of musicianship and what it means to be a musician. Either Sanjek suppresses or he does not know the role that classism and race plays in the discussion of musicianship; either he suppresses or he does not know the role that race plays in the bias against the sampling tradition of hip hop/rap music, particularly whether or not the art form's practitioners possess musicianship. Sanjek does not know the primary aesthetic developments in the sampling tradition of hip hop/rap music, nor does he know *who* was responsible for them. As such, Sanjek's biases and blinders, which are also caused by his privileged status in academia, lead him to speak (authoritatively) about sampling and hip hop/rap music despite his lack of familiarity with either subject.

[10] *Ibid*.

Sanjenk describes sampling, in the general sense, as just an every man's game. *Anyone with some records or access to songs can do it.* Theoretically, that's just as correct as saying that anyone with access to any instrument can be a musician. So is Sanjek implying that "real" musicianship is marked by limited access? Anyone with a computer and access to word processing program can call themselves a writer, no? If we accept the reality that open access to tools of production — samplers, pianos, cameras, computers — has historically always lead to more consumers becoming creators, we can see how easily Sanjek's thesis, with regards to sample-based musicians and musicianship, unravels.

Sanjek's Bias Leans Towards Those Who Are Sampled, Not Those Who Sample

Sanjek's bias is also apparent when it comes to copyright law. He's more concerned with the rights of the composer (recording artist) who's sampled than he is with the rights of those who sample. Put another way, he's less concerned about the right of the public or the balance that copyright law seeks to strike:

> [H]ow is one to **guarantee the livelihood of the composer** of the sampled material, and insure that it is accorded the protection of copyright, if the sampling does not appear to infringe upon the original material under the protection of the 'fair use' clause of the 1976 Copyright Act. [emphasis mine][11]

What about the protection of the sample-based musician? What about the public's right to limited access to copyrighted works via de miniminis and fair use? Do the rights of the composer of the sample material — i.e. the copyright owner — superced the rights of the public? Copyright law says no. The primary purpose of copyright law is "to promote the progress of the Sciences and useful Arts." The protection of a copyright owner's work is always secondary concern to fulfilling that purpose and the other objectives

[11] *Ibid*.

of copyright law, namely the advancement of society. Therefore, if the use is de minimis or fair use, it's not an infringement. But in "'Don't Have to DJ No More,'" Sanjek is at odds with this reality. Moreover, his "guarantee the livelihood" question demonstrates his misunderstanding of what it means for copyright owners when samples of their works are de minimis or fair use. According to Sanjek, the "livelihood" of the "composer of sampled material" is in jeopardy whenever the sample material does not infringe upon the composer's work. But this is a logical fallacy. If the composer's work has not been infringed, then the composer has not been harmed; and therefore, the composer is not entitled to compensation or credit.

Either Sanjek failed to recognize this simple point or it didn't concern him. As we will see later, Sanjek believed that the "solutions" were two. One, for Congress to make a special amendment to copyright law specifically for sampling. Second, for the music industry to establish "an industry-wide rate structure for licensing and royalty payments for samples." In either case, Sanjek's so-called solutions, which are designed to assure payment to (i.e. the "livelihood" of) copyright owners where payment is not warranted, effectively blocks the borrowing (sampling) of sound recordings from de minnimis and fair use protection. In this scenario, the rights of copyright owners who own compositions and sound recordings are broadened. With the addition of sound recordings as copyrightable subject matter to the Copyright Act of 1976, Congress specifically stated that this is not and should never be the case. But Sanjek did not address any of this in "'Don't Have to DJ No More.'"

Sanjek's Three Questions

In "'Don't Have to DJ No More,'" Sanjek says that "[t]he question of sampling's propriety remains open, but it is a process whose presence is increasing, not decreasing," and that his purpose, therefore, is "to address three questions."[12] Before taking a close look at Sanjek's three questions, we must first consider what he

[12] *Ibid*.

means by *"the question of sampling's propriety remains open."* This question actually distracts attention away from the basic fact that the sampling of sound recordings represents just *one* form of permissive borrowing. So-called questions around sampling's "propriety" that ignore this fact are never about treating sound recordings like other copyrightable subject matter; rather, such questions are suggestive of treating sound recordings differently than other copyrightable subject matter. In other words, such a question is really about broadening the protection for sound recordings and compositions. (Later in this chapter, we'll see how this fits with Sanjek's solutions to the questions.) Now, let's turn to Sanjek's three questions.

First question — Sanjek asks:

> **"[W]hat is sampling's history** and how is it connected to other common practices in the recording process; are the ideological presuppositions of rock history, which see technology as directly opposed to self-expression, no longer operative?" [emphasis mine][13]

With regards to sampling's history, Sanjek doesn't offer a thorough account. He says that "sampling is most often associated with the genre of hip hop." He's correct. But he leaves it there, as if sampling just has an "association" to hip hop/rap music, nothing further. Then, with the very next sentence, he quickly shifts the terrain and says that sampling "has in fact become common in recording of *all* forms of music."[14] While some limited sampling was taking place in other music forms at the time that Sanjek wrote his essay, sampling was by far practiced most in hip hop/rap music. Thus, in one stroke Sanjek dimishes the role of hip hop/rap music in the development and popularization of sampling, and he signals that he's going to push the significance of sampling in hip hop/rap music off to the side. Sanjek doesn't thoroughly answer his own question, "What is sampling's history?" To account for hip hop/rap music as simply being just the genre that "sampling is most often *associated* with," is to overlook the extent to which hip hop/

[13] *Ibid*.
[14] *Ibid*.

rap music has advanced the art of sampling, both in terms of its compositional practices and its popularity around the world. Such an odd understatement hardly speaks to the important role that hip hop/rap music played (and continues to play) in the popularization of sampling. Between 1991 and 1994, the years that "'Don't Have to DJ No More,'" was first published and updated respectively, hip hop was synonymous with sampling! Hip hop/rap music was not only responsible for the key creative and aesthetic developments of the art form, it provoked the most controversy and it also lead to the biggest sampling-related copyright infringement cases of the time.

Also note: Sanjek's "all forms" proclamation decenters hip hop/rap music from the discussion of sampling and opens the door for commentators to center other music forms and recording artists who played little to no pivotal role in the history of sampling. (Later in this chapter, I'll show how Sanjek did exactly that.)

Lastly, Sanjek's claim that "the ideological presuppositions of rock history, which see technology as directly opposed to self-expression…," is not true. If rock 'n' rollers never embraced technology, electric guitars would have never been a mainstay of the culture. Moreover, various recording techniques, including sampling, have been used throughout the history of rock 'n' roll. So I'm not sure if Sanjek presumed rock music to be the gold standard for music making that was absent of technology, but in any case, rock musicians did *not* view technology as "directly opposed" to self-expression; in fact, the truth was quite the opposite. Throughout the history of rock 'n' roll, rock musicians have embraced technology and used it as an aid to their self-expression.

Second question — Sanjek asks:

> [H]ow has the sampling process necessitated a reexamination of copyright law and infringement litigation; has the 'fair use' clause been rendered more elastic or called into question?"[15]

This is actually a good question. I believe that sampling has proven how fair use is *supposed* to work; it has revealed why

[15] *Ibid*.

transformation, the critical sub-factor of the first factor of fair use, should always be the most important factor. At the same time, sampling has demonstrated why "harm to market," the fourth factor of fair use, should not be the most important factor in a fair use examination. Still, Sanjek did not mention the de minimis doctrine in connection with his question. Sanjek's omission of de minimis is critical because de minimis is a consideration that precedes fair use. And it's further worth noting that most of the sampling that is done in the hip hop/rap music tradition is de minimis, especially when we consider the sampling of drum sounds, sound-stabs, 3-second snippets, and the like.

I'm persuaded to believe that Sanjek ignored a discussion of the de minimis doctrine because he saw all sampling activity as the same, and because he was convinced that sound recordings should be treated differently than other copyrightable subject matter. (Unfortunately, there are many critics today who share this same view.) In any event, this omission is glaring, and it's used as yet another way to: 1) Decenter hip hop/rap from the art of sampling; and 2) Remove an important safe harbor for sampling. The result is that Sanjek placed emphasis on the applicability of fair use; from this perspective then, it's easier to make a case for the need for clearance, which was Sanjek's concern.

Third question — Sanjek asks:

> [I]s sampling the postmodernist artistic form par excellence, and if so, **does it demand that we reexamine certain ideologies of performance, composition, and authenticity** that have driven rock history for most of its duration.[16]

Here, Sanjek makes no mention of the art of beatmaking, hip hop/rap music's chief compositional process, which was already three periods deep at the time that Sanjek published and updated his essay. So here we find another critical omission, because as far as sampling goes in the hip hip/rap music tradition, sampling is situated within beatmaking, not above it. Therefore, it's beatmaking, which

[16] *Ibid*.

emerged prior to the rise of modern sampling, that serves as the "postmodernist artistic par excellence," not sampling. Further, it's beatmaking that still demands that we "reexamine certain ideologies of performance, composition, and authenticity that have driven rock history for most of its duration" as well as other popular and classical music forms. I suspect that Sanjek was unware of the art of beatmaking as its own music process and aesthetic, just like he was clearly unfamiliar with hip hop/rap music in general. Either way, "'Don't Have to DJ No More'" reveals that Sanjek did not understand the art of beatmaking and how sampling in hip hop/rap music was developed through it.

When considering his three questions, Sanjek adds that "we must not forget about the dominant society's demonization of much contemporary popular music as well as the fact that the very technology that permits the process of sampling *is manufactured by conglomerates that demean their employees and pollute our environment*."[17] But nobody thinks about this. Nobody thinks of these things when it comes to contemporary popular music, let alone the manufacturers of digital samplers. Sanjek inserts his own opinion about conglomerates' mistreatment of their employees and environmental pollution into a discussion about sampling and copyright law, and it's awkward to say the least. It's certainly no "fact" that the "dominant society demonized much of contemporary popular music" at the time "'Don't Have to DJ No More'" was published. Consider just a few of the albums that were released in 1992: Dr. Dre – *The Chronic* (1992); Gang Starr – *Daily Operation* (1992); Pete Rock & CL Smooth — *Mecca and The Soul Brother* (1992); Billy Ray Cyrus – *Some Gave All*; The Pharcyde – *Bizarre Ride II the Pharcyde* (1992); Tori Amos – *Little Earthquakes* (1992); En Vogue – *Funky Divas*; Eric B. & Rakim – *Don't Sweat the Technique* (1992); Mary J. Blige – *What's the 411?* (1992); Prince – *Love Symbol Album* (1992). Where exactly was the "demonization" by dominant society of contemporary popular music that Sanjek was talking about?

[17] *Ibid*, 346.

Next, Sanjek affirms that "[s]ampling is a process with a distinct history, a developed aesthetic, and a set of auteurs who have defined the parameters of its use."[18] This is correct. But what is the "distinct history" and "developed aesthetic" that Sanjek choses to focus on, and who are the "auteurs" that he identifies as having defined the parameters of sampling's use? If we're to accept the fact that sampling was first popularized by and "most often associated with" hip hop/rap music, as Sanjek states, then we should expect a history of sampling in hip hop/rap music to follow, along with a list of names of the most recognized "auteurs" in hip hop/rap music. However, that's not the analysis that Sanjek offers. Instead, he goes with a discussion that situates sampling as something that proceeds from abstraction, something that he calls the "innovative potentialities of technology." He does not seriously examine sampling's outgrowth from hip hop DJing, nor does he discuss hip hop culture in general or its impact on sampling:

> Rather than engaging rock's traditional distinction between technology and art, the romantic assumption that any overindulgent use of technology diminishes not only individual 'feel' or 'touch' but also the very idea of self-expression, **sampling proceeds from a belief in the innovative potentialities and the use of a recording itself as a musical instrument.** It legitimizes the belief that technological devices can be utilized by musicians and audiences alike (two distinguishable constituencies that sampling effectively unifies, as the technology can make an audience member a potential musician) to appropriate the products of capital and the recording industry to serve their own devices." [emphasis mine][19]

Here, Sanjek allows for technology's presence in rock's "traditional" history, but he qualifies it by describing "any overindulgent" use of technology as an affront on the very idea of self-expression. The implication is that sampling is an "overindulgent" use of technology, and therefore, it calls it to question whether it actually involves musicianship.

[18] *Ibid*.
[19] *Ibid*.

Next, Sanjek gets a key point terribly wrong: He states that it's the "recording itself" that is used "as a musical instrument." In fact, the *sampler* is the instrument and the sound recording is source material, *not* the instrument. The paradigm is something more akin to notes which can be played through samplers, drum machines, and other EMPIs (electronic music production instruments). Sanjek then emphasizes the point that technology can make an audience member a potential musician. OK, sure. But again, technology or rather *any* music instrument can make an audience member a potential musician; this has long been true. As for utilizing "technological devices" as instruments, in the hip hop/rap music tradition this is less of a "belief" and more of a reality of the "culture of sampling" — *Anything that can be sampled and flipped, will be*! This attitude is in line with what Walter Gibson said in his book *Burning Chrome* (1982): "the street finds its own uses for things — uses the manufacturers never imagined."

What also should be noted is that throughout his essay, Sanjek continues to imply that when it comes to sampling, there's no musicianship, that it's more about the machine and not the musician. In doing so, Sanjek's machine-not-the-man implication robs the pioneers of hip hop/rap music's sampling tradition of their intelligence, their creativity, their ingenuity, their originality — in short, it robs them of their agency altgother. And this makes it easier to discredit or devalue their musicianship. Sanjek mentions hip hop/rap music at times in "'Don't Have to DJ No More,'" but it's his erasure of hip hop/rap music, particularly as it relates to key developments in the history of sampling, that continues to stand out. For instance, when he describes how computer technologies — i.e. samplers — automated a process that was once "manual," he points out that the sophistication and precision gained by samplers "transferred the work of the DJ to the programmer." It's quite telling that he omits the fact that it was specifically *hip hop* DJs who innovated these manual practices.

When Sanjek does get into hip hop/rap music, the results are a hodgepodge of borrowed observations that do not get at the heart of hip hop/rap music and its relationship to sampling:

> The performing modes it largely, but not exclusively, serves — *rap and hip-hop* have their origins in various black vocal performance styles including acapella work songs, skip-rope and ring game songs, doo-wop vocalizing, Cab Calloway and other Jazz vocalists (including Leo Watsin and Slim Gaillard), and the aggressive braggadocio of Bo Didley.[20]

Here, Sanjek draws on the research of David Toop (*The Rap Attack*) (1984), but he does a surface read. He fails to mention James Brown, Black radio DJs, and Lightnin' Rod, whose album *Hustlers Convention* was cited by DJ Kool Herc and all others of the period, as the direct inspiration for rap. Worse still, Sanjek, who relies on the incomplete research of Dick Hebdige, regurgitates the mythical Jamaican roots narrative of hip hop/rap music and makes the common error of situating the Jamaican dub music and yard party culture as the inspiration for the roots of hip hop. So it follows then then that Sanjek also makes the mistake of insisting that Jamaican dub music was the precursor to modern sampling:

> **However, technique and technology came together in Jamaica** when portable sound systems allowed DJs such as Prince Buster, Duke Reid, Sir Coxsone, and Lee 'Scratch' Perry to establish mobile discotheques and, using records by all manner of Jamaican and non-Jamaican artists alike, engage in audio combat with one another. They began to chant over records, scatting or toasting improvised sets of lyrics. At first, this was an exclusively live phenomenon. Later, producer/engineer King Tubby discovered that by manipulating the elements of a recording through reverb and echo or emphasizing bass tracks and phasing elements of the vocal in and out of the mix, one could create a multitude of versions from the raw components of any given record. Henceforth, what was once a purely vocal performance-based form became a technological creation, dub. It allowed for the process Dick Hebdige has called 'versioning,' who's beauty is that 'it implies that no one has the final say. Everybody has a chance to make a contribution. And no one's version his treated

[20] *Ibid*, 347.

> as Holy Writ.' Performers adapted King Tubby's discovery to their own ends, and dub performers such as U Roy, I Roy, Big Youth, Tapper Zukie, Dr. Alimentado, Prince Far I, Augustus Pablo, and Eek a Mouse chanted their lyrics over the booming bass and echoing guitar and drums of the dub mix."
>
> Dub most likely made its way to the United States through the Kingston, Jamaican-born Kool DJ Herc who emigrated in 1967 and purchased a sound system in 1973. [emphasis mine][21]

When Sanjek does arrive at discussing sampling and hip hop/rap music, he does a decent job at describing what manual sampling (i.e. done with turntables) was like before digital samplers became common, but even here he gets a key point wrong, as he describes vinyl records as "instruments":

> He soon, along with such other early key DJs as Theodor, Afrika Bamabaataa, and Grand Master Flash, **began to establish the techniques that would lead to sampling:** emphasizing the 'break-beat' passages of a given record by cueing and extending a particular rhythmic break until the crowd was virtually exhausted; spinning or 'scratching' a record very quickly on a single groove so that the vinyl itself becomes a percussion *instrument*; switching adeptly from one record to another or 'punch phasing' so one musical passage flows seamlessly to the next; and emphasing the pulse of the records by adding an electronic beat box. DJs engaged in style wars, a veritable form of aesthetic combat in which the audio auteurs attempted to outdo one another by providing the freshest sounds, the hardest beats, and the widest range of tracks. The result was, in the words of Houston A. Baker, Jr: 'Discotechnology was hybridized through the human hand and ear — the DJ turned wildman at the turntable. The conversion produced a rap DJ who became a postmodern, ritual priest of sound rather than a passive spectator in an isolated DJ booth making robots turn. A reverse cyborgism was clearly at work in the rap conversion. The high technology of advanced sound production was reclaimed by and for human ears and the human body's innovative abilities. A hybrid sound then erupted in seemingly dead urban acoustical spaces.'" [emphasis mine][22]

[21] *Ibid*.
[22] *Ibid*.

Sanjek's on-point description of manual sampling and how it led to sampling as we now know it can't mask two crucial mistakes that he makes elsewhere in his analysis. With regards to technique and technology coming together, the fact remains that similar remix techniques and track manipulation (vocals and all elements of the mix) had already been a staple of mixing practices in American popular music (notably rock 'n' roll, soul, and funk) *before* King Tubby's creation. This is not to downplay King Tubby's achievements or those of Lee "Scratch" Perry, et. al., nor is it to say that Jamaican dub music did not emerge as a distinctly Jamaican product. Rather, two things must be clarified. First, "technique and technology," particularly where sampling is concerned, did not first come together in Jamaica. Second, as I detail in chapter 1, Jamaican dub music — and the musical practices and processes that personified it did not "make its way to the United States" as the precursor to or "inspiration" for hip hop DJs or hip hop/rap music culture; and Jamaican performers like U Roy, Big Youth, Tapper Zukie, Dr. Alimentado, Prince Far I, Augustus Pablo, and Eek a Mouse were *not* the precursors to rappers in the South Bronx.

DJ Kool Herc, on whom Sanjek (like Hebdige) rests his theory, has been adamant that Jamaican dub music and yard party culture had no influence on the roots of hip hop/rap music, and that the impetus for what he was doing (the hip hop DJ style) came from Bronx DJ Pete DJ Jones, who played and mixed funk and soul records. Further, countless architects of early hip hop, including DJ Kool Herc, cite Lightning Rod as the forefather of rapping in the hip hop/rap music tradition. Lastly, ca. 1973 New York's disco DJs also must be included as having at least some influence on the development of the roots of hip hop/rap music.

***

I appreciate the fact that Sanjek included mention of the early/mid-'70s pre-sampling history of hip hop/rap music (even to this day, some commentators still do not recognized this history). This part of the story, which DJ Kool Herc, Grandmaster Flash, Afrika

Bambaataa all played a pivotal role in, is important. Still, Sanjek leaves out the critical history of hip hop/rap music and sampling that took place between the mid-'80s and mid-'90s. It's during this period in which the direct link to digital samplers, hip hop/rap music, and the major development of the art of sampling is best drawn.

The Four General Areas of Sampling According to Sanjek

Sanjek says that there are four general areas of sampling:

> **[t]he range of possible uses for sampling is wide, but the forms it has taken can roughly be broken down into four general areas,** each of which is distinguishable by the amount of sampling included, its placement in the material, and the effect the sampler has accomplished by the uses of computer technology. **"First, there are those records which sample known material of sufficient familiarity so that the listener may recognizes the quotation** and may, in turn, pay more attention to the new material as a consequence of the familiarity….
> **In addition, there is quoting of material not immediately recognizable to the listener.** The chief example of this practice is the drumming of Clyde Stubblefield, percussionist for James Brown from 1965 to 1971; his playing on the minor hit "Funky Drummer" has been sampled by various artists including Sinead O'Connor, Fine Young Cannibals, Big Daddy Kane, the Good Girls, Grace Jones, Mantronix, Miche'le, Seduction, Todd Terry Project, Alyson Williams, and most notably at the beginning of Public Enemy's 'Fight The Power,' on which Chuck D. raps '1989 the number another summer/Sound of the funky drummer….'"
>
> **"Secondly, there are those records which sample from both familiar and arcane sources, thereby attracting a level of interest equal to the lyrical content.** Most often the amount of sampling, particularly on rap recordings, is minimal, the emphasis being laid on the rap itself and the beat supporting it: excessive sampling might be felt to intrude upon the vocal performance." [emphasis mine][23]

[23] *Ibid*, 348-49.

The range of possible uses for sampling *is* wide, but three of the four areas that Sanjek "breaks" down demonstrates his lack of understanding of the compositional characteristics of the different sample-based styles and different categories of samples. (I explored these in chapters 4 and 5, The Compositional Elements of Sampling, Parts 1 and 2). Actually, there are three general forms of sampling: 1) Simple or "piggy-back" sampling; 2) Break-beat or "mix" sampling; and 3) Intricate sampling. I now turn to Sanjek's "four general areas of sampling" and offer my assessment.

"Known material of sufficient familiarity"

Here, Sanjek is mostly right. Sometimes the goal of the beatmaker (producer) in the sampling tradition of hip hop/rap music is to sample a "familiar" record in order to get people to "pay more attention to the new material as a consequence of the familiarity." A good example of this is Diddy and Faith Evans – "I'll Be Missing You" (1997), which sampled The Police's hit "Every Breath You Take." Still, often the goal is also to reconnect with one's musical heritage and call up songs from one's youth.

"Quoting of material not immediately recognizable to the listener. The chief example of this practice is the drumming of Clyde Stubblefield"

My first response to this description was: *Why is this the "chief" example?* Who declared this in 1992 and 1994? Drum sounds were sampled from many different records and many different drummers during the major sampling era of hip hop/rap music. One drum break played by Clyde Stubblefield may have been sampled often, but this doesn't take precedent over the tradition of sampling drum sounds in the sampling tradition of hip hop/rap music. In other words, Clyde Stubblefield represents just one drummer who was sampled, but he doesn't represent the "chief example of the practice" of sampling less-recognizable songs (material). Sanjek conflates the number of times that "Funky Drummer" was sampled as proof that

it's the "chief example" of an entire form of sampling. Further, he overstates Public Enemy's "Fight The Power," a song from Public Enemy's *third* album, *Fear Of A Black Planet* (1990), as being the "most notable" example of all. In fact, "Funky Drummer" was sampled by Public Enemy before *Fear Of A Black Planet*, for instance, on "You're Gonna Get Yours" and "Too Much Posse," two songs of their debut album, *Yo! Bum Rush The Show* (1987).

Additionally, when listing some of the names of artists — eleven names in total — who have sampled "Funky Drummer," Sanjek curiously *begins with*…Sinead O'Connor and the Fine Young Cannibals??? and he includes *just three* hip hop/rap artists: Big Daddy Kane, Mantronix, and Public Enemy. Missing from this list is every major sampling pioneer of the same era, like Marley Marl, DJ Premier, RZA, Pete Rock, Q-Tip, Howie Tee, and Large Professor. "Funky Drummer" drum samples were ubiquitous in hip hop/rap music at the time that Sanjek's wrote and published his essay. So either Sanjek didn't know this, didn't look more closely at hip hop/rap music, or, as I'm more inclined to believe by the balance of his essay, he intended to temper hip hop's role in the development of the art of sampling by prioritizing non-hip hop recording artists who did not use sampling as a primary music process and aesthetic. If the latter is true, this is made more problematic by the fact that Sanjek misses — or omits — the reality that pop-rock artists like Sinead O'Connor and the Fine Young Cannibals (seriously?) weren't inspired by sampling itself. Rather, they were persuaded by the growing appeal of hip hop, and they wanted to add a pinch of that hip hop vibe and feel to their music. Sampling, in particular a drum break commonly sampled among hip hop/rap music artists, was just a means to achieve that goal. Sanjek either didn't recognize this or purposely ignored it. Either way, it greatly undermines his analysis in this specific area.

Sanjek's "chief" example description is further flawed by another important point. Drum sounds and drum breaks represent their own compositional corner in the art of sampling. While drum breaks are often less familiar, i.e. obscure, this is not their defining feature. Sanjek was clearly unaware of this, so he made two

significant errors. First, he pointed to the sampling of drum sounds and drum breaks as the chief example of sampling material "not immediately recognizable to the listener" — i.e. obscure samples. But this is not what is meant by "obscure" samples in the art of sampling. Second, he crowned the drumming of *one* drummer, Clyde Stubblefield, as the chief example of the practice itself. This is part of another common trope with scholarship and commentary surrounding sampling: An emphasis on the number of times that a given record was sampled and pointing to that occurrence as if it holds more meaning than it does.

What is clear is that Sanjek did not have a command of what is considered obscure (lesser known source material) and how it 's sampled and used in hip hop/rap music. Moreover, Sanjek failed to draw a distinction between drum samples (and drum programming) and other types of sampling.

"Secondly, there are those records which sample from both familiar and arcane sources…"

Sanjek gets this partly right. However, by 1992, when "'Don't Have to DJ No More'" was first published, the beat was not merely a "supporting" element of the song. By 1992, beats, and the beatmakers (producers) who made them, were highly respected. And the reason why most sampling in hip hop/rap music is minimal is not because "excessive sampling might be felt to intrude upon the vocal performance," but rather it is a preferred aesthetic choice, the idea of doing more with less. This a fundamental principle of the ethics of the sampling tradition in the hip hop/rap music, which I discussed in Chapters 5 and 6.

Under his second general area of sampling, Sanjek offers Public Enemy[24] as the example of what he means. Then, curiously, he says

[24] The mention of Public Enemy is predictable in scholarship surrounding sampling, this is because most of the scholars in this field have quoted each other's research. Moreover, because most of the scholars in this field have had little familiarity with the key pioneers of sampling in the hip hop/rap music tradition (beyond Public Enemy, Beastie Boys, and De La Soul), they mention the same names. When you consider the icons that are almost always left out: Marley Marl, DJ Premier, RZA, Q-Tip, Paul C, Large Professor, Pete Rock, and Dr. Dre, you see how incomplete the picture is.

that "[o]f *equal* interest is the work of the British producer/mixer and director of the On-U Sound record label, Adrian Sherwood."[25] No, Sherwood's work does not equate to that of Public Enemy or the specific aesthetic approaches of the sampling tradition of hip hop/rap music. Sherwood specialized in the creation of dub music and employed the recording practices and predilections associated with that music tradition. Sampling was the chief compositional processes and primary of aesthetic for Public Enemy; the same could not be said for Sherwood.

"…a process dubbed 'quilt-pop'"

Sanjek refers to the third general area of sampling as "quilt-pop": "Finally, in a process dubbed "quilt-pop" by critic Chuck Eddy, recordings can be constructed *wholecloth* from samples to create a new aesthetic."[26] Here, once again, Sanjek reveals just how little he actually understands about the art of sampling, particularly its compositional characteristics. Whether sampling is done using "known material of sufficient familiarity" or "obscure" recordings, it can all still be — and usually is — created wholecloth from samples; that process is the fundamental aesthetic. Thus, Sanjek not only repeats the error of conflating form with tactic and misidentifies a technique trope that's paramount to the sampling, he makes critic Chuck Eddy the authority on the technique, as Eddy named the process "quilt-pop".

And what's Sanjek's chief example for "quilt-pop"? Grandmaster Flash's album *Adventures of Grandmaster Flash On the Wheels of Steel*. An album, it must be noted, that literally contains *no* samples, is for, Sanjek, the album that laid the ground work for "quilt-pop." And to explain what Flash's *Adventures of Grandmaster Flash On the Wheels of Steel* was all about, Sanjek quotes Dick Hebdige:

> "'The result was a recording about 'taking sound to the very edge of chaos and pulling back from the brink at the very last millisecond. On this record Flash is playing chicken with a stylus.'"

[25] Sanjek, 349.
[26] *Ibid*, 350.

This quoted Hebdige passage is purple prose that doesn't really describe anything at all. Further, it reveals a common problem among scholars and commentators who either: A) Know little about hip hop/rap music; or B) Conduct insufficient research on it — while relying on other insufficient research. So in key areas, they simply rely on their imagination rather than tangible data. This is why we get nonsensical things like: *"Flash is playing chicken with a stylus."* And in the case of Grandmaster Flash and his seminal recording *Adventures of Grandmaster Flash On the Wheels of Steel,* neither Hebdige or Sanjek provide an accurate depiction of what Flash actually did.

What's essential to know is that Grandmaster Flash recorded *Adventures of Grandmaster Flash On the Wheels of Steel* because he believed that the live DJ experience could be translated to the recording studio and thereby turned into a marketable record. When Sugar Hill Records (his then record label) finally gave him the chance to get into the recording studio to prove it, he came up with *Adventures of Grandmaster Flash On the Wheels of Steel.* What Flash was attempting to do with this album was merge live DJ tactics with recording studio practices. He wanted to expand the possibilities of the turntable as an instrument while maintaining the hip hop DJ feel and vibe. And he wanted to prove that there was still a fundamental role for the DJ on rap records. The result was that Flash laid the groundwork for a new kind of musician — the beatmaker — and a new form of music making, beatmaking.

Sanjek also asserts that:

> "[t]he technology Grandmaster Flash used to create these audacious and spectacular results is primitive compared to that available to contemporary samplers. Today, more sophisticated forms of montage encompass not only musical sources, but all manner of sounds in what might be described as instances of musical onomatopoeia."[27]

But here, Sanjek again omits the fact that the pioneers of the sampling tradition of hip hop/rap music were already using "all

[27] *Ibid*.

manners of sound" well before 1992. Finally, in one of his most alarming, terrbily inaccurate statements in "'Don't Have to DJ No More,'" Sanjek invokes the descriptor "postrap":

> "Certainly one of the most exciting and prolific creators of sampled collage is the young mixer/producer **Todd Terry**. Under various names, including Masters at Work, Black Riot, Swan Lake, and Royal House, Terry's 'aggressive appropriation and recycling of breaks, hooks, shouts, and choruses from all corners of clubland combine with a rhythmic population for another sort of ***postrap*** noise: raw, reckless, risky jams as exhilarating as they are brutal." [emphasis mine][28]

Think about that for a moment. Sanjek was saying that in 1992 (or at the latest 1994) we were "*postrap*". In other words, before Jay-Z's debut album, *Reasonable Doubt*; before Mobb Deep's debut album, *The Infamous*, before Raekwon's debut album, *Only Built 4 Cuban Links*, before J Dilla, Madlib, Alchemist, Kanye West — just to name a few rap albums released in 1995 and a few beatmakers (producers) who made their name after 1994 — Sanjek was endorsing the notion, as he quotes Vince Aletti (*Village Voice*, 1989), that we're *post* rap by 1989?!

Never mind all of the rap albums released between 1990 and 1994, Sanjek believed that in 1994, we were "postrap"; and that all the "raw, reckless, risky jams as exhilarating as they are brutal" stuff occured *after* "postrap" — and it was coming from… *Todd Terry*, whom we're supposed to accept as "one of the most exciting and prolific creators of sampled collage." Ok. This demonstrates what happens when insufficient research is applied and mixed together with bias against hip hop/rap music. It also demonstrates what happens when figures are centered in stories that they have had little to no role in. It also demonstrates what happens when people with little knowledge of hip hop culture are given the space to be propped up as authorities on hip hop/rap music. This problem continues in hip hop/rap music criticism today.

[28] *Ibid*, 351.

"...sampling has been utilized in the ever proliferating domain of 'mixes.'"

Sanjek ascribes the fourth general area of sampling to "mixes." Notwithstanding the fact that he's really not talking about the various forms of sampling but rather where *some* sampling is done, Sanjek stitches together comments that: 1) Do not actually speak to the art of sampling; 2) Conflates sampling with "remixing;" and 3) Misidentifies what DJs and remix producers actually do:

> [S]ampling has been utilized in the ever proliferating domain of "mixes." As new dance forms of performance styles come into fashion, mixers — many of whom began, and on occasion still act as club DJs — are hired to produced alternate versions of a given recording in that style….The degree to which these individuals deconstruct the original texts they mix can be so extreme that Arthur Baker was once named 'Rock Critic Of The Year.'"[29]

Notice here Sanjek's centering of Arthur Baker and his recognition of "*Rock Critic Of The Year*." Seriously, what does that have to do with anything? Next, Sanjek quotes John Pareles's dismissal of sample-based musicians:

> **It should come as no surprise that the practitioners of sampling have been accused of *sheer pilferage*,** of appropriating the work of others *because they are incapable of creating any of their own.* Jon Pareles, popular music critic of the *New York Times*, in a piece entitled 'In Pop, Whose Song Is It, Anyway?' wrote, '[I]t sometimes seems that sophisticated copying has overtaken innovation, than an *exhausted culture* can only trout out endless retreads.'" [emphasis mine][30]

First, why should this come as surprise? Given who was authorized to cover sampling and hip hop/rap music for the *New York Times* in 1989, such an assessment should have been expected. Moreover, Pareles and Sanjek are working from the same privileged

[29] *Ibid*.
[30] *Ibid*; see also: John Pareles, "In Pop, Whose Song Is It Anyway?," *New York Times*, Aug. 27, 1989, (Arts & Leisure), at 1.

social, political, media, and cultural pillars that grant authority to white men in music discussions — despite their lack of command of the subject matter. Second, Pareles's premise that "sophisticated copying has overtaken innovation"[31]and can only lead to "endless retreads" invalidates sample-based songs as new, creative works. This is a profound misunderstanding of sampling; sample-based songs are not "retreads."

But why does Sanjek include this Pareles quote without any attempt to dispute or counter it? I suspect Sanjek does so because Pareles's comment speaks to his own premise that sampling does not involve musicianship. Further, why is culture deemed to be "exhausted" in *1989*, at a time when sampling, and the technology that enables it, is just starting to take off? Sanjek does not consider any of these questions. Instead, he moves on as if the Pareles's comment is the authority on the matter and as if there is no further critical analysis required. Ostensibly, Sanjek offers some thin pushback to Pareles's denigration of sampling, which he called "appropriationist art."[32] But even when he does gets it somewhat right, in this case offering light pushback against the critique that sampling is just appropriationist art (i.e. just a matter of taking the work of others *because those who sample can't create anything on their own*), he still manages to mangle things up:

> However, it is absurd to assert that we are living in an audio echo chamber, cycling and recycling the same sounds without adding to our stock materials. Samplers engage in the practice for a number of reasons, only one of which (and any honest sampler will admit to it) is their lack of instrumental expertise….
>
> But even more important is the belief that sampling is not so much ransacking the past as reanimating. As Greg Tate writes, '[M]usic belongs to the people, and sampling isn't a copycat act but a form of reanimation. **Sampling in hip-hop is the digitized version of hip-hop DJing, an archival project and an artform unto itself.** Hip Hop is ancestor worship." [emphasis mine][33]

[31] This is another way to say that there is no creativity or originality involved in the art of sampling.
[32] Sanjek, 352.
[33] *Ibid,* 351-52.

In one stroke, Sanjek asserts that *he* is capable of distinguishing dishonest and honest sample-based musicians, that sample-based musicians lack "instrumental expertise," and this is one reason why they sample. Even if we suspend the reality that samplers are electronic music production instruments and that Sanjek is referring to expertise with traditional instruments, he still assumes that there are no sample-based musicians with "instrumental expertise" – that sample-based musicians sample because they *lack* instrumental experience. This isn't true. Again, samplers and drum machines are instruments, and those beatmakers (producers) who have mastered these instruments do indeed have instrumental experience. Furthermore, 90% of the sample-based beatmakers (producers) that I've interviewed have instrumental experience with traditional instruments. For example, DJ Premier played the drums, and 9th Wonder was in band and studied music theory from grammar school through high school; but both *chose* the art of sampling. And the main reason that most people choose sampling as a music process is because they are attracted to sampling as a style and aesthetic of music making itself.

Keeping his attention on Jon Pareles and writers like him, Sanjek takes exception with the fact that Pareles and others focus mostly on hip hop/rap music (as they should) when discussing the art of sampling:

> "We need also to realize that, while writers like Pareles focus almost exclusively upon rap and hip-hop music sampling practices now pervade all elements of modern music recording. The magnetic tape that recording companies began to use in the 1950s has, from the start, made possible all manner of cutting/splicing/dubbing/multi-track recording."[34]

Here, Sanjek is being disingenuous. Either he's out of touch with the connection between hip hop/rap music and sampling or he's fully aware of it; in any case, it's obvious that his aim is to decenter hip hop/rap music from the discussion of sampling. When one thinks of sampling, as an art form, aesthetic, and music

[34] *Ibid*.

practice, the "magnetic tape" that recording companies of the1950s produced is not what comes to mind; and it's certainly not the discussion that was taking place around sampling in the early '90s.

Next, Sanjek returns to his theme of technology above musicianship:

> "Part of it is surely ***fascination*** **with a form of technology** whose cost and use is easily within their grasp. Additionally, technology is now so developed it has made the manual practice of DJing outmoded. [emphasis mine][35]

Even when Sanjek quotes a passage directly speaking to hip hop's connection to history, Sanjek misses the point that that sampling serves as means for engaging with a musical heritage and a path for commenting on history. For Sanjek, it's all about a "fascination" with the technology. His larger point being that sample-based musicians are not guided by musicianship or an inspiration and desire to create music. And to show another example of how disconnected Sanjek really was from the subject that he was covering, consider the fact that he believed manual DJing was "outmoded" by *1994*.

Resurrecting Back Catalogs

One of the most accurate assessments that Sanjek makes in "'Don't Have to DJ No More'" is that sampling "in many cases resurrects material the conglomerates in charge of record companies have allowed to languish in their back catalog (those recordings kept in print but not customarily released to record sellers unless upon request)."[36] But he misses an important detail. The back catalog of records that sample-based musicians sample are practically never in print. This is a critical distinction to make because it speaks to the crate digging culture that's deeply connected to hip hop/rap music's sampling traadition. In the early and mid-'90s, most "crate diggers" who shopped for records outside their own homes

[35] *Ibid*, 352.
[36] *Ibid*.

got their records from used record stores and other vintage shops, as well flea markets, record exchanges, street vendors, swap meats, yard sales, and the basements, closets, and attics of older family members. More recently YouTube and other sites specializing in old songs and other sound recordings is where new generations of crate diggers go. Point is, a record *not* being in print is an important part of the allure and aesthetic. However, thanks to streaming services, many once-out-of-print records are now back "in print" and finding new audiences.

Sanjek also claims that "[s]ampling, one could also argue, *only benefits* the conglomerates, as much of the CD market has been dedicated to just that archival material."[37] But no one makes this argument. For one thing, in the past most sample-based musicians, especially in hip hop/rap music, did not sample CDs but rather vinyl records. More importantly, sampling is a useful art that benefits, above all, society.

The hypocrisy of "Natural" vs. "Artificial" Recording Practices

Sanjek is spot on with his critique of the hypocrisy among musicians who use the same technological resources in recording studios that are sometimes afforded to sample-based beatmakers (producers). But Sanjek errs in implying that sample-based musicians sample because they want to cut costs:

> **To assume that studio-produced recording is 'natural,' while the sampling of recording is 'artificial,' is splitting hairs.** Producers and artists who belittle sampling see nothing wrong with availing themselves of the same technological resources — which range from digital to string and drum machines, emulators, and synclaviers — when it will *save them the cost* of hiring a live string section…. [emphasis mine][38]

[37] *Ibid*.
[38] *Ibid*, 353.

Sanjek's Misunderstanding of the Implications That Sampling Holds for Authorship and Copyright Law

Turning to the implications that sampling holds for authorship and copyright law, Sanjek asks:

> **"[B]ut what then is the legal status of that sampled record?** Is it now a new composition and **how should its authorship be credited**, **royalties be judged, and proper monetary distributions of earnings be made?** Such questions are complex and it must be admitted that the Copyright Act of 1976 fails to apply in any direct way to the administration of sampled material."
> [emphasis minne][39]

Take Sanjek's phrase, "sampled material." Now, replace the word "sampled" with the word "borrowed" — you get *borrowed material*. In effect, Sanjek (and other commentators who follow his lead) are playing a game of semantics. The truth is, the Copyright Act of 1976 *does* apply in direct ways to *all* borrowed material, because the same protections and limitations apply to all categories of copyrightable subject matter, and this includes sound recordings.

So here, Sanjek makes several critical mistakes. The first mistake, one which many commentators sttill repeat today, is not locating the fact that sampling constitutes just one kind of borrowing. The Copyright Act of 1976 did not apply in any "direct way" to *any* specific kind of borrowing; not photocopying with photocopy machines, for example, or tracing paper or manually copying (by hand) the text from a book or any number of different ways to borrow copyrightable subject matter. So to say that the Copyright Act of 1976 fails to apply in any direct way to "the administration of *sampled* material" is terribly misleading. The Copyright Act of 1976 does apply to sampling in a direct way inasmuch as it codifies the de minimis and fair use doctrines and adds sound recordings to the list of categories of copyrightable subject matter. In other words, borrowing from sound recordings is just as permissible as borrowing

[39] *Ibid*.

from any other copyrightable subject matter. It doesn't matter if the borrowing is done via a pencil, a pen, a camera, a tape recorder, a reel to reel machine, or a digital sampler, the borrowing itself is protected by copyright law; and the specific use (i.e. the "sampled material"), whether it's a sample (borrowing) of a sound recording, a sample (borrowing) of a literary work, or a sample (borrowing) of a piece of dance choreography, it is subject to the same rules, no category of copyrightable subject matter is to be treated differently under copyright law. Sanjek completely misses all of these points.

Sanjek's second mistake is creating a false crisis. The art of sampling, as we know it, did not exist in 1976, and thus, there was no attempt by Congress to address an issue that had not yet come into being. But even if it had been an issue, sampling represents exactly the kind of progressive (new) "useful Art" that copyright law envisions. This is why Congress made it clear in the Copyright of Act of 1976 that copyright protection for sound recordings was *not* to be broadened. Which means that all of the rules that apply to writings, photographs, compositions, and other copyrightable subject matter applies to sound recordings.

Sanjek's misunderstanding of copyright law, and his bias for artists who are sampled over those musicians who do the sampling, leads to his third mistake. Sanjek asks if a song that contains sampled material should be considered "a new composition," and if so, "how should its authorship be credited, royalties be judged, and proper monetary distributions of earnings be made?" In asking this question, Sanjek overlooks key facts of the matter that can easily provide the answer to his question. Once a new work is created, it's a new composition, full stop. As to the question of how authorship should be credited, royalties be judged, and proper monetary distributions of earnings be made, this, too, is much easier than Sanjek recognizes. If the new composition contains a sample that makes de minimis or fair use of the song (sound recording) that it samples, then authorship should be credited to the creator of the new composition, and royalties and proper monetary distributions of earnings should also be made to the creator of the new composition. In other words, if the new composition has not infringed the

copyright of the work that it samples, then the new composition is the property of the creator of the new composition outright. The copyright owner of the work that was lawfully appropiated has no legal claim to the new composition.

To drive this point home and to show how, on some level, Sanjek is again making a logical fallacy, let me give you an example with me as the copyright owner. As the author of this book that you're reading, I own the copyright. This means that I enjoy the benefits of the limited monopoly that copyright law bestows upon me; it also means that this work is subject to the same limitations of other copyrightable subject matter. So if another writer, scholar, researcher, commentator, or fan borrows pieces from my book and writes an entirely new book — and the takings from my book are de minimis or fair use — then I have no authorial or monetarial claim to that new book written by that other person. Even if the new book cites me, I am not owed and should not expect any royalties from the book's publisher. If, however, I believe that the takings infringe on my book, then my only legal relief is to file a claim of copyright infringement in court against the author (and publisher). But even if I prevailed in court, I would still likely not receive authorial credit for the new book; and royalties, if any, that I received would be decided by the court (or jury). Of course, I could also opt to settle out court with the author and his publisher, but I still would not seek, nor would I expect to receive, credit for the author's book. Why? Because although the author may have infringed my work, the new book may have contained many unique expressions of ideas that belonged to that author.

Beyond this, that is to say, for compositions/sound recordings that contain samples that were cleared, authorship should be credited, royalties be judged, and proper monetary distributions of earnings be made in the manner proscribed by the sample clearance agreement that the parties agree to. The issue here, which I think Sanjek was getting at, was how do you *automate* this process? But any automation of the sample clearance process can't be an end run around copyright law because sample clearance can't broaden the protection for sound recordings and compositions.

Next, Sanjek turns his attention to the nature of copyright and its alleged non-recognition of the rhythmic components of a song:

> "Furthermore, it can be argued, and samplers have done so, that the very nature of copyright is inexorably West European, in that it recognizes the melodic and lyrical components of any given piece, but fails to encompass it rhythmic components." [emphasis mine][40]

It's true that copyright is inexorably West European. (In Part 4, I explore the history of copyright's West European roots and its implications for modern copyright.) However, a sound recording copyright makes no distinction between the melodic, lyrical, or rhythmic components. Sanjek seems to be combining various concepts, arguments, and conflicting facts into one thing. What he fails to recognize — while clearly relying on Charles Aaron's analysis, which wrongly sets melody as the primary factor in seeking a license or selling a composition — is that the only thing that actually matters is that the sounds are fixed in the sound recording. Some elements are protected (actionable in a court of law) and some elements are not protected (not actionable in a court of law), and what is or isn't protected is not based on the notion of privileging melodic and lyrical components over rhythmic elements. Rather, the determination turns on things like transformation and amount taken.

Sanjek follows this up with a question about the "legal status" of a sample-based musician:

> What then is the legal status of a sampler and his use of digital technology for the appropriation of other artists' material?[41]

The wording of Sanjek's question is telling. Why does Sanjek project "legal status" onto the sample-based musician, not the *work* created by the sample-based musician? Moreover, by stressing the "use" of digital technology, Sanjek is suggesting that the legal status of the *practice* of sampling itself — not the sample, not the

[40] *Ibid*.
[41] *Ibid*, 353-54.

appropriation, but the borrowing itself — is at question. This error is egregious because no form of borrowing is illegal. If that where the case, no musician could rehearse the songs of other musicians along their way to making new songs; no illustrator could copy the illustrations of other illustrators on their way to creating new illustrations; no writer could paraphrase another writer and build new paragraphs. Copyright law doesn't outlaw *borrowing*, i.e. the activity of borrowing itself. On the contrary, copyright law ecourages borrowing! And copyright infringement is not, above all, concerned with whether one work copied (appropriated) another work. Rather, the question revolves around whether the copy (the appropriation) was actionable, i.e. not permitted by law.

Turning to what he describes are the three key issues at question surrounding the legal status of a sample, Sanjek continues with his mixing of various concepts, doctrines (fair use), and key points to arrive at an assessment that is partly accurate, mostly inaccurate, and marked by a serious misunderstanding of copyright law and the 1971 Sound Recording Act. He writes:

> Despite the variety of settlements, the legal status of a sample involves three key issues: the nature of the appropriation, the amount of bars or length in number of seconds, and the intention of use, either to complement or parody and in some way damage the status of the original recording. At present, any legal resolution of these questions must refer back to the 1971 Sound Recording Act, as a sample is always the transfer of an element of a recording to another recording." [emphasis mine][42]

First, the "legal status of a sample" is not restricted to the safe harbor of fair use, de minimis applies as well; and de minimis considered before fair use. Second, the "legal status of a sample" is not based on "the *intention* of use." Here, as with the other "key elements" that Sanjek outlines in this passage, Sanjek is pinning the legal status of a sample to fair use; and he's raising "intent" of use as the deciding factor in a fair use inquiry. He does not mention, however, the importance of transformation as a leading

[42] *Ibid*, 354.

factor. Third, despite briefly tracing the history of the 1971 Sound Recording Act, which brought sound recordings that were fixed before February 15, 1972 into Federal protection, Sanjek fails to point out that for all recordings fixed after February 15, 1972, the 1976 Copyright Act applies. In other words, Sanjek's "at present," which would be 1992, the year his essay was first published (or 1994 the year he updated his essay), really means that the 1976 Copyright Act applies to all sound recordings created and fixed after February 15, 1972, but that "[s]tates may, however, only protect sound recordings fixed prior to February 15, 1972."[43]

Compressed Information and Non-Facts

Another problem that plagues "'Don't Have to DJ No More'" is that it often includes lots of different information that is compressed and presented is fact. In reality, Sanjek's essay not only suffers from brevity but also serious conflations of ideas, concepts, and actual facts associated with copyright law. Such is the case when Sanjek writes about the drafting of the Copyright Act of 1971:

> The problem with this supposed resolution of the issue of pirated recordings, the immediate worry being the practice of home taping, is that **it is meant to protect the reproduction of a whole recording, not the appropriation of separate sounds on that recording which digital technology allows.** [emphasis mine][44]

Sanjek is correct in locating piracy as the key issue that prompted Congress into adding sound recordings to the list of works protected by copyright law. But while he's correct in noting that copyright was not "meant to protect the reproduction of a whole recording,

[43] "General Guide to the Copyright Act of 1976 - US Copyright Office" (1977)] "Sound Recordings (Section 301(c)) This subsection provides an exception for sound recordings fixed before February 15, 1972 (the effective date of the law extending federal copyright protection to this type of work). If this provision were not included there would probably have been a resurgence of piracy of sound recordings. States may, however, only protect sound recordings fixed prior to February 15, 1972 and then may only protect them until February 15, 2047." "General Guide to the Copyright Act of 1976 - US Copyright Office" (1977).

[44] Sanjek, 355.

not the appropriation of separate sounds," he fails to mention that copyright law was not meant to protect a *whole* book or a *whole* photograph or a *whole* composition or a *whole* dance. It's not necessary to say about a book that copyright law is meant to protect the reproduction of a *whole* book or that copyright law is meant to protect the appropriation of *separate* words, because it's clear that copyright law doesn't protect every single word — every letter, syllable, vowel, etc. — of a book. Copyright law guarantees that the public has limited access to all copyrighted works. Permissive appropriations are part of the balanced deal that copyright law strikes with copyright owners in exchange for granting them a limited monopoly over their works. Thus, Congress makes it clear that sound recordings are not to be treated any differently than other categories of copyrightable subject matter.

However, it appears that Sanjek believed that sound recordings *should* be treated differently from other copyrightable subject matter. According to Sanjek, sound recordings should have greater protections than all other copyrightable subject matter because technology has advanced: "As is often the case with copyright legislation, the law must catch up with advancing technology."[45] But this is absurd because the very reason why copyright law is broad (and specific at the same time) is precisely because it already accounts for advancing technologies. In fact, this is a fundamental component copyright law because advancing technology inevitably leads to the "Progress of the Sciences and useful Arts," and this fulfills the primary purpose of copyright law.

[45] Ibid.

The Gray Area Is Baked Into the Design

As I pointed out earlier, even when Sanjek acknowledges that a sample may not be an infringement of copyrighted work, his bias is such that his concern is for the composer (artist) who was sampled, not the composer (artist) whose work contains the non-infringing sample:

> "[H]ow is one to guarantee the livelihood of the composer of the sampled material, and insure that it is accorded the protection of copyright, if the sampling does not appear to infringe upon the original material under the protection of the 'fair use' clause of the 1976 Copyright Act."[46]

Here, Sanjek is also discussing (indirectly and unintentionally) the gray area of borrowing. The gray area is an important factor to consider especially because, as we will see in chapter 23, the music industry uses it — along with the fear of a copyright infringement lawsuit — to justify the notion that all samples must be cleared. The idea being that since there may be some gray area as to whether the sample is de minimis or fair use, why take the chance? Sanjek, one of the first commentators to raise the gray-area factor, doesn't look at the gray area from the same angle as the music industry, but his view is just as alarming.

When considering how to deal with the gray area of samples, the proposed approach (historically) has been to *remove* the gray area via some form of automation, for example, sample clearance for all samples or a specific change to copyright law just for samples. Sanjek acknowledges both approaches (which I will address later in this chapter), with his concern being that the composer (artist) whose work is sampled should be monetarily compensated and credited *even when the sample of that composer's (artist's) work is de minimis or fair use*. For Sanjek, the removal of the gray area is also about ensuring that composers (artists) are compensated and credited when their works are sampled, whether the samples are de minimis or fair use or not. Yeah, but it doesn't work like that.

[46] *Ibid*, 345.

The gray area is baked into the design of copyright law. Copyright law seeks to protect the interests of the public *before* the interests of copyright owners. That's the deal that every copyright owner makes when he *opts in* to copyright law.[47] Therefore, leeway — the gray area — resides with the public. This is why the burden of proof of copyright infringement rests with the copyright owner.

So consider this scenario. Creator B borrows from the work of creator A. Creator B believes that the borrowing (the sample) is de minimis or fair use. But Creator A believes that the borrowing (the sample) infringes his work. Well, copyright infringement can *only* be determined in a court of law. So the gray area, if there is any, remains gray until a formal claim of copyright infringement is brought by Creator A against Creator B. From that point, the case can either be decided by a judge via summary judgment, the case can go to trial, or Creator A can drop the case because a settlement is reached with Creator B. None of these outcomes, however, can remove the gray area that is built into the design of copyright law.

Looking at Sanjek's perspective then, we should understand that he believed that the gray area must be removed when it comes to samples of sound recordings and compositions, despite the fact that copyright law already hast a system for dealing with the gray area of borrowing. (We will see later in chapter 23 that the music industry wants to regulate the gray area.) Thus, Sanjek failed to recognize that if his perspective was to become the "solution," it would undermine the fundamental design of copyright law and how each category of copyrightable subject matter is to be treated equally.

Sanjek's Misunderstanding of How Copyright Infringement Is Determined

Sanjek offers a loose description of how copyright infringement is determined in a court of law, but once again he makes a serious error in conflating separate issues. He correctly notes that the burden of proof is on the plaintiff in a copyright infringement suit.

[47] A work has to be published and registered with the copyright office to receive any of the benefits of copyright law.

However, what must be proven is *infringement*. Sanjek replaces the word "infringement" with "piracy." In doing so, he presents "piracy" as the only basis for infringement, and he implies that any sample that is not fair use (again he leaves out de minimis) represents "piracy" (sound familiar?):

> Nonetheless, **the burden of proof of *piracy* is upon the plaintiff**, who must prove that the accused party had access to the recording and that the new work is 'substantially similar' to the original. [emphasis mine][48]

Following this, Sanjek states that it can be difficult to prove substantial similarity if the "original work has been so mechanically altered as to be unrecognizable." What is lost on Sanjek is the fact that, if it can't be proven that the new work is substantially similar to the old work, then it *isn't* substantially similar. Put another way, if the new work is transformative, enough to the point where it is *not* substantially similar to the old work from which it borrows, then the new work is not substantially similar; and therefore, it's not infringement. It doesn't matter through which means — "mechanically" or otherwise — that the appropriation of the old work was altered (transformed). What counts is this. The degree to which the appropriation was transformed and whether the two works at issue are substantially similar or different.

After misrepresenting "piracy" as the sole basis of infringement, Sanjek really goes off the rails, recklessly throwing together a hodgepodge of complex legal terms, concepts, and cases that confuse and conflate more than enlighten. The result is a major discordance of complicated issues and facts which are compressed (yet again) into one thing:

> "The defendant can try, in turn, to apply the 'fair use' component of copyright law and assert that he appropriated neither the 'hook' nor the 'essence' of the original composition, that his borrowing of a sound, rhythm, or stock musical phrase is so insignificant or de minimis as not to damage the original recording, make light of its substance, or affect its marketability. Aside from these qualitative

[48] Sanjek, 355.

> measures, he may also apply the quantitative tests posited in legal decisions but which are not necessarily outcome determinative. These include the limits to infringement stated in the 1915 *Boosey v. Empire Music Co.* settlement that indicated that borrowing of six notes or more are an infringement when accompanied by phraseology similar to that sung in the original and the 1952 *Northern Music Corp v. King Record Distribution Co.* that indicated that the appropriation of **any more than four bars can indicate *piracy***." [emphasis mine][49]

With regards to *Boosey v. Empire Music Co.*, Sanjek's analysis was incomplete and misleading, which reveals that he didn't really understand the decision in *Boosey*. In *Boosey*, the only question that was answered was whether a preliminary injunction should be issued because of the alleged infringement. The motion was granted but the injunction was "suspended," and the court noted the specific complexity of the case. Here, I quote the liberally from *Boosey*:

> Plaintiffs claim that a musical composition entitled "I Hear You Calling Me" is infringed by defendant, which is selling another musical composition, entitled "Tennessee, I Hear You Calling Me." I think the plaintiffs, for the purposes of this motion, have met the objections raised by defendant as to the necessary showing of jurisdictional facts. **The question, therefore, is whether, on the merits, a preliminary injunction should issue because of the alleged infringement.**
>
> …. The two compositions are considerably different, both in theme and execution, except as to this phrase, "I hear you calling me," and, as to that, there is a marked similarity.
>
> …. The 'I hear you calling me' has the kind of sentiment in both cases that causes the audiences to listen, applaud, and buy copies in the corridor on the way out of the theater.
>
> *However, these cases must be viewed and dealt with from a practical standpoint.* Songs of this character usually have a temporary vogue, and, if the sale is stopped just at the time that the public is keen, serious injury may be done, even though a plaintiff gives a bond or undertaking to respond. On the other hand, the financial

[49] *Ibid*, 355-56.

> showing of the defendant here, so far as disclosed by the papers, is not satisfactory, and, should plaintiffs ultimately prevail, they may have their labor for their pains. **A further consideration is that the sale of defendant's composition cannot interfere with the sale of plaintiffs' composition by virtue of the inherent difference, generally speaking, of the tastes to which they appeal; and therefore the case is not one where plaintiffs' commercial exploitation of their composition is interfered with, but one which involves solely the rights under the statute.**
>
> Under all these circumstances, I have concluded that the fair course to pursue is as follows: The motion will be granted, but injunction will be suspended... [emphasis mine][50]

Turning to *Northern Music Corp v. King Record Distribution Co.*, Sanjek's analysis is not only incomplete and misleading, it's also an improper reading and misinterpretation of the written decision. *Northern Music* didn't turn on the question of whether "the appropriation of any more than four bars" could determine piracy; rather, the case turned on a different question. When "the whole meritorious part" of a song is used without any material alteration (i.e. substantial transformation) in another song does it constitute copyright infringement? What *Northern* Music should have made clear to Sanjek is that if the borrowed element *is* materially altered, i.e. substantially transformed, the use is *not* infringement. From *Northern Music*:

> **We come then to consider whether the two compositions are similar.**
>
> Whether the songs are similar presents a question of fact. Expert testimony has been offered by both sides. Much of it is in conflict. While it has been of some help, we rely on the only other test available to a judge, who is a musical layman, namely — whether there is a resemblance noticeable to the average hearer. H*irsch v. Paramount Pictures, Inc., D. C.*, 17 F.Supp. 816.
>
> Both songs are so-called "popular music" and are described as "love ballads". We give no significance to this, however, for it is the lyrics

[50] *Boosey v. Empire Music Co.* 224 F. 646 (S.D. N.Y. 1915).

of a song which determine whether or not it is a ballad, and here the lyrics are not claimed to have been infringed. The construction of the chorus of each is identical — thirty-two measures, with 4 separate strains of eight measures; the first eight measures give the typical melody; this is repeated identically in the second strain or the next eight measures; the third strain, or measures 17 through 24, contain the release or relief — a different melody entirely; ….both songs are classified as of the AABA construction. *This is a form found in many compositions of popular music; it is not unusual for a chorus to have 32 measures.*

We examine now the rhythm, harmony and melody of both songs to determine whether similarity exists.

[W]e find that the rhythmic pattern of both songs in suit is virtually identical and that the high point of the melody of each song occurs at precisely the same place. The playing of record Exhibit 25 convinces of this.

The harmonic pattern of both songs is similar. Exhibit 31, in which both songs were played simultaneously against a common harmony demonstrates this.

The experts called by the defendants gave evidence of some similarity between the two songs. Thus, Howard testified that to the untrained musical ear measures 4, 5, 6 and 7 of both songs would sound similar; *Rettenberg, — that the accused song had the first four measures identical in rhythm but somewhat different in melody and the next four measures identical in melody and rhythm to plaintiff's song.* In his opinion, too, to the ear of the public there is a similarity between the two songs. It was specifically conceded by the defendants that there is a similarity between the 4th and 5th measures of both songs.

While both experts called by the defendants recognize the similarity of these passages in both songs, they account for it by the fact that they are found "in well known compositions of earlier origin." We do not agree with these experts that the similarities of these four consecutive measures are not striking but are trivial and commonplace. While we are not concerned primarily with the number of measures or of notes which are similar, we find that they comprise a significant and continuous portion of the melodies of both songs.

A piracy of a song is committed if that portion which is the *whole meritorious part of the song is incorporated in another*

> **song, without any material alteration in the sequence of bars.** We find that this was done here."[emphasis mine][51]

To Sanjek's credit, his analysis of *United States v. Taxe* is solid:

> "[T]he 1974 case, *United States v. Taxe*…involved a defendant who pirated tapes of hit records produced and distributed by major recording companies; the defendants changed the originals through alteration of speed, frequencies, or tones and addition of echoes or other sounds produced by a Moog synthesizer. They claimed the result was a 'derivative' work, but the court was not persuaded by that defense."[52]

Although Sanjek gets the facts of *Taxe* right (generally speaking), he does not discuss one critical detail of the case, which was that *Taxe* was about the reproduction and resale of *entire* songs. From *Taxe*:

> Richard Taxe directed the operation. Stereo records of eight-track stereo tape recordings manufactured by major record companies were purchased on the open market from retail outlets. With specially adapted electronic tape equipment, **the commercially acquired records or tapes were re-recorded** with changes in one or more of the following respects: the recording speed was increased or decreased; reverberation or echo was introduced; certain portions of the musical sounds were eliminated or reduced in volume; and additional sounds were produced by synthesizers. **The eight-track stereo tapes thus created were thereafter sold to the public.**
>
> *In view of the definition of fixation, the statutory language is not so vague that men of common intelligence must necessarily guess at its meaning.* [1] See *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); see also *Shaab v. Kleindeinst*, 345 F.Supp. 589 (D.D.C.1972).
>
> When instructing the jury, the trial judge defined "independent fixation" as a separate performance, expressly excluding re-recording, even with changes. He went on to instruct that since a new fixation by re-recording with modifications is not an independent fixation, it constitutes infringement. Appellants claim this instruction both misstated the law and removed from the jury a matter within

[51] *Northern Music Corp. V. King Record Distributing Co. et al.* 105 F.Supp. 393 (1952).
[52] Sanjek, 356.

> its exclusive province. The government supports the part of the instruction paraphrased above, but objects to language later in the instruction directing the jury to compare tapes and to find no infringement if the appellants' final product was no longer recognizable as the same performance originally recorded.
>
> ***We believe the instruction went beyond the law insofar as it purported to characterize any and all re-recordings as infringements,*** but the subsequent inclusion of a comparison test permitted the jury to consider "substantial similarity", and cured any error in the earlier part of the instruction.[2] See 1 Nimmer at § 109.21. [emphasis mine][53]

Sanjek's failure to make clear the distinction that *Taxe* centered around a re-recording, sale, and distribution of *entire* songs presents a false equivalent to sampling. Sampling is an art form and music process based on borrowing *snippets* (often de minimis) from sound recordings. Sampling is *not* the commercial practice of copying, re-recording, selling, and distributing *entire* songs; and therefore, this is one major reason why sampling is not "piracy."

Perhaps worse still is the fact that Sanjek doesn't note that the Ninth Circuit's decision, which affirmed the district court's decision of infringement, specifically stated that the court believed that the lower court's instruction to the jury "went beyond the law insofar as it purported to characterize any and all re-recordings as infringements." The significance here is that the court is making it clear that the re-recording (sampling, borrowing, appropriating) of a copyrighted work is not *inherently* infringement.

False-Crisis Narrative: The Problem with Sanjek's Proposed Solutions

Sanjek proposed three solutions to the problem that he saw in determining the legality of a sample. His first solution was that Congress could make an amendment to copyright legislation just for sampling, in other words, broaden the protection for sound recordings and compositions:

[53] *United States v. Taxe*, 540 F. 2d 961 - Court of Appeals, 9th Circuit 1976.

> Clearly, the law has begun to reflect the possibilities open to creators through digital technology, but *it has not yet fully resolved the substance of sampling. A possible solution is for Congress to amend copyright legislation to establish some specific restrictions on duration,* but this might affect the mechanical rate structure and raise the wrath of music publishers and songwriters. [emphasis mine][54]

Sanjek's only reservation about this possible solution? He was concerned about what effect such an amendment would have on the mechanical license rate structure and the wrath that it would cause among music publishers and song writers. Sanjek did not offer any concern for fairness with regards to the public or, more specifically, those musicians who compose music through the use of samples.

The bigger problem here is that Sanjek is suggesting an amendment to copyright law legislation for sampling. This is particularly disturbing because his essay demonstrated that he lacked a firm understanding of copyright law, the complex issues related to it, and the herculean effort that it takes to actually amend copyright law legislation. Moreover, Sanjek seemed oblivious to the fact that such an amendment would broaden the exclusive rights related to copyright in sound recordings beyond those associated with other copyrightable subject matter. Again this is exactly what Congress was adamant about *not* doing with the Copyright Act of 1976.

Sanjek's second proposed solution was that the record companies establish "an industry-wide rate structure for licensing and royalty payments for samples;" but he cautioned that "that could lead to complaints of price fixing."[55] Sanjek was right in thinking that price fixing could arise from this; the record industry has a long history of shady business practices and unfair dealings with artists, and there is nothing that suggests to me that they would do anything in the best interest of sample-based musicians. But price fixing is not the worst thing here. The worst thing about what Sanjek proposes is that such a scheme effectively blocks (or at the very least dissuades) people from utilizing the safe harbors that copyright law already provides

[54] Sanjek, 356-57.
[55] *Ibid*, 357.

in the form of the de minimis and fair use doctrines. Therefore, any industry-wide rate structure that does not recognize that all samples need not (inherently) be cleared, is tantamount to prior restraint, i.e. is insisting that all samples are illegal beforehand without due process. Another issue with an industry-wide rate structure for licensing and royalty payments for samples is that it undermines copyright owners' right to set their own prices for their intellectual property. (But as licensing bureaucracies often go, copyright owners usually go with the flow and opt in to the scheme.)

Finally, Sanjek's third proposed solution was sample clearance. In this paradigm, Sanjek writes that:

> **The likely resolution is outlined in the proposals of Steven R. Gordon and Charles J. Sanders. Samplers should apply for the appropriate licenses, respect the rights of copyright holders, and be respected in turn as equal creators.** Responsibility for obtaining clearance should fall to either the artist, the label, or both." [emphasis mine][56]

A "likely resolution" is not the creation of a new bureaucratic agency that relies on a blanket license device. The problem isn't clearance. The real problem is the manipulation of the facts of copyright law. First, the myth, supported wholeheartedly by the music industry, that de minimis and fair use do not apply to sound recordings, must be acknowledged and respected. Second, the public's lack of understanding of copyright law and the music industry's attempt to thwart and manipulate that understanding, must be addressed. Therefore, the best solution is a combination of a campaign of copyright education for the general public (sample-based musicians especially) on the fundamentals of copyright law, industry-wide recognition that all samples do not need to be cleared, and a fair sample clearance system when samples do need to be cleared.

Next, I agree with Sanjek in that sample-based musicians must be respected as equal creators. But what's telling is that while Sanjek believed that sample-based musicians should "respect the rights of

[56] *Ibid*.

copyright holders," he didn't stress that copyright owners should respect the rights of sample-based musicians, i.e. the public. Sanjek shrouded his argument in copyright law, but he seemed to believe that the purpose of copyright is to protect copyright owners. This is the same one-sided argument that plagues sample clearance discussions today. (In Part 5, I cover this in more detail.) Also, in implying that sample-based musicians who do not clear samples are "renegades," Sanjek not only spoke for samplers (the audacity), he ignored the fact that *all* samples do not *need* to be cleared because some appropriations are protected by de minimis and fair use. Rather, he claimed that some samples will be "overlooked" because they are "obscure":

> Samplers realize that in the litigious environment of the United States, there is nothing to be gained and much money to potentially to be lost by be **a renegade**. Surely some obscure materials will be overlooked, but the process should proceed devoid of recrimination and with the opportunity for money to be made by both the sampler and those whom he samples. [emphasis mine][57]

It must also be noted that none of Sanjek's proposed solutions suggest honoring what copyright law actually says about the borrowing of *any* copyrightable subject matter. Sanjek didn't seriously account for de minimis and fair use. He believed that sample clearance, not an enforcement of what copyright law stipulates when it comes to borrowing from any copyrightable subject matter, was the likely solution. But this points to the problem with trying to regulate all samples through sample clearance. In such a scheme, the rights of copyright owners are privileged over the rights of the public, and that does not serve the purpose of copyright law.

Finally, all three of Sanjek's proposed solutions fall under what I call the false-crisis narrative of sampling. The false-crisis narrative seeks a solution to a problem that doesn't exist — or where it's more of a problem for copyright owners (and record labels) than it is for the public. What drives the false-crisis narrative is the belief

[57] *Ibid*.

(fake rule) that *all* samples, no matter the length or type, must be cleared. And for Sanjke and other proponents of the false-crisis narrative, the notion that all samples should be subject to some form of clearance — be it an industry-standard clearance system or a copyright-amended special license for samples — is presented under the guise of "fairness." But fair to whom? Is it fair to the public to have to forfeit its right to limited access to copyrighted works? Is it fair to lead people to believe that de minimis and fair use do not apply to sound recordings when copyright law makes it very clear that these public safeguards do indeed apply to sound recordings *and* compositions equally, just as with all copyrighted subject matter?

John Oswald Was Not the Best Model

Leaving his discussion of "solutions," Sanjek turns next to an analysis of the sampling practices of Canadian musician, composer, and professor John Oswald. Sanjek situates Oswald as a sample-based musician who "operates outside the commercial mainstream," and he explores the legal problems that Oswald faced as a result of sampling:

> "However, all too often the process has become embroiled in accusation and litigation even when the sampler operates outside the commercial mainstream, acknowledges his sampling, and in no way intends the new work to act as a detriment to that which it appropriates. **Such was the case for John Oswald, a Canadian musician, operator of the Mystery Labs project, and a professor of music at York University, Toronto.** Over the last several years, Oswald has spoken and published about the sampling process as a means of composition he calls 'Plunderphonics,' the practice of 'electroquoting' or 'audioquoting.' Although Oswald uses sampling techniques, he has always been entirely aboveboard in his procedures and has in no way attempted *to hide* behind fair use protection. He stated in an interview, 'My overall game plan was to try not to be covert about anything,' and further indicated that he wished all records came with footnotes or bibliographies of who they quoted. Oswald saw his work as being in the avant-garde tradition that treated all forms of sound, recorded or otherwise, as

> potential compositional elements. In a March 1988 guest editorial in *Keyboard* Magazine he wrote: 'If creativity is a field, copyright is the fence….When writers borrow ideas, they enclose the material in quotation marks and credit the source by name. There's a similar solution for musicians: credit all sources in print on albums and recital programs…. By definition, sampling is a derivative activity. Samples won't replace all pianos; they will continue to refer to pianos. Similarly, a sample or a quote from an existing composition refers to, rather than steals from, the original. It's not necessary to tear down the copyright fence when you can enter from the gate." [emphasis mine][58]

Before getting into Sanjek's analysis of John Oswald, it's worth asking one question. *Why John Oswald*? Why interrogate sampling practices and copyright law through the work and perspective of John Oswald when his work did not epitomize the art of sampling, nor was it the focus of a major copyright infringement case involving sampling at the time? After 1987, the year Oslwald released his work, and prior to the publication of "'Don't Have to DJ No More,'" there were stand-out events that served as better examples of sampling and the implications that it holds for copyright law, most notably De La Soul and Biz Markie and their corresponding copyright infringement cases.

Given that Sanjek interviewed Prince Paul, the producer for De La Soul's debut album, *3 Feet High and Rising*, I'm convinced that he was aware of The Turtles' copyright infringement suit against De La Soul. So here we have two possible scenarios: A) Sanjek was aware of the copyright infringement lawsuit against De La Soul and he chose to ignore its significance and relevance to his own research; or B) Sanjek was not aware of these events. Neither scenario is good, and each scenario undermines the choice of Oswald as a good model of what sampling is and the implications that it holds for copyright law. If scenario A is true, then it exposes Sanjek's bias and willingness to overplay the significance of a white (Canadian) artist at a time when Black Americans were clearly dominating the art form. If

[58] *Ibid*, 358; Sanjek quoting John Oswald from "Neither a Borrower nor a Sampler Prosecute," *Keyboard* magazine, March 1988, as cited by Gerry Belanger in Gerry Belanger, "*Plunderphonics* — Who Owns the Music?, Option," Jul./Aug. 1990, at 16.

scenario B is true, then it's reflective of a long-standing pattern of commentators with little familiarity of hip hop/rap music (its most notable pioneers and the key moments in sampling's history) commenting on the art of sampling and whitewashing its history.

With regards to Sanjek's analysis of John Oswald's work, Sanjek first implies that sample-based musicians who acknowledge their sampling and release their music outside of the commercial mainstream should receive less scrutiny than those who do not acknowledge their sample source material and release their work within the commercial mainstream. But this is absurd. Sanjek was thinking only within the framework of fair use and one component of the first factor specifically: purpose of use, i.e. whether such use is of a commercial nature or is for nonprofit. Moreover, Sanjek believed that a sampler who operates outside of the commercial mainstream and who acknowledges the source of his samples should be privileged above other sample-based musicians who do not. But this is a serious misread of copyright law in general and fair use in specific. Factor one is just one of the four factors of fair use, and it includes the "character" of the use, i.e. a consideration of the degree of transformation. Further, fair use — and de minimis — does not require that a borrower acknowledge his source material. For example, writers are not required to acknowledge the works that they've borrowed from; filmmakers are not required to acknowledge the films that they've borrowed from; dance choreographers are not required to acknowledge which dancers or dance routines they borrowed from. And with regards to commercial or non-commercial uses, fair use — and de minimis — does not bar works that are of a commercial nature.

It's also telling that Sanjek prioritizes the notion of acknowledging sample sources. If a sample is de minimis (or fair use) and substantially transformed, revealing the sample source material is neither mandatory nor is it ethically superior. And fair use is a right that copyright grants to the public, it's not something the public "hides" behind as Sanjek describes.

Second, Sanjek presents what Oswald does, i.e. the way Oswald samples, as if it's in line with what beatmakers (producers) in the

sampling tradition of hip hop/rap music do, as if the two sampling practices/approaches are identical and rest on equal footing. This sleight of hand ignores the reality that whether Oswald acknowledges the sources from which he draws his samples, his process/form of sampling, as described by Sanjek himself, is not the same as what's traditionally done in hip hop/rap music, nor are the appropriations made by Oswald likely de minimis or fair use.

Third, Sanjek quotes an excerpt from an editorial written by Oswald, in which Oswald implies that *all* "quoting" is the same, that there is no difference between quoting a writer's written text when citing the source and sampling a piece of recorded music. Oswald maintains that this is also a "solution" for musicians. While general parallels may be drawn between what a writer does and what a sample-based musician does, notably with regards to the fact that both groups borrow and transform what they borrow, Oswald made a false equivalent, which Sanjek overlooked.

Although "quoting" and "sampling" are both words that can be used to describe "borrowing," quoting the ideas and words of a writer is not exactly the same thing as sampling the sounds from a sound recording. Quotes possess meaning that readers can readily understand when they read them. A literary expression and a musical expression, i.e. a sound fixed on a sound recording (not a written composition), are two different types of expressions; the latter can't be read or understood in the same manner.

Writers don't merely borrow *ideas*, they also borrow the specific *words* used to expressed those ideas. When these words exceed a certain threshold, citing the author becomes necessary. But we must remember that ideas are not protected by copyright law. Furthermore, a sound is not always an *idea* in the same sense of a writer's text. A journalist writing about the use of old voting machines and their impact on an election is not the same thing as a sample-based musician sampling the *sound* of an old voting machine and turning it into a kick drum or bass line. If you want to use the journalist's *expressed* idea (i.e. words, as is/unchanged), then beyond a certain degree quotation marks and citations are required. However, sampling the *sound* of an old voting machine

does not offer the possibility of quotation marks, nor does it require that the source — the voting machine — be credited. Similarly, if you sample a small snippet of an old song, a de minimis use for example, there are no quotation marks and you are not required to credit the source.

So if we take Oswald at his word, that all quoting is the same, then we should recognize that Oswald is suggesting — and by proxy Sanjek is agreeing — that all books, films, and dance routines should also come with "acknowledgement" of their sources, ergo, footnotes or bibliographies. See the absurdity?

Oswald also claimed that, "by definition, sampling is a derivative activity." Oh? What is the definition? Sampling is borrowing. So according to Oswald's claim, what are we to make of all creativity? If all creativity involves borrowing from the works of others, which it necessarily does, should we then say that all creativity is, "by definition," derivative? Of course not. That's not what's understood when we say "derivative work."

Oswald's false equivalent between sampling and writing is furthered exposed when he says that a sample from an existing composition (curiously he doesn't say or add recording) refers to the original. This is usually not the case, especially in hip hop/rap music where sounds are often transformed beyond their original essence. For instance, a piano sound transformed into string-stabs or a bass guitar sound transformed into a kick drum, and these are just the basics. In such cases, like the kick drum made from a bass sound, the kick drum sound isn't referring to the bass sound from which it was made; a kick drum made from the sample of the sound of a voting machine isn't referring to the voting machine, it's not a "derivative" work of the voting machine.

Finally, Sanjek details the musical project that created legal trouble for Oswald, and the description of this project demonstrates its disconnect from the kind of sampling that's more commonly practiced and known in the hip hop/rap music tradition:

> "In 1987 he [Oswald] released a vinyl EP of four **treated pieces** by Stravinsky, Count Basie, Elvis Presley, and Dolly Parton that was followed by the 24 piece, 73 minute Plunderphonics CD

> with its **sampled cover design of the head of Michael Jackson attached to a scantily clothed female body.** As stated on the packaging, 'Any resemblance to existing recordings 'or — existing individual — ' is unlikely to be coincidental. This disc is absolutely not for sale.' Furthermore, it includes a circled S, the computer term for programs that can be reproduced indefinitely by anyone with access to them…. [Bruce] Robertson [then-President of the Canadian Recording Industry Association (CRIA)] threatened to prosecute him to the full extent of the Canadian law… Oswald was threatened with exorbitant infringement fines, a six year prison term, and required to surrender all remaining CDs and master tapes. He did so, and, in a compromise, agreed to surrender all materials, thereby erasing the master tapes and ceasing distribution of the materials…" [emphasis mine][59]

What does Sanjek mean by "treated pieces?" Why didn't he say "samples?" Given the description of the project, the threatened infringement fines, the threatened six-year prison term, and Oswald's agreement to turn over all remaining CDs and the master tapes, my guess, especially after listening to *Plunderphonics* (it's on YouTube), is that Sanjek recognized that this project was comprised of less-transformed, much longer pieces of songs, and that it did not feature the kind of sampling, i.e. transformation of small snippets, that is usually practiced in hip hop/rap music. Further, with his *Plunderphonics* project, Oswald demonstrated his misunderstanding of copyright law, specifically how fair use works, as he presumed that what he was doing was perfectly fine, so long as he did not offer it for sale. Notwithstanding the fact that whether a work is made for sale (i.e. the use is of a commercial nature) or not is only one consideration in a fair use analysis (where all factors are weighed together), Oswald essentially distributed the project to anyone with a computer. Fittingly, the heat that Oswald received from Bruce Robertson, though extreme, should have been expected in this case.

The biggest sleight of hand that Sanjek made is when he centered Oswald as a model for what the art of sampling is, and stated that "Oswald's fate bring us to the question of how sampling has transformed our notions of composition and authenticity."[60]

[59] *Ibid*, 359.
[60] Ibid.

Say what? *Oswald's* fate prompts us to reflect on the question of how sampling has changed how we look at composition and authenticity? That's a hard no. Oswald does not represent the first popular instance or best demonstration of sampling.

That Sanjek places Oswald's fate above that of De La Soul's or Biz Markie's (again, both faced copyright infringement cases around the time Sanjek published "'Don't Have to DJ No More.'") is curious. But that Sanjek places Oswald's kind of sampling above that of early hip hop/rap sampling pioneer's, like Marley Marl, DJ Premier, RZA, Q-Tip, Paul C., Large Professor, Dr. Dre, or Pete Rock — all of whom were producing sample-based music at the time Sanjek published (then updated) his essay — is ridiculous. Sanjek does not recognize these aforementioned beatmakers (producers), among others in the hip hop/rap music tradition, as the genesis that changed our notions of composition and authenticity, and as such, he minimizes the role that hip hop/rap music played (and continues to play) in the development and popularization of the art of sampling.

Moreover, despite the broad range of sample-based hip hop/rap music that was released between 1987, the year Oswald released *Plunderphonics*, and 1994, the year Sanjek's essay was updated and published in *The Construction of Authorship*, and despite the fact that there were three more notable copyright infringement lawsuits involving sampling during that same seven-year period (against Beastie Boys, De La Soul, and Biz Markie), Sanjek still made a little-known Canadian musician (whose sample-based project wasn't even commercially released) the bridge to our inquiry surrounding sampling's effect on our notions of compositions and authenticity. This is another problem that persists today in music criticism: Situating the mediocre (and often fringe) achievements of white artists above the extraordinary achievements made by Black artists who created, popularized, and dominated the space.

Hip Hop/Rap Music's Compositional Processes: The Key to Understanding Sampling

In order to fully understand the art of sampling, a more detailed examination of the specific sub-compositional process of sampling in the hip hop/rap music tradition and beatmaking (hip hop/rap's chief compositional process) is required. "'Don't Have to DJ No More,'" does not include either of these examinations. Moreover, Sanjek's analysis of Oswald's work basically serves as a substitute for such examinations. Thus, Sanjek illustrates the problem with analyzing sampling in hip hop/rap music without having a strong understanding of hip hop/rap music and its compositional practices, or even hip hop in general.

What Sanjek Gets Right

Despite his numerous missteps, Sanjek ends his essay on solid ground with a number of important assessments. First, he's right in pointing out that "the fury sampling has given rise to in some people must be connected to the demonization" of hip hop/rap music."[61] And he doesn't let it rest there. His own bias notwithstanding, he hints at the racism that fuels the demonization of hip hop/rap music and points out that, "[w]hen *Newsweek* denigrates the 'attitude' of much contemporary Afro-American music as a debasement of civilized standards, we must not only recognize that a diverse community is being painted with too broad a brush but also wonder how much of its work the dominant society has sampled?"[62]

Sanjek then follows this up with a series of assessments that are critical to understanding certain aspects of the discussion surrounding sampling:

> [S]ampling must be seen as a tactic, not the means of a technological utopia of unfettered creation by disenfranchised cultures. Is it as important to focus upon the process of pastiche as the ends which

[61] *Ibid*.
[62] *Ibid*, 360.

> pastiche might serve? Too often the discussion of sampling has led to either exaggerated cultural pessimism or a facile polemical overenthusiasm. [emphasis mine][63]

Here, Sanjek is right in locating sampling as not only an art form and music process but also a tactic. He's right in pointing out that sampling has its creative and technological limits (like all art forms do), and that it's not an activity reserved for disenfranchised cultures. And he's right again in describing how wide the extremes — criticism against and support for — underscore the discussion around sampling.

The Damage of Sanjek's Essay

In "'Don't Have to DJ No More': Sampling and The 'Autonomous' Creator," Sanjek's analysis of sampling and copyright law appears to be well-meaning, and in a few places it's insightful; but as a whole it suffers — especially in critical areas of copyright law — from a lack of information, conflation, misunderstanding of key concepts, and disorganized analysis. Some of Sanjek's interpretations rest on solid ground, but most of his commentary rests on a serious misunderstanding of the work that he's researched. Furthermore, Sanjek's essay also indicates the extent to which bias (conscious and subconscious) can suppress Black American history and minimize Black American achievements in and contributions to society. For the reasons (and more) "'Don't Have to DJ No More'" does more harm than good.

The damage being what it is, "'Don't Have to DJ No More'" reveals four things that, to this day, still plague commentary around sampling and the implications that it holds for copyright law. First, it demonstrates the problem with attempting to discuss copyright law without a firm grasp on its complicated nature or even its basic facts. Second, it reveals biases and inaccuracies that are still prevalent today among many musicians, commentators, and members of the media. Third, it highlights the tendency of many

[63] *Ibid*.

commentators to minimize the role that hip hop/rap music played (and continues to play) in the development and popularization of the art of sampling. Fourth, it privileges the rights of copyright owners over the rights of the public. If the public is to be better informed about the art of sampling and copyright law, we must demand that those commentators who are authorized[64] to speak in this space present an accurate accounting of the issues. Only then is the public good served.

[64] That is to say, those authorized by academic journals, large publishers, and media publications.

Part 4
COPYRIGHT LAW

Copyright Law Is *Complicated*, Not Complex – With the Right Information, You Can Understand It

Studies show that when people do not know the facts about a given topic or issue, they rely on conjecture and misinformation. Conversely, when people know the facts about a given topic or issue, they tend to engage with it in a confident, informed, and reasonable manner. But then there's also the issue of confirmation bias to wrestle with.

Elizabeth Kolbert has noted that "[o]nce formed…impressions are remarkably perseverant," and that with regards to confirmation bias, people have a tendency "to embrace information that supports their beliefs and reject information that contradicts them. If reason is designed to generate sound judgments, then it's hard to conceive of a more serious design flaw than confirmation bias. Mercier and Sperber prefer the term 'myside bias.' Humans, they point out, aren't randomly credulous. Presented with someone else's argument, we're quite adept at spotting the weaknesses. *Almost invariably, the positions we're blind about are our own*…."

In this paradigm, there's "little advantage in *reasoning clearly*," while much is "to be gained from winning arguments. Sloman and Fernbach see this effect, which they call the 'illusion of explanatory depth,' just about everywhere. *People believe that they know way more than they actually do.* What allows us to persist in this belief is other people….Where it gets us into trouble, according to Sloman and Fernbach, is in the political domain. It's one thing for me to flush a toilet without knowing how it operates, and another for me to

favor (or oppose) an immigration ban without knowing what I'm talking about."[1]

I agree with Kolbert, people often avoid reasoning clearly in favor of winning arguments. And facts are quickly cast aside if it means winning the argument. This is the climate of most copyright law discussions. Many people ignore facts, especially when they're inconvenient to their argument and position. And once an impression sets in with someone, it is remarkably perseverant and difficult to change. This, at the base, is how and why marketing works. A campaign of disinformation — which is really a marketing campaign intended to boost the authority of the side of who is disseminating the disinformation — is designed to drown out the truth and implant false information in the public psyche. Once people have the impression of something, regardless of the facts, their opinion is not likely to change; and they are even less likely to investigate the issue further, opting instead to accept their opinion as fact. This is the situation that we see in the debate about sampling and in the implications that it holds for copyright law.

The impressions around sampling and copyright law that are generally held by the public are the product of a campaign of disinformation that is led primarily by two groups. The first group is composed of members of the music industry, specifically, members of the sample clearance ecosystem, who ignore the de minimis and fair use safe harbors of copyright law and insist that all samples must be cleared. The second group is made up of those copyright owners who believe that the sole purpose of copyright law is to protect the work of copyright owners. Both of these groups suffer from confirmation bias ("myside bias"), the tendency people have to embrace information that supports their beliefs and reject information that contradicts them; and each group does not respect the full breadth of copyright law. The only way to fight these two groups, the only way to successfully counter a campaign of disinformation, is to market fact-based information to the people who need it most: sample-based beatmakers (producers), in specific,

[1] Elizabeth Kolbert, "Why Facts Don't Change Our Minds," *New Yorker*, February 19, 2017 https://www.google.com/amp/s/www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds/amp (emphasis mine).

and the public in general. Once fact-based information takes hold amongst the public, the dialogue changes and the tables are turned.

Copyright law is *complicated*, not complex. People often mean complicated when they say complex, but there's a difference. To help you understand, think of it like this: Relationships are *complicated.* Rocket ships are *complex.* (You can understand copyright law with fact-based knowledge and historical perspective; you can't really understand how rocket ships work unless you're a rocket scientist.) But there are those who want you to believe that copyright law is terribly complex (like a rocket ship). They want you to believe that copyright law is so complex that's it's not even worth your time or effort trying to learn about it; that such knowledge is not attainable by everyday people; that such knowledge is better left to lawyers, copyright law scholars, and music industry folks. And as if that wasn't problematic enough, there remains the socio-psycho reality that people often believe that they know more than they actually do, and therefore, they randomly spread inaccurate information.

Taken together, these factors — the intentional campaign of misinformation, the unintentional spread of misinformation, and the authoritarian (elitist) attitude that knowledge of copyright law is beyond the purview of the general public — create an echo chamber full of incomplete or misrepresented truths, half-truths, outright lies, double talk, conjecture, and disconnected facts. In other words, the result is a bunch people favoring or opposing sampling, favoring or opposing absolute sample clearance (and arguing loudly) without knowing, to a lesser or greater degree, what they're talking about.

A debate about sampling and copyright law in this climate favors two groups of self-appointed authorities that I mentioned earlier: The members of the music industry and sample clearance ecosystem who ignore the de minimis and fair use safe harbors of copyright, law and who insist that *all* samples must be cleared, those copyright owners who believe that primary objective of copyright law is to protect the rights of copyright owners. The unchecked status of these two groups enables them to market the big lie: *"All samples must be cleared."* But *all* samples don't have to be cleared,

because no sample (i.e. the usage of a portion of a copyrighted work) is *inherrently* copyright infringement. Once you've finished reading *The Art of Sampling*, especially the following part on copyright law, you'll know why. More importantly, you'll know how to dismantle misinformation about sampling and copyright law.

Lawyers are certainly critical to this discussion, but they are not the saving grace. Your own knowledge of copyright law and key copyright infringement cases are equally important. You have to know the critical *how's* and *why's* of copyright law in order to dismantle misinformation. The basis for the music industry's "all samples must be cleared" stance is not based on the facts of copyright law. Rather, it's the result of two factors. First, *Bridgeport*, the ccopyright infringement case in which the Sixth Circuit of Appeals infamously stated: "Get a license, or don't sample." Second, the perceived risk related to losing a copyright infringement case.

As for *Bridgeport*, it has been debunked by other circuit courts, most notably the Ninth Circuit, which specifically created a split circuit around the applicability of de minimis to sound recordings. The Ninth Circuit asserts (correctly) that de minimis does apply to sound recordings. Thus, a reliance on *Bridgeport* at this point is both willful ignorance and willful deception.

As to perceived risk, are there risks involved when a copyright infringement case goes to trial? Yes. But all copyright infringement lawsuits are decided on a case-by-case basis. And as with any lawsuit, the likelihood of one result or another can be determined, to greater or lesser degree, by the specific facts and details of the individual case. For example, on the surface, sampling a drum snare from a 5-minute rock 'n' roll song and using that sound in the creation of a hip hop/rap song — complete with a new beat and new lyrics — is clearly transformational, and more than likely de minimis if not fair use. In a scenario such as this, a defendant who seeks summary judgment on the grounds that their usage was de minimis and fair use would likely be granted summary judgment by a judge. But even in presumably clear-cut scenarios such as this, the music industry projects the fear of losing. This provokes the "clear everything" approach, regardless of the type of sample, the amount of the sample, or its transformative use.

But here's the thing. If you don't already have a solid (or even introductory) understanding of copyright law, there is no single web page or series of articles that's really going to give it to you. Copyright law is not something that you can grasp in a single Wikipedia search. None of your favorite music publications (especially hip hop) will be able to help you understand copyright law with any serious depth because they only cover copyright law from a sensationalist, "breaking news," slant. And practically none of their writers or editors have a firm understanding of the full extent of copyright law. One reason for this is because copyright law is one of the deepest of deep dives.

To fully grasp and appreciate copyright law, to really get a feel for it, you have to commit to serious research. Research that is focused and free of confirmation bias. And without a guide to help lead you, it's difficult to learn, especially with all of the howling inaccuracies often published by the media today. Not to mention the fact that most of the information on copyright law that exists online is one-sided, misleading, incomplete, or all of the above — And this is coming from both the hard-nosed copyright owners *and* the "free culture" people, who tend to think that copyright law shouldn't even exist.

There are different layers to copyright law and, ironically, it tends to be the simple layers that many copyright lawyers commonly distort or misstate when building either affirmative or defensive strategies in copyright infringement lawsuits. Incidentally, I have read hundreds of copyright infringement cases involving everything from photos to blankets to compositions to sound recordings to plays to movies, and I can tell you that even many copyright lawyers often seem to be confused about the facts of copyright law.

Thus, what this part provides is a thorough examination of copyright law, an examination which is fact based, comprehensive, unbiased, and accessible. This part explores copyright law *as it is*. And it includes examples, wherever applicable, for how certain aspects of copyright law and related policy can be improved. That said, if you know little to nothing at all about copyright law, when you're done reading this part, you will come away with a

solid understanding of copyright law. And if you're already quite familiar with copyright law, I assure you that this Part will enhance your understanding.

Chapter 13

An Overview of Copyright Law

Historical Clarity on Copyright Law and Policy in the United States

> "Since the advent of Western music, musicians have freely borrowed themes and ideas from other musicians."
> –Judge Thomas A. Higgins

> "If the United States adhered strongly to the principle of authorial reward as the sole function of copyright law, every rock-and-roll [sic] musician would owe money to Mississippi Delta blues musicians."
> –Siva Vaidhyanathan

When the delegates of the Constitutional Convention met between the early summer and fall of 1787, their main focus was to address the problems in governing a recently independent United States, which had been operating under the Articles of Confederation. But the issue of copyright was still a chief concern within the discussions. The leaders at the Constitutional Convention had recognized that the non-rights and non-liberties of the English Empire in the eighteenth century had, in effect, created an "empire" of creative works. Specifically, the framers of the Constitution recognized the total control over books that the British Crown and the Stationers' Company had maintained.[2]

"In 1710, the Parliament of Great Britain passed the Statute of Anne, which 'was designed to destroy the booksellers' monopoly

[2] For a detailed description of the Stationers' Company, see Lyman Ray Patterson, *Copyright in Historical Perspective*, (Nashville: Vanderbilt University Press 1968).

of the book trade and to prevent its recurrence.'" The framers, who insisted that copyright clearly protects distinct expressions of ideas for a limited time — while allowing others to freely use, criticize, and refer to the ideas that lay beneath the text — relied on the Statute of Anne when drafting the copyright clause of the Constitution:

> Our Founders codified this perspective in the Constitution in Article I, Section 8, Clause 8. Law professors Joseph Singer and Tom W. Bell explain that the Framers relied on the Statute of Anne when drafting this clause, which reads, **"The Congress shall have Power… to promote the Progress of Science…** by securing for limited times to authors… the exclusive right to their respective writings." **The Copyright Clause was intended "to be the engine of free expression."** This clause is the only clause in Article 1, Section 8, which outlines specific congressional powers, that conditions the enumerated power on a particular purpose.... **Congress directly transferred the principles from the Statute of Anne into the copyright law of the United States in 1783, first through a recommendation to the states to enact similar copyright laws, and then in 1790, with the passage of the first federal copyright statute. They tried to strike the careful balance of not too much or too little copyright protection.** [emphasis mine][3]

The Statute of Anne: The Blueprint of United States Copyright Law

To understand how a particular version of the ideology of "authorship" informed United States copyright doctrine, we must recognize that "the first introduction of the 'author' into English law" was not the result of a philosophical argument about "authors' rights" as such. Rather, the Statute of Anne (1710), which codified the "author" in law and which served as the blueprint of United States copyright law, was the result of "lobbying by and for established London-based publishers and booksellers seeking new legal weapons against down-market competition spawned by

[3] Derek Khana, "The Problems with Natural-Law Copyright" http://www.cato-unbound.org/2013/01/31/derek-khanna/problems-natural-law-copyright, (accessed May, 2015).

the proliferation of print technology.[4] In Chapter 16, I examine authorship more in depth, but in this section I will focus on the Statute of Anne.

Before digging into the story of the Statute of Anne, it's worth noting that the laws that regulate writing practices stem from two systems: The system of book privileges and the system of authors' rights. The system of book privileges, which dates back to late fifteenth century and the advent of the printing press, was one wherein "state, or other authorities, conferred to publishers the exclusive right to publish and distribute a given book." The system of authors' rights, which dates back to the eighteenth century, is "based on the notion that authors — and not publishers — have certain specific rights in their own creations…the resulting legal system took the name of the most prominent of those rights, namely 'right to copy' or, simply, copyright."[5]

Final primer. Prior to the Statute of Anne, authors basically had no rights. In return for their manuscripts, authors were paid a lump sum and they did not have the right to contest the unauthorized reproduction of their work. In other words, booksellers — printers and modern-day publishers — were free to make unauthorized reproductions of an author's work. The authors received no royalties in this scheme and they had no means of stopping it.

Pre-Copyright and Stationers' Company

In the sixteenth century, the English Crown needed to control the press, and just like it had controlled other industries by granting monopolies to "certain favored persons," the Crown used the same scheme for the printing and publishing industry.[6] The associations that were incorporated as the Company of Stationers of London (1556) — commonly known as "Stationers Company" — were

[4] Peter Jaszi, "On The Author Effect: Contemporary Copyright and Collective Creativity," *The Construction of Authorship* (Durham and London 1994), 32.
[5] Maurizio Borghi, "Copyright and the commodification of authorship in 18th and 19th Century Europe" http://eprints.bournemouth.ac.uk/29935/3/FEIC_Borghi_Copyright_and_the_commodification_of_authorship.pdf.
[6] W. S. Holdsworth, "Press Control and Copyright in the 16th and 17th Centuries," *The Yale Law Journal* , Jun., 1920, Vol. 29, No. 8 (Jun., 1920), 841.

the trade guild, or livery company to which members of the book trade belonged. The Crown wanted the Stationers Company to supervise this new industry; ergo, the Crown wanted to suppress the press, particularly any "mischievous and libellous books," i.e. books that were religiously or politically unacceptable to the Crown. So the Stationers' Company was protected by the Crown, and it was granted powers and privileges far beyond those of other livery companies. In 1557, the Stationers Company was granted a Royal Charter, a "monopoly over printing and bookselling in London and throughout the kingdom." In this way, this system restricted the number of printers and booksellers; and "even within that number there were close controls on who might print what books."[7] By 1558, the power of the Stationers' Company was amplified by Queen Elizabeth I, and the role of the Stationers' Company was clear: "[C]ontrol the output of the press and ensure that no book was printed unless it was properly licensed by the censors appointed by the Crown." So the deal the Crown made was straight forward. In exchange for "relieving the state of the day-to-day burden of censorship," the Stationers' Company would receive a monopoly over the publishing of English books.[8]

This system soon outgrew the Crown's capacity to administer it, and this responsibility was left to the book trade itself to sort out.[9] At first, it was the printers, "with their command of the limited technical facilities for book production, who controlled the trade." Over time, however, the copy-owning booksellers (publishers)

[7] See generally Oren Bracha, "Owning Ideas: The History of Anglo-American Intellectual Property Law" (S.J.D. dissertation, Harvard Law School) (on file with author). Printing privileges tended to fall into one of three distinct classes: "(1) privileges to print a book of unknown or collective authorship; (2) privileges to print groups of books on a particular subject or in a particular category, including books not yet written; and (3) privileges to print named books by named authors." See also John Feather, "From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries," in *The Construction Of Authorship: Textual Appropriation In Law And Literature* 191, 192-93 (Martha Woodmansee & Peter Jaszi eds., 1994).]

[8] John Feather, "From Rights In Copies to Copyright: The Recognition of Authors' Rights In English Law and Practice In the Sixteenth and Seventeenth Centuries," in *The Construction of Authorship* (Durham and London 1994), 195. See also W. S. Holdsworth, "Press Control and Copyright in the 16th and 17th Centuries," *The Yale Law Journal* , Jun., 1920, Vol. 29, No. 8 (Jun., 1920), 841, 199.

[9] *Ibid*, 208.

took over from them. Having managed to take bureaucratic and economic control over the administration of copyright through the Stationers' Company, copy-owning booksellers were able to rise to financial dominance in the book trade, and they took over the role that the printers had long maintained. As a result, "printers came to be, as they have remained, the paid agents of the copy owners." And it was through the Stationers' Company, from the late 1580s onwards, that copy owners reinforced their dominance.[10]

But the leaders among the Stationers saw this arrangement for the commercial advantage that it was. So to manage printing rights, the Stationers "invented an administrative and judicial mechanism for recognizing and enforcing a publisher's rights in a copy acquired from the author."[11] But in capitalizing on the Crown's inability to administer the system and suppressing unlicensed printing, the Stationers "confirmed the idea that a copy was unique and that the right to print it was also unique. *This, in turn, led to the gradual realization that unique copies had unique creators, and that those creators also must be deemed to have some share in the rights which they had created*."[12] Thus, the conception of "copyright" was born.[13]

Under this system created by the Stationers, "[a]uthors had no legal right to complain about the unauthorized reproduction of their work, and they would be paid, if at all, by a lump sum in exchange for their manuscripts;" further, authors had no right to publishing royalties, and any earnings beyond the sale of the manuscript would

[10] Marlon B. Ross, "Authority and Authenticity: Scribbling Authors and the Genius of Print In Eighteenth-Century England," in *The Construction of Authorship* (Durham and London 1994), 241. Also see: John Feather, "From Rights In Copies to Copyright: The Recognition of Authors' Rights In English Law and Practice In the Sixteenth and Seventeenth Centuries," in The Construction of Authorship (Durham and London 1994), 199.

[11] Michael W. Carroll, "The Struggle for Music Copyright," 57 Fla. L. Rev 907, 934 (2005) 922.

[12] John Feather, "From Rights In Copies to Copyright: The Recognition of Authors' Rights In English Law and Practice In the Sixteenth and Seventeenth Centuries," in *The Construction of Authorship* (Durham and London 1994), p. 208.

[13] W. S. Holdsworth, "Press Control and Copyright in the 16th and 17th Centuries," *The Yale Law Journal* , Jun., 1920, Vol. 29, No. 8 (Jun., 1920), 841.

depend upon the "bookseller's generosity.'"[14] Along with the general hostility that the Crown was facing with regard to the royal power to censor expression and regulate trade in the seventeenth century, this level of exploitation led Parliament to let the Printing Act of 1662 lapse in 1694. The result was that the book publishing was left largely unregulated. More importantly, it marked the end of "the property rights in copies that the Stationers had become accustomed to and the end of censorship by the Surveyor of the Press."[15]

The Statute of Anne Backfired Against Booksellers

Prior to the system of copyright that emerged in the eighteenth century, the precursor system was the royal printing privilege and the royal license of the sixteenth and seventeenth centuries. Until the end of the seventeenth century, the book trade was dominated by the Stationers Company;[16] and in effect, "copyright law," had been invented in England mainly because of the English Crown's deal that granted the Stationers Company a monopoly over the book trade.[17] With the monopoly over property rights in copies now stripped from the Stationers; with the realization that unique copies had unique creators, and that those creators must have some share in the rights which they had created; *and* with authors gradually viewing themselves not only as rights-bearing proprietors but "author-victims locked in a struggle with grasping publishers,"[18] the shift from publishers'/printer's rights to *authors'* rights began to take shape. But booksellers (the established book trade) weren't about to give up their power without a fight. They responded by

[14] Michael W. Carroll, The Struggle for Music Copyright, 57 Fla. L. Rev 907, 934 (2005) 922; John Feather, "From Rights In Copies to Copyright: The Recognition of Authors' Rights In English Law and Practice In the Sixteenth and Seventeenth Centuries," in *The Construction of Authorship* (Durham and London 1994), 195.
[15] *Ibid*.
[16] Peter Jaszi, Introduction to *The Construction of Authorship* (Durham and London 1994), 6.
[17] Michael W. Carroll, The Struggle for Music Copyright, 57 Fla. L. Rev 907, 934 (2005) 922.
[18] Peter Jaszi, Introduction to *The Construction of Authorship* (Durham and London 1994),7.

asserting that "their claims of proprietorship extended not only to the particular books they published, but to the *content* of those books — if not to the very market itself…" Their response "invoked a new rhetoric of individual interest and individual entitlement — both their own and, somewhat curiously, that of the 'authors' who provided them with manuscripts."[19] Although the new law, the Statute of Anne, would convey the tone of the booksellers' response, it would eventually be through the Statute of Anne that the booksellers' own rhetoric would backfire and be used against them, granting "authors" a power that they haven't lost to this day.

"An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in Authors"

When we refer to the Statute of Anne simply as the *Statute of Anne* and do not mention the actual name of the act, we lose a fundamental sense of the purpose of the world's first copyright statute. Entitled "An Act *for the Encouragement of Learning*, by Vesting the Copies of Printed Books in *Authors* or Purchasers of such Copies *during the Times Therein Mentioned*," the Statute of Anne formally signaled what had been known since the invention of books. That books represent, above all, *knowledge*, a means by which we learn.

Like Lyman Ray Patterson before him, Mark Rose has noted that the Statute of Anne was "essentially a booksellers' bill, a legislative continuation of the ancient trade regulation practices of the Stationers' Company, the London guild of printers and booksellers which had long controlled the book trade in Britain."[20] While this is certainly true, the language in the act, specifically *"for the Encouragement of Learning,"* must not be underestimated in the message that it sent to booksellers, printers, and authors alike.

The English Crown, long focused on censorship of the press,

[19] *Ibid*, 7 (emphasis mine).
[20] Mark Rose, "The Author In Court: Pope v. Curll," in *The Construction of Authorship* (Duke University Press, Durham and London 1994), 213.

came up with an Act that emphasized, ironically, the "encouragement of learning," a sentiment certainly at odds with censorship. Next, the language: "by Vesting the Copies of Printed Books *in Authors* or Purchasers of Such Copies…" is equally significant. Here, the statute mentions "Authors" before "Purchasers" (i.e. booksellers, printers). This effectively stressed authors' rights above the rights of booksellers and printers. In doing so, "the statute established authors as the original holders of the rights in their works, *thereby explicitly recognizing for the first time the author as a fully empowered agent in the literary marketplace.* Prior to the passage of the statute, authors could not be said to 'own' their works."[21]

Authors in the Courts

To our modern minds, the notion that text, as distinguished from a book, could *not* be property is absurd. But just under 250 years ago this was not the case. In fact, it wasn't until the eighteenth century that the idea of an author's work as intangible "property" (i.e. text as property) came into being.[22] Logically, if text can be property then any creative work can be property. This is how we've leaped to the well-understood concept of intellectual property. And what's important to note here is that the concept of intellectual property is inextricably linked to the concept of authors' rights.

We can see hints of the idea of an author's work as property, or more specifically, the notion of authors' rights, *before* the enactment of the Statute of Anne and certainly not too long after. In this regard, perhaps the two most critical developments in the paradigm of author rights center around two of the greatest English poets of all time: John Milton and Alexander Pope.

[21] Mark Rose, "The Author In Court: *Pope v. Curll*," in *The Construction of Authorship* (Duke University Press, Durham and London 1994), 213 (emphasis mine).
[22] *Ibid*, 224-25.

John Milton's "Paradise Lost" Contract Helped Sanctify the Author

John Milton is most famous for having written *Paradise Lost*, one of the best epic poems of all time. But he's less known for the stunt that he pulled in getting his seminal poem published. A stunt that would subsequently shatter the notion of the author for all time. Commentators have noted Milton's consistent insistence that he was a major poet. In this way, Milton was the first great author/self-promoter and quite possibly the world's earliest modern "professional" author.[23]

When Milton entered into a formal contract with printer Samuel Simmons for the publication of *Paradise Lost* on April 27, 1667, it was the "earliest known such literary agreement to have come down to us."[24] At a time when copyright was "granted solely to stationers through entry in the Stationers' Company Register…," Milton's formal contract between an author and publisher stands out for two reasons. First, since the creation of the Stationers' Company in 1556 on through to 1667 — more than one hundred years of "industry standard" — no such contract had existed. Second, and more importantly, Milton's contract represented the action of an author who was fully self-aware of his position. Here, we see "an author *who is fully acknowledging the condition of authorship, viewing himself the possessor of property that gives him definite rights (for instance, the right to demand an accounting of sales),* even as he lives and writes at a time when copyright is granted solely to stationers through entry in the Stationers' Company Register."[25]

Thus, when it comes the earliest event that helped sanctify the author, John Milton's self-promotion as a poet of note and his publishing contract for *Paradise Lost*, his most famous work, deserves the credit. But if Milton was the foreshadow, i.e. the hint at what would come, then Alexander Pope was the signal for what had arrived.

---

[23] Peter Lindenbaum, "Milton's Contract," in The Construction of Authorship (Duke University Press, Durham and London 1994), 190.
[24] *Ibid*, 176.
[25] *Ibid*, 180 (emphasis mine).

Pope v. Curll: A Foundational Case in the History of Copyright Law

If John Milton was the first self-promoter/businessman-author, Alexander Pope, who stood on the shoulders of Milton, was the first media-wise, entrepreneur-author:

> **"Alexander Pope was an exceptional figure, for more than any other writer of his day *he behaved like a literary entrepreneur and made a fortune from his verse.* Pope's prominence gave him enormous bargaining power, which he used to secure unusually favorable terms from his booksellers.** Despite his involvement in the literary marketplace, Pope characteristically presented himself as a gentleman and scholar rather than as a professional and was almost obsessively concerned with what we could today call image management." [emphasis mine][26]

In 1741, Alexander Pope sued Edmund Curll for publishing *Dean Swift's Literary Correspondence*, a volume of letters to and from Pope and Jonathan Swift (as well as John Arbuthnot, Lord Bolingbroke, John Gay, and others). The suit was a daring and shrewd move by Pope. Prior to the filing of his complaint, Pope tricked Curll into publishing the letters:

> **As part of his concern with image management, Pope resolved to make his correspondence public in the latter part of his career,** in order, as Maynard Mack puts it, among other things, *to 'erect a monument to himself and the gifted writers he had known.'* **But for a gentlemen to publish his own letters would have seemed inexcusably vain, and Pope had to arrange matters so that publication would seem to occur against his wishes.** Therefore, in 1735, ***Pope tricked Curll into publishing his correspondence*, thereby creating a situation which would allow him to protest against the indignity of being exposed in print and at the same time, open the way for an authorized version….**
>
> **The correspondence with Swift was a set of letters that Pope particularly wished to see published, and for many years he had sought to get Swift to return his letters to him. When at last**

[26] Rose, 216 (emphasis mine).

> **he succeeded, *Pope arranged through an elaborate ruse to have the letters printed in Dublin.* This made it possible for him to publish an authorized edition as part of his collected works.** Six weeks after Pope's edition appeared, Curll released a volume, which he claimed was a reprint of the Dublin edition. Pope, who anticipated Curll's action, immediately brought suit. **No doubt commercial considerations figured in Pope's suit, for Curll's cheap piracy represented a threat to the expensive authorized edition.** [emphasis mine][27]

The Product of the Mind: Authors' Rights and the Concept of Intellectual Property

Pope's stunt emboldened him to use a commercial regulatory statute "to pursue matters that had as much to do with 'propriety' — with authors' personal rights — as with authors' economic interests.[28] And the decision in *Pope v. Curll* established that the "rights in letters, considered as incorporeal texts rather than physical objects, belong to the writer rather than the recipient."[29] Thus, Pope foreshadowed the answer to what at the time had been a profound question. *"Could text — as distinguished from a book — be a property?* Did authors really have a 'property' in their works, entitling them to general relief at common law, or did the statute merely grant them an exclusive privilege, a limited monopoly with penalties to give force?"[30]

This question, and the subsequent answer, set in motion the development of the concept that we commonly refer to today as intellectually property. Prior to *Pope*, a book was thought of as a physical entity; "of rights in it and offenses against it as related to 'printing and reprinting' the thing itself.'" But the decision in *Pope* separated the "notion of literary property from its material basis in ink and paper."[31] So while we recognize *Pope* for having established "that rights in letters, considered as incorporeal texts rather than

[27] *Ibid*, 216-18.
[28] *Ibid*, 218 (emphasis mine).
[29] Jaszi,8.
[30] Rose, 225.
[31] *Ibid*, 223.

physical objects, belong to the writer rather than the recipient,"[32] what's more important to observe about *Pope* is that it drew the distinction between property rights in the paper — the material object — and the property rights in the words, the author's fixed expression.

Among eighteenth-century writers like Pope, there had been a growing belief that one had a right to own what he created in words:

> "Men — and a very few women — had been *living by their pens* in England since the sixteenth century. **By the middle of the eighteenth century, they were a large and growing, if not yet entirely respectable, class.** That was possible only because *the products of their pens* commanded a market price, and that in turn was possible only because the commodity was protected against unfair competition." [emphasis mine][33]

The decision in *Pope* confirmed what eighteenth-century writers had believed, and it began to solidify the idea that text could be property. Four years after the decision in *Pope* and five years after Pope's death, William Warburton, "Pope's friend and literary executor, published his *Letter from an Author Concerning Literary Property*, which provided the earliest theorization of copyright as a wholly intangible property."[34] In his *Letter from an Author*, Warburton offered an analysis of the nature of property that was designed to show that text can be property:

> At the heart of Warburton's Letter is an analysis of the nature of property, designed to demonstrate that a text can indeed be property. **Property, he says, can be divided into two classes — movables and immovables.** Movable properties can in turn be divided into those that are natural and those that are artificially made. **Artificially produced movables can be further divided into products of the hand and *products of the mind*,** for example, "an Utensil made; a Book *composed*."

[32] Jaszi, 8.
[33] John Feather, "From Rights In Copies to Copyright: The Recognition of Authors' Rights In English Law and Practice In the Sixteenth and Seventeenth Centuries," in *The Construction of Authorship* (Duke University Press, Durham and London 1994), 209 (emphasis mine).
[34] Rose, 225.

> **"For that *the product of the Mind* is as well capable of becoming *property*, as that of the Hand, is evident** from hence, that it hath in it two essential Conditions, which, by the allowance of all Writers of Laws, make Things susceptible of Property; *namely common Utility,* and a *Capacity of having its Possession ascertained*."
>
> What was the nature of the author's property? According to **Warburton, property that was the product of the hand was "confined to the individual *Thing* made."** Like the instrument of its creation, the property was wholly material. "But in the other Case of Property in the *Product of the Mind*, as in a Book composed, it is not confined to its Original MS. but it extends to the doctrine contained to it: Which is, indeed, the true and peculiar Property in a Book."
>
> **Thus, *the essence of the author's property was wholly immaterial, consisting solely of the 'doctrine' or ideas that were the product of his mental labor.*** [emphasis mine and in the original][35]

Warburton didn't mention, however, that it's the *expression* of the ideas — the fixed arrangement of the words and symbols, not the ideas themselves — that merit copyright protection. Once an author publishes his *ideas*, they cease to be private property. This speaks to the idea-expression dichotomy of copyright law (which I discuss later in this chapter). In any event, one year after Warburton's *Letter from an Author* was published, the decision in *Tonson v. Collins* "denied that a text could be a property." But as Mark Rose has noted, the legal debate over the nature of literary property was not over. William Blackstone, lawyer for the plaintiff in *Tonson*, was influenced by Warburton's theorization of copyright, but he developed the notion of copyright to something more in line with what we recognize today, particularly when we think of concept of "fruits of labor" and the limited monopoly aspect of copyright holders:

> **"[A] literary composition, as it lies in the author's mind, before it is substantiated by reducing into writing,'** has the essential requisites to make it the subject of property. **While it is dormant in the mind, it is absolutely in the power of the proprietor. He**

[35] Rose, 226-28.

> **alone is entitled to the profits of communicating, or making it public.** The first step to which is clothing our conceptions in words, the only means to communicate abstracted ideas.'"
>
> Words might be either spoken or written, Blackstone continued, but in any case the **words were merely the vehicles of the author's sentiments. 'The sentiment therefore is the thing of value, from which the profit must arise."** [emphasis mine][36]

As Blackstone further developed Warburton's theory of copyright, he evolved to understand that it was not merely the sentiment, i.e. the knowledge, that was of value but also the *expression* of that sentiment (knowledge). Having recognized that knowledge could not be protected by copyright once it was published, Blackstone shifted his concept of literary property, moving away from his own doctrine that words were merely the vehicles of the author's sentiments.[37] Thus, Blackstone grew to understand that it was the expression of the knowledge — the *arrangement* of the words — that warranted copyright protection. This was the birth of the concept of intellectual property.

In this vein then, we understand that a literary work is a specific expression, a specific arrangement of words. And just as words arranged in a literary work constitute the sentiment *and* the expression, sounds arranged in a sound recording reflect the sentiment *and* the expression, the thing of value protected by copyright law.[38]

[36] Rose, 227; Rose quoting William Blackstone (emphasis mine).
[37] Ibid, 228.
[38] Jim Swan, "Touching Words: Helen Keller, Plagiarism, Authorship," *The Construction of Authorship* (Duke University Press, Durham and London 1994), 73-74: "[a] writer acquires property in words *by the distinctive order he bestows on them*: that is what the law of copyright protects. Writing is understood as something *belonging exclusively to its author whose unique production it is*." (emphasis mine).

Composer's Copyright: How Music Became a Copyrightable Subject Matter and Its Lasting Impact

In chapter 14, I discuss copyright infringement, and I examine substantial similarity and the various tests the courts use to determine it. I note how one test, "the ordinary observer" test, is especially problematic when it comes to music. But while the ordinary observer test certainly presents an obstacle when it comes to properly determining substantial similarity, the context of musical works and its relationship to copyright presents an even greater challenge.

We must remember that musical works and sound recordings, like other categories of copyrightable subject matter, are assessed under a copyright scheme that was established for the distinct purpose of protecting *"books and other writings"* (literary works). This is why copyright law is, to some extent, unsuitable for addressing non-literary works like music compositions and song recordings. Furthermore, we have to recognize the fact that music did not *naturally* become a category of copyrightable subject matter; rather, music was added (just as other categories were periodically added) due to "specific legal and political contests."[39] Therefore, when United States copyright law is applied to musical works, there are certain creative assumptions, aesthetic biases and predilections, and presumptions of originality embedded within "judges' and jurors' findings of infringement."[40]

[39] Michael W. Carroll, "The Struggle for Music Copyright," 57 *Fla. L. Rev* 907, 934 (2005) 910.

[40] Nicole Lieberman, "Un-Blurring Substantial Similarity: Aesthetic Judgments and Romantic Authorship in Music Copyright Law," *New York University Journal Of Intellectual Property and Entertainment Law* Volume 6 Fall 2016 Number 1 (December 30, 2016), 93-94.

To understand how we arrived here, we have to comprehend how music was brought into copyright. In eighteenth-century England, it was well established that copyright applied to books and other literary works. At the same time, however, copyright owners resisted the "very idea that copyright should apply to music." And as Michael W. Carroll notes, "music became copyrightable in England primarily through litigation brought by professional composers against music publishers during the eighteenth century;" it was not a natural process.[41] This section (and its sub-sections) examines when copyright law first applied to music; how and why music was brought within the Statute of Anne; how music became a copyrightable subject matter; and how music affected conceptual themes associated with copyright law and helped expand the concept of what could be intellectual property.

Background to The Composter's Fight for Copyright

Earlier in this chapter, I discussed the origins of United States copyright law, noting that copyright was invented in 1710 in England when the Parliament of Great Britain passed the Statute of Anne. The Framers relied on the Statute of Anne in the creation of copyright in the United States Constitution. "Congress directly transferred the principles from the Statute of Anne into the copyright law of the United States in 1783, first through a recommendation to the states to enact similar copyright laws, and then in 1790, with the passage of the first federal copyright statute."[42] Further, the "judicial extension of copyright to music copyright in England greatly influenced the subsequent legislative extension of copyright to music in the United States."[43] Thus, to understand the origins of United States copyright law means that we must remember two things. First, that the Statute of Anne was *invented* to protect copyright in books and other literary works. Second, that where

[41] Carroll, 910.
[42] *See* Lyman Ray Patterson's detailed description of the Stationers' Company; and Derek Khana.
[43] Carroll, 910.

music is concerned, the United States again followed England in bringing music within the scope of copyright law.[44]

Finally, to better comprehend the story of music and copyright, we must recall that the evolution of music copyright is distinct from literary works. Without an understanding of the nuances of music copyright's origins and evolution, it's difficult to comprehend how the general contours of copyright law suit and *do not* suit music works, especially sound recordings. What follows then in the following sub-sections is the background to the composer's fight for copyright and how it lead directly to music becoming a copyrightable subject matter under the Statute of Anne.

Growth in the Book and Music Publishing Industries

Just as the book publishing industry in seventeenth- and eighteenth-century England had experienced tremendous growth, thanks to the increasing importance of the printed page in the public sphere and population growth, the music publishing industry of eighteenth-century England had experienced a similar paradigm. Thanks in large part to the growth of public performances and the increased popularity of music in society, the growth in the music publishing industry led to the demand for printed music, particularly printed music of popular songs that could be performed in the home. As the demand for printed music increased, composers — who had sought more control over the publication of their music — became embroiled in court battles with music

[44] "AN ACT to amend the several acts respecting copyrights," Act of Feb. 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, or who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design, any print or engraving, and the executors, administrators, or legal assigns of such person or persons, shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, musical composition, print, cut, or engraving, in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

publishers. To fully grasp how and why the litigation came to be, and how and why composers ultimately prevailed, it's important to understand the background of the whole scene, that is to say, "the relatively different positions that musical composers and music publishers held in society as compared to the positions of literary authors and booksellers."[45]

Publication vs. Performance / Authors vs. Composers and Musicians

In the American book publishing industry, it's standard practice for authors, not publishers, to own the copyrights to their works. In the music industry, however, recording artists practically never own the copyrights to the sound recordings that they create; rather, those copyrights are owned by the record labels that distribute them. The reason for this is not as simple as it seems. True, the music industry has a long track record of business practices that are unfavorable to recording artists; this is especially the case when it comes to boilerplate record contracts. But a deeper review of the historical context of music copyright's origins can, to some extent, help explain: 1) The disparity between authors (book publishing) and recording artists (the music industry) even today; and 2) Why recording artists have been conditioned to accept "standard" music business deals.

You see, it all comes down to the fact that authors and composers and musicians were historically preoccupied by two different revenue streams. Authors focused on publishing revenue, and composers and musicians focused on *performance* revenue. Once the general public had started to become a major patron of music, first via the advent of the public concert with paid admission, second via the opera, and third via music festivals, professional composers and musicians — who previously "relied on the goodwill of wealthy patrons for their economic survival" — began to see concert performance as an alternative means to earning a living. This growth in markets for live performance led to an explosion in the market for

[45] Carroll, 918-20.

printed music. In turn, increasing demand for printed music gave way to new opportunities for freelance composition. But because composers usually made little money from the publication of their compositions, ("many composers did not even receive a one-time payment from publishers for their compositions"), many composers regarded publication of their composition as a means for fueling demand for their public performances.[46]

In today's terms, composers in eighteenth-century England focused on show (tour) money over record sales as they were effectively blocked from the publishing money. And for those musicians whose employment agreements included composition (not just performance) as part of their musician's duties, ownership in the manuscript was generally held by their employers. Think of this as a work-for-hire situation. But for those musicians whose only musical duty was *performance*, opportunities were wide open; these musicians were free to shop their compositions for publication and keep any payment they made from them. Thing is, however, most composers of popular music received a one-time lump-sum payment for the composition (manuscript); in exchange, the buyer of the composition owned the right to publish it.[47]

For most musicians who sought to earn their living primarily through composition rather than performance, economic rewards were limited. Most musicians living in eighteenth-century England were from the "lower-middle ranks of society; [t]hey pursued musical careers because they were either following in a family tradition, taking advantage of natural talent, chasing after potential riches, or responding to unanticipated economic hardship." What's worse, "[t]hroughout the eighteenth century, English-born musicians and composers competed with foreign and immigrant musicians, who generally enjoyed greater prestige and financial remuneration than did their English counterparts." In fact, "[t]he only musicians able to focus solely or primarily on composition were certain foreign composers, such as George Frideric Handel, Johann Christian Bach, and Joseph Haydn."[48]

[46] *Ibid*.
[47] *Ibid*.
[48] *Ibid*, 918-920, 929.

Handel's Impact: The Well-Funded DYI Composer Who Set Everything Off

Of the three English musicians who were able to earn a solid living solely or primarily from their compositions, not performance, George Frideric Handel was the most important in terms of the composers' fight for copyright. Handel made his name (and money) by working in the markets for public performance *and* publication of his work. Simply put, Handel hustled hard, expanding his audience through a series of innovative measures. He was the first major composer "to pursue freelance composition in a serious way." Breaking away from Italian opera, which was all the vogue in eighteenth-century London, Handel invented the English oratorio. And as a composer/impresario, Handel came up with various ways of raising funds for his performances. Notably, he secured funds through individual attendance tickets, a modern-day direct-to-consumer ticket scheme akin to crowdsourcing his shows through his own Kickstarter start-up. Individual attendance tickets were particularly revolutionary because they "permitted middle class citizens who could not afford seasonal subscriptions to become part of his audience." Further, not missing out on any money bag available to him at the time, Handel served as musical director of London's principal opera company, the Royal Academy of Music, for eight years, from 1720 to 1728. After that, "Handel then became partner in managing King's Theatre, where he continued to stage operas and other musical performances."[49] Taken together, all of Handel's hustles demonstrate that he was an entrepreneur and a self-made music star. By today's metrics, Handel would be the quintessential iconic indie artist, strategically diversified, popular, and presiding over their name, brand, and self-made empire.

[49] *Ibid*, 929.

Why Composers Were Slow to Embrace Copyright At First

Generally, professional composers in eighteenth-century England embraced copyright reluctantly. Rather than "seek legal recognition as authors under the Statute of Anne," i.e. assert their rights like literary authors had "by registering their new compositions in Stationers' Hall," they sought "legal vindication for proprietary claims in their music through petitions for *printing privileges*." And it's worth noting that the term of protection for most printing privileges was fourteen years, as opposed to the twenty-eight years that copyright guaranteed without the need for petition.[50] The reluctance of composers to embrace copyright was most likely due to three factors. First, "*privileges* may have been preferable to composers because privileges often provided ex ante protection to all of the composer's works whereas copyright was effective on a per-work basis and normally did not vest until registration and deposit took place." Second, "royal privileges may have been *a valuable status signal* that would not have been easily sacrificed in favor of copyright." And third, "if composers would have had difficulty obtaining deposit copies, privileges may have been more attractive." In any event, some composers did "eventually embrace copyright as a legal hedge, and it was through this indirect route that they eventually won the struggle over music copyright."[51]

Nature of the Business: Music Publishers vs. Literary Publishers, and the Shelf Life of Printed Music

Like composers, music publishers (music sellers) were also slow to embrace copyright. Music publishers had little concern for copyright because the shelf life of printed music was short. Thus, the economic model that music publishers relied on was

[50] *Ibid*, 930.
[51] *Ibid* (emphasis mine).

different than that of literary publishers. Music publishers made most of their money from the sales of *contemporary* works, so lead time (for new releases) was more important to them than exclusive rights for exploiting the value of new music. By contrast, literary publishers "relied on their backlists to supply a steady stream of revenues." But as the seventeenth century ended and the eighteenth century powered on, the value of printed music increased. This was due to five factors. First, the size of the England's national population grew. Second, music literacy increased. Third, Londoners became wealthier. Fourth, the invention of classical music. Fifth, advancements in printing technology made publishing and distribution of popular music cheaper. The advancements in printing technology were particularly important; by the end of the seventeenth century "engraving had become the dominant technique for music publishing. Not only did this development make printed music more widely accessible, but it also better served consumers, who previously had been forced to purchase an entire book in order to obtain the one song they truly desired."[52]

Economic models aside, another reason that music publishers did not make the transition from printing privilege to copyright — just as literary publishers had done — was because it was unclear if the Statute of Anne applied to anything more than books (literary works). Therefore, most music publishers, who routinely engaged in unauthorized reproduction of previously-published works, continued operating as if the Statute of Anne did not apply to music, and is if composers had no right to control reproduction of their works.[53] In other words, "music publishers, who overwhelmingly employed engraving, by not voluntarily considering the Act of Anne as applying to music books, actively denied composers their copyright."[54]

[52] *Ibid*, 932.
[53] *Ibid*, 935.
[54] David Hunter, "Music Copyright in Britain to 1800," 67 *Music and Letters* (1986), 278.

Composers Wanted Their Piece of the Pie

Setting aside the contrasts between authors and composers/musicians and literary publishers and music publishers, the one thing that composers could see more clearly by the end of the seventeenth century was that the music publishing revenue stream was growing. And they wanted their piece of the action, both in terms of monetary gain and stature. In this light then we can see that the struggle for composer's copyright was about both material gains *and* social status. Increasingly, composers saw themselves as their own bosses; naturally, they wanted the kind of sizeable share in publishing revenue that comes from greater economic independence. Moreover, they believed (rightfully) that they were entitled to reap the benefits of their intellectual labor. These benefits included financial gain of course, but they also included the social awards that come with the social standing of *intellectuals* — the kind of social clout that literary authors were starting to enjoy.

But composers seeking to tap into the growing music publishing market faced conflict with the London music publishers, who, operating under their industry's standard, engaged in rampant piracy and did not respect any claims of royal privilege (i.e. printing rights), whether the claims were made by rival music publishers or composers. What followed then throughout the eighteenth century was a sporadic series of court cases and "public advertisements by composers warning against unauthorized publication of their works." The latter action likely due to the fact that "[c]omposers generally lacked the resources and will to pursue litigation," and also due to the fact that music publishers "relied primarily on their lead-time advantage to profit from publication."[55]

[55] Carroll, 936.

Composers in Court

Bach v. Longman (1777) was the case that ultimately brought music within the Statute of Anne and established music as a copyrightable subject matter. But two other cases that came before *Bach*, *Gay v. Read* (1728) and *Arne v. Roberts and Johnson* (1741), illustrate the composer's long fight for copyright.

Gay v. Read

At issue in *Gay v. Read* was John Gay and his composition *Polly*. Gay had composed *Polly*, a sequel to *The Beggar's Opera*, and the government censored the work's *performance* but did not prohibit its printing. Seizing on the publicity that the censorship brought, Gay hired a printer, had the words and music bound together, and self-published 10,500 copies. Considering himself an "author" and believing that *Polly* was a "book" within the meaning of the Statute of Anne, Gay had the title entered in the Stationers' Register around the time of *Polly's* first printing. Within less than a month, four unauthorized editions of *Polly* were on sale in London. Booksellers could not resist profiting off of the hype that censorship brought to a title. Gay immediately filed suit (under the Statute of Anne), and three months later, he received "a preliminary injunction against more than twenty printers and booksellers." What's especially worth noting is that "none of the defendants denied that *Polly* was within the subject matter of the Statute of Anne, as defendant booksellers would later do when accused of infringing only musical compositions."[56]

Arne v. Roberts and Johnson

At issue in *Arne v. Roberts and Johnson* was a number of Thomas Augustine Arne's "theatrical songs that the composer claimed had been illegally printed and sold by the defendants, the London

[56] *Ibid*.

booksellers Henry Roberts and John Johnson."[57] Thomas Augustine Arne — "who wrote primarily for the theater," self-published his compositions, was "the leading English theatrical composer after Handel's death in 1751," *and* who was a "legal and a commercial entrepreneur"[58] — did not set out to bring music within the Statute of Anne, nor was his aim to establish copyright in music. Rather, his "principal goal was to obtain an injunction that would halt the unauthorized publications,"[59] By also asserting claims under the Statute of Anne and the Engraving Act, Arne was simply hedging his position. In fact, the outcome of the case is unknown; Arne dropped the case and likely settled the dispute out of court. But what we do know, what's very instructive of the composer's fight for copyright, is the defendants' response to the lawsuit.[60]

Opting not to assert his rights in compositions by having the titles of his new works entered into the Stationers' Register — as he could have since he was his own publisher — Arne chose instead to petition the Crown for a royal printing privilege, which he was granted in January 1741. With the royal privilege in hand, Arne then placed an advertisement warning that "the author has procur'd his Majesty's royal license for the sole printing and publishing of his works, whoever shall print or sell any Work of the author's without his approbation or consent, will be prosecuted according to law." London music publishers Henry Roberts and John Johnson ignored the warning and each published "some of Arne's works immediately prior to the issue of the privilege (and Johnson published a few immediately thereafter), and both continued to sell their publications after having notice of Arne's privilege. The

[57] Ronald J. Rabin and Steven Zohn, "Arne, Handel, Walsh, and Music as Intellectual Property: Two Eighteenth-Century Lawsuits," *Journal of the Royal Musical Association* Vol. 120, No. 1 (1995), , Published by: Taylor & Francis, Ltd. on behalf of the Royal Musical Association, 113

[58] Carroll, 936.

[59] Rabin and Zohn, 113.

[60] Carroll, 938. Note: Arne had exposure to the inner workings of the law and he put his legal training to use. Arne serves as an example of what can be, or at least the willingness to engage in the sort of careful work that copyright law requires. Arne had the knowledge and the means, and certainly the latter makes one's path easier in the U.S. legal system. Still, having the knowledge goes a long way in at least offering an array of the best legal angles to pursue. That, along with sheer will, can often lead to the means that one needs.

works in suit were eight songs, six from Arne's popular masque (the English version of ballet) Comus, and two from his incidental music to Shakespeare's As You Like It. 195"[61]

Defendants Roberts and Johnson disputed the legitimacy of Arne's royal printing privilege and argued that even if Arne's royal printing privilege was valid, the privilege applied only to publications printed after the privilege had been issued. Thus, as they had printed their versions of Arne's songs prior to the grant of privilege, Roberts and Johnson argued, nothing that they had printed *before* the grant of privilege could be deemed an infringement of any right granted to Arne.[62]

Telling of the kind of willful piracy that London music publishers like Roberts and Johnson routinely engaged in *as a business model* is the fact that they essentially argued that they did not have to respect Arne's intellectual property; that they were free to print it without his permission because it was outside of any protection they were bound to respect. Indeed, "[i]n response to Arne's assertion of statutory rights, Roberts and Johnson argued that (1) neither the Statute of Anne nor the Engraving Act applied to printed music; (2) if either Act did apply, Arne's suit was barred because he had failed to follow the required procedures under each Act; and (3) even if Arne had complied with procedural prerequisites, the three month limitations period had run under both statutes."[63]

Bach v. Longman

At issue in *Bach v. Longman*, the landmark case in British copyright law that affirmed that music was indeed entitled to protection under statutory copyright — which effectively made music a copyrightable subject matter — was Johann Christian Bach's claim that music publisher Longman, Lukey & Co. had printed unauthorized editions of two of his compositions: "A new lesson for

[61] *Ibid*.
[62] *Ibid*.
[63] Carroll, 940.

the Harpsichord or Piano Forte" and a "new Sonata" for keyboard and viola da gamba.[64] The lawsuit was actually brought by Johann Christian Bach and Karl Friedrich Abel. Bach, the youngest son and eighth child of renowned composer Johann Sebastian Bach, was the most famous composer in London at the time. Known as the "London Bach," he was a musician who served as music master to the Queen of England in 1762, and he was one of the important early musical influences for Mozart. Abel, who once studied with Bach's father, was a composer and a distinguished musician who served as chamber musician to the Queen of England in 1759.

As individual composers, Bach and Abel had each secured a royal printing privilege from the Crown and published music under their own imprints. As an entrepreneurial team, Bach and Abel co-directed an annual popular concert series at Vauxhall Gardens (1765).[65] Overall, Bach and Abel enjoyed economic and social success, and it was during a period when both men were having financial success that they each clashed separately with music publisher Longman, Lukey & Co. So per their agreement, Bach filed suit against Longman, "seeking injunctive relief based on his royal printing privilege, which had longer to run than Abel's."[66]

At first, Bach relied on his royal printing privilege as the legal basis for the suit. Defendants Longman & Lukey "claimed that they were not aware that Bach had been granted a royal privilege, and questioned whether Bach was actually the true author of the work." Additionally, Longman & Lukey claimed that since they had bought copies from Adolphus Hummell, a local music seller to whom Bach had allegedly given the work, there was no infringement and that they should be permitted to print and sell the music and not turn over any profits to Bach.[67] Forced to change strategy, Bach petitioned Parliament for clarification that musical compositions were within the scope of the Statute of Anne, but

[64] Rabin and Zohn, 112.
[65] John Small, "J. C. Bach Goes to Law," *The Musical Times*, Sep., Vol. 126, No. 1711 (1985) 526-529.
[66] Carroll, 943.
[67] Georg Predota, "Composers in the Court Room Bach versus Longman & Lukey," November 23rd, 2020 https://interlude.hk/composers-in-the-court-room-johann-christian-bach-versus-longman-lukey/.

the legislative effort failed. In the lawsuit, however, things went differently. Nearly three years after the lawsuit was first filed, the case came before the Lord Chancellor — the court of Chancery, which held jurisdiction over all matters of equity, including trusts, land law, and other property. Bach's counsel introduced the Statute of Anne as the new basis for granting relief, arguing that music was a form of writing within the meaning of the copyright act. Having not jurisdiction to interpret the copyright act, the Lord Chancellor referred the question of whether music was protected by the Statute of Anne to the King's Bench, the higher court.[68]

One year later, on June 10, 1777, Lord Mansfield, the Lord Chief Justice of the King's Bench, gave his answer. An extract of J.C. Bach's petition as printed in the Parliamentary Proceedings of 15 March 1774 offers the details of Lord Mansfield's response:

> "Lord Mansfield called on Mr. Wood to begin; and without hearing Mr. Robinson in answer, said, the case was so clear and the arguments such, that it was difficult to speak seriously upon it. **The words of the Act of Parliament are very large: "books and other writings." *It is not confined to language and letters. Music is a science;* it may be written; and the mode of conveying the ideas, is by signs and marks.** A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use. **If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no colour for saying that music is not within the Act."** [emphasis mine][69]

While Lord Mansfield said that the Statute of Anne (the Copyright Act) used a "narrow interpretation" of what was meant by "books and other writings," we must recognize that the court's determination was made because music fit within the meaning of "other writings." Nevertheless, the extension of copyright to music and the King's Bench court's aversion to narrowing the scope of what was meant by "other writings" paved the way for an expansion of the

[68] Small, 528.
[69] Small, 529; *See Bach v. Longman*: 2 Cowp. 624; English Reports, xcviii, 1273; *See Bach v. Longman*, 98 Eng. Rep. 1274 (K.B. 1777).

categories of intellectual property that are protected by copyright law to this day. *Bach v. Longman* also clearly "established that composers were 'authors,' and that their works are a valuable and protectable commodity."[70] It flows from this intellectual flexibility that creators of intellectual property are commonly called "authors" under copyright to this day.

The Intellectual Themes and Conceptual Impact of Bach v. Longman

There are a number of intellectual themes that emerged from *Bach v. Longman* that reverberate to this day. The following sub-sections locate these themes and explains their cultural impact.

Broad Interpretation of Copyright

Bach v. Longman affirmed that music was indeed entitled to protection under statutory copyright, effectively making music a copyrightable subject matter for all time. But the legal and conceptual importance of *Bach* goes far beyond that. And the biggest legal and conceptual impact of *Bach* is that it broadened the interpretation of what was copyrightable and demonstrated how the concept of copyright could be "readily expanded through statutory interpretation."[71]

In answering the question of whether the copyright act (the Statute of Anne) applied to music, Lord Mansfield noted that copyright was *not confined* to "books and other writings" or "language and letters," and that "music is a *science*."[72] Thus, Lord Mansfield established that music was a science *and* an art, something that, among other things, society draws knowledge from. Lord Mansfield further noted that if a narrow interpretation of copyright was to hold, the progress of the "sciences and useful

[70] Predota.
[71] Carroll, 955.
[72] *Bach v. Longman*: 2 Cowp. 624; English Reports, xcviii, 1273; *Bach v. Longman*, 98 Eng. Rep. 1274 (K.B. 1777).

arts" would be stifled and the advancement of society would suffer as a result. (This is no doubt where United States copyright law draws the wording of its purpose from — "*to promote the Progress of the Sciences and useful Arts.*") So while *Bach* made it law that music is a form of "writing" protected by the copyright act, more generally speaking *Bach* "set a precedent for a broad interpretation of the copyright act, which from then on was interpreted to apply to anything at all which could be regarded as a book or a form of writing."[73] From this point, the broader interpretation of copyright meant that copyright could apply to any "*intangible* work reflected in material copies;"[74] ergo, the notion that copyright could apply to any intellectual property.

The Concept of Authors' Rights and The Extension of "Authorship" Beyond Literary Works

Bach v. Longman cemented the concept of authors' rights. Historian Michael W. Carroll has observed how the struggle for composers' rights gave way to "the power of the author's right as an organizing principle;" noting that "[t]he concept of author's rights was not invented by the English Parliament. Rather, the Statute of Anne gave government sanction to a concept for which various authors had contended for some time."[75] *Bach* certified that composers were indeed "authors" endowed with a property right. In doing so, *Bach* extended the concept of who or what an "author" was under copyright.

The Value of Art in Society

Bach v. Longman validated another important reality about music. In comparing music (more specifically music notation) to "algebra, mathematics, arithmetic, hieroglyphics,"[76] Lord Mansfield

[73] Small, 529.
[74] Carroll, 951 (emphasis mine).
[75] *Ibid*, 938.
[76] *Bach v. Longman*: 2 Cowp. 624; English Reports, xcviii, 1273.

was not only saying that music was on par with literary works but that music was also a form of *knowledge*, whose importance and value to society was ubiquitous.

Lord Mansfield's assessment of music also reflected what was going on with music at the time. As music increased in importance in England, drawing nearer to the social status of literary works, music came to be seen not only as property but also as a valuable commodity. Within this paradigm, however, questions of intellect and originality waned but did not disappear entirely. Even today, for some, there is an assumption that literary works require a greater level of intellectual rigor than music works. But how we interpret or perceive the intellectual rigor and originality associated with a given art form changes with the increase in value of that art form within society. (This speaks to the "useful Arts" part of the purpose of copyright law.) In this regard, as the value of the art sampling has grown in society, the perception of the intellectual rigor and originality associated with it has grown as well. It's no coincidence that DJ Premier, RZA, and J Dilla are now often described as geniuses. And it's no accident that more commentary about the art of sampling has appeared following sampling's explosion between the late 1980s and mid-1990s.

Intellect, Art, Musical Hierarchy, and Social Status

All art forms require varying degrees of intellect and have different levels of social status attached to them. We can go even further and say that all creative expressions/creative professions have associated social perceptions and presumptions. In effect, the social perceptions and presumptions surrounding specific forms of creative expression are so apparent that when we juxtapose the names of creative professions, we illicit a number of implied opinions. Graphic designer vs. illustrator; novelist vs. non-fiction writer; journalist vs. blogger; sample-based beatmaker vs. non-sample-based beatmaker. Looking at these professions, we often draw certain conclusions about the level of intellect involved in them as well as the value society places on them. Three hundred

years ago, the same pattern applied to authors of literary works vs. music composers.

When music composers began their fight for copyright in England in the eighteenth-century, they were not considered to be on the same level as authors of books (literary works). The work of music composers was considered to be less intellectually rigorous, in part due to the perception that composers borrowed from other composers more than literary authors borrowed from other literary authors. Also, compared to authors of literary works, who enjoyed a high social status, the social status of composers was low. For years leading up to *Bach v. Longman*, music composers had been struggling not only to gain copyright for music but to attain the same social status as book authors. *Bach* signaled that that moment had finally arrived. Once *Bach* certified that music was a copyrightable subject, and subsequently validated music as property and a valuable commodity in league with literary works, the social perceptions and presumptions surrounding music, and the composers who created it, began to change. After *Bach*, composers began to see an increase in their social status.

Indirectly, *Bach* could also tell us something about music's hierarchy. Although Lord Mansfield's decision expanded the interpretation of the copyright act, *Bach* dealt specifically with the *written composition* (sound recordings weren't invented yet). Further, the composers involved in the lawsuit were both virtuoso musicians in their own right. Here, we can see a musical hierarchy that looks (crudely) something like: composer > virtuoso > great musician > good musician. However, what must be noted in this paradigm is the reality that there has been the steady invention of new musical instruments throughout the past three centuries. So what happens when new instruments are created? Are not the same types of hierarchies established along with the invention of these new instruments?

New music instruments that arrived in the twentieth century, which are today lumped together as "traditional instruments," reflect the emergence of new composers composing for new instruments and new virtuosos performing on those instruments. Take Jimmy

Hendrix and the electric guitar. The electric guitar was invented by George Beauchamp in 1932; and roughly 30 years later, by the mid-1960s, Hendrix was a virtuoso on this revolutionary instrument. This was nearly 200 years after *Bach v. Longman*. The important parallel to note here is that rock 'n' roll was once discredited by those (allegedly) higher up on the musical hierarchy. At one point, rock 'n' roll was considered to be little more than uncultivated "noise;" in fact, there was a time when people said that rock 'n' roll was not "real" music. Sound familiar? This is the same thing that was said (and continues to be said) about hip hop/rap music.

So what changed? Well, in a word, popularity. As music gained in popularity in eighteenth-century England, "classical music" was *invented*. A similar phenomenon occured with rock 'n' roll once it grew in popularity in the twentieth century. Along with this increase in popularity came an extension of the concepts of the composer and the virtuoso, and an increase of social status for rock 'n' roll composers and musicians. In other words, for every new musical instrument invented, we inevitably see composers and virtuosos working on those instruments. This leads to new music and an increased social status of the composers and musicians who make it. Taken together, society is the direct beneficiary of all this advancement. This is what is meant by "the progress of Sciences and useful Arts."

What then do we make of electronic music production instruments like drum machines and samplers? Does the same pattern hold? Today, it's hard to argue that it doesn't. In the late 1980s, a decade after turntables were first used as instruments and featured as part of the blueprint to formulate hip hop music, beatmakers (producers) crafting beats using drum machines and digital samplers were not considered composers or virtuosos. Fast forward to 2024, however, and you'd be hard pressed to not find descriptions of DJ Premier, RZA, Pete Rock, Q-Tip, J Dilla, Madlib, and Alchemist (among others) as not being composers or virtuoso, i.e. masters of their instruments.

So what changed? Well, again, in a word, popularity. Hip hop/rap music, having surpassed rock 'n' roll as the number one music

genre in the world, is incredibly popular today. Its impact on not just American culture but global culture is undeniable. And the art of sampling has played a huge role in getting hip hop/rap music to this point. In fact, courts have already recognized sampling in hip hop/rap music and have, in effect, certified sampling as a valuable music form.[77] Despite this reality, the music industry, which has stigmatized sampling, maintains a disconcerting view about sampling. Many traditional musicians, songwriters, and music producers continue to demonize those who make music primarily through sampling, viewing the art form as creatively bankrupt and devoid of any originality. More alarming is the fact that most music publishers and sound recordings copyright owners continue to demonize those who sample without sample clearance, furthering the myth that *all* samples must be cleared.

The Scope of Borrowing in Music

Borrowing didn't just occur randomly in music in eighteenth-century England. It was standard practice, even for great composers like Bach and Mozart.[78] During the eighteenth century, borrowing

[77] *Campbell v. Accuff-Rose Music*, 510 U.S. (1994). In *Campbell v. Accuff-Rose* Music, the Supreme Court acknowledged sampling as a legitimate form of copying, noting that "2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original [recording]… **2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing "scraper" noise, overlaying the music with solos in different keys, and altering the drum beat.** See 754 F. Supp., at 1155. This is not a case, then, where 'a substantial portion' of the parody itself is composed of a 'verbatim' copying of the original.'" (emphasis added).

[78] *See* Adam Baer, "Wolfgang Amadeus Copycat: Did Mozart plagiarize?" *Slate* (February 13, 2002) https://slate.com/culture/2002/02/did-mozart-plagiarize.html: "It's a testament to playwright Peter Shaffer's pen that to this day when people hear the name Mozart, the image of Amadeus' whimsically childish genius replete with glass-shattering cackle instantly comes to mind. Yet beyond the liberty Shaffer took with Mozart's personality, **two important exaggerations of his remain in our collective imagination: Mozart's supposed abilities to both instantly conjure masterworks of the utmost ingenuity and then to perfectly dictate them from his head to staff paper in the form we now hear them. In fact, Mozart wasn't only more workmanlike than many of us think, crafting numerous sketches and drafts of his pieces just like other composers. He was what you might politely call a "creative collaborator."** *"Calling Mozart a plagiarist would be going too far; the musicians from within his theatrical community borrowed freely from each other as colleagues and partners who made livings off ticket sales. And it's not uncommon for classical-music composers to quote one another; using age-old tunes…"* (emphasis mine).

practices were so prevalent that borrowed music could be found in three out of four operas![79] This is largely because traditional borrowing practices had long been regarded as a "composer's liberty." In fact, the practice of borrowing from old songs dates back to before the eighteenth century.[80] Three hundred years ago, "[o]ne composer would rearrange, rescore or adapt another composer's music;" it was even "considered flattering to have your work used by another composer."[81] "In the 16th century, as earlier in the Renaissance, *various kinds of borrowing* had played an important part in the art of musical composition." Actually, "to work from an earlier model was not only permissible, but commendable."[82] Moreover, the reuse or recycling of older compositions in newer ones was mandatory:

> "In order to compose at the kind of speed required by the conditions under which they worked, **seventeenth- and eighteenth-century composers frequently resorted to what have come to be called *'parody' techniques* — that is, to *the reuse or recycling of older compositions in newer ones.* Every church and theater composer indulged in the practice.** There was really no choice. **The only question involved the nature of the sources plundered and the specific means or methods employed."** [emphasis mine][83]

The common nature of borrowing in music allowed eighteenth-century English music publishers to play both sides. They acknowledged wide-spread borrowing in music and used this fact as defense to their unauthorized publications of composers compositions: "Implicit in the [music] publishers' challenges to musical authorship" was "*the view that old songs were free to be re-used in the creation of new ones* and could be freely republished."[84]

---

[79] *See* Olufunmilayo B. Arewa, From "J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context," 84 *N.C. L. REV.* (2006) (discussing evolution of musical borrowing practices from eighteenth-century England to present).
[80] Carroll, 958.
[81] UPI, "Musicologist says Mozart, Bach 'borrowed'" *UPI* (May 31, 1985) https://www.upi.com/Archives/1985/05/31/Musicologist-says-Mozart-Bach-borrowed/4034036016018/.
[82] Franklin B. Zimmerman, "Musical Borrowings in the English Baroque," *The Musical Quarterly*, Vol. 52, No. 4 (Oxford University Press, Oct., 1966), 483.
[83] Richard Taruskin, "Borrowing," *Oxford History of Western Music* https://www.oxfordwesternmusic.com/view/Volume2/actrade-9780195384826-div1-07004.xml.
[84] Carroll, 955.

Composers held different views about the scope of borrowing from each other, but the borrowing of melodies, harmonies, and *other compositional elements* was fair game among composers of the eighteenth century. But the question of the scope of legitimate borrowing changed dramatically after *Bach v. Longman*, as "originality" became a central conceptual concern. After *Bach*, with music haven been brought under copyright, borrowing continued of course, but the views about borrowing began to stiffen. *Bach* regularized the means for obtaining and enforcing rights in music; and embolden by *Bach*, music publishers — who had quickly embraced music copyright as means of protecting their profits, via registration at Stationers' Hall — grew overprotective of the works that they registered and began a pattern of "nuisance" lawsuits against upstart music publishers whose printed works contained only small parts of compositions that they owned the copyrights to.[85] Sound familiar?!! Today, it's music publishers and sound recording copyright owners who demonize sampling the most. They are also among the main groups who push the sample clearance agenda, a misinformation campaign designed to get the public to believe that only *cleared* samples — i.e. only cleared "borrowings" — are legitimate.

What's important to note here is that attitudes about borrowing shifted primarily because of the music publishing trade, not the views of composers. Certainly, the explosive consumer growth (increased concerts, performance spaces, and the increased social value of music) also had an effect on why composers' views on borrowing began to center on "originality" as the "principle criterion for value of any composer's works." Once music had been brought into copyright; once composers — especially those who published their works under their own imprint — had property to protect; and once composers had begun to establish social status near par with authors of literary works, their views on borrowing narrowed and they began to place a deeper importance on the concept of originality. Still, this was not the main reason that composers began

[85] Carroll, 946; *See Pyle v. Falkener*, C33/442 London Public Record Office (1772), reprinted in Rabin and Zohn.

to focus on "originality" as the "principle criterion for value of any composer's works." The main reason that borrowing came to be considered especially "sinful" during the eighteenth century was due to the fact that "keen competition within the music publishing trade made it an economic issue."[86] Music publishers had "suggested that authorship of music required a higher standard of *originality* to qualify for protection under any legal theory;"[87] this sentiment, along with the music publishers' wave of "nuisance" litigation, is what led composers to become fixated on "originality."

Questions around legitimate borrowing and originality in music would intensify in the nineteenth century and they continue to be debated to this day.

Why the Composers' Fight for Copyright Is Instructive for Sample-Based Beatmakers

Much like the composers' fight for copyright shed light on various issues related to intellectual property rights, borrowing in art, and social status in eigteenth-century England, the art of sampling — and subsequently the sample rights vs. sample clearance debate — sheds light on the relationship between music's hierarchy, the long-held practice of borrowing in music, the advancement of technology, and music's ever-increasing value in society today. With special regards to music as a commodity, we can't ignore the fact that music has, to some degree, passed books in terms of potential future earnings. For instance, books aren't used in the same ways as music; advertisers don't use books to sell products and services. Music, however, is always used to help sell products and services.

[86] Zimmerman, 484.

[87] Carrol note: *See Pyle v. Falkener*, C33/442 London Public Record Office (1772), reprinted in Rabin & Zohn, supra note 163, at 144. Falkener alleged that Bickerstaff was the putative author of both Thomas and Sally (rather than Arne) and Love in a Village (co-authored with Arne). Id.: "Roberts and Johnson suggested that Arne may have only rearranged "some old Songs made by Shakespear [sic] and other Authors. Falkener similarly defended with respect to the Bickerstaff opera, claiming that he did not know of any 'New Tunes or New Music' that Bickerstaff had composed and instead he had relied on "Old Tunes which had been Used in Common by all persons for many years before the said Isaac Bickerstaff wrote the said Opera." Carroll, 950.

And while books are available for download, they are not used to power the world's largest streaming and download channels like Apple Music, Spotify, Amazon Music, and Tidal. Simply put, the value of music in society has long left the shadow of literary works, raising the social status of music makers to levels that eighteenth-century English composers could only envy. Still, today's sample-based musicians can learn a lot from the eighteenth-century English composers' fight for copyright.

If *Bach v. Longman* "should be understood as the outcome of a specific political struggle,"[88] then there are two important lessons that we can take away for sample-based beatmakers (producers). First, sample-based beatmakers (producers) must increase their awareness of copyright law. Specifically, this means recognizing that music — compositions and sound recordings — is subject to the same limitations of *all* copyrightable subject matter, and that sampling (i.e. *borrowing* for the purpose of creating new works) is a necessary and healthy activity in society, one that is protected by the same safe harbors of copyright law that protect all forms of permissive borrowing. Second, sample-based beatmakers (producers) must fight against the propaganda that seeks to persuade the public that: A) Sampling is illegal without sample clearance; and B) That *all* samples need to be cleared.

Sample-based beatmakers (producers) must understand that this fight is a political struggle. As such, sample-based beatmakers (producers) must dictate the discussion around sampling and the implications that it holds for copyright law and not allow music publishers, sound recordings copyright holders, and sample clearance agents to go unchecked in their spread of negative propaganda about sample clearance. The music industry wants the full breadth of copyright law — which includes the real purpose of copyright law and its fundamental safe harbors — out of public view, because the music industry wants the world to buy into its

[88] Carroll, 956.

"Get a license or don't sample" stance.[89] Sample-based beatmakers (producers) must do everything in their power to thwart this propaganda campaign; this includes stepping forward in engaging in legal battles.

It should be generally understood that well-financed, well-organized distributors of music, "beginning with the Company of Stationers and continuing to groups such as the RIAA and the MPAA have been the primary agents of change in copyright law's evolution."[90] Therefore, sample-based beatmakers (producers) must organize specific efforts to counter the propaganda that discredits the art of sampling. Sample-based beatmakers (producers), especially those in hip hop/rap music, must invest time and energy in destigmatizing sampling and promoting the value of the art of sampling and its protected status under copyright law. This also means engaging directly with copyright law; for instance, actively leading discussions about the purpose and objectives of copyright law and how copyright law actually encourages borrowing — The de minimis and fair use doctrines offer guidance in this regard. This also means challenging the RIAA, which Negativland successfully did before[91] and seeking relief in the courts whenever the opportunities arise. Principally, this includes fighting "nuisance" copyright infringement suits via a strategy of summary judgment filings based on de miminis and fair use.

---

[89] The music industry's "standard" stance on sampling echo's the Sixth Circuit's decision in *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390,399 (6th Cir. 2004). In this case, the Sixth Circuit tried to an establish a "bright line" regarding music, and wrote in its decision: "Get a license or do not sample." In effect, with it's "Get a license or do not sample" bright-line rule, which no other court outside of the Sixth Circuit followed, the Sixth Circuit attempted to hand over the exclusive right to sample old songs — and create new art using said samples — to the music publisher and sound recording copyright owners of those old songs.

[90] Carroll, 958-59.

[91] In 1998, Negativland, a self-described experimental-music and art collective of sound collagists (sampling musicians), took on the RIAA and its then-recent guidelines issued to CD plants. The guidelines had prompted Negativland's CD pressing plant not to press its CD because it contained samples. Negativland responded to the RIAA with a press release entitled, "DO WE REALLY HAVE TO SUE THE RIAA????" In the press elease, which threatened legal action against the RIAA, Negativland expressed deep concerns over the RIAA's attempt, via it's CD plant guidelines, to prevent the art of sampling and subvert the purpose of copyright law. See "DO WE REALLY HAVE TO SUE THE RIAA????" http://www.negativland.com/archives/014riaa/, (Accessed March, 2012). See Chapter 16 for detailed commentary on Negativeland's fight against the RIAA.

What *Bach v. Longman* ultimately demonstrates is that "conditions in eighteenth-century England led professional composers such as Johann Christian Bach to engage directly with copyright law."[92] They relied on the Statue of Anne to fight against music publishers. Current conditions in music — including hip hop/rap's popularity, advanced recording technology, and everyday borrowing practices in culture — present a similar catalyst for engagement for well known sample-based beatmakers (producers) of today. If today's high-profile sample-based beatmakers (producers) become more involved in the fight for sampling rights, there is no doubt that the discussion around sampling and the implications that it holds for copyright law will undergo a seismic shift.

Two Theories of Copyright: Natural Right and Economic Incentive

Before the enactment of the first United States copyright law, there were two conflicting theories of copyright at work. One theory of copyright, argued for by Warburton and Blackstone, was that copyright is a common law property right; as such, copyright should be *perpetual*. Alfred C. Yen has noted that the "'natural law' theory considers copyright as the legal vindication of a person's moral right to property in the fruits of her labor," and that "[under this theory, copyright's justification does not rest upon any showing of economic necessity. Instead, copyright exists because society's failure to protect authors' property interests would result in the denial of a basic human right. Thus, the author rightfully gains copyright in her work to the extent that she can claim sole credit for the work's creation."[93]

This theory of copyright, which descends from eighteenth-century concepts of property, is centered on the notion that copyright is an *inherent* right. Thus, natural right/common law theory allows for copyrights of *unlimited* duration. James Madison,

[92] Carroll, 961.
[93] Alfred C. Yen, "The Interdisciplinary Future of Copyright Theory," in *The Construction of Authorship* (Duke University Press, Durham and London 1994), 162.

one of the two main architects of United States copyright law, supported the enactment of copyright law on the basis that authors had enjoyed such a right as common law. Yet he recognized that copyright should be for a *limited* duration. The theory of natural right/common law copyright was rejected in the United States.[94] But Gary Kaufman reminds us that the "claim that courts and legislatures never associate natural law principles with copyright law is simply untrue."[95]

The other, more dominant theory of copyright, the theory that continues to guide the United States system of copyright law to this day, is the economic incentive theory. Under this theory, copyright provides necessary economic incentives for the production of creative work. Thus, according to the economic incentive theory, copyright is justified as an economic incentive that advances society. Moreover, under this theory, the belief is that "copyright is *necessary* because in its absence those interested in a using the author's work would simply copy the work instead of buying it from the author. Authors would then find their economic returns too small to justify the costs of authorship. In such a situation authors might not produce and social welfare would presumably suffer. To remedy this problem, economic theory supports granting authors a copyright in their works."[96] In this way, copyright law works like a (potential) advance payment to authors for their contribution to society. But more importantly than that, economic incentive reminds us that the heart of United States copyright law is social progress through the promotion and advancement of knowledge via creative works:

[94] The argument of natural-law copyright, i.e. that copyright is a natural right — a human right — caused debate among the framers. However, the debate was settled and reaffirmed more than 200 years ago: "the limited copyright system in our Constitution was not the default conception of what copyright as a concept was – rather *it reflected a conscious rejection* of the ideology of *indefinite* copyright." Furthermore, in *Wheaton v. Peters,* the Supreme Court's first case on copyright (1834), the high court rejected the doctrine of a common law copyright in published works, and affirmed that copyright was a right created by Congress — that "Congress, by the act of 1790, instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time by the provisions of that law." *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 593 (1834) (emphasis mine).]

[95] Yen, 162. Yen quoting Kauffman. See Gary Kauffman, Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents, 10 Colum. — *VLA J.L. & Arts* 381, 403-08 (1986).]

[96] Yen, 161, 169.

> **The enactment of copyright legislation….is not based upon any natural right that the author has in his writings….<u>but on the ground that *the welfare of the public will be served and progress of science and useful arts will be promoted*</u> by securing to authors for limited periods the exclusive rights to their writings.** [emphasis mine][97]

Lastly, in contrast to natural right/common law, economic incentive theory calls for a limited duration of copyright and it permits the public to borrow from works created by authors. Therefore, we must recognize that United States copyright law does not rest solely on economics but rather a combination of "the welfare of the public" (the advancement of society) *and* economics, with the latter serving as an incentive to contribute to the prior.

Publication of a creative work gives the public access to the ideas that lie beneath the work. In addition, the public gains limited access to pieces of the work itself. That is to say, under the de minimis and fair use doctrines, the public can freely borrow from the fixed expression as well. Thus, publication, which authors opt into to receive copyright protection, is the formal path through which the idea, the science, the art — the knowledge — is made public. And once the work is published, society has access to it and can benefit from it forever. Therefore, regardless of whatever economic gain that a copyright owner may achieve through the limited monopoly that copyright law grants, society (the public) is enriched in perpetuity by the works that a copyright owner publishes and makes available to the public. That's the exchange at work; it doesn't matter if the author of the work set out to make a masterpiece or large sums of money or not.

[97] H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909), reprinted in 6 Legislative History of the 1909 Copyright Act, at S7 (1976).

Idea-Expression Dichotomy and the Purpose of Copyright Law

Another fundamental principle of United States copyright law is the idea-expression dichotomy. To the framers, a specific creative expression necessarily divulges ideas that can and should be freely used by the public. That is to say, the Framers understood that after a creative expression is divulged or shared with the public, the ideas that lie beneath that specific creative expression cannot belong to any one person, as *ideas* are not susceptible to the notion of exclusive property. The Framers recognized, however, the need to protect specific *expressions* of ideas. But the Framers also believed that the protection of distinct expressions of ideas should not be so rigid and restrictive as to stifle the creativity of new distinct expressions of ideas. In other words, a balance needed to be reached between the limited protection of specific expressions of ideas of authors (producers of creative expressions) and the right of the public to freely use the ideas that lie beneath those specific expressions.

Dymow v. Bolton

In *Dymow v. Bolton* (1926), a case in which a defendant playwright had been accused of improperly appropriating plot points from a script he was supposed to be translating from Russian into English, the Second Circuit drew on copyright law's essential dichotomy between the underlying unprotected ideas and the protected expression of those ideas as a justification for its findings. In *Dymow*, the Second Circuit, which included the renowned copyright jurist Judge Learned Hand, articulated this core copyright doctrine in its most famous formulation as the idea-expression dichotomy, noting plainly that:

> **"copyright law protects the means of expressing an idea;** and it is as near the whole truth as generalization can usually reach that, **if the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result, and no infringement will exist.**

> If one compares two dramatic compositions, whether in forms suitable for the stage or for the library, what has been called the "fundamental plot," the "same old plot," or an "old story," can assume any author's dressing or adornment; **that author can devise and use his own way of expressing that plot, and he will not infringe.** This general proposition is illustrated in *London v. Biograph Co.*, 231 F. 696, 145 C. C. A. 582; Eichel v. Marcin (D. C.) 241 F. 404; *Stodart v. Mutual Corp.* (D. C.) 249 F. 507.
>
> The theory is (however difficult may be its application at times) **"that the protection accorded the owner of copyright is of the intellectual product of the author."** King, etc., Syndicate v. Fleischer (C. C. A.) 299 F. 533, at page 536.
>
> *692 Admitting, now, that a plot, **the mere concept of a situation around which to build and develop literary adornment, is not copyrightable,** it is insisted that the court below was right in holding that Bolton had appropriated the "theme" of Dymow's work. [emphasis mine][98]

Note, however, that there are some instances where the expression is not protected. This is because there are some ideas that can be expressed (intelligibly) only in one or a limited number of ways. For example, the chronological timeline of historical events, the rules of Congressional procedure or the rules of a game even. In such cases, the expression *merges* with the idea and is therefore not protected. This is known as merger doctrine. There is also a doctrine similar to the merger doctrine called "scènes a faire." This doctrine acknowledges that there are sometimes specific conditions when there is no other way to present an idea but only by using certain fixed elements. So, for example, if two movies wish to treat the unprotected idea of drug-dealer life in Brooklyn, for each it will be only natural to depict scenes of drug addicts, killers, and clandestine business meetings, juxtaposed against streetwise cops wearing plain clothes and wires, tough prosecutors, and sneaky informants. Such incidents are "scènes a faire."

[98] *Dymow v. Bolton* 11 F. 2d 690 - Circuit Court of Appeals, 2nd Circuit, 1926.

The Purpose of Copyright Law

To achieve the balance between the interests of the authors/creators and the interests of the public, i.e. to strike a balance between protecting original works and stifling further creativity, the framers of the constitution, led by James Madison and Thomas Jefferson, made the incentive to create new works the core principle of United States copyright law. This means that copyright law operates as an incentive to share ideas in public fora without removing the authors'/creators' right to determine the uses of their particular form of expression. Thus, copyright law serves as a policy that balances the interests of the public with the interests of existing authors (creators).

The Framers understood the fact that creativity, consciously and subconsciously, depends on the use, consideration, supplementation, and criticism of previous works. They argued that authors should enjoy a *limited* monopoly — exclusive control over access and use, on their works — "just long enough to provide incentive for them and others to create new works," but that upon the expiration of this limited monopoly, the work created should live afterward in the public domain as common property of the reading public. In this vein, the Framers established copyright law as a deal in which authors and publishers would get a limited monopoly for a short period of time, and then thereafter the public would get access to those protected works and free use of the facts, data, and ideas within them. Thus, U.S. Constitution, Article I, Section 8, Clause 8 states:

> The Congress shall have power to **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.** [emphasis mine][99]

[99] U.S. Const. art. I, § 8, cl. 8. See also 17 U.S.C. § 102 (1976). The term "writings" is construed broadly and, according to the Copyright Act of 1976, it defines "works of authorship."

Although the Framers believed in the rights of independent publishers, many, like Thomas Jefferson, were suspicious of concentrations of power and "artificial monopolies." Moreover, the Framers were fearful of giving indefinite copyright protection to the most powerful publishers, because they believed that it would lead to no incentive for individual citizens (commoners) to create and distribute new works. This would mean a stifling of new creative works, creating an atmosphere that was akin to the "empire of creative works" of eighteenth-century England. Therefore, the intent of copyright law is to stimulate, motivate, and influence the creation of new creative works — the ultimate goal being to promote knowledge, which aids in the advancement of society. In this way, the Framers linked copyright law to the "greater good" of American society, i.e. the "welfare of the public." Jefferson, Madison, and others believed that the health and growth of the union depended in large part on its citizen's ability to create and innovate within the spheres of science and the arts.

The Framers thought that a reward (a limited monopoly) for creativity and innovation in science and the arts should be just long enough to encourage new works and innovations. This is why the first federal copyright act to be instituted in the United States, the Copyright Act of 1790, granted authors copyright protection for a term only of *14 years*, with the right to renew for one additional 14-year term should the copyright owner still be alive. After 1831 the term of copyright protection was increased to 28 years, with the right to renew for another 14 years. It's worth noting that Thomas Jefferson objected to the 14-year term. He fought for an 8-year term of copyright protection for authors, and to him, even that was too long.

The Purpose of Copyright Law is *Not* to Protect Copyright Owners

With regards to the actual purpose of copyright law, it must be noted that, contrary to the belief of some copyright owners, copyright law does *not* exist to benefit the copyright owner at the expense of the public; rather, copyright, and the limited exclusive monopoly that it confers on individual authors, exists to benefit the welfare of the public, first and foremost; benefits to the copyright owner is a "secondary consideration." The Supreme Court has consistently stated as such:

> "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. **Rather, the limited grant is a means by which an important public purpose may be achieved.** It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.
>
> The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In Fox Film Corp. v. Doyal, 286 U. S. 123, 286 U. S. 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress,"
>
> **"The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public** from the labors of authors."[emphasis mine][100]

The notion then that copyright law exists solely to protect to copyright owners and their works is terribly mistaken; "copyright is intended to increase, and not to impede, the harvest of *knowledge*;"[101] it is "a means by which an important public purpose may be achieved."[102] And fair use sits at the heart of this utilitarian goal.

---

[100] *Sony Corp. v. Universal City Studio*s, 464 U.S. at 429 (1984).
[101] *Harper & Row v. Nation Enterprises*, 471 U.S. at 546 (1985) (emphasis mine).
[102] *Sony Corp. v. Universal City Studios*, 464 U.S. at 429 (1984). (emphasis mine).

The Purpose of Copyright Law Is Not About the Consent of Creators

(Or, What Copyright Law Isn't: A Reminder for Copyright Owners Who Believe That Copyright Law Exists Only For Their Benefit)

I believe in the purpose of copyright law and I'm a strong advocate for it. This means that I don't support the "free culture" ideology or the notion that copyright law is bad. It also means that I believe that any advocacy for copyright law that promotes an incomplete or one-sided interpretation of copyright law is wrong. What I advocate for is effective copyright law. Nothing more, nothing less. Effective copyright law serves the interests of the public and all creators who opt in. However, it's this first part, "the interests of the public," which is often ignored by copyright owners who wrongly believe that the purpose of copyright law comes down to them and their consent.

The primary purpose of copyright law is *not* about the consent of a creator, as some commentators prefer to maintain. As I pointed out earlier in this chapter, Congress specified clearly and unequivocally what the purpose of copyright law is: "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." Thus, the primary purpose of copyright law "is not so much to protect the interests of the authors/creators, but rather to promote the progress of science and the useful arts — that is —knowledge. To accomplish this purpose, copyright ownership encourages authors/creators in their efforts by granting them a temporary monopoly, or ownership of exclusive rights for a specified length of time. However, this monopoly is somewhat limited when it conflicts with an overriding public interest, such as encouraging new creative and intellectual works, or the necessity for some members of the public to make a single copy of a work

for non profit, educational purposes."[103] Therefore, consent, as an aspect of copyright law that falls under the scope of the limited exclusive right that authors (creators) receive in exchange for opting into copyright protection, serves the purpose of copyright where applicable — but consent is not the purpose of copyright law.

This is why the United States Constitution outlines: 1) The limited monopoly that all creators (copyright holders) have; and 2) What copyright infringement is and the ramifications thereof, i.e. the implications of not obtaining consent from copyright owners when consent is required. In this way, copyright law specifies the contours of what copyright owners can do with their works as well as the level of access that the public has to those works *without having to obtain consent*. In other words, copyright law makes it clear where exceptions are permitted — i.e. when consent is not needed — in the form of the de minimis and fair use doctrines.

Copyright owners who attempt to broaden the definition of copyright law as something that exists solely for their benefit ignore the limitations that copyright law places on the ownership of their works; and in doing so, these copyright owners undermine the fundamental purpose of copyright law and they help further weaken the public's fragile understanding of copyright law. This is one reason why it's necessary to state clearly what copyright law *is* just as much as what copyright law *isn't*.

The Act of Borrowing Is Not Infringement

If you copy an entire article from an online publication and save it to a Word file for your reference, is it copyright infringement? No, it isn't. The mere act of copying something is not inherently infringement. To further clarify this point, let's say you're at the library. If you photocopy the article, is it infringement? No. What if that same article is only available on microfiche? If you use your smartphone to take photos of the article, is it infringement? Nope.

[103] Description of the purpose of copyright law from Morris Library at The Southern Illinois University (Carbondale); https://lib.siu.edu/copyright/module-01/purpose-of-copyright-law.php (emphasis mine).

How about if you proceed to hand write, word for word, the article so that you have it for reference, is that infringement? Still no. The point here is that these are all methods for copying, and a method or technology that permits copying is *not* infringement.

This extends to the sampling of sound recordings. Merely sampling a song does not constitute infringement, neither does using some of the exact sounds from the sound recording. Infringement occurs only when a *substantial* piece of a copyrighted work is *used* in another work without the copyright owner's permission. Conversely, infringement does *not* occur when an *insubstantial* piece of a copyrighted work is used in another work without the copyright owner's permission.

The Balance of Copyright Law Explained

What is the balance of copyright law really about? Why is the deal that copyright law offers so vital to society? Alfred C. Yen answers this question perfectly:

> If too much art is reserved as private property, through copyright, future would-be authors will find it impossible to create. Society would presumably suffer from the decreased production of creative works. Proper construction of our copyright law therefore depends on striking ***a socially acceptable balance between the interests of authors and the public.*** [emphasis mine][104]

Thus, the balance of copyright law between the rights of the public (consumers) and the rights of authors (producers) notwithstanding is not designed — first and foremost — to provide a special private benefit to copyright owners. The purpose of copyright law is to "promote the Progress of Science and useful Arts," i.e. the advancement society. In this way, copyright law motivates creators (authors) to produce new works, and this is what fuels the balance of copyright law. The Supreme Court has cemented this interpretation of United States copyright law. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme

[104] Yen, 160.

Court affirmed that copyright law is designed primarily to benefit the public, and that the purpose of copyright law — to promote progress in the Sciences and useful Arts; i.e. to motivate creators (authors) to produce new works — is what fuels the balance of copyright:

> **The monopoly privileges that Congress may authorize are neither unlimited *nor primarily designed to provide a special private benefit.*** Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motive the creative activity of authors and inventors by the provision of a special reward, *and to allow the public access* to the products of their genius after the limited period of exclusive control has expired.'" [emphasis mine][105]

Key Twentieth-Century Developments In United States Copyright Law and Policy

If United States copyright law and policy in the eighteenth and nineteenth centuries had been about striking and maintaining a balance between authors, publishers, and the public — i.e. honoring the interests of *existing* creators/authors and the interests of the society of readers, consumers and *future* creators/authors — then copyright law and policy in the twentieth century was about the erosion of this balance, the broadening of the once limited trade monopoly for authors (producers), the *corporatization* of the fundamental principles of United States copyright, and the centralization of creative power in America.

Copyright Term Extensions and the Corporatization of United States Copyright Law and Policy

Among the many developments of U.S. copyright law and policy in the twentieth century, two of the most pivotal and detrimental changes that occurred were the extensions of the

[105] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 reh'g denied, 465 U.S. 1112 (1984).

monopoly that authors have over the works that they create, and the development of the corporation as the author/creator. The Copyright Act of 1790 granted authors copyright protection for just 14 years, along with the right to renew for *one* additional 14-year term should the copyright owner still be alive. In 1831, the term increased to 28 years, with the right to renew for another 14 years. And from 1909 through 1978, the term was 28 years, renewable for 28 more. Then, after the 1976 copyright revision, the term spiked to "the life of the author" *plus 50 years*! And in 1998, under the Copyright Extension Act, commonly known as the Sonny Bono Act, Congress extended the term again, this time to the life of the author plus *70* years, *20 more years than before*! Interestingly, works of corporate authorship were extended to *95* years after publication or 120 years after creation, whichever is shorter.

The extension of copyright protection to a term of the *life* of the author *plus* 70 years raises a number of questions. First, if the U.S. Constitution provides that "The Congress shall have 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," how can the life of the author *plus* 70 years possibly be considered as a "limited time?" Certainly, this is a radically different system from what the Framers intended.

The "life of the author plus 70 years" term in itself is so out of touch with the original term of copyright protection and the fundamental purpose of copyright law that one can only assume that such an extension was made — at the behest of American corporations — to achieve exactly what the Framers of the Constitution feared: A central force of monopolists who hold complete control over the creation, use, and access to ideas and expressions. Moreover, these counter-intuitive copyright term extensions dramatically increase the time that it takes for works to make their way into the public domain.

So here's another question that begs asking. How does a monopoly of the life of an author plus 70 years provide incentive for other authors to create? The truth is, it doesn't, because every potential author (creator) must come to grips with the fact that

they will either have to sell their specific creative expression to the established monopolist (this usually means successful corporations) or compete with them. Although a minority of creators do indeed opt to compete with the established monopolists, such a competition is rigged in favor of the monopolists. Moreover, should new creators become successful, they are immediately susceptible to joining the ranks of the established monopolists in their field. So the cycle continues, and thus most works never make their way into the public domain in a timely fashion.

"Property Talk" and the Property Model for Copyright Law and Policy

The Framers of the Constitution understood that "creative ideas and expressions" were not "property" as the general public understands the meaning of property. From the earliest discussions about what copyright law should be, the Framers were acutely aware of the dangers of arguing for copyright as "property." In fact, the property model for copyright was explicitly dismissed by Jefferson and others who recognized that such "property talk" would eventually expand to encompass *idea* protection, not just *expression* protection. Should an expansion of such magnitude occur, the idea-expression dichotomy, a crucial principle of copyright law, would be compromised, and the centralization of creative ideas would eventually take hold, giving monopolists (copyright owners) power to strengthen their control over the flow of ideas and the use of expressions. Simply put, the Framers were fearful of duplicating the complete and ominous control over creativity, ideas, and freedom of expression that England held throughout the eighteenth-century.[106]

[106] Lyman Ray Patterson, *Copyright in Historical Perspective*, (Nashville: Vanderbilt University Press 1968), 192-200; Vaidhyanathan, 11, 23-24, 28.

"Intellectual Property" and the Corporatization of Copyright Law and Policy

Despite the fact that copyright law was never intended to be a restrictive "property right," the twentieth-century brought about a dramatic reversal of one of the fundamental principles of copyright law and policy. The phrase "intellectual property," which had been used before, started to make its way into common American business parlance around 1967. Soon after that, the American Patent Law Association and the American Bar Association Section on Patent, Trademark, and Copyright Law changed their names to incorporate "Intellectual Property." To understand copyright law and policy as it is currently perceived, you first have to understand how it fits into intellectual property in general.

There are three main spheres or branches of intellectual property law in the United States: patent, trademark, and copyright law. Patents cover inventions and processes, not words, texts, or phrases. A patent for an invention is the grant of a "property right" to the inventor, issued by the United States Patent and Trademark Office. A patent is granted to an inventor of a new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof. The term of protection of a patent is just *20 years.* But unlike copyright, a patent protects the ideas, as well as the specific invention itself, so that a similar invention that operates along the same lines as the protected invention would be considered an infringement.[107]

A trademark "is a word, name, symbol, or device that is used in trade with goods to indicate the source of the goods and to distinguish them from the goods of others." A trademark allows a company or person to enjoy goodwill in the marketplace. A trademark can be a logo, design, sound, container shape, or even a smell that points to the product's origin. Trademarks are associated or linked to particular brands or products in a way that offer a sense of predictability or perceived quality assurance to consumers. For

[107] U.S.P.T.O. See: http://www.uspto.gov/web/offices/pac/doc/general/index.html#ptsc.

instance, whenever you by a new MacBook or another product made by tech giant Apple, the Apple logo (name) on the product indicates specific design and functionality characteristics as well as performance expectations that are unique to and associated with the Apple brand.

Copyright is the protection granted to the authors/creators of "original works of authorship." *Originality* implies that the author or artist created the work through his own skill, labor, and judgment. But bear in mind that the bar for originality is low for a work to qualify for copyright.

By the mid-1970s, the notion of intellectual property had overtaken the original context of copyright law and placed it in a context of "property talk." This reversed one of the fundamental components of United States copyright law. Just like "the life of the author plus 70 years" term extension, the reversal of the context of United States copyright law helped further solidify Jefferson's greatest fears. As with the most notable copyright protection term increase of the twentieth century, the use of the property model for copyright helped strengthen the power of the monopolists (i.e. corporate copyright owners) to control the flow of ideas and the use of expressions. As a result, the centralization of creative ideas in America is now greatly unbalanced, and it has steadily moved under the umbrella of a small network of powerful copyright owners and further away from the the public.[108]

[108] *Ibid*, 11-12. Vaidhyanathan maintains that "from the middle of the nineteenth century," there have been "those who have pushed to enlarge and deepen copyright protection" and "have invoked the need to protect authors from 'theft.'" This notion of protecting authors from "theft" developed as larger publishers and corporations grew in power and influence. Vaidhyanathan also points out that "since 1909, courts and corporations have exploited public concern for rewarding established authors by steadily limiting the rights of readers, consumers, and emerging artists." He further cites copyright historian Lyman Ray Patterson's articulation that "copyright has in the twentieth century really been about the rights of publishers first, authors second, and the public a distant third."

Sound Recording Amendment of 1971

The first two decades of the twentieth century saw the invention of phonographs and recording machines. But it wasn't until 1971 that phonorecords or sound recordings would receive formal copyright protection. At that time, there was a growing problem of record piracy — illegal duplication, reproduction, and redistribution of entire records. Between the late 1960s and early 1970s, one third of all records and tapes sold in the United States were illegal duplicates. Thus, Congress was pressed to act:

> While it is difficult to establish the exact volume or dollar value of current **piracy activity**, it is estimated by reliable trade sources that the annual volume of such piracy is now in excess of $100 million. It has been estimated that legitimate prerecorded tape sales have an annual value of approximately $300 million …. **The problem of record piracy has not been dealt with…We are persuaded that the problem is an immediate and urgent one, and that legislation to deal with it is needed now. The seriousness of the situation with respect to record piracy…is unique…. The committee agrees that it is necessary, without delay, to establish Federal legislation prohibiting unauthorized manufacturers from reproduction and distribution of recorded performances.** [emphasis mine][109]

Congress dealt with the growing problem of record piracy by amending the 1909 copyright law. The Sound Recording Amendment of 1971, which became effective on February 15, 1972, and was later made a permanent part of the Copyright Act, specifically granted a limited copyright to sound recordings.[110]

---

[109] *The House Report on the Sound Recording Amendment* of 1971, September 22, 1971 — Committed to the Committee of the Whole House on the State of the Union, H.R. Rep. No. 92-487, at 10 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1572. (Hereinafter H.R. Rep. No. 92-487) In the House Committee's report, it's clear that the legislation was aimed at "*manufacturers* engaged in the unauthorized reproduction of records and tapes," not individuals who now practice the art of sampling.

[110] Sound Recording Amendment of 1971, P.L. 92-140, § 1 (a), 85 Stat. 391 (amending 17 U.S.C. (1970) (current version at 17 U.S.C. 114(b) [Supp. II 1978]). 2.10[A], at 2-145, 2-146. Also see: Paul S. Wallace, Jr., "Copyright Law: Legalizing Home Taping of Audio and Video Recording," Issue Brief number IB82075, updated 05/31/84, *The Library of Congress Congressional Research Service Major Issues System*, 07/08/82.

That the Sound Recording Amendment of 1971 was the reaction of Congress to curb rampant *record piracy* in the United States tells us much. First, it is clear that "record piracy," as in the reproduction, manufacture, and distribution of *whole* records, had been a problem for quite some time, but Congress had failed to act sooner. Second, Congress acted in 1971, roughly 15 years before the first era of commonly used digital samplers and before sampling became a regular music process. This means that Congress was driven solely by the need to stem the growing "record piracy" problem in the United States. And clearly, when Congress amended the Copyrigh Act in 1971, they did *not* intend to stop the art of sampling, a practice which, in its physical (digital) form, had not yet become commonplace.[111]

Despite the facts surrounding the Sound Recording Amendment of 1971, various legal commentators and opponents of sampling (and hip hop in general) have maintained that sampling is a case of "piracy." This notion is absolutely absurd. In 1971, Congress had no way of knowing that hip hop/rap music would emerge or that the art of sampling would be a fundamental part of its development. How could Congress draft an amendment specifically intended to counter and restrict an art form and practice that were not yet being commonly practiced?

Still, by way of pure sleight of hand, i.e. using a curiously *loose* and non-intended definition of the term "piracy," some legal commentators are able to mislabel and misrepresent sampling as "piracy." The detailed examination in Part Two of this study demonstrates not only how complex sampling is an art form, it also shows how sampling is never "piracy." The art of sampling requires any number of steps, the fourth (after digging for, listening to, and studying a piece of music/source material) being the *physical* recording (digital sampling) of a sound.

The term "recording," by broad definition, implies "duplication" and/or "copying." The Sound Recording Amendment of 1971 expressly prohibits "duplication of sound recordings;" furthermore, it grants authors the exclusive right to "make copies," and to

[111] H.R. Rep. No. 92-487, at 10 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1572.

authorize others to make "copies," and to "republish" those "copies." Here, there are a number of points that have to be made. First, Congress did not distinguish between a *whole* sound recording and isolated *pieces* of it, there was no need to do so. In fact, we know that the language within the Sound Recording Amendment of 1971 that was used to describe sound recordings was understood to mean "whole sound recordings." There is no uncercentainy here: The *clear intent* of the Sound Recording Amendment of 1971 was to rein in "record piracy." Second, the copying, republication, and distribution of *entire* records are the main conditions that properly define "piracy." Third, in proving copyright infringement, the copyright owner must prove that the sample is an improper appropriation, i.e an illegal duplication. All appropriations are *not* illegal, as I discuss in the Fair Use chapter of this study. Sampling is not the process of wholesale duplication and redistribution of whole records; ergo, sampling is not "record piracy."

In the process of *digital* sampling, the third or fourth step in the art of sampling, sounds are copied. Herein lies the illogical legal loophole — based on willfully misinterpreted nomenclature — that some legal experts rest their claims of "piracy" on. But the meaning and level of duplication in the context of sampling must not be confused with the meaning of "duplication" in the context of "record piracy," as Congress clearly defined it in 1971. A sample-based beatmaker (producer) does not make copies of *whole* sound recordings and then redistribute them; he does not copy a whole song (a complete fixed expression) then "republishes" or "manufactures" or "redistributes" that whole song. So by the most common, practical, and legal definition of "piracy," sampling is certainly not "piracy." Yet the opponents of sampling aim to use the most impractical and most thinly technical definition of "piracy" to link it to sampling. They are able to make this long, impractical leap from sampling back to "record piracy" simply because of a shrewd game of technical and cultural semantics. Thus, these legal experts who, incidentally, are mostly the ones who have framed the public debate about sampling and its copyright implications, maintain that sampling has always been prohibited under U.S. copyright

law. However, they are wrong. Copyright law actually *encourages* the art of sampling.

Chapter 14

Demystifying Copyright Infringement

Substantial Similarity and the Complexity of Proving Infringement (And the Problem with Copyright Infringement Cases Involving Music)

> "You can sue for anything if you've got the filing fee."
> —somebody on Twitter

The common misconception or bias about copyright infringement, especially involving sampling, is that: 1) The plaintiff — the copyright owner — is automatically right; and 2) When it comes to sampling, just suing someone for copyright infringement is an automatic victory for the plaintiff. But copyright infringement doesn't work like that. Every copyright infringement case is decided on a case by case basis. And at the heart of each case is the inquiry of substantial similarity. In this chapter, I'll explain what substantial similarity is and outline how it's determined in a copyright infringement case.

Specifically, this chapter focuses on the various tests that courts use to determine substantial similarity. "A key theme of this examination is the reality that the courts are plagued by doctrinal confusion; and, particularly where sampling is concerned, the reality that *aesthetic judgments* are inherent in determining copyright infringement cases."[1]

[1] Nicole Lieberman, "Un-Blurring Substantial Similarity: Aesthetic Judgments and Romantic Authorship in Music Copyright Law," *New York University Journal of Intellectual Property And Entertainment Law* Volume 6 Fall 2016 Number 1 (December 30, 2016), 92 (emphasis mine).

What is Copyright Infringement and How Is It Determined?

Attorney Gregory L. Phillips, founding partner at the law firm Phillips Kaiser, has written that "[c]opyright infringement occurs when someone uses (e.g., copies, sells, distributes, displays) an original work without the express consent or permission of the creator or the copyright holder. *It is that simple*."[2] But, no, copyright infringement is *not* "that simple." In fact, missing from Phillips's overly simple definition of copyright infringement is the fact that copyright infringement occurs *only* when the copying (borrowing) that takes place is of a "*protectible* expression" *and* when the copying is substantially similar.[3] Evidence that you copied a work is not automatically the same thing as evidence that you committed copyright infringement.

Generally, lawyers (especially music industry lawyers) spend a fair amount of time dictating what copyright infringement *is*; and in the process, they never express what copyright infringement *isn't*, and they typically leave out key aspects of copyright law and how copyright infringement is actually proven in court. The result is that the public has a warped view of copyright infringement. For instance, one common misconception is that just a mere claim, i.e. a copyright infringement lawsuit against someone, is proof that the alleged infringer committed copyright infringement. This isn't the case, however. For example, Beastie Boys, the Estate of The Notorious B.I.G., Jay-Z, and Drake all fought and won copyright infringement cases involving sampling precisely because the copying that they engaged in was *not* copyright infringement. (In Chapters 21 and 22, I cover these cases and other pivotal copyright infringement cases involving sampling in detail.)

[2] Gregory L. Phillips, "I've Been Accused of Copyright Infringement What Should I Do Next?" Phillips Kaiser https://phillipskaiser.com/what-is-copyright-infringement-copyright-attorney/ Accessed August 27, 2021. (emphasis mine).
[3] U.S. Code, 17 § 501. Infringement of copyright.]

While the focus of this chapter is on determining substantial similarity and the complexity of proving infringement, the essence of this chapter is about what is *not* copyright infringement. Because the following sections explain when the threshold of copyright infringement, i.e. unlawful appropriation, is *not* reached, it's necessary to first explain what copyright infringement is and how it's proven. Copyright infringement is the unauthorized use of a work under copyright. U.S. Code, 17 § 501 - Infringement of copyright states that "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be."[4]

"To *prove* copyright infringement, the *plaintiff* must establish that he or she owns a valid copyright, that the defendants copied a *protectible* expression, *and* that the copying is *substantial enough* to constitute *improper* appropriation of plaintiff's work."[5] So in order for copyright infringement to be proven, there are three elements that must be established, i.e. three things that the plaintiff (the copyright owner) must prove. First, ownership of a *valid* copyright must be proven. A valid copyright is established through proof of fixation, this usually means a registration of the copyrightable subject matter with the copyright office. Second, proof of copying must be established. This means that the plaintiff must prove that actual copying took place. This is established either by direct evidence of copying or by indirect evidence showing that the alleged infringer had access to the copyright owner's work. Third, *unlawful* appropriation of the copyrighted work must be proven. Remember, not all appropriation/copying is unlawful. This means that after a valid copyright has been proven *and* proof of copying established, it must further be proven that the copy was "*improper*" under the statute, which means that the two works at issue have to be substantially similar.

[4] U.S. Code, 17 § 501. Infringement of copyright.
[5] *Jarvis v. A&M Records*, 827 F. Supp. 282, 290 (D.N.J. 1993), at 288, B. (emphasis added).

In determining *unlawful* appropriation, the courts will engage in a substantial similarity analysis in which qualitative and quantitative factors are assessed. An allegedly infringing work is considered *substantially* similar when it is nearly indistinguishable from the copyrighted work it appropriated. Quantitative analysis examines whether the secondary use (i.e. the part copied/borrowed) constituted a substantial portion of the appropriated work, *not* whether the appropriated work comprised a substantial portion of the new work (i.e. allegedly infringing work). Qualitative analysis considers whether the sample (i.e. copied portion) is qualitatively important to the allegedly infringed work *as a whole*. In other words, in terms of sampling, the analysis asks how critical, qualitatively speaking, is the sample (the copied portion) to the appropriated work, and *as a whole*, how similar is the allegedly infringing song to the song it sampled.[6] Thus, something that is *quantitatively* insignificant may be substantially similar if the material is qualitatively important to the appropriated work. For instance, a hook from a song might be quantitatively small yet qualitatively important to the work from which it came. And note: An allegedly infringing work is considered substantially similar when it is nearly indistinguishable from the copyrighted work it appropriated.

"Proof of substantial similarity is satisfied by a two part test of extrinsic similarity and intrinsic similarity. The extrinsic test is objective in nature and requires the plaintiff to identify specific criteria which it alleges have been copied. The intrinsic test is an examination of an ordinary person's subjective impression of the similarities between the two works, and is the exclusive province of the jury." Further, "the test for substantial similarity is the reaction of a lay ear, not the reaction of the alleged infringer."[7] This test looks at each work as a whole, and considers "whether an average

[6] *Warner Bros., Inc. v. American Broadcasting Companies*, 654 F. 2d 204 - Court of Appeals, 2nd Circuit 1981. *Warner Bros., Inc. v. American Broadcasting Companies r*eaffirms how unlawful appropriation is determined in the courts. Quote from Jennifer R. R. Mueller, "All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling," *Indiana Law Journal*, Vol. 81, Issue 1, Article 22 (2006). 442-43.

[7] Scott Hervey, "The Complexity of Proving Copyright Infringement" http://www.theiplawblog.com/archives/-copyright-law-the-complexity-of-proving-copyright-infringement.html, (accessed April, 2009); and *Jarvis v. A&M Records*, 827 F. Supp. 282, 290 (D.N.J. 1993), at 287.

lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[8] Therefore, the plaintiff (copyright owner) **must prove that the two works *taken as a whole* are substantially similar**. In *Williams v. Broadus*, the court noted that "if a secondary work ***transforms*** *the expression of the original work such that the two works cease to be substantially similar*, **then the secondary work is *not* a derivative work and, for that matter, *does not infringe the copyright* of the original work.**"[9]

The more the allegedly infringing work takes from a copyrighted work, the stronger the claim of infringement. Conversely, the less taken and the less similar the allegedly infringing work is to the copyrighted work that it appropriated, the weaker the claim of infringement. Thus, the third element in an infringement claim, unlawful appropriation, can't be established when there's a finding of de minimis or fair use. (In Chapters 17, 18, and 19, I cover de minimis and especially fair use in far more detail.)

Factual Copying, "Probative Similarity" – Not Enough to Establish Infringement Alone

"Probative similarity," or rather establishing similarity based on the fact that a defendant has copied the work of a plaintiff does not automatically constitute copyright infringement. What's typically not known by most copyright owners and the public in general is that, in copyright infringement cases, defendants routinely *admit* to copying. But copying, even when the plaintiff has direct evidence of it, is not enough to establish copyright infringement. Copyright infringement takes place *only* when the copying is legally *actionable*, i.e. not permitted under the Copyright Act. And determining whether the copying — the unauthorized use of a copyrighted work — turns on various questions, most notably whether the copying is "substantial" and "substantially similar" or not:

[8] Mueller, 442.
[9] *Marlon Williams v. Calvin Broadus* No. 99 Civ. 10957 (MBM), 2001 WL 984714 (S.D.N.Y. Aug. 27, 2001) (emphasis mine).

> "In some cases, the plaintiff has **direct evidence of copying**. Indeed, *it is not unusual for a defendant to admit copying* a small element of the plaintiff's work and defend the suit solely on grounds that the copied element is unprotectable or that the portion copied was not substantial." [emphasis mine][10]

Additionally, what's also often misunderstood is the fact copyright protection is not *absolute*. Every aspect or element of a copyrighted work is *not* protected simply because the work is copyrighted:

> **"[T]he mere fact that [a plaintiff's works] are copyrighted does not mean that all aspects of those [works] are *automatically* protected.' *Although the work itself may be original and subject to copyright, it may contain constituent elements that are not subject to copyright* because they are not original or because they are otherwise *unprotectable.*"** [emphasis mine][11]

Finally, it's further worth noting that determining substantial similarity is really about "'***[d]etermining Actionability***': **The 'substantial similarity' inquiry determines whether factual copying is 'quantitatively and qualitatively sufficient' to support *liability*. In other words, it tests whether the appropriation is "legally actionable."**[12] So there's no infringement when the copying is *not* legally actionable.

Determining Substantial Similarity

Determining substantial similarity is complicated and problematic. David Nimmer, author of *Nimmer on Copyright*, the standard reference treatise in the field, has related that the determination of the extent of similarity that will "constitute a *substantial*, and hence infringing, similarity presents one of the most difficult questions in copyright law...and the Supreme Court itself has not weighed in to give definition to the field, so all the

[10] *Batiste v. Najm*, 28 F. Supp. 3d 595 - Dist. Court, ED Louisiana 2014.
[11] *Id.*
[12] *Id.*

decisions on point emanate from the inferior courts." Nimmer maintains that the problem is one of line drawing, finding the middle ground between the one extreme of no similarity and "the other of complete and literal similarity lies the line marking off the boundaries of 'substantial similarity." But the vagueness of where to draw the line is baked into copyright for good reason, as Nimmer cites Judge Learned Hand: "'wherever it [the line] is drawn will seem arbitrary' and that 'the test for infringement of a copyright is of necessity vague.'"[13]

Two Types of Similarity: Comprehensive Nonliteral Similarity and Fragmented Literal Similarity

Comprehensive Nonliteral Similarity is when there is:

> **a similarity not just as to a particular line or paragraph or other minor segment, but where the fundamental essence or structure of one work is duplicated in another.** If such duplication is literal or verbatim, then clearly substantial similarity results. The problem here under scrutiny is the situation where there is comprehensive similarity but no word-for-word or other literal similarity — what the Second Circuit terms "inexact-copy infringement." *The mere fact that the defendant has paraphrased rather than literally copied will not preclude a finding of substantial similarity.* **As Judge Learned Hand noted in words often quoted, copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."**
>
> Balanced against this principle is the countervailing consideration that copyright does not protect against the borrowing of abstract ideas contained in the copyrighted work. Therefore, **if the only similarity between plaintiff's and defendant's works is that of the abstract idea, there is an absence of substantial similarity and hence, no infringement results.** [emphasis mine][14]

[13] David Nimmer, Nimmer on Copyright 4 Nimmer on Copyright § 13.03[A] at 1-13 (emphasis mine).
[14] *Ibid*, 13, 15.

Fragmented literal similarity is when there is literal similarity between the two works in issue. Under this type of similarity, the inquiry as to whether there is a copying of the expression of idea(s) tends not to be necessary, because literal similarity, on the surface, is usually a similarity as to the expression of ideas. But fragmented literal similarity is *not always* a similarity as to the expression of the ideas. This is because there are times when the *literal* similarity is not comprehensive; i.e. the fundamental substance, the brunt of the whole work or underlying scheme has not been copied. Maybe a word, a line, even a paragraph from a chapter in a book has been appropriated; or a drum sound from a song has been sampled. In this paradigm, the question is: At what point does such fragmented similarity become *substantial* so as to constitute the borrowing an infringement?

Evolution of the Copyright Infringement Tests

There are various copyright infringement tests that courts use to determine substantial similarity — i.e. to solve the problem of drawing the appropriate line between copying that is actionable and copying that is allowed under copyright law. The main tests that the courts use include: the "abstractions test," the "pattern test," the "total concept and feel" test, and the "iterative test." (As the "iterative" and the "filtration" tests are related to determining substantial similarity in the field of software infringement, they are not instructive for our purposes in this study, so I will not discuss them.) In the following sub-sections, I explore the manner in which these tests differ, and the basis for determining substantial similarity in each.

Abstractions Test

The "abstractions test," introduced in 1930 by Judge Learned Hand in *Nichols v. Universal Pictures Co.*[15], seeks to draw the line between an expression of ideas and the ideas in the abstract. For

[15] *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930).

instance, a plot about a cop who gets revenge on the villain who killed his wife is not protected. What is protected, however, is the *specific expression* of this well-known plot. Furthermore, other abstract patterns that may service this plot — like a hard-drinking, break-all-the rules, street-wise cop and a hardnosed police captain — are also not protected. While the abstractions test is helpful in drawing the line between the expression of an idea and an idea in the abstract, it does not present a bright line that tells us where in any given work the level of abstraction is such as to cross the line from idea in the abstract to expression of idea.

Pattern Test

In considering the question of where the level of abstraction crosses the line from idea to expression, law professor and judicial philosopher Zechariah Chafee has said that the line lies between the author's idea and *how he expressed* it:

> No doubt the line does lie somewhere between the author's idea and **the precise form in which he wrote it down.** I like to say that the **protection covers the "pattern" of the work … the sequence of events, and the development of the interplay of characters.** [emphasis mine][16]

The "fish-out-of-water" plot device in movies can be used here to illustrate how the pattern test works. There is a long history in cinema of the plot device in which the protagonist finds himself completely out of his element and in a new environment: *a fish out of water*. As an *idea*, this plot device is not protected. But when expressed in a pattern with a sequence of events and development of the interplay of characters, the idea crosses the line into protected expression.

Beverly Hills Cop (1984) and *Red Heat* (1988) are especially good at illustrating the line between the common plot device — the idea — and a specific expression of it. Both films revolve around

[16] Zechariah Chafee, Jr., "Reflections on the Law of Copyright," 45 *Colum. L. Rev.* (1945) 503, 513.

cops who find themselves out of their depth in new environments. In *Beverly Hills Cop*, Axel Foley (Eddie Murphy), finds himself in Beverly Hills, a wealthy, predominantly white, easy-going town where it's always sunny and fabulous. Foley, a Black cop who's a long way from his blue collar, gritty and cold Detroit, is on the hunt for the murderer of his best friend. In *Red Heat*, Russian Militia Captain Ivan Danko (Arnold Schwarzenegger), finds himself in Chicago, far from his home in Moscow, on the hunt for the murderer of his former partner. *Beverly Hills Cop* and *Red Heat* employ the same fish-out-of-water idea, and both movies are commonly described as a "buddy cop" film. While the two films share the same fundamental abstract idea, they are ultimately separated by their distinct expressions of the idea, i.e. the different patterns, sequence of events, and interplay of characters that they use. Thus, despite the fact that *Beverly Hills Cop* and *Red Heat* are similar in the abstract idea — theme, scope, manner — no reasonable analysis could ever find that these two films are *substantially* similar.

Total Concept and Feel Test

"Total concept and feel" is a phrase used to refer to contextual, abstract concepts rather than specific details such as plot elements or characters. The roots of "total concept and feel" can be traced back to *Roth Greeting Cards v. United Card Co.* (1970). In *Roth*, the Ninth Circuit Court of Appeals noted that greeting cards distributed by United bore "a remarkable resemblance to seven of Roth's cards on which copyrights had been granted." Further, the court used "total concept and feel" to describe what is meant by "remarkable resemblance":

> It appears to us that **in total concept and feel** the cards of United are the same as the copyrighted cards of Roth. With the possible exception of one United card, **the characters depicted in the art work, the *mood* they portrayed,** the combination of art work conveying a particular mood ***with a particular message,*** and the ***arrangement of the words*** on the greeting card are ***substantially the same*** as in Roth's cards. In several instances the lettering is also very similar. [emphasis mine][17]

[17] *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970).

In 1976, in *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, the Ninth Circuit again cited "total concept and feel" while laying out the framework for what would become the "extrinsic and intrinsic test":

> We have viewed representative samples of both the H. R. Pufnstuf show and McDonaldland commercials. **It is clear to us that defendants' works are substantially similar to plaintiffs'. They have captured the *"total concept and feel"* of the Pufnstuf show.** *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9 Cir. 1970). We would so conclude even if we were sitting as the triers of fact. There is no doubt that the findings of the jury in this case are not clearly erroneous. [emphasis mine][18]

Thus, the "total concept and feel" test examines similarities in how a copyrighted work and an allegedly infringing work express more abstract concepts, such as their structure, art work, mood, and message. More recently in 2011, in *Allen v. Scholastic*, Inc., the Southern District Court of New York reaffirmed that the "total concept and feel" test examines similarities in how a copyrighted work and an allegedly infringing work express more abstract concepts, such as their "structure, mood, details, and characterization":

> Because the works at issue are primarily created for children, the total concept and feel of the works rather than their plot and character development is the most important factor for purposes of establishing copyright infringement. Here, **the contrast between *the total concept and feel* of the works is so stark that any serious comparison of the two strains credulity.** As an initial matter, the dramatic difference in length between Goblet of Fire and Livid Land 734 pages and 16 pages of text, respectively immediately undermines Allen's suggestion that the authors similarly "selected, coordinated and arranged the elements" of their work. **Indeed, a reading of the works unequivocally confirms that they are distinctly different in both substance and style, and ultimately engender very different visceral responses from their readers. The works vary in structure, mood, details, and characterization.** [emphasis mine][19]

[18] *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.* 562 F.2d 1157 (9th Cir. 1977).
[19] *Allen v. Scholastic, Inc.*, 739 F. Supp. 2d 642, 656–58 (S.D.N.Y. 2011).

The total concept and feel test and the decisions in *Roth Greeting Cards v. United Card Co.* and *Allen v. Scholastic, Inc.* are highly instructive for sampling in hip hop/rap music because they get at the heart of how sample-based hip hop/rap songs are practically never substantially similar to the works that they borrow from. In hip hop/rap music, the "mood," "the particular message," and the "arrangement" of words and musical elements of a song are nearly always "distinctly different" from the song (sound recording) that it sampled. Moreover, if "a *reading* of works" can unequivocally confirm that two works are "distinctly different" in both "substance and style" and "ultimately engender very different visceral responses from their *readers*," and if "a *reading* of works" can also unequivocally confirm that two works "vary in structure, mood, details, and characterization," so then can a *listening* of works (songs) unequivocally confirm that two works (songs) are "different in both substance and style, and ultimately engender very different visceral responses" from their *listeners*; and that the sample-based song and the song that it borrows from "vary in structure, mood, details, and characterization."

Here, it's also good to clear up a common misconception about the *relation* of similarity and how a sample appears — specifically, how many times a sample of one song (sound recording) appears — in a new song (sound recording). With regards to whether the similarity relates to matter that constitutes a *substantial* portion of a copyrighted work, David Nimmer has related that:

> The question in each case is whether the similarity relates to matter **that constitutes a substantial portion of plaintiff's work — *not* whether such material constitutes a substantial portion of *defendant's work*.** Thus, for example, **the fact that the sampled material is played [looped] throughout defendants' song cannot establish liability, if that snippet constitutes an *insubstantial* portion of plaintiff's composition.** [emphasis mine][20]

In other words, in a copyright infringement case it doesn't matter how many times a sample was looped or how many times the

[20] David Nimmer, "Nimmer on Copyright 4," *Nimmer on Copyright* § 13.03[A], 14.

sample appears in the defendants' song. If the sample constitutes an *insubstantial* portion of the plaintiff's song (composition/recording), it's *not* infringement.

Extrinsic and Intrinsic: Two-Part Substantial Similarity Test

In a basic umbrella sense, if you will, proof of substantial similarity is determined by a two-part test of *extrinsic* similarity and *intrinsic* similarity. The Ninth Circuit has pointed out that the extrinsic test, which is objective in nature, is focused on the similarity in general ideas; and in this regard, the test is used to filter out elements that are not protected by copyright. Elements not protected by copyright law include: ideas, facts, and scènes à faire. From *Shaw v. Lindheim*:

> **"Where idea and expression are unified, extending copyright protection to the objective elements of expression would grant the copyright holder a monopoly over the ideas expressed in the works, in violation of 17 U.S.C. § 102(b).**
>
> **…the law of this circuit has implicitly recognized the distinction between situations in which idea and expression merge in representational objects and those in which the idea is distinct from the written expression of a concept by a poet, a playwright, or a writer.** A high degree of similarity is "inevitable from the use of [the] jewel-encrusted bee forms" at issue in Kalpakian, 446 F.2d at 742, or the stuffed dinosaur forms at issue in Aliotti, or the karate video games in Data East. **As a result, the scope of the copyright protection afforded such works is *necessarily narrow*.** See id. ("A jeweled bee pin is . . . an `idea' that defendants were free to copy."). In contrast, there is an infinite variety of novel or creative expression available to the author of a book, script, play, or motion picture based on a preexisting idea.
> …Once a court has established that a triable question of objective similarity of expression exists, by analysis of each element of the extrinsic test, its inquiry should proceed no further. What remains is a subjective assessment of the "concept and feel" of two works of literature — a task no more suitable for a judge than for a jury.

> **the extrinsic test focuses on "specific similarities between the plot, theme, dialogue, mood, setting, pace, characters, and sequence of events. . . . 'the actual concrete elements that make up the total sequence of events and the relationships between the major characters.'"** Narell, 872 F.2d at 912 (quoting Berkic, 761 F.2d at 1293). These are the measurable, objective elements… these elements are embodied in the extrinsic test…" [emphasis mine][21]

The Ninth Circuit has also noted that the measurable elements associated with literary works — i.e. plot, theme, dialogue, mood, setting, pace, characters, and sequence of events — are not the same factors that apply to works of art and therefore, with regards to works of art, courts look at similarity of the objective details in appearance:

> **As with literary works, *unprotectible* elements should not be considered when applying the extrinsic test to art work.** "This does not mean that at the end of the day, when the works are considered under the intrinsic test, they should not be compared as a whole. Nor does it mean that infringement cannot be based on original selection and arrangement of unprotected elements. **However, the *unprotectable* elements have to be identified, or filtered, before the works can be *considered as a whole*."** *Apple Computer*, 35 F.3d at 1446 (citations omitted). The precise factors evaluated for literary works do not readily apply to art works. Rather, a court looks to the similarity of the objective details in appearance. See *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 319 (9th Cir. 1987) (citing Litchfield, 736 F.2d at 1356) ("In *Litchfield*, we stated that the similarity of ideas prong may be shown by focusing on the similarities in the objective details of the works. Concluding that the plates are 'confusingly similar in appearance' is tantamount to finding substantial similarities in the objective details of the plates."). **Although we do not attempt here to provide an exhaustive list of relevant factors for evaluating art work, the subject matter, shapes, colors, materials, and arrangement of the representations may be considered in determining objective similarity in appearance.** [emphasis mine)][22]

[21] *Shaw v. Lindheim*, 919 F.2d 1353, 1359, 1360 (9th Cir. 1990).
[22] *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822, 826 (9th Cir. 2002.

Unlike the extrinsic test, which is objective in nature, the intrinsic test is subjective and it focuses on the similarity in *specific expressions* of ideas. The intrinsic test, which is normally conducted by a jury with instructions from a judge, tasks a jury — ordinary observers, not experts — with evaluating their subjective impressions of the similarities between two works. In other words, while the extrinsic test relies upon detailed scrutiny in the form of filtering out elements that are *not* protected by copyright law and the testimony of experts, the intrinsic test eschews expert testimony and relies upon the untrained subjective observation of ordinary observers.

As I mentioned previously, the bifurcated extrinsic and intrinsic test was first introduced by the Ninth Circuit in *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.* What's especially important to note with regard to the intrinsic test is that it is dependent upon the subjective "response of the ordinary reasonable person" to the "total concept and feel" of a work:

> **The test to be applied in determining whether there is *substantial* similarity in expressions shall be labeled an intrinsic one depending on the response of the ordinary reasonable person.** See *International Luggage Registry v. Avery Products Corp.*, supra, 541 F.2d at 831; Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 18-19 (9 Cir. 1933). See generally Nimmer § 143.5. It is intrinsic because it does not depend on the type of external criteria and analysis which marks the extrinsic test. As this court stated in *Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579, 582 (9 Cir. 1944):
>
> "The two works involved in this appeal should be considered and tested, *not hypercritically or with meticulous scrutiny*, but by the observations and impressions of the average reasonable reader and spectator."
> Because this is an intrinsic test, analytic dissection and expert testimony are not appropriate. [emphasis mine]23

[23] *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp* 562 F.2d 1157 (9th Cir. 1977).

The Ordinary Observer Test

If determining substantial similarity requires that we first distinguish elements that are protected by copyright law from elements that are *not* protected by copyright law, then the ordinary observer test poses a serious problem. Ordinary observers are not properly educated on the difference between protectable and unprotectable elements, so their ability to determine whether two works are substantially similar is impaired. And without guidance from judges in this area, ordinary observers are likely to find substantial similarity — and therefore copyright infringement — where there isn't substantial similarity and thus no infringement.

Substantial Similarity Test and The Ordinary Observer in Copyright Infringement Cases Involving Music

Ordinary observers are particularly problematic when it comes to assessing popular music. Popular music is primarily written in the tonal system, which relies on a hierarchical structure of chords and pitches. Since there is a finite number of viable possibilities of pitch and harmonic relationships, the tonal system is limited, which means that musicians often create new songs using common base or stock arrangement patterns and elements as building blocks. Jeffrey Cadwell has noted that there are "certain prevalent patterns and tendencies that are common to virtually all musical works composed in the tonal system;" and that these "patterns and tendencies can be described as the ideas, or scènes à faire, in a musical work. *It is the manner in which any composer makes use of these ideas in constructing a piece of music that constitutes expression.* **However, because the distinction between idea and expression in music is not as simple as it seems, the expert testimony of music theorists is important**

in music infringement litigation."[24] In other words, similarity, to some degree, is a given when it comes to popular music.

But for ordinary observers, determining *substantial* similarity — or filtering out what is *not* substantially similar — is difficult precisely because they don't know that there are prevalent patterns and tendencies that are common to virtually all musical works. Ordinary observers, who often lack musical training, especially "the sort necessary to make a meaningful comparison of musical works," have a hard time dissecting what is and isn't substantial similar between two non-sampled-based music works. So what can we expect them to comprehend about the difference between a sample-based work and the work that it sampled, especially if they don't (meaningfully) understand what sampling is or that certain expressions (appropriations) — e.g. de minimis takings — are *not* protected by copyright law?

Ordinary observers don't know how to dissect non-substantially similar elements from substantial elements music. Moreover, ordinary observers aren't familiar with the elements and factors that go into the creation of music in general, let alone sample-based beats. In this paradigm, can we expect ordinary observers to make meaningful decisions about any substantial similarity between a sample-based song and the song that it sampled? Fortunately, judges, not ordinary observers, usualy determine whether a use is de minimis (which is what most samples in hip hop/rap music are) or fair use in the sumary phase of a copyright infringement lawsuit. Still, it's worth considering how ill-equipped ordinary observers are when it comes to assessing substantial similarity in music because ordinary observers echo the comprehension of the general public. If the general public lacks the level of musical training that could help them understand substantial similarity, it follows then that the general public lacks the training to fully grasp sampling in music, despite the reality that the type of borrowing that takes place in sampling sound recordings is parallel to the type of borrowing that occurs in other categories of copyrightable subject matter.

[24] Jeffrey Cadwell, "Expert Testimony, Scenes a Faire, and Tonal Music: A (Not So) New Test for Infringement," *Santa Clara Law Review*, Vol. 46, No. 1, Article 4, 1/1/2005, 157-159 https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1177&context=lawreview (emphasis mine).

Judicial Safe Harbor: A New Sampling Test for the Courts?

With regards to cases involving digital sampling and sound recordings that actually reach the courts, at least one commentator has suggested that the courts could come up with a new sampling test. Jennifer R. R. Mueller proposes that the courts could:

> consider how prominent the sample is, whether it is an organizing feature of the defendant's song, and how many times it is used. *Courts should also take into account the degree to which the sample was manipulated or altered.* This test would take into account the ability of sample-based artists to loop a sample, thus making it longer or more prominent in their song than it was in the original. At the same time, this test would ensure that small samples that are used merely as accent or atmospheric sounds would not be considered infringement. [emphasis mine][25]

First, I strongly object to any new court test for non-actionable samples, mainly because any such test oversimplifies the art of sampling. Second, ther's already a test that the courts use to achieve the same objectives that Mueller presumably seeks. And this test, the substantial similarity test — which is required in all copyright infringement cases — has worked well when applied properly. I'd much rather stick to the substantial similarity test that courts already employ more than I would like to see the courts *add* a new (arbitrary) test made up by someone who seems to not really understand all of the mechanics of sampling or how the substantial similarity analysis works in *all* copyright infringement cases. Third, "how prominent the sample is" in the secondary work doesn't matter, nor does the ability "to loop a sample." "Prominence" in the secondary work is not what the courts look at during a substantial similarity analysis. And "prominence" in the *secondary* work has no bearing on the lack thereof in the primary work. That is to say, the amount taken and the qualitative nature of the piece taken

[25] Jennifer R. R. Mueller, "All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling," *Indiana Law Journal*, Vol. 81, Issue 1, Article 22 (2006), 459.

from the primary work doesn't increase the *more* it appears in the secondary work. For instance, a 1-second digital sample of a single drum sound that appears 200 times in the secondary work doesn't magically become a *200-second* digital sample simply because it's more prominent in the secondary work, nor does the sample's *qualitative* character become *more* important in the primary work because it's important in the secondary work. Furthermore, with regards to "prominence," it also doesn't matter if the sample is used in an "organizing feature" or *not* used in an organizing feature in the secondary work. What matters is: 1) Whether the *amount* taken was substantial, and this is measured quantatatively and qualitatively (i.e. was it substantially important to the primary work); and 2) To what degree that amount taken was *transformed*.

Next, in terms of the role of looping, which is a foundational concept in sample-based beats and all electronic music, it must be noted that looping isn't merely one "organizing feature" of a sample-based beat. Looping is the most fundamental aspect of arrangement in sample-based beats. Given Mueller's wording — "small samples that are used *merely as accent* or *atmospheric sounds* would not be considered infringement" — it's not clear if she understands beatmaking or how elemental looping is in the overall aesthetic. Looping plays a vital role in the creation of all types of beats, but especially sample-based beats. So is Mueller proposing that samples that are *not* looped are not considered infringement? Or is she proposing that only loops of "small samples" and "atmospheric sounds"are not considered infringement? Either way, any privileging of "small," "atmospheric," or "accenting" non-looped *or* looped samples is misguided. As far as creativity goes, this is just as harmful as a bright-line rule. Does Mueller presume that looped samples, no matter the size of the sample, are more likely to be infringements than non-looped samples?

Hence, Mueller's proposal, in this regard, runs counter to how the *quantitative* part of the substantial similarity analysis is addressed. With respect to the quantitative question in the substantial similarity test, "the relevant question in copyright infringement cases is whether the segment in question constituted a

substantial portion of the plaintiff's work, *not* whether it constituted a substantial portion of the defendant's work."[26] Therefore, if a sample does not constitute a substantial portion of the plaintiff's work, then the sample does not infringe the plaintiff's work, regardless of *how many times* it's used, looped or not, or how "prominent" it is in the defendant's work, or whether the sample is "atmospheric" or not. The general principle at work here is *substantial similarity*. And whether a sample is looped or not, or whether the sample appears one time or thousand times in the secondary work, does not undermine this principle. Thus, the harm in Mueller's proposal (at least this part of her proposal) is that it would instruct the courts to now count how many times a sample loops, regardless of the level of transformation of the sample and its use in a new context. Such a test would unnecessarily add an additional burden to the substantial similarity analysis in cases involving digital samples and sound recordings.

So Mueller's proposal, which seems to rely much less on a solid understanding of the core methods of the art of sampling than it does on a simple mathematical equation, misses much of what sampling is about, particularly the importance of the break — the loop — and emphasizes something closer to another bright-line rule. *Bridgeport's* bright-line rule essentially bars all digital samples without a license. Does Mueller's proposal, which oversimplifies the issues sampling raises, seek relief for *non-looped* samples and make them *presumptively* non-infringing? Conversely, according to Mueller's proposal, are *looped* samples that are more than "atmospheric" or used for more than just for "accent" *presumptively* infringing? Either way, like *Bridgeport*'s bright line, Mueller's proposal stifles creativity and does not serve the objectives of copyright law.

Perhaps Mueller's distinction for looped samples has something to do with most legal commentators' familiarity with only those sample-based musicians who had copyright infringement claims made against them, Beastie Boys and Public Enemy being particular darlings of legal commentators. A deeper audit and analysis of the

[26] *Jarvis v. A&M Records*, at 290 (emphasis mine).

art of sampling in the hip hop/rap music tradition — through a more comprehensive study of more sample-based artists, not just those highlighted by copyright infringement cases — would show how fundamental the practice of looping is to the art form, and just how marginal "atmospheric," non-looped samples are. But Mueller's proposal seems to overlook these two facts and pushes looping to the margin, making "atmospheric" or samples used as "accent" the presumably non-infringing. But if a sample is substantially transformed, recontextualized, and combined with other elements to make a new work, it's wrong to think that the use is an infringement merely because is was looped.

Finally, in terms of how the courts should take into account the degree to which a sample was manipulated or altered in the secondary work, this is already happening in the courts. The courts are supposed to consider the level of transformation of the copy — whether it involves digital samples of sound recordings or "samples" of literary works — so this consideration speaks to the substantial similarity of the two works in part and "as a whole."

Chapter 15

"No Rights Which the White Man is Bound to Respect"

The Unequal Protection of Black American Music Artists and How Copyright Law, Racial Discrimination, and Inequality Have Historically Disadvantaged Black Music Artists in America... And the Impact This Has on Sampling and the Implications it Holds for Copyright Law

"I belive in white Supremacy."
—John Wayne, American hero

"Today is a good day to remind you that whitewashing American history is how white supremacy thrives."
—Robert Reich

Some would like to believe that copyright law is an entirely "race-neutral" affair. That is to say, that since it's rooted in property rights, it's not influenced by or concerned with race. But in reality, when we understand that race was once a major property rights issue in the United States — as enslaved Africans were considered "property" in the United States — this false "race neutral" concept of copyright law in America quickly dissipates.

Historically, Black music artists have received discriminatory treatment under the United States copyright system. This has been due both to the social structure of society, which is impacted by white supremacy, institutional and cultural racism, and structural elements of the copyright regime, which have rendered protection of Black forms of cultural production more problematic. Without understanding how this came to be and why it still persists today, it's difficult to understand the specific vitriol surrounding the sampling tradition of hip hop/rap music. This chapter takes an unflinching look at the impact that racial discrimination, inequality, the sovereignty of Black art, and copyright law have on the discourse surrounding the art of sampling and the implications that it holds for copyright law.

The Dred Scott Decision: *Dred Scott v. Sandford* and The Legacy of White Supremacy in America

Let me make something plain about racism and inequality in America. Institutional and systematic change may come, but white supremacist ideology in America will never die. White supremacy is baked into the founding of the United States, and it will continue to power attitudes about race, equality, and justice, long after you and I are gone. With regards to race and racism specifically, we can concede that the United States has seen tremendous change since its founding in 1776. But for all of that change, for all of its general achievement for Blacks in America, white supremacist ideology — the dark underbelly of America's founding — is still alive and well today. In this chapter, I examine how and why this is. More importantly, for our purposes here, I will show how it impacts views on creativity, originality, authorship, property rights, and copyright law, particularly as it pertains to Black Americans. We begin (and we will end) with the Dred Scott Decision of the United States Supreme Court in 1857.

The Legacy of White Supremacy in America: Background to Dred Scott v. Sandford

In1846, Dred Scott filed a claim in the federal court of Missouri to affirm that he was a legally free man. Scott, who had been held as a slave in Missouri, traveled to Wisconsin with his master for some time, then he returned to Missouri. Wisconsin was not a slave state, and Scott claimed that his time spent in Wisconsin made him a free man. Having been to Wisconsin, where slavery was outlawed, Scott reasoned that he was free and, having been free,

he could then no longer be held as a slave. Scott's claim rested on solid legal ground because legal precedent prior to 1846 had made it clear that slaves who made it to the North (states where slavery was outlawed) would be held to be legally free. The case made its way to the Supreme Court in 1857, where the principal issue in question was Dred Scott's legal condition. In short, the question the Supreme Court asked was, "Does Dred Scott even have the legal to right to sue?" In what is largely considered to be the worst Supreme Court decision in United States history, the Supreme Court said that only "citizens" of the United States had the right to seek redress in federal court, and that since Dred Scott was not a citizen of the United States, he had no rights.

White people in the United States don't have to respect the rights of Black people because Black people in the United States don't have any rights.

That is the message of the *Dred Scott* decision.
Let the above message echo in the background as you continue to read this chapter…

So now that we have a firm understanding of how deeply entrenched white supremacy was in the American legal system and American society in general, I will quote at considerable length the actual Supreme Court opinion in *Dred Scott*. Appearing directly after each emphasized passage, you will find in brackets my translation of the legalese, which drives home the ideology that underscored the *Dred Scott* decision and the legacy of white supremacy today:

"It is true, **every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised [sic] as citizens in the several States, became also citizens of this new political body**; ***but none other;*** **it was formed by them, and for them and their posterity, but for no one else."**[1]

[Translation: Black people are not "people" in the same sense as white people and can therefore not be citizens. Further, Black people played no role in forming the United States. Finally, the "prosperity" of United States was meant only for white people, "no one else."]

"And the personal rights and privileges guaranteed [sic] t**o citizens of this new sovereignty were *intended* to embrace those *only* who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the *principles* on which it was founded."**[2]

[Translation: Personal rights and privileges were intended for citizens, white people, not Black people because Black people, according to the Constitution, are not people (at least not in the same or *whole* sense as white people). The provisions of the Constitution were meant to protect the principles that the United States was founded upon. The principles that the Constitution was founded upon include white supremacy. So despite critical

[1] *Dred Scott v. Sandford*, 60 US 393 - Supreme Court 1857 (hereinafter *Dred Scott*) [emphasis and mine].
[2] *Ibid* (emphasis mine).

Amendments, the fact remains: The Constitution was an instrument of white supremacy.]

"It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the Untied [sic] States. **And it gave to each *citizen* rights and privileges outside of his State which he did not before possess,** and placed him in every other State upon a **perfect *equality* with its own *citizens* as to rights of person and rights of property; it made him a *citizen* of the United States."**[3]

[Translation: "When the Constitution was adopted," Black people "were not regarded in any of the States as members of the community which constituted the State;" Black people were not counted among these separate communities, nor were they members of the united "political family." Again, we must remember that Black people were not considered "people" or "citizens" of the community. Consequently, the special rights and immunities guaranteed to citizens didn't apply to Black people. And since Black people are not citizens as clearly defined by the Constitution, they do not have the right to sue as a citizen in a court of the United States, and the Circuit Court has no jurisdiction in such a suit. *Moreover, Black people in the United States do not even have a right to their own personhood or their property.*]

"It becomes necessary, therefore, to **determine *who* were *citizens* of the several States when the Constitution was adopted.** And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. **We must inquire *who*, at that time, were recognised** [sic] **as *the people* or *citizens* of a State, whose rights and liberties had been outraged by the English Government;** and *who* declared their independence, and assumed the powers of Government to defend their rights by force of arms.[4]

[3] *Ibid* (emphasis mine).
[4] *Ibid* (emphais mine).

[Translation: When the Constitution was adopted, Black people were not people in the same sense as white people, nor were they citizens. Thus, Black people can't be, according to the Constitution, citizens now. In order to prove that Black people are not citizens, we must turn to our government and institutions. Black people were not among those who separated from Great Britain, and Black people did not (could not) defend the rights of citizens (by force) afforded to the people or citizens of the original thirteen colonies. Black people were slaves when they came to America, they were not citizens or even whole people.]

"In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been *imported* as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, *nor intended to be included* in the general words used in that memorable instrument.[5]

[Translation: Looking at the Constitution, "that memorable instrument," the legislation and histories of the times, the specific language of the Declaration of Independence, there can be no doubt that that Black people were nothing more than imported slaves when they came to America; and it is understood by the Constitution, neither those Black people nor their descendants are the same class of people as white people; moreover, the Declaration of Independence did not include them; thus, they were never *intended* to be citizens of the United States. So a so-called free negro of the African race is not and can not be a citizen of the United States.]

"It is difficult at this day **to realize the state of public opinion** in relation to **that *unfortunate* race, which prevailed *in the civilized and enlightened* portions of the world at the time of the Declaration of Independence,** and when the Constitution of the United States was framed and adopted. **But the public history**

[5] *Ibid* (emphasis mine).

of every European nation displays it in a manner too plain to be mistaken."[6]

[Translation: We don't even understand how this is a debate of public opinion, when we can certainly all agree that Black people are an "unfortunate race" inferior to Europeans, i.e. white people. Black people are neither civilized nor enlightened, and they were an uncivilized race at the time that the Constitution was adopted — this is all plain to see, nobody can dispute the superiority of white people over Black people, it's "public" knowledge; *everybody in Europe knows this!*]

"They had for more than a century before been regarded as *beings of an inferior order*, and *altogether unfit to associate with the white race*, either in social or political relations; and **so far inferior, that *they had no rights which the white man was bound to respect;*** and **that the negro might justly and lawfully be reduced to slavery *for his benefit.*"**[7]

[Translation: There is no debate here! Everyone knows that the Black (African) race is inferior to the white race. This was already established more than a century before this case came before the court. Everyone here knows that Black people aren't fit to even associate with white people in any manner, be it social or political, because the white race is the superior race. In fact, the Black race is so inferior to the white race, Black people do not have *any* rights in the United States, and even if they did have rights, the white man does not have to respect them! Moreover, as white people, the superior race, we have the moral and lawful obligation to make Black people slaves for their benefit.]

"He was bought and sold, and treated as an ordinary article of *merchandise and traffic*, whenever a profit could be made by it. This opinion was at that time *fixed and universal in the civilized portion* of the white race. It was regarded as an axiom in morals as well as in politics, which **no one thought of disputing,**

[6] *Ibid* (emphasis mine).
[7] *Ibid* (emphasis mine).

or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion."[8]

[Translation: Black people in the United States are no different than an "ordinary article of merchandise," and their only purpose in the United States is to be used by white people for profit! The inferiority of the Black race has been a "fixed" fact "universal" truism since the civilization of white people; any white person who does not recognize the inferiority of the Black (African) is not a civilized white person. No civilized white person has ever disputed the inferioty of the Black race, and no civilized white person should ever even think of disputing the accuracy of this fact well understood in society.]

***

During his Supreme Court confirmation hearings in 2005, Chief Justice John Roberts was asked about the *Dred Scott* decision. He described the decision as "perhaps the most egregious example of judicial activism in our history," and noted that in "the *Dred Scott* case," "the court went far beyond what was necessary to decide the case." Though Justice Roberts was clear in his implication that the *Dred Scott* decision was an error, he didn't exactly say that the decision was the worst Supreme Court decision in United States history. Instead, he called it a case of "judicial activism." Having read the decision, *Dred Scott* was certainly not just a case of judicial activism; it was a rousing affirmation of white supremacy!

[8] Ibid (emphasis mine).

Worse still, Justice Roberts seemed to sympathize with the *Dred Scott* court in what he saw as simply their attempt to resolve the "dispute" about the extension of slavery. Justice Roberts faults the *Dred Scott* court for the way that they went about things, not their white supremacy: "And really I think historians would say that the Supreme Court tried to put itself in the position of resolving the dispute about the extension of slavery and *resolving it in a particular way that it thought was best for the nation*. And we saw what disastrous consequences flowed from that."[9] So let's get this straight. In *Dred Scott*, the Supreme Court emphatically detailed and endorsed white supremacy and stated, in no uncertain terms, that Black people were not and could not ever be citizens because they are Black. And for Justice Roberts, who, again, was then up for confirmation to the United States Supreme Court, *Dred Scott* was nothing more than a "particular way" to resolve the dispute about the extension of slavery?

Given the fact that it took the Thirteenth and Fourteenth Amendments to overturn the *Dred Scott* decision, Justice Roberts's dodgy remarks in 2005 around *Dred Scott* remain an odd understatement *and* an example of how America still struggles to deal honestly with the legacy of white supremacy to this day. And while Justice Roberts was presumably referring to the Civil War when he said "disastrous consequences," we should note that he did not offer any outrage over (let alone mention) a decision that was overtly underscored and guided by white supremacist ideology.

Today, 167 years later, we might ask: What is the legacy of the *Dred Scott* decision? Turning away from commentary on the different types of "judicial activism" that Justice Tanny spawned in *Dred Scott*, I find that the legacy of *Dred Scott* is threefold. First, *Dred Scott*, and by proxy the the entire American legal system, validated the culture and practice of racial inferiority and normalized the mistreatment of Blacks within the American legal

[9] Transcript: Day Two of the Roberts Confirmation Hearings Courtesy Morningside Partners/FDCH, *Washington Post*, Tuesday, September 13, 2005; 1:33 PM U.S. SENATE JUDICIARY COMMITTEE HOLDS A HEARING ON THE NOMINATION OF JOHN ROBERTS TO BE CHIEF JUSTICE OF THE SUPREME COURT SEPTEMBER 13, 2005 -- Part II https://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300979.html (emphasis mine).

system. Second, *Dred Scott* stands as an example of how the state, through its legal system and highest court of the land, can strip a people of its natural law rights, its dignity, and the right to the fruits of its labor. Third, *Dred Scott* serves both as a beacon for white supremacy and proof that white supremacist judges can still make it to the Supreme Court.

What else does the legacy of *Dred Scott* signify? Consider this. There are still some white Americans who believe that the Confederacy was right and that the Union got it wrong. Here, I expressly mean that there are a number of white Americans today who believe that Blacks are inferior to whites. But this is only one part of a larger issue. Because of white supremacy, there are many white Americans who either do not recognize or are simply unbothered by the fact that Blacks are still treated differently than whites in a court of law. Further to this, there are many white Americans who still believe Blacks have "no rights that the white man is bound to respect." We need only look at the repeated violations of Black people's human and civil rights by police in America and other white citizens for proof. The level of support for such illegal activity or the lack of public indignation by most white Americans speaks volumes in this regard. So within this racial, social, and legal climate, should we expect an honest, open, and diverse discourse around the art of sampling and the implications that it holds for copyright law, especially when Black music artists are at the very center of this discussion?

Letter from BMG's CEO Hartwig Masuch
To Music Artists and Managers
June 9, 2020 (163 years *after* the Dred Scott Decision)

BLACKOUT TUESDAY: ONE WEEK ON

We are determined that last week's action is more than a black square in a social media post or a series of slogans.

We need to play our part in addressing ***historical injustices inflicted on black people.***

Last Wednesday we embarked on a journey designed to make lasting change.

We know we cannot change the world by ourselves, but we are determined to change our part of it. For the better.

Mindful of the music industry's record of shameful treatment of black artists, we have begun a review of all historic record contracts. While BMG only began operations in 2008, we have acquired many older catalogues. If there are any inequities or anomalies, we will create a plan to address them. Within 30 days.

In common with many music companies, at BMG the reality is that black people are not as well represented as they are in the populations in which we operate. We are not as diverse as we could be. Despite numerous initiatives over the years, we have not made sufficient progress. We pledge to do so and will produce a plan to do so. Within 30 days.

Racism and social injustice exists in all 12 countries in which we operate. We need to play our part in tackling it. Each BMG office will create a plan to do so. Within 30 days.

Blackout Tuesday was an important moment of reflection. The real test for us all is now to come up with a credible plan for change.

We are committed to do so.

#BlackLivesMatter

Letter from BMG's CEO Hartwig Masuch, on the topic of anti-racism and the treatment of black artists, via BMG's my-BMG app on Tuesday (June 9).

Before examining the specific ways that Black music artists have received unequal protection and how copyright law, racial discrimination, and inequality have historically disadvantaged Black music artists in America, let's take a look at the music industry's reaction to the murder of George Floyd[10]:

> "In an email sent to managers and performers reported by Music Business Worldwide, BMG CEO Hartwig Masuch said the label was '**mindful of the shameful treatment of black artists**', and would begin a review of historic record contracts, vowing to address 'inequities or anomalies" within 30 days."[emphasis mine][11]

> "As reported on Rolling Stone earlier this week, the likes of Kelis, Erykah Badu and John Legend manager Ty Stiklorius have all shared a message from author and professor Josh Kun, which reads: 'If the music industry wants to support black lives, labels and platforms can start with amending contracts, distributing royalties, diversifying boardrooms, and **retroactively *paying back* all the black artists, and their families, they have built their empires on.'**…. Now another major player in the modern music business, BMG, appears to be meeting Kun's call even more directly.

> A forthright message from BMG's CEO Hartwig Masuch, on t**he topic of anti-racism and the treatment of black artists,** landed in the inbox of performers and their managers via BMG's my-BMG app on Tuesday (June 9). In it, Masuch said: ***'Mindful of the music industry's record of shameful treatment of black artists,*** we have begun a review of all historic record contracts. While BMG only began operations in 2008, we have acquired many older catalogues. If there are any inequities or anomalies, we will create a plan to address them. Within 30 days.'"[12]

[10] April 20, 2021, former police officer Derick Chauvin was convicted of murder. Around the time the decision was being read by the judge, a 16-year-old Black girl in Ohio was shot four times in the chest and killed by police officers.

[11] Laura Snapes, "BMG to review historic record contracts due to 'shameful treatment of black artists" *The Guardian*, (June 12, 2020) https://www.theguardian.com/music/2020/jun/12/bmg-to-review-historic-record-contracts-due-to-shameful-treatment-of-black-artists.

[12] Tim Ingham, "BMG Pledges To Review Historical Record Contracts 'Mindful Of The Music Industry's Shameful Treatment Of Black Artists," *Music Business Worldwide* (June 11, 2020) https://www.musicbusinessworldwide.com/bmg-to-review-historic-record-contracts-mindful-of-the-music-industrys-shameful-treatment-of-black-artists/

Power of the Cultural Narrative: White Cultural Understanding of Blackness

Another thing that the *Dred Scott* decision shows, and what the BMG statement confirms *164 years* later, is that the cultural, legal, and political hierarchies in America are intertwined; and that these hierarchies have collectively worked against Black people in America since the founding of the United States and the ratification of the Constitution — that "memorable instrument" that we are bound to and whose meaning we are still fighting over. In this light, we must understand that the *Dred Scott* decision not only led to the American Civil War, it provided a legal and ideological blueprint for white supremacists to follow. A blueprint that has been used to justify racism, racial segregation, and the general maltreatment of Black people in America. As such, the *Dred Scott* decision showed white supremacists not only how to validate the culture and practice of racial inequality, not only how to expand it and safeguard it, but also how to shape the cultural understanding of Blackness in America, *without* the participation of Black Americans.[13]

It's the s*haping of cultural understanding of Blackness in America by whites* part that seemingly operates without bias but is, nonetheless, also at the heart of the disparity in protection for Black music artists, the social discrimination and social inequality that Black people face, and the lack of legal guidance generally afforded to Black people. This part is curiously powerful, not so much because it can be readily identified, but rather because how this power is constructed and how it seemingly operates in an omnipresent manner. We can recognize who has control

[13] T. Alexander Aleinikoff, "A Case for Race-Consciousness," *Columbia Law Review*, Jun., 1991, Vol. 91, No. 5 (Jun., 1991), 1070. Aleinkoff has noted that: "Blacks are 'invisible' not in the sense that whites do not see them; they are 'invisible' in the sense that whites see primarily what a white dominant culture has trained them to see. **In a curious yet powerful way, whites create and reflect a cultural understanding of blackness that requires little contribution from blacks.** ***The dominant and dominating story excludes or ignores black representations of blackness*** not out of vindictiveness or animus but because the black stories simply do not register.'" Aleinkoff fails to mention, however, that it's no accident that Black stories "simply do not register" to white people, but rather the direct cause of white supremacy in America.

over a narrative simply by looking at the main players, attributes, and tools of production within that narrative. The media, for instance, is shaped by groups of trained professionals, specializing in communication, copy and visual editing, and research. We can see in these factors how a specific news item is formed, shaped, reshaped, and finally distributed to the public. And it's logical. In contrast, white cultural understanding of Blackness, or rather the dominant narrative of Blackness *as told by* whites, is formed with little contribution from Blacks. It's illogical.[14]

The *Dred Scott* decision also speaks to how the illogical can become the logical. You recall that according to the Supreme Court in 1857, Blacks were not legally citizens and that Blacks were "regarded as beings of an inferior order" who were "altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that *they had no rights which the white man was bound to respect.*"[15]

Dred Scott was decided 7-2. Put another way, seven out of the nine Supreme Court justices in 1857 were white supremacists! So when we look at the key phrases "*beings of an inferior order*" and "*no rights that the white man was bound to respect*," what does it tell us about them? What this tells us about them is that, even if they knew what they were pushing was wrong in principle and theory, it was okay in practice (legally and culturally), because just as the founders had rationalized, Blacks were inferior to whites, and therefore, concepts such as liberty and justice did not apply to Blacks. This is embedded in the foundation and psyche of America. So is it really such a big leap to believe that when white musicians and label reps exploited Black music artists throughout the twentieth century, they did so, not with a knowing wink, but because they had been indoctrinated with the belief that they were entitled to do it, that they *could* do it, because Black people have no rights which whites are bound to respect?

Here's where it gets really meta. Ownership of the vast majority of composition and sound recording copyrights to soul, funk, and

[14] *Ibid*.
[15] *Dred Scott*.

jazz records (the music most sampled in the hip hop/rap music tradition) is largely consolidated among the major record labels. In many cases, those copyrights were obtained illegally or by using legally questionable maneuvers. Today, just like throughout the '60s, '70s, and '80s, the music industry — on the business side — is dominated and controlled by white people. So the rude irony is that there are many whites in the music industry who play the victim and yell "theft" around sampling and pollute the public's opinion about sampling, despite the fact that the music industry's historical practice of stealing the work of Black music artists is well known.

"No rights that the white man was bound to respect." The belief that whites don't have to respect the rights of Blacks still casts its shadow over America, still permeates throughout its institutions and industries. That Blacks are no longer enslaved in America is, for some white Americans, a thing of tolerance, not necessarily a reflection of how things *should* be. At best, whites within this group (although extreme, they are many numbered and not always out in the open) acknowledge begrudgingly that slavery is outmoded or impractical. At worst? Whites within this group openly express their belief in the "old ways" of the Confederate South. This is a full-chested endorsement, not a dog whistle, of the idea that slavery should have been allowed to continue, of white supremacist ideology, and of the belief that whites do not have to respect the rights of Blacks.

Nothing incites the anger of white supremacists in America more than Black Americans recognizing and attempting to invoke their rights. For as the legacy of *Dred Scott* has shown, there are still many white Americans who believe that they are not "bound to respect" the rights of Black Americans. And while the white supremacists that I describe here may be considered "extreme," we must recognize that their views permeate throughout America in both passive and micro-aggressive ways. But whether we're talking an extreme or passive expression of white supremacy, the fact is, white supremacist ideology has extended — and continues to extend — the approach that some whites take when it comes to copyright law and Black art in America. This is in no small

part why the practice of Black Americans *sampling* music enrages some white Americans. Sure, we can take some stock in the fact that the music industry is ridiculously litigious and rife with all manner of "industry standards" that rest outside of common law (and common sense). But sampling is a specific thorn in the side of the music industry in America, which is still today controlled by whites. This is not to say that the music industry is run by white supremacists or that there are no Blacks in the music industry who are against sampling. What I'm getting at is that there can be no doubt that the whites who run the American music industry are, like other whites in America, affected — negatively influenced and informed to varying degrees — by white supremacist ideology. This is obvious in the music industry's historical mistreatment of Black music artists; this is obvious in the hiring practices in the music industry (the lack of top-level Black executives at major labels in America is glaring); and it is obvious in the sentiments expressed about originality, authorship, and creativity, particularly as they pertain to hip hop/rap music.

The Lasting Effects of Racial Discrimination Against Blacks in America

When Justice Thurgood Marshall, the first Black Supreme Court Justice and one of the finest legal minds America ever produced, remarked that "it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court *did not prohibit the most ingenious and pervasive forms of discrimination against the Negro,*" he was speaking about a specific set of disadvantages that Black Americans face in America. If we are to properly understand the full implications of Marshall's remarks in *University of California Regents v. Bakke*[16], we must acknowledge what he meant by "pervasive forms of discrimination against the negro." Marshall was referring to the overall mistreatment and disadvantage of Black Americans as a direct result of slavery.

[16] *University of California Regents v. Bakke*, 438 US 265 - Supreme Court 1978.

Copyright is one of those laws created by the government that *should* force America to take its Constitution seriously. But America tends to respect the Constitution when it applies to and benefits white people, less so when it applies to Black people. This hypocritical and double-standard approach to Constitutional rights has meant that Blacks, as a class, have suffered historically in almost every aspect of American life, from the legal arena to the business world to the everyday work environment to housing. And of all the areas where Blacks have excelled in America, none stands out more than Black American music. Despite this, or perhaps because of it, Blacks have been exploited and appropriated in ways incomparable to any other group in America.

The Locke Paradox: Slavery and Why Locke Didn't Apply to Black People In America

John Locke, the seventeenth-century English philosopher commonly regarded as the "father of liberalism," is the single most important influencer on the founding of the United States. His most famous works, "A Letter Concerning Toleration" and "Second Treatise of Government," had a profound effect on Thomas Jefferson, the author of the Declaration of Independence.[17] Locke was big on the idea that humans had the ability to use reason to avoid tyranny. He considered a legitimate government to be one that attains authority through the consent of the governed. And he believed that "the duty of that government is to protect the *natural* rights of the people," which for Locke included "life, liberty, and property." Locke also asserted that if a government fails to protect these rights, then its citizens have the right to overthrow that government.[18]

[17] Brenee Goforth, "How John Locke Influenced the Declaration of Independence," *The Locker Room*, July 4, 2019.

[18] USHistory.org https://www.ushistory.org/gov/2.asp#:~:text=John%20Locke&text=In%20his%20Second%20Treatise%20of,basis%20of%20a%20legitimate%20government.&text=If%20the%20government%20should%20fail,drafted%20the%20Declaration%20of%20Independence.

Equally important for Locke was the idea that "people are entitled to the fruits of their own labor, and that *property rights in one's body* and its labor entail property rights in the products of that labor."[19] This would seem to be a straightforward concept of justice. But as scholar K.J. Greene has noted, in considering Aristotle's concept of justice, i.e. "giving to each their due," that justice "is relative, and is only meaningful 'within a concrete social context .... [s]lave owner and slave, landowner and serf, capitalist and worker may all agree that each person should receive what is due to them, but they will define justice differently according to their understanding of *who is to count as a person*, and what the grounds of entitlement should be.'"[20] Therein lies what I call the Locke paradox: The idea that reason, justice, and the fruits-of-labor principle all work according to a concrete social context. Under white supremacist ideology lies the historical practice of not fairly compensating Blacks *and* not giving Blacks credit for the fruits of their labor. This practice, which extends broadly in the music industry, has long been justified through illogical fallacies and a justice system designed to treat Blacks unequally to whites.

As I have stressed eslewhere in this book, what's often missing from the discourse surrounding the art of sampling and copyright law is an honest discussion about the role that race plays in the art form specifically and Western popular music in general. Further, with regards to copyright law, what's missing is a comprehenisve discussion about how copyright law has been historically used against Black music artists, *and* the ways in which the American legal system is shaped by race. In the grand dialogue about sampling and copyright law, nothing is said of the Locke paradox. There's never a word mentioned about this context, i.e. America's obsession with "freedom" and its vigorous support of slavery at the birth of

[19] See John Locke, John Locke, Second Treatise of Government, ch. 5, (Wm. B. Berdmans Publishing Co. 1978) (1690). Rosemary J. Coombe, "Author/izing the Celebrity: Publicty Rights, Postmodern Politics, and Unauthorized Genders," *The Construction of Authorship* (Durham and London 1994), 105.

[20] Emrys Westacott, Relativism and Autonomy, 27 PHIL. F. 127, 135 (1996). K. J. Greene, "Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection" *Hastings Communications and Entertainment Law Journal*, Volume 21 | Number 2, Article 2, 1/1/1998, 384 (emphasis mine).

the nation. And there's certainly never a word spoken about the music industry's history of stealing property rights from Black music artists and how this figures into discourse surrounding the art of sampling and the implications that it holds for copyright law.

At the cradle of United States copyright law, a time when Locke's philosophies were being soaked up by Thomas Jefferson and the other Framers of the Constitution, Blacks in America remained in slavery. Enlaved Africans had little agency because their lives, for all intents and purposes, were controlled entirely by their enslavers, which is to say, white property owners who were enabled by the Constitution and protected by the American legal system that made slavery possible and preserved its existence for more than 250 years. So enslaved Africans could not own or benefit from the "fruits of their labor," because their labor, like their bodies and their offspring thereof, was controlled by their enslavers.

Even out outside of slavery, Locke's "fruits of labor" principle didn't apply to Blacks, because free Blacks in America were still considered to be inferior to whites. So this is where we can trace the roots of America's unequal legal system and the widely held belief in America that Black Americans are not *supposed* to own property, not land and especially not intellectual property, let alone benefit from it; for the prior would suggest "equality" to whites, and the latter would suggest intelligence ("genius"), two fundamental human qualities that Blacks were presumed to not be in possession of. Over time, as Greene has noted, these factors "had a particularly disadvantageous impact on Black artists, who consistently created highly original, innovative, and valuable works, *but who frequently found their creations used or copyrighted by a non-creator who was clever enough to secure copyright on the works."* And "Blacks as a class have been excluded until modern times from the ancient legal principle that labor and services must be compensated."[21] If we consider the fact that United States copyright law was enacted 75 years before the end of slavery, it should come as no surprise that Black Americans faced barriers to obtaining copyrights for their creative genius right from the start.

[21] FN: Greene, 354, 345 (emphasis mine).

The Paradox of American Democracy and Black Culture

The Locke paradox is part of a larger paradox: The paradox of American democracy. But if it can be said that the Locke paradox applies more specifically to America's core beliefs about property and the human right to enjoy the fruit of one's labor, then it's the broader paradox of American Democracy, with its unequal treatment of Blacks at its core, that has shaped (and continues to shape) American popular culture. Jim Cullen has articulated the paradox of American Democracy and its relation to Black culture quite well:

> **"The paradox of American democracy, of course, is that the freedom Euro-Americans endlessly celebrated co-existed with — some might say depended on — the enslavement of African Americans.** It is therefore one of the great ironies of popular culture that the contributions of black culture (a term here meant to encompass African, American, and amalgamations between the two) proved so decisive…**It is, in any event, difficult to imagine that U.S. popular culture would have had anywhere near the vitality and influence it has without slave stories, song, and dance. To cite merely one example: every American musical idiom from country music to rap has drawn on, if not actually rested upon, African-American cultural foundations,** whether in its use of the banjo (originally an African instrument) or its emphasis on the beat (drumming was an important form of slave communication). This heritage has often been overlooked, disparaged, and even satirized. The most notable example of such racism was the minstrel show, a wildly popular nineteenth century form of theater in which white actors blackened their faces with burnt cork and mocked slave life. **Yet even the most savage parodies could not help but reveal an engagement with, and even a secret admiration for, the cultural world the African Americans made in conditions of severe adversity, whether on plantations, tenant farms, or in ghettoes."**[emphasis mine][22]

[22] Jim Cullen, "The Art of Everyday Life," *St. James Encyclopedia of Popular Culture* (Detroit: St. James Press, 2000), xii.

If we can acknowledge that "every American musical idiom from country music to rap has drawn on, if not actually rested upon, African-American cultural foundations," what, then should we make of that? One thing is clear: White Americans have been appropriating (sampling) Black American music artists since the dawn of American popular music — all for free. Some might counter, however, that regardless of the obvious and rampant appropriation of Black culture by white Americans in music and other media, that what we're dealing with is simply fair use. Such an oversimplification misses the mark however. But we must remember that Blacks could not, in effect, protect their works through the American copyright system like whites were able to; and even if and when Blacks did or attempt to do so, whites did not respect those rights. So Black Americans were denied the same access to and protections and benefits of United States copyright law that were granted to white Americans. Consider this as you think about the music industry's stance on sampling: An industry standard that insists that *all* samples must be cleared — no matter the amount of the sample or the character of it use — and a dismissive attitude towards fair use (and de minimis) where sampling is concerned. Likewise, consider the fact that hip hop/rap music, the music genre that popularized and led the development the art sampling, has been dominated by Black music artists. It is difficult to imagine that the music industry's attitude towards sampling would be so hostile if hip hop/rap music was dominated by white people or if the chief architects of sampling were white.

Patterns of Unequal Protection – From Black Radio to Black Music Styles; When Imitation Is Not the Sincerest Form of Flattery

Picture this. You're a DJ on the radio, breaking new records to your audience, not just because you've got your finger on the hottest new sound in America, but also because of your style of DJing, the way you talk, the way you rap, the way you effortlessly express your vernacular. You're so good at this, in fact, that after cold calling one

of the biggest radio stations in town for a "Black radio" DJ position, you land an interview — off of your voice alone. You get to the interview, you prove that you know your stuff, you impress the white guy in front of you who's doing the hiring. He offers you the job on the spot! And just before leaving he asks, as a formality because he's not sure, *"By the way, are you a nigger?"* So you don't land the job as the Black radio DJ because you *are* Black but fair skinned. You are pioneering Black radio Dr. Daddy-O (Vernon Winslow), and you're in New Orleans in the early 1950s.[23]

Dr. Daddy-O's story — wherein he was rejected by radio station WJMR because he was Black, but then hired to teach the white DJ how to "talk Black" — speaks to what Nelson George has called "Blackface broadcasting in the extreme." This situation also demonstrates the long history of white Americans appropriating Black culture and dismissing Black Americans as second-class citizens. Arriving at his WJMR interview, Wilson had to take the service elevators because Blacks could not use the regular elevators, which were reserved for whites only. Wilson's story, which tells the rise of one the most important Black radio DJs, is worth exploring in its own right. But for our purposes here, Wilson's story offers a window into the emergence of the music industry and the odd mix of racism, Black creativity, and unequal copyright protection that helped to shape it.

Regarding imitation, the old saying goes, "Imitation is the sincerest form of flattery." But historically, for white Americans appropriating by Black culture, especially Black music, this has hardly been the case. From the cradle of the blues on through to the dawn of rock 'n' roll, scores of white music artists have appropriated ("imitated") Black music artists. This meant that Black music artists were also robbed of the economic fruits of their labor. Remember, the copyright system rests in part on the philosophy of neutrality of legally sanctioned economic incentives, a kind of "neutrality" that was never intended to include Black people. Again, from Greene:

[23] Nelson George, *The Death of Rhythm and Blues* (Penguin, New York 2003), 50-51.

> Music scholars have noted that **Black artists, as a class of performers, routinely found their works appropriated and exploited by publishers and managers. The publishers typically (although hardly always) were white.** As a result, Black artists as a class were denied the economic benefits of the copyright system. ***The prolific exploitation of Black artists casts doubt on the value and neutrality of legally sanctioned economic incentives.*** The copyright system did not protect Black artists as a class from disproportionate economic and cultural exploitation and appropriation of the fruits of their works. [emphasis mine][24]

When we look at the blues, we see that the "first large financial gains [by blues musicians] were made by white musicians playing Black music to essentially white audiences [many of whom] got their musical education in the 'second line' of the Black marching bands and admittedly tried to play as much like the Black originators as possible."[25]

Race Records: How Black Music Artists Helped Save the Music Industry, Only to Be Exploited In Return

Between the 1920s and 1930s, "Race records" or "race music" were terms used to describe music that was made by and marketed to Black Americans. As a catch-all term, "race records" were comprised of all types of Black American music, including the blues, jazz, and what would soon become known as rhythm & blues. Because live performance venues were segregated, a reflection of the general segregation in American society culture at the time, and because Black Americans were largely not represented on radio, race records were a crucial part of Black American life up until the 1940s. Segregation, legal and otherwise, meant that Black Americans had their own popular culture collectively described as "race" media. Race media included music, art, films, books and other publications that were created for and by Black Americans. Race records were

[24] Greene, 357-58.
[25] Greene, 357-58; See also Thomas J. Hennessey, *From Jazz To Swing: African-American Jazz Musicians And Their Music* (1994), 149.

sold in stores and advertised in publications that catered to Black Americans (segregation in America also meant that race records were kept separately from the records of white artists); so white audiences seldom knew or cared about the creative art forms of Black Americans. That is until the music industry discovered race records. Finally, it's worth noting that the term "race records" was not considered to be pejorative. On the contrary, at the time "race was symbolic of [B]lack pride, militancy, and solidarity in the 1920s, and it was generally favored over *colored* or *Negro* by African-American city dwellers."[26]

It's widely known that the music industry, led predominantly by rich white men, profits millions of dollars off of Black music. What's less known is that this activity is actually a continuation of a practice that began with "race records" in 1923. What's critical to know for our purposes here is that, without race records, the music industry may not have survived, or at least it would have become something entirely different. This is because in the early 1920s, the recording industry was bleeding money. In the years immediately following World War I[27], commercial radio broadcasts had disrupted the recording industry's stranglehold over recorded music. Record companies like Victor and Columbia, then the two dominant record labels, saw huge declines in sales, and the future

[26] Matthew A. Killmeier, "Race Music," *St. James Encyclopedia of Popular Culture* 4, edited by Tom Pendergast and Sara Pendergast (Detroit: St. James Press, 2000), 155-156. Killmeier quoting William Barlow in Cashing In: 1900-1939 (emphasis mine).

[27] For added context about how unlikely it was that the recording industry would ever treat Black music artists equally to white artists, we need only look at what happened to Black American soldiers who returned after the War. The hostility towards Black Americans was violent and sometimes deadly: **"After the Armistice, black veterans returning home were greeted not with recognition of their civil rights but, instead, with an intense wave of discrimination and hostility...**Many black veterans were denied the benefits and disability pay they'd been promised. In the first summer after the war, known as the Red Summer, anti-black riots erupted in more than twenty American cities, including Houston, Chicago, and Washington, D.C...**In the years after the war, at least thirteen black veterans were lynched. Countless more survived beatings, shootings, and whippings." "[O]ften, the only provocation was *a black man's insistence on wearing his uniform in public*."** Peter C. Baker, "The Tragic, Forgotten History of Black Military Veterans," *The New Yorker*, November 17, 2016] See also James Mennell, "African-Americans and the Selective Service Act of 1917," *The Journal of Negro History, Summer*, 1999, Vol. 84, No. 3 (Summer, 1999), pp. 275-287 Published by: The University of Chicago Press on behalf of the Association for the Study of African American Life and History.

of the music industry was looking bleak. So race records "made sense for white record labels, which had been losing market share with the introduction of radio. But they made financial sense for another reason: It was easier to exploit and underpay black artists than white ones."[28] The trigger was Mamie Smith's song "Crazy Blues" selling *1 million* copies in 1920.

Mamie Smith was the first Black American to record a blues song, and the success of "Crazy Blues," recorded and released by the upstart record label Okeh, alerted the music industry to the selling power of race records. "The record became a sensation, selling 75,000 copies in a month and a million copies in seven months."[29] These sales, which are the rough equivalent of 5 million sales today, came *only* from the Black American audience. It's also worth noting that buying a record was a significant purchase at the time:

> **"The hefty price tag of the record indicates just how much consumers were willing to pay for the pleasure of listening to Black folk music.** A dollar was a significant price for anything in 1920, let alone a non-essential commodity. After World War I, the average hourly wage for manufacturing labor was 53 cents. **The purchase of the $1 record, then, was about two hours' wages for the average laborer [and Black Americans were not the average laborers, as they have historically been paid less than white Americans].** This corresponds to spending about $40 today based on average manufacturing wages. The cost of the race record was significant, but it did not deter listeners from lining up to buy17."[30]

Thus, the sales of Mamie Smith's "Crazy Blues" in 1920 represented the tremendous buying power of the Black American community. Although large, white-owned and operated companies would eventually take note of the economic benefits of creating products for and marketing to Black Americans, racial equality didn't correlate to the increased spending of Black dollars in white spaces.

---

[28] Erin Blakemore, "How 'Race Records' Turned Black Music Into Big Business," History.com Updated: Feb 22, 2019; Original: Aug 7, 2018.
[29] Mintz, S., & McNeil, S, "1920s," Digital History (2018). Retrieved May 2, 2021 (retrieved from http://www.digitalhistory.uh.edu/era.cfm?eraID=13&smtid=6)]
[30] Lerone A. Martin, *Preaching on Wax: The Phonograph and the Shaping of Modern African American Religion (Religion, Race, and Ethnicity)* (NYU Press (2014), 35.

The story of how the first blues song (the first Black popular music ever recorded) was recorded reveals much about music industry patterns when Black music artists are involved. Prevailing racist attitudes by whites towards Blacks meant that Blacks were not seen as multi-dimensional recording artists, nor were Black music artists seen as a bona fide consumer group worth catering to. In 1920, Black music artists were seen by white record labels as only minstrel-show style (comedy) acts. When Perry Bradford pitched the idea of recorded Black music to record companies in 1920, racism stood in his way. Bradford, a well known vaudeville performer and composer from Alabama who migrated to Atlanta, struck out notably with Columbia records, who told him that they "*wouldn't think* of recording a colored" popular artist. Believing in the commercial profitability of Black popular music, which he discerned from the success of his vaudeville and minstrel shows and compositions, Bradford pressed on and was able to convince the Victor Talking Machine Company to take a chance.

Victor, which doubled as a phonograph maker and record company, recorded one of Bradford's popular Black vaudeville singers, Mamie Smith. At the time, Black artists were limited to minstrelsy, so Victor classified the studio session in their recording ledger as a "comic" performance. Fearing that a Black artist would sully the company's reputation and prestige among white consumers, Victor opted not to release the recording. That's when Okeh Records stepped in. Okeh Records, the record label wing of the General Phonograph company, took Perry Bradford up on his offer, making Mamie Smith the first Black vocal artist to record Black popular music, "pioneering the race record genre." Still, Okeh did everything it could to hide the race and name of its new artist.[31]

After Mamie Smith's hit record, white record labels turned to producing race records as means of expanding their consumer market and stopping declining revenues.

[31] Ibid, 35.

Consider the parallel with the music industry in the late 1980s. At first, the major record labels paid little mind to hip hop/rap music. Then they were dismissive of it; they said that hip hop/rap wasn't "real" music, and they called it a fad. But after the success of independent hip hop/rap labels, major record companies quickly entered hip hop/rap music as a means of expanding their consumer market.

Columbia, who had just a few years earlier sworn that they "wouldn't think of recording a colored popular artist," signed Bessie Smith in 1923. Picking up on what Mamie Smith started, Bessie Smith would go on to become the "Queen of the Blues," recording upwards of 160 songs with Columbia and transforming into the first Black American superstar. Although Bessie Smith was one of Columbia's best-selling artists, she never received a single royalty payment from the label! Likewise, Big Bill Bronzy, who recorded hundreds of songs in one decade during the height of the race records era, told Alan Lomax in 1947 that he "didn't get no royalties, because I didn't know nothing about trying to demand for no money."[32] Among other issues, Bronzy's case appears to have been one of unequal protection caused by his exclusion from white culture and equal access to America's legal and educational systems. As historian Matthew A. Killmeier has noted, for Black label owners, segregation and racism meant "less access to capital, technology, and distribution — which were almost exclusively controlled by whites;" and this "placed the African-American labels at a disadvantage and ultimately contributed to their quick demise."[33]

The music industry's pattern of not paying Black music artists royalties continued after the race records era had faded. In fact, the racism and discrimination against and exploitation of Black music artists were first formally recognized (to some extent) by the music industry in 1989 when major record label MCA started paying "significant royalties" to artists who recorded for the Chess and Checker labels in the '50s and '60s (MCA acquired the catalogues to the labels in 1985). However, this should not be read as a

[32] Blakemore.
[33] Killmeier.

major step forward. MCA, who was under no legal obligation to pay royalties to artists like Chuck Berry, Willie Dixon, and Howlin' Wolf, announced at the time that they would pay artists royalties "for all Chess and Checker products sold *since it acquired those labels* and, additionally, will wipe out production debts that Chess levied against artists to preclude royalty payments." Muddy Waters, Howlin' Wolf, Buddy Guy, Bo Didley and the Soul Stirrers (among many other Black music artists) were paid flat fees for their recordings. By the design of the exploitive system, they received no royalty payments for record sales.[34]

The significance of Black music artists not being paid royalties is not only a reflection of the exploitation of Black music artists at the time, it also speaks to the injustice associated with generational wealth created by Black music artists. Because once songs were recorded and published, they "became commodities and any future recordings would result in royalty payments to the publisher,"[35] which was practically always white owned and operated. This meant that generational wealth, which was generated by Black music artists, was taken[36] and transferred to the offspring of the whites who had originally exploited the Black musicians. This legacy of exploitation still looms over the music industry today. It's also worth noting that exploitation even extended to proper credit and live-performance revenue, as "many artists were put on records that gave them pseudonyms or left out their names entirely, which meant they weren't able to parlay their recording careers into successful performing careers."[37]

[34] See Richard Harrington, "MCA to Pay Royalties to R&B Greats," *Washington Post*, Dec. 7, 1989.
[35] Killmeier.
[36] "Until recent decades, African-Americans, as a class, have been victimized by systematic takings of their property.134 It has often seemed particularly ironic to this author that many of our laws are preoccupied with preventing 'takings' of property, while- as noted by Supreme Court Justice Thurgood Marshall- the property rights of Blacks have historically not been respected in the United States." Greene, 368.
[37] Blakemore.

Pattern of Hypocrisy: Good Enough to Record, But Not Good Enough to Be Equal

For big record companies like Columbia and Victor, "the production of race records was a more profitable endeavor than the recording of white artists;" and "[a]s in other endeavors, African-American artists were paid less than their white counterparts for recording sessions and were often exploited. Artists' ignorance of copyright law, and the lack of an independent accounting body to track sales, allowed industry personnel to grossly underpay or waive royalty monies."[38] This marks a pattern of hypocrisy that's still present in the music industry today. Record companies have historically seen the value in producing, recording, and distributing Black music artists, yet record companies have not demonstrated a parallel commitment to treating Black music artists equally to white music artists; nor have these record companies shown any serious interest in placing Black people in key C-suite positions. In the early 1920s, big record companies discovered what Black Americans had already known at the time: Black American music is profitable. But even as companies like Columbia and Victor turned to Black music artists to stave off financial ruin, they still considered Black music artists to be inferior to white music artists. As such, Black music artists were routinely exploited, received less marketing support, and were denied practically all of the same opportunities that were readily available to white recording artists. In effect, for these record companies, Black music artists were good enough to record, but not good enough to be equal.

[38] Killmeier.

One-Way Cultural Appropriation

The impact of Black music artists on the character, psyche, evolution, and economics of American popular music can't be denied. No ethnic or racial group has contributed more to or been more influential in American popular music than Black Americans. Yet despite this wealth of contribution, a level that will never be matched, consistent patterns of one-way cultural appropriation have persisted in the music industry.

The race records era demonstrated the music industry's mistreatment of Black music artists and it revealed how the copyright system was used against Black music artists to steal the fruits of their labor. White-owned labels purposely "misidentified" the names of Black music artists on the records that they created, often insterting their own names as authors in place of the Black music artists, which denied Black music artists the possibility to copyright their works. Further, white-owned labels used the original works of Black music artists as if they were works in the public domain. Here, we must remember that "the copyright regime, although facially race-neutral, exists in the same society that produced a deep-seated legacy of separation and racial inequality."[39] As time went on, these clear patterns of economic exploitation evolved and cultural distortion of works created by Black music artists became another norm. "[B]ecause Black artists were not considered acceptable to mainstream (white) audiences, 'covers" of Black recordings by white artists [became] commonplace in the recording industry." This meant that white music artists benefitted from being able to mimic (cover) Black music artists. Those white music artists who did these "covers" received full support from their label, and they were able to crossover and become commonplace in the market to the point where they became ubiquitous in pop culture. Historically, we have seen how "cultural trailblazers like Little Richard and James Brown have been squeezed out of their place in popular consciousness to make room for Elvis Presley, Mick Jagger, and others."[40]

[39] Greene, 367.
[40] *Ibid*.

But this type of cultural appropriation, a consistent characteristic of the music industry, was one way.[41] For an example of how this legacy still impacts the music industry today, consider the white artists who can "crossover" with R&B and still do pop and country. And with regards to country music, the hypocrisy and segregation of the music industry is alive and well. The music charts have always been segregated — by design. The majority of country and pop music is produced by white artists, while the majority of hip hop/rap music and R&B is produced by Black artists. Yet, white artists are entitled to expand into Black music, receiving the full support of the label and chart systems. On the other hand, Black music artists are discouraged from expanding into "white music." Moreover, the music industry does not treat Black artists who do succeed in such expansions equal to whites who do the very same thing. A great example of this is what happened with Lil's Nas X's song "Old Town Road" (2018), a song that "debuted on Billboard's cross-genre Hot 100 chart, the Hot Country Songs chart and the Hot R&B/Hip-Hop Songs chart all at once." That "Old Town Road" was removed from the country charts reveals much about racism in the music industry, particularly the doubled standards that are based on race:

> ***Billboard* quietly removed "Old Town Road" from Hot Country Songs and informed Lil Nas X's label, Columbia Records, that his inclusion on the ranking was a *mistake*…**
>
> *Billboard* did not publicly announce the change, but in a statement released to Rolling Stone, the publication said that "upon further review, it was determined that 'Old Town Road' by Lil Nas X does not currently merit inclusion on *Billboard's* country charts. When determining genres, a few factors are examined, but first

[41] "The treatment of Black artists by the music industry and the copyright system reveals a pervasive history of infringement. For blues artists particularly, it was almost as if their work- some of the most innovative, original and imaginative artistic work ever produced in America- was, to use a legal term of art, 'in the public domain,' i.e., freely usable by anyone." (Greene, 369). Greene further suggests seeing David P. Szatmary, *Rockin' In Time: A Social History Of Rock-And-Roll* (1995), 27: "noting that to reverse the dominance of independent record labels in rock music, many of which were Black owned, **'larger companies signed white artists to *copy*, or 'cover' the songs of African-American artists, sometimes sanitizing the lyrics.'"** (emphasis mine).

> and foremost is musical composition. While 'Old Town Road' incorporates references to country and cowboy imagery, it does not embrace enough elements of today's country music to chart in its current version."
>
> **Expelling Lil Nas X's single from Hot Country Songs points to a complicated racial dynamic. The music industry still relies heavily on old-fashioned definitions of genre, *which have always mapped on race…***
>
> In today's streaming world, however, songs can go viral before labels, radio programmers and playlist curators can sort them into genre buckets. **When the music industry enforces genre borders after the fact, it becomes part of a power struggle about who has the right to make what and, in this case, whether black artists can fit in predominantly white genres.**[emphasis mine][42]

Historically, the imitation of Blackness by whites has appeared as a repeated pattern: Black innovation followed by white appropriation. This appropriation by whites is often understood to be the "mainstreaming" of Black art forms. What follows is the growth of the white audience who celebrate the form and the success — or at least an easier path to success and sometimes dominance — for white performers who practice the form. For instance, long before the white R&B boy-band craze (think New Kids On the Block, Backstreet Boys, NSync and their spawns), this pattern was at play in the world of jazz. As K.J. Greene has aptly noted, jazz was transformed from a "primarily local music rooted in Black folk traditions to the tightly managed product of a national industry controlled by white businessmen and aimed [at] a predominately white mass market."[43]

Looking at the explosion of white jazz bands between the 1920s and 1940s, we can see how the imitation of Black music by whites was in full force, so much so that some at the time considered it to be white music.[44] So it should come as no surprise that jazz is

[42] Elias Leight, "Lil Nas X's 'Old Town Road' Was a Country Hit. Then Country Changed Its Mind," *Rolling Stone*, March 26, 2019 https://www.rollingstone.com/music/music-features/lil-nas-x-old-town-road-810844/.
[43] Greene, 371.
[44] *Ibid*.

now respected by the dominant (white) culture and celebrated in its cultural institutions and academia. By stark contrast, the art of sampling, especially as it's practiced in the hip hop/rap music tradition, has not been so easy to imitate for white Americans who do not identify with hip hop/rap culture. Thus, as it follows — for history indicates that wherever white Americans do not have a strong hand in the creative development in an art form, or commercial control over it — hip hop/rap music is less celebrated in America's cultural institutions and academia. Incidentally, we should recognize the sample clearance agenda for what it is: An overt attempt to assert commercial control over an art form of which whites are not the leaders or main practitioners.[45]

The level of delusion that underscores white supremacist ideology is so warped that it doesn't stop at the belief that Black people are incapable of creativity, it extends to the notion that even when Blacks *appear* to create something, it's not "really" a creation but rather the "robbery" or imitation of something that whites created. One example of this absurdity is that there are some white academics who won't even grant credit to Black people for creating Negro spirituals. As Milles Fisher has noted, the mindset of the age of slavery was that "Blacks were 'simply *imitators who pathetically cried* in their captivity."[46] (That any white academic would accept the theory that Negro spirituals did not come from Black people speaks to how white supremacy continues to affect academia.)

Stereotype, Demean, and Take at Will

The predisposition of white American culture to stereotype and demean Black culture, and at the same time the sense of entitlement to take from Black culture at will, are two characteristics of the cultural appropriation that Black American music artists have long suffered in the music industry. These characteristics also help explain why the disparate treatment of Black music artists

[45] "It has been noted that 'primarily because of its appeal as dance music, [jazz] became so popular among whites, and white bands began playing it in such large numbers, that from the 1920's to the 1940's, jazz was seen as white music.'" Greene, 372.
[46] Miles Mark Fisher, *Negro Slave Songs In The United States* (1990), 22, 23.

occurred "despite the ostensible race neutrality" of copyright law. "The copyright system does not exist in a vacuum, but in a concrete social milieu." That is to say, United States copyright law exists in a "concrete social, cultural, and historical context." Thus, "the degree of protection accorded to intellectual property in American society, as with tangible property, frequently depended on the racial (as well as gender and class) status of the individual." In other words, while copyright law exists *superficially* outside of social factors, like racism and income inequality, the fact is, the legal structure of copyright law itself is a "sub-culture" of society, one which privileges and incorporates the values, predilections, and assumptions of white American culture (i.e. the dominant Anglo-American culture).[47]

We should understand then why the music industry holds the assumptions about sampling and copyright law that it does. The music industry supports the logical fallacy that any sample, regardless of amount taken or level of transformation, is infringement without a license; put another way, the music industry promotes the logical fallacy that the de minimis and fair use doctrines, cornerstones of United States copyright law, do not apply to sound recordings. It is clear that these assumptions, and the policies ("industry standards") that the music industry has instituted around sampling are influenced in large part by the fact that, historically, sampling has been practiced, popularized, and dominated by Black Americans. And there's also the history of hypocrisy and exploitation of Black American music artists that sampling exposes!

[47] Greene, 359.

Why the Model of Copyright Has Not Always Worked For Black Music Artists

Four Patterns of Inadequate Protection: Distortion Pattern, Copyright-By-Appropriation Pattern, Copyright-By-Hostage Pattern, and False-Author Pattern

Theoretically, copyright begins at the creation of a work, but in practice, copyright protection does not begin until the fixed expression of a work is captured in a tangible medium (e.g. composition on sheet music, a song on a phonograph, etc.) and registered with the Copyright Office. Historically, the compliance with formalities, i.e. the fixed expression and registration, has worked against Black music artists because copyright does not protect *how* Black music artists were copied and exploited. To be clear, copying Black music artists, i.e. imitating their styles and sounds, is not the same thing as copyright infringement. The latter must be proven in court, and the prior technically amounts to ideas; copyright law does not protect *ideas*. However, what I hope to demonstrate in this section is that the way in which copyright works — in the framework of only protecting fixed expressions that are registered with the copyright Office and the encouragement of the spread of ideas — has historically disadvantaged Black music artists. Scholar K.J. Greene has noted that there are four patterns that have resulted from inadequate intellectual property protection for Black music artists in America.[48] While my own research yields the same finding, I find that these patterns did not emerge in the same chronological order as Greene originally presented them. Thus, in this section, I have reordered and renamed the patterns to better align with the timeline of these patterns and what each pattern represents more specifically.

[48] Greene, 372.

The Distortion Pattern

The first pattern of unequal protection for Black music artists that copyright fostered is the distortion pattern. This pattern goes like this. A creation/innovation is made by Black artists, followed by whites imitating and *distorting* the original creation/innovation made by Black artists. The distortion takes place in two forms: Stereotypical distortion and Watered-Down distortion. Stereotypical distortion is when whites portray Black culture in negatively stereotypical ways. Think of "Saturday Night Live" skits where comedians dawn baseball hats, Run-DMC style fedoras, large gold rope chains, and the like, and posture like rappers for laughs with exaggerated Black vernacular and slang. Watered-Down distortion is when whites appropriate Black music and water it down, i.e. make it more palatable for white audiences. In this scenario, the life and spirit of the imitated Black music form are removed and replaced with a hollowed-out version (often little more than a caricature). Notably, this describes, to varying degrees, practically every white R&B boy band since the 1990s.

Copyright-by-Appropriation Pattern

The second pattern of unequal protection for Black music artists that copyright fostered is the copyright-by-appropriation pattern. While this pattern includes appropriation and imitation of creations/innovations made by Black artists, it differs in that the white artists who follow this pattern are not distorting or attempting to water-down the Black music form; rather, they're "covering" it. Notably, under this pattern we typically find that the white artists who do the covers often eliminate (or drastically reduce) the market for the Black artists who created the style or genre of music. Thus, the white artists who do the covers reap the benefits that copyright ensures. Meanwhile, the Black artists that were appropriated were often left without financial compensation and credit — or even just basic creative recognition.

Copyright-by-Hostage Pattern

The third pattern of unequal protection for Black music artists that copyright fostered is what I call the copyright-by-hostage pattern. Under this pattern, Black music artists create/innovate then sell or transfer the copyright to a record company or artist manager for a ridiculously low price. The *hostage* dimension of this pattern derives from the fact that many Black music artists of the first half of twentieth century (sadly much like today) were severely economically disadvantaged, illiterate in the spectrum of copyright, often had a limited educational background (if any), and were therefore under duress at the time of signing. While this isn't outright stealing, as is the case in the False-Author pattern, it is an example of the unethical exploitation of the disadvantaged position that many Black music artists found themselves in. Record companies, producers, and artist managers took advantage of the situation and bought the copyrights to songs from Black music artists for absurdly low sums, which effectively made record companies, publishers, artist managers, and others "authors" of songs that they did not create.

One of the most famous instances of the copyright-by-hostage pattern involves Little Richard and his hit song "Tutti Fruti." Richard (real name Richard Penniman), signed with Specialty Records in 1955 and granted full ownership of his songs to Specialty in exchange for 50 percent of the royalties; and he sold his publishing rights to "Tutti Frutti" for *$50*![49]

The kind of exploitation that occurs under the copyright-by-hostage pattern is rooted in music "industry standard" tactics and the general principle of bargaining inequality. The extreme disadvantage that Black music artists faced shows how such exploitation was more severe for and happened disproportionally to Black music artists.

[49] See "Good Music. Bad Deals. How Mismanaging Music Royalties Can Lead to Financial Ruin," *Royalty Exchange*, March 7, 2017 (https://www.royaltyexchange.com/blog/good-music-bad-deals-how-mismanaging-music-royalties-can-lead-to-financial-ruin#sthash.kDK8srTa.wVGthnxz.dpbs); See also, "Little Richard sues for royalties," *United Press International*, June 21, 1984 (https://www.upi.com/Archives/1984/06/21/Little-Richard-sues-for-royalties/9934456638400/).

False-Author pattern

The fourth and most brazen pattern of unequal protection for Black music artists that copyright fostered is the false-author pattern. In this pattern, outright theft occurs! A record label executive, artist manager, or other person registers the copyright with *their* name added as an author of the work — or they replace the artist's altogether with *their* name altogether — despite not having any involvement in the creation of the work. This pattern was common throughout the first half of the twentieth century, especially among Black blues and early R&B artists. Prior to the mid-1960s, there were few Black-owned record labels. Motown Records, the first Black-owned record label of major note, wasn't incorporated until 1960; and Stax Records, which was originally founded in 1957 as Satellite Records (name change in 1961), was a white-owned label. In other words, the false-author pattern was overwhelmingly done by white record label executives and artist managers prior to the 1960s.

One of the most famous instances of the false-author pattern involves the group Frankie Lymon and The Teenagers and their hit song "Why Do Fools Fall in Love?." When the original copyright on the song was filed in 1956, the songwriters were listed as George Goldner and Frank Lymon. Goldner, the band's manager, had no hand in the writing of the song; in truth, the song was co-written by Frank Lymon, Jimmy Merchant, and Herman, all members of Frankie Lymon and The Teenagers.[50]

[50] *Merchant v. Lymon*, 828 F. Supp. 1048 (S.D.N.Y. 1993) US District Court for the Southern District of New York - 828 F. Supp. 1048 (S.D.N.Y. 1993) July 23, 1993; see also Don E. Tomlinson, "Everything That Glitters Is Not Gold: Songwriter- Music Publisher Agreements and Disagreements," *Hastings Communications and Entertainment Law Journal* Volume 18 | Number 1 Article 3 1-1-1995, 218.

Three Grand Thefts and How the Cultural Appropriation of Black Culture Penalizes Black Americans

Theft of the Black Body, Theft of Black Intellectual Capacity, and Theft of Black People's Fruits of Creative Labor

Theft of the Black Body

"The murder of George Floyd was the result of inhumane police brutality that is perpetuated by a culture of white supremacy. What happened to George Floyd was not the result of a bad apple; *it was the predictable consequence of a racist and prejudiced system and culture that has treated Black bodies as the enemy from the beginning.* What happened to George Floyd in Minneapolis is the fruit borne of toxic seeds planted on the shores of our country in Jamestown in 1619, when the first enslaved men and women arrived on this continent."[51] This statement, entitled "We Must Dismantle White Supremacy," was released by ice cream maker Ben & Jerry's on June 2, 2020, one week after George Floyd, a Black man, was murdered by Derek Chauvin, a white police officer with the Minneapolis Police Department. At the time of Floyd's murder, Chauvin had *eighteen* prior complaints against him with the Minneapolis Police Department's Internal Affairs, including multiple incidents in which he or other officers used fatal force against other Black men.[52]

[51] "We Must Dismantle White Supremacy," Statement by Ben & Jerry's Homemade Holdings Inc, commonly knows as Ben & Jerry's, June 2, 2020, https://www.benjerry.com/about-us/media-center/dismantle-white-supremacy (emphasis mine).

[52] "Officer charged in George Floyd's death used fatal force before and had history of complaints," Derek Hawkins, *Washington Post*, May 29, 2020 https://www.washingtonpost.com/nation/2020/05/29/officer-charged-george-floyds-death-used-fatal-force-before-had-history-complaints/; see also Dakin Andone, Hollie Silverman and Melissa Alonso, "The Minneapolis police officer who knelt on George Floyd's neck had 18 previous complaints against him, police department says," CNN, May 29, 2020 https://edition.cnn.com/2020/05/28/us/minneapolis-officer-complaints-george-floyd/index.html]

The murder of George Floyd is a direct extension of the first grand theft befallen Black Americans: Slavery — America's original sin. This is the theft of the body. It's a legacy that permeates society today in many forms but most visibly in the frequency of Black people murdered by white police officers. It's all increasingly visible in the absurdly high number of times that white Americans call the police on Blacks, with a full understanding what the consequences could mean: An arrest or murder. Here, the label of racism has been quickly thrown at white people who use the police force as a quasi control-Black-people force. But this behavior isn't merely an indicator of racism; rather, it's rooted in one of slavery's hold-over beliefs. The belief that Black bodies do not belong to Black people; that Black bodies do not have the right to move about freely around white people; that Black bodies belong to white people and thus, when they are *out of line*, white people have the right to call the state (the police) to have them put back in line, even if that means jail or murder. So for Black Americans, the baked-in trauma of slavery echoes loudly in the background while the trauma of modern-day policing of Black bodies — and not policing just by the police, but also by white housing property managers, white store clerks, white park goers, and white neighbors — sounds its own haunting horn.

Chattel slavery in America existed from 1619 to 1865. Which means that we're 155 years removed from America's greatest sin. This means that, to date, Blacks have lived in America *as slaves longer* than they have as free people. It will take another ninety-one years for Blacks just to draw even with the number years that Blacks were enslaved in America! Thus, if we're to have a truthful, comprehensive discussion about American society, specifically about music, art, culture, creativity, originality, and authorship, we must recognize that the legacy of slavery persists today, and that it permeates throughout every aspect of American life, from civics to labor to business to housing to art and music and everything in between. But grappling with that complexity means acknowledging, first and foremost, the theft of the Black body. Of the four things that Ben & Jerry's call for in their statement, the second thing stands out in this regard:

> "Second, we call upon the Congress to pass H.R. 40, legislation that would create a commission *to study the effects of slavery and discrimination from 1619 to the present and recommend appropriate remedies.* We cannot move forward together as a nation until we begin to grapple with the sins of our past. **Slavery, Jim Crow, and segregation were systems of legalized and monetized white supremacy for which generations of Black and Brown people paid an immeasurable price. That cost must be acknowledged and the privilege that accrued to some at the expense of others must be reckoned with and redressed."** [emphasis mine][53]

This theft of the Black body is central to Black Americans, particularly in the way that it informs Black music. If you recall, I mentioned earlier how music was the only art form that white enslavers allowed enslaved Africans to perform. Thus, music for Black Americans took on both a deeply spiritual and practical meaning. Having their bodies stolen, enslaved Africans escaped, momentarily, through music. For three centuries in America, enslaved Africans used music to express pain just as much as joy, and often as a coded form of communication. Thus, to say that Black music is intensely important to Black people is an understatement.

In the context of sampling, there's no secret that the preferred music to sample among most Black sample-based beatmakers (producers) — and for that matter, most white sample-based beatmakers (producers) — is soul, funk, and jazz. What's at work here is a process of Black musicians doing what they have always done: Turning to the common well of Black music to make new Black music. On a broader level, this is the activity that copyright law both encourages and protects. The fundamental way that copyright law protects permissive borrowing is through the safe harbors of the de minimis and fair use doctrines. However, when it comes to sampling (an art form pioneered, popularized, and dominated by Black Americans) and the rights to these safe harbors, we find that Black people's rights are in effect not respected. If white Americans can look the other way when Black bodies are being taken en masse — repeatedly and in the same fashion — it's no stretch

[53] Ben & Jerry's Statement.

then to see how some white Americans can attempt to criminalize sampling itself, or look the other way when Black Americans are being blocked from the safe harbors of copyright law.

Theft of Black Intellectual Capacity

The second grand theft, which was situated in and still stems from slavery, is the belief that Blacks are incapable of creativity, innovation, or originality. This is the theft of the mind's work. As I pointed out earlier in this chapter, one principle of white supremacist ideology is the belief that Black people are incapable of creativity. That even when Blacks appear to create something, it's not "really" a creation but rather the robbery or imitation of something that white people created.

This belief that Blacks are incapable of intellectual capacity — or where such capacity may exist, it is inferior to the capacity of white people — impacts every level of society, and it is especially observed in the business and legal worlds, which are terribly race exclusionary. Among the Fortune 500 companies — *Fortune Magazine's* ranking of the 500 largest corporations by total revenue each year — only *four* of the corporations on the 2020 list have Black CEOs; and that number is down from six in 2012. More telling, since 1966, when the Fortune 500 list was created, there have only been seventeen Black CEOs in total.[54]

Turning to the music industry, where hip hop music now represents the #1 music genre in the world, music and tech writer Cherie Hu has noted that there is a "lack of racial diversity in the music industry's corporate and executive ranks." Looking at the names of "all the board members and C-Suite executives across the top three record labels (Universal Music Group, Warner Music Group and Sony Music Entertainment) and their biggest imprints, as well as the top two concert promoters (Live Nation and AEG)," Hu found that of the 61 total board members and C-Suite

[54] Jeanne Sahadi, "After years of talking about diversity, the number of Black leaders at US companies is still dismal," *CNN Business*, June 2, 2020 https://edition.cnn.com/2020/06/02/success/diversity-and-Black-leadership-in-corporate-america/.

executives, only five of them — or just *8%* — are Black. This data asserts the reality that "[t]he relative absence of Black leadership in the upper echelons of an industry like mainstream music that profits *off of developing Black culture and talent* is clearly a problem."[55]

While these examples of the non-inclusiveness of Blacks in the business world are glaring, we need not only look at the top corporations or the top law firms to see how the non-inclusion of Blacks in management positions is normalized. From cultural institutions to restaurants to grocery stores to local municipalities, there is a pervasive view that Black Americans are not qualified or lack the capacity to hold management positions or posts reserved for decision makers. All of this stems, in part, from white race consciousness, which includes the modem belief in cultural inferiority. White race consciousness "acts to further Black subordination by justifying all the forms of unofficial racial discrimination, injury and neglect that flourish in a society that is only formally dedicated to equality."[56] In other words, white race consciousness in America works to reinforce the belief held by many white Americans that Blacks are inferior, *and* white race consciousness works to blame Blacks for their unequal treatment in American society. Further:

> Race consciousness also reinforces whites' sense that American society is really meritocratic and thus helps prevent them from questioning the basic legitimacy of the free market. ***Believing both that Blacks are inferior*** **and that the economy impartially rewards the superior over the inferior, whites see that most Blacks are indeed worse off than whites are, which reinforces their sense that the market is operating "fairly and impartially"; those who should logically be on the bottom are on the bottom.** This strengthening of whites' belief in the system in turn *reinforces their beliefs that Blacks are indeed inferior*. After all, equal opportunity is the rule, and the market is an impartial judge; ***if Blacks are on the bottom, it must reflect their relative inferiority.*** **Racist ideology thus operates in conjunction with the class components of legal ideology to reinforce the status quo, both in terms of class and race.**
> "To bring a fundamental challenge to the way things are, whites

[55] Cherie Hu, *Water and Music*, Issue #87, June 5, 2020.
[56] Kimberlee Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in AntidIscrimination Law, 101 *HARV. L. REV.* (1988), 1331, 1380.

> would have to question not just their own subordinate status, but also both the economic and the racial myths that justify the status quo. **Racism, combined with equal opportunity mythology, provides a rationalization for racial oppression, making it difficult for whites to see the Black situation as illegitimate or unnecessary.** *If whites believe that Blacks, because they are unambitious or inferior, get what they deserve, it becomes that much harder to convince whites that some-thing is wrong with the entire system.* Similarly, a challenge to the legitimacy of continued racial inequality would force whites to con-front myths about equality of opportunity that justify for them what-ever measure of economic success they may have attained.[emphasis mine][57]

Looking at the grand theft of Black intellectual capacity and white race consciousness, we can draw the connection between the idea that Blacks lack creativity and originality (or if Blacks do possess such qualities, the levels are inferior to whites) and the idea that sampling is not creative, unoriginal, and nothing more than cut and paste. But when Girl Talk (Greg Gillis), a white sampled-based musician championed by many in the media, engaged in sampling, the activity was dubbed "mash up" (something different), and he was revered as an *innovator*, a creative musician at the dawn of a "new" music process. He was also never sued! This, despite the fact that he sampled lots of songs, and despite the fact that his album *Feed the Animals* (2008) included *300* samples of other music, and many of the songs he sampled for *Feed the Animals* were contemporary recordings, not older stuff from the '60s or '70s. And Girl Talk did this all out in the open. So how did he *not* get sued? When he was asked point blank, *"How did you not get sued?"* in a 2020 *Billboard* interview, Girl Talk offered this response:

> It's a very good question. **There is an aspect of copyright law called "fair use." You can sample things without asking permission if it falls under a certain criteria.** It looks at the motivation behind the work — if it's transformative. **You don't know whether your work falls under fair use or not until you're taken to court.**
>
> We believed in what we were doing, that this music deserves to exist

[57] *Ibid*.

> and should be allowed. **I think part of the reason *we didn't have issues* was the warm response from fans *and critics*.**
> [emphasis mine][58]

Girl Talk doesn't include race as a factor in why he didn't "have issues," i.e. why he was not sued for the massive number of samples that he used without any licenses, or why *he* received a "warm response" from critics. But we can safely conclude that such praise and treatment — "no issues," *zero* copyright infringement cases brought against him and *zero* demands that he clear all of the samples that he used — reinforces the idea that white artists are superior to Black music artists who do the same thing; and as such, they are entitled to benefits and protections that are denied to Black music artists. Girl Talk deserves credit for his artistry, but it's naïve to believe that he doesn't benefit in the market, that he doesn't receive a "warm response" from critics and avoids multiple copyright infringement cases, in part due to his being white. Historically, this kind of disparate treatment (favoritism and acceptance) has always been the case whenever musicians take up music forms innovated and popularized by Black music artists.

Looking past the race factor for a moment, the other reason Girl Talk was not sued is that the music industry had no interest in opening up a Pandora's box by losing to Girl Talk in court and thereby opening the floodgates on fair use.

[58] Kat Bein, Girl Talk on How He Avoided Getting Sued for Sampling: 'We Believed in What We Were Doing,'" *Billboard* April 29, 2020 https://www.billboard.com/articles/news/dance/9367418/girl-talk-interview-2020.

A byproduct of the theft of Black intellectual capacity is the devaluation of Black art particularly as it relates to what are deemed "great" works. How is an art form deemed worthy of praise? Moreover, how are great works determined? Jimmy A. Frazier has noted that "the process of becoming a 'great' artist is really about being endowed by prominent art worlds with the reputation of being a great artist. Thus, 'great' works are great not because they speak to timeless human values, but rather because their creators have been endowed, socially, with 'greatness'. Only an elaborate set of cultural myths ... sustains the belief in the great artist."[59]

Historically, "[t]he persistence of notions of white superiority and ideology of separation" has caused "cultural devaluation of works by minority artists as a class." Furthermore, "[i]n a racially separatist society, Black artists did not have the same opportunity to be acknowledged as 'great.' For example, the great jazz composer Duke Ellington, a towering figure in American music, was rejected for a Pulitzer Prize in the 1960's 'because the board deemed his music insufficiently 'serious;' it regularly awarded the prize to composers working in the European art music idiom descended from Haydn, Mozart, Beethoven, Brahms, Mahler, and Schoenberg."[60]

Despite hip hop/rap music's proven prowess, its popularity, and its impact on pop culture around the world, it could be argued that hip hop/rap still does not get respect for its greatness overall. More specifically, sample-based works of art are not only rarely deemed great by prominent art worlds and academia, they're often considered to be unoriginal, uncreative non-musical atrocities. Knowing that American society does not generally value works made by Black artists as much as the same works made by white artists, it's easy to see why it was "the active search for and use of blues songs by major white entertainers that thrust the blues into the center of the entertainment industry."[61] One wonders how the art of sampling would be looked at today, that is to say, how

[59] Jimmy A. Frazier, "On Moral Rights, Artist-Centered Legislation and the Role of the State in Art Worlds: Notes On Building a Sociology of Copyright Law," 70 *TUL. L. REv.* (1995), 313, 326.
[60] Greene, 370.
[61] *Ibid*, 370-71.

its celebrated works in the hip hop/rap music tradition would be regarded today, if white musicians where the leaders of the art form. If history is any indication, such a scenario suggests that prominent art worlds, academia, and, of course, the music industry would all see the art of sampling in the hip hop/rap music tradition as "great."

Theft of Black People's Fruits of Creative Labor

Moving into the twentieth century, when the belief of Black intellectual/creative capacity became more difficult to deny (at least publicly), we can locate the third grand theft as the theft of Black people's fruits of creative labor. The level of uncompensated and uncredited appropriation of Black creative labor in America is so ubiquitous that it has resulted in the de facto establishment of a first-class creative citizenry in music that was built from the creativity, originality, and innovation of Black music artists, a class that has, to date, held basic human rights in the United States far less longer than it hasn't. Add it up. Slavery lasted 246 years, from 1619 to 1865; Reconstruction followed from 1863 – 1877; and Jim Crow followed after that from 1877 to the mid-1960s. From 1619 to 2020, that's *400 years* of systematic oppression. One would be foolish to believe that this has not had or does not still have any effect on Black music or the relationship between Black music artists and copyright law. And one would be in denial to ignore the harm caused by this relationship. And loss of the fruits of their creative labor represents various harmful effects to Black music artists as a class.

Apart from the loss of tremendous financial wealth, Black artists and innovators must also suffer the pain from seeing their innovations — their creativity, their originality — appropriated without compensation or credit. *Elvis is the King of Rock 'n' Roll* (no, that would be Little Richard)… *Rick Rubin was the first to combine rock 'n' roll with hip hop* (no, that would be Larry Smith)… The list of claims like these, where the achievements of white music artists are privileged and revered over the Black artists whom they imitated (appropriated), is non-exhaustive. K.J. Greene suggests

that the pain associated with the appropriation of Black music without compensation is so severe for Blacks that it "feeds into the often-intense experience of anger that is part of the collective Black experience in America. No one can be happy about being or feeling victimized, and no one likes to have anything personal taken from them."[62]

In her article "Property and Personhood," Barbara Radin points out how most people "possess certain items they feel are almost part of themselves... [such] objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world ... an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement." This describes the connection that Blacks have with their culture — music specifically. It also speaks to the pain that arises from having a part of themselves appropriated without compensation or recognition. Radin also says that "[t]he premise underlying the personhood perspective is that to achieve proper self-development — to be a person — an individual needs some external control over resources in the external environment. The necessary assurances take the form of property rights."[63] In other words, such appropriation that Blacks have endured in America amounts to a force that has worked to keep Black people from achieving their full personhood.

Green has qualified Radin's statement that the "necessary assurances take the form of property rights," saying that "[c]learly, songs, poems, lyrics, art, and music are such objects, born of intensely personal experiences. This 'property' looks and feels more connected to personhood than 'tangible' forms of property, such as land, buildings or business property. Misappropriation of intellectual property, such as music and art, hurt at a very spiritual level."[64] Thus, looking historically at the fundamental ways whites in America have taken the property rights of Blacks, we can see in the appropriation of Black culture and the subsequent theft of the

[62] Greene, 374.
[63] Barbara Radin, "Property and Personhood," Stanford Law Review, Vol. 34 (1982), 959, 957.
[64] Greene, 374-75.

fruits of Black creative labor a systematic pattern of stripping Blacks of their personhood. In this light, we can also see why sampling for Black music artists is not merely an act of reclaiming heritage, but also an act of reclaiming property rights; we might also see it as a means for erasing the pain caused by the original theft of this heritage and these property rights.[65]

Creative Colonialism: How Copyright Law Indirectly Harms Black Music Artists

United States copyright law was enacted 75 years before the end of slavery, so it should come as no surprise that Black Americans faced barriers to obtaining copyrights for their creative genius right from the start. Copyright law was not intentionally designed to disadvantage Black Americans, but as Green has pointed out, it has nonetheless operated in such a fashion. Looking at the three characteristics of private property — title ownership, the right to collect income or rent off the property, and the right to exclude others from that property — we can see a parallel in the patterns of appropriation of Black creativity, innovation, cultural production. All three private property characteristics are at play when Black culture is appropriated.[66] Moreover, considering that copyright law protects authors against those who use or copy their work (i.e. the parts of their work that copyright protect, not what is de minimis or fair use), we can't ignore the reality that this legal right can be used as both a form of creative control and wealth. Wendy J. Gordon has noted that:

> The primary protection that intellectual property law gives creators is a legal right against those who would use or copy the work without permission. *That right can be employed as a tool of creative control. However, it is also a form of wealth.* Subject to some limitations,

[65] Ibid: **"Inadequate copyright protection has increased the economic inequality in our society.** Blacks, deprived by legal and social segregation and discrimination of access to capital, property, and the best jobs, could least afford to miss the opportunity of residual income offered by copyrights. Yet history indicates that the Black community has not reaped the benefits of its phenomenal creativity." (emphasis mine).
[66] Ibid, 376.

> notably the inalienable power to terminate copyright grants, creators can sell this wealth. **Since intellectual property law can ameliorate but not eliminate underlying disparities in bargaining power, economic need might induce an impecunious author or inventor to part with control over her work, and even to give up the liberty to use it, perhaps in return for fairly small rewards.** Thus, although intellectual property improves the creative person's position, it can guarantee neither adequacy of compensation nor continuation of control.[emphasis mine][67]

Focusing on Gordon's commentary that economic need might induce an indigent author or inventor to part with control over her work and even give up the liberty to use it, in return for small rewards, we must understand that this occurrence is only the surface of the matter. Gordon's commentary doesn't account for the institutional and cultural racism and systematic discrimination that persistently forced Black Americans to part with their creative works for "fairly small rewards."

Looking at how the music industry is structured — here, I mean label ownership, executive management, distribution channels, tools of production, and performance outlets — we can see more clearly what I call the creative colonialism of Black music. Frank Kofsky, author of the book *Black Nationalism and the Revolution In Music*, has noted that "[w]ith very minor exceptions, it is whites who own the major economic institutions of the jazz world — the booking agencies, recording companies, nightclubs, festivals, magazines, radio stations, etc. Blacks own nothing but their own talent."[68] Kofsky is correct in his analysis, but he fails to account for one critical fact: Historically, many whites in the music industry have operated as if Blacks don't even have the rights to their own talent.

Thus, a closer look at Black American creativity, historically from the late nineteenth century to the mid-twentieth century, reveals that the incentive theory of intellectual property law did not apply equally to Black Americans. Black music artists received

[67] Wendy J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory," *Stanford Law Review*, Vol. 41, No. 6 (Jul., 1989), 1345.

[68] Frank Kofsky, *Black Nationalism And The Revolution In Music* (Pathfinder Press, 1970), 12.

less protection — or in many cases no protection at all — for their works, and they received little to no economic reward for their creations. But Blacks continued to create despite the unequal protection that they faced.[69] And with every new innovation, from blues to jazz to rhythm & blues to rock 'n' roll to soul to funk and to hip hop/rap music, white music artists have engaged with these music forms and have benefited in the market in ways that Black music artists could never; this includes everything from publishing to larger record sales to bigger tours and of course Grammy awards.

No Rights Which the Music Industry is Bound to Respect

Racism, discrimination, and inequality — all inspired by the white supremacist ideology that was core to the founding of the United States — impact every aspect of American society and culture. Historically, for Black people, the general impact has meant "educational deprivation, lack of access to legal resources, and exploitation in the entertainment industry."[70] In the music industry in particular, this has resulted in rife exploitation of Black music artists. While the music history has a long history of unfair and predatory dealings when it comes to all recording artists (draconian artist contracts are still the norm for most artists today), no class of artists has been exploited and discriminated against by the music industry quite like Black music artists. As I've detailed in this chapter, there have been consistent patterns of exploitation of Black music artists. At the base of this exploitation has been the ideology that the music industry, which has been dominated and controlled by white people (mostly white men) since its inception, does not have to respect the rights of Black music artists. This ideology is a sub-ideology of white supremacist ideology in America.

While the rights of sample-based musicians can't be equated with the basic human rights that Black Americans have been denied in America, we can nonetheless draw a parallel with what

[69] Greene, 378.
[70] *Ibid*, 391.

has historically occurred in the American music industry. Through its policies and customs commonly known as "industry standard," the music industry has taken a one-sided approach to copyright law when it comes to sampling sound recordings. Looking only through the lens of copyright owners, the music industry has purposely concocted a sample-clearance system that ignores the fact that *all* samples need not be cleared. The music industry is not guided here simply by the fear of a copyright infringement lawsuit where sampling is involved. This plays a part, yes, but the music industry's attitude towards sampling rests upon its assertion that the de minimis and fair use doctrines do not apply to sound recordings.[71] When you consider the fact that Black Americans are at the heart of sampling, it's no coincidence that such an illogical fallacy is supported by the music industry. Effectively, the music industry believes that sample-based beatmakers (producers), the majority of whom have historically been Black, have no rights that the music industry is bound to respect. However, copyright law says differently. And as more people learn the truth about copyright law, the music industry's current sample-clearance agenda will crumble.

The Conceptualization of Artists' Rights as Essential Civil Rights

With regards to sampling, the Constitution already protects our right to the freedom of speech. The public is also shielded from what is legally known as prior restraint. According to the definition by Cornell Law School's Legal Institute, "[i]n First Amendment law, prior restraint is government action that prohibits speech or other expression before the speech happens."[72] For instance, when a music lawyer or sample-clearance agent says that sampling or the use of samples is prohibited without a license, that is prior restraint because they are attempting to act as the government and prohibit expression — in this case sampling and the use of samples — before

[71] "It's just a defense." The *Bridgeport* got it wrong about de minimis and amended its judgment on the applicability of fair use. Yet, the music industry continues to operate as if fair use and de minimis doesn't apply to sound recordings.
[72] Cornell Law School Legal Institute https://www.law.cornell.edu/wex/prior_restraint.

publication or proof that the use is in fact actionable (i.e. copyright infringement). Right now, prior restraint is of major concern to sample-based musicians because the sample-clearance agenda is invested in the criminalization of sampling by way of convincing the public that sampling — or more specifically the use of samples — without a license is illegal. This is simply not true. Thus, as a class of music artists, sample-based beatmakers (producers) would benefit from access to informed legal guidance, not legal guidance that attempts to erase the de minimis and fair use doctrines, copyright law's primary safe harbors for permissive borrowing.

Fostering Fairness and Equality

Even in the face of "pervasiveness of the economic exploitation of Black artists, and the cultural distortion and devaluation of their works,"[73] we don't need to redefine the fundamental purpose of copyright law, nor overhaul the entire copyright structure. Where the art of sampling is concerned, we need only to amplify the safe harbors of permissive borrowing: the de minimis and fair use doctrines. This amplification also means neutralizing the music industry's disinformation campaign around sampling and copyright law; notably its insistence that the de minimis and fair use doctrines do not apply to sound recordings, and that *all* samples must be cleared. This amplification also means pushing back against copyright owners who believe that the sole purpose of copyright law is to protect their works. Finally, this also means educating and reminding the public that the purpose of copyright law is to promote the progress (advancement) of society through Science and Useful arts.

[73] Greene, 383-84.

Chapter 16

The Truth About Originality and Authorship

How the Romantic Concept of Authorship Came to Be, and the Importance of Relocating the True Meanings of the Concepts of Originality and Authorship

"[i]n 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."
—Justice Joseph Story, United States Supreme Court (1845)

"Authorship is possible only when future authors have the ability to borrow from those who have created before them."
—Alfred C. Yen

"We have clearly inherited the cult of originality from the Romantic poets"
—Jessica Millen

"When there's anything to steal, I steal."
—Picasso

"Only an inventor knows how to borrow, and every man is or should be an inventor."
—Ralph Waldo Emerson

One of the great ironies of the past one hundred-twenty years is this. Even in the face of rapid technological advancements and the dissemination of *more* books, *more* music, *more* film, *more* art, *more* photography, *more* design, *more* choreography, *more* creative products and more celebrated creatives than ever before, many people today still scream about how "original" they are. Think about that. More people, more creatives, more published and distributed works than at any other time in history. But lots of people still don't seem to get that originality and creativity are powred by borrowing from the works and ideas of others.

Centuries ago, there were far fewer published creatives to draw ideas from. In the year 1500, the estimated global population was less than 500 million people. Yet before the eighteenth century — before the Romantic period — the concept of borrowing as a necessary function of originality and creativity was well understood. Even more bizarre is how hyper-conscious many of today's creatives are about the so-called threat of someone "stealing" *their* ideas or violating their copyrights. As if originality and creativity haven't always included the process of borrowing, a process that all creatives engage in. The level of hypocrisy is dizzying.

So how did we get here? Where did this borrow-free vision of authorship and "cult of originality" come from? Simply stated: The Romantic period. Because copyright law "implicitly assumes the continued relevance of the Romantic vision of 'authorship,'"[1] and because the individualistic assumptions of authorship held by judges (like most people) are shaped by this vision and ideology, it's necessary to examine originality and authorship in the Romantic period and to detail how this vision still, three centuries later, informs our general notions of originality and authorship; and this examination includes looking at the ideology around *who* is and who *isn't* deemed capable of originality and authorship. It's impossible to understand the inherent presumptions about originality and authorship — and how these presumptions impact copyright

[1] Peter Jaszi, "On The Author Effect: Contemporary Copyright and Collective Creativity," *The Construction of Authorship* (Durham and London 1994), 54.

law — without first examining the history of these presumptions and locating them precisely at the time copyright law (as we would come to know it) emerged. In this chapter, then, I explore the concepts of originality and authorship and, by proxy, creativity. In highlighting the connection between the Romanticism of these concepts, I will spotlight the *myths* of originality and authorship and demonstrate how they are used to discredit the legitimacy of sampling as an art form.

The Shadow of the Romantics

When we consider artistic expression, what is it that shapes our concept of originality? And when we talk of "unique expression," what do we really mean? The assumption is that a "unique" expression is one that is "original," and the underlying assumption of *originality* is that it rests solely upon individual innovation and wholly individualized creativity. Further to this, there is a hardcore notion that originality is free of borrowing and imitation. Scholar Jessica Millen has noted that the "scorning of imitation remains deeply ingrained into today's literary culture."[2] It should be noted, however, that the scorning of imitation, and the obsession with the idea that originality is the product of individual innovation alone, is not limited to literature; this attitude and assumption applies to all art forms. So in this vein, Millen has also observed, as Thomas Mallon did before her, that we tend to concentrate on originality as being something tethered to "individual 'sincerity'," and that this concentration on originality as a hyper-individualized phenomenon is the product of the "fearful legacy of the Romantics."[3] Finally, Millen and others have maintained that our present day's "strong possessiveness over ideas" stems from "our *obsession* with individual innovation,"[4] and that this obsession, this *"ideal of originality as a value*,"[5] was inherited by the Romantic poets of the late eighteenth and early nineteenth centuries.

---

[2] Jessica Millen, "Romantic Creativity and the Ideal of Originality: A Contextual Analysis, in Cross-sections," The Bruce Hall Academic Journal – Volume VI, 2010, 91.

[3] Millen quoting Thomas Mallon from Stolen Words: Forays into the Origins and Ravages of Plagiarism (Harcourt, 1989) 24; Jessica Millen, "Romantic Creativity and the Ideal of Originality: A Contextual Analysis, in Cross-sections," *The Bruce Hall Academic Journal* – Volume VI, 2010, 101-02 (emphasis mine).

[4] *Ibid*.

[5] *Ibid*, 92.

The Romantics notwithstanding, we must understand that this obsession is unhealthy and terribly at odds with the reality of creativity, because it denies what we already know intuitively: That nothing comes from *nothing*. No art arrives from *nowhere*. Instead, everything emerges from something. And this *something* has always been — will always be — the combination of reactions to and borrowings from the cultural past and present, *along with* added individual innovations. This is the real face of originality and the foundation of creativity.

In Chapter 18, I note that the basic principle of the transformative element of the first factor of the fair use analysis — or, perhaps better stated, the transformative use *sub-test* derived from the Supreme Court — is that borrowing is indispensable to literature, science, and the arts as a whole. Thus, works that borrow from copyrighted works and make transformative uses of them — the result being the production of new "useful" works that benefit society — is a practice that dates back hundreds of years. And it is this practice and fundamental understanding of originality that are at the heart of the purpose of copyright law itself. Justice Story noted in 1845 that:

> [i]n 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. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. *No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others.* The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. **Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and**

> **Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.** What is La Place's great work, but the combination of the processes and discoveries of the great mathematicians before his day, with his own extraordinary genius? What are all modern law books, but new combinations and arrangements of old materials, in which ***the skill and judgment of the author*** in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copy-right? Blackstone's Commentaries and Kent's Commentaries are but splendid examples of **the merit and value of such achievements**. [emphasis mine][6]

Originary vs. Reactionary: The Community, the Individual, and the Truth of Originality

"Every book in literature, science and art, borrows, and must necessarily borrow."[7] Let's stick with this for a moment, because, here, Justice Story is absolutely correct. There is no individuality without the community; there is no originality or creativity without borrowing. This is the simple truth of originality just as much as it is the simple truth of creativity. As Thomas McFarland has noted, "[n]either individuality nor communality can be felt without the other."[8] It follows then that originality cannot exist without the input of the individual *and* the community.

Creativity, which in higher degrees presumably indicates more originality, is always determined by the equation of the individual borrowing from and building upon the community. No artist creates in a void, thus no artist is ever truly isolated. The artist is always surrounded by the community of ideas and works he has observed. In this way, originality is not originary but *reactionary*. The Romantics saw it differently however. The Romantics were

---

[6] *Emerson v. Davies*, 8 F. Cas. 615, 619 (CCD Mass. 1845) (No. 4,436); See also: Campbell v. Acuff-Rose Music, 510 U.S. 569,575 (1994).

[7] *Id.* (emphasis mine).

[8] Thomas McFarland, "The Originality Paradox," *New Literary History*, Spring, 1974, Vol. 5, No. 3, History and Criticism: I (Spring, 1974) (The Johns Hopkins University Press), 447 (emphasis mine). McFarland calls this "the originality paradox; and he cautions that "[a]ny attempt to resolve the paradox is unsuccessful," that the "Romanticism's very emphasis on the isolated ego is an attitude that leads to nothingness." (emphasis mine).

obsessed with the "isolated ego," and they considered originality to be originary. As such, they invented a new concept of originality that was based on the idea that something truly original emanates *naturally* and wholly from the individual. This, of course, is in direct opposition with the reality of how creativity and originality actually work.

Again, we all know that nothing comes from nothing, that no art arrives from nowhere. Everything emerges from something; everything arrives from somewhere. French rap, for instance, is original. But it came from American rap; it *arrived* from America, it was combined with French slang and French styles and aesthetics and transformed and *made into* its own original expression in France. Thus something, from which all originality springs, has always been — and will always be — the combination of individual imagination reacting to the community, both its cultural past and present. This is the foundation of creativity. In contrast, the Romantics believed that originality and creativity (and even ideas) stemmed from individual innovation alone. And, again, we inherited this obsession with individual innovation and a "strong progressiveness" over ideas from them.[9]

So here we are. Weighed down by the Romantics' idea that "true" literature — "real" art — is "pure invention"[10], *pure* meaning wholly individualized, free from imitation or borrowing. Despite the glaring reality of the nature of originality, creativity, authorship, and the necessity of borrowing, the shadow of the Romantics still casts itself over us today.

[9] Millen, 101-102.

10 Millen, 91: Millen quoting William Hazlitt in Thomas Mallon's *Stolen Words: Forays into the Origins and Ravages of Plagiarism* (Harcourt, 1989) 24. (emphasis mine).

The Truth of Originality vs. "The Originality Paradox"

The "originality paradox"[11], as first described by Thomas McFarland and further simplified by Gerhard Joseph, basically states that originality and imitation are "two terms of a ratio, two sides of a 'paradox'"[12]. But this "paradox" overlooks a more consequential point, something I call "the truth of originality." Thing is, originality always involves a certain amount of imitation, just as creativity always involves a certain amount of borrowing. This is the truth of originality, and it's something that I view less as a "paradox" and more just as a fundamental necessity of creativity. (*In life, there are many different fundamental necessities that we do not consider as paradoxes. Consider, for example, the fundamental necessity of survival. Humans need food, rest, and shelter to survive; this is not a "paradox".*) Rather than being a paradox, the truth of originality underscores the requirement of originality. Which is to say, originality *requires* imitation and borrowing. There's no escaping this reality.

Further, to my reading, a "paradox" implies that the concept of originality is complex. But it's not. *Complexity* implies unknowns. The Romantic poets conjured up a new concept of originality to cope with their "anxiety of influence" and their fear of competition from the growing number of writers around them. But this has no bearing on the truth of originality. The concept of originality may be, at worst, *complicated*, but once you recognize the underlying facts — that nothing new can be created from nothing; that we are all indebted to the past; that all innovation relies on borrowing from the past and existing works — originality is not hard to understand. Thus, seeing it through the prism of a paradox misses the point.

Further, inasmuch as imitation is "never merely slavish but *always inclines toward its opposite, originality or invention*,"[13] I do not see this as a paradox, but rather the aim of creativity. Authors

[11] Gerhard Joseph, "Charles Dickens, International Copyright, and The Discretionary Silence of Marin Chuzzlewit" in *The Construction of Authorship* (Durham and London 1994), 267. Joseph conferring with what Thomas McFarland has stated.
[12] *Ibid*, 531 (emphasis mine).
[13] *Ibid*.

and artists (all creatives) do not imitate for imitation's sake. Rather, artists imitate and borrow to create something of their own. The underlying principle here is that artists *add* their ideas, talent, skills, ingenuity, and perspective to whatever has been imitated or borrowed. For example, Wilson Pickett borrowed from and, in some cases, imitated James Brown. Nonetheless, Wilson Pickett had his own style and sound that was original and recognizable.

The Romantic Poets' Lazy-Man's Concept of Originality

Or, the Concept of Originality In Which You Do No Work, Nobody Copies, and Everything Is Just Individual Vibes When You're Born With It.

***Creatio* vs. *Inventio*:**

Divine Arrival vs. Work: Two Opposing Cultural Theories of Originality

If we pay careful attention to the hustle that the Romantic poets ran on the world, we see that what lies at the heart of the Romantic poets' conception of originality and creativity is the notion that art is not achieved through work and a cultivation of talent, but rather something that descends upon the chosen individual in divine fashion. And also because of the Romantics, we are further led to believe that the mastery of art is something that has little to do with actual work, the idea being that you either have it (were born with it) or you don't. In other words, if you don't already have it, you can't *work* to achieve or improve it.

Here, it's worth looking at the two opposing cultural theories of originality: *Creatio* and *Inventio*. The Romantic poets' idea of originality and creativity rested in stark contrast to what originality is and how creativity actually works. To understand this contrast and how (why) it was created, we must first recognize that there are two conceptions of originality, *creatio* and *inventio,* and that these two conceptions of originality — along with other biases associated with art — have shaped our understanding of originality and creativity and, subsequently, added to our warped understanding

of authorship. *Creatio* is the Latin word for "creating," "producing," or "creation," and *inventio* is the Latin word for "invention" or "discovery." *Creatio* implies the creation of something from *nothing*. It's the idea that a creator (author) produces their work solely from within themselves or from a divine-like, supernatural, intangible force[14] that overtakes and works *through* them. *Creatio* "reflects this idea of originality as having no source but the poet himself. In this way, *creatio* is associated with neither hard work nor skill, but with an unconscious force that results in a work *free of any borrowed elements*. It is a process by which all ideas spring from the 'individual soul' and 'the imagination creates its ideas…from nothing!'"[15]

To the Romantic poets, the ability to achieve (the state of) creatio was something a poet either had or didn't have from birth; it was the belief that originality is a natural, unlearned gift. Moreover, the Romantic poets believed that this natural gift of originality, specifically poetic genius, was a gift "that only a select number of individuals possess." Further, as argued by the Romantic poet Samuel Taylor Coleridge, this theory of originality specified that creative genius may be cultivated, even improved, but it could never be learned, and that "true" creative imagination, i.e. originality, is only a gift.[16] Lastly, the Romantic poets defined original genius as "the talent for producing works that are *independent of the ideas and expressions of others*."[17]

Of course, this is a con job. It's creative protectionism plain and simple. It's also the sort of thing that fuels the genius trope of our day— even if the genius trope is, more often than not, misplaced. Are there exceptionally talented authors (creators)? Yes. Are there

[14] Creatio is also hailed as a supernatural force that is channelled through the poet, where the poet is not the source but the 'prophet' of a higher creative power." See Millen, 97-98 (emphasis mine).

[15] Millen, 96 (emphasis mine).

[16] Samuel Taylor Coleridge, *Biographia Literaria* (J. M. Dent & Co, 1906) 166. See Samuel Taylor Coleridge, Biographia Literaria (1817), Project Gutenberg's Biographia Literaria, by Samuel Taylor Coleridge (2014) www.gutenberg.org Title: Biographia Literaria Author: Samuel Taylor Coleridge Release Date: July, 2004 [EBook #6081] https://www.gutenberg.org/files/6081/6081-h/6081-h.htm; *see* also Millen, 96.

[17] Millen, 92; *see* also: (note 8) Immanuel Kant, *Critique of Judgement* (J H Bernard trans, Hafter Press, 1951) 150 [trans of Kritik der Urteilsckraft (first published 1790)], and (note 10) Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (Oxford University Press, 1973) (emphasis mine).

talented authors (creators) more talented than others? Absolutely. But the idea that originality is merely a gift bestowed at birth to a certain few defies reality. The idea that genius, or rather that exceptional talent is brought into existence *without* borrowing, without any skill or hard work is ridiculous. Even among validated geniuses like Mozart, we find the presence of learning, hard work, talent, and borrowing. Mozart was not "unlearned," nor was his music the product of someone who worked very little at his art form and trade. Even though Mozart was undeniably a genius, music was still something that he *worked* hard at. He himself made this quite clear:

> "It is a mistake to think that the practice of my art has become *easy* to me. I assure you, dear friend, *no one has given so much care to the study of composition as I*. **There is scarcely a famous master in music whose works I have not frequently and diligently *studied*.**" [emphais mine][18]

You don't "frequently and diligently study" the works of master musicians (or any other artists and writers) and *not* learn and borrow from them in the process. And after "frequently and diligently studying" the master artists and learning and borrowing from them, you don't come away from all of that *without* imitating them to some degree. Mozart understood and embraced this fact. Mozart recognized that the musician (the author) is never *wholly* individualized; that the musician's — the author's — discourse can never be attributed to him *alone*; that one comes up with ideas all on his own, but rather through combining what we learn and borrow from others with our own specific ideas, talent, and ingenuity.

The German philosopher, theologian, poet, and literary critic Johann Gottfried Herder spoke of this when he completely dismantled the Romantic poets' concept of originality and observed

[18] "Spoken in Prague, 1787, to conductor Kucharz, who led the rehearsals for Don Giovanni, from Mozart: The Man and the Artist, as Revealed in his own Words by Friedrich Kerst, trans. Henry Edward Krehbiel (1906)." QuotePark.com (see wikiquotes) https://quotepark.com/quotes/1747009-wolfgang-amadeus-mozart-it-is-a-mistake-to-think-that-the-practice-of-my-a/; see also: Maria Popova, "Mozart on Creativity and the Ideation Process," Brain Pickings (February 24, 2015) https://www.brainpickings.org/2015/02/24/mozart-on-creativity/ (emphasis mine).

that "if the imagination is without consciousness and understanding, the poet is only a raging dreamer." And Millen added to this, noting that "order and unity *must* be used to contain the poet's original creative energy;" that it is the "combination of 'talent and much reading' that makes 'creative power and intellectual energy wrestle as in a war embrace.'"[19] "Talent and *much reading*" is a recognition that imagination and talent alone are not sufficient; one must also have skill, and to acquire skill one must learn and study — reading is *work*! Of course, this undermines the myth that originality is a *natural*, completely individualized occurrence that is free of work and essentially a special power given only to a chosen few. In this paradigm, the "gift" of originality ignores the role that work plays in originality and creation. And while talent *is* indeed a gift[20] — one that comes with the responsibility of cultivating it — originality is not. Originality requires work.

Michelangelo, the famed Italian sculpture and poet whso lived and created art *200 years before* the Romantic poets invented their sham conception of originality and creativity, was adamant about the work that is required by an artist. A careful reading of Michelangelo's writing on the subject of his art reveals that what was at the heart of his creative process was a rigid notion of work:

> If people knew **how hard I had to *work*** to ***gain*** my mastery, it would not seem so wonderful at all. [emphasis mine][21]

Here, Michelangelo is declaring that he *had* to "work" to "gain" his "mastery." It was not a "gift" *given* to him.

There's also this:

> The sculpture is already complete within the marble block, before

[19] Millen, Jessica Millen quoting and building upon Frederick Burwick from *Poetic Madness and the Romantic Imagination* (Pennsylvania State University Press, 1996) 27 (emphasis mine).

[20] Where art is concerned, the "gift" of talent is basically the capacity to create — and we can all create. But this capacity must be worked at and nurtured. In other words, the gift is not art that arrives from nowhere, but rather the capacity to shape the imagination that comes from somewhere.

[21] Michelangelo.

> I start my ***work***. It is already there, ***I just have to chisel away*** the superfluous material. I saw the angel in the marble and ***carved until I set him free.***[22]

Here, Michelangelo literally describes his artmaking as "work." Something completely at odds with the Romantic poets' notion of the divine arrival of their gift. Michelangelo further described the process of bringing his imagination to fruition as a simple matter of "chiseling," working his way through to what he saw (imagined) in the marble. For Michelangelo, work is what brings forth the image in his head. In other words, work is a large part of the process of creativity. What Michelango did not say was that his artwork was a gift that arrived from nowhere. And there's also this:

> The true ***work*** of art is but a shadow of the divine perfection. [emphasis mine][23]

In other words, for Michelangelo, the truth about art is that it is work that is imperfect as compared to the perfection of divine creation. "Yet," Michelangelo once exclaimed, "*I am always learning*."

And this:

> The greatest artist does not have any concept
> Which a single piece of marble does not itself contain
> Within its excess, though only **A *hand* that obeys the *intellect* can *discover* it.** [emphasis mine][24]

Said differently, an artist must have talent *and* skill, both the "intellect" and "the hand," in order to create and "discover" something original.

[22] Michelangelo.
[23] Michelangelo.
[24] Michelangelo Buonarroti, *I Sonetti Di Michelangelo: The 78 Sonnets of Michelangelo* with Verse Translation (emphasis mine).

Finally:

> It is *necessary* to keep one's compass in one's eyes and *not* in the hand, for the hands execute, **but the eye judges**." [emphasis mine][25]

Here, Michelangelo reveals something that every creative knows: Learned experience teaches you about the duality of the execution of art, that art *requires* talent, skill, *and* work.

***

Both Michelangelo and Mozart are recognized today as geniuses, just as they were recognized as geniuses in their own the time. One parallel among these two geniuses is how self-aware they were about the "work" that went into the "mastery" of their art. Another parallel is that both men deflected the recognition of genius. Michelangelo and Mozart resented the idea that their work was given to them, or that it came "easy" to them.

Inside the world of sample-based hip hop/rap music, we recognize that beatmaking giants like Marley Marl, DJ Premier, RZA, Dr. Dre, Pete Rock, Q-Tip, J Dilla, and Alchemist mastered their art only after lots of work and "frequent and diligent study" of the masters in hip hop/rap music production. Many of those looking at the art of sampling from the outside often hold the misconception that sampling is "easy." But it's not "easy" to create feeling within art. It's not easy to sculpt life-changing songs from small pieces of other songs, pieces that are, in many cases, not even 2 seconds long. It's not easy to create soundtracks to people's lives much in the way countless sample-based hip hop/rap songs have done. Classic art — and here I'm referring to all art that stands the test of time, i.e. continues to move and enlighten people — is not the work of happenstance and simple parlor tricks, it's the culmination of the processes of learning and mastering what the artist has learned.

The Romantic poets copped out of this responsibility because they found themselves stuck between two master classes of poets:

[25] Michelangelo (emphasis mine).

Those who came before them and the new writers who were quickly emerging around them. So the Romantic poets used originality — their warped idea of originality — as a defense mechanism. They twisted the concept of originality to preserve their status in society and to cope with their own creative anxiety and fear of emerging competition.

There is a similar parallel at play with traditional musicians and sample-based hip hop/rap musicians. For years now, many within the hip hop/rap music beatmaking community have referred to non-sampled based beats as "original." Ergo, sample-based beats lack "originality." Ergo, sample-based beats lack creativity. Ergo, sample-based musicians are not "real" musicians. But these value judgments are terribly misplaced. And as Michelangelo once said, "*Why do You Send Fools To judge My Work?*"

T. S. Eliot's Glorious Takedown of the Romantics' Idea of Originality

For our discussion about originality, which includes: 1) The two concepts of originality, *invetio* and *creatio,* and the Romantic Poets' idea of originality as a value[26]; 2) What originality tells us about the work of the artist; and 3) The role that borrowing plays in the creative process, T. S. Eliot's 1916 essay "Tradition and the Individual Poet" is particularly instructive. Looking at why (or when) we typically praise a poet and how it speaks to the misleading idea of wholly individualized originality, Eliot, the renowned poet, essayist, publisher, playwright, and literary critic, noted that:

> we might remind ourselves that criticism is as inevitable as breathing, and that we should be none the worse for articulating what passes in our minds when we read a book and feel an emotion about it for criticising our own minds in their work of criticism! **One of the facts that might come to light in this process is our tendency to**

[26] Millen, 92.

> **insist, when we *praise* a poet, *upon those aspects of his work in which he least resembles anyone else*. In these aspects or parts of his work we pretend to find what is *individual*,** what is the peculiar essence of the man. **We dwell with satisfaction upon the poet's *difference* from his predecessors, *especially his immediate predecessors*; we endeavour to find something that can be isolated in order to be enjoyed.** Whereas if we approach a poet ***without this prejudice* we shall often find that not only the best, but *the most individual parts of his work may be those in which the dead poets, his ancestors, assert their immortality most vigorously*.**
>
> Yet if the only form of tradition, of handing down, consisted in following the ways of the immediate generation before us in a blind or timid adherence to its successes, "tradition" should positively be discouraged. We have seen many such simple currents soon lost in the sand; and novelty is better than repetition. **Tradition is a matter of much wider significance. It cannot be inherited, and *if you want it you must obtain it by great labour*. It involves, in the first place, the historical sense, which we may call nearly indispensable to anyone who would continue to be a poet beyond his twenty-fifth year; and the historical sense involves a perception, not only of the pastness of the past, but of its presence;** the historical sense compels a man to write not merely with his own generation in his bones, but with a feeling that the whole of the literature of Europe from Homer and within it the whole of the literature of his own country has a simultaneous existence and composes a simultaneous order. *This historical sense, which is a sense of the timeless as well as of the temporal and of the timeless and of the temporal together, is what makes a writer traditional.*
> **And it is at the same time what makes a writer most acutely conscious of his place in time, of his contemporaneity.**"
> [emphasis mine][27]

Having read these passages, all we need to do is replace the word "poet" with "artist"or even "creative," and the case for the *inventio* concept of originality and the necessity of borrowing that T. S. Eliot alludes to becomes more clear. First, Eliot noted that tradition is not something that *automatically* covers us. You can be *born into* a tradition, as it were; for example, your country of birth, your musical or literary family, etc. But you cannot "inherit" tradition.

[27] T. S. Eliot, "Tradition and the Individual Talent," *The Egoist* in 1919.

If you want to be a part of the tradition, i.e. if you want take place in a given tradition and make your own place *within* that tradition, you gotta work at it, "you **must obtain it by *great labour.*"** This is the first time in "Tradition and the Individual Talent" that Eliot points to work, "great labour", as a requirement for being part of a creative poetic tradition, as well as being original within that tradition. For Eliot, creativity was a process, and *inventio* was the concept of originality that he aligned himself with.

Eliot further went on to describe what the *work* of being part of a tradition involves:

> It involves, in the first place, the **historical sense**, which we may call nearly indispensable to anyone who would *continue* to be a poet beyond his twenty-fifth year; and the historical sense involves a perception, not only of the pastness of the past, but of its presence; the historical sense compels a man to write not merely with his own generation in his bones, but with a feeling that the whole of the literature of Europe from Homer and within it the whole of the literature of his own country has a simultaneous existence and composes a simultaneous order. **This historical sense, which is a sense of the timeless as well as of the temporal and of the timeless and of the temporal together, is what makes a writer traditional.** And it is at the same time what makes a writer most acutely ***conscious*** of his place in time, of his contemporaneity. **No poet, *no artist of any art, has his complete meaning alone.*** …. Whoever has approved this idea of order, of the form of European, of English literature, will not find it preposterous that **the past should be altered by the present as much as *the present is directed by the past.*** And the poet who is aware of this will be aware of ***great difficulties and responsibilities***." ." [emphasis mine][28]

Notably, one important thing that Eliot says this work involves is having a "historical sense." This, he tells us, is "indispensable." But the historical sense is not a given thing. The historical sense is not something bestowed upon only a few chosen artists. To continue as an artist, you must engage with this historical sense and develop a perception of its "presence" within today. In addition, you must be "conscious" of your place in time. You must recognize

[28] *Ibid*.

that the "present is *directed* by the past," and that "**no artist of any art, has his complete meaning *alone.***" Ergo, you cannot avoid the influence of the past, nor can you create new art without borrowing from old (existing) art. All of this is work.

Genius or not, like Mozart and Michelangelo, no artist can skip out on this labor. Artists are directed and shaped by the past, so as a matter of course, artists are compelled to borrow from the past. Taking from existing works (and their creators) and using these takings for the purpose of creating new works completes the circle of creation. Recognizing this — embracing all of the work that goes into creating and being the artist "who is aware of this" — means accepting the reality that creating new art comes with "great difficulties and responsibilities." To "absorb knowledge," Eliot pointed out, means the **"more tardy" among us "must *sweat* for it."** Learning from other artists is necessary, and becoming a student of your influences is part of the deal: "**Shakespeare acquired more essential history from Plutarch than most men could from the whole British Museum.**"[29] Eliot's preoccupation with the work that the artist must do strikes against the core of the Romantic concept of *wholly individualized* originality. For Eliot, it was obvious that new art comes from the work of blending ideas — *and pieces of works* — from other artists with an artist's own ideas, skill, talent, and ingenuity. New art does not come from the individual artist *alone*, as the Romantic poets proclaimed. The artist is not formed wholly alone; therefore, the artist's originality is never formed wholly alone.

For Eliot, "the importance of the relation of the poem to other poems by other authors," was key. His suggestion that "the conception of poetry *as a living whole* of all the poetry that has ever been written," is instructive to our recognition and understanding that the artist works within a continuum, not a vacuum. Said differently, the relation of art works (writings, music, paintings, etc.) to other art works by other artists makes it impossible for originality to be wholly individualized. Moreover, this relation ensures that borrowing always takes place. Here, it should be noted

[29] *Ibid* (emphasis mine).

that within the *work* paradigm of the artist, the need for the artist to develop a historical sense, and the fundamental relation of art works to other art works by other artists, Eliot also alluded to the depth of borrowing that the artist must engage in:

> **What is to be insisted upon is that the poet *must develop* or procure the consciousness of the past and that he should continue to *develop* this consciousness throughout his career.**
>
> What happens is a continual surrender of himself as he is at the moment to something which is more valuable. **The progress of an artist is a continual self-sacrifice, *a continual extinction of personality.*** [emphasis mine][30]

In other words, the artist's borrowing from the past is so extensive, so overwhelming, so unavoidable that the progress of the artist is predicated upon what the artist *learns* and *borrows* from the past. And within this paradigm — within this "sacrifice" — the artist's individualization, the artist's own "personality," becomes depersonalized. By "personality," Eliot did not mean what we commonly understand to be a personality, i.e. someone's character traits. Rather, what Eliot meant was that "the poet," the artist, "has, not a 'personality' to express, but a *particular medium*, which is *only* a medium and not a personality."[31] In other words, the art work itself is of a *tradition,* a form, a style; it is not the province of one person's personality. Hence, when the artist creates, the artist gives himself (his creative self) over to a *particular tradition* in order to do so. This means that the artist can transform history only when the artist is transformed by history in exchange. To illustrate this phenomenon and the relationship between the past (tradition) and the artist, Eliot pointed to a "suggestive analogy":

> [T]he action which takes place **when a bit of finely filiated platinum is introduced into a chamber containing oxygen and sulphur dioxide….**
> When the two gases previously mentioned are mixed in the presence of a filament of platinum, they form sulphurous acid. This combina-

[30] *Ibid*.
[31] *Ibid* (emphasis mine).

> tion takes place *only if the platinum is present*; nevertheless the newly formed acid contains no trace of platinum, and the platinum itself is apparently unaffected; has remained inert, passive and unchanged. ***The mind of the poet is the shred of platinum.*** It may partly or exclusively operate upon the experience of the man himself; but, *the more perfect the artist, the more completely separate in him will be the man who suffers and the mind which creates*; the more perfectly will the mind digest and transmute the passions which are its material. The experience, you will notice, the elements which enter the presence of **the transforming catalyst.**
>
> If you compare several representative passages of the greatest poetry you see how great is the variety of *types of combination*, and also how completely any semi-ethical criterion of "sublimity" misses the mark. **For it is not the "greatness," the intensity, of the emotions, the components, but the intensity of *the artistic process*, the pressure, so to speak, *under which the fusion takes place*, that counts.** [emphasis mine][32]

Under Eliot's "transforming catalyst" analogy, the artist is the catalyst that, by *mixing with the past*, transforms the past into something new. In other words, something new can only be created when the artist borrows from the past; and the past can only be transformed into something new *when* the artist borrows from it.

Towards the end of "Tradition and the Individual Poet," Eliot made another critical observation about the work of the artist:

> **The *business* of the poet is not to find *new* emotions, but to use the ordinary ones and in *working them up* into poetry….There is a great deal, in the writing of poetry, which must be *conscious and deliberate*.** [emphasis mine][33]

Here, again, Eliot was making the case for the *inventio* concept of originality while blasting the *creatio* concept of originality held by the Romantic poets. First, Eliot notes the "business" of the poet. There is nothing *natural* about business. Business does not occur by divine intervention, nor is business reserved for a chosen few at birth. To effectuate business is to *work*, to do something "conscious

[32] *Ibid*.
[33] *Ibid*.

and deliberate." Business is not an activity of the passive observer. To conduct business, to be successful at business, one must study the business that they are in as well as the businesses of others. Ergo, the artist must study the works of other artists, especially those artists working from within the same tradition. Next, Eliot reminds us that there aren't any "new" emotions. Limited by this fact, the poet most "work" up existing emotions "*into* poetry." Put differently, the poet must borrow from old emotions in order to create new *expressions* of those old emotions via the *medium* of poetry. Within this spectrum, it is impossible for originality to be wholly individualized.

Fittingly, Eliot ended "Tradition and the Individual Talent" with this:

> This essay proposes to **halt at the frontier of *metaphysics* or *mysticism*, and confine itself to such *practical conclusions* as can be applied *by the responsible person* interested in poetry.** [emphasis mine][34]

In other words, Eliot was saying that the "metaphysical" and "mystical" have no place in the discussion of originality, because originality is in fact much more pratical (simple) than that.

Lastly, it should also be noted that Eliot's fatal blow to the Romantic poets' idea of originality doesn't come from his essay "Tradition and the Individual Talent," but rather his 1920 essay on the playwright Philip Massinger:

> "One of the surest of tests is the way in which a poet *borrows*. **Immature poets imitate; mature poets steal**; bad poets deface what they take, and **good poets make it into something better, or at least something different.** *The good poet welds his theft into a whole of feeling which is unique,* ***utterly different from that from which it was torn;*** the bad poet throws it into something which has no cohesion. **A good poet will usually borrow from authors *remote in time*,** or alien in language, or diverse in interest." [emphasis mine][35]

[s] *Ibid*.

[35] T.S. Eliot, "Philip Massinger," *The Sacred Wood: Essays on Poetry and Criticism* (1920).

Regarding Eliot's implicit discussion of transformation, things like "the way in which a poet borrows" and "make it into something utterly different" sound an awful lot like the required threshold for the transformative sub-factor of the first factor of fair use. And Eliot's declaration that "[a" good poet will usually **borrow from authors *remote in time*,** or alien in language, or diverse in interest," echoes the activity of sample-based beatmakers (producers) who borrow from old songs and other sound recordings.

What Herder, Mozart, Michelangelo, and Eliot all testify to is the cultural theory of originality known as *inventio*. In contrast to *creation* — the cultural theory of originality and creativity which reflects creation as something brought into existence from nothing, i.e. entirely new, divine intervention, etc. — *inventio* reflects creation as the **rearrangement of *existing* parts**.[36] (Sound familiar? The art of sampling falls under *inventio*). *Inventio* represents the composition of new works through the use of existing raw material. Raw material being defined as any number existing factors: Existing works, existing aesthetics, existing cultural habits, and, of course, existing ideas. In this way, *inventio* positions borrowing as a fundamental part of creativity.

Inventio also asserts three other important facts. First, when it comes to originality and creativity, borrowing from existing works is unavoidable — it is a fact of all creative activity. Second, skill and hard work do indeed factor into creativity, regardless of talent. Third, the process of creativity is *learned*, it is not a gift granted to a chosen few at birth. So while *creatio* is unrealistic and impractical, *inventio* is realistic and practical, the "inevitable" result as Millen puts it. Which is precisely why it's the "more pragmatic understanding of originality."[37] Despite this reality, however, many people today subscribe to the Romantic ideal of originality, imagination, and creativity. But here's the rub: Most people today recognize that talent, skill, and hard work play a vital role in originality and creativity. This is because even when an idea does strike us, whether in a fit of inspiration or during a routine

[36] Millen, 99 (emphais mine).
[37] *Ibid*, 99, 94, 30.

trip to the grocery store, we still have to rely on our capabilities, sensibilities, tastes, and other factors in order to bring that idea to fruition. But where these same people draw the line is at *borrowing*. As if borrowing from the works of others isn't among the required variables that make up the equation of originality and creativity.

T.S. Eliot also spoke of the "unconscious" quality present in the ideal of originality as *inventio*. Jessica Millen has suggested that the Romantic poets shared Eliot's perspective:

> **Although *inventio* connotes hard work and wide knowledge, Eliot argues that originality 'does not happen consciously or of deliberation' and therefore shows that *inventio* also requires the poet's creativity to have an 'unconscious' quality.** This perspective concerning originality as *inventio* is shared by the Romantic poets. [emphasis mine][38]

Here, I believe Millen misinterpreted what Eliot was saying. In referencing Eliot's quote "…does not happen consciously or of deliberation," Millen misapplied what Eliot actually wrote, and she left out the context from which she pulled this quote. Eliot didn't say that "originality" requires an unconscious quality. In the full passage, which Millen omitted, it's clear that Eliot was writing about how the act of "*concentration*" operates *within* the work — "the business" — of the poet, particularly the fact that is an "inexact ***formula***." This is *not* how the Romantics saw the "unconscious" factor. Here's the full passage from Eliot:

> **The business of the poet** is not to find new emotions, but to use the ordinary ones and in ***working them up into* poetry**, to express feelings which are not in actual emotions at all. And emotions which he has never experienced will serve his turn as well as those familiar to him. Consequently, we must believe that "emotion recollected in tranquillity," is ***an inexact formula***. For it is neither emotion, nor recollection, nor, without distortion of meaning, tranquillity. ***It is a concentration, and a new thing resulting from the concentration,*** of a very great number of experiences which to the practical and active person would not seem to be experiences at all; ***it is a concentration which does not happen consciously or***

[38] Millen, 101.

> ***of deliberation.*** These experiences are not "recollected," and they finally unite in an atmosphere which is "tranquil" only in that it is a *passive* attending upon the event. Of course **this is not quite the whole story. There is a great deal, in the writing of poetry, which must be conscious and deliberate.** In fact, the bad poet is usually unconscious where he ought to be conscious, and conscious where he ought to be unconscious." [emphasis mine][39]

Here, Eliot is talking about passive learning and the way that it affects our concentration. Think of a student earnestly trying to learn a new language and, as a major part of that work, he "listens" to the news in the language that he's trying to learn *while* doing something else, like cooking, cleaning, writing, whatever. While things are inevitably picked up passively — things like new words, expressions, pronunciation, and critical nuances — concentration is taking place nonetheless. Later on, what has been gained in these moments of passive learning finds its way unconsciously into the speech and writings of the student. Residual originality works exactly in the same way. A poet (an artist) gathers through his own experiences and the experiences of others, and both sets of experiences show up during the creative process, most often consciously and deliberately but also unconsciously.

This is not how the Romantics saw it, and Eliot understood that. The Romantics' perspective of the "unconscious" was a major driver of their obsession with originality. The Romantics saw the "unconscious" as akin to divine intervention, something that was wholly individualized. The Romantics did not see the "unconscious" as something gathered from passive learning, something used in "the business of the poet." So contrary to Millen's assertion, the Romantics did *not* "share" Eliot's perspective on the unconscious in originality, they believed quite the opposite in fact. Thus, under Eliot's perspective of the unconscious *at work* in originality and Eliot's ideal of *inventio*, there are no "points of difficulty and contradiction," as Millen maintains, because the unconscious, in the context of Eliot's discussion, is actually the product of passive learning under the rubric of "concentration."

[39] T. S. Eliot, "Tradition and the Individual Talent," *The Egoist* in 1919.

Flipping "Golden Apples in Silver Dishes"

Our preoccupation with originality also derives from the idea that creativity itself is an individual endeavor. In part, this is true. However, an individual's creativity cannot take place without exposure to and engagement with past (existing) creative works. So when we speak of individual creativity, we're really speaking about the individualization of one's exposure and engagement with past (existing) creative works.

Still, even if the Romantic ideal of *creatio* and the Modernist ideal of originality as *inventio* both point to contradiction, or rather seek the same result — "a sense of novelty and originality that reflects the transcendent creative genius and skill"[40] of an artist — the idea that creativity never embodies an unconscious quality is hard to prove. But it's the preoccupation of originality via this unconscious quality dimension of creativity that's just as problematic as the obsession with originality itself.

Again, Millen has observed that our "strong possessiveness over ideas that stems from our obsession with individual innovation shows itself in our ongoing obsession with plagiarism, copyright and the public figure of the author."[41] If we drill down on this, we can replace "individual innovation" with "individual *genius,*" as our obsession with crowning someone as a genius runs parallel or is subject to our obsession with originality. And within the originality paradigm, specifically as it relates to creativity, a premium is always selectively placed on genius. But if the German poet, playwright, novelist, scientist, statesman, and critic Johann Wolfgang von Goethe was right in saying that Shakespeare created "golden apples in silver dishes," and that "[w]e get indeed the silver dishes by studying his works," what might we further say of those "golden apples" and "silver dishes"? In his description of the transformation of material borrowed from Shakespeare, Goethe was saying that with careful study of Shakespeare and his works, we may acquire the process, structure, and the know-how — the "silver dishes" — but we may

[40] Millen, 101 (emphasis mine).
[41] *Ibid*, 101-102.

typically find that we don't have the "golden apples" to put on those silver dishes, but rather just "potatoes."[42] In other words, absent the talent and skill of a Shakespeare, an artist can't create the greatness of a Shakespeare. Of course, in this description of Shakespeare, Goethe leaves out the fact that Shakespeare — arguably for some the greatest writer in the history of the English language — was one of the biggest borrowers of all time. Which means that a big part of what made Shakespeare great was his ability to borrow and transform what he got from the works of others.

The omission of Shakespeare's unapologetic and obvious borrowing aside (Shakespeare often borrowed from current events similar to way that writers of the hit television series "Law & Order" did), Goethe's description of Shakespeare makes an equally important statement, the same statement that Justice Story made: *That it's not only possible to build upon what we borrow, it's the only way that we can build anything at all.* So long as the artist has great skill, then might we not also consider some sample-based hip hop/rap songs as golden apples made in silver dishes? For example, take the song "Memory Lane (Sittin' In Da Park)" (1994) by Nas, produced by DJ Premier. The beat, which is comprised of three main elements — a recontextualization of a 3-second snippet of Reuben Wilson's song "We're in Love" (1971), drum programming, and a scratch-hook — is combined with the raps (poetry) of Nas. Altogether, "Memory Lane (Sittin' In Da Park)" points to what Goethe and Justice Story were both getting at. That via the creative skill of the artist(s) involved, something new and exceptional can indeed be created through the process of building upon something of material value already in existence.

Two Poles of Originality: The Modern Day

[42] Blanche Garren Icenogle, "A Study of the Value of The Tempest for Audiences and Readers — Elizabeth and Modern," (1960) *The Keep*, January 1, 1960 (Plan B Papers Student Theses & Publications) (Eastern Illinois University Press), 1: Icenogle quoting Gay Wilson Allen and Harry Hayden Clark quoting Goethe on Shakespeare in *Literary Criticism* (Chicago, 1941), 1455. *See also*: James Hirsh, "Samuel Clemens and The Ghost Of Shakespeare" *Studies in the Novel*, fall 1992, Vol. 24, No. 3, Brontë Clemens Conrad Faulkner Hardy Trollope (fall 1992), (Johns Hopkins University Press), 251-272.]

Understanding of Creativity

If we're being honest about the full extent of creativity, we must recognize that, to some degree, *creatio* and *inventio* overlap each other. Millen has noted that "*creatio* and *inventio* are not entirely separate from each other, and that all expressions of creativity lie *in the space between the two poles of originality***."** Like this, Millen observed that:

> [t]he understanding of creativity that we have inherited from the Romantic poets, including the ideal of originality, therefore has two forces working upon it — the burdensome pressure of **the cultural past and the uplifting power of the human imagination. It is the friction between these two forces that sparks creative inspiration,** and **the ongoing, mutually-transformative relationship between the two that develops a creative space** in which we continue to contribute both poetry and criticism to the cultural and literary dilemma of originality. [emphasis mine][43]

In terms of the "sparks of creative inspiration," what they are made of and how they visit the artist, I agree with Millen. The work, talent, and skill of the artist certainly comprise the bulk of the matter that makes up creativity. But the unconscious — which is the residue of the work, talent, skill, passive learning, and sometimes *chance* of the artist — rounds out the equation of creativity and imagination and renders a two-dimensional portrait of originality, something Millen calls the "two forces" at work in originality. I also agree with Millen in that the "ongoing, mutually-transformative relationship between these two forces" constitute a creative exchange between the cultural past and present, i.e. the continuum of the human imagination. However, I disagree with Millen on one point. I don't believe that today's artists view the cultural past the same way that the Romantics did. Today's artists don't look at the cultural pass as a "burdensome pressure."

[43] Millen, 101-102.

The Anatomy of Original Genius (aka the Author-Genius)

Now, let's turn to how the Romantic theory of original genius came to be. First, we should understand that the function of originality is parallel to the function of individuality. Which is to say, to create something distinguishable from mere imitation, or, as Thomas McFarland has said, "to avoid duplicates of what we had." But McFarland noted something important about the idea of genius in this paradigm. He observed that originality is "furthermore, closely bound up with the conception of 'genius,' which is itself an analogue of the unduplicatibility, always hope for even if only precariously real, of the individual."[44]

But how did genius get bound up in the Romantics' idea of originality? To understand this, we must recognize that the Romantics' idea of originality was actually a response to three things — three things that were really nothing more than the anxiety that Romantic poets had about competition with emerging writers.[45] The first thing was massive population increase. The second thing was the Industrial Revolution. And the third thing was an intense sense of competition with past and contemporary poets for cultural relevance. In other words, in the face of overwhelming cultural influence from the past, i.e. the shadow of the master writers who came before the Romantics and the ranks of *new* writers that were swelling fast, the Romantic writers *invented* a new concept of originality to help cope with their intensifying sense of creative

[44] McFarland, 451.
[45] *Ibid*, 457-459.

inadequacy and their fear of not being culturally relevant.[46] See the problem?

So let's get this straight. Where *creatio* is concerned, we have inherited an obsession with originality from a group of Romantic poets who: 1) Had a severe "burden of the past" complex[47], i.e. an inferiority complex with the great works that came before them; and 2) Had an anxiety of rising creative competition in their own time. And these two things were so crippling to the Romantic poets that it prompted them to concoct a goofy theory that basically says, *"Originality and the ability to create is a natural gift. And if you're not born with it, you don't have it."* What a hustle.

But wait, there's more. The Romantic poets had a "woe is me" attitude. In his aptly titled book, *The Burden of the Past and the English Poet*, Walter Jackson Bate talked about the "accumulating anxiety" that comes from competing with the past, and the question that it supposedly presents to the artist or poet: "*What is there left to do?* To say this has always been a problem, and that the arts have still managed to survive does not undercut the fact that it has become far more pressing in the modern world."[48] But the contradictions here are glaring.

---

[46] Romantic originality is a response to a historical context that included elements like growing mass industrialisation and an intensifying sense of competition with past and contemporary poets for cultural relevance. See Jessica Millen, "Romantic Creativity and the Ideal of Originality: A Contextual Analysis, in Cross-sections," *The Bruce Hall Academic Journal* – Volume VI, 2010, 92. See also Thomas McFarland, "The Originality Paradox," *New Literary History*, Spring, 1974, Vol. 5, No. 3, History and Criticism: I (Spring, 1974) (The Johns Hopkins University Press), 448-49. McFarland has noted that the effects of population increase on technology, consumerism, creativity, art, authorship lead to "[t]he intensification of the paradox arising from an alteration of relationship between the individual ego and its conditions of communality — an alteration that becomes clearly visible with the Romantic era — is a counterpart, both logically and historically, of a problem with regard to individual talent and the existence of intellectual tradition. Romantic egotism, which was a response to the palpable diminution of the meaningful self, is paralleled by the cultural rise of an emphasis on originality. The intensification marks out, as it were, an abscissa; and that of the individual/tradition problem an ordinate."

[47] Millen, 93-95: "Coleridge and his Romantic contemporaries were acutely aware of what Walter Jackson Bate terms 'the burden of the past', which poses a question that, as time passes, grows increasingly difficult to answer: 'What is there left to do?'… McFarland describes this phenomenon as an 'exponentially increasing deluge of culture' that weighs down upon all poets as 'an intellectual fear of inundation by masses of books."

[48] McFarland, 458: McFarland quoting Walter Jackson Bates from Bates's book *The Burden of the Past and The English Poet* (1970).

Bate argued that the burden of past art was so great that it produced an anxiety in artists, a "problem" that essentially reduced poets and artists to either routine imitation or creative paralysis. In the same breath, Bate concedes that artists have continued to make art during this same time; actually, he describes art as having merely "survived." After this illogical description of the progress of art, he centers the modern world — *his* world — as the world where this problem, the essential anxiety of the artist, is even "more pressing." Like the first Romantics, Bate takes the position then that the weight of the past makes little room for the present, and that artists are plagued by the anxiety of this.

Of course, this sets up the same solution that the first Romantics invented: A hyper emphasis on and warped concept of originality that is grounded in an illogical reimagining of the concept of wholly individualized talent. What also underscores Bate's "problem" and "solution" is the same apprehension that the first Romantics had with the past *and* population growth, industrialization, and technology. Thus, just as with the Romantics, Bate found the same "problem" and turned to the same "solution" in the face of past artists of cultural influence and the ranks of artists who were swelling fast in the twentieth century. Again, what was that solution? A twisted and contradictory idea of originality that allowed for the deflection of an intensifying sense of creative inadequacy.

Finally, with further regard to the effects of population increase on technology, consumerism, creativity, art, and authorship, we also see that Romantic period was marked by an unhappiness with the decay of humanism, the displacement of man at the "central position as the measure of all things," and a "sense of melancholy and self-diminishment." Poets like William Wordsworth were increasingly unnerved by advancements in technology and population growth. Wordsworth believed that these two factors combined to create what he called the "mighty city," a place where man's *individuality* was swallowed up — causing men to be "melted and reduced to one identity."[49] What emerged then in the Romantic period was a

49 McFarland, 449-50, footnotes 4-5: McFarland quoting from *The Prelude: A Parallel Text*, ed. J. C. Maxwell (Harmondsworth, Middlesex, 1971), I805-06 version, Book XII, 11. 201-02, p. 498; Book VII, 695-703, p. 292 (emphasis mine).

rebellion, a fight to restore man's individuality (which, according to the Romantics, had been lost) in a world that had become, in Wordsworth's words, a "blank confusion." For the Romantic poets then, the chief psychological parlor trick used to wage this fight was the manipulation of the concept of originality from something that had long been communal to something that was *originary*, i.e. the notion that originality arises wholly from the individual.

Reality Check: Imitation As a Constant of Genius

Like their idea of originality and original genius, the Romantics' idea of and view concerning originality relied on an illogical fallacy and a key contradiction. As I've stated elsewhere throughout this study, no artist, no creative, creates in a void. Instead, the artist, no matter their level of talent, skill, and imagination, is also the product of his influences. And by the default, the artist imitates, at various times, degrees, and in various ways, their influences. Prior to the Romantics, this was long recognized; in fact, the "imitation" of the great poets and other writers and artists was well established before the Romantic Period. But as the publication of Edward Young's *Conjectures on Original Composition* (1759) confers, the Romantics ushered in a transformation *away from* the mimetic tradition — i.e. a gradual change from imitation of the greats that came before — to a wholly individualized idea of originality.[50] But the illogical fallacy and blunt contradiction of the Romantics' idea originality is personified by Edward Young himself in both his *Conjectures on Original Composition* (1759) and earlier in his essay "On Lyrick Poetry" (1728).

Young says that to be original is to be individual, to *not* imitate — that originality "differs" from imitation. He further cautioned that genius always possesses an "*original spirt*." But Young also said that we *should* imitate! Further confusing the matter, Young adds, however, that we should not imitate the works of the artists that we imitate, but rather their motives and methods:

[50] McFarland, 451 and 452., also see note 11.

> [**I**]**n every work of Genius,** somewhat of **an *Original Spirit*** should be, at least, *attempted*; otherwise the *Poet*, whose Character disclaims *Mediocrity*, makes a *secondary* praise his ultimate ambition; which has something of a contradiction in it. ***Originals* only have *true* Life, and differ as much from the best *Imitations*,** as *Men* from the most animated *Pictures* of them. Nor is what I say at all inconsistent with *a due deference* for the great Standards of Antiquity; nay, that very deference is an argument for it, for doubtless their *Example* is on my side in this matter. **And we should rather imitate their example in the general *motives*, and fundamental *methods* of their working, than in their *works* themselves.** [emphasis mine][51]

So the original "spirit" which is natural and free of imitation should be, in the end, "attempted." Huh? If it's a natural spirit, how can it be *attempted*? Moreover, how can an artist imitate another artist *without* imitating the work of the artist he is imitating? One artist cannot know of another arstist and *not* know his work. So it's impossible to imitate another artist without imitating his work. the "general motives" and "methods" are attached to the work itself. The gag in all of this is that Young (and the other Romantics) understood very well that imitation was necessary to creativity, and by proxy, originality. You can see it clearly in Young's own words; his double talk gives up the whole game. Young's detailed concept of originality actually includes "imitation." He urges that the artist imitate, even though the Romantic concept of originality is free of imitation. So for Young, it's clear that originality cannot exist without imitation. But imitation cannot exist without the artist borrowing. Ergo, originality cannot exist without borrowing. So part of the con job the Romantics ran was convincing people that originality is free of borrowing. See how this works?

[51] Edward Young, "On Lyrick Poetry," at Hrsg. von Scott Elledge, "Eighteenth-Century Critical Essays,". Bd. 1. 2. Aufl. Ithaca, N.Y. 1966.
Text: S. 410-415; Kommentar: S. 558-559. http://www.lyriktheorie.uni-wuppertal.de/texte/1728_young.html *See also*: Edward Young, "Ocean. An Ode."
Ocasioned by His Majesty's late Royal Encouragement of the Sea-Service.
To which is prefix'd, An Ode to the King: And a Discourse on Ode. By the author of the Universal Passion. London: Worrall 1728, S. 14-30.

Impact of Technology On Originality: More Proof That Originality Is Never Wholly Individualized

Technology always removes certain restraints that had previously limited copying, production, and distribution. This fact, combined with the expansion of culture, which is often caused simply by population growth alone as well as the increase in the number of different channels that disseminate culture, should temper an obsession with originality. But much like the Romantics, some authors today (including musicians, writers, and other artists) turn to a hyper-emphasis on originality for two reasons. First, they do so as a means of trying to distinguish themselves inside of a so-called "deluge"[52] of culture. Second, they do so as a means of trying to stave off the masses from catching up with and overtaking them. This becomes especially clear when technology helps lead directly to a new art form like sampling— An art form where the hierarchical privilege of previous music traditions is rendered all but obsolete. This is why many traditional musicians tend to decry "lack of *originality*" when considering sampling. This despite the fact that the works of these musicians, like all traditional musicians, also rest on the borrowings of previous songs.

What we should also recognize is that new technology always stokes fear among artists who benefited from the restraints that lesser technology granted them. McFarland has spoken of a "fear of a "legion of books." A fear of new authors outside of those for whom they presumed that authorship was reserved.[53] This is a bourgeois concept of authorship. There is no such thing as "intellectual overproduction;" there is no limit to thought, nor is it possible to have a monopoly on thought. The fear of the Romantics was embedded in a class war, one in which intellectual leadership was at stake. More precisely, the class war of the Romantics was a war to keep intellectual leadership from control of the masses. Of course, this fear also speaks to *who* gets to create and *who* is meant

[52] McFarland, 453-54.
[53] *Ibid*.

to write books for society. Here, the prevailing thought related to originality and fear is that the masses, i.e. the commoners or those at the bottom of society, are not supposed to produce intellectual texts, especially not the kind which shapes cultre. The idea being that such activity is reserved for special groups, people (mostly men) of a higher class. This is echoes of who gets to make music and the unwritten class requirements associated with it. A retreat to originality, which was presumably accessible to the privileged, was the way that the Romantic authors sought to solidify their place as intellectual leaders of society and to hold off the onslaught of the "new masses" of authors (the *new* authors) that technology, i.e. the inventions of paper and the printing press, had ushered in.

But the fear-induced retreat to an emphasis on and a warped idea of originality is not simply a fear of an "inundation by masses" of new creative works, it's also about a fear of competition. Fighting to be an intellectual leader in society, which is really more about fighting to keep a lid on who gets to lead society as much as it is about who gets to create art, is one thing. Having to compete with new poets who can possibly outwrite you is another thing altogether. If we take the Romantic poets at their word, they were suffering from the burden of the cultural past. But when new artists create new great works, they join the giants of the cultural past. But that pathway becomes more difficult with increasing competition from the present. An the distortion of the idea of originality then becomes a mechanism for devaluing the *new* competition.

For example, we can even see this in the sampling tradition of hip hop/rap music. Early digital samplers, drum machines, and studio equipment were limited in terms of all of the functions, editing, and data storage tools at one's disposal. Chopping samples in the late 1980s to the mid-1990s was more difficult and required far more expertise. The limitations of the music production equipment of this specific era, which coincides with what is commonly known as hip hop/rap music's (second) Golden Era, sparked a rush of creativity and led to many of the fundamental practices that still shape the sampling tradition of hip hop/rap music today. On the other hand, today, music production and studio equipment

are much more advanced than those of the '90s. Today, one can produce, write, *and* record a song on his smartphone.

With such advancement in technology, and the democratization of the tools of production that coincides with it, it's inevitable that an increase in the number of beatmakers (producers) will follow. Therefore, developments in technology led to fear for some veteran beatmakers (producers) who had come up on earlier beat machines and studio equipment; and the same sort of fear is present with some new beatmakers (producers) who find themselves increasingly surrounded by other *newer* beatmakers (producers) *and* veterans. Facing what they see as a "deluge" of new competition, some members from both groups latch on to originality and distort its meaning, similar to the way the Romantic poets did to cope with their fear of competition.

All in all, whether it be literature, music, art, or any other creative activity, for many creatives today the emphasis on originality continues to be used much the same way that the Romantics used it: As a defense mechanism — in the "Freudian sense of defense mechanism — against the "exponentially increasing deluge of culture."[54] Ironically, however, this defense mechanism reveals the larger truth about originality. That originality is something that necessarily requires input from the culture that surrounds the artist; that originality is always the result of creative expressions thar borrow from and stand upon other creative expressions that came before it. Seen in this realistic, "responsible" light, we must recognize that any individual expression of originality is proof of the cultural realities that inspired and helped make it possible in the first place. The world doesn't have access to the originality of Shakespeare without first receiving the originality of the Roman poet Ovid or other great English authors Geoffrey Chaucer and Christopher Marlowe. We don't get to have the originality of Prince without first receiving the originality of Stevie Wonder; the originality of Quentin Tarantino without first receiving the originality of Sergio Leone; the originality of Dizzy Gillespie without first receiving the originality of Louis Armstrong; or the originality of J Dilla without

[54] *Ibid*, 454-455.

first receiving the originality of Marley Marl, DJ Premier, RZA, Pete Rock, and Q-Tip. There are different degrees of originality, of course, but originality is never "pure" because we are all borrowers. And this is one of the greatest truths of our cultural reality. What makes the art of sampling such a powerful art form is precisely the fact that sample-based beatmakers (producers) embrace this reality of borrowing. Sample-based beatmakers (producers) embrace the fact that the artist is never entirely alone, that the artist feeds off of his ability to recreate from and build upon existing works.

The Artist Is Never Alone

Scholar and literary critic Thomas McFarland has noted that, "[i]n the mind of the artist a sort of chemical reaction is set going by the clash between his individual sensibility and already existing art. *He does not find himself all alone* with the world before him; in his relations with the world there always intervenes, like an interpreter, the artistic tradition…"[55] McFarland's observation points to something interesting about the way people talk about "original" works. People often speak of original works as if they arrived untouched by past influence, or that "original" works contain no borrowed pieces of other works. In this spectrum of hyper-originality, there's an insistence on originality at the expense of the fundamental realities of permissive borrowing in the creative process. The artist desires to be in league with past artists of note. But at the same time, the artist wants to distinguish himself, both from the past and especially in the present. It is here where the artist often denies the role of permissive borrowing — an acknowledgement of the processes that have aided his own work — and pretends that the *difference* that may be found in his work, no matter how minor, demonstrates originality. To deny permissive borrowing is to assert that the artist is alone when creating. But the artist is never alone, figuratively speaking. Any insistence otherwise is a denial of the cultural reality that surrounds him.

[55] *Ibid*, 455.

The reverence for originality *within* tradition is another area where the art of sampling stands out. Earlier in this chapter, I mentioned this T.S. Eliot quote: "We dwell with satisfaction upon the poet's difference from his predecessors, especially his immediate predecessors; we endeavour to find something that can be isolated in order to be enjoyed. Whereas if we approach a poet without this prejudice *we shall often find that not only the best, but the most individual parts of his work may be those in which the dead poets, his ancestors, assert their immortality most vigorously.*"[56]

In the sampling tradition of hip hop/rap music, beatmakers (producers) always speak of tradition; in doing so, originality is linked to the understanding and mastery of the tradition, which sample-based hip hop/rap beatmakers (producers) express through sample-based beats that simultaneously incorporate and build upon the tradition. Musicians in the sampling tradition of hip hop/rap music do not dwell on the *difference* from their predecessors, even though differences are certainly observed. What takes place in the hip hop/rap music tradition is the celebration of the parallels found between predecessors and the present beatmakers (producers). And within this paradigm, unique individualizations are always championed as well.

"There Never Was an Original Writer": Emerson's Contradiction and Why the Road to Originality Always Passes through Borrowing

Ralph Waldo Emerson, the famed nineteenth century American poet, essayist, lecturer, and philosopher, was a staunch individualist and originality cultist who couldn't get out of the way of his own contradictions about the concept of originality. Remarkably, in "Spiritual Laws," an essay from his seminal collection *Essays: First Series* (1841), Emerson extols the individuality of man and props up the Romantic concept of originality, the *originary* myth wherein originality emanates from the individual alone, while simultaneously upholding the truth of originality:

[56] T. S. Eliot, "Tradition and the Individual Talent," *The Egoist* in 1919 (emphasis mine).

> "**What a man does, that he has.** What has he to do with hope or fear? In himself is his might. Let him regard no good as solid but **that which *is in his nature* and which must *grow out of him*** as long as he exists. The goods of fortune may come and go like summer leaves; let him scatter them on every wind as the momentary signs of his infinite productiveness.
>
> He may have his own. **A man's genius, the quality that differences him from every other,** the susceptibility to one class of influences, **the selection of what is fit for him,** the rejection of what is unfit, determines for him the character of the universe. **A man is a method, a progressive arrangement; a selecting principle, gathering his like to him wherever he goes. He takes only his own out of the multiplicity that sweeps and circles round him.**"
> [emphasis mine][57]

For Emerson, each man's existence is unique — "individual" — so it follows that "what a man does, that he has," his "genius," and what is *within* man is natural, "in his nature;" and thus, what grows "out of him" is then equally *natural*. This is the *originary* concept of originality. However, Emerson's (borrowed) mental gymnastics about individualism couldn't extinguish the truth about originality, even if he lays it on heavy about individualism. In his "IV: Spiritual Laws," he paints a sobering portrait of the "truth" of originality in his "Chaucer" lecture of 1835:

> "**The truth is all works of literature are Januas faced and look to the future and to the past. Shakespear [sic], Pope, and Dryden *borrow* from Chaucer and shine by his borrowed light.** Chaucer reflects Boccacio and Colonna and the Troubadours; Boccacio and Colonna elder Greek and Roman authors, and these in their turn others is only history would enable us to trace them. ***There never was an original writer.*** Each is a link in an endless chain. To receive and impart are the talents of the poet and he ought possess both in equal degrees. He is merely the marble mouth of a fountain into which the waters ascend and out of which they flow. This is but the nature of man, universal receiving to the end of universal giving."
> {emphasis mine][58]

[57] Ralph Waldo Emerson, "IV: Spiritual Laws," *Essays: First Series* (1841).
[58] Ralph Waldo Emerson, "Chaucer" (1835), *The Early Lectures of Ralph Waldo Emerson*, 1833-1836, 284.

McFarland has observed that Emerson situated "the originality paradox" as "a truth of culture."[59] I agree. In reality, the foremost truth about originality is that it *is* a paradox. An artist cannot be "original" without the influence of the culture around him. And individual talent, to whatever degree, cannot emerge *without* borrowing from others. In this way, originality and individual talent co-exist interdependently with each other. Moreover, the self-reliance of individuality is not isolated. To rely on one's self is to engage, to a lesser or greater extent, with everything one's mind has recorded. No idea, no expression of an idea, is born from nothing.

Further to the discussion of self-reliance, philosopher Friedrich Nietzsche was emphatic in his belief that:

> "originality and intellectual self-reliance existed *side by side* with an equally emphatic avowal of relationship to precursor: 'I am totally amazed, totally enchanted! I have a precursor, and what a precursor! I hardly knew Spinoza: that I should have turned to him just now was inspired by 'instinct.' Not only is his whole tendency like mine…but in five main points of his doctrine I recognize myself.'"[60]

In other words, originality is *indebted*, tethered even, to past works and the authors who created them. Emerson had much to say about this. So to drive this point home, here I will quote Emerson liberally from his essay "Quotation and Originality":

> "Our *debt to tradition* through reading and conversation is so massive, our protest or private addition so rare and insignificant," that "**there is no pure originality**. *All minds quote.* Old and new make the warp and woof every moment. There is no thread that is not a twist of these two strands. **By necessity, by proclivity, and by delight, *we all quote***. We quote not only books and proverbs, but arts, sciences, religion, customs, laws; nay, we quote temples and houses, tables and chairs. The Patent Office commissioner knows that all machines in use have been invented and re-invented over and over; that the mariner's compass, the boat, the pendulum, glass, movable types, the kaleidoscope, the railway, the power-loom, &c., &c., have been many times found and lost from Egypt, China, and Pompeii, down; that, *if we have arts which Rome wanted, so Rome had*

[59] McFarland, 461-62.
[60] *Ibid*, 463.

arts which we have lost; that the invention of yesterday of making wood indestructible by means of vapor of coal oil or paraffine, was suggested by the Egyptian method which has preserved its mummy-cases four thousand years….

If we confine ourselves to literature, 'tis easy to see that *the debt is immense to past thought.* None escapes it. *The originals are not original.* There is imitation, model, and suggestion, to the very archangels, if we knew their history. The first book tyrannizes over the second. Read Tasso, and you think of Virgil, read Virgil, and you think of Homer; and Milton forces you to reflect *how narrow are the limits of human invention.* The 'Paradise Lost' had never existed but for these precursors; and if we find in India or Arabia a book out of our horizon of thought and tradition, we are soon taught by new researchers in its native country to discover its foregoers, and its latent but real connection with our own bibles.

Read in Plato, and you shall find Christian dogmas, and not only so, but stumble on our evangelical phrases. Hegel pre-exists in Proclus, and, long before, in Heraclitus. Whoso knows Plutarch, Lucian, Rabelais, Montaigne, and Bayle, will have a key to **many *supposed* originalities**. Rabelais is the source of many a proverb, story, and jest, derived from him into all modern languages, and, if we knew Rabelais's reading, we should see the rill of the Rabelias river. Swedenborg, Behmen, Spinoza, will *appear* original to uninstructed and to thoughtless persons. **Their originality will disappear to such as are either well-read or thoughtful**… **Dante *absorbed* and he survives for us.** Reinhard the Fox, a German poem of the thirteenth century, was long supposed to be the original work until Grimm found fragments of another original, a century older. M. Le Grand showed that in the old Fabliaux were the originals of the tales of Molière, Lafontaine, Boccacio, and of Voltaire….

The *borrowing* is often honest enough, and comes of magnanimity and stoutness. A great man quotes bravely, and will not draw on his invention, when his memory serves him with a word as good. What he quotes, he fills with his own voice and humor, and the whole cyclopaedia of his table-talk is presently believed to be his own….

Now shall we say that only the first men were well alive, and the existing generation is invalided and degenerate? ***Is all literature eavesdropping, and all art Chinese imitation? our life a custom, and our body borrowed, like a beggar's dinner, from a hundred***

charities?.... In common prudence there is an early limit to this learning on an original. **In literature quotation is good only when the writer whom I follow goes my way, and, being better mounted than I, gives me a cast, as we say….**

Every word in the language has once been used happily. The ear, caught by that felicity, retains it, and it is used again and again, as if the charm belonged to the word, and not to the life of thought which so enforced it. These profane uses, of course, kill it, and it is avoided. But a quick wit can at any time reinforce it, and it comes into vogue again. Then people quote so differently, — one finding only what is gaudy and popular, another the heart of the author, — the report of his select and happiest hour, — and the reader sometimes giving more to the citation than he owes to it. *Most of the classical citations you shall hear or read in the current journals or speeches, were not drawn from the originals, but from previous quotations in English books; and you can easily pronounce from the use and relevancy of the sentence, whether it had not done duty many times before, — whether your jewel was got from the miner, or from an auctioneer.* **We are as much informed of a writer's *genius* by what he selects, as by what he originates. We read the quotation with his eyes, and find a new and fervent sense, as a passage from one of the poets, well recited, *borrows* new interest from the rendering.** As the journals say 'the italics are ours.' The profit of books is according to the sensibility of the reader. **The profoundest thought or passion sleeps as in a mine, until an equal mind and heart find and publish it. The passages of Shakespeare that we most prize were never quoted until within this century, *and Bacon, Milton's prose, and Burke, even, have their best fame within it….***

We cannot overstate our debt to the Past, but the moment has the supreme claim. **The Past is for us, but the sole terms on which it can become ours are its subordination to the Present. *Only an inventor knows how to borrow, and every man is or should be an inventor*…** This vast memory is only *raw material*."
[emphasis mine][61]

[61] Ralph Waldo Emerson, "Quotation and Originality," *Collected Works of Ralph Waldo Emerson, Volume VIII: Letters and Social Aims*, 94-107.

The Modern Concept of Authorship, the Establishment of Intellectual Property, and the Truth About Creativity

In chapter 13, I chronicled the origins of copyright law and detailed how the first copyright system was born from a system of privileges bestowed by the English Crown. Specifically, these were printing privileges bestowed to printers and bookselling privileges bestowed to booksellers (publishers). In this section, I trace how that transition from a system of privileges to a system of copyright led to the modern concept of authorship and intellectual property.

As historian Maurizio Borghi has noted, "[b]efore the intellectual property paradigm took shape in the legal systems of Western countries, the exchangeability of intellectual creations *was secured by a system of privileges*."[62] With regards to writing, this system rested on the notion of written text as a "gesture" or "act" to be performed within a patronage system. But as the author, the writer of text, came to be understood as a "supplier of intellectual labor" who purportedly benefited "society at large," products of authorship, i.e. texts, manuscripts, books, etc., became "fully-fledged commodities to be exchanged in the global market place."[63] And thus, once the notion of text went from being "*a gesture* or *act* to be performed within a patronage system to *a thing or commodity to be owned* within a marketplace structure," the result was that the completed act of writing, the process of expressing ideas in written manuscript form, became "an object capable of being *owned* in order to be commercially negotiated and legally regulated — in other words, in order to qualify as literary *property*."[64]

What occurred next is that the author went from being a scribe employed by printers and booksellers in a patronage system to a valuable property rights holder in a market system. This recognition of the author as "the subject of certain property rights within the marketplace for *books*," lead to directly to the modern concept of authorship:

> **The inclusion of copyright under the umbrella of property and the dominating economic discourse *marked the naissance of a new figure of the author,* namely the author as supplier of *intellectual labor* to the benefit of society at large. In this sense, products of authorship became fully-fledged commodities to be exchanged in the global market place.**
>
> The transition between the privilege- and the copyright-systems, and the prevailing economic rationale for the protection of works of

[62] Maurizio Borghi, "Copyright and the commodification of authorship in 18th and 19th Century Europe" http://eprints.bournemouth.ac.uk/29935/3/FEIC_Borghi_Copyright_and_the_commodification_of_authorship.pdf.
[63] *Ibid* (emphasis mine).
[64] Margreta De Grazia, "Sanctioning Voice: Quotation Marks, The Abolition of Torture, and the Fifth Amendment" in *The Construction of Authorship* (Durham and London 1994), 290. (emphasis mine).

> authorship, leaves on the background a more original understanding of authorship as rooted in the human need of reciprocal communication for the sake of truth. **Modern authorship, as grounded in a narrow utilitarian understanding of authors' rights,** detaches itself from both **the economic logic of the privilege system** and **the rational foundation of copyright.** [emphasis mine][65]

Regarding Borghi's assessment that modern authorship, "as grounded in a narrow utilitarian understanding of authors' rights, detaches itself from…the rational foundation of copyright," my view, as I've said elsewhere, is that copyright law, today in its institutional context, serves the interests of copyright owners (publishers, distributors, authors, etc.) more closely than it does the public. This runs counter to the original purpose and objectives of copyright law. Moreover, the concept of modern authorship tends to lead authors and other creatives to focus on their property right, as opposed to the "more original understanding of authorship" as being "rooted in the human need of reciprocal communication for the sake of truth" and for the advancement of society.

Once the author was considered to be the supplier of intellectual labor, the concept of intellectual property was born. Scholar Anne Ruggles Gere has linked the construction of authorship with the rise of the concept of intellectual property, noting that "[b]y the latter half of the nineteenth century, the concept of intellectual property had gained currency, and *the construction of authorship* had been largely accomplished," and that "by the 1870s the concept of intellectual property was firmly established in the United States."[66]

[65] Borghi.

[66] Anne Ruggles Gere, "Common Properties of Pleasure: Texts In Nineteenth-Century Women's Clubs," in *The Construction of Authorship* (Durham and London 1994), 383.

Originality and the Presumption of a Proprietary Authorial Impulse

What if I told you that your concept of originality isn't really your own, would you believe me? What if I told you that the concept of originality that you have — that most of us have today — is actually the concept of originality held by the bourgeois class of eighteenth-century England?

Despite the reality that "authorship" is a well understood and *objective* concept, our conceptions of authorship are *subjective*.[67] And wherever subjectivity is at play, then you can bet that culture and socio-economic status will influence it. The art that we engage with, the laws that we understand, our political outlooks, our educational backgrounds — All of these things converge to shape our ideas of authorship and, by proxy, our concepts of originality and creativity. Where subjectivity is concerned, one modern view of authorship and originality is that it is *originary*, i.e. that it comes solely from within the lone author. While the "modern myth of genuine authorship consists in individual acts of origination,"[68] the truth is, authorship, writing in particular, has always been an enterprise conceived collaboratively.

The presumption of a proprietary authorial impulse,[69] the notion that a word or an innovation is the property of an author/creative, is erroneous; and when we locate the *accidents* that often occur within the creative process, this concept becomes even more absurd. For instance, what if a song contains the sound of a microphone that accidentally dropped on the floor during a recording session. Does the proprietary authorial impulse take hold in this instance? Put another way, if a sample-based beatmaker (producer) samples this dropped-microphone sound — an action that was neither intended and a sound that was not *meant* to be musical — and transforms it *into* music, what do we say of the dropped-microphone sound from the original recording? Can it be argued that it's the *musical*

[67] Thomas Pfau, "The Pragmatics of Genre," in *The Construction of Authorship* (Durham and London 1994), 134.
[68] Woodmansee, 18, 21.
[69] *Ibid*, 23.

province of the copyright owner, now that the sample-based beatmaker (producer) has transformed it into music?

What we might do while sitting alone at our desks or at a table in Starbucks must not be confused with the idea that writing is inherently and necessarily a solitary, *individual* act.[70] Writers, like all creatives, do not exist in a void. Writers do not create works free from the works that came before them, i.e. the works and authors that influenced them. So whether a writer labors "alone" at his desk for hours or whether he writes on a laptop surrounded by patrons inside a crowded coffee house, he is always engaged in a *collaborative* process. Moreover, writing, like any other creative art form, is the craft of execution, a process through which multiple steps are taken and where ideas give way to new ideas. And it is impossible for ideas to emerge from nowhere. Ideas are the residue of all that we have consumed. How we shape these ideas, then, and how we *express* these ideas in new ways, is the basis of originality.

As the myth of the author as the sole creator of unique, original works further dissolves, brought on especially by technology's impact on writing and music and other art forms, it becomes clear that attitudes are shifting more favorably towards the art of sampling. Certainly, proponents of the sample clearance agenda recognize this, which is why they've been pushing hard to normalize the idea of sample clearance for all samples. In doing so, they want to bring all samples — even the *activity* of sampling itself — behind the wall of clearance. In the paradigm where the public believes that all samples are inherently illegal, the public is led to believe that all samples must be cleared. And in this case then, the public is made to believe that sound recordings are treated differently from other

[70] Woodmansee, 25-26. Woodmansee has noted that: "electronic technology is hastening the demise of the illusion that writing is solitary and originary…the computer is dissolving the boundaries essential to the survival of *our modern fiction of the author as the sole creator of unique, original works*….Readers may even incorporate part of the original message in the reply, blurring the distinction between their own text and the text to which they are responding." This description applies especially to social media platforms like Twitter and Facebook. "There is also little respect for the conventions of the prior medium of print. Subscribers often type newspaper articles or excerpts from books into their replies without concern for copyright." Woodmansee for notes that "[i] n a variety of ways, electronic communication seems to be assaulting the distinction between mine and thine that the modern author construct was designed to enforce... the boundaries between author and reader disintegrate."

copyrightable material. The notion being that borrowings (samples) from a sound recording are different from, let's say, borrowings (samples) from a literary work. As such, the illogic follows that all samples from sound recordings *always* require clearance, whereas samples of literary works *do not always* require clearance. But this is not how copyright law works. Copyright law, properly understood, applies equally to all categories of subject matter. Which means the de minimis and fair use doctrines apply to liteary works just as they do to sound recordings. But the sample clearance regime prefers that the public is not aware of this fact.

Knowledge or Products of Authorship As Commodities

If the of nature of authorship, as understood within the context of the origins of copyright, is rooted in the concept of property rights, then originality is not about the *ideals* of creativity and knowledge, but rather the rational economics associated with the production of new works that promote the spread of knowledge. In other words, in the paradigm of copyright's economic rationale for the protection of works, the fundamental understanding of authorship is rooted in the human need for the dissemination of knowledge. But this understanding of originality is overshadowed by modern copyright's "narrow utilitarian understanding of authors' rights,"[71] as well as a pervasive belief in the Romantics' view of authorship.

Naturally, this influences the bias against works that openly rely on the borrowing of pieces of other works as raw materials and building blocks for new works. It's also important to remember that the idea grounded beneath such bias is the widely held belief that books represent an intellectual endeavor while music represents merely a craft, free from any of the genius usually ascribed to literary works. Thus, when you add it all up — the reality that originality is not about the *ideals* of creativity and knowledge but rather the

[71] Borghi. Borghi discusses how the "modern concept of authorship evolved in parallel with the legal recognition of the author as the subject of certain property rights within the marketplace for books."

rational economics associated with property rights; the reality that modern copyright holds a narrow utilitarian understanding of authors' rights; the Romantic view of authorship; the bias against works that openly rely on the borrowing; and the idea that literary works serve as the intellectual standard — what you have is a backdrop that is hostile to fair use.

Originality, Authorship, Creativity, and Copyright Law

Having examined the Romantics' concept of originality and authorship and our inheritance of it, we can see why our understanding of originality and authorship is terribly distorted. So it follows then that most people's understanding of copyright law — and the public's relation to it — is distorted and misguided. And the biggest misunderstanding of originality and authorship has to do with the role that borrowing, ergo, "copying," plays in originality, authorship, and creativity. Simply stated, no author (creative) creates *without* borrowed elements from other authors (creatives). And it's the borrowed elements of other works that comprise the raw materials that all authors (creatives) use to create new works. From the start, United States copyright law has recognized this fact. Still, there remains a large difference between what authors (creatives) really do and the *perception* of what authors (creatives) do.

In this section, I examine the interaction between originality, authorship, and copyright law. My aim is to show, particularly through an examination of United States copyright law's public domain, how originality, authorship, and creativity actually work.

The Public Domain Needs a Rebrand: How the Public Domain Speaks to Originality and Authorship

Reconsidering One of the Most Vital Aspects of Copyright Law, and How a Proper Understanding of the Public Domain Leads to a Proper Understanding of Authorship

Much has been written about the public domain— What it is, what it should be, why it's important and how it functions as a part of the United States copyright system. But one angle that has been given less attention is the relationship between originality and authorship and the public domain. In this area, the essay "The Public Domain" stands out: *Since 2013, this essay has been cited 1,490 times*. Written by intellectual property scholar Jessica Litman and published in 1990, "The Public Domain" argues that originality is a "conceit" and that the public domain is the primary bulwark against this conceit. While I agree that the public domain is invaluable to the United States copyright system, I strongly disagree with the take that originality is a conceit. And since Litman's article stands out as the definitive essay on the topic of the public domain and how it speaks to originality and authorship, in the following section I offer extensive commentary on Litman's argument and subsequent claims. Moreover, in the following section I aim to offer readers a deeper understanding of originality and authorship by examining the function of the public domain.

The Importance of the Public Domain

What must be noted first about the public domain is how vital it is to the United States copyright system. The public domain is not simply about works whose copyright have expired. The public domain is not only about "old" works that are out of publication or fashion. The public domain is about the very essence of borrowing that occurs as a fundamental process of authorship.

We must remember that the purpose of copyright law, as stated clearly in the Constitution, is "to promote the Progress of Science and the useful Arts." As I've noticed elsewhere is this book, this translates ultimately to mean t*he promotion of knowledge and the advancement of society.* In other words, United States copyright law is dedicated to the advancement of society; not the rights of copyright owners. This is why emphasis on the public's right to aspects of copyrighted works is fundamental to copyright law. Once a work is published and statutory copyright is secured, the work is subject to the copyright statute just like all other works. This means that those aspects of a copyrighted work that copyright does *not* protect belong to the public domain. That's the deal. And, as other commentators have noted, that's the "toll" copyright owners pay in exchange for a statutory copyright. Which is to say that the public domain represents the "toll as the price for a statutory copyright. and that courts will enforce the public's claim to common property even when the ideas or systems reflected in works are ingenious."[72]

So in exchange for copyright, which provides exclusive rights and a limited monopoly to authors of copyrighted works, authors tacitly agree to the *exceptions* of those exclusive rights. And the most notable exception to the exclusive rights of a copyrighted work is the public domain— The zone in which the public is permitted *free access* to copyrighted workers.

It must also be noted that the public domain plays a central role in promoting authorship. As Litman has correctly noted, the public domain should also be understood as "a device that permits the rest

[72] Jessica Litman, "The Public Domain," 39 *Emory L.J.* 965 (Fall, 1990), 977-978 (emphasis mine).

of the system to work by leaving the *raw material* of authorship available for authors to use."[73] I would add, however, that if the public domain is the "device…," then the de minimis and fair use doctrines are the essential levers of this device.

What the Creation of the Public Domain Reveals About Borrowing in Music

What's rather telling about the fact that eighteenth-century English music publishers constructed an account of a customary public domain as part of their defense and challenge to musical authorship, is that composers readily admitted that old songs have customarily and long been used to make new songs, for it was the common"view that *old songs were free to be re-used in the creation of new ones* and could be freely republished."[74]

For more than 500 years, the concept of borrowing from old songs to create new songs has been well respected. But when it comes to *sampling* old songs, the view held by many contemporary music publishers and musicians is that it's an act of "theft" — Hundreds of years of customary musical practices be damned! Were it just a matter of copyright law, this view would be less disingenuous. But because this view is not simply rooted in copyright law but a challenge to the very nature of how music has always been made — i.e. by borrowing, implicitly or directly from other music — it is a view that is astonishingly disingenuous. For even when sample clearance is granted, the stigma against sampling as music practice persists.

[73] Litman, 967 (emphasis mine).
[74] Michael W. Carroll, "The Struggle for Music Copyright," 57 *Fla. L. Rev* 907, 934 (2005) 954-955.

The Five Classes of Works That Make Up the Public Domain

Most people recognize that intellectual property falls into the public domain once a copyright has expired. But this is an incomplete definition of what the public domain means. As noted in *McCarthy on Trademarks*:

> [W]hile intellectual property statutes and laws do not explicitly define the public domain, they do so by negative implication…. **[P]ublic domain' is the status of an invention, creative work, commercial symbol, or any other creation that is *not* protected by any form of intellectual property**…. **A thing is in the public domain *only if no intellectual property right protects it***…. **[T]he public domain is simply whatever remains after all methods of protection are taken into account."** [emphasis mine][75]

Thus, most copyright scholars and commentators recognize that there are essentially four classes or categories of works the make up the public domain. But a fuller understanding of the public domain reveals that there is actually a fifth class. The first class are works that are free of copyright. These are works that were created before the advent of copyright law. So basically any work created prior to early eighteenth century. The second class includes works that were once copyrighted but for which the copyright term has since expired. Here, think of works copyrighted essentially before the 1930s. The third class includes works that were, for one reason or another, ineligible for United States copyright. Here, we have a number of works that were published by foreign nationals at the time of the first United States copyright statute. The fourth class includes elements, parts, or aspects of copyrighted works that copyright does not protect. Notably, this includes things like *scènes à faire.* The fifth class, which is often overlooked, are those elements, parts, and aspects of works that have been deemed de minimis or fair use.

[75] J. Thomas McCarthy, *McCarthy On Trademarks & Unfair Competition* (4th rev. ed., Clark Boardman Callaghan 2002), § I :30; § I :31; Edward Samuels, "The Public Domain in Copyright Law," 41 *Journal of the Copyright Society*, 138 (1993).

A Crucial Distinction Between the Promotion of *Authorship* and the Promotion of *Authors*

With regards to the purpose of copyright law, in terms of authorship, Litman has noted that there is a "crucial distinction" between "nurturing" authorship and "nurturing" authors.[76] Litman is correct here, but we need to swap out the word "nurturing" with the word "encouraging," or better still, "promoting." There is a difference between promoting *authorship* and promoting *authors*. The purpose of copyright law is "to promote the progress Science and the useful Arts." Full stop. That is the aim. The aim of copyright law is not to protect authors at the expense of *authorship*. Thus, the copyright system encourages authors to create by providing authors with an economic incentive to do so. When authors create, society benefits from their creations. Thus, the "progress" of society is both the purpose of copyright law and the ultimate return on the investment that the copyright system makes in authors. This is the central objective of copyright law. And authorship, the process of creating new works, serves as a means for fulfilling this objective. Thus, *authorship* takes precedent over *authors*. Said another way, copyright law does not protect authors at the expense of the enterprise of authorship. Hence, the *limited* rights and the *limited* monopoly of copyrighted owners.

[76] Litman, 968.

The Problem with "Property" Talk and How Originality and Authorship Take the Place of Physical Boundaries Associated with Common Property Ownership

Or, How Copyright Law Determines "Who Owns An Intellectual property and What Is That Property Comprised of?"

One reason why the discussion of the public domain is so important, particularly as it relates to originality, authorship, and creativity, is because copyright commentary is guided by discussions of copyright ownership and the rights of copyright owners; less focus is given to the rights of the public. In this paradigm, dialogue about copyright law overwhelmingly emphasizes that which is protected; while that which is *not* protected by copyright is emphasized far less and often treated as an afterthought or the last line of reason.

Next, looking at originality and authorship through the prism of "property" talk further allows us to see how the Romantic concept of originality and authorship, which is greatly at odds with what authors (creatives) actually do, does not account for borrowing as a necessary, unavoidable part of originality, authorship, and creativity.

One problem with the term "intellectual property" then is that it's not really *property*, at least not in the way we commonly understand physical property. Physical property, like a car, a boat, or a home, is a *tangible* thing. Intellectual property is not; it's *intangible*. And no matter how much the law would like to treat intellectual property and physical property as the same, it's impossible to do so. Therefore, substitutes must be put in place to determine ownership, and where and when ownership has been violated.

There are number of different categories of intellectual property, but the main three include patents, trademarks, and copyrights. In the patent system, ownership of an invention is declared. An inventor must prove (beforehand) that the invention is new and that they are in fact the inventor of it, and an inventor must also express the scope of rights that they claim in the invention. Once a patent is granted, ownership can subsequently be proven much in the way that a deed proves ownership in a piece of land or real estate.

In the trademark system, you register a mark. Ownership in the case of trademarks is proven by your use of the mark in trade. Think of the iconic Apple and Nike logos. The public has come to recognize these marks and associate them with the Apple and Nike brands. Thus, wherever these marks appear, we perceive them as emanating from Apple and Nike. While Apple and Nike (the trademark owners) have the exclusive right to use these marks/words *in contexts* in which it will be understood in its trademark sense, Apple and Nike does not have the exclusive right to use the words in other contexts. For example, I can used the words "apple" and "nike" in a poem describing thee connection with delicious foods or a hard earned victory. Essentially, you can use these words in any other context separate from the well understood trademark sense of "Apple" and "Nike".

In the copyright system, copyright relies on the premise that property ownership is asserted by two things: Something added and something original. Since copyright law recognizes that borrowing takes place as a matter of course in all creative works, i.e. all creative works are based on preexisting works to a lesser or larger degree, the copyright system distinguishes ownership based on whatever new thing that an author has added. Further, copyright law protects *only* those parts of a work that are "original" — ergo, what's not new/original, or what's trivial, is *not* protected. So while a melody from Led Zeppelin's song "When the Levy Breaks" is the kind of a creative expression that copyright law likely protects[77], a sample of a drum kick sound from "When the Levy Breaks" is trivial, i.e. de minimis.

While some commentators have asserted that it's impossible to separate the original parts of authorship from the borrowed (copied) parts, I strongly disagree. Jessica Litman has stated that "[t]he principle of limiting copyright protection to *only those aspects of a work that are original with its author*, while remarkably easy to state, proves to be impossible to apply," and that "[w]e lack the capacity to ascertain the sources of individuals' inspirations. Thus,

[77] But even a sample of the melody is not inherent infringement. It depends on the level of transformation of amount of the melody used.

the boundaries of copyright are inevitably indeterminate."[78] The first problem with Litman's claim is that it conflates "inspiration" with the use of an actionable element of a copyrighted work. To identify an author's "inspirations" is not the inquiry of copyright law or, more precisely, a copyright infringement suit. "Inspiration" — essentially an *idea* — is not copyrightable. The second problem with Litman's claim is that the boundaries of copyright are generally *not* "inevitably indeterminate." This sweeping statement ignores the reality that there are often very clear boundaries. In a song for instance, the music and lyrics certainly are boundaries. We need not enquire about an author's inspirations to see the boundaries set by the original aspects of his work. Jay-Z's song "Girls, Girls, Girls" (2001), a familiar boast song about a guy who has lots of girlfriends in his life, may be inspired by other songs about a guy with lots of girls, but Jay-Z's lyrics are indeed original, as is the beat of the song, and both the lyrics and the beat serve as a barrier of copyright law that *is* determinate.

Originality *Is* Ascertainable

For Litman, the public domain is also necessary because, as it speaks to her view that originality is not possible to ascertain, it protects the actual enterprise of authorship against a copyright system that might otherwise render overprotective rights to copyright owners. More directly, Litman has argued that "originality is a legal fiction," and that originality is "inherently unascertainable."[79] I'm receptive to Litman's view that the public domain protects (and promotes) authorship, but I disagree with her latter argument. First, originality is indeed ascertainable. We can ascertain when something "new" has been *added* to something old. And we can ascertain, more or less, the degree of transformation that resulted in the new work. Second, as for originality as "legal fiction," the bar for originality is already low under the law, so that's not where the problem lies. Ascertaining whether something is "original" or not

[78] Litman, 972 (emphasis mine).
[79] *Ibid*, 968.

isn't the issue. The problem is that since originality and authorship have been tethered together and perceived with the distorted vision of originality and authorship as something singular and wholly individualized, the perception of how creators really create, i.e. how the process of authorship really works, has been *Romanticized*; i.e. modeled on the Romantics' concept of originality and authorship. And this has led to a number of complications in copyright law, including hyper attention on protecting the rights of copyright owners at the expense of protecting the rights of the public.

Is Anything Ever Really Original? Yes! Originality Is Not a "Conceit"

One interesting passage from Jessica Litman's essay "The Public Domain" hints at the idea that nothing is ever "really" original:

> "The dangers of **overbroad and overlapping property rights in works of authorship** seem most obvious. When considering the plight of *inadvertent* infringers. **Ideas, systems, themes, and plots are not easily traced. It is difficult to ascertain the source of an *idea* and impossible to prove its provenance in any meaningful sense. A court cannot unzip *an author's head* in order to trace the genealogy of her motifs; indeed, the author herself usually cannot pin down the root of her *inspiration*.** Giving an author a copyright in something that is a basic building block of her art thus risks denying that basic building block to all other authors who come into even fleeting contact with the first author's work. It is our inability to trace or verify the lineage of ideas that makes it essential that they be preserved in the public domain."
> [emphasis mine][80]

That it's impossible to trace every step of an author's process, as well as all of the "ideas, systems, themes, and plots" that guided him to the creation of a given work, is a central preoccupation of Litman's essay. Read her essay and you get the feeling that Litman seems to think that practically nothing is original, that the very concept of originality is a logical fallacy itself; indeed, she argues

[80] *Ibid*, 1002.

that originality is just a "conceit." Under this paradigm, I would imagine then that Lipman believes that very little should ever be granted a copyright. Further, Lipman's preoccupation with "our inability to trace or verify the lineage of *ideas*" clouds the more pressing points because this inability goes without saying. It's really not the big deal that Lipman emphasizes that it is. Authors, the courts — everyone! — knows you can't possibly trace the source or origin of *every* "idea" that settles into an author's "head" (creative psyche). This isn't lost on anyone. It's so obvious that it goes without saying. Thus, tracing every step of an author's process is not one of the aims in a copyright infringement case. Moreover, it's not the foundation of the public domain that Lipman implies that it is. The public domain is not a depository of free "*ideas*;" the public domain is a well of works, *fixed expressions*, that the public can use freely. Again, copyright law does not protect *ideas*; and *ideas* can not be "property" under copyright law.

Absent this understanding of the public domain as a well of fixed expressions, Litman's views of the public domain is distorted. Litman correctly situates the public domain as a commons from which all authors (creatives) draw from. However, for Litman, this commons is only an repository of *shared property*, things so common or trite that they cannot be assigned as property to any one author.[81] But what's missing here is any mention of how de minimis or fair use are also part of the public domain. Anything that's *not* protected by copyright law is, in fact, in the public domain. What distinguishes de minnimis and fair use is that they are not necessarily covered by a shared rubric like *scènes à faire* or trite story plots and tropes. De minimis and fair use do not work in this way, mainly because they are unique instances rather than stock occurrences. A red magic book (Litman's example) used by a bullied middle schooler to save the world is a familiar, albeit general, trope that belongs to the public domain.[82] On the other hand, de minimis and fair use always represent specific expressions or examples of types of expressions that *may be* general representations.

[81] *Ibid*, 1007.
[82] *Ibid*.

A digital sample of snare drum sound from a Led Zeppelin song is de minimis. So it's not that the Led Zeppelin snare drum sample is in the public domain. It's that the sampled snare drum sound is the rubric which represents the notion that digital samples of snare drum sounds from old songs are generally understood to be de minimis and therefore in the public domain. Similarly, if the transformation of a digital sample of a brief snippet of the same Led Zepplin song may qualify as fair use, it is not necessarily *that* specific use and transformation that's in the public domain, but rather the general guiding trope that's in the public domain. In this way, fair use is a public domain pathway, if you will.

Next, Litman has stated that:

> "[b]ecause copyright's paradigm of authorship credits the author with **bringing something wholly new into the world,** it sometimes **fails to account for the raw material that all authors use.** This tendency can **distort our understanding** of **the interaction between copyright law and authorship.** Specifically, it can lead us to give short shrift to the public domain by failing to appreciate that **the public domain is the law's primary safeguard of the raw material that makes authorship possible."** [emphasis mine][83]

Sure, copyright's paradigm of authorship credits the author with bringing something new into the world, not necessarily *wholly* new. A fixation on "wholly" new is where the trouble starts. Litman misinterprets what is meant by "wholly" new, and this is the seed of the problem with Litman's argument that originality is a myth. According to Litman, nothing is "wholly" new, so nothing can ever be truly original. But this is a terribly limited and misleading view of originality.

If we were to take Litman's argument seriously, we would be hard pressed to evaluate and distinguish those authors responsible for the progress of "Science and the useful Arts" over last 200 years. Fortunately, a quick survey of copyrighted works of the authors (creators) since the inception of United States copyright law reveals that, despite the presence of similarity between copyrighted works,

[83] *Ibid*, 966.

originality is very real. I agree with Litman that the copyright's paradigm of authorship "sometimes fails to account for the raw material that all authors use." But the reason for this has nothing to do with the way in which United States copyright law perceives originality. And again, copyright's perception of originality is not exactly what Litman argues that it is. The reason is that since the discourse around copyright law tends to center the rights of copyright owners, which leads to the false notion that *every* element of a copyrighted work is inherently protected, the fact that authors have always used other works as raw materials for the creation of new works is sometimes overlooked.

Next, looking at building blocks, a "basic building block" of art, or any other work, is far easier to ascertain than Lipman than argues that is. In writing, there are countless building blocks that writers use, from one-sentence intros to adverb-led phrases. And music is loaded with various building blocks that musicians use all the time. In the art of beatmaking, more specifically, there are basic drum patterns that all beatmakers build upon. And there are numerous other programming building blocks, like loop points and sound layering, that all beatmakers employ in one way or another.

Turning squarely to "the essence" of Litman's argument, that "[o]riginality is a conceit,"[84] It's clear that Litman's entire analysis is colored by her view that originality is a "mere apparition"— essentially just a myth — that we just happen to like. But this argument is easily refuted, even by some of the points that Litman makes herself. For example, if we concede that elements of prior works are used by authors (creators) to create new works, it's illogical then to say that there is no originality at play in the new work. For every new work, there's a minimum degree of originality that can't be ignored. Take cop shows, detective mysteries, hospital dramas, and law dramas. There are similarities between "Columbo" (1968-1978) and "Kojack" (1973-1978); there are similarities between "Hill Street Blues" (1981-1987) and "NYPD Blue (1993-2005;" there are similarities between "The Shield" (2002-2008) and "The Wire" (2002-2008); there are similarities between "LA Law" (1986-1994)

[84] *Ibid*, 1005.

and "Suits" (2011-2019); there are similarities between "ER"(1994-2009) and "Grey's Anatomy" (2005-present). The point is, each one of these shows bears a significant mark of originality despite whatever similarities they obviously share.

And even when a copyrighted work is remade, as in the case of film remakes and cover songs for example, originality is certainly at work. Actually, cover songs represent one area where we often see a high degree of originality where the given constraints of the original song suggests otherwise. Consider Stevie Wonder's cover of The Beatles' "We Can Work It Out" (1965/1970), or Aretha Franklin's cover of Otis Redding's "Respect" (1965/1967), or Jimi Hendrix's cover of Bob Dylan's "All Along the Watchtower" (1967/1968), or Soft Cell's cover of Gloria Jones's "Tainted Love" (1964/1981), or Whitney Houston's cover of Dolly Parton's "I Will Always Love You"(1974/1992); or Run-DMC's cover of Aerosmith's "Walk This Way" (1975/1986).

Just a quick survey of the aforementioned television shows and cover songs illustrates the illogic of arguing that originality is a "conceit." Originality is *not* a conceit nor a myth; originality is very real thing. Litman also stated that to the "extent that we are tempted to forget that originality is a conceit, it can be a dangerous principle on which to base a system of property. Most authors would agree in the abstract that the raw material that authors use in their work must be left free for all authors to use."[85] I'm an author and I disagree totally with what Litman argues. If originality is a conceit, that means that everything is raw material then. See the problem?

[85] Ibid (emphasis mine).

Proving Originality through Cover Songs: Stevie Wonder's Cover of The Beatles' "We Can Work It"

So that readers can appreciate how originality is indeed real and not a conceit, even when one creative work is obviously based on another, here I will offer an analysis of Stevie Wonder's cover of The Beatles' song "We Can Work It Out." Overall, Stevie Wonder gives a popular Beatles tune more soul and adds new punch and feel. By this mark alone, originality is clear. Although a cover of a song is not sampling per se, it's exactly what transformation is all about. And transformation is the fuel of originality. The more transformative a work is, the easier it to ascertain the originality of the work.

The art of sampling is not a (complete) reinterpretation of someone's work in the same way that a traditional cover version is. In sampling, snippets and phrases of sound recordings (usually old songs) are digitally extracted, then recontextualized and refashioned into a new musical work. Still, there is a link, subtle as it may be, between sampling and the ways in which one musician is inspired to reinterpret the work of another. This point is illuminated when you consider that the art of sampling is rooted in the long-held tradition of versioning (a topic I discussed elsewhere in this study).

As a beatmaker (producer), particularly one with a strong affinity for the art of sampling, I appreciate it when great musicians do their own versions (i.e. covers) of equally impressive musicians. I'm interested in how one musician converts the work of another into their own style, feel, and aesthetic without losing the core themes and structures of the original. And I'm impressed when one musician's version (interpretation) remains respectful to the original and *adds* new nuance and dimension to it as well, serving up something new and *original*. This is the case with Stevie Wonder's remake of The Beatles' "We Can Work It Out."

As far as creative license goes, Stevie Wonder takes grand liberty with his version of one of The Beatles' most popular hits. There are numerous instances where rock groups have dipped into the

blues/soul fountain, pulling out tunes and reworking them with rock-pop magic. But with his version of "We Can Work It Out," Stevie Wonder is doing the reverse. He's taking a rock number — in this case, a 1960s folk pop tune — and dipping it back into the blues/soul fountain. What emerges in Stevie's version is a song that respects the original while going beyond, adding an entirely new aesthetic, essence, and vibe.

While Stevie Wonder shadows the basic structural framework of the Beatles' original, there are a number of new dimensions that he adds for his version. Stevie's remake starts with a 3-bar organ intro (a signal that Stevie's signature will be all over this version), then the drums crash in. And while The Beatles' original actually has a nice rhythmic pattern, albeit tucked low in the mix, Stevie Wonder's version amps up the drum scheme, making the drums, as well as the entire piece, sound meatier than the original. The kick and snare drums punch and pounce, springing off of each other, while the hi-hat and tambourine shuffle throughout.

For the rest of the arrangement, Stevie Wonder makes two other standout changes. First, he avoids the same use of strings that stream through The Beatles' original. This tightens up the groove of "We Can Work It Out," effectively making the Stevie Wonder cover edgier and rendering the original almost tranquil by comparison. Second, Stevie incorporates a milky bass line that "walks" in deference to the priorities of soul more than it does to rock 'n' roll. This, along with the drums as described earlier, also adds to the urgency and aggressiveness of Stevie Wonder's version, which makes the original, folksy as it is, sound much more passive aggressive. Here, I'd be remiss if I didn't also highlight Stevie's harmonica solo at the midway point of his version. Again, this is something *added*, something original, something that did not exist in The Beatles' version.

Finally, Stevie Wonder's treatment of the vocal arrangement is as impressive as everything else in his cover of "We Can Work It Out." Six bars into Stevie's cover, and we hear a voice belch out "Hey!" This "Hey!," an added background vocal element that did not exist in The Beatles' original, alternates in pitch, giving Stevie's

cover a unique swing nuance not found in the original. And when the rising gospel background vocals turn up in the latter half of Stevie's cover — yet another addition, something else that was not in The Beatles' original — the tune slides briefly into the Black American church music tradition.

Then, of course, there's Stevie's lead vocals. A comparison of Paul McCartney's or John Lennon's vocals to Stevie Wonder's is perhaps unfair or misleading at best, inasmuch that Stevie Wonder and the two Beatles front men are approaching the song from two different traditions, with two different vocal priorities and styles of vocal inflection. Still, it's worth mentioning that Stevie's soulful reworking of the original — no doubt powerful in its own glory — makes "We Can Make It Out" sound more searing and converts it into a freedom song/Black power amalgamation.

According to *Feist*, the manner in which Stevie Wonder "selected, coordinated, and arranged"[86] the elements of the original composition — a preexisting work — was certainly original, and this goes without mentioning the elements that Stevie Wonder *added*. Thus, Stevie Wonder's version of "We Can Work It Out" is nothing short of a magnificent transformation. Ironically, Litman recognized that "*transformation* is the essence of the authorship process."[87] But according to her view of originality, Stevie Wonder's cover version of "We Can Work It Out" isn't original. Make it make sense! If transformation "is the essence of the authorship process," then it follows that transformation is the prism through which courts look at originality or lack thereof. In other words, it is through transformation that we *can* ascertain originality. This is why, not coincidentally, that in a copyright infringement case, the transformation of a copyrighted work is typically the most important factor in determining no infringement.

Finally, to some extent, you could say that Stevie Wonder "flipped" the Beatles original. Does this all mean that Stevie Wonder's version of "We Can Work It" is *better* than the original? I'm still thinking that through. Let's just say that after hearing Stevie

[86] *Feist Publications, Inc. v. Rural Telephone Service Co.* 499 US 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 - Supreme Court, 1991.
[87] Litman, 999.

Wonder's version, it's hard to listen to The Beatles' original the same way. Both the original by The Beatles and Stevie Wonder's version are great music works; each shine in their own regard, and each travel along the paths of their creative priorities and influences. But Stevie Wonder *transforms* the Beatles' song into something new. And by virtue of turning The Beatles' version into a freedom song/black power anthem, Stevie Wonder's version gives the song a new meaning. This, as well as all of the elements that I detailed, makes it quite clear that originality is not a conceipt or apparition as Litman argues, but rather a very real aspect of creative ingenuity and authorship.

Thus, a more interesting question at this point would be what is it that enables any musician to pull off a quality version of a another musician's work? I believe it comes down to this. Music performance skills, a broad-based knowledge of music history, various musical processes, and music forms, and a fundamental respect and reverence for the musician(s) whose music you're inclined to rework. Stevie Wonder includes all of these variables and that's why his version works so well. Further, his version demonstrates, on many levels, how reconceptualization works in sampling. Which ultimately serves as a reminder that hip hop/rap music is a continuum of soul, funk, and jazz music.

Litman's interpretation of what is meant by "wholly" new is unrealistic and too rigid. In the context of creativity, originality, and authorship, "wholly" new doesn't mean that a new work bears no hint of a work that we've already seen or heard before, but rather that the resulting new work, as a whole, is something that did not exist before. This is what is meant by *wholly new*. Thus, by this metric, a more accurate and less contentiously rigid interpretation of originality, Stevie Wonder's cover version of The Beatles' "We Can Work It Out" is a wholly new creative work, one that departs significantly from the work that it is based on.

Originality, In the Abstract, Is Not the Basis for Deciding Copyright Infringement Cases

Litman has stated that "[c]opyright law purports to define the nature and scope of the property rights that it confers by relying on the concept of originality, and that "*[i]n fact*, originality is an apparition; it does not, and cannot, provide a basis for deciding copyright cases. The vision of authorship on which it is based — portraying authorship as ineffable creation from nothing — is both flawed and misleading, disserving the authors it seeks to extol."[88] First, it is not a "fact" that originality is an "apparition." Second, originality, in the abstract, is *not* the basis for deciding copyright cases. The basis for deciding copyright infringement cases is a determination of what best serves the objectives of copyright law. And within this scope, determining if and where originality exists is a conduit for this examination. Thus, here, Litman missed a crucial aspect of copyright infringement cases: That a determination of what's *not* original — what's *not* protected by copyright law — forms a fundamental part of the basis for deciding copyright infringement cases. Given this understanding, we see how originality can indeed provide, in part, the basis for deciding copyright cases.

Notwithstanding the flaws of the modern concept of originality and authorship and the legal definition of authorship (and the debate around it), courts are keenly focused on what is *not* original just as much, if not more, as what *is* original. "The Constitution, which serves as the foundation for copyright legislation, offers Congress the power to protect *only* the writings of 'authors,' and the copyright statute itself only protects '*original* works of authorship.'"[89] *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991) illustrates how the determination of what is *not* original and what *is* original is part of the focal point of every copyright infringement case. In *Feist*, the question raised "was whether stuff of phone books constituted non-protected 'facts' as opposed to the work of an 'author.' Justice

[88] *Ibid*, 1008 (emphasis mine).
[89] Monroe E. Price and Malla Pollack, "The Author In Copyright: Notes for the Literary Critic," in *The Construction of Authorship* (Durham and London 1994) 439-440 (emphasis mone); *See also:* Benjamin Kaplan, *An Unhurried View of Copyright* (1968).

O'Connor easily dealt with that aspect of authorship, reiterating that facts are not copyrightable, whether they come in molehills or mountains. The amount of work involved in assembling the facts does not enter into the legislated equation." But "[o]n another question, however, analysis was necessary, and it was analysis that yielded insight into the requisites for authorship. Even if facts are not copyrightable, compilations or collections may be, if, but only if, the mode of compiling or collecting is itself *'original,'* or the act of authorship."[90]

Where originality and authorship and copyright law are concerned, the courts are focused *only* on serving — or *preserving*, depending how you want to look at it — the objectives of copyright law. And even while the courts don't always get it right, their job then is much different than that of commentators who work outside of the legal domain, not only because the focus is different but also because judges are in pursuit of a decision that serves the objectives of copyright law. In this paradigm, judges are preoccupied (or at least *should* be) with officiating the balance between the rights of the public and the limited rights of copyright owners. Inasmuch as the legal definition of authorship is concerned, judges use the concept of originality and authorship *within* their determination of where the greater harm lies — to the public or to copyright owners. In the scheme of copyright law, when the harm is greater to the public than to copyright owners, the law is supposed to side with the public. For in *Feist*, where it was affirmed that facts are not copyrightable, the Supreme Court clarified that even though facts are *not* copyrightable, compilations or collections of facts *can be* copyrightable. On the surface, it appears that the court was siding with the copyright owner. But in reality, this clarification by the court is for the public, not just for Rural Telephone Service Co., because the inverse, i.e. that a compilation or collection of facts cannot be copyrightable, would harm the public.

Here, an excerpt from *Feist* demonstrates how authorship is used within a court's inquiry into determining: A) the outcome that best serves the objectives of copyright law; and B) the outcome that

[90] *Ibid* (emphasis mine).

places the harm to the public *above* the harm to copyright holders:

> **[F]acts are not copyrightable, compilations or collections may be, if, but only if, the mode of compiling or collecting is itself *'original,'* or the act of authorship."**
> **The purpose of the statutory definition is to emphasize that collections of facts are not copyrightable *per se.*** It conveys this message through its tripartite structure, as emphasized above by the italics. **The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation:** (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an "original" work of authorship. "[T]his tripartite conjunctive structure is self-evident, and should be assumed to 'accurately express the legislative purpose.'" Patry 51, quoting *Mills Music*, 469 U. S., at 164.
> At first glance, the first requirement does not seem to tell us much. It merely describes what one normally thinks of as a compilation — a collection of pre-existing material, facts, or data. What makes it significant is that it is not the *sole* requirement. **It is not enough for copyright purposes that an author collects and assembles facts. To satisfy the statutory definition, the work must get over two additional hurdles. In this way, the plain language indicates that not every collection of facts receives copyright protection.** Otherwise, there would be a period after "data."
> The third requirement is also illuminating. It emphasizes that a compilation, like any other work, is copyrightable **only *if* it satisfies the *originality* requirement** ('an *original* work of authorship"). Although § 102 states plainly that the originality requirement applies to all works, the point was emphasized with regard to compilations to ensure that courts would not repeat the mistake of the "sweat of the brow" courts by concluding that fact-based works are treated differently and measured by some other standard. As Congress explained it, the goal was to "make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works . . . **containing *preexisting* material."** H. R. Rep., at 57; S. Rep., at 55.
> The key to the statutory definition is the second requirement. It instructs courts that, in determining whether a fact-based work is an original work of authorship, they should **focus on the manner in which the collected facts have been *selected, coordinated,* and *arranged.*** This is a straightforward application of the originality requirement. Facts are never original, so the compilation author can

> claim originality, if at all, only in the way the facts are presented. To that end, the statute dictates that the principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection. [emphasis mine][91]

The "magic" of authorship notwithstanding, despite the inheritance and impact of the Romantics' concept of originality and authorship, no one — certainly not judges — adheres, wholeheartedly, to this concept. That judges recognize that nothing cannot come from nothing is a clear indication of this fact.

Further, in a copyright infringement case, the burden of proof rests with the plaintiff, *not* the defendant as Litman and some other commentators have stated. Litman stated that, "[a]ccording to most authorities, the plaintiff's evidence of access and substantial similarity *shifts the burden of persuasion to the defendant to disprove copying.*"[92] But this is not true. Once the plaintiff proves access, this does not remove the plaintiff's burden of proof with regards to *actionable* copying. A defendant is not tasked with the burden of *disproving* copying. In fact, defendants often acknowledge the copying. What's always at question, once copying has been established, is whether or not the copying was *actionable*; i.e. whether or not the elements copied were protected or not protected by copyright law.

No judge has had a greater influence on copyright law in the twentieth century than Judge Leonard Hand, and in *Nichols v. Universal Pictures Corporation* (1930), Judge Hand noted that "[w]e have to decide *how much*, and while we are as aware as anyone that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; ***it is a question such as courts must answer in nearly all cases.***"[93] The "line" Judge Hand was referring to is the line between what is protected, actionable, and what is not protected by copyright law. And that burden of proof does not rest with the defendant but rather the plaintiff. Hence, the defendant *can* rebut the plaintiff's argument. This isn't a "burden of persuasion" however; it's a right of defense.

---

[91] *Feist Publications, Inc. v. Rural Telephone Service Co.*
[92] Litman, 992-993.
[93] *Nichols v. Universal Pictures Corp.* 45 F.2d 119 (2d Cir. 1930) (emphasis mine).

Finally, with regards to fair use, Litman, who considers the public domain as in important device for the promotion of authorship, ironically misrepresented what fair use is, describing it curiously as "privilege" and relegating it as a "last resort" for defendants in copyright infringement cases:

> "The second principle allowing resolution of actual cases on subjective grounds is *the privilege* of fair use. Fair use is *the darling* of the commentators, who routinely nominate it to assuage any danger of overprotection; it has received much more limited application by contemporary courts. It can operate as a safety valve to rescue worthy defendants from the perceived injustice of an infringement judgment should the substantiality wicket fail to operate."[94]

But fair use is not a "last resort" "safety valve" for defendants when substantial similarity is proven and all else has failed, nor is a "privilege" or "darling" of commentators. Such inaccurate and dismissive descriptions of fair use misstate the importance and true significance of fair use. As the Supreme Court reaffirmed in *Campbell*, Fair use is necessary to fulfilling the purpose of copyright law: "From the infancy of copyright protection, some opportunity for **fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose,** '[t]o promote the Progress of Science and useful Arts . . . .' U. S. Const., Art. I, § 8, cl. 8.5."[95] Fair use helps ensure the kind of everyday activity that copyright law seeks to promote, namely the stimulation of knowledge. How Litman spoke so highly of the public domain and yet so dismissively of fair use is glaring, especially since her characterization of fair use does not jive with the reality of what the public domain is and how the safe harbors of United States copyright law work.

Finally, in yet another bizarre and, what the author herself called "controversial" statement, Litman claimed that copyright law "defines authorship and infringement so that they are indistinguishable in a concrete world." This is false. Copyright law does not do this; and any attempt to prove that it does is

[94] Litman, 995.
[95] *Campbell v. Accuff-Rose Music*, 510 U.S. 569 (1994), 575.

futile and beholden to various misrepresentations or distortions of key elements of copyright law. Yet as evidence for her controversial claim, Litman offered that "[a]n author transforms her memories, experiences, inspirations, and influences into a new work. That work inevitably echoes expressive elements of prior works. Whether it infringes the copyrights in the prior works depends upon the conscious and subconscious processes within the author's mind."[96] But this is also not true. Copyright infringement occurs *only* when *actionable* elements of a copyrighted work have been proven to be used without the permission of the copyright owner. Full stop. Copyright infringement does not depend on the "*conscious* and *subconscious processes* within the author's *mind*." Still, Litman went even further, stressing that "[w]e cannot verify them [previous works]; neither can she. If this author's work lands in a copyright suit, the legal conclusions that will be drawn will depend in the first instance on facts (such as whether she is suing or being sued and whether she is holding a certificate of registration) that have nothing to do with the nature of the authorship process."[97] Here, Litman distorts reality. The fact that there are aspects and elements of copyrighted works that are *not* protected speaks directly to the authorship process. All works inevitably use expressive elements of prior/existing works.

The Romantic concept or idea of originality and authorship suggests, as I've noted earlier in this chapter, that authorship is a divine-like occurrence, a singular, magical process with little to no borrowing or input from other authors (creators), ergo, the outside world. Litman argued that the Romantic concept of authorship "establishes the distinction between creation and copying."[98] But this is inaccurate. The distinction that is being drawn is not between creation and copying — *copying is at play in every creative expression*. The distinction that is being drawn, the real inquiry of procedural devices despite any presumptions about authorship, is whether or not the copying is actionable. That is to say, whether the expressive elements copied by an author (creative) are protected or not protected.

[96] Litman, 997 (emphasis mine).
[97] *Ibid* (emphasis mine).
[98] *Ibid*, 998.

Next, in an ill-advised use of sarcasm, Litman described our conception of authorship this way:

> "…central to our conception of authorship, copyrightability is identified with originality: A work is copyrightable if and to the extent that it is original, or created, rather than copied. We know that real authors create rather than copy, so we are comfortable with a presumption that the works they register for copyright are original. We believe in the idea that expression is created from thin air and the correlative notion that the universe of creative expression is infinite, so we are ready to conclude that similarity of expression must reflect plagiarism. And we worry not a bit that our conclusions are unverifiable because they reflect our intuitive beliefs about reality. [emphasis mine][99]

No reasonable person believes that nothing comes from thin air, regardless of the concept of originality and authorship that we inherited from the Romantics. We all know that nothing comes from *nothing*, that "there is nothing new under the sun." This is especially true of how the courts perceive originality. Justice Joseph Story reaffirmed this fact in 1845: "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 is well known and used before."**[100]

Parts of all creative works echo the works of others. An author's (creative's) work is always shaped, in lesser or larger degree, by the works of other authors (creatives) that they have studied, borrowed from, or otherwise absorbed. In other words, as Litman herself noted, "[a]ll works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else's works."[101] Thus, the process of authorship is one in which authors are always in dialogue with pre-existing works that were created by other authors. At best, what emerges from this dialogue is *new* works — with borrowed elements woven in — that represent original creative expressions

[99] *Ibid*.
[100] *Emerson v. Davies* 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845).
[101] Litman, 1000.

that communicate to the world new meanings and new ideas. Again, this is exactly the kind of activity and ultimate result that copyright law seeks to promote.

Nonetheless, thanks to the Romantics and their warped concept of originality and authorship, our intuitive beliefs about originality and authorship are based on the sham notion that works are singularly created and made up from out of nowhere. And since we've bought into the idea that creative expression is a singular affair, we have been conditioned to conclude that borrowing from works to create new works is rare and therefore a frowned-upon activity. Similarly, we have been conditioned to believe that similarity between creative expressions suggests plagiarism. But both things are untrue. Borrowing from pre-existing works to create new works is common; it's tethered to the creative process and authorship and this link can never be undone. In fact, this understanding is part of the bedrock purpose of United States copyright law. Further, similarity is not an *inherent* sign of plagiarism. There can be similarity in a multitude of creative expressions, this does not suggest plagiarism or wanton duplication. Ever see a cop show or a romantic comedy?

And while it's absolutely absurd that we still accept the Romantics' sham notion of originality and authorship (to *some* degree), we worry little about the obvious inconsistencies and misleading presumptions of such a concept of originality and authorship because such presumptions "reflect our intuitive beliefs about" originality and authorship — which we inherited from the Romantics. This goofy, vicious cycle of misunderstanding is implicit in copyright law precisely because creation and copying is central to our conception of originality and authorship. So of course the copyrightability of a work is linked closely to originality. Further, a central aim of the fact-finding process in a copyright infringement case is to separate the original from the *non*-original elements of copyrighted work, while also ascertaining the originality of the defendant's *allegedly* infringing work. Thus, the distinction that is being drawn is not between creation and copying — copying is at play in every creative expression. The distinction that is being

drawn, the real inquiry of procedural devices, despite any of our presumptions about originality and authorship, is whether or not the copying is actionable. That is to say, whether the copied expressive elements of a copyrighted work are protected or not protected.

Litman also suggested that originality isn't taken seriously under the law; and that if it were, "we would need to ensure that authors' copyrights encompassed only those aspects of their works that were actually original." Further, Litman claimed that "[w]e could not draw the boundaries of an author's property in the contents of her work until we had dissected her authorship process to pare the preexisting elements from her astigmatic recasting of them."[102] But I disagree. I think Litman's argument, which is accurate in parts, is a narrow reading of how originality and authorship are treated under copyright law. I'd argue that the legal concept of originality *is* taken seriously, and that the "boundaries" of originality that courts try to ascertain are concerned more with identifying transformation of one work from another.

Courts already work from the default abstract position that "there's nothing new under the sun;" again, this goes all the way back to Justice Story in 1845! So courts rightfully sidestep the kind of dissection that Lipman describes. Why? Because there's an implicit understanding that every author builds upon the works of others, it's not only impractical to dissect *every* element of an author's authorship process, it's impossible. Thus, in a copyright infringement case, courts do not try to dissect "author's property" (what belongs to a copyright owner) as much as they look to identify what *isn't* the author's property. In other words, courts seek to locate those elements of a copyrighted work that are *not* original, i.e. actionable, *not* protected by copyright law. Equally important, courts seek to identify if, where, and *to what degree* the allegedly infringing work departs from the copyrighted work it has borrowed from. In this paradigm, originality is very much at the center of the inquiry, which is why transformation is central to determining the secondary work's own originality and whether or not it has infringed.

[102] *Ibid*, 1000 (emphasis mine)

Finally, here it's worth mentioning another big misunderstanding of authorship under copyright law: The dynamic of what copyright owners *believe* they own and what they do not actually own, ergo, what copyright law actually stipulates is not protected. While an author (copyright owner) may "claim to own everything embodied her work,"[103] this is not enforceable in court. Under copyright law, three safe harbors make this clear— de minimis, fair use, and the public domain.

How Copyright Law Rescues Us from the Dilemma of Originality, Authorship, and Creativity

Litman argued that authorship and originality, as portrayed as "ineffable creation from nothing," poses a dilemma. If we took this flawed vision of authorship and originality seriously, Litman maintains, "we could not grant authors copyright rights without first dissecting their creative process to pare elements adapted from the works of others from the later authors' recasting of them." Noting that this would be "both impossible and unwelcome," Litman further states that if we took this flawed vision of authorship seriously, "we would oblige each author to solicit the permission of her predecessors. In such a world, most works of authorship would find themselves enjoined by the owners of other copyrights." Litman proposes that it's the public domain that "rescues" us from the dilemma of authorship and originality.[104] The problem with Litman's argument here is that she situates the public domain as the singular remedy for the dilemma of authorship and originality. But the public domain, as it is commonly understood and as Litman frames it, is not the only way that copyright law "rescues us" from this dilemma; it's not even the primary way. The primary ways that the dilemma of authorship and originality is addressed are the de minimis and fair use doctrines.

[103] *Ibid*.
[104] *Ibid*, 1008.

The Authority Paradigm: What Qualifies a Writer as an Author (or a Creative as a Creative)? And *Who* Has the Authority to Write or Create?

Having closely looked at how the public domain speaks to originality, authorship, and creativity, here, I want to turn to a discussion of authority and authorship. Historian Marlon B. Ross has asked plainly, "What qualifies a *writer* — one who writes out words — to be considered an *author*, one whose words demand attention?" He says that the answer to this question lies in a socio-historical distinction rather than an intellectual or cognitive distinction. Ross arrives at his thesis, which I agree with, through a close-up look at the difference between the scribblings of a writer — which remain locked up "awaiting a dialogue with a public that does not exist" — and the writings of a writer that "traverses the gulf between self and other," and transmits knowledge (experience) to a public space "where itself is knowable, shareable, and answerable."[105]

Similarly, in *The Beat Tips Manual* (2015) I asked the question, *What makes a musician a musician*? Evidence suggests that the answer to this question has, historically, remained the same. A musician, simply stated, is one who makes music. But unlike the scribblings of a writer that remain locked up, music — prior to the

[105] Marlon B. Ross, "Authority and Authenticity: Scribbling Authors and the Genius of Print In Eighteenth-Century England," in *The Construction of Authorship* (Durham and London 1994), 231 (emphasis mine).

age of audio recording — was much harder to "lock up" mainly because music is also sound, not merely thought. So the legitimacy of a musician has had far less to do with a musician's distribution of his music to a public. This is an important point to remember because the term "author," particularly in the context of copyright law, is a catch-all, stand-in term for what we generally refer to today as a *creative*.

As Ross further notes, eighteenth-century writers in England "used the word 'scribbler' to indicate the intrinsically wayward nature of producing script." To scribble was to "make marks in a carefree or careless manner; usually intelligible marks that are also unintelligible except to the mark maker in the moment of the marking." Drilling down deeper on the word "scribe," the root word of scribbler, the historical significance of both words is even more revealing:

> The word "scribe" itself is used to translate the Hebrew concept of ***one who is an authority*** on the Jewish law, and the etymology of the word "scripture," holy text, takes us back to the same root in the Latin word meaning "to write." [emphasis mine][106]

What's key here is the sense of authority. *Who* has the *authority* to write? In the context of the ancient scribe, authority was vested by virtue of one's knowledge of Jewish law and holy texts. For writers in eighteenth-century England, this authority was also vested by virtue of one's knowledge. But "knowledge," in the case of eighteenth-century English writers, was linked to a writer's specific experience, i.e. personal knowledge, which was not tethered to *religious* knowledge. Moreover, the question of *Who has the authority to write* did not come down to the simple matter of making scribblings legible for a public, or as Ross puts it, "the art of making writing legible." While the authority of writing should be vested in one who chooses to write, that's not how the authority to write was determined by writers in eighteenth-century England.

When we look at scribes of religious texts, their authority was self-evident: To be an authority is to be *scripted* and preserved in

[106] *Ibid*, 231-232.

religious texts. So, originally, to be an "authority" is to be scripted. Over time, particularly as more books were published and writing became a profession, this concept of authority was replaced by a new concept: To be an "authority" is to be *printed*.[107] But in the marketplace, where did this new reality leave writers?

As writers looked to make writing a profitable business, they transformed the idea of the *authority to write*. And in doing so, they established the idea of authorship within copyright as we know it today. For writers in eighteenth-century England, the authority to write, or equally stated, the *justification to write*, comes from the idea that a writer's work his "property." This was a crucial transformation in the understanding of authorship because it helped form the ideology that a writer's work is "property whose value is based on ***originality*** and whose profits belong to the author, rather than to printers and booksellers."[108] Before this shift in ideology — which was spawned by writers attempting to make writing into a profitable business, i.e. to get a bigger piece of the pie from printers and booksellers — copyright was the province of printers and booksellers, and authors had very little power.

Looking at the role of printing as the basis of authority, we can draw parallels with the music industry and the grounds for authority in modern times. To be an authority in music is to be a musician, one who plays an instrument with the intended purpose of making music. But what happens to this paradigm when instruments evolve, just as writing instruments evolved? What happens, for instance, when a traditional drum kit is no longer the only way to play the drums? Moreover, what happens when a traditional drummer is no longer *presumed* to be superior to or more popular than someone who plays the drums on a drum machine? What I'm getting at here is that the authority paradigm always changes with the advancement of technology and the expansion of the ranks of *who* we consider to be members of a creative class. The number of scribes was limited in large part because of the limits of technology of their time; uniform script, the basis of their authority, meant

[107] *Ibid*, 236.
[108] *Ibid*, 231 (emphasis mine).

that they wrote (and copied) by hand. This was pre-print culture. However, after the advent of printing technology (the basis of authority of eighteenth-century writers in England), the number of writers expanded.

Today, print remains important to culture; and despite the acceptance of and need for digital texts, there will likely never be a time when print is completely obsolete. Nevertheless, because of digital technology post-print culture runs parallel to print culture. And here's where we should come to understand that print, historically, has a dual meaning: *distribution*. Writers in eighteenth-century England did not want to become printers; they recognized, however, that if you were not in print, you were not *distributed*. So for them, part of the end game of making writing into a profitable business was being able to have their say in the distribution of their written works.

Over time, we ascended from print — or at least from the level of importance that print held in the world — and the form of distribution that it was tethered to it. Once we swapped out the word "print" for "publish," the authority paradigm changed again: To be an authority as a writer is to be *published*. Similarly, in music the authority paradigm changed with the advent of recording technology: To be an authority is to be *recorded*. But what happens when the tools of production are democratized and publishing, recording (practically any form of creative production), and distribution are all made more accessible to the public? Doesn't the authority paradigm (necessarily) shift again? *Who* now qualifies as a writer, a musician, an author, a creative? And today, what is the basis of their authority?

The development of writing and publishing tools, like word processing software programs — which, along with the computer, replaced the typewriter — and digital publishing platforms have made it possible to publish written works and distribute them to the masses with one click. What do we say about this? And in the spectrum of music, the development of new kinds of instruments — like analog and digital drum machines, samplers, the all-mighty DAWs, and other audio recording equipment —

enabled new modes of music production, chief among these the art of beatmaking. If anything, such advancements in technology should humble us all and return us back to the reality that, where creativity is involved, be it writing or making music or creating in any art form, what *authorizes* us to create is our desire and will to do so as well as our unique intellectual capacity to see this endeavor through. But here's the catch. Individual intellectual labor is never non-collaborative; we are all informed by pre-existing works and impacted by our personal influences. This is why the authority paradigm has not only helped to expose the myth of authorship, it has also demonstrated how the notion of authority has distorted what we come to think about originality, creativity, and copyright law, and how it shapes our biases towards works of art and *who* makes them.

The authority paradigm is especially instructive in the case of music. As music tastes shifted from classical to popular, and as traditional instruments evolved and new instruments based on recording technology were invented, the question of *who* had the authority to be a musician and *what* gave (could give) one that authority changed. But the biases remained. The emergence of rock 'n' roll had Western classical musicians scoffing at rock 'n' rollers and their use of *electronic* instruments in particular. Likewise, the emergence of hip hop/rap music found rock 'n' roll artists scoffing at rappers and beatmakers (producers) and their use of *electronic* instruments, like drum machines and digital samplers. The latter scenario also sheds light on the role that the authority paradigm plays in the criticism against the art of sampling.

In the 1960s, rock 'n' roll established itself as the dominant, most popular music culture in America, and its influence soon spread throughout the world. By the end of the '80s, however, rock's power grip on American culture was loosening. Hip hop/rap music, the music culture that music industry experts once cast off as *just a fad*, was emerging fast. Throughout the '90s, as rock competed with hip hop/rap music as the dominant, most popular American music culture, the bias against hip hop/rap music intensified. The biggest knock lobbied against hip hop/rap music by rock 'n' rollers — and

members of the media who were bred on rock 'n' roll, conditioned to believe that rock 'n' roll was a superior music form and that rock musicians were "real," *authorized* musicians — was that hip hop was not "real" music and that its practitioners were not "real" musicians.

No doubt a large part of the reason for so much ire against hip hop/rap music was due to the fact that sampling was (is) an integral part of the music-making process in the hip hop/rap music tradition. For rock 'n' rollers, and the media that saw rock 'n' roll as the highest form of popular music, using new (non-traditional) instruments and sampling meant that hip hop/rap music was *unauthorized*. Never mind that rapping, the dense and often complex vocal practice of hip hop/rap music, was equally important to beatmaking, the chief music compositional process of hip hop/rap music. These critics of hip hop/rap music overlooked their own history and ignored the fundamental fact of the authority paradigm in music: *To be an authority in music is to be a musician, one who plays an instrument with the intended purpose of making music.*

The New Dynamic of the Authority Paradigm: The Creative of Note

Today, anyone with a laptop (or even a smartphone), word processing program, and recording software can write, print, and publish a book or make and record music. If the history of print and publishing is akin to the musical instrument and recording — which is to say, if the tools of production and distribution are now more accessible and less important — then to be an authority in writing, publishing, and music is far less about the tools of production and distribution. Increasingly, it's more about the notoriety of the creative! Today, to be a creative of note is a dynamic that is increasingly transforming the authority paradigm. This doesn't mean that the fundamental basis for authority will change. I'm suggesting, however, that this new dynamic reaffirms the fact that *systems* of authority also evolve.

The Changing Patterns of Social Control

The authority paradigm speaks to *who* is authorized to create and *what* is the basis of that authorization. Looking past the tools of production and distribution, we can see that, historically, authorization in the bookselling (publishing) and printing industries and the writing profession have serious social components as well. In eighteenth-century England, licensing laws authorized booksellers and printers to make *copies* of written works. For eighteenth-century writers who belonged to the upper class and who believed that the writing profession was reserved only for men of their social rank, this meant that they were "expected to grovel before middle-class merchants and artisans in order to receive the stamp of the state authority."[109] Thus, social control rested not with upper class writers, but rather with middle-class merchants and artisans.

Here, then, we have to properly situate the role that changing patterns of social control have played in the concepts of authority and ownership. If the authority paradigm speaks to *who* is authorized to create and *what* is the basis for that authorization, it also suggests then — copyright law notwithstanding — *who* controls society and *who* can own a creative work. Writers in eighteenth-century England recognized that while they ostensibly owned their written works, authorization, i.e. control (real ownership), did not rest with them but instead with booksellers and printers, i.e. those who held the right to make copies of writers' works. In this light, authorship and publications were viewed as instruments of social control.

Therefore, we must understand that "the history of copyright was a history of *control* before it became a history of the individual's right to own what she or he created in words," the latter being a principal characteristic of modern-day copyright. So it's a myth that the development of the concept of authorship was as simple as a progressive shift from "monarchic state control to authorial individual freedom."[110] The real cause of this shift was the battle for social control between booksellers, printers, and writers. Writers

[109] *Ibid*, 241.
[110] *Ibid*, 242.

ultimately won this battle by changing the authority paradigm for themselves and, in effect, all creatives. In fact, writers of eighteenth-century England raised two poignant questions: "How is it that the author himself must be authorized? Is not the author by definition the authority who must authorize *himself*?"[111] In similar fashion, today, we must ask: How is that the musician — or any other creative — must be authorized? Is not the musician (or the creative of any art form) by definition the authority who must authorize himself?

The Author-Function and the Myth and Sanctification of the Individual Author

Having looked at *who* is authorized to be an author and what is the basis for this authorization, we can now turn to *what* is an author, as this question gives better insight into the modern concept of authorship. When noted French philosopher and social theorist Michel Foucault asked, "What is an author?" in his 1969 essay of the same in name, he challenged modern notions of authorship through an examination of the relationship between the author, text, and readers. Principally, Foucault argued that something peculiar happened in the seventeenth and eighteenth centuries, that the modern conception of authorship "evolved as authors came to be figured as *sacred figures*, holders of legal ownership of texts and words, *which in turn conveyed privilege or sanctity to the text itself*." [112]

Foucault pointed out that:

> [i]n the seventeenth and eighteenth centuries, a totally new conception was developed when scientific texts were accepted on their own merits and positioned within an anonymous and coherent conceptual system of established truths and methods of verification. *Authentification* **no longer required reference to the individual**

[111] *Ibid*, 242.

[112] Peter Leithart "Individualization of the author," Evangelical (October 13, 2006) https://www.patheos.com/blogs/leithart/2006/10/individualization-of-the-author/ *See also*: Foucault's essay was originally a lecture responding to Roland Barthes' famous essay "The Death of the Author." "What Is an Author?" (French: Qu'est-ce qu'un auteur?) was a lecture on literary theory given at the Collège de France on 22 February 1969; it was later published in full in 1969 in Modernity and Its Discontents. (emphasis mine).

> **who had produced them;** ***the role of the author disappeared as an index of truthfulness*** **and, where it remained as an inventor's name, it was merely to denote a specific theorem or proposition**, a strange effect, a property, a body, a group of elements, or pathological syndrome. **At the same time, however, "literary" discourse was acceptable only if it carried an author's name; every text of poetry or fiction was obliged to state its author and the date, place, and circumstance of its writing.** ***The meaning and value attributed to the text depended on this information.*** If by accident or design a text was presented anonymously, every effort was made to locate its author. Literary anonymity was of interest only as a puzzle to be solved as, in our day, literary works are totally dominated by the sovereignty of the author." {emphasis mine}[113]

And in describing how the *author-function* was developed, Foucault emphasized that the author-function is not:

> **formed spontaneously through the simple attribution of a discourse to an individual. It results from a complex operation whose purpose is to construct the rational entity we call an author.** Undoubtedly, **this construction is assigned a "realistic" dimension as we speak of an individual's "profundity" or "creative" power, his intentions or the original inspiration manifested in writing. Nevertheless, these aspects of an individual, which we designate as an author (or which comprise an individual as an author), are projections, in terms always more or less psychological, of our way of handling texts:** in the comparisons we make, the traits we extract as pertinent, the continuities we assign, or the exclusions we practice. In addition, all these operations vary according to the period and the form of discourse concerned. A "philosopher" and a "poet" are not constructed in the same manner; and the author of an eighteenth-century novel was formed differently from the modern novelist. **There are, nevertheless, transhistorical constants in the rules that govern the construction of an author.**
> [emphasis mine][114]

Thus, for Foucault, three things were clear. First, the individualization of the author was a *process*, a construction. Second, this construction was *not* inevitable or natural. Third, this construction of the author as wholly individualized, i.e. an

[113] Michel Foucault, "What Is An Author," Modernity and Its Discontents (1969), 306.
[114] *Ibid*, 307.

author's discourse is attributed *solely* to himself, was (is) a myth. The idea that an author doesn't borrow, that he comes up with his ideas all on his own, arrives at a moment in history that Foucault calls "a privileged moment of *individualization* in the history of ideas, knowledge, and literature, or in the history of philosophy and science."[115] Although Foucault maintained that his focus was on the relationship between "an author and a text, and reader, the manner in which a text apparently points to this figure who is outside and precedes it," he acknowledged the sociohistorical analysis of the author as an individual and provided clues to its construction. Notably, questions regarding individualization, authenticity, attribution, and valorization figure prominently in the construction of the author:

> …I will set aside a sociohistorical **analysis of the author as an individual** and the numerous questions that deserve attention in this context: ***how* the author was individualized in a culture such as ours**; **the status we have given the author, for instance, when we began our research into authenticity and attribution; the systems of valorization** in which he was included; or the moment when the stories of heroes gave way to an author's biography; **the conditions that fostered the formulation of the fundamental critical category of "the man and his work."** For the time being, I wish to restrict myself to the singular relationship that holds between an author and a text, the manner in which a text apparently points to this figure who is outside and precedes it.[116]

Regarding the author as an individual, the first set of questions that Foucault seeks to set aside are the questions associated with individualization, authentication, and systems of valorization. This is instructive for the purposes of seeing how *all* creatives are linked. And it's especially helpful for better understanding the bias against the art of sampling. Foucault's author-function, though specifically formulated for authors of the written word, applies to all creatives. Remember, copyright law uses the term "author of the work" as a catch-all term that is understood to mean *creator*

[115] *Ibid*, 300 (emphasis mine).
[116] *Ibid* (emphasis mine).

of the work. For instance, a photographer who registers a photo with the Copyright Office is not listed as the "photographer" of the work but instead the "author" of the work. Thus, each creative class represents its own function which operates similarly to the author-function. Looking at the "musician-function" then, we can draw important parallels. With regards to questions (or perceptions) about individualization, authentication, and systems of valorization, we can see where, in part, opponents of the art of sampling get their views from. Ironically, looking at the musician-function through the dynamics of individualization, authentication, and systems of valorization, we can also see how the art of sampling exposes the myth of authorship. What Foucault is referencing when he says "…privileged moment of *individualization* in the history of ideas" is the popular, pre-eighteenth-century process of writers altering an author's work to suit their own needs. In modern terms, we call this "hacking."

One example of this common practice of altering an author's work, i.e. transforming and reproducing pieces of an author's work along with added elements, was the commonplace book of the Renaissance period (fifteenth and sixteenth centuries). "The Renaissance practice of keeping a poetic commonplace book, in which a variety of poetic texts might be 'gathered and composed, as Arthur Marotti puts it, typically in a blank 'table book,' often received as a gift, 'in which poems or poems and prose *were meant to be transcribed by its owner* — usually without a governing plan or arrangement.' Most of the time, these poems were transcribed without attribution; sometimes even the compiler of the commonplace book remained anonymous."[117] Here, it's worth noting the circumstances in which poems were associated with authors during the Renaissance period. "Peter Beal writes that when names do 'become associated with poems' in manuscripts, it is 'for a variety of reasons besides simple authorship. A man's name might become linked with a poem in the course of manuscript

[117] Max W. Thomas, "Reading and Writing the Renaissance Commonplace Book: A Question of Authorship?," in *The Construction of Authorship* (Durham and London 1994), additional quote of Arthur Marotti from Johne Donne: Coterie Poet 5-6, 7 (1986), 401 (emphasis mine).

transmission because he was the copyist, or because it was written by someone in his circle, or because he added his own stanzas to it, or wrote a reply to it, or set it to music, and so on."[118]

With regards to textual practices and the conditions that make them possible, attribution during the Renaissance period held a different significance than attribution associated with modern notions of authorship. In "Reading and Writing The Renaissance Commonplace Book: A Question of Authorship," Max W. Thomas points outs that:

> most twentieth-century readers approach Elizabethan poetry through *single-author* editions (Donne, Shakespeare, Marlowe, Jonson, and so forth) or through anthologies, which are organized by author. **An Elizabethan reader's approach to that poetry would be significantly different from a modern reader's approach, even in the poetry's most basic material dimensions. Not only attributions, but also texts of the poems themselves remained highly variable.** As Gerald L. Bruns argues, ***the manuscript text remains open, malleable, and therefore 'tacitly unfinished*: *it is never fully present but is always available for a later hand to bring it more completely into the open.'*** As a result, poems might exist in several different versions."[119]

More generally speaking, beyond the commonplace book of the Renaissance period, we must recognize that "[r]enaissance writers and readers approached texts as unified, variable artifacts that were to be engaged with, compiled and rewritten according to the instruction of the reader's pleasure, rather than according to some notion of authorial authority emanating from an individually authorized text."[120] Changing, for instance, the sentiment reflected in the adulation of a character in text, or rearranging the order of importance of specific points of thesis — or for that matter, *adding* new points to the thesis while removing others, then producing a *new* text — was what the pre-eighteenth-century process of writers

[118] Ibid, Thomas quoting Peter Beal from "Shall I Die," *Times Literary Supp.*, Jan.3 1986, at 13, 401. Further worth noting from Thomas: "Composition is a process of mediation as well as a process of production…. The composer iss thus presented as a kind of reader, going through the poems one by one and commenting upon them." Thomas, 407-08]
[119] *Ibid*, 402.
[120] Ross, 237 (emphasis mine).

altering an author's work to suit their own needs was all about. If this practice sounds an awful lot like sampling that's because, well, it is. But this is the basis of all creativity, this is how permissive borrowing works in all art forms, in all creative activity. Creatives hack works that came before them and add new ideas, new interpretations, reconceptualizations, new elements, etc. The transformation of older works for the purpose of creating new works to the benefit of society is exactly what copyright law seeks to encourage.

What's also important to note about the popular pre-eighteenth-century practice of altering authors' works (such as the commonplace book) is that adaptions of other authors' works were radically revised and transformed repeatedly, and the *name* of the author did not sanctify his work. The sanctifying of an author's name, a major part of modern notions of authorship, did not emerge until the end of the eighteenth-century. By the middle of the nineteenth century, for example, the adulation of Shakespeare as the "greatest writer in the English language," is widespread. This despite the fact that questions of Shakespeare's "authorship" persisted around the same time, and the fact that Shakespeare wrote during the Elizabethan Era, a period in which borrowing — including *the altering of authors' works to suits one's own purposes* — was still very much en vogue.

My point here is not to cast doubt on the authorship of Shakespeare. Rather, what I hope to show is that even for the so-called "greatest writer in the English language," borrowing from pre-existing works was as much a part of the creative process as it was for any other writer of the Elizabethan Era; that it was also a major part of the creative process of writers in the Romantic Period; and that it certainly remains a part of the creative process of writers of our time. The *authoring*, i.e. the creating, that all creatives do is a combination of borrowing from pre-existing works, transforming them, and adding one's own ideas. Any examination of authorship, originality, and creativity that ignores this reality is incomplete and an act of willful ignorance. This is one reason why the criticism of the art of sampling as a "non-music" process, or a music process that "steals" from other artists (authors), does not align with reality.

Here, it's important to turn to the components that make up the author-function, for the primary characteristics of the author-function demonstrate how the eighteenth century became the period in which the concept of authorship as we know it today was institutionalized.[121] Foucault argued that the author-function is comprised, primarily, of four characteristics, which he maintains are the most obvious and important. He summarizes them in the following manner:

> "1) the 'author-function' is ***tied to the legal and institutional systems*** that circumscribe, determine, and articulate the realm of discourses; 2) it does not operate in a uniform manner in all discourses, at all times, and in any given culture; 3) it is not defined by the spontaneous attribution of a text to its creator, but through a series of precise and complex procedures; 4) it does not refer, purely and simply, to an actual individual insofar as it simultaneously gives rise to a variety of egos ***and to a series of subjective positions that individuals of any class may come to occupy."***
> [emphasis mine][122]

In discussing the author-function, Foucault limits his subject of analysis to the domain of discourse, i.e. books and texts, "in the limited sense of a person to whom the production of a text, a book, or a work can be legitimately attributed." But he acknowledges that the author-function is also at work in painting, music, technical fields, and so forth.[123] It is not surprising then that this construct of authorship is loaded with society's projections of what the characteristics of an author are, what is the assigned status of an author in society, and *who*, presumably, gets to be an author. While this construction is linked to a given period and *form* of writing (i.e. type of knowledge/discourse) concerned — a novelist, a song writer, a philosopher, and a historian are not the same — certain aspects of the construction of the author always remain. *All* authors of written works describe, in more or less detail, actions, events, or concepts within a text; and all authors are tied to their

[121] Peter Lindenbaum, "Milton's Contract," in The Construction of Authorship (Durham and London 1994), 175.
[122] Foucault, 309 (emphasis mine).
[123] *Ibid*, 307.

worldview and social predilections and aversions. Thus, *defining* an individual author requires a determination of his "originality;" and this determination is made by distinguishing the author from other authors and existing texts. In other words, determining the originality of an author should simply mean locating what can be credited to him (his own creativity, ingenuity, vision, etc.) and ruling out what can't be credited to him. This speaks to the low bar of the originality qualification in copyright law — Reaason being, copyright law recognizes that all authors arrive at their own works through the path of borrowing from and building on previous works.

Applying the Primary Characteristics of the Author-Function to Sample-Based Musicians

The same characteristics that make up the author-function — and thus show us how, in part, the modern notion of authorship was constructed — can also be used to show the construction of what is *not* authorship, or more specifically for our purposes in this study, why some critics argue that authorship shouldn't be extended to sample-based beatmakers (producers)s.

There are long-standing social associations with musicianship, but the two most important factors in Western culture that determine *who* is a musician are: privilege and status. And this is based on three factors. First, at least a rudimental understanding of Western music theory. Second, a performance talent with a traditional musical instrument. Third, "legitimate" music training.

Anyone making music who does not meet these criteria is often considered to not be "real" musicians. Many critics believe that sampled-based beatmakers (producers) do not have a rudimental understanding of music theory. Likewise, these same critics tend to not recognize drum machines, digital samplers, and the like as real musical instruments, or at least not in the same vein as "traditional" musical instruments. Finally, critics of sample-based beatmakers (producers) believe that the art of sampling is "easy" and therefore requires little to no intellect, nor any serious training. For these

critics, the art of sampling begins and ends with the capturing of a sound, that's it; to them, sample-based beatmakers (musicians) do nothing more than cut and paste. (As I detailed in the "Instruction" part of this book, the art of sampling is certainly far more than that.)

Setting aside these flawed critiques of the art of sampling, what should be recognized is that more often than not, critics discuss sampling in hip hop/rap music *without* acknowledging that sample-based hip hop/rap songs are traditionally accompanied by a lyrical performance. Thus, even the most basic use of a sample is transformative whenever a rap performance accompanies it. When the substantially similarity analysis of two (or more) works is conducted in court, the works are compared to each other *on a whole*. That means, the original song that is sampled must be compared to the song that samples it — *on a whole*. This includes the vocal performances and themes of each song. In terms of vocal performance, hip hop/rap songs never share a similarity with the songs that they sample primarily because rapping is a distinct vocal performance that can never be mistaken for traditional singing. (Not to mention all of the songs sampled that do not include a vocal performance.) Further, overwhelmingly hip hop/rap songs do not share themes with the songs that they sample. And when they do, the expansion of the theme is practically always apparent.

The Author-Entrepreneur vs. The Author-*Artiste*: Why the Originality Problem is Also a "Purity" Problem, and Why Self-Promotion is Good

As I noted earlier in this chapter, the Romantic poets conjured up a twisted, illogical concept of originality to cope with their "anxiety of influence" and their fear of competition from the growing number of authors around them. But these weren't the only reasons. The Romantic poets were also concerned about the notion of "purity" in writing and the "purity" of the author, as well as the authority paradigm related to authorship, i.e. the notion of *who* is *authorized* to be an author. Recall that, in Chapter 13, I pointed out that in pre-eighteenth-century London, writing was something essentially reserved for the upper class, something for "gentlemen" who had the leisure to do it. Writing, at that time, was not yet a "profession" as we would come to know it, and the concept of the "author" as a professional figure in the marketplace was not yet a thing. Again, as Peter Jaszi has noted, prior to the advent of copyright in the mid-eighteenth century, very few writers "had been *living by their pens* in England since the sixteenth century."[124] But everything changed once authors became entrepreneurs — thanks to the advent of copyright.

When mid-eighteenth century writers in London had finally turned writing into a profitable business, they transformed the idea of the *authority* to write. In turn, they revealed the "purity" aspect

[124] Peter Jaszi, "On The Author Effect: Contemporary Copyright and Collective Creativity," The Construction of Authorship (Durham and London 1994), 8. (emphasis mine).

of authorship for the myth that it was. And in doing so, they established the idea of authorship and entrepreneurship, alongside copyright, as we know it today. For these writers, the "purity" of literary ideas was not mutually exclusive with entrepreneurial aspirations. In other words, these writers didn't see self-promotion as "selling out." On the contrary, they embraced self-promotion not simply because it was as a fundamental part of the business of authorship, but because it bore witness to their position and status as the author-entrepreneur.

In Chapter 13, I highlighted two early and important examples of the author-entrepreneur: John Milton and Alexander Pope. Here, it's worth noting how these two author-entrepreneurs approached self-promotion. To get *Paradise Lost* published, John Milton, who had long relentlessly promoted himself as a "major" poet, had to pull a stunt! In this way, he was the first great author/self-promoter, and quite possibly the world's earliest modern "professional" author. So when John Milton entered into a formal contract with printer Samuel Simmons for the publication of *Paradise Lost* on April 27, 1667, it was the "earliest known such literary agreement to have come down to us."[125] Peter Lindenbaum has noted exactly why the Milton *Paradise Lost* contract stands out, and what it meant for writers and authorship thereafter:

> At a time when copyright was "granted solely to stationers through entry in the Stationers' Company Register…," Milton's formal contract between an author and publisher stands out for two reasons. First, since the creation of the Stationers' Company in 1556 on through to 1667 — **more than one hundred years of "industry standard" — no such contract had existed.** Second, and more importantly, **Milton's contract represented the action of *an author who was fully self-aware of his position*.** Here, we see "an author *who is fully acknowledging the condition of authorship, viewing himself the possessor of property that gives him definite rights (for instance, the right to demand an accounting of sales),* even as he lives and writes at a time when copyright is granted solely to stationers through entry in the Stationers' Company Register." [emphasis mine][126]

[125] Peter Lindenbaum, "Milton's Contract," in The Construction of Authorship (Duke University Press, Durham and London 1994), 190.
[126] *Ibid*.

In viewing himself as the possessor of property, John Milton was "fully self-aware of his position" as an author-entrepreneur.

Like John Milton, Alexander Pope was concerned with his image as a major writer. And like John Milton, Alexander Pope pulled a stunt to boost his name among authors. Even if he did try to present himself "as a gentleman and scholar rather than as a professional," Alexander Pope was deeply involved "in the literary marketplace;" and Pope, "more than any other writer of his day," "behaved like *a* ***literary entrepreneur*** and made a fortune from his verse."[127] Alexander Pope's stunt, which resulted in the famous lawsuit *Pope v. Curll* (1741), was all about his image management.

For years, Pope had sent letters to Jonathan Swift (and other major writers of the time, including John Arbuthnot, Lord Bolingbroke, and John Gay). When Swift finally responded, Pope wanted to make his correspondence public, because it was a way to puff up his name by association with the name of one of the greatest writers of his time. "But for a gentlemen to publish his own letters would have seemed inexcusably vain, and Pope had to arrange matters so that publication would seem to occur against his wishes." So Pope had the letters printed in Dublin, which "made it possible for him to publish an authorized edition as part of his collected works. Six weeks after Pope's edition appeared, Curll released a volume, which he claimed was a reprint of the Dublin edition. Pope, who anticipated Curll's action, immediately brought suit." The lawsuit against Curll allowed Pope to "protest against the indignity of being exposed in print and at the same time, open the way for an authorized version" of his letters with Swift, which permitted Pope to make his association with Swift known to the public and boost his image.[128]

What the stunts of John Milton and Alexander Pope show is that, for more than *350 years*, authors were fully self-aware of their position as author-entrepreneurs. Additionally, what the stunts of Milton and Pope show is that motivations of authors are never

[127] Mark Rose, "The Author In Court: Pope v. Curll," in *The Construction of Authorship* (Duke University Press, Durham and London 1994), 216 (emphasis mine).
[128] *Ibid*, 216-218 (emphasis mine).

purely creative. So in considering the self-promotion antics of Milton and Pope, are we to say that these two giant writers were sellouts? Moreover, are we to say that "purity" was central to their literary works and the methods they used to promote them?

These are interesting questions, especially since some people today conflate "selling out" with self-promotion (or other business and making money practices). But if self-promotion was good for John Milton and Alexander Pope, two of the giants of English literature, how is self-promotion a bad thing for authors (artists) *300 years* later?

***

In her article "Everyone's a sellout now" (*Vox,* 2024), Rebecca Jennings takes a look at self-promotion that creatives do in today's creator economy. Jennings examines self-promotion through the lens of "selling out," and shrouded in the impact of social media activity on social networks like Tik Tok, YouTube, and Twitter, she indirectly focuses in on the notion of the "pure" artist, i.e. the author-*artiste*, and the reservations that the author-*artiste* has when it comes to self-promotion. Jennings recalls the "no-sellout" wave of the 1990s, but she doesn't explore the fact that, while creative "purity" has always been *one* of the motivations for some artists, especially writers, artists have long been self-promoting entrepreneurs at the same time.

Like writing itself, or creating art of any kind, self-promotion comes easier to some people than others. So some people are more comfortable with self-promotion and therefore quite good at it. Others are not. Hence, for those who are not at ease with self-promotion, or simply not as good at it, it's easier to look at self-promotion as "selling out," something not "pure." See the hustle? Sounds familiar?

Remember, when faced with growing competition from the emergence of new writers all around them — a fact brought about by technology and an increased number of writers in the literary marketplace — the Romantic poets invented a twisted concept of

originality to cope with their inability (or unwillingness) to compete in accordance with the new rules of the changing landscape of their time. Similarly, today, faced with the explosion of new writers and new music artists, some writers and music artists have turned self-promotion into a dirty word.

What these writers and music artists are ignoring of course, is that once art and commerce merge, every creative becomes an entrepreneur! So if a writer or a music artist is not willing to compete, if he is not willing to promote his work — via promoting himself — then he must recognize that he will have a lower chance of success in the marketplace. In other words, if a creative believes that "purity" in creativity is mutually exclusive to entrepreneurship (business, making money, self-promotion, etc.), then why engage in *professional* creative activity at all? If a writer or a music artist wants to create for the sake of creating, if it's just all about the "purity" of the work, then why go public with the work and make it available on the marketplace at all?

The truth is, all professional creatives are driven by a combination of things. But the vast majority of creative professionals are driven by two motivations. First, the need to make a living off of their work. Second, the desire to obtain prestige in their industry. Neither of these things, alone or together, are bad or more or less noble. And neither of these things are subject to "purity;" in fact, if anything, these two professional motives prove that there is no "purity" where art and commerce are concerned because the motivations behind the creation and selling of the work are never purely creative.

So in terms of making a living off of professional creative activity or achieving prestige, I would argue that any author (any creative) who views self-promotion as a negative is at a huge disadvantage in the marketplace. This was true in the mid-eighteenth century and it's certainly true today.

In recent years, publishers have come to realize this, observing that legacy-industry marketing practices are less effective or no longer enough to generate sufficient book sales. Jennings correctly points out that, "[w]ith any book, but especially nonfiction ones,

publishers want a guarantee that *a writer comes with a built-in audience of people who already read and support their work* and, crucially, will fork over $27 — a typical price for a new hardcover book — when it debuts." But this is not an unreasonable demand. For the latter part of the twentieth century, legacy book publishers, like legacy music labels, thrived on the "manufacture-a-hit" model. Under this model, hits were manufactured by the labels' "marketing machine" and sheer power and connections within the entertainment and media industries. Whether the book was any good or not mattered less once the machine was behind it. And while it was presumably the machine's job to build the audience, it was always the job of the author to keep (and further expand) his audience, presumably by writing new works and doing book tours and other publicity engagements.

Legacy publishers relied on their own marketing machine because it was a surefire way to sell books. Still, authors have been self-promoting themselves and their work much longer than not. However, legacy publishers, like most of the authors that they published, operated under the notion of the author as an *artiste*, a creative who was so "purely" focused on their writing that they scoffed at *the business* of books. The idea being that a "pure" author is *above* self-promotion, never a "sellout." But this would be laughable if it wasn't so tragic. The author-*artiste* aside, legacy publishers — like booksellers in eighteenth-century London — had a vested interest in steering authors away from the business of books. Why? Because while authors had won their fight for copyright, giving them *initial* control over their literary works, booksellers had actually gained more control over the literary marketplace and the overall *business* of literary works. And booksellers turned the loss of copyright into something that allowed them to carve out an even bigger piece of the pie. (Ever wonder why the standard royalty publishers offer is just *10%* of the retail price of a book?)

As publishers grew in power, authors were pacified and treated as *artistes*. This led new authors to believe that marketing and promotion were the job of the publisher, and that the *only* job of the writer was to write. But this couldn't be further from the

truth. As I noted earlier in this chapter, writers were actively self-promoting more than *300 years* ago! And those writers didn't see themselves as "sell outs," nor did they considered self-promotion be a "burden" — *and let's remember, these authors were super sensitive about creativity and originality*! Rather, they saw it as a fundamental part of being an author-entrepreneur in the literary marketplace.

A Personal Brand Is Not a Tyranny; It's the Most Egalitarian Aspect of the Creator Economy

Self-promotion, on some basic level, is a necessity for all professionals who put their work — and by proxy, themselves — into any marketplace. So conflating "hucksters vying for your attention and money by selling you courses and coaching on how to get rich online"[129] with the basic kind of self-promotion professional creatives *should* do misses the point. In "Everyone's a sellout now," Jennings frames the omnipresence of "the personal brand" — which runs, in part, on self-promotion — as a "tyranny" that we "cannot escape." In this way, she frames self-promotion as a bad thing that all creative professionals *must* do, save for the "very lucky," *as she calls them*. One overarching idea of Jennings's article is that authors, music artists, journalists, and other creative professionals are being tormented by the need for self-promotion; and the implicit message in this is that it that was never like this before.

Jennings puts a lot of the blame on "the internet" for enabling the bombardment of self-promotion. But while the internet has certainly extended the public square and made the whole world local, self-promotion is not new, nor is it the product of the internet. The internet has expanded opportunities for writers and other creatives and, naturally, this has resulted in increased competition. And wherever you find competition, you will find self-promotion. This critical context, which is missing from Jennings's article, reveals that the so-called tyranny of self-promotion is really about

[129] Rebecca Jennings, "Everyone's a sellout now," Vox (Feb 1, 2024) https://www.vox.com/culture/2024/2/1/24056883/tiktok-self-promotion-artist-career-how-to-build-following (emphasis mine).

two things. First, the sense of entitlement that some creative professionals have. Second, and more significantly, the nature of competition and how it's more daunting for some than others.

Today, there's much more competition in the creative industries than there ever was in the twentieth century. Barely 40 years ago, creative industries were closed to all but a handful of people. For instance, the book publishing and music industries were "pick-me" industries in which people maneuvered, using various tactics, just to get *picked*. And once picked, authors and recording artists benefited from a tightly controlled media landscape. This meant that promotion, publicity, and marketing were all controlled and coordinated under a tight, "hit-making" system. This system worked as a wall that blocked entry to anyone not fortunate enough — through connections, contacts, privilege, or similar advantages — to be on the inside. But the democratization of production, publishing, and distribution tools (ushered in by new technology and accelerated by the internet) brought the wall down. Just like the Industrial Revolution did when it brought down the wall around the Romantic poets.

As more and more people recognized that they no longer had to stand in line and wait to get picked, enterprising individuals took matters into their own hands and launched themselves into the game. Where did this leave those who preferred the old system in which only a few were *chosen*? Since entitlement is central to the whole "pick-me" scheme, this left these creatives flatfooted and without a viable course to follow. After all, how do you compete when you've been led to believe that it's not necessary for you to compete, that all you need to do is focus on your art? Moreover, how do you compete when you believe that, by the nature of your being picked, those who picked you are responsible for taking care of all of your promotion, publicity, and marketing?

In today's creator economy, there's a bevy of great new literary and musical works being released every day — A pace never seen before in history! Hence, for some, it's not really self-promotion that's tormenting them, it's the competition. Self-promotion is just one means of competing. But if you can *redefine* the basic concept

of self-promotion, let's say frame it as a tyranny that's tantamount to "selling out," well, then it's easier to scapegoat self-promotion as the barrier to your advancement, as opposed to accepting the reality that more competition is the real roadblock. Remember, while there are many authors and music artists today having a harder time making a living from their creative work, there are others who are doing just fine. This is how it's always been.

In the world of art and commerce, some will do exceptionally well, some will be able to earn a comfortable living, some will struggle to get by, and others simply won't make it. Self-promotion has never guaranteed success to anyone; on the other hand, a lack of self-promotion has never improved anyone's chances. And one way or the other, competition has always played a role in this. So while one creative class may be struggling in today's creator economy — with all of its increased competition and other challenges — another creative class may be flourishing under the exact same conditions.

This is why the *self-promotion-as-"selling out"* trope doesn't address what's really going on, nor does it offer an inclusiveness analysis. Speaking prematurely for how *all* millennials and Gen Xers view self-promotion, literary agent Carly Watters says that:

> Authors are writing these incredible books, and yet when they ask me questions, *the thing that keeps them up at night* is, '*How do I create this brand?'* It's not that they want to be spending their time doing it, *it's that they feel they have to.* I think that millennials and Gen Xers really feel like sellouts. It's not what they imagined their career to look like. It *inherently* feels wrong with *their value system.* [emphasis mine][130]

First, Watters is discussing *her* experience with book authors that she likely represents or is familiar with in some other capacity. This is a very small sample size, yet Watters frames her experience as universal for all millennials and Gen Xers. The truth is however, *all* millennials and Gen Xers don't see self-promotion the way that Watters say they do; *all* millennials and Gen Xers don't see themselves as "sellouts."

[130] Jennings.

Second, and more revealing, what did these "authors writing incredible books" imagine their careers would look like? Did they imagine things to be like they once were under the "pick-me" system? Did they imagine that, even with competition — from other authors writing incredible books (or even sub-par books) — that they'd be able to skip out on self-promotion?

Third, self-promotion does not conflict with the value systems of *all* millennials and Gen Xers. And in reality, self-promotion, in the abstract, is just the process of making people aware of your work, something that you believe in and stand behind. It's hard to see how this conflicts with anyone's value system. But even still, everyone does not share the same value system. And counter to what Jennings says, everyone does not think that self-promotion "sucks." For instance, hip hop culture places significant value in self-promotion, mainly because in hip hop culture, competition is healthy and self-promotion is a form of self-respect. (More on this later.)

The *Good* News About Building a Personal Brand: How Tom Peters's Article "The Brand Called You" Speaks to Competition and the Author-Entrepreneur

In his article "The Brand Called You" (*Fast Company*, 1997), Tom Peters — the writer who coined the term "personal brand" — demonstrated why self-promotion and building a personal brand are not bad things. In her piece "Everyone's a sellout," Rebecca Jennings summed up the "gist" of "The Brand Called You" this way: "If you're not building your 'personal brand…you're already being left behind by the new economy, one where career success isn't defined by moving up the corporate ladder but by individual growth and self-promotion."[131] So I'll begin my larger examination of "The Brand Called You" here with that.

[131] Jennings.

First, while Peters pointed out how (and why) moving up the corporate ladder was outdated by 1997 and no longer the primary pathway that professionals used to advance their careers, this observation was *not* the "gist" or the heart of "The Brand Called You." And it's worth noting that even when the proverbial corporate ladder pathway was looked at as the primary means for career advancement, individual growth and self-promotion still played a role.

Second, the sub-title on the headline design for Peters's article was: "You Can't Move Up If You Don't Stand Out!" Said differently, this means: *You can't compete (and succeed) if you don't stand out.* And Peters was careful to note that "**[t]here is no one right way to create the brand called You;"** ergo, there is no one right way to compete — John Milton and Alexander Pope proved this *300 years* ago. Hence, Peters's piece wasn't about self-promotion *per se* or rather any one form of self-promotion. More significantly, "selling out" was not a theme of "The Brand Called You;" and self-promotion was not isolated in the article as some heavy lift that professionals had to (unfortunately) bear. Instead, "The Brand Called You" was about the necessary work of building your personal brand — in order to stand out — in a creator economy filled with competition.

Thus, Peters was getting at the importance of standing out, something creative professionals have always needed to do. In the abstract then, self-promotion, which can take on many different forms, is fundamental to standing out, but it's subordinate to the larger theme of creating and building your personal brand so that you compete. Think of it this way. While the promotion of your new book or album is certainly important, it's not, however, more important than the book or album itself. Your work — that book or that album — still must prove its value in the marketplace, no matter how you promote it.

Next, far from the slim, negative narrative of self-promotion and personable branding as something "inescapable," as Jennings frames it, the real "gist" of "The Brand Called You" is something much deeper and uplifting. In "The Brand Called You," Peters

argued that personal branding is the promotion of one's unique "power." "The Brand Called You" was not about self-promotion *alone* or in the abstract; neither was it about the danger of being "left behind if you're not building your 'personal brand,'" as Jennings puts it. The real point of "The Brand Called You" is this. In an economy of "free agents," the term Peters uses to describe individual professionals, everyone is a *competitor*, not a "sellout." And the only way to compete in an economy of free agents, what we know today as the creator economy, is to stand out by building — and constantly expanding — your personal brand. Self-promotion is just *one* aspect of this larger pursuit.

Additionally, Peters, who was clearly not against self-promotion, saw the openness of competition in the creator economy as a good thing: "The good news — **and it is largely good news** — is that ***everyone has a chance to stand out. Everyone* has a chance to learn, improve, and build up their skills.** *Everyone* has a chance to be a brand worthy of remark."[132] This attitude is certainly a far cry from the doom and gloom framing of self-promotion and personal branding that Jennings does in her article "Everyone's a sellout." Moreover, in "The Brand Call You," Peters doesn't spend any time propping up the notion that building your personal brand compromises creative integrity or personal values. In other words, building your personal brand is not less "pure" than *not* building your personal brand. In fact, the term "selling out" doesn't even appear in "The Brand Called You."

Another key point that Peters is occupied with in "The Brand Called You" is how to figure out "how to transcend the narrow boundaries" and "categories" that we compete in.[133] Thus, the equation translates this way: How to "transcend" = how to "stand out" = how to compete in the ever growing creator economy. This is the "power" of the author-entrepreneur. No one knows your work quite like you do. More significantly, you know what makes your work different. So when you create your work, you, above

[132] Tom Peters, "The Brand Called You," *Fast Company* (Issue 10 August/September 1997) 83, (emphasis mine).][FN: Tom Peters, "The Brand Called You," Fast Company (Issue 10 August/September 1997) 83, (emphasis mine).

[133] Peters (emphasis mine).

all, have the power to advance your work in the marketplace. And the number of ways that you can do this through self-promotion is infinite. Even when using the same tools or methods of others, you are limited only by your own imagination and ingenuity. This of course is a good thing, because you can always improve your skills, expand your imagination, and boost your ingenuity; and when you do so, you can transcend the competition. Also, as Peters noted, you have to be proud of your brand! Which means there's nothing wrong if you "shamelessly take credit for" your brand by promoting it. Having this attitude is also a part of transcending the competition. Moreover, Peters reminds us that, just like the branding campaigns for major corporations like Nike, General Motors, Ford, or Chrysler, the author-entrepreneur has the same need for visibility. And without a big budget, self-promotion is one of the best ways that the author-entrepreneur can gain visibility.

You don't want visibility via your own efforts? You don't want to self-promote because you think it's "selling out" or not in line with your values? Fine. But that communicates the value and character of your brand. The alternative is that you recognize that, "[i]f you want to grow your brand, you've got to come to terms with power — your own. The key lesson: power is not a dirty word!" Hence, self-promotion — literally promoting yourself, advertising the strength of your brand, your *power* — is not a dirty word. "In fact," Peters observed, "power for the most part is a badly misunderstood term and a badly misused capability." And Peters notes that there are ways to do self-promotion, to promote your power, "**without appearing to be a self-absorbed, self-aggrandizing megalomaniacal jerk.**" "Getting and using power — *intelligently*, *responsibly*, and yes, powerfully — are essential skills for growing your brand. One of the things that attracts us to certain brands is the power they project. As a consumer, you want to associate with brands whose powerful presence creates a halo effect that rubs off on you."[134] So choosing to throw in the towel on self-promotion or mischaracterize it as a bad thing is a counterproductive to expanding your visibility.

[134] Peters (emphasis mine).

Thus, Peters's thesis about the personal brand and its importance is keenly focused on a central theme: How to compete with the competition — i.e. the other creative professionals in your field who are bound by the same narrow boundaries — by building your personal brand. To develop your personal brand, you have to identify "the qualities or characteristics that **make *you* distinctive from your *competitors.*"** "**To start thinking like your own favorite *brand manager*,"** as Peters urged readers to do, is to think of yourself as a business. This is exactly what it means to be an author-entrepreneur and not an author-*artiste*. And if you're going to be an author-entrepreneur — which is something you really don't have any choice but to be once you enter the world of art and commerce — then "you're going to be a brand," so "*you've got to become relentlessly focused on what you do that adds value*" to your brand. Moreover, "no matter how beefy your set of skills," no matter what advantage you may appear to have in the marketplace, "you still have to market the bejesus out of your brand," because there is no entitlement in the creator economy and the competition never stops.[135]

Speaking further to the wide open competition that the creator economy presents, Peters drilled down on the everyone/anyone component of competition in the creator economy:

> ***Everyone*** has a chance to be a brand worthy of remark.
>
> Who understands this fundamental principle?...
>
> Who else understands it? Every single Web site [sic] sponsor. In fact, **the Web makes the case for branding more directly than any packaged good or consumer product ever could.** Here's what the Web says: ***Anyone* can have a Web site.** And today, because anyone can ... anyone does! **So how do you know which sites are worth visiting, which sites to bookmark, which sites are worth going to more than once? The answer: branding. *The sites you go back to are the sites you trust.*** They're the sites where the brand name tells you that the visit will be worth your time — again and again. **The brand is a promise of the value you'll receive."** [emphasis mine][136]

[135] Peters (emphasis mine).
[136] Peters.

We should understand then that building and expanding your personal brand is not some hollowed out, morals-lacking endeavor that can be reduced down to the time it takes to make a day-in-the-life-style TikTok video. While standing out is certainly one aim of building your personal brand, the more significant goal of building your personal brand is giving people a reason to invest their time in *you* and *your work*. With so many choices today, why should anyone buy *your* book or download (stream) *your* music? Because you're an *artiste*? Because *your* "values" — values that make *you* feel like self-promotion and building your personal brand is "inherently wrong" — are superior to the values of those authors and musicians who are perfectly find with brand building their brands? As Peters notes, "**[t]he brand is a promise of the value you'll receive."** In this way, your personal brand is the promise you make to consumers, it's how you build trust in you and your work.

As your brand builds trust, you gain supporters; and this helps develop your ability to further compete in the creator economy. And the good thing about this is, there's no one right way to build your personal brand. Likewise, there's no one right way to approach self-promotion on social media. If something doesn't work for you, even though it may work for others in your field, that doesn't mean that it's inherently wrong or that it's the product of "selling out." In "The Brand Called You," Peters maintained that, "if you're <u>really smart,</u> you figure out what it takes to create a distinctive role for yourself — <u>you create a message and a strategy to promote the brand called You.</u>"[137] What this means is this. If you're really creative and enterprising, you figure out a way to distinguish yourself — You create a message and a strategy to promote you and your work. Taking the other side of this coin, consider how disadvantaged you are if you complain about self-promotion or think that you can distinguish yourself from the competition — in a world full of creatives — *without* building your personal brand and using self-promotion as one tool for doing so.

Next, Peters's seminal analysis in "The Brand Called You" hits on my overall point about technology and competition and the

[137] Peters (emphasis mine).

difference between the author-entrepreneur vs. the author-*artiste*. Since the late 1990s, there's been a huge increase in competition for creative professionals, something that's been brought about by advancements in technology and further accelerated in recent years by the internet. But technology and the internet also make it more possible than ever for *anyone* to better compete. So on a more leveled playing field, some of those who are finding it harder to compete — or just not capable of competing in a larger pool of competitors — prefer to cope with their own reality by complaining about self-promotion and self-branding, making it out to be a drag and something less "pure" or something in conflict with their "values." Again, how did the Romantic poets cope with an onslaught of new completion? They invented a new concept of originality to position themselves morally above the competition!

Finally, "The Brand Called You" also speaks to the reality of originality. Originality is about using the same tools that are accessible to everyone, then borrowing from the ideas and works and models put forth by others, then combining those ideas, works, and models with your own ingenuity. No one's reinventing the wheel here, and no one's operating in a void entirely on their own Rather, as Peters notes, while it's always about the substance of the actual product, be it a book or an album, it's also about "what *you* have to say and *how well you get it said*; and "it's also a matter of style." This is originality! Doing *your* version of what *others* have done (said) and how *they* did (said) it. In other words, doing your version, creating your *brand*, based on the combination of borrowed ideas and pre-existing works and your specific ingenuity.

***

Increased competition, increased self-promotion, the constant flow of personal brands. Are these things tyrannical? To craft "an engaging-but-authentic persona on Instagram," or on Twitter, or on Facebook, or on YouTube, or TikTok, or all of the above, how is this a bad thing? To "build a platform so that execs can use your existing audience to justify the costs of signing a new artist?" How is

this necessarily a negative and not just a recognition of what market forces demand in today's world of art and commerce? Should a professional creative expect that his work sell in the marketplace on just *vibes* alone, or just the creative *effort* that he puts into his work, or because he believes that his motivations are purely creative? Should a professional creative expect that an exec with funding and decision-making power invest in him without any serious indication of his potential in the marketplace?

The marketplace is a grand space of choices and consumers have always, to some degree, chosen a product as much for the product as the maker (self-promoter) of the product. This shouldn't be controversial. But because the notion exists, for a small, select group, that art and commerce should be "pure," or because some people increasingly want success for their works without the competition that goes along with it, self-promotion translates to burdensome work and the "personal brand" is a "tyranny" that we can't escape?

Of course, this isn't simply about competition in the area of self-promotion; the complaints about self-promotion are actually more reflective of the pressure some authors (artists) feel in competing with authors (artists) from the past *and* the present. Earlier in this chapter, I discussed how the Romantic poets were tormented by the idea of having to compete with the master poets who came before them *and* the new writers who were emerging rapidly around them. In remembering the "bygone era" of 2009, Bethany Cosentino, leader of the indie rock band Best Coast, lamented about competition in a similar fashion:

> Bethany Cosentino ***was 22 when she started her indie rock band*** **Best Coast** ***in 2009,*** and by the time she released her first album under her own name this year, the music industry was barely recognizable. **In that *bygone era*, she explains, you had to be reading *certain blogs*, going to *certain venues*, and hanging out with *certain people*** if you wanted to find a cool new indie artist. **There was *an entire cottage industry supporting* the discovery of emerging talent;** now, it's been relegated to a playlist algorithmically designed to match your existing tastes. "***Anyone*** can upload **anything** to Spotify, but Spotify **has every piece of music that's**

> **ever been made in the entire world,"** says Cosentino. "You're up against the Beatles and Fleetwood Mac." [emphasis mine][138]

This is a complaint about competition. First, Cosentino describes an insular world, a world in which her band flourished precisely because this "cottage industry" was small, narrow, and filled with far less competition. When cottage industries like these are disrupted, giving way to more competition, those who benefited from those cottage industries tend to have a harder time competing in the new landscape.

Second, being "up against" authors (artists) from the past is nothing new. For example, book authors were up against Hemingway and Faulkner long before Amazon arrived. So Spotify may have "every piece of music that's ever been made in the entire world," but you have a narrow vision of the world and your own talents if you believe you can't carve out your own place in that world. There are tens of millions of music listeners, tens of millions of hardcore and casual readers in the world, each with their own unique taste. Locating 100 of these folks and getting them to like your art is a challenge, but it's not impossible. And after you've got 100 fans (supporters), you scale up by creating more art and doing better self-promotion. This concept is a constant.

Still, the concept of and approach to self-promotion — as well as the wide-open nature of competition in the creator economy — leave artists like Cosentino even more frustrated:

> Where that's left her — **a musician *who's had* a successful career for 15 years** — is basically the same place it leaves any random up-and-comer: *constantly* promoting yourself online. **"It genuinely feels like I'm clocking into work,"** she says of social media. In the lead-up to her latest record, released this summer, she says *she was online for hours* from the moment she woke up, using an Excel spreadsheet to keep track of what she needed to post. **Even still, she says that as soon as her album came out, "it basically went away" in terms of commercial success.** Whether that was because it was under her own name instead of her more well-known band, *or because it was a departure from her earlier sound*, or because she didn't

[138] Jennings.

> hit the viral lottery, is impossible to say. **The only thing that matters now, she says, is streaming numbers, and if a record flops, the artist gets blamed *for not promoting it enough*.** [emphasis mine][139]

Of social media, i.e. doing self-promotion on social media, Cosentino says: "It genuinely feels like I'm clocking into work." But creating art *is* "clocking into work." Author (artists) who fantasize about a career in literature or music where there's no work are the ones most disenchanted with self-promotion.

Next, Cosentino essentially says that a "record flops" because it's not promoted "enough." Promotion can certainly help make a record a success, but promotion does not guarantee commercial success. Listeners still have the last say. Even still, in terms of commercial success, it's much easier to blame a lack of promotion or the *wrong* promotion than it is to accept the possibility that the music simply didn't resonate with enough listeners to make the record a success.

Additionally, Cosentino says that "A lot of stuff is broken." This isn't true; nothing's "broken." There's just more competition! And there are more tools to compete with. In this paradigm, privilege still plays a role, but the role is less impactful than things like creativity, skill, know-how, personality, a knack for marketing, and, of course, the final product. If you're spending the majority of your time on self-promotion, putting in hours on an Excel spreadsheet to keep track of what you need to post, that's a you problem, not a problem of self-promotion itself. It's up to you to decide the ratio of your bang to buck. It's up to you decide *how* you approach self-promotion and which tools you use to affect the types of self-promotion you engage in, because *you* decide what is acceptable and effective for you.

[139] *Ibid*.

The Truth About Competition and How the Advent of Copyright Changed *How* Authors Can Compete

Speaking up for yourself, sharing your work, expanding on your ideas in public. All of these things are forms of self-promotion. So let's call it what it really is. Some authors (artists) don't want to do the work relative to the desired outcome they'd like. And some authors (artists) feel entitled to success; they see competition as over saturation — as if only a chosen few have the right to create and sell work in the marketplace. Hence, it's much easier to cry "purity" (like the Romantic poets did) than it is to compete. Meanwhile, those who see self-promotion as an egalitarian way to rise up increase their chances to succeed.

And since when did any of us gain any measure of success *without* putting ourselves out there? To some degree, at every job there comes a time when you need to promote yourself if you want to rise up in the company. This basic concept isn't new, and it shouldn't be controversial. So if part of your job takes place on the internet, in the open space of social media, it's naive, ridiculous even, to believe that self-promotion *isn't* part of the job, especially if you want to grow your outreach, build your author (artist) brand, and sell your work. Speaking up for yourself, presenting yourself in a way that attracts interest in you and your work, promoting brand *You* as Peters puts it — is not a new thing in the world of art and commerce. Neither is competition. So it's not really the *work* of self-promotion that troubles some authors (artists). The truth is, what bothers some authors (artists) the most is the same thing that bothered the Romantic poets: Increased competition!

Confronting competition — or better stated, obtaining success in the face of competition — has always required that authors (artists) establish and extend their brand. When an author (artist) creates and shares his work in a marketplace, he creates a "brand" in the process. And once the author's (artist's) work is published and for sale in the marketplace, all promotion, publicity, and marketing *builds* on this brand.

With the advent of copyright law, itself a byproduct of technology, authors became entrepreneurs. Meaning, empowered by the right of copyright, i.e. the exclusive right to decide who could make copies (who could *print*) their literary and musical works, authors and composers in eighteenth-century London instantly became business partners with booksellers and music publishers. Consequently, this new business partnership created joint ownership in the entrepreneurial aspect of creating and selling literary and musical works.

The loss of control over copyright led booksellers and music publishers to shift attention to *sales*. And when it comes to sales, promotion, publicity, and marketing have always been critical. Thus, what changed shortly after the first copyright law in England is this. Booksellers and music publishers reclaimed all but full control over the entrepreneurial aspect of the literary and music markets. And they did this by pushing authors and composers (musicians) off to the side and into the shadow realm of the author-*artiste*. Hence, the idea of the author-*artiste* — i.e. the author who's unbothered by or self-righteously *above* business affairs — grew and soon many authors fell victim to the belief that the job of promotion, publicity, and marketing is the sole responsibility of the publisher. This warped view plagues many authors (artists) to this day.

In truth, while publishers (booksellers in the eighteenth century) took on the responsibility promoting and marketing their authors, this responsibility was never the sole province of publishers. Historically, authors have always relied on self-promotion in addition to whatever marketing efforts their publishers made. Nonetheless, many authors would prefer to not "brand build," in large part because they believe in the old top-down publisher/author model, where just having the prestige of being published by a reputable publisher was enough.

***

The irony in all of this is that authors in eighteenth-century London used copyright not just to wrestle away some of the power

from booksellers *and* printers, but to become entrepreneurs in the same marketplace. Clearly, the motives of these authors were not "purely" creative. Over time, however, most authors moved away from the dynamic of the author-entrepreneur who was *in business with* publishers. In other words, after authors in eighteenth-century London fought to be entrepreneurs and business partners with booksellers (publishers), authors in the nineteenth- and twentieth-century centuries essentially gave back all the strides gained by fighting to become author-*artistes*. And in the mind of the author-*artiste*, self-promotion is a dirty word.

In the publishing industry, this switch from the author-entrepreneur to the author-*artiste*, meant the dawn of what I call the **illusion of control**. Under the illusion of control, publishers (at least in the United States; in France and other countries it's different) concede copyright to authors, and in turn, publishers get the exclusive right — basically a license — to manufacture, distribute, market, and sell the authors' literary works, usually for eight years or more. So while the authors own their copyrights, once their works are published, they do not however *control* their works in the marketplace, publishers do! Because of this, the royalties that authors earn can pale in comparison to the revenue that publishers can make.

Competition, the Hip Hop/Rap Music/Self-Promotion Correlation, and Small Sample Size

Today, hip hop/rap music is the most popular music genre in the world. It's also the most competitive music genre. And, perhaps not surprisingly, self-promotion in hip hop/rap music is the least taboo of *all* music genres. By and large, no other artists are more adept at observing the principle of self-promotion than rappers! Looking at the correlation between the popularity of hip hop/rap music and attitudes towards self-promotion in hip hop/rap music, we can learn a lot.

Hip hop/rap music has never been about entitlement, mainly because it's so staunchly competitive. In Chapter 1, I discussed how hip hop has its own esthetic standards as well as its own aesthetic priorities. Taken together, these standards and priorities form what I call the "**hip hop sensibility."** To understand what the hip hop sensibility is and how it drives and informs creativity *and business* in hip hop, I noted that you have to know the five fundamental attributes, i.e. properties and traits, that personify the hip hop sensibility. **Competition** is the fourth attribute of the hip hop sensibility.

The *competitive consciousness* of the architects of hip hop culture was second only to *style consciousness*; this is one reason why competition persists as a major component of hip hop culture. This also explains why hip hop/rap music artists, as a class, are far more at ease with self-promotion than any other class of artists in the creator economy. Thus, a discussion of self-promotion and music artists that does not mention hip hop/rap music artists and their relationship with and attitudes towards self-promotion means that one of the biggest counterpoints to the "tyranny of self-promotion" trope is being ignored.

In her article "Everyone's a Sellout Now," Rebecca Jennings doesn't offer a single interview with a hip hop/rap artist (or even a reference to how hip hop/rap artists see self-promotion). I don't suggest that Jennings intentionally left out hip hop/rap artists' perspective on self-promotion. The point I'm making is that this is the kind of blind spot that contributes to a narrow perception of self-promotion in today's creator economy. Sure, some people look at self-promotion as a terribly laborious thing that we have to do. But this is not how everyone sees it. This is why casting a small net over multiple, large creative classes is insufficient and misleading. If the scope is too narrow, the observations and analysis will also be too narrow. This is the same problem that we run into with the Romantic poets. Incredible that such a small sample size of writers was ever able to con people into accepting a new concept of originality. It's only when we expand beyond the Romantic poets and look at writers before the Romantic poets — and even

other writers in London during the Romantic period — as well as writers long after the Romantic poets, that we see the Romantic poets' concept of originality as the farce that it is.

Similarly, looking at a small, limited group of creatives as the primary barometer for notions of self-promotion and personal brand building in today's creator economy is not as informative as when we expand the sample size and add other notions of and attitudes towards competition to the mix. Hence, Jennings's article speaks to the choir that it represents: A creative professional class still influenced by a legacy media system that was tightly controlled and underscored by a sense of entitlement. Jennings's article does not, however, speak to the historical or practical accuracy of self-promotion for any creative professional who enters the world of art and commerce. I imagine that those who find self-promotion to be a burden, or see self-promotion as "selling out" or as something we can't escape, *feel seen* in Jennings's article. On the other hand, I imagine that those who enjoy self-promotion and appreciate the chance to build their personal brand see it differently. Since these folks see self-promotion and the opportunity to promote their power as fundamental aspects of competition — which they also embrace — I doubt that they see themselves in Jennings's article.

How the Author-Entrepreneur and Self-Promotion Expose the Myth of "Purity" and the Myth of Originality

The author-entrepreneur — what author William Deresiewicz calls the "artist as business manager" — reveals one fundamental truth. Writing, as a profession, is never "pure," there are always professional (business) goals that occupy the professional author, and originality is never wholly individualized. As I mentioned earlier in this chapter, the Romantic view of the author — and by proxy the Romantic concept of originality — was an invention that was with odds with the world prior to eighteenth-century London. In paraphrasing Deresiewicz's observation in his book *The Death of the Artist: How Creators are Struggling to Survive in the Age of*

Billionaires and Big Tech (2020), Jennings correctly notes that since the late eighteenth and early nineteenth centuries, "we've tended to think of 'artists' not as artisans or master craftspeople, *as we did prior* to the Romantic movement, but as solitary oracles existing on a higher spiritual plane than the rest of us."[140] Under the Romantic view (pun not intended), we see the concept of the author-*artiste*, the lone writer whose "genius" is wholly individualized and divine, free from borrowing, something "pure," something inherently high in moral standing. Naturally then, this conflicts with self-promotion — that is, if you see self-promotion as "selling out." And that's the thing, self-promotion further exposes the myth of originality and the myth of purity in art and commerce.

The Romantic concept of originality and authorship is a fallacy; and the notion that self-promotion, a fact of the author-entrepreneur's world for *300 years*, is "selling out" or something less "pure" is misguided. As I noted earlier, the author-entrepreneur has always borne the *first* responsibility to promote himself. That business practices evolved, first in the publishing industry then in the music industry, that publishers and record labels intentionally sought to keep authors and music artists out of the business side of things does not change this fact. This is another reason why the Romantic concept of the singular "genius" is so harmful.

***

One scheme of self-promotion that authors (artists) engage in is the "day in my life" videos that populate TikTok. In "Everyone's a sellout now," Jennings has a helpful passage about this:

> [A]uthor-content creators succeed by making the visually uninteresting labor of typing on a laptop worthwhile to watch. **You'll see a lot of cottagecore-esque videos where the writer will sip tea by the fireplace against the soundtrack of Wes Anderson, or wake up in a forest cabin and read by a river, or women like this Oxford University student who dresses up like literary characters and films herself working on her novel.** Videos like these **emulate the**

[140] Jennings (emphasis mine).

> **Romantic ideal of "solitary genius" artistry,** evoking a time when writing was seen as a more "pure" or quaint profession. **Yet what they best represent is the current state of art, where artists must skillfully package themselves as products for buyers to consume.** [emphasis mine][141]

Pay careful attention here. Jennings props up specific preferences and assumptions associated with the idea of "solitary genius" artistry. "*Wes Anderson*," "*a forest cabin*," "*reading by a river*," an "*Oxford University student who dresses up like literary characters"* — These are all things that could be associated with a very specific kind of author and a very specific kind of writing and one very narrow group of writers. Still, Jennings's observations around this raise an interesting question. If authors (artists) recognize that "skillfully packaging themselves as products for buyers to consume," is one way to achieve success, how can the motivations of a professional author be purely creative? Authors can certainly have noble goals or altruistic objectives, but even this underscores the fact that writing, as a profession, is never quaint or entirely "pure." Additionally, if an author (artist) readily borrows from other authors (artists) to promote themselves and their works — and that there is even a well-recognized genre of "day in my life" videos is enough proof that borrowing is going on — are we to accept the idea that "originality" only emerges *without* borrowing, or that there is really ever "purity" in art and commerce? What the existence of the author-entrepreneur shows us in fact is that neither is true.

A Balance Between Creating and Self-Promotion – To Each His Own

That some authors (artists) are uncomfortable with self-promotion does not negate the fact that self-promotion has always been a part of the game. But if you look more carefully at the complaints that some authors (artists) make about the need for constant self-promotion, two things become clear. First, some

[141] *Ibid*.

authors (artists) don't want to self-promote at all. They believe (naively) that self-promotion was never a requirement of "real" artists, and they fantasize about what other artists in earlier eras did in this regard. In other words, they identify as author-*artistes*. Here, not only do they buy into the Romantic concept of originality and authorship, they also believe that "true" authors (artists) in the past did very little in the way of self-promotion. (Like a chain of radio appearances, magazine interviews, in-stores, etc, isn't self-promotion.) Consequently, the idea of self-promotion weighs on them.

Second, self-promotion is another aspect of competition for the professional artist. Having to compete based on your art is one thing, having to compete based on your *self-promotion* efforts is another thing altogether. Again, some artists are better a self-promotion than others. Moreover, some artists are better at finding a balance between creating their art and self-promotion. Those who are not tend to regret self-promotion.

In dissecting the so-called imperative of building an artist brand, Jennings made some revealing observations:

> **It's precisely the kind of work that is *uncomfortable* for *most* artists, who by definition concern themselves with what it means to be a person in the world, not what it means to be a brand. There's been a fair amount of backlash to this imperative,** recently among musicians on TikTok. For the past few years, it's been common for indie artists to make videos asking, in a kind of faux-bashful way, "Did I just write the song of the summer?!" In December, one artist made a TikTok in which she asked her followers to imagine, say, Radiohead's Thom Yorke posting a video like that. Ricky Montgomery, a 30-year-old musician with 1.7 million TikTok followers, made a thoughtful follow-up from the perspective of someone who'd gotten a record deal out of a viral moment, saying that **even when you land the record deal or have a few hit songs, you're still stuck on the treadmill of constant self-promotion.** "Next thing you know, it's been three years and you've spent almost no time on your art," he tells me. "You're getting worse at it, but you're becoming a great marketer for a product which is less and less good." [emphasis mine][142]

[142] *Ibid*.

The backlash that Jennings details is displaced however. As I noted earlier in this chapter, John Milton and Alexander Pope were very concerned about what it means to be a brand *300 years ago*! That Ricky Montogomery spent almost no time on his art in three years is a Ricky Montgomery problem. It's not, by default, a reflection of *every* author (artist) that creates *and* builds their author (artist) brand using self-promotion as *one* tool in that endeavor. If an author (artist) can accept constant creativity as part of the job, why is accepting constant self-promotion difficult to accept? The idea of creating art constantly is not thought of as being "stuck on the treadmill of constant" *creating*. It's part of the gig for a professional author (artist), it's what you sign up for if you create art professionally and choose to enter the world of art and commerce.

***

One thing every author (every artist) knows is that creativity requires labor. Moviegoers see their favorite stars in fine-tuned slabs of motion pictures that last roughly two hours a pop. But what moviegoers don't see however is all of the work that actors put in. From having call times that necessitate arrival on set early in the morning or late at night to long hours of rehearsals (see Keanu Reeves's fight-scene training and rehearsals for *The Matrix* or Margot Robbie's dance rehearsals for *Barbie*), the *making* of films is a daily grind; it's nowhere near as glamorous as most people imagine it be. What comes off on the movie screen as cool and effortless is actually the product of a lot of *work*. Moreover, perfecting one's art and craft, whether it be as a writer, a musician, a filmmaker, or a dancer (ever see dance TikTok?), requires loads of labor and time. But most successful artists embrace this as part of the job. They don't see it as a burden. If you sign up for a profession in which the products you create are sold in the marketplace, it's unreasonable to believe that you'll have any serious level of success *without* self-promotion. So framing self-promotion as a "burden" overlooks one key responsibility of the author-entrepreneur.

The system of art and commerce runs on publicity, and publicity requires marketing and promotion. If you're an author (artist) and you offer your work to the public square, you accept this part of the deal. It's not lost on you that your success as an author (artist) will depend, in great part, on your visibility, i.e. on the public being aware of you and your art (work). Once you see it from this angle, you should understand then — as did John Milton and Alexander Pope *300 years ago* — promotion of an author's (artist's) work always begins, first and foremost, with the author (artist). So the author (artist) who excels at self-promotion will always have a better chance at success than the author (artist) who doesn't. As I've made clear before, self-promotion is just as much about competition as the creation of the art itself. Consequently, neither of these things is "pure."

Yet some artists (authors) today deal with this competition in a way that would have made the Romantic poets proud. They place self-promotion in the realm of something less "pure," deeming self-promotion as a "burden" that true artists (authors) should not have to deal with. Jennings buys into the "promotion and marketing *as a burden"* trope and interviews at least one artist who illustrates how this idea allows artists (authors) to console themselves about skipping out on the responsibility of self-promotion or not being able to do it as well as the competition:

> The system works great for record labels or publishing houses, who can hand over ***the burden of marketing*** **to the artists themselves**. But that means, as Montgomery says, "If you have absolutely no knowledge of video creation, good fucking luck." The *labor* of making TikToks — and if you want to reach the most people in the shortest amount of time, **TikTok is pretty much the only place to go** — requires both tedium and skill. You've got to get used to the app's ever-evolving editing features, understand the culture of the platform, make yourself look presentable but not too presentable or risk coming off as *inauthentic*, prepare for and practice what you're going to say, but again, not too much. And you've got to do it again and again and again, because according to every single influencer ever, the key to growing your audience is posting consistently."
> [emphasis mine][143]

[143] *Ibid*.

In the '50s and '60s, James Brown, the self-proclaimed "hardest working man in show business," worked the Chitlin' Circuit, the famed gauntlet of gigs (often small venues) that ran carefully through the Jim Crow South. And he was certainly not the only recording artist to do this. In fact, every Black recording artist of the era — from Chicago to Memphis, from New York to New Orleans, from Philadelphia to Atlanta — knew that if they wanted "to reach the most people in the shortest amount of time," the Chitlin' Circuit was the way to go. TikTok, by contrast, is *not* "pretty much the only place to go." There are a number of different social media platforms that authors (artists) can go to, at least four as or more effective than TiKTok, and most platforms don't require that you have "knowledge of video creation" in order to be effective with your self-promotion.

Going on the Chitlin' Circuit was as much about promotion and marketing as it was about perfecting one's music and *brand*. The labels didn't do this work for James Brown and other recording artists, they did it for themselves. The point is, knowing the level of self-promotion that's required to reach your professional goals as an artist (author) is not new; and neither is casting off this responsibility as something less "pure" and burdensome.

Jennings pushes Montogomery's point about the "burden of marketing" and goes even further. Notice in the following passage how she uses the refrain "*you've got to*…," which she borrows from Peters's "*you've got to*…" in "The Brand Called You;" except while Peters used the refrain in an uplifting sense, Jennings uses the refrain in a negative sense:

> More than that, ***you've got to*** actually spend your time doing this stuff on the off chance that the algorithm picks it up and people care about what you have to say. ***You've got to*** spend your time doing this even though it's corny and cringe and your friends from high school or college will probably laugh as you "try to become an influencer." ***You've got to*** do it even when you feel like you have absolutely nothing to say, because the algorithm demands you post anyway. ***You have to do it*** even if you're from a culture where doing any self-promotion is looked upon as inherently negative, or if you're a woman for whom bragging carries an even greater social stigma

> than it already does. You've got to do it even though the coolest thing you can do is not have to."
> [emphasis mine][144]

This *woe is me*, *I've got to self-promote* attitude is the same kind of con that the Romantic poets pulled when they faced increased competition from a rapidly growing number of writers in the marketplace. The internet opened up competition and ushered in loads of new authors (artists), just like the Industrial Revolution did in the eighteenth century. Some authors (artists) have reacted better to this than others. Some authors (artists) have figured out how to maintain a healthy balance of creating and self-promoting. For those who haven't been able to find this balance; or for those who do not have the personality that's conducive to self-promotion; or for those who'd rather somebody else take care of all of the promotion; framing self-promotion as the burdensome bogeyman is the easy thing to do.

Jennings frames doing some of the things that add up to work required for self-promotion and brand building like this: "you've got to actually spend your time doing *this stuff*," the negative implications being clear; and that "you have to do it even if you're from a culture where doing any self-promotion is looked upon as *inherently negative*, or if you're a woman for whom *bragging* carries an even greater social stigma than it already does." With these passages, Jennings reveals how she sees self-promotion. And her perception is largely a mischaracterization. Self-promotion and brand building aren't about "bragging." They're about building trust with consumers based on the value that you present. They're about creating visibility for you and your work by showing what makes your work different and useful. Instagram, TikTok, Facebook, Twitter, Twitch — They're all attractive to people precisely because they are vehicles for *self-promotion*, even for people who don't have any art or products to promote. More significantly, these social media platforms are also destinations where people go *to find* value. So those who stand out and prove their value, usually get the nod of support.

---

[144] *Ibid*.

Again, the whole game runs on self-promotion. And this tradition began more than *300 years ago*. So it's when we juxtapose these positions like this that we see more clearly the absurdity of the notion of "purity" in professional artistry and the world of art and commerce. Furthermore, when we see how people routinely use the same self-promotion schemes, we also see how originality is never wholly individualized. Additionally, when we look at what goes into to becoming a writer (author, artist) of note, we don't frame it through the lens of "burden," we usually see it like James Joyce saw it, like Mozart saw it, like Michelangelo saw it, like James Brown saw it: Through the lens of *work*! Ask most professional writers for advice on writing, and the number-one thing they'll tell you is: Write, *every day*! And they'll never tell you that it's a "burden."

***

As technology advances, and as the tools of production are democratized as a result, the methods of promotion change. For authors, it used to be that legacy book publishers took care of all of the promotion, publicity, and marketing. But this was never because publishers had authors' best interests in line. It was always about publishers' bottom line. Publishers didn't just throw tens of thousands of dollars into a black hole and *hope* that their authors got much needed publicity and the buzz that came with it. Publishers put up this money as a *guarantee* that their authors would benefit. Working the media — particularly the print media — in this way allowed publishers, and the book reviewers at newspapers like *The New York Times*, to play king maker. In the old publicity paradigm, this was how publishers *manufactured* hits. But once the internet brought about a dramatic decline in the popularity of the printed newspaper, it killed this lucrative scheme for turning books into hits.

Soon, things like personal blogs, message boards, and social media gave authors (artists) the tools to promote themselves and create their own publicity and manufacture their own hits. Then came Amazon book reviews — which are written and uploaded primarily by countless consumers, not book reviewers from

prestigious newspapers and literary journals — and the scheme of legacy publishers was revealed for what it was really about: control. Today, a hundred Amazon book reviews is enough to move the needle for any author. And, over the long run, these same Amazon book reviews have more staying power than a one-off flashy ad in a prestigious newspaper or a book review from the *New York Times Book Review*. Regardless of what it might've seemed like, the big publicity runs of legacy publishers were well coordinated; nothing was ever left to chance. Legacy publishers paid for this access and level of control. But without control over publicity or, more specifically, without control over the *results* of publicity, legacy publishers cut back on publicity budgets, and began looking to publish new authors who already had an audience — An audience which these authors built themselves through *self-promotion*!

***

Another complaint that some authors (artists) have made about self-promotion, specifically about social media, is that it's making art worse. Jennings asks: "Is the labor of self-promotion making art worse?" While she doesn't believe this to be the case, "[i]t's sort of impossible to argue this," she says, she co-signs the idea that "with less separation between art and commerce," creating art becomes less pure:

> [T]he internet has abetted the creation and exposure of infinitely more art than ever before in human history. But with ***less* separation between art and commerce,** Montgomery says, 'there's **some self-censorship** that happens. If you're a little too knowledgeable about PR, you start to become way too aware of things like posting schedules, and it's impossible to be *punk* anymore."
> [emphasis mine][145]

But when has there ever been a time when some "self-censorship" didn't happen with an author (artist)? Every author (artist) is intentional and self-aware; every author (artist) creates

[145] Ibid.

his work through his own *filtered* lens. Moreover, when was there more separation between art and commerce? It may appear that authors (artists) are now closer to the business side of things. But I'd argue that that's actually a return to the way that things were hundreds of years ago. Once an author (artist) has an idea to create something for the marketplace, and once art enters the marketplace, i.e. once art goes up for sale, the machinations for selling that art immediately begin to turn. And the promotion, publicity, and marketing — which begin fundamentally with the author (artist) of the art — are achieved using the technology and methods of the time. Again, the author-entrepreneur is not new. What is new is the advent of better tools that allow author-entrepreneurs to become better at self-promotion.

***

In closing her piece, Jennings says that "[t]o achieve the current iteration of the American dream, you've got to *shout* into the digital void and *tell everyone how great you are*. All that matters is how many people believe you." This is a terribly cynical view. Self-promotion is not about bragging; and it's not only reductive to view self-promotion this way, it's also a sign of privilege and entitlement. Authors (artists) who use self-promotion to build their brand and gain visibility are not "shouting into the digital void" and telling "everyone how great" they are. They're attracting consumers and demonstrating the value that they offer.

Negative, misguided attitudes that some authors (artists) hold towards self-promotion further reflect the impact that the Romantic view of originality and authorship still has on modern author (artists). The Romantic idea of originality and authorship leads authors (artists) to see themselves as author-*artistes*. At the same time, the Romantic idea of originality and authorship blocks them from seeing reality, which is this. All authors (artists) who reside in the world of art and commerce are author-entrepreneurs.

Whoever Controls the Work In the Marketplace Has the Last Say *and* Makes the Most Money

A fundamental truism of commerce is that, the smaller the marketplace, the more necessary it is for the players who *want in* to do business with the players (companies) who shape that marketplace. Conversely, the larger the marketplace, the greater the choice for the players. Prior to the first copyright law, the only players in eighteenth-century London's marketplace for literary works were printers and booksellers. Under this system, authors were exploited and made very little money. So if we're to take this notion of "purity" at face value and buy into to the idea that professional writing for writers in eighteenth-century London was all about being "pure" and not being paid fairly or paid at all, then we should expect to see that these authors did nothing to change the system. But that certainly wasn't the case. Instead, authors in eighteenth-century London — *some of whom were great self-promoters* — spent decades fighting the system and trying to change it. And that change was finally ushered in with the first copyright law.

After copyright law clarified that *authors* — not printers, not booksellers — were the owners of their literary works and thus the sole decision makers who determined who *could* print and sell their works, authors became real players in the game. Before, printers and booksellers didn't need authors. There were enough authors who would accept scraps for pay; moreover, printers and booksellers made lots of money off of their backlists, for which they were not obligated to pay royalties to the authors whose literary works that they printed and sold. But after copyright law, printers, and especially booksellers, needed writers *real bad*. Empowered by copyright law, authors could now bypass booksellers and go directly to printers. (Hello, self-publishing.) So where did this leave booksellers? What could booksellers possibly offer authors in a world where authors could have their own literary works printed? Answer: Advanced payments on future sales *and* promotion, publicity, and marketing. Sound familiar?

In the twentieth century, legacy publishers had an iron grip on the marketplace for books much like printers and booksellers once had on literary works in London up until the eighteenth century. In the twentieth century, to get published and to become an *authorized* author, all would-be authors were expected to go through a legacy publisher. Essentially, it was the only game in town, or at least it was the only reputable pathway to being published and becoming a "big time" author, or at least an author with visibility. Additionally, local bookstores served as the main pipeline for the monopoly control that legacy publishers enjoyed in the twentieth century.

But then came two critical advancements in technology, and everything changed. First, advancements in print technology. This cut print turnaround times in half, lowered print costs, and opened up the door to smaller, independent publishers. Second, the internet, aka the digital revolution. This had a much larger impact on things. The internet made it possible for books and other literary works to be sold online. In terms of point of sale, not cultural significance or the importance to local communities, this reduced the significance of the local bookstore, and in the process, this crippled the legacy publishers' monopoly control over *where* and *how* books are sold. Next, the internet helped usher in new publishing and distribution tools; this helped redefine *who* was *authorized* to be a publisher, reshaped methods for promotion, publicity, and marketing, and gave authors a level of control over their professional literary destinies never seen before.

How "Earning Out," the Cost of Publishing a Book, the publishing Route That a Writer Chooses, and "Writing to the Market" Illustrate the Myth of Purity

The Truth About "Earning Out"

Under the economics of a traditional book deal, a publisher pays an author an advance payment against future royalties. This advance payment is paid up front before the book is published, and usually in three installments; first, at the signing of the contract; second, when the publisher accepts the manuscript; and lastly upon book publication. This amount must then be "earned out" before the author actually receives any additional royalty payments. What this means is, after an author's book is published, he earns royalties based on book sales. Royalty rates are calculated as a percentage of the book's retail price. Traditionally, the royalties that authors receive vary depending on book format. For hardcover book sales, 10-12% of the book's retail price; for paperback book sales, 10%; and for e-Book and audio book sales, around 25%. In order for an author to earn out, i.e. receive any money north of the advance payment, his book must generate enough royalties (based on book sales) to cover the amount of his advance. So if an author receives a $10,000 advance and the royalty rate is 10%, his book has to generate *$100,000* in book sales in order for him to "earn out" his advance. After the author has earned out his advance, he receives additional royalties (usually paid out every six months). The thing is though, most authors never earn out and thus never receive any royalties.

The fact is, only *25%* of all books published ever earn out.[146] Put another way, *75%* of all authors published under a traditional book deal never earn out their advance! Nonetheless, for most

[146] Chip Macgregor, "Ask The Agent: What If My Book Doesn't Earn Out?" *MacGregor & Luedeke* (July 20, 2016) https://www.macgregorandluedeke.com/blog/ask-agent-book-doesnt-earn/.

would-be authors, going with a traditional publisher is the dream. But some dreams are never quite what they seem. And since we know that there are countless authors on the outside looking in, chasing the dream and fawning over the chance to get picked up by a traditional publisher, it should be understood then that an author's motives are never purely creative. Yet, this Romantic idea of the author whose motivations are "pure" persists, even though professional writing is obviously a business endeavor as well as a creative and artistic pursuit.

When press releases, like those typically found at *Publishers Weekly,* announce the news of a book deal between an author and a publisher, they state that the book was "sold," as in, the book was *sold* to a publisher. This detail implies the business processes that occurred before the actual signing. For instance, the name of the author's agent is also included in the same news announcement. So this means that the author had to find an agent to represent him. Once an author secures representation, and there are different ways that each author can attract an agent, the "selling" of a book to a publisher requires, as many authors have noted, some finesse. So it would be foolish to believe that there's no finesse at play when an author actually writes a book. In other words, at no point are an author's motives ever purely creative because the author — who wants to be published and have his book sold in the marketplace — always has an eye on his (overall) larger goal. And the larger goal plays a role in determining the type of book (fiction or non-fiction, for instance) that an author chooses. The larger goal also plays a role in the subject matter that the author chooses to write about. And the larger goal also plays a role in *how* the author shapes his book. Hence, any writer who sets his sights on being published and becoming a successful author, but believes that his motives are purely creative, is lying to himself.

The Cost of Publishing a Book

Would it be radical to say that promotion, publicity, and marketing are a tax that publishers apply to authors for granting

them the right to publish their literary works? Stick with me here. It's no secret that publishers have cut the publicity and marketing budgets for authors across the board. A-list authors continue to get a decent publicity push, but not like before. And B- and C-list authors are basically being told to go make a TikTok. But standard royalty splits remain the same today despite cuts in publicity and marketing budgets. Hmmm.

To illustrate the pathway open to the author-entrepreneur in today's creator economy, and to show how helpless the author-*artiste's* destiny really is in today's world, let's compare the cost of publishing a new book using the legacy publisher's model against today's self-publishing model. At the same time, we will use an example of 100,000 copies sold. *Most books do not sell 100,000 copies, but this is a good (easy) number to use in terms of a book that's a big hit.*

Before itemizing specific costs, first, it's useful to give an overview of a publisher's cost for bringing a book to market. Essentially, there are four types of costs that publishers pay: hard costs; editorial costs; design costs; promotion, publicity, marketing; and overhead. Hard costs include the cost of the printed book; paper, binding, and ink collectively make up the print cost. Editorial costs include manuscript editing, copyediting, and proofing. The design cost includes the cost of the book cover design. Promotion, publicity, and marketing costs are exactly that. And overhead cost refers to all other costs that publishers pay to stay in operation, ergo to keep the lights on. Ok, here's the example.

> 100,000 copies sold at the retail price of $20 per copy. The Publishers' costs are as follows.
>
> Author advance: $20,000. This can differ in range, but let's go with the lower-median range for a book that's expected to do decent sales.
>
> Editorial costs: $0 additional. Editors on staff are assigned projects; their annual salary could be anywhere from $44,000 to $64,000. And copy-editing and proofing are handled in-house by the publisher's editors and proofers.

Print cost: The cost of printing a $20/300-page book is usually $3 or $4 per book, so let's say $3 (legacy publishers can always obtain a lower cost because they print large, bulk print runs).
E-book cost: $0 additional. Since there's no printing, shipping, or warehousing, the costs for producing an e-book are much lower. Standard e-book conversion, if not done in-house, should be no more than $200, and that's a one-time fee.

Promotion, publicity, and marketing cost: $50,000. At the Big 5 publishers, this is typically managed by people on staff in the publicity/marketing department, but payments are made for ads (print and digital) and shelf placement at bookstores.

Book cover design cost: $0 additional dollars if cover design is done in-house; minimum of $10,000 if cover design is outsourced; let's say the publisher splurged the $10,000 on an outside cover design.

Bookseller discount: 40% - 50%. This isn't a "cost" that a publisher pays, it's the discount that booksellers like Amazon and local bookstores receive. So publishers receive $10 ($20 minus the 50% discount). Note: A discount can be as much as 85% for special discounted books, and since this is considered "at cost" for the publisher, authors are not credited any royalties on books sold at this discount.

Overhead: the standard overhead charge is roughly $2 per book (or $50,000 per title.) Finally, author royalties: 10% of retail price = $2 x 100,000 copies sold minus $20,000 advance = $180,000.

So what's the publisher's net? After the booksellers discount of 50%, the publisher has $1,000,000 (100,000 x $10). Subtract from this amount the costs listed above, and the publisher is left with a $450,000 profit.

It's important to note that in the above example and scenario, the book, being a big hit, has earned out. But as I mentioned earlier, 75% of authors (books) do not earn out their advances. Still, the truth is, publishers typically make a profit even when authors don't earn out their advance. As longtime literary agent and former Big Six associate publisher Chip MacGregor has bluntly stated, "Don't accept the myth that a book must earn out or the publisher is losing money — it's just not true." "[F]ailing to earn out" does not mean

that "the publisher *lost* money." "[T]he majority of books do not earn out their advance, yet publishers stay in business."[147] The reason that publishers can stay in business even though *75% of all books published* never earn out is because the revenues that publishers bring in more than cover their costs.

Using the same 300-page book as an example, let's say the same book didn't sell 100,000 copies, but rather an *expected* modest 5,000 copies. So what's the publisher's net on 5,000 copies sold? After the booksellers discount of 50%, the publisher has $50,000 (5,000 x $10) gross. From this amount, subtract $5,000 for author advance (there would be a lower advance for this book), $15,000 for print cost, $0 for promotion, publicity, and marketing — as this book was not expected to sell more than 5,000 copies, $0 for book cover design (again, not expected to be a big hit, so design was done in-house), and $10,000 for overhead ($2 x 5,000 copies). After all the bills are paid, the publisher is left with a $20,000 profit.

This $20,000 profit seems miniscule until you consider that publishers can duplicate this same model. In fact, scaling models like these are exactly what the Big 5 publishers do. Penguin Random House, the biggest of the Big 5 publishers, publishes *15,000* titles annually! Even if all Penguin Random House did was this same 300-page book/$20,000 profit model for all 15,000 titles, it would still make $300 million in annual profit just off book sales. HarperCollins publishes *10,000* titles annually. Simon & Schuster publishes 2,000 titles annually. Hachette Livre publishes *15,000* titles annually![148] And the annual revenue at Macmillan Publishers — the "smallest" of the Big 5 publishers who also publishes thousands of books annually — has "been over $1 billion" annually since 2019.[149] Get the picture?

Looking at this cost mockup and potential publisher profit, we should understand that even though an author owns his copyright, once he signs an exclusive book deal with a publisher, that publisher

[147] *Ibid*.

[148] Stacey Donovan and Lee Embers, "The 'Big Five' Trade Publishers and Their Imprints," *Authors' HQ* (July 9, 2024) https://authorshq.com/the-big-5-trade-publishers-and-their-imprints/

[149] Dimitrije Curcic, "Macmillan Publishers Sales Statistics," *WordsRated* (November 10, 2022) https://wordsrated.com/macmillan-publishers-sales-statistics/.

controls his work in the marketplace. And whoever controls the *work* in the marketplace, not the copyright, makes the most money. Hence, the significance of copyright isn't simply about ownership, it's also about control. In this paradigm, nothing is "pure;" the author is not naïve to the fact that his publisher stands to profit from his work and that he stands to earn a cut of whatever money the publisher makes. So once an author enters a formal publishing agreement, he becomes an author-entrepreneur. So why would any author who's built up a brand and following, all on his own, hand over the *control* of the power of that brand and following to a publisher? Presumably, to make more money faster by doing less work. The tradeoff being that the author gains access to the publisher's massive distribution network and marketing arm. While this seems to be a great arrangement on the surface, it's actually a miscalculation of reality.

The thing is, even when an author signs with a publisher, he doesn't all of sudden stop interacting with his following; he continues with the labor of self-promotion. In fact, once the book deal is done, publishers expect authors to ratchet up their interactions with their following. Which means that the labor of self-promotion actually increases once an author's new book is in the process of being published and after it's published. So if author interaction — self-promotion — is a key variable, with or without a publisher, why don't authors simply self-publish their own work? Well, some do! And in today's creator economy, more and more authors are taking that path, including A-list authors who were long associated with legacy publishers. These developments testify to the existence of the author-entrepreneur and vanquish the notion that "purity" is ever the defining metric where art and commerce are concerned.

Nonetheless, most contemporary authors still subscribe to the idea of the author-*artiste* and reject the prospect of "self-publishing." The irony of this of course is that the original vanguard authors in eighteenth-century London, those authors who fought for and gained control via copyright — the same authors many people today look at as examples of "pure" writers — were in effect self-publishers.

They retained the copyright in their literary works and licensed the *printing* rights to printers and booksellers. But in all cases, they handled promotion, to varying degrees, on their own.

Now, let's recall the publisher's cost and profit mock-up from earlier and compare it with what an author *could* do on their own with just 10% of the sales (10% of books sold) of the same book. Here's our example for the self-published author.

> 10,000 copies sold at $20 per copy.
> The self-published author's costs are as follows.
>
> Author advance: $0.
>
> Typesetting: $0-$2,000. With a traditional publisher, the typesetting will be done in-house. A self-published author will have to hire someone to typeset his manuscript. A self-published author could also buy a subscription to InDesign and learn to typeset. A self-published author could even typeset his book in Microsoft Word and convert it to a print-ready PDF. A freelance typesetter will charge between $1,000 and $2,000 for a book of this size.
>
> Editing, copyediting, and proofreading; There's a wide range here, but a freelancer who provides these professional services will charge between $500 and $7,000, but this is a highly competetive market with lots of qualified people who could do the job well, so let's go with $2,000.
>
> Book cover design: Again, wide range here between $500 and $5,000, so let's go with $1,500.
>
> Print cost: $4 per book, 300 pages/$40,000 *total*. Note, however, a self-published author can print smaller print runs, let's say, 50, 100 copies at a time; there's typically no need for a self-published author to print 10,000 copies on the first print run. Moreover, a self-published author can also print on-demand with IngramSpark or Amazon KDP; in this scenario, the author pays no up-front print costs because the books are printed only when a customer buys one.
>
> Promotion, publicity, and marketing: A self-published author is not spending tens of thousands of dollars on a full-page ad in a newspaper, or on digital campaigns, or on shelf space in bookstores. They're likely going to do all of their own self-promotion online

via social media. Some self-published authors might hire a PR person (most won't), and others might invest in camera and lighting equipment to make high-quality videos (you don't need to do this; any smartphone with a decent camera will do). So total cost here can be anywhere from $0-$2,000. Promotion, publicity, and marketing for a self-published author are mainly *time* cost spent interacting with followers across social media and prepping videos. But this is exactly the same thing that the Big 5 publishers expect authors to do today!

Bookseller discount: 40-55%. If you're an author with an independent publishing company and you handle everything externally, this is the discount that booksellers like Amazon and local bookstores receive. If you self-publish through a second party like Amazon's KDP self-publishing service, the discount is 40% of the retail price, so you receive $12 ($20 minus the 40% discount).

Author royalties: $0! 45-60% of the retail price of the book — and everything after all the bills are paid — goes to the self-published author, so this is not a cost.

So what's the author's net? After the booksellers discount of 55%, the self-published author has $90,000 (10,000 x $9). From this amount, subtract $0 for author advance, $0 in author royalties, $2,000 for typesetting, $1,500 for book cover design, $40,000 for print cost, $0 for promotion, publicity, and marketing, and $0 for overhead. After all the bills are paid, the self-publisher author is left with a $46,500 profit. That's more than double what the author made in the previous example with an advance and traditional Big 5 publisher. And the self-published author booked this profit doing the same amount of work while having to sell *90,000 fewer* books!

Let's add in the fact that the author could pay for independent marketing services. In fact, an author could even pay for the marketing services of a Big 5 publisher for around $10,000. So an author can *grow* book sales by continuing to interact with their following at the same pace as before *and* by reinvesting portions of their profit in additional marketing. So let's say after one year and a reinvestment of $10,000 in marketing, book sales soar to 20,000 — 2 times the initial sales. The author's net is now $210,000. If an author continues on this trajectory, reinvesting $50,000 in

marketing services — not labor — and book sales ultimately hit 100,000, that's $1.05 million net to the author. See how whoever *controls* the work in the marketplace makes the most money?

The significance in detailing these figures is that it points to the fact that we are now in an entrepreneurial age similar to the very moment that copyright became law in England in the eighteenth century. Hence, authors who inform themselves about copyright law and take being an author-entrepreneur seriously stand to be more successful. These figures also show the *business* of art and commerce, which demonstrate that professional writing is never a purely creative endeavor. Whether an author publishes a book with a publisher or on his own, he is an author-entrepreneur. If an author prefers to view himself as an author-*artiste*, that does not change this reality.

Lastly, that there's no "purity" in professional writing and bookselling also speaks to something else: the myth of originality. In a competitive environment, no author is ever entirely alone. Success, like creativity itself, demands that we borrow from other works and creatives. No author is alone on an island (or in a cabin); every author is joined by his influences, which means that the work of every author is a product of his influences and his own creative ingenuity. Consequently, it's the specific reconciliation of these two forces that gives way to originality.

***

For authors in eighteenth-century London, the *authority* to write, or equally stated, the *justification* to write, came from the idea that an author's work is his "property." This was a crucial transformation in the understanding of authorship because it helped form the ideology that an author's work is "property whose value is based on *originality* and whose profits belong to the author, rather than to printers and booksellers." Before this shift in ideology — which was spawned by writers attempting to make writing into a profitable business, i.e. to get a bigger piece of the pie from printers and booksellers — copyright was the province of printers and booksellers, and authors had very little power.

What I'm getting at here is that the authority paradigm always changes with the advancement of technology and the expansion of the ranks of *who* we consider to be members of a creative class. The number of scribes in the Middle Ages was limited in large part because of the limits of technology of the time — uniform script, part of the basis of authority — meant that all scribes wrote (and copied) *by hand*. This was pre-print culture. However, after the advent of printing technology, the basis of authority of eighteenth-century writers in London changed and the number of writers greatly expanded.

Today, print remains important to culture, and despite the acceptance of and need for digital texts, there will likely never be a time when print is completely obsolete. Nevertheless, because of digital technology, post-print culture runs parallel to print culture. But digital culture, which the internet helps facilitate, is far more powerful than print culture.

And, historically, here's where we should come to understand that printing is not simply about the manufacturing of copies of a work, it's also about *distribution*. Writers in eighteenth-century London didn't want to become *printers*. They recognized, however, that if you were not in print, you were not *distributed*. So for them, part of the endgame of turning writing into a profitable business was being able to have the biggest say in the distribution of their literary works.

Over time, we ascended from print — or at least from the level of importance that print held in the world — and the form of distribution that it was tethered to it. Once we swapped out the word "print" for "publish," the authority paradigm changed again: To be an authority as a writer is to be *published*. But what happens when technology changes yet again (it always does) and, as a result, the number of publishers or the idea of *who* can be a publisher changes? The authority paradigm changes once again. With each subsequent change like this, the author-entrepreneur becomes more practical, and thes author-*artiste* becomes more absurd.

Thus, the very existence of the author-entrepreneur is further evidence that originality is not a "divine" gift given to a chosen few,

nor is originality ever wholly individualized. Borrowed business practices and borrowed promotional tactics, like borrowed writing practices and borrowed creative practices and borrowed ideas, llustrate how borrowing is fundamental to any creative endeavor.

The Two Publishing Routes an Author Can Take

Becoming a published author is an artistic, creative, and professional endeavor that requires a lot of work and planning, and every writer who embarks on this venture factors in his earning potential. In other words, from the moment a writer decides to write a book — with the aim of it being published and sold in the marketplace — his motivations are not "pure." This doesn't mean that the writer sacrifices his creative integrity or the quality of his work. It simply means that the motivations of an author who writes a book are never purely creative; there are always business considerations involved in author's motivations. Hence, a professional writer is always an author-entrepreneur, whether he takes the traditional publishing route (and signs with a publisher) or the self-publishing route.

Still, for most would-be authors in today's creator economy, it certainly appears that the self-publishing route is the way to go. If you're even thinking about having a serious chance at earning a living from your book, you have to respect the fact that *75%* of all authors never earn more than their initial advance. And since the average author advance is roughly $20,000, that means most authors never make more than $20,000 off of their books. That's not making a living. And to drive the point home about the difference between the two publishing routes that an author can take, consider this. If you self-publish, you're responsible for your own promotion, publicity, and marketing. And if you go the traditional publishing route — and you're *not* already a big-time author — you're still responsible for your own promotion, publicity, and marketing because the publisher expects you to do it as part of the deal. So in other words, if you go the traditional route and are "fortunate" enough to sign with a Big 5 publisher, you're getting 10% of the

retail price in exchange for what? Book cover design, distribution, and *possibly* prestige? But since you're doing the promotion on your own either way it goes, is it really worth giving up control and getting just 10% of retail price of your bbook? *And* you have more choice over the type of book you choose to write. Which leads us to my next point: Writing to the market.

"Writing to the Market": More Proof that There's No "Purity" in Authorship and that Originality is Not Wholly Individualized

Because there are already books in the marketplace, because there are already proven concepts and ideas in the marketplace, it's clear that all writers "write to the market" to some degree. All writers look at what's out there, categories, niche subjects, etc., then they decide on the topic they want to focus on. Usually, this is the topic or category that they believe that they can *add* something to, not *reinvent*. Science fiction books, vampire novels, erotica, self-help books — All of these categories are examples of markets that writers knowingly write to. The existence of such markets illustrate that, for writers who choose a given category or market to write to — be it within commercial fiction, literary fiction, memoir, non-fiction, or self-help — their motivations are never purely creative. More significantly, implicit in the reality of writing to a market is the fact that all writers *borrow* from the pre-existing works within the markets of their choice.

***

Earning out, the cost of publishing a book, the publishing route that a writer chooses, and "writing to the market." What these things all show, separately and collectively, is that authorship is not, like the Romantic poets saw it, some divine province begotten to a chosen few, that the professional author's motivations are never entirely "pure," and that originality is never wholly individualized because borrowing is always taking place at every juncture of the author-entrepreneur's professional pursuit.

Creativity: The Fuel of Originality and Authorship

Having thoroughly examined originality and authorship, here, in closing, I want to clarify a few things about creativity— The fuel of originality and authorship. The Oxford dictionary's definition of creativity defines creativity as "the use of imagination or original ideas to create something; inventiveness." Can you spot the error? In reality, creativity doesn't require that you use "original" ideas; *any* idea will do. Understanding what creativity is and, more specifically situating it as the fuel of originality and authorship, helps us better understand originality and authorship altogether.

Creativity is Limitless

Originality and authorship are both limited. For example, the reworking of an old idea or theme can only be but *so* original, even when it's highly original. And authorship is bound in a similar fashion. On the other hand, creativity, which is rooted in the word *create*, is generative and synonymous with process and work (labor). An examination of the etymology of the word creativity is beyond the scope of our purposes here, the word changed meaning centuries ago, but today the concept of creativity conjures up the very notion of doing or making something. Creativity immediately suggests that work (labor) is required. Creativity begins with the recognition that something must be *brought into* reality, that something — an idea, one's imagination, the borrowed elements of prior works — must be fashioned into something. As such, creativity dismisses outright the idea that things invent themselves or come from thin air. Thus, creativity is limitless; there is no cap on the amount of creativity that an author (creative) can have. And while originality and authorship are both limited, it's the

limitless nature of creativity that broadens the scope of originality and authorship. Too little creativity, and chances are a work will be less original and the prospects of authorship will be more narrow.

Creativity Overtly Embodies Work

Earlier in this chapter, I talked about how authorship requires work, that authorship does not arrive naturally, nor is it the result of divine invention. Creativity also doesn't have the same baggage as originality and authorship. Creativity doesn't begin with any rigid pre-conceived notions about *how* ideas arrive or *where* they arrive from. Creativity recognizes that ideas arrive in infinite ways and from anywhere. Thus, when *being* creative, which is always a process, we intuitively and consciously know that we are borrowing from the works and ideas of others.

Further, unlike the words "originality" and "authorship," which conjure up the notion that works appear magically, ergo, without work, creativity is overtly about process and work (labor). Recall what Mozart said about work as part of the author's (creative's process):

> It is a mistake to think that the *practice* of my art has become *easy* to me. I assure you, dear friend, no one has given so much care to the study of composition as I. **There is scarcely a famous master in music whose works I have not frequently and diligently *studied*.**" [emphais mine][150]

To "frequently and diligently study" the works of master musicians (or any other artists and writers) is to put in the work. Mozart's originality and authorship were functions of his creativity. Like all authors (creatives), Mozart could not have existed creatively without doing the work. Recall also what Michelangelo said about work as part of the author's (creative's process): "If people knew *how hard I had to work to gain my mastery*, it would not seem so wonderful at all."[151]

[150] Mozart, "Spoken in Prague, 1787 (emphasis mine).
[151] Michelangelo, (emphasis mine).

Creativity is the Process of Transformation and Innovation

How does the creative process actually work? Does the creative process rely solely on new ideas, or might we say that the creative process is the product *building upon* pre-existing ideas and combining them with new ideas? When we look at it this way (and to look at any other way is a farce), we recognize then that the crux of originality is *transformation* and *innovation*. When an art form (or even a science, professional procedure, etc.) grows or when a new art form is created, we always find transformation and innovation present. In this way, the very nature creativity helps fulfill the purpose of United States copyright law.

Creativity Is Always a Collective Process, Even when We're Alone

Notwithstanding the construction of authorship and the establishment of the concept of intellectual property, the truth about creativity is that is has never been a wholly individualized process. Instead, creativity has always been a collaborative process. This is what is meant by the term "collective creativity,"[152] which copyright law scholar Peter Jaszi and others have mentioned. The process of collective creativity recognizes the fact that we all draw from the ideas and works of others and match them with our own ideas and innovations. In this paradigm, creativity is represented by a collection of sources which the artist (or other creative) shapes into new original expression.

[152] Peter Jaszi, "On The Author Effect: Contemporary Copyright and Collective Creativity," *The Construction of Authorship* (Durham and London 1994), 55.

Chapter 17

Fair Use, Part 1: Communal Creativity and Fair Use Defined

> "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."
> –United States Supreme Court Justice Joseph Story

> "It's not where you take things from – it's where you take them to."
> —Jean-Luc Godard

> "Steal from anywhere that resonates with inspiration or fuels your imagination. Devour old films, new films, music, books, paintings, photographs, poems, dreams, random conversations, architecture, bridges, street signs, trees, clouds, bodies of water, light and shadows."
> —Jim Jarmusch

The act of creating art always involves building on previous art and the artists who made it. Even the most cursory listen to American popular music illustrates the cross fertilizations of styles, sounds, and genres; and it tells us that the act of creating music necessarily involves borrowing and building on previous works. This is something that copyright law fundamentally recognizes, and it's something that speaks to the reality that American popular music could not have been created without the principle of fair use and the communal creativity that underscores this principle.

Communal Creativity and the Concept of Originality In the Black (African American) Music Tradition

Originality, which is not often an easily definable aspect of a creative work, has always been a fundamental principle of copyright law, as it implies that the author or artist created the work through his own skill, labor, and judgment. But that being said, how is originality actually defined, and more importantly, *who* gets to define it? In the previous chapter, I answered this question in great detail. Here, I want to add that when most commentators discuss music, copyright law, originality, and authorship, they not only typically overlook or ignore notions of originality and collective creativity as they have been understood in American culture for more than 200 years, they do not account for notions of communal creativity and originality as they are well understood in the Black (African American) music tradition. This is unfortunate because such notions of communal creativity and originality are at the forefront of what fair use is really supposed to be: A recognition and protection of communal creativity itself.

To properly examine notions of originality within the Black (African American) music tradition, you must first recognize the role of communal creativity within this tradition. In the Black (African American) music tradition, the concept of music as community (common) property is absolutely critical. From field songs to the advent of the blues tradition (the foundation for nearly all forms of twentieth-century Western popular music), the idea of borrowing other people's music and creating new musical expressions on top of it — for example, through the processes of versioning, improvisation, and the like — is paramount to the Black (African American) music tradition. Further, the Black (African American) concept of communal creativity is actually more in line with the philosophy and ideology of James Madison and Thomas Jefferson, the main architects of United States Copyright law, than has previously be noted.

Musicians and singers in a culture that prioritizes communal creativity draw freely from the culture and creative environment that surrounds them. They inhale common musical themes, styles, and attitudes and then rework and transform what they've taken, all in accordance with their own style, sound, and other creative influences.

In the Black music tradition, the moment that a music expression and/or idea is divulged to the community, it flows into a common well. Once there, the most pivotal and popular music practices, priorities, aesthetics, elements, styles, and expressions form a music canon, or what I like to call "the mix." And it's the mix — the grand communal music canon, *the well of the Black music tradition* — that all musicians (artists) are encouraged and certainly expected to draw new streams of expressions and texts from. And the mix is not treated as "private property." For example, the jazz musician who borrows a well-known blues melody to build something new never feels encumbered, but rather empowered to do so because he's fully invested in a shared cultural system. In this way, musicians in the Black music tradition are rewarded for their mastery of the canon as well as the uniqueness of their own individual style.

Furthermore, in the Black music tradition, the terms "new" and "original" are associated with the concept of using the the Black music canon while *adding* something to it, particularly through one's own individual style, creative instincts, ingenuity, and influences. This is entirely different from the notion of purportedly doing something entirely brand new. In the Black music tradition, something "brand new" really means a *new individualized extension* of what already exists in the music canon. Historically, in the Black music tradition, musicians have simultaneously relied upon using, exploring, revising, and extending the common aesthetics, tropes, and ideas from within the tradition. In other words, what constitutes creative originality in the Black music tradition is one's ability to add their individual take — their own style, version, rendition, signature, flavor, etc. — to the works and ideas within the canon.

There are two excellent examples of the priority of this practice within the Black (African American) music tradition. In the jazz tradition, the aforementioned use of blues "standards" (well known blues songs) as the foundation or inspiration for new jazz compositions is not only common, it's expected. To the jazz pioneers of the 1930s and 1940s, some blues standards are seen as common source stock (raw material) that is available for all to create on top of, i.e. to use as the foundation for new works. In this case, there is no overriding concern for authorial originality as some copyright hawks might define it. And when you examine the earliest days of hip hop/rap music, it must be remembered that Kool Herc picked up a new style of funk DJing from John Brown, an older DJ and fellow South Bronx resident. Having gotten his cue from John Brown, Herc began showcasing the new style at his parties and park jams. Soon, other DJs, most notably Grandmaster Flash and Afrika Bambaataa, keyed in on what Herc was doing and followed suit. Each DJ brought something new to the mix. For instance, Flash brought his technical precision and new style of blending record breaks, while Bambaataa brought his style of imploring record breaks from a more extensive and varied collection of records. In all three cases, Herc, Flash, and Bambaataa added their own individual style to the mix. In doing so, they extended the mix, and added a new music tradition that was based on the key tropes and sensibilities of an older one.

It must also be noted that originality in the Black music tradition is very different from the standard European model and the mythical concept of originality that many like to believe. In the Black music tradition, distinction is achieved through one's individual mastery and unique exploration of the musical canon. Unlike the European model (as best seen in the Western classical tradition), where originality is grounded in the abstract knowledge of the composition conjured up by the sole composer, the Black music tradition has historically considered originality in the context of *value-added* to the mix via a musician's individual interaction with the community.

Finally, we must consider the fact that because the concept of United States copyright is so embedded in Western literary tradition, it cannot appropriately address the Black (African American) oral tradition. Orality is central to American culture in general, but it is, and has always been, particularly important to Black (African American) culture.[1] In oral traditions, *style* is what matters most; ultimately, it's what determines originality, and it's the way in which individuals distinguish themselves. Notions of authorship in oral traditions are rooted more in individual stylization than anything else.

Current State of Copyright Law as It Pertains to Sampling

Sampling, especially as it is performed and understood in hip hop/rap music, is not simply a reflection of cultural change or part of a "post-modern" sensibility, as author and copyright historian Siva Vaidhyanathan describes it. His description of sampling is a misreading of what sampling is in hip hop/rap music. And while I have no doubt that Vaidhyanathan understands communal creativity, I believe that his description of sampling in this regard ignores the actual history of *sampling* (borrowing) within the Black (African American) music tradition. Sampling, in its digital (physical) form, is an extension of intellectual-appropriation, or what can best be called *virtual* sampling (like versioning or renditioning), which is an important trope and sensibility of the Black music tradition.

Furthermore, sampling does not merely exist *because of* technology, as Vaidhyanathan implies, nor is sampling the *invention* of technology. Advancements in recording technology and electronic instruments, like digital samplers and drum machines, simply represent a new means for the kind of intellectual

[1] The peculiar institution of slavery in the United States made it illegal for slaves to read and write. Thus, the significance of the oral tradition in Black (African American) culture is deeply rooted in the history of American slavery, the Reconstruction period, and the Jim Crow South.

appropriation that has always taken place. In other words, new technology ins't the *cause* of intellectual appropriation itself, new technology is simply the catalyst. As I've mentioned elsewhere is this study, sampling is the natural evolution of what the earliest hip hop/rap DJs were doing. And technically speaking, sampling, i.e. the process of using sound recordings to make music, goes back to the 1940s, when French composer Pierre Schaeffer experimented with recording technology, specifically tape manipulation, and came up with the music (aesthetic) process known as *musique concrète*. Utilizing a magnetic tape recorder, which was invented in Germany in the 1930s, Schaeffer produced the recording "Étude aux chemins de fer," which was composed entirely of a variety of different train sounds that were edited (i.e. looped and chopped) by Schaeffer. So sampling's roots go back further than some copyright commentators perhaps care to discuss or are aware of. Moreover, the art of sampling involves any number of processes, including, most importantly, transformation, reconceptualization, recontextualization, and *intellectual* appropriation. It is the process of *intellectual* appropriation that digital sampling technology simply makes possible. In this regard, technology *enables* the ideas of the sample-baseed musician, but technology does not create his ideas and sensibilities for him.

Even though digital sampling transcends some of the latter practices of the Black music tradition (most notably versioning, rendering, and signifying), the process of sampling itself is still an extension of the concept and same musical process of using elements of pre-existing music as raw materials to create new music. The advent of digital samplers has simply allowed for this process to be carried out with granularity (infinite flexibility) and greater precision.

Unfortunately, however, the legal perception of sampling held by most opponents of sampling is that sampling is "piracy" whenver any sample is not cleared. This is another reason why sampling is misrepresented and quickly mis-labeled as "theft," despite the fact that such terms are misleading and woefully inadequate for defining the true meaning of the art of sampling.

So it should come as no surprise that there's been a legal pushback against sampling by those who adhere to the property rights model of copyright. But to be sure, most opponents of sampling are not privy to and/or informed about sampling — Neither its meaning, nor its value to society. Also, because of their lack of understanding of sampling, these opponents are certainly not sensitive to the predilections, tropes, and fundamental concepts that are prescribed within a "culture of sampling"[2] in specific or the Black music tradition in general. Instead, these opponents of sampling merely write sampling off as a simple case of "stealing." And therein lies the crux of the communal creativity/copyright clash. On one side of the spectrum, you have the opponents of sampling who see sampling as an inherent encroachment against "property" rights. On the other side of the spectrum, we have the champions of sampling who see sampling as an art form and a music process that's tremendously valuable to society.

Finally, we must remember that the objective of copyright law is to stimulate, motivate, and influence the creation of new works; to prompt, foster, and provoke innovation; to offer reward for such innovation and creativity; and to give incentive to create and innovate. But modern perceptions of copyright law, especially as it pertains to sampling, do just the opposite. It actually discourages the creativity of musicians (artists) who use the art of sampling (in whole or part) as the compositional process that it is. And at the heart sampling, the very heart of borrowing, is fair use.

[2] See Chapter 1 for a detailed description of "culture of sampling."

The Story of Fair Use

Shortly after the adoption of the United States Constitution, Congress enacted the Copyright Act of 1790, the first federal copyright statute. The purpose of the Copyright Act was "to promote the Progress of Science and useful Arts, by securing for limited to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The legislation granted "authors" (creatives) a limited monopoly over the works that they created and the legal means by which they could secure rewards for their works. This means that authors received the exclusive right to exploit their works as well as the right to guard against *unlawful* appropriation of those works by others. In order to fulfill the objectives of copyright law, Congress imposed a significant limitation on the authors' exclusive right to the disposal of their works. Specifically, this limitation allows the public, in certain situations, to use copyrighted material without the permission of the copyright owner. Thus, where the material copied by others is *lawful* — non actionable — there is no infringement. So in effect, one of the fundamental principles that United States copyright law was established upon was the recognition that all creative works build upon, to a lesser or larger degree, elements of pre-existing works. As such, copyright law recognizes that creative borrowing is always at work and unavoidable. And the primary doctrine that embodies this understanding is known as fair use.

Now, there are actually *two* doctrines that generally cover this area of *non-actionable* copying: de miminis and fair use. This chapter examines fair use, its function, the policy underlying it, and how it is resolved — when conflicts arise — by the courts (not Congress). I begin with a description of what is lawful appropriation.

Lawful Appropriation: When It's Not Copyright Infringement

De Minimis and Fair Use: Limitation On the Exclusive Rights of Copyright Owners

The old adage that there's nothing new under the sun is correct. Every piece of art, every intellectual activity, draws from something else that came before it. Since the creation of things, people have borrowed and built upon ideas and pre-existing works; this is a permanent construct of society. "There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers." Further, *absolute* ownership of any copyrighted work is not what copyright law prescribes. Excessively broad protection of a copyright undermines the objectives of copyright law; for as Judge Leval has noted, "excessively broad protection would stifle, rather than advance, the objective" of copyright because "[m]onopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process." Thus, the fair use doctrine, "which protects *secondary creativity* as a legitimate concern of the copyright," is a critical component of United States copyright law.[3]

The fair use doctrine is especially important to sample-based beatmakers (producers) for two reasons. First, because most sample-based music uses pre-existing sound recordings as raw material, fair use gives sample-based beatmakers (producers) a core set of principles to consider when determining whether the use of a copyrighted sound recording is fair use or not. Second, fair use allows sample-based beatmakers (producers) a path to creativity that doesn't require permission from a copyright owner or a clearance fee. Sampling that is fair use or de miminis, i.e. *lawful*, *non-actionable* copying, helps sample-based beatmakers (producers) avoid clearing samples that do not actually need to be cleared. Thus, fair use serves as a legislative safe harbor for the kind

[3] Leval, 1109. 1110 (emphasis mine).

of art that sample-based recording artists create. In order to take full advantage of the protection that fair use (and de minimis) affords, as well as improve your level of creativity in the art of sampling, here's what you need to know about fair use.

First, What is De Minimis?

De minimis — which is short for the Latin maxim *de minimis non curat lex*: "the law cares not for small things" or "the law does not concern itself with trifles" — is a legal doctrine that refers to trivial matters that are not worthy of judicial scrutiny. In *On Davis v. Gap, Inc.*, the United States Court of Appeals for the Second Circuit points out that **"the de minimis doctrine essentially provides that where unauthorized copying is *sufficiently trivial*, 'the law will not impose legal consequences.'"**[4] In other words, if you use an element of a copyrigthed work without permission, and that element is de minimis, like say, a sample of a drum kick from an old song, then the use is *not* infringement. In noting the importance of locating when copying is actually "trivial," the Second Circuit further noted that "[t]he de minimis doctrine is rarely discussed in copyright opinions *because suits are rarely brought over trivial instances of copying*. Nonetheless, **it is an important aspect of the law of copyright."** In further describing the frequency in everyday life and the ordinary, practical nature of de minimis, the Second Ciruit also added that:

> **Trivial copying is a significant part of modern life.** *Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the de minimis doctrine, would technically constitute a violation of law.* We do not hesitate to make a photocopy of a letter from a friend to show to another friend, or of a favorite cartoon to post on the refrigerator. Parents in Central Park photograph their children perched on Jose de Creeft's Alice in Wonderland sculpture. We record television programs aired while we are out, so as to watch them at a more convenient hour. 8 Waiters at a restaurant sing "Happy Birthday" at a patron's table.

[4] *On Davis v. Gap, Inc.*, 246 F.3d 152 (2nd Cir. 2001) (citations omitted).(emphasis mine).

> When we do such things, it is not that we are breaking the law but unlikely to be sued given the high cost of litigation. **Because of the de minimis doctrine, in trivial instances of copying, we are in fact not breaking the law.** ***If a copyright owner were to sue the makers of trivial copies, judgment would be for the defendants.*** **The case would be dismissed because trivial copying is not an infringement.** [emphasis mine][5]

As a broad principle well recognized in common law,[6] de minimis is understood to mean usage that does not amount to actionable (unlawful) copying under the law. "Under the de minimis doctrine, some things, while technically violations of the law, are considered *too petty* to waste the time and resources of the court."[7] In the context of a copyright infringement lawsuit, if the allegedly infringing work makes such a quantitatively *insubstantial* use of the copyrighted work as to fall below the threshold required for actionable copying, courts reject the claim on that basis and find no infringement. So whether the allegedly infringing use is de minimis is also a consideration of the substantial similarity analysis. So in a context of sampling sound recordings, the de minimis threshold is the level at which courts deem the appropritation of a sound recording to be "trivial" and "*quantitatively insubstantial"* and therefore not an infringement. Think of something like a sample of a kick drum, a bass-stab, or two short notes from a long melodic phrase, and the like.[8]

De minimis is particularly important to understand *prior* to the scope of fair use, because if a sample is de minimis, then there's no need to for the courts to engage in the fair use test. "The fair use defense involves a careful examination of many factors, often confronting courts with a perplexing task. If the allegedly

[5] *Id*.

[6] Common law (also known as case law or precedent) is law developed by judges through decisions of courts and similar tribunals rather than through legislative statutes or executive branch action.[1] A "common law system" is a legal system that gives great precedential weight to common law,[2] on the principle that it is unfair to treat similar facts differently on different occasions.[3] —http://en.wikipedia.org/wiki/Common_law

[7] Mueller, 435 (emphasis mine).

[8] For a good example of a court's description of the *de minimis* doctrine, see *Ringgold v. Black Entertainment Television, Inc.*, 126 F. 3d 70 - Court of Appeals, 2nd Circuit 1997.

infringing work makes such a *quantitatively insubstantial* use of the copyrighted work as to fall below the threshold required for actionable copying, *it makes more sense to reject the claim on that basis and find no infringement, rather than undertake an elaborate fair use analysis* in order to uphold a defense."[9] In this way, the de minimis doctrine recognizes that there are instances in which an appropriation (like a sample from a sound recording or words from a book) is too small, too trivial to be considered copyright infringement. Although sampling case law has addressed this issue, most notably in *Newton v. Diamond*, there is however no arbitrary de minimis threshold. In fact, what occured in *Newton v. Diamond*, according to Dr. Lawrence Ferrera, is very insightful in this regard:

> I was the musicologist for the defendant, the Beastie Boys and all of the co-defendants. And in that case, James Newton...had sold the sound recording rights to his song the 1978 song "Choir." He sold the rights to the sound recording, but he held on to the publishing rights to the composition. The Beastie Boys took the first 5 and a half seconds, which is three notes, which is essentially James Newton in a falsetto singing these notes [begins to play the notes, then sings the notes].
>
> And simultaneous with singing those three notes, he over blows the flute, same time, and he creates a multi-phonic, which is [he plays], which is just literally a multi-phonic of sounds. And so, essentially, it was three notes, and he actually even had a score, that actually accompanied that in his 1978 filing for copyright. The Beastie Boys duly licensed from the record company, that Newton sold his rights to (I think they were in Germany), the use of that sound recording sample. But they didn't take the license on the three notes. He [Newton] sued. I was the musicologist.
>
> And as I presented, I said, "Those three notes, first of all, they're de minimis. Because you only hear it once in this 4-and-a-half-miute work. You never hear it again. And **the de minimis test or analysis is, what is the substantiality of the portion at issue within the context of the whole song, not the new song, the original song.** *That the Beastie Boys looped that [sample], something like 47 times, in their song "Pass the Mic" is not the de minimis test.* It's how substantial was that three notes in the original Newton work. And the point

[9] *Id.*

> was that it was de minimis.
> It was minimal.... So I established that, first of all, there's nothing new about what he did. Moreover, those three notes, I gave oodles of examples in major works where that was actually a motif. And so I had some really great prior, what is called prior art, as well as you know, everything else. And Judge Menella, of the District Court in Los Angeles, on the basis on everything, not just what I wrote but what the defendants proffered, dismissed the case. It was appealed. The 9th Circuit upheld, but with one dissent. And then it went to the en banc. I don't know how many judges looked at it, I think nine or ten or whatever **in the 9th Circuit, and they unanimously upheld on the de minimis.**
>
> So, there is a case where if there's three notes in the composition — So I've done the analysis and say, "Hey, you know what, yeah, maybe they did copy those three notes." [laughs] **The point is, it doesn't matter. Because it's de minimis.** And in the case of *Newton*, they did copy it. Because they sampled it. And they licensed the sample. So there's no question that they copied it. **But the copying, the copied expression was not sufficiently substantial for there to be, and this is important, musicological support for a claim of copyright infringement.** [emphasis mine][10]

Newton v. Diamond aside, the circumstances of each sample are different. Therefore, in the courts, de minimis must be determined on a case-by-case basis. For this reason, the notion of a default or precise de minimis sample line of one, two, or three notes, or one, two, or three seconds is misleading. There is no "bright line" de minimis threshold for what constitutes a de minimis sample of a sound recording.

Since de minimis is a less complicated concept to comprehend, I will leave the description of it where it is and I'll just make one final point. All copyrightable subject matter, from sound recordings to literary works to motion pictures — is subject to a de minimis threshold for infringement. Now, a more detailed discussion of fair use is required, as it is an oft misunderstood concept that contains lots of gray area. Thus, what follows is a deeper examination of fair use.

[10] Amir Said interview with Dr. Lawrence Ferrara, November 29, 2018.

What Is Fair Use?

Before turning to an extensive examination of the four factors of fair use, it's necessary to spend substantial time discussing what fair use is, its background, and the important role that it plays in copyright law.

In 1741, roughly 30 years after the creation of copyright by the Statute of Anne of 1709 in England[11],the concept of "fair abridgement," now known as "fair use," was introduced in *Gyles v. Wilcox*.[12] At that time, the courts in England recognized that "certain instances of unauthorized reproduction of copyrighted material" would *not* infringe a copyright owner's rights. In the United States, the fair use doctrine was adopted, first formally introduced by Justice Joseph Story in 1841 in *Folsom v. Marsh*[13], then later incorporated into the Copyright Act of 1976, which states that **"the fair use of a copyrighted work . . . is *not* an infringement of copyright."**[14]

Law professor Barton Beebe, author of *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005,* the first empirical study of U.S. copyright fair use opinions, described fair use as the "most enigmatic doctrine in U.S. copyright law and by far the most important;" and he noted that without it, "much of our economic and communicative action would constitute copyright infringement."[15] What Beebe is speaking to here are the functions, roles, and objectives of fair use.

[11] For historical analysis of the Statute of Anne of 1790, see chapter 11.
[12] Gyles v. Wilcox, 26 Eng. Rep. 489, 2 Atk.
[13] *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841).
[14] 17 U.S.C. § I07 (emphasis mine).
[15] Barton Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005," *University of Pennsylvania Law Review* Vol. 156, No. 3 (January 2008), 549-50.

The Functions and Roles of Fair Use

There are 10 separate but interrelated functions or roles of fair use. Each is vital, but some are more structurally important. As *one* of the exceptions that limit the exclusive right of copyright owners, we can say that the first function of fair use is to *preserve* the public's right to use — in those limited situations broadly prescribed by copyright law — copyrighted works without clearance or the need of a copyright owner's permission. Put another way, this function of fair use is to uphold the exceptions to a copyright owners' exclusive monopoly over his work. The second function of fair use, what Matthew Sag has called the "true" function of fair use, is to "enable copyright law to evolve in response to new challenges without necessitating legislative intervention." Like this, fair use is "*meant* to be used as *a flexible standard* through which the judiciary can determine the application of copyright *in response to social and technological changes.*"[16]

Fair Use Protects (and Enables) Secondary Creativity and Use

The Supreme Court has noted what all of us already know: *There's nothing new under the sun*. Which is to say, every new creative work has been created by borrowing, to some degree, from other pre-existing creative works. "Wholly" original thought or invention do not exist; each advance in history stands on building blocks made by prior thinkers and creators.[17] This shouldn't be a controversial concept. But when it comes to copyright law, views about the vital role that borrowing plays in creativity, the process of invention, and all intellectual activity are skewed. Often views are

[16] Matthew Sag, "God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine," 11 MICH. TELECOMM. TECH. L. REV. 381 (2005), 404 (emphasis mine).
[17] Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review*, Vol. 103, No. 5 (Mar., 1990), 1109.

formed depending on which side of the stake you sit on. Secondary creativity is a reality of all intellectual activity; the public relies on this fact. Therefore, society can't afford for the pathway to secondary creativity to be blocked. In terms of copyright law, this means that too much monopoly protection stifles creativity.

Further to this, fair use helps make clear that quoting, in some circumstances, is not "stealing" but a necessary part of the creative process. As Judge Leval has noted, "[q]uotation can be vital to the fulfillment of the public-enriching goals of copyright law."[18] Looking specifically at writers, for instance, we can see that, "[i]n private letters and notebooks, they practice the writer's craft, trying out ideas, images, metaphors, cadences, which may eventually be incorporated into published work.... the copyright objectives include a reasonable solicitude for the ability of the author to practice the craft in the privacy of the laboratory."[19]

Thus, practicing or working out your ideas would be copyright infringement were it not for fair use; likewise, recording other people's songs, for example, to practice with and develop your own skill as a musician, would be copyright infringement were it not for fair use. Fair use protects secondary use in the general sense of everyday life. Fair use allows others to copy and use part (or, in some circumstances, all) of a copyrighted work *without* authorization of its copyright owner. "Consumers and creators rely on access to existing works, not just in artistic fields but in countless areas of social, political, cultural and economic activity. Most of the fabric of our cultural and intellectual lives is owned in some fashion by someone else."[20] Accordingly, fair use protects (and enables) secondary creativity and use.

[18] *Ibid*, 1111-1116.
[19] *Ibid*, 1120-1121.
[20] Sag, 382-383 (emphasis mine).

Fair Use Ensures That Copyright Protection Is Not Excessively Broad

While copyright owners hold an exclusive monopoly over their works, copyright law maintains that this exclusive monopoly is *limited*. This limitation manifests in two critical ways. First, authors (creators) are granted exclusive control over their works for a limited time. Second, this exclusive control is not *absolute*. The public which benefits from the "intellectual and practical enrichment that results from creative endeavors,"[21] has access to copyrighted works, in certain circumstances, free of charge so to speak. In other words, copyright allows for some degree of borrowing of copyrighted works without need of permission from, nor payment to, the copyright owner.

Without safe harbors like fair use (and de minimis), copyright protection would be excessively broad and the objectives of copyright law would be stifled. Hence, the fair use doctrine is a guarantee to the public that helps protect against excessively broad copyright protection. In noting this guarantee, Matthew D. Bunker and Clay Calver have stated that fair use "'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that the law is designed to foster."[22] And in *Campbell v. Acuff-Rose Music,* The Supreme Court noted that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of *the fair use doctrine's guarantee* of breathing space within the confines of copyright…"[23]

[21] Leval, 1109.
[22] Matthew D. Bunker & Clay Calvert, "The Jurisprudence Of Transformation: Intellectual Incoherence And Doctrinal Murkiness Twenty Years After *Campbell V. Acuff-Rose Music*," Duke Law and Technology Review, 2014, 96.
[23] *Campbell v. Acuff-Rose Music*, 510 U.S. 579 (1994) (emphasis mine).

Fair Use Serves as a Guardian of Free Speech

Another critical function of fair use is free speech. Matthew D. Bunker has observed that in *Eldred v. Ashcroft*, the court "alluded to fair use, as well as the idea–expression and fact–expression dichotomies, in pointing out that 'copyright's built-in free speech safeguards are generally adequate' when copyright interests conflict with First Amendment values."[24] In other words, fair use "has a role to play in maintaining a constitutionally acceptable balance between copyright and freedom of speech." This function of fair use is so vital that the Supreme court has consistently held that "copyright does not present a danger to freedom of speech because of the idea expression distinction *and the fair use doctrine, copyright's 'own speech-protective purposes and safeguards.'*"[25]

Also, within the context of fair use as a guardian of free speech, we must remember that the exclusive right of copyright owners is not *absolute*; if it was, there would be infringement found any number of harmless private activities, like: Taking screenshots of an article (copying); time-shifting a television program (copying and editing); or recording a song into Pro Tools, converting it to an MP3 file, and transferring it to your smartphone or other portable device (copying). None of these examples constitute copyright infringement because fair use protects these private-use examples as freedom of speech.

Thus, the application of the exclusive right of copyright owners varies according to context. This was made clear in *Chapman v. Maraj* (2020). In this case, brought by Tracy Chapman against Nicki Minaj, Minaj argued that her sampling and use of Chapman's song "Baby Can I Hold You" constituted fair use. The district court of the Central District of California agreed, and found that Nicki Minaj's sampling and use of Tracy Chapman's song did amount to fair use, and the court granted Minaj partial summary judgment:

[24] Matthew D. Bunker & Clay Calvert, "The Jurisprudence Of Transformation: Intellectual Incoherence And Doctrinal Murkiness Twenty Years After Campbell V. Acuff-Rose Music," Duke Law and Technology Review, 2014, 95.
[25] Sag, 408-409 (emphasis mine).

> In determining whether a use is fair use, courts consider four factors…
>
> These factors should not be treated in isolation, and **instead must be explored and *weighed in light of copyright's purpose.***
>
> The Supreme Court has found that ***transformative uses*** "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright" because such works generally further "the goal of copyright, to promote science and the arts[.]"
>
> Courts should also ***"consider the public benefit resulting from a particular use*** notwithstanding the fact that the alleged infringer may gain commercially." The public benefit need not be direct or tangible, but may arise because *the challenged use serves a public interest.* (Id. at 1523). As explained above, artists usually experiment with works before seeking licenses from rights holders and rights holders typically ask to see a proposed work before approving a license. **A ruling uprooting these common practices would limit creativity and stifle innovation within the music industry. *This is contrary to Copyright Law's primary goal of promoting the arts for the public good.*** This factor thus favors a finding of fair use.
>
> Maraj's creation of the new work **for the purpose of artistic experimentation** and to seek license approval from the copyright holder thus did *not* infringe Chapman's right to create derivative works.
>
> …**this Court finds that any liability for Maraj's creation of the song is barred by the fair use doctrine.** The Court therefore DENIES Chapman's Motion for Partial Summary Judgment and GRANTS Maraj's Motion for Partial Summary Judgment." [emphasis mine][26]

Whether you're a superstar like Nicki Minaj or not, fair use provides assurance for everyday free-speech uses. Another common example of such uses is in the area of research. As a former library technician (and former page) at the New York Public Library, I watched countless researchers make and receive photocopies of thousands of pages of books. They didn't seek permission of the

[26] Chapman v. Maraj No. 2:18-cv-09088-VAP-SS (C.D. Cal. Sept. 16, 2020).

copyright holders of those books; that would have been absurd. Fair use assures members of the public that this kind of access to copyrighted works is protected. If Congress had not permitted such breathing room, i.e. "made no allowance for the private use of copyrighted material," via statutory language in the Copyright Act of 1976, "the resulting law would have been extraordinarily oppressive."[27] Therefore, Congress left such language out because fair use functions as a sort of catch-all for the limitations on the exclusive rights of copyright holders. And while the statutory language of the Copyright Act does make mention of some *specific* exemptions, i.e. specify some activities and uses that are "not infringement," like fair use, it is understood that the list of non-infringing activities and uses that *could be* fair use is non-exhaustive. As such, fair use essentially covers all of the possible exemptions that Congress did *not* specify.

And if ever there is conflict — a question as to whether a specific use is exempt or not — well, Congress intentionally left that for the courts to sort out. In some contexts, this advantages copyright holders. But in the context of sampling, this actually advantages sample-based beatmakers (producers) despite what conventional wisdom says. Remember, for instance, Girl Talk? He sampled, openly shared his source material, *and* announced loudly that he believed that what he was doing was fair use. So why was he *not* sued en masse? Why didn't the major record labels go after him and have the question answered in court? The simple answer is: They didn't want to take the chance of getting an answer that they did not want, and they did not want to bring attention to fair use in a big way.

[27] Sag, 417 (emphasis mine).

Fair Use Ensures That There Are No Bright-Line Rules for Borrowing

Standards vs. Bright-Line Rules: On the Clarity and Broadness of Fair Use

Some commentators have claimed that Section 107 of the Copyright Act is vague. Perhaps in some ways this may be true, but if you replace the word "vague" with the word "broad," things become a lot more clear. Section 107 states that "the fair use of a copyrighted work is *not* an infringement of copyright." This part is not vague, nor is it broad; on the contrary, it's a firm statement of one of the Copyright Act's inherent limitations on the exclusive right of copyright owners. What could be described as broad however are the *types* of uses that may meet the fair use threshold. And while Congress mentioned some specific types of uses that may meet the fair use threshold, Congress also intentionally mentioned, *and left open*, specific *standards* and guides for determining fair use, *not* bright-line rules. In fact, Section 107 provides a non-exhaustive list of examples of fair use, *including*: criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research) and four non-exclusive factors for courts to consider in determining fair use. Again, the proper word here is "broad" because the four factors serve as a *flexible standard*, not a "vague" principle, which courts use in determining fair use.

Fair Use as De Facto Policy Maker

(Policy Making Performed by the Courts and Judges)

One constant of the development of copyright law over time, as proven by the implementation of the Copyright Act of 1976, is that the "rights of copyright owners adapt to technological challenges, whereas users' rights," the rights of the public, "are

diminished or marginalized."[28] As new technologies emerge, the rights of copyright owners expand presumptively; the presumption being that questions of protection raised by emergent technologies default in favor of copyright owners. Within this paradigm, one function of fair use is to preserve users' rights, the public's right, in the face of technological advancement. Normally, this would be the role of Congress, but it's neither possible nor practical for Congress to amend copyright law every time a new technology emerges. In effect, the way copyright law is designed and structured, and in particular the way in which fair use is detailed in the Copyright Act, Congress has basically said: *With regards to questions pertaining to rights associated with new technologies, the courts will sort it out!*

Thus, despite the fact that the courts are not supposed make policy — that's Congress' job — fair use is used by the courts for de facto policy making. Matthew Sag has noted that "[t]he structure of the Copyright Act and the history of copyright law indicate that the true function of fair use is to enable copyright law *to evolve in response to new challenges without necessitating legislative intervention*." Further to this, as I mentioned previously, fair use is a flexible standard "through which the judiciary can determine the application of copyright in response to social and technological changes — fair use was never intended to preserve the status quo in the face of change."[29]

Congress intentionally used fair use to transfer "significant policy making responsibility to the judiciary, *allowing judges to develop the law in response to external changes."* And the reason Congress did this was just as much about fairness as it was about the high cost of not doing it. De facto policy making by judges in this way is simply more cost effective — and presumably more *fair* — than Congress performing "specific statutory exemptions, compulsory licenses" or drafting "concrete statement of rights" every time a new technology is created, or every time a new conflict emerges from existing technology. For instance, In 1971, when sound recordings were incorporated into the Copyright Act,

[28] Sag, 404.
[29] Sag, 404.

Congress could not have realized that sampling would become an art form and popular music-making process. But they did recognize that advancements in technology make such art forms and activities possible, and that therefore copyright law must be flexible enough to absorb those advancements in technology as well as the cultural and social changes that new technology inevitably brings with it. So it's "not a coincidence that Congress chose to codify fair use as a standard at the same time that it radically expanded copyright rights in the 1976 Act."[30]

There's also the question of practicality:

> **"This structural role of fair use is significant because of the perceived inability of the legislative process to keep pace with the demands of rapid technological and social changes. A flexible, forward-looking set of owner's rights, combined with a flexible fair use doctrine, *allows Congress to legislate less frequently and entrust significant policy responsibility to the judiciary."***[31]

However, one problem with Congress transferring significant policy making responsibility to the courts is that it tends to *expand* the power of copyright owners. Already overwhelmed by expansion of copyright term limits — which, in effect, expanded the right of copyright owners — the public is not well informed about copyright law. So this allows copyright owners, who were empowered by the expansive language of the Copyright Act of 1976, to take advantage of the situation and proceed as if the exclusive right in their copyright works is *absolute*. As such, copyright owners often engage in what amounts to publicity campaigns that are designed to make the public believe that their exclusive right is absolute. In other words, the worst offenders of this *absolutism propaganda* — many of whom are music copyright owners — would like the public to believe that there is *no* access of any kind to copyrighted works without a license or permission from copyright owners. This is exactly what we see with the perception of sample clearance, i.e. the idea that *all* samples must be cleared and that any sample that is not cleared is *presumptively* copyright infringement.

[30] Sag, 410 (emphasis mine).
[31] *Ibid*, 410-411 (emphasis mine).

Fair Use Plays a Role In Covering New Technologies and Old Ones All at Once

Amanda Webber has maintained that "the Copyright Act nor the Sound Recording Act was written with digital sampling in mind."[32] But this statement is misleading and it misses the point entirely. Neither the Copyright Act nor the Sound Recording Act was written with Tik Tok, Twitter, Facebook, Instagram, YouTube, and other social media platforms in mind. The Copyright Act was not written with any *one specific* technology, art form, or service in mind! Instead, the Copyright Act was written and designed with the good of the public — the benefit of society — in mind, insofar as this benefit is achieved through creative output and technological advancement. To single out digital sampling as something that neither the Copyright Act nor the Sound Recording Act had in mind, as Webber and some other commentators have said, is to put forth a logical fallacy that goes something like this: *Since Congress didn't expressly mention the art of sampling, Congress didn't mean for the digital sampling of sound recordings to be covered by the same exceptions as types of borrowings and copyrightable subject matter*. See the problem with that?

Like the Copyright Act, the Sound Recording Act was written with *the purpose and objectives of copyright* in mind; which means that it was written, in part, with permissive borrowing very much in mind. Congress was clear on several points in this regard. First, the Sound Recording Act was *not* to treat sound recordings any differently than other copyrightable subject matter. Explicitly, this means that the same rules apply to sound recordings and all other categories of copyrightable subject matter. Second, the Sound Recording Act was left intentionally broad to account for advancements in technology, the kind of advancement in technology that made *digital* sampling possible.

[32] Amanda Webber, "Digital Sampling and the Legal Implications of Its Use After Bridgeport," *Journal of Civil Rights and Economic Development*, Volume 22, Issue 1 (2007, 374).

Fair Use Preserves the Idea-Expression Dichotomy of Copyright Law

Ideas are not protected by copyright law. Copyright law does not bar others from using the ideas (or factual information) found in an author's work. This principle, or exemption to the exclusive right of copyright owners, is known as the idea-expression dichotomy of copyright law. Fair use plays an important role in safeguarding the idea-expression dichotomy because "[w]here particular situations and advances in technology threaten to undermine the idea expression distinction, courts have applied fair use to reinforce this copyright principle."[33]

Fair Use Preserves Consumer Autonomy and the First Sale Doctrine

(The Under Limits)

Finally, another role of fair use is to preserve consumer autonomy and the first sale doctrine. Under the first sale doctrine, the consumer who buys a copyrighted work is entitled to sell *or dispose of* his or her copy without permission from the copyright owner. Congress codified the first sale doctrine in the Copyright Act of 1909; and in 1947, the doctrine was recodified (using virtually the same language as the Copyright Act of 1909). Language for the modern form of the first sale doctrine was updated and set in the Copyright Act of 1976. Then, in 1998, in *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, the Supreme Court strengthened the doctrine, stating that "[t]he whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution."[34]

So under the first sale doctrine, the copyright owner has the exclusive right to make copies of a copyrighted work and sell them.

[33] Sag, 406 (emphasis mine).
[34] Sarah Reis, "Toward A 'Digital Transfer Doctrine'? The First Sale Doctrine In The Digital Era, *Notes and Comments*, Vol. 109, No.1 (2015). *See also*: 523 U.S. 135 (1998).

But for each copy sold on the open market, i.e. wherever commerce is legally conducted, the copyright owner's right to *further* control distribution of the copy that was sold is exhausted by the *first sale* of that copy. So the first sale doctrine allows the copyright owner to retain control over the work until it is first sold. And with the purchase of the copy, the consumer retains the right to resell the copy or use it privately as he pleases. One common example of this is the purchase and resell of a vinyl record.

At the foundation of the first sale doctrine sits consumer autonomy. When a consumer purchases a copyrighted work (like a song, a book, or a film), the consumer may privately consume the product however he chooses. If, for example, you want to write notes in the margins of a book that you bought, you can do that. You can even cut pages from the book and tape them to your fridge. The copyright owner of that book can't stop *how* you privately consume their work. In this regard, the first sale doctrine and consumer autonomy are further preserved by fair use.

With regards to music specifically, this means that once you buy a sound recording, regardless of the initial capture-media format — vinyl record, CD, digital download — you can lawfully make a digital audio recording of it for your own noncommercial use. This includes making copies of it for the purposes of engaging in, and experimenting with, the art of beatmaking and sampling. Again, sample-based beatmaking is not *per se* copyright infringement. What is *potentially* copyright infringement however are the individual samples and their uses. But a sample is not *presumptively* copyright infringement simply because it's a sample. In other words, there is no such thing as "per se" infringement because a sample is not "illegal" simply by virtue of it being a digital copy of an element of a sound recording.

Copyright ownership does *not* make copying by end users unlawful. The mere activity of copying something for private use is protected by fair use. This is why the concept of *per se* infringement (introduced by the *Bridgeport* court) violates freedom of speech. And this is one way in which fair use protects free speech.

Towards a Healthy, Consistent Perception of Fair Use

There are two terribly misguided perceptions of fair use that still prevail today. First, there's the perception that fair use is "just a defense." This illogical, dismissive view — one that is held predominantly by music industry lawyers — seeks to place fair use at the back doorstep of a copyright infringement lawsuit. Second, there's the perception that fair use is *merely* an exception (one that is grudgingly tolerated) to the rules of copyright law, i.e. to the copyright owner's exclusive right. Both perceptions are harmful. A healthy, consistent perception of fair use means not misrepresenting fair use as "just a defense" or as an insignificant spectacle of copyright law, but rather recognizing fair use as a vital component and fundamental policy of copyright law. In fact, fair use — which, again, protects secondary creativity — is necessary to the fulfillment of the objectives of copyright law:

> *The stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author's monopoly.* **But it depends equally on the recognition that the monopoly must have limits.** Those limits include the public dedication of facts (notwithstanding the author's efforts in uncovering them); the public dedication of ideas (notwithstanding the author's creation); **and the public dedication of the right to make fair use of material covered by the copyright.** [emphasis mine][35]

A healthy, consistent perception of fair use also means a recognition of the four factors of the fair use text, and more specifically, how these factors are interpreted with the objectives of copyright as the guiding principle.

Lastly, a healthy, consistent perception of fair use requires that judges do not treat fair use as something mysterious or dependent upon intuitive judgments or individual fact patterns. There is a reliable guide to how to govern conduct, and in this regard the objectives of copyright remain supreme. Further, clarity in

[35] Leval, 1136.

fair use isn't about a bright line, but rather guiding principles. Quoting Justice Story, Leval reaffirms that a "definite standard would champion predictability at the expense of justification and would stifle intellectual activity to the detriment of the copyright objectives. *We should not adopt a bright-line standard unless it were a good one — and we do not have a good one.*" Nor should we aim to find such a standard, as some commentators have suggested. The four statutory factors — when balanced together in light of the objectives of copyright — provide excellent guidance. "We can...gain a better understanding of fair use and greater consistency and predictability of court decisions by disciplined focus on the utilitarian, public-enriching objectives of copyright — and resisting the impulse to import extraneous policies."[36]

Some Important Conclusions About Fair Use, Especially As It Pertains to Sampling

When Is Fair Use In Your Favor?

There are no legislative safe harbor guidelines specifically for sampling. Instead, the principles of fair use, as described earlier in this chapter, apply to all kinds of copyrighted material. That said, below is a description of when fair use is in your favor, or rather when the sampling and use of a copyrighted sound recording is likely a fair use.

The more transformative the use of a sample, the more likely it will constitute a fair use; conversely, the less transformative the use of a sample, the more likely it will not meet the fair use threshold. In other words, a 1- to 4-bar sample chopped up, pitched up or down, and combined with additional drum work — and vocals over the top of the beat — is more likely to qualify for fair use than an 8- to 16-bar sample with little to no transformation and no additional music elements.

Although transformation may be subjective, when considering how transformative a sample-based beat is or isn't, ask yourself

[36] Leval, 1135 (emphasis mine).

four main questions. First, is the way in which the sample is used conceptually different from the sound recording it samples? Second, is the way in which the sample is used a change in context from the sound recording that it samples? Third, is the new work, which incoporates the the sample, substantially similar to the sound recording that it samples *as a whole*? Fourth, is the length of the sample short or long? These four questions should you give you a good gauge on whether a use is fair or not. But in all cases, the more that you aim for a high level of creative transformation, the more likely your sampling will meet the fair use threshold.

With regards to amount taken, the smaller the sample, the better shape you're in. In a de facto context, a very small sample, like a drum kick, i.e. a sound that usually amounts to less than one second, is de minimis, despite the *Bridgeport* ruling (more on the controversial *Bridgeport Music v. Dimension Films* case in chapter 20). Still, there is no official 1-, 2-, or 3-second rule for the amount of sampling that *automatically* qualifies for fair use.

Looking at the transformation and amount factors, there are three ways to approach the art of sampling in a way that's favorable to the fair use doctrine. First, sample as little as possible. Second, transform whatever you sample, i.e. flip it to the maximum, which means transform it by changing and adding to it to create something new and substantially different. Third, avoid sampling the "heart," i.e. the most recognizable part of a sound recording. But even if you do sample the heart, make sure that you alter it to the point that it's substantially different from the sound recording that it samples.

Shifting Attitudes Regarding Copyright Protection

Ideas about ownership of artistic works shifted dramatically in the twentieth century. But remarkably, ideas about fair use have remained the same. And despite the fact that revolutionary advances in technology have been (and continue to be) made, the problems with modern copyright policy and protection, namely the Romantics' conception of authorship and the property concept of intellectual creativity, continue to persist. No doubt this has influenced how some people perceive art forms like sampling. This is one reason why fair use, perhaps the most important constant in copyright law, aside from the very purpose of copyright law, is critical right now.

Fair use, the "breathing room within the confines of copyright law," recognizes the realities of creativity and how new original works necessarily borrow from pre-existing works. This legal appropriation, if you will, that the fair use doctrine guarantees is particularly important to the art of sampling, as the entire aesthetic is fundamentally about making new art from pieces of pre-existing sound recordings.

On the Question of Amending Fair Use and Judicial Intervention

Some commentators have suggested that Congress reduce the uncertainty surrounding fair use. The authors of *Creative License* (2011) point out, for example, that Congress "could amend section 107 of the federal copyright code, which codifies the fair use doctrine, to clarify whether a sample-based song that is not a parody can qualify as a transformative use in at least some cases."[37] However, I strongly disagree with any such amendment or specific clarification for sampling, because fair use is codified in the Copyright Act as a deliberately *non-exhaustive* doctrine — for reasons I've outlined here in this chapter. So there's no need for

[37] McLeod and DiCola, 243.

such an amendment, but rather a simple recognition that fair use applies to all copyrighted material, including sound recordings. Still, in terms of clarity, in the following chapter, I detail how fair use is determined in a court of law. And despite perceived outcomes, the *path* to determining fair use is always clear. The results however are not.

Another problem with trying to clarify something that is intended to be non-exhaustive is that such an action may actually weaken fair use by perhaps limiting instances of sampling that are fair use, and even casting aspersions on other art forms and other forms of copying. In fact, McLeod and DiCola recognize the pitfalls of pursuing such an amendment, as they point out that "Realistically, though, it is unlikely that Congress would be motivated to alter the copyright code for the benefit of such a small class of constituents — remixers — and there is no guarantee that legislators would get it right. In fact, *it's quite possible that Congress could make things worse by retooling the federal copyright code,* especially given the lobbying power and influence of the entertainment industries that have Congress' ear."[38]

Further, there's nothing in the statute that expressly says or indicates that "a sample-based song that is parody" is the *only* kind of sampling that qualifies as a transformative use; in fact, the statute plainly suggests that the possibibilities are infinite. So it's useless to pursue a course for amending the fair use doctrine to clarify non-parody transformative uses just for sample-based songs. The fair use doctrine, as codified in the Copyright Act, does not state that parody, in any form, is the *only* transformative appropriation; judicial opinions in recent years make that quite clear.

Instead of altering the Copyright Act just for some clarification of what forms of copying other than parody qualify as a transformative use when sampling is involved, I think the emphasis should simply be placed on educating the public about fair use. An emphasis on fair use education is more realistic and less harmful. Again, it's not practical to believe that Congress is going to cut open the Copyright Act to address the issue of music sampling. Fair use is strong enough

[38] *Ibid* (emphasis mine).

as is. So the problem isn't that the statute lacks specific language referencing sampling or more specific clarification on what forms of copying other than parody may qualify as transformative use. Moreover, as Leval and the Supreme Court suggest, the solution is simple: Allow the objectives of copyright to guide any fair use inquiry, and recognize that all copyrighted material is subject to fair use.

As for the federal courts implementing "a clearer way to address fair use in sampling cases, perhaps by including a workable definition of transformative use for cases that don't involve parodies,"[39] again, I don't agree. What concerns me about the courts making this type of bright-line determination is *who* exactly would help the courts determine this workable definition of transformative use when it comes to sampling? Would there be an advisory panel to the courts on this issue? And if so, who would be on this panel? Would the advisory panel be made up of all of the most relevant groups — sample-based beatmakers (producers) and copyright scholars, music lawyers, music publishers, and previously sampled reocrding artists? Even if all of the stakeholders were at the table, I don't believe it's possible to establish such a bright line, especially given the widely different views about creativity, or the fact that the ways in which samples can be transformed are limitless.

What Matters More, Your Art or the Philosophy of Fear?

On Being Motivated by Your Art; and Why You Shouldn't Be Spooked by the Sample Clearance System or the Thought of a Looming Lawsuit

The monstrous sample clearance system caused many sample-based beatmakers (producers) to move away from sampling. In hip hop/rap music this has had a devastating effect, as it dramatically reduced the amount of sampling that was taking place. But what I find more troubling than the widespread move away from sampling

[39] *Ibid*.

is the underlying philosophy of fear that the sample clearance system has fostered. This philosophy of fear — of not getting a sample cleared and therefore not selling beats even with samples — has caused scores of would-be samplers to avoid the sample-based compositional style and compromise their thoughts on sampling. This has meant that some beatmakers (producers) have even give up the art form altogether, merely because of arbitrary sample clearance issues and the pressing fear of litigation in the music industry. And the fact that fair use has been systematically buried alive in the music industry makes this philosophy of fear all the more disturbing.

I'm convinced that if there had been more awareness of fair use among sample-based beatmakers (producers) in the past two decades, this widespread shift in hip hop/rap music away from sampling would never have occurred. Instead, armed with the knowledge of fair use, and copyright law in general, I think that the ranks of sample-based beatmakers (producers) — who would have been consciously operating under the protection of fair use — would have risen to such a level that the music industry would have had no choice but to deal with the issue of sampling and fair use much more favorably than it does now.

I suspect that as result of widespread fair use awareness among sample-based beatmakers (producers), the sample clearance system would be tame by today's standard. And although it didn't happen in the past two decades, there's no reason that it can't happen now. This is why I urge sample-based beatmakers (producers) to learn about fair use, to understand its nuances, and to uphold its importance in culture and society. Moreover, I urge sample-based beatmakers (producers) to regularly use fair use as a guiding factor in their creativity. Naturally, if you aim to sample reasonably small portions of sound recordings, and aim to be substantially transformative with your uses, then fair use will likely always be on your side. So you should, therefore, proceed like it is on your side! This means putting your art first. It means making creativity a priority and being guided by your creative convictions. It means understanding hip hop/rap sampling's standards and best practices

and working them into your approach and skill set. Of course, it also means taking the progress of the art of sampling seriously.

Finally, here's a thought. Since we know that Negativland once took on the RIAA over fair use *and won*, sample-based beatmakers (producers) should take comfort in knowing that another fair use call to arms would be even more successful. Think about it: What did it take for the RIAA to amend its CD Plant Guidelines and publicly recognize that some sampling may in fact qualify as fair use? It took a grassroots, month-long letter-writing campaign. So imagine a month-long campaign of coordinated sample-based song releases, all of which upholding the sampling tradition's best practices and standards guidelines, and all of which accompanied by a fair use open letter to the RIAA — A letter detailing that the samples used made fair use of existing sound recordings. What a great response to the music industry's dismissive attitude towards fair use this would be, right? More importantly, what an excellent way it would be to raise the profile of fair use in the public's eye.

Chapter 18

Fair Use, Part 2: Determining Fair Use

A Detailed Examination of the Four Factors of the Fair Use Test and How the Courts Typically Apply Them

In the previous chapter, I discussed the key functions and roles of fair use as designed and structured in copyright law by Congress. In this chapter, I examine the four factors of fair use (separately and collectively) and how the courts typically apply them. Also, I explore what fair use actually is *in practice*, i.e. how the courts actually determine fair use, and what the success rate of the affirmative fair use defense really looks like.

There are five key takeaways to consider while reading this chapter. First, fair use is not "a disorderly basket of exceptions to the rules of copyright," nor is it a "barely tolerated" exception to the exclusive right of copyright owners, nor is it "a departure from the principles governing that body of law;" rather, fair use is "a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law."[1] And these objectives notably include: The promotion of Science and the useful Arts, and the safeguarding against excessively broad protection for copyrighted works. Second, fair use is often dependent upon intuitive judgments, not haphazard assessments. Third, fair use is not "mysterious" and it should not be treated as such. Fourth, much of the prevailing conventional wisdom about fair use is wrong, empirical examinations of fair use case law makes this clear. Fifth, despite conventional belief to the contrary, fair use is mostly predictable.

[1] Pierre Leval, "Towards A Fair Use Standard," 103 *HARV. L. REV.* I 105, (1990), 1107.

Now, before tackling the four factors of fair use, there are number of contextual areas that deserve serious attention. These areas include: The scope of fair use; the two competing perspectives or opinions of fair use; the guiding principles of fair use; and the question-framing and outcome-determinative calculations of fair use.

The Scope of Fair Use In the Statute: What's Behind the Four Factors?

What are the considerations that lie behind the fair use doctrine's four-factor test? Aside from its four factors of analysis, we can get a greater understanding of the rationale behind fair use by examining its scope and intent — as it was designed by Congress in its report accompanying the Copyright Act of 1976. What follows in this section is a discussion of the scope of fair use (17 U.S.C. § 107), as it is outlined in the Copyright Law Revision Report (H.R. Report No. 94 1476) issued by Congress to accompany the Copyright Act of 1976, which was a complete revision of the Copyright Act of 1909.

Clarification of SECTION 107. FAIR USE begins with the reminder of the importance of fair use in copyright law:

> The judicial doctrine of fair use, **one of the most important and well-established limitations on the exclusive right of copyright owners**, *would be given express statutory recognition for the first time in section 107.* [emphasis mine][2]

Continuing, the report expresses that *there is not just one definition of fair use*, but that there is a set of criteria that helps to gauge what is a fair use, and that the rule of reason should be applied when considering whether a use is fair or not:

> Although the courts have considered and ruled upon the fair use doctrine over and over again, **no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of**

[2] U.S. House. The Committee on the Judiciary. Copyright Law Revision, 1976, (to Accompany S.22) Report Together with Additional Views (94 H. Rpt. 94-1476), 65.

> **reason, *no generally applicable definition is possible*, and each case raising the question must be decided on its own facts**. *On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities.* These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107… [emphasis mine][3]

Here, where the determination of fair use is concerned, Congress calls for the "rule of reason" and makes clear that the "gauging" of fair use (in every fair use analysis) must be *reasonable*. By this, it is widely understood to mean that not only should reason be applied, but also the fundamental objectives of copyright must be the guiding principle. So in the context of sampling, the 1976 Copyright Law Revision Report indicates that it's *reasonable* to consider the transformative use of a small sample of a copyrighted sound recording *may* be fair use. Conversely, the 1976 Copyright Law Revision Report makes it plain that it's *unreasonable* to consider such a tranfsormative use as *inherent* infringement.

Next, the 1976 Copyright Law Revision Report explains the specific wording of Section of 107 as the result of the related problems of fair use:

> The specific wording of section 107 as it now stands is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes. For example, the reference to fair use "by reproduction in copies or phonorecords or by any other means" **is mainly intended to make clear that the doctrine has as much application to photocopying and taping *as to older forms of use;*** *it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.*
>
> ...**It must be emphasized *again* that the same general standards of fair use are applicable to *all* kinds of uses of copyrighted material...** [emphasis mine][4]

[3] *Ibid*.
[4] *Ibid*, 66, 72.

This clarification crucial, as Congress makes it clear — even "emphasizes again" so that there is no ambiguity on this point — that fair use applies equally to all "forms of uses" and "that the same general standards of fair use are applicable to *all kinds* of uses of copyrighted material," and that there is no kind of reproduction, i.e. no form of copying, that is to receive any special status under the fair use provision. This doesn't just speak to the fact that Congress *intended* for fair use to apply to all kinds of uses of copyrighted material, it is glaring proof of this fact, written in plain language (*so no court could ever rightfully say that the intent of Congress was not clear in this regard*).

Hence, there no question that fair use (or by proxy, de minimis) applies to sound recordings. It is absolutely clear that fair use applies to sound recordings and digital sampling, the "form of use" that sampling is. Put another way, digital sampling is just another form of copying, and sound recordings are just another category of copyrighted material. And there is no "special status under the fair use provision" granted to older or new forms of use. So it follows then that no sample of a sound recording is *inherrently* infringement because any sample may be fair use or de minimis.

Next, in the 1976 Copyright Law Revision Report under the sub-header "General *intention* behind the provision," Congress explains that Section 107 is meant to serve only as a guidance for determining fair use, *not* a restriction on when fair use applies:

> The statement of the fair use doctrine in section 107 ***offers some guidance*** to users in determining when the principles of the doctrine apply. **However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute.** The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. *Section 107 is intended to restate the present judicial doctrine of fair use, not*

change, narrow, or enlarge it in any way. [emphasis mine][5]

Notice the specific language that Congress used here when describing the possible cases of fair use: "the endless variety of situations and combinations of circumstances." This demonstrates Congress' awareness of the infinite types of situations in which a use of copyrighted material may be fair use. Next, additional specific language is even more instructive: "precludes the formulation of exact rules,"— ergo, no bright lines! This language clearly signals Congress' intent to protect the fundamental nature of the fair use doctrine by refusing to limit it to an "exact rule," i.e. a bright line, or by "freezing" its scope in the statute, especially amid the constant flux of technological advancement. In other words, Congress intended for fair use to be "very broad," flexible, and adaptable, particularly in view of rapidly changing technology.

Also, Congress sought to prevent changing technology from weakening or strengthening fair use. Therefore, for example, the technology that makes *digital* sampling possible cannot weaken or change the principles of fair use. This doesn't show that Congress knew that the art of sampling would blossom within two decades after its of report; then again, this doesn't show that Congress knew of any other specific art form that would emerge after its report. But it does show that Congress understood the inevitable role that changing technology plays in making new "useful Arts" possible. Moreover, the codification of fair use in the statute was intended to formally restate, not replace, the judicial doctrine that it was based upon. Still, this does not preclude courts from considering other factors in their analysis. As such, Congress recognized that a non-narrowing of the judicial doctrine of fair use helps to fundamentally fulfill the objectives of copyright law.

Finally, in the 1976 Copyright Law Revision Report under the sub-header "Reproduction and uses *for other purposes*," Congress reemphasized that although educational uses receive concentrated attention, such uses should not overshadow or exclude other uses, as fair use applies to an exhaustive list of uses:

[5] *Ibid*, 66.

> The concentrated attention given the fair use provision in the context of classroom teaching activities **should not obscure its application in other areas. It must be emphasized again that the same general standards of fair use are applicable to *all kinds of uses of copyrighted material*,** although the relative weight to be given them will differ from case to case. [emphasis mine][6]

The Misleading Perspective

Despite the existence of the 1976 Copyright Law Revision Report (H.R. Report No. 94 1476), which makes it clear that the purpose of fair use is to serve the objectives of copyright, there is one perspective or opinion of fair use that continues to impact fair use in the courts and the discourse around fair use itself. This perspective is the: *"It's only fair use if it's proven to be so in court."* This perspective is dominant among copyright owners, but this perspective rests on illogic. As I detailed in the previous chapter, fair use is at play in vastly different ways in our daily life. Read an article online, copy a couple of paragraphs from it, and paste it in a Word or Google Doc so that you can formulate commentary — That's fair use. It's impractical to think that one would contact the author of the piece or the website that published it to ask permission to copy two paragraphs, which will not be published verbatim, if at all. The reason why one doesn't need permission to engage in such copying is because fair use makes it possible. Without fair use, basic creativity, the development of ideas, news gathering, the sharing of facts, and so many other things would be stifled or walled off altogether.

Thus, there are two problems with the perspective that "fair use is *only* fair use if it's proven in court." First, this perspective wrongly implies that the Copyright Act has made the courts a prerequisite to fair use; that is to say, that the only way something can be fair use is if it is *first* determined to be so in a court of law. This is false and a misleading idea to follow, especially since it implies that one must be sued for copyright law infringement, then prevail on a fair use defense in order for the use to be fair. But the Copyright Act

[6] *Ibid*, 72.

does not insist on such an absurd prerequisite. The Copyright Act describes, in intentionally broad terms, what fair use is and it provides a non-exhaustive list of the *kinds* of activities ("forms of use") that may be fair use. From these descriptions, guidelines if you will, the public routinely makes fair use of copyrighted works within the parameters outlined in the Copyright Act. That the Copyright Act outlines four factors that courts "shall" consider when determining whether a use is fair is not a prerequisite to making fair use of a copyrighted work; rather, it is the mandatory four factors that courts *must* consider if and only if the question of fair use is raised in a copyright infringement lawsuit.

The Courts Regularly Resolve Fair Use at the Summary Judgment Stage

Since the mid-1990s, there has been a **"remarkable increase in the prevalence of fair use summary judgment opinions,"** and "**the just as *remarkable absence of fair use bench trial opinions* during the same period**."[7] This is a crucial point to consider as it speaks to the fact that, today, *juries* are typically not being asked to determine fair use. Which means that, today, fair use is less likely to be determined by juries, and more likely to be determined by *judges*. Thus, because the courts usually resolve fair use at the summary judgement stage, attention in this chapter is necessarily placed on the determination made by judges and not that of juries.

Contours and Objectives of Fair Use

In his article "Toward a Fair Use Standard," Judge Pierre N. Leval noted that what was "most curious about the fair use doctrine" was that "neither the decisions that have applied it for nearly 300 years, nor its eventual statutory formulation, undertook to define or explain its contours or objectives." Further, while Justice Story may have articulated "an often-cited summary of

[7] Beebe, 556 (emphasis mine).

how to approach a question of fair use"[8] in *Folsom v. Marsh* (I84I), and while the Copyright Act of 1976 largely adopted Story's summary, "these formulations, however, furnish little guidance on how to recognize fair use." According to Judge Leval, the statute directs judges in *what* to do but does not provide any guidance in *how* to do it. As such, judges engage in the fair use inquiry using "ad hoc perceptions of justice without a permanent framework." Hence, Judge Leval argued, there was a need for a set of guiding ("governing") principles to follow in determining fair use; and he insisted that these guiding principles should be "soundly rooted in the objectives of the copyright law"[9]

Common Considerations: The Guiding Principals In the Absence of a Bright-Line Definition of Fair Use

The Copyright Act — Section 107 in particular — does not provide a bright-line definition of fair use, but it does set forth four broadly worded factors that courts "shall" (*should*) consider in whether an unauthorized use of a copyrighted work is fair use and therefore not infringement. These four factors, which functionally define what fair use is, would seem to be the collective guiding principle for judges, but the framework of guidance that judges follow is actually not entirely deferential to the four factors described in Section 107.

While judges do not share a consensus on the *exact* meaning of fair use, the basis of judges' fair use determinations often springs from two separate and opposing guiding principles, both of which allegedly rooted in the notions of fairness. First, decisions result from "intuitive reactions to individual fact patterns." Within this paradigm, "[j]ustification is sought in notions of fairness," which are "often *more responsive to the concerns of private property than to*

[8] *Folsom v. Marsh* (I84I): "In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."6 The I976 Copyright Act largely adopted his summary.
[9] Leval, 1105-1106 (emphasis mine).

the objectives of copyright."[10] Second, decisions result from a notion of fairness that is rooted in the objectives of copyright. Under this guiding principle, the public good, in particular free speech, weighs heavier than any concerns of private property.

Even though judges have not complained of a lack of guidance, it is the second guiding principle that Judge Leval has suggested is *the* framework for judges to follow. This is primarily because, in Judge Leval's view, "throughout the development of the fair use doctrine, courts had failed to fashion *a set of governing principles or values*." Judge Leval surmised that the reason for this wasn't because "no rational defining values exist," but rather because "judges, like me, have repeatedly adjudicated upon ad hoc perceptions of justice without a permanent framework?" For Justice Leval, considering fair use "in the light of the governing purpose of copyright law" means that the purpose of copyright law, its goals and objectives, must be at the heart of each fair use inquiry. It follows, then, that in order for a use to be fair use, is must "**be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."**[11]

Because "the fair use enquiry often requires close *questions of judgment* as to the extent of *permissible borrowing*,"[12] we can clearly see how intuitive reactions to individual fact patterns shape decisions. If a judge's sense of fairness is rooted in the notion of fairness that is more responsive to the concerns of private property than the objectives of copyright, this his enquiry will proceed with that slant. Conversely, if a judge's sense of fairness is rooted in the notion of fairness that is grounded in the objectives of copyright, than his inquiry will proceed from that slant.

[10] *Ibid*, 1106-1107 (emphasis mine).
[11] *Ibid*, 1110 (emphasis mine).
[12] *Campbell v. Accuff-Rose Music*, 510 U.S. 569 (1994), 578 (emphasis mine).

Framework Guidance and How Fair Use Is Calculated: Question-Framing vs. Outcome-Determinative

Further with regards to the context of framework guidance, Matthew Sag has claimed that "Congress has given the courts a framework for deciding fair use cases, however it is still the responsibility of the courts to determine the scope of the copyright owner's rights in particular situations."[13] But is this the *only* responsibility of the courts? Is it not also the responsibility of the courts to determine the scope of the right of the public in particular situations? To focus only on the scope of the copyright owner's exclusivee right, as Sag suggests the courts are instructed by Congress to do, and not also the scope of the public's right as well is to engage in a de facto presumption that the copyright owner's right is privileged and absolute, or at the very least that the copyright owner's exclusive right is *presumed* to be protected, first and foremost, in all situations. But this is not the case. Congress has given courts a framework for upholding the utilitarian objectives of copyright law first and foremost; and this requires a consideration of the both the public right (with a keen eye on free speech) and the copyright owner's exclusive right.

In terms of calculation then, this guidance leads to a fair use test that is not merely question framing (as some commentators have suggested) but also outcome-determinative. The question-framing is interrelated with the outcome determination. In other words, the question framing is always based on the sought-after outcome: Either A) The outcome that is more responsive to the concerns of private property than to the objectives of copyright; or B) The outcome that is rooted in the objectives of copyright, which places the public good, in particular free speech, above any concerns of private property.

[13] Matthew Sag, "God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine," 11 *MICH. TELECOMM. TECH. L. REV.* 381 (2005), 418 (emphasis mine).

The Preamble of Section 107

Having pointed out that the two primary guiding principles that judges use in the absence of a bright-line definition of fair use, here I turn to an examination of the four factors of fair use. I will begin with the pre-amble of Section 107 of the Copyright Act:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, ***including*** **such use by reproduction in copies or *phonorecords*** or by any other means specified by that section, ***for purposes*** *such as* criticism, **comment,** news reporting, **teaching** (including multiple copies for classroom use), scholarship, or research, **is *not* an infringement of copyright**. In determining whether the use made of a work in any particular case is a fair use the **factors to be considered *shall* include**—
>
> (1) **the purpose and *character* of the use,** including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) **the *amount* and *substantiality* of the portion used** in relation to the copyrighted work ***as a whole***; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. [emphasis mine][14]

The preamble in Section 107 is commonly misunderstood. The introductory language states that fair use made for various purposes, *including* "criticism, comment, news reporting, teaching." But this list is actually intended to be non-exhaustive. In the preamble, the word "including" is meant to be read as "*including," but not limited to*… In fact, the legislative history of fair use shows that this line was added to the preamble at the last minute, just before the

[14] 17 U.S.C. § 107.

Copyright Act of 1976 was completed. The line had been added to the preamble at the eleventh hour to appease the concerns of members of academia and the press. In his account of the legislative history of fair use, William F. Patry related that "the dependent clause in which the reference appeared was inserted very much at the eleventh hour of the drafting process." Patry further noted that "Congress also rejected requests that nonprofit use be presumptively fair use or otherwise more favorably treated: 'It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given will differ from cases to case.'"[15]

In other words, that "including" line was added only after pressure from two specific interest groups; they wanted more assurance that the statutory language explicitly included those types of activities that they regularly engaged in. This line was not added to exclude other activities, nor was this line meant to serve as the best or only example of activities that are likely fair use. So the equation looks like this: "including" = this *also* includes = this also includes *but is not limited to* = this does *not* exclude other activities they may be fair use. Congress was quite clear about this:

> the reference to fair use "by reproduction in copies or phonorecords or by any other means" **is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use;** ***it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.*** [emphasis mine][16]

In fact, the legislative history of fair use tells us even more about this. The complexion of the draft that would become the preamble of Section 107 changed dramatically between 1963 and 1976, when the final version appeared in the Copyright

[15] William F. Patry, *The Fair Use Privilege In Copyright Law* (2d Ed. 1995) (BNA BOOKS, 261-365, 369. *See also*: Beebe, 599.] [FNBeebe 599.

[16] U.S. House. The Committe on the Judiciary. Copyright Law Revision, 1976, (to Accompany S.22) Report Together with Additional Views (94 H. Rpt. 94-1476), 65.] [FN: U.S. House. The Committe on the Judiciary. Copyright Law Revision, 1976, (to Accompany S.22) Report Together with Additional Views (94 H. Rpt. 94-1476), 65.

Act of 1976. The controversy that caused the negotiations was photocopying, an emergent technology at the time. In the *two decades* of negotiations that led to the Act, Congress recognized the importance of the judge-made doctrine of fair use and how exactly it should be codified in the Copyright Act. Some interest groups urged that the Act not reference fair use at all, "or if it did, that its reference take the form of a 'bare bones' one-sentence limitation. Their concern was that statutory recognition of fair use would 'freeze' or otherwise unpredictably alter the judge-made doctrine." [17] So with the objectives of copyright in mind — the public good — Congress deliberately made the statutory language of fair use "very broad," and intentionally did *not* include a bright line for what fair use is or isn't.

Critical Note About the Preamble for Sample-Based Beatmakers (Producers), Rappers, Other Songwriters, and Other "Teachers"

While the preamble does not specifically mention books, it does however expressly mention "phonorecords" (i.e. sound recordings). This alone invalidates the *Bridgeport* court's statement that the de minimis doctrine does not apply to sound recordings. If the fair use doctrine applies to sound recordings, how can the de minimis doctrine *not* apply to sound recordings? See the problem with *Bridgeport*? But more on that in Chapter 21. Further, "news reporting" and "teaching" are not limited to the newsroom or the classroom. When I rhyme, for instance, I report *and* I teach. This applies to many rappers and other songwriters just as it applies to independent journalists, bloggers, dance instructors, language tutors, photography teachers, tourist guides, and a whole host of other "teachers."

[17] Patry, 261-365, 369. See also: Beebe 599.

The Four Factors of Fair Use

Having examined the preamble of Section 107, I turn now to a detailed examination of the four factors of fair use.

The fair use statute in the Copyright Act of 1976 lists four pertinent factors to be considered when determining whether a use is fair use. These factors are *not* to be a tally of the majority; it's not as simple as: If three out of four of the factors are satisfied, then that automatically means the use is fair use. Conversely, if only one out of the four factors is satisfied, it doesn't automatically mean that a use is not fair use. In fact, even if just one factor is satisfied, particularly the first factor (especially when observing substantial transformation), a use may still be fair use. Consequently, the statutory factors are supposed to be a *guide* that directs courts to examine the issue from every relative angle. "Each factor directs attention to a different facet of the problem. The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of copyright."[18]

Again, under the statutory codification of the fair use doctrine in the Copyright Act, the four pertinent factors to be considered when determining whether a use is fair use are:

> (1) **the purpose and *character* of the use,** including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) **the *amount* and *substantiality* of the portion used** in relation

[18] Leval, 1110, 1111.

to the copyrighted work ***as a whole***; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.[19]

The First Factor

"the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"

The first factor, or as it is commonly referred to as "facto one," is said to be the "soul of fair use" or the heart of the fair use test because this factor "raises the question justification. **Does the use fulfill the objective of copyright law to stimulate creativity for public illumination?** This question is vitally important to the fair use inquiry, and ***lies at the heart*** *of the fair user's case*."[20] The first factor considers whether and to what extent the use is transformative. If quoted matter — i.e. the subject matter copied, for example a literary work or sound recording — is used as raw material, transformed in the creation of new information, new aesthetics, new insights, and new understandings, then it is more likely to pass the fair use test. On the other hand, *minimal* transformation will not likely pass the test. More, the first factor "*calls for careful evaluation whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts* or whether it merely repackages, free riding on another's creations. If a quotation of a copyrighted matter reveals no transformative purpose, fair use should perhaps be rejected without further inquiry into the other factors." Transformative uses may include: "criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, *and innumerable other uses*…."[21]

[19] 17 U.S.C. § 107.
[20] Leval, 1111 (emphasis minne).
[21] *Ibid*, (emphasis mine).

Judge Leval has stated that the use "must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."[22] But this is wrong and misleading. First, it's not always clear *how* "productive" is to be defined and *who* is supposed to define it. In this regard, some uses may appear to be more productive; take for example a protest song that makes use of a vocal sample. Second, the use does *not* have to employ the quoted matter in a different manner or for a different purpose from the original; a use can be employed in the same manner as the original and still have a different purpose.

The first factor also raises the question of whether the use is of a commercial nature or for nonprofit educational purposes. While it has been widely held that nonprofit educational purposes tip the scale in the direction of a fair use, a use made for commercial purposes may also be a fair use. In other words, a use made for commercial purposes is not automatically excluded being fair use; conversely, a use that is of a nonprofit educational purpose is not automatically a fair use.

The Transformative Element of the First Factor

The Meta Sub-Factor

Officially, there are no "sub-factors" to the four-factor fair use inquiry, but if there were, the transformative element of factor one is the most powerful sub-factor of them all. If factor one is the heart of the fair use test, then the transformative element is its main artery. In observing the objectives of copyright and how transformative uses of copyrighted works fulfill those objectives, the Supreme Court has stated that "the goal of copyright, to promote science and the arts, **is generally furthered by *the creation of transformative works*. Such works thus lie at the heart of the fair use doctrine's guarantee** of breathing space within the confines of copyright."[23] The transformative element of factor one is so dominant that it not only renders the commerciality element irrelevant, it also essentially

[22] *Ibid*.
[23] *Campbell*, 579 (emphasis mine).

eclipses the other three factors, even the fourth factor which many commentators wrongly interpret as being *the* determining factor in the fair use test. Again, here, Beebe's study supports this:

> …**a finding of *transformativeness* trumped a finding that the defendant's use was commercial for purposes** of determining whether factor one favored fair use. In 28 opinions, the court found the defendant's use to be both commercial and transformative under factor one, and in *26* of these opinions, the court found both that factor one and the overall test favored fair use with one of the two outliers reversed on appeal. [emphasis mine][24]

Hence, despite conventional wisdom to the contrary, factor one has significant influence over the overall outcome of the fair use test. And since *Campbell* (1994), the transformative element has become the most important sub-factor in a court's overall fair use determination. Nonetheless, even *non-transformative* use can still qualify as fair use. The point is, however, the more transformative the use, the more likely the courts will determine the use to be fair:

> **The more transformative the new work, the less will be the significance of other factors,** like commercialism, that may weigh against a finding of fair use. [emphasis mine][25]

The Commerciality Element of the First Factor

The Less-Significant Element of the First Factor and the End of the "Sony Presumption"

At present, the commerciality element of the first factor is really a non-factor. It doesn't really matter if the secondary use was for a "commercial" purpose of not. Said differently, a "commercial" purpose does not automatically bar a finding of fair use. But this wasn't always the way that the commerciality of element of the first factor was interpreted. Because of the so-called "*Sony* presumption," conventional wisdom was that a commercial use was *presumptively* unfair. To show how we got here, ergo, to explain why there's still

[24] Beebe, 606.
[25] *Campbell*, 569.

a lack of clarity around the "commerciality" element and why some still consider the "commerciality" purpose as an automatic strike against the finding of fair use — even though the Supreme Court in *Campbell* (1994) stated the contrary — consider the following anecdote.

Imagine you're the co-CEO of company with eight other co-CEOs. All nine of you have the right to remain as co-CEO for life, so each of you are bound to the company in a very unique way. Naturally, you have a vested interest in preserving the reputation of your company. Now in terms of your "clients," you represent an entire nation of people. Thus, your *company's* decisions have a huge impact on the progress of that nation. So what happens when one day, your company makes a terribly inaccurate statement — a statement that, in no uncertain terms, leads your clients to believe something that is not true? One year later, realizing that your company has made a huge error, you have an opportunity to set things right, to make things clear to your clients — the nation — that your company made a terrible mistake a year ago, and that you're now committed to correcting that mistake. What should your company do in this situation? A) Should your company do what's best for your clients — the nation — and *plainly* say that your company's previous statement was incorrect and that you should disregard it? Or, B) Should you say that your company's previous statement was *not actually* wrong, it was just *misstated*, and the *clients* misunderstood?

This anecdote is about the Supreme Court's decisions in *Sony v. Universal City Studios, Inc.* 464 U.S. 417 (1984) and *Harper & Row, Publishers, Inc. v. Nation Enters.* (1985), and how the Supreme Court effectively chose "option B." Given the same opportunity five years later with *Stewart v. Abend* (1990), the Supreme Court once again chose "option B." But in 1994, faced with the same challenge, the Supreme Court finally chose "option A." But by then, all the damage had been done.

Thus, this sub-section looks at what the Supreme Court has said about the commercial/non-commercial distinction, a sub-factor of the first factor of the fair use test, and it explains how the "*Sony*

presumption" was established and then ultimately overwritten. The Supreme Court made a mistake in establishing the *Sony* presumption; and it would take 10 years before the Court corrected its error. And ironically, or perhaps not, it did so with *Campbell*, a case that involved sampling and hip hop/rap music!

One reason why the fair use analysis has, to some extent, "run off the rails," as Beebe puts it, is because of the mixed messaging communicated from the Supreme Court, particularly in the *Sony*, *Harpers & Row*, and *Campbell* opinions. In *Sony v. Universal* (1984), the Supreme Court established the presumption that "[e]very commercial use of copyrighted material is *presumptively*…unfair."[26]

A year later In *Harper & Row, Publishers, Inc. v. Nation Enters,* the Supreme Court, in attempt to correct itself while maintaining the appearance of redundancy, stated that "[t]he fact that a publication was *commercial* as opposed to nonprofit is a separate factor *that tends to weigh against a finding of fair use."*[27] The language here is convoluted. First, the Court's language implies that a *tendency* to disfavor fair use and a *presumption against* fair use are one in the same thing, but they are certainly not. Second, and more importantly, instead of expressly stating that the *Sony* presumption was wrong, rather than making it clear that a commercial use does *not* bar a finding of fair use, the Court twisted what it had said in *Sony*. Describing the "profit/non-profit distinction" — the commercial/non-commercial sub-factor — as a "separate" factor is not bad in and of itself, but by going a step further and saying that a commercial use "tends to weigh against a finding a fair use," the Court did not expressly overwrite the *Sony* presumption, it quoted and reaffirmed it: *"every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege."*[28]

A decade later, in its landmark opinion in *Campbell v. Acuff-Rose*, the Supreme Court categorically rejected the *Sony* presumption and reduced the significance of the commerciality element of factor one. Effectively, in its opinion in *Campbell*, the Court not only established that a commercial use does *not* presumptively render a

[26] *Sony v. Universal City Studios, Inc.* 464 U.S. 417 (1984) (emphasis mine).
[27] *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).
[28] *Id.*, 562 (1985) (emphasis mine).

use unfair, but also that the non-commercial or commercial nature of a use is *merely one* issue among others that a court *may* consider as part of its factor one analysis of the defendant's use. From *Campbell*:

> **The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to *one* relevant fact, the *commercial* nature of the use. The court then *inflated the significance of this fact* by applying *a presumption ostensibly culled from Sony,*** that "every commercial use of copyrighted material is presumptively . . . unfair . . .." Sony, 464 U. S., at 451. **In giving virtually dispositive weight to the commercial nature of the parody, *the Court of Appeals erred.***
>
> **The language of the statute makes clear that the commercial or nonprofit educational purpose of a work *is only one element* of the first factor enquiry into its purpose and character.** Section 107(1) uses the term *"including"* to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into "purpose and character." **As we explained in *Harper & Row*, Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence.** 471 U. S., at 561; House Report, p. 66. Accordingly, ***the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.*** If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country."
> [emphais mine][29]

It's worth noting, however, that even though the *Cambell* court categorically rejected the *Sony* presumption, it still tried to have it both ways to some degree. To understand what I mean, recall the anecdote at the beginning of this section. Thus, along with its rejection of the *Sony* presumption, the *Campbell* Court also chose

[29] *Campbell*, 569, 583-84.

"option B." The *Campbell* court didn't say that the *Sony* Court (1984) was *wrong*; rather the *Campbell* Court attempted, just as the *Harper & Row Court* had done in 1985, to cover for the *Sony* Court and create the appearance of redundancy by quoting the *Harper & Row* Court's mistake. So just as the *Harper & Row* Court had done, the *Campbell* Court made the mistake of implying that a commercial use "tends to weigh against a finding of fair use." Then, one sentence after quoting the *Harper & Row* Court, the *Campbell* Court nullified that proposition:

> The Court of Appeals's elevation of one sentence from *Sony* to a per se rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication. **Rather, a*s we explained* in *Harper & Row*, *Sony* stands for the proposition that the "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." 471 U. S., at 562. But that is all, *and the fact that even the force of that tendency will vary with the context*** is a further reason against elevating commerciality to hard presumptive significance. [emphasis mine][30]

Some commentators have noted that the *Campbell* court revived the mistake of *Harper & Row*. This is true. Note the *Campbell* Court's use of "*as we explained*," as if the *Harper & Row* Court offered the same categorical rejection of the Sony presumption. The "as we explained" is really nothing more than the proverbial "*Like I said…*" You know, that phrase that one says when they've been proven wrong, and rather than admit that they're wrong outright, they essentially say: "Like I said…," then include the proven fact — as if they've said all it along. The clear implication being that *you* simply didn't hear them correctly.

The *Campbell* court's unintended revival of the *Harper & Row Court's* mistake does not, however, overshadow the other crucially important things that *Campbell* established, or rather reaffirmed. First, that the transformation element is the most critical sub-factor of the factor one. Second, that the commericiality of a use does *not* bar it from fair use.

[30] *Id.*, 569, 585 (1994) (quoting Harper & Row, 471 U.S. at 562).

A Broader Understanding of What "Transformative" Can Be

Matthew Sag has suggested that transformativeness, as a predominant element (sub-factor) in a fair use analysis, has its limits. In as much as the "number of uses that do not appear to be transformative, but are nonetheless fair use," Sag argues, that transformativeness is not the only "animating principle from within copyright law to which judges should look." He offers the type of fair use activity that takes place in classrooms as a chief example: "[T]ransformative use does not offer a satisfactory explanation for the fair use status of *untransformative* reproduction of materials for use in the classroom."[31] But here, Sag makes the mistake of implying that there is only *one* context or *one* kind of transformativeness, i.e. the context and kind of transformativeness in which a new work is created. Of course, this isn't the only context or kind of transformative use. In the "classroom," for example, if the reproduced materials, in whole or part, are used for the purpose of teaching, then the use *is* transformative. To illustrate what I mean, consider a film professor who shows a film in class. He analyzes various frames, shots, scenes, etc. to explain any number of methods or aesthetics in film. Such use is indeed transformative. Moreover, the *knowledge* produced by such use does often lead to the creation of a new work. And this is exactly the kind of activity that copyright seeks to induce.

Another example that illustrates what I mean is the reverse engineering of computer software, which, ironically, Sag uses to illustrate the limitations of transformativeness. Object code, i.e. what source code is typically distributed in, is protected by copyright. However, the *ideas* and *functions* that are contained *within* object code are *not* protected by copyright (remember the idea-expression dichotomy). In order to gain access to the unprotected elements within the object code of a program, programmers have to make a copy — or multiple copies — of the

[31] Sag, 424.

program. This is a necessary first step in reverse engineering, and this step is protected by fair use. In fact, courts have consistently held that making unauthorized copies of a computer program as a necessary step in reverse engineering is fair use. In *Sony Computer Entertainment, Inc. v. Connectix Corp*., the Ninth Circuit noted that "[i]n *Sega* the Ninth Circuit stated that because of the nature of computer programs, disassembly of computer program code *could be* fair use if it was for the purpose of studying the unprotectable ideas contained in the copyrighted software, **and if it was the only way to gain access to and understand those ideas**."[32] Once again, the *knowledge* produced by such use does often lead to the creation of a new work.

Sag further narrows the scope of transformativeness by limiting its application to parody or review. "[T]ransformativeness typically applies to critical works such as parody or review,"[33] he claims. But transformativeness is not limited to parody or review; and it's ironic that Sag would suggest that it is, given his focus on what is and isn't limiting in the fair use analysis. Further, Judge Leval, who has for the most part persuasively urged the courts to make transformative use the predominant factor, never implied that transformativeness is limited to parody or review. Rather, in speaking of the significance of trannsformativeness, Judge Leval — and the myriad of fair use court decisions studied by Bedbe, others, and myself — has made it clear that transformativeness is not limited in its application to one or two types of works.[34]

In sum, Sag doesn't imply that transformativeness should not be a guiding principle in a fair use analysis. But he does want judges to see what he perceives to be the limitations of the transformativeness sub-factor. And that's where Sag's contradiction is so glaring. On one hand, he's not against transformativeness being a guiding principle; on the other hand, he believes that transformativeness is limited, and because of the limitations that he perceives, he argues that transformativeness should be a less significant component of

[32] *Sony Computer Entertainment, Inc. v. Connectix Corp*., 203 F.3d 596,602 (9th Cir. 2000) (citations omitted) (emphasis in the original and added).
[33] Sag, 424.
[34] See Leval, 1111 (1990).

the fair-use analysis. But given the principle of copyright; given the Constitutional mandate of copyright law and the statutory language of Section 107; given the fact that Section 107's description of fair use draws significantly from Justice Story and his focus on *transformation*; and given Judge Leval's commentary on transformativeness and the Supreme Court's reliance on it in *Campbell*; and given the infinite number of different ways of that works *can be* transformed, it's hard to see the same limitations of transfortmativeness that Sag does. So it's hard to see how the transformativeness sub-factor should be less significant.

The list of transformative uses is non-exhaustive. Later in this chapter, after all of the sections examining the remaining three factors of fair use, I detail more precisely what transformative means, and I explore the different models or types of transformative uses.

***

The First Factor and the Outcome of the Overall Fair Use Test

Outcomes under the first factor correlate strongly with the outcome of the overall fair use test. Barton Beebe's first empirical study of U.S. copyright fair use opinions (1978-2005) found that:

> [O]utcomes under this factor correlated very strongly with the outcome of the overall fair use test," that "***95.3%* of the 148 opinions that found that factor one disfavored fair use eventually found no fair use, while *90.2%* of the opinions that found that the factor favored fair use eventually found fair use.**" [emphasis mine][35]

And Beebe's updated study (1978-2019) found that:

> **the outcome of factor one continues to correlate very strongly with the overall outcome of the fair use test. Expressed in percentage terms, of the 354 core opinions in the updated dataset,**

[35] Beebe, 597.

> **153 found that factor one favored fair use and 141 of these (or 92.2%) found fair use; of the 174 core opinions that found that factor one disfavored fair use, 168 (or 96.6%) found no fair use.** [emphasis mine][36]

Basically what this means is that when judges do not find that a use is transformative, fair use is not found. Conversely, when judges *do* find that a use *is* transformative, fair use *is* found. For those who may say that there's little clarity with what fair use is, or that one is taking a chance with a fair use defense, these numbers are staggering in what they reveal. While there are no certainties, in copyright infringement cases, each case is decided on a case-by-case basis with the unique facts of each case under analysis. Still, if we might say there's a *likeliehood* or *near* certainty, the near certainty is this. If the use is substantially transformative, it's *likely* fair use; and that's quite clear.

[36] Barton Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019," *NYU Journal of Intellectual Property & Entertainment Law*, Volume 10, Number 1, (December 31, 2020), 22 (Hereinafter: Beebe updated.

The Second Factor

"The nature of the copyrighted work"

The second factor looks at the type of material that copyright was designed to stimulate, i.e. whether the copyrighted work is fictional or non-fictional (facts). Creative works receive more protection than factual ones; think of a novel vs. a telephone book. In principle, the more creative a copyrighted work is, the more the other factors must favor the secondary user in order to earn a fair use finding. The second factor also looks at whether a work was published or unpublished. And "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all" four factors.[37] Finally, while the implication may be that certain types of copyrighted material are more amenable to fair use than others, the scope of fair use is not narrowed by the nature of a copyrighted work.

In the overall fair use analysis, the second factor is fairly insignificant. In practice, the second factor has minimal impact:

> **Fair use opinions continue routinely** ***to denigrate factor two as unimportant to the overall fair use analysis*** and the updated data support the view that ***the factor typically has a relatively minimal impact on the outcome of the overall four-factor test.***
> [emphasis mine][38]

[37] 17 U.S.C. § 107

[38] Beebe updated, 30.]

The Third Factor

"The amount and substantiality of the portion used in relation to the copyrighted work as a whole"

The third factor considers the amount of the copyrighted work that has been used in the new work. Generally, a small amount tips the scale towards fair use. In *Ringgold v. Black Entertainment Television, Inc.* (1997), the 2nd Circuit maintained that "the third fair use factor concerns a *quantitative* continuum. Like all the fair use factors, it has no precise threshold below which the factor is accorded decisive significance. ***If the amount copied is very slight*** **in relation to the work as a whole, the third factor might strongly favor the alleged infringer.**"[39] Judge Leval offers additional clarification:

> The third statutory factor instructs us to assess 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole.' In general, the larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as fair use.
>
> This factor has further significance in its bearing on two other factors. It plays a role in consideration of justification under the first factor (the purpose and character of the secondary use); and it can assist in the assessment of the likely impact on the market for the copyrighted work under the fourth factor (the effect on the market). **As to the first factor, an important inquiry is whether the selection and quantity of the material taken are reasonable in relation to the purported justification….** The more taken the greater the likely impact on the copyright holder's market, and the more the factor favors the copyright holder. **Too mechanical a rule, however, can be dangerously misleading. One can imagine secondary works that quote 100% of the copyrighted work without affecting market potential.**
> [emphasis mine][40]

[39] *Ringgold v. Black Entertainment Television, Inc.*, 126 F. 3d 70 - Court of Appeals, 2nd Circuit 1997 (emphasis mine).
[40] Leval, 1122, 1123.

But even a small amount may not meet the fair use threshold if it can be considered the heart of the copyrighted work. Conversely, since there is "no precise threshold," even the copying of an entire work may still qualify as fair use. It depends on the *context* and purpose of the copying and any number of different elements.

Next, the third factor considers how *substantial* is the portion of the copyrighted work that has been used. Here, "substantiality" relates to the significance of the portion copied in relation to the work as a whole. Often at question is whether or not the "heart" of work was copied. An example of the heart of a work could be the hook in song or its main melody. Eight bars of the main melody of a song are more likely to be considered substantial; however, a single kick drum is not likely to be considered substantial. In principle, the more *insubstantial* the copying is, i.e. the less used in relation to the work as a whole, the more likely the third factor will favor the use.

Still, we must be careful to remember that judges sometimes make inquiries based on *subjective* qualitative impressions or suppositions as to the value of the work that is copied. So even copying the heart of the song, such as the hook, or eight bars of the main melody, may still qualify as fair use; it depends on the facts of the individual case. In noting that the rap group 2 Live Crew used the heart of Roy Orbison's song "Pretty Woman," the Supreme Court held in *Campbell* that "[e]ven if 2 Live Crew's copying of the original's first line of lyrics and characteristic opening bass riff may be said to go to the original's 'heart,'" it could be protected by fair use, particularly because 2 Live Crew's use "***thereafter departed markedly* from the Orbison lyrics and *produced otherwise distinctive music.***"[41].

In any event, under the third factor there is a need for both a *quantitative* and a *qualitative* inquiry. But as Matthew Sag has observed, "[t]he question of qualitative significance is inextricably" linked to the fourth factor "because each requires the court to assess the 'value' of the original work." While a mechanical quantification of the copied work may certainly be employed — for example,

[41] *Campbell*, 570.

counting the number of words copied from a book or the number of seconds sampled from a sound recording — "[t]he third factor does not rely on mechanical quantification of the amount of the original work used; it asks courts to assess how much of the value of the original work is present in the later use."[42]

So what implications does the third factor hold for digital samples of sound recordings? Well, just as with any other copyrighted material, the question raised is *how much was sampled*, both quantitatively and qualitatively. While extensive takings may impinge on creative incentives, the determination of *substantial* copying is based on the actual amount of appropriation, *not* how the appropriation is used. For instance, many beatmakers (producers) use drum sounds that they have sampled from old songs. In this way, beatmakers (producers) typically use small takings as raw materials that are transformed in the creation of a new aesthetic. Certainly, a single drum hit is de minimis.

Thus, the copying in this instance is *not* substantial even it's looped many times. Again, it must be emphasized that the third factor looks at "the amount and substantiality of the *portion used* in relation to the copyrighted *work as a whole*;" **it does not look at how many times the copied portion was used (repeated) in the new work.** Taking a de minimis fragment, looping it, then repeating it throughout a song is not what is meant by substantial copying. If one borrows a word, phrase, or line from a poem or other literary work and repeats it, numerous times — for, let's say, commentary, proving a fact, exposing the character of the original author, summarizing a point, making an aesthetic declaration, etc. — in the new work, this is not what is meant by excessive taking. Likewise, the insistence that the looping (repeating) of a sample is an excessive taking is not only flawed legal reasoning, it's a grave misreading of the third statutory factor.

[42] Sag, 391 (emphasis mine).

The Third Factor and the Outcome of the Overall Fair Use Test

There is no doubt that insubstantial takings overwhelmingly favor fair use. Beebe's first empirical study revealed that *96%* of the cases — 76 out of 79 — that found fair use, found that the third factor favored fair use; and 95% — 72 out of 76 — of these cases also found that the fourth factor favored the result. Thus, "**[a]n insubstantial taking of the plaintiff's work will not likely have an appreciable effect on the market for or value of that work and, perhaps on that ground alone, will likely trigger a finding of fair use."** Simple and plain, the less you borrow from a copyrighted work, the more likely your use is to be fair use: "Of all of the factors, the third factor boasts the most settled and easily understood doctrine. In general, the more the defendant takes of the plaintiff's work, the less likely it is that the taking will qualify as a fair use."[43]

This proposition lines up well with the sampling tradition of hip hop/rap music, where it is a source of pride to do more with less. In fact, flipping a sample in the hip hop/rap music tradition — especially using the micro-chopping technique — is more often about making *de minmis* use of sound recordings. Further, flipping samples that do not serve as the "essence" or "heart" of a recording, another common practice in the hip hop/rap music tradition, also favors a finding of fair use: "In situations where the court finds that the defendant did or did not take the 'essence' or the 'heart' of the plaintiff's work. **Courts explicitly found that the defendant took the heart of the plaintiff's work in 37 opinions, and found no fair use in 35 of these.** Courts made the opposite finding-that the defendant did not take the heart of the plaintiff's work-in 25 opinions, and found fair use in 23 of these."[44]

[43] Beebe, 615 (emphasis mine).
[44] *Ibid*, 616 (emphasis mine).

The Fourth Factor

"The effect of the use upon the potential market for or value of the copyrighted work"

The fourth factor considers the likely effect upon the market of the appropriated work. It weighs the effect that the new work has on the copyright owner's right to exploit their own work. In other words, it considers whether harm would be done to the market of the original. "A secondary use that interferes *excessively* with an author's incentives subverts the aims of copyright." However, a secondary use that does not *excessively* interfere with an author's incentives does not subvert the aims of copyright, rather it achieves the very objectives of copyright. Further, "The fourth factor disfavors a finding of fair use *only* **when the market is impaired because the quoted material serves the consumer as a *substitute*,** or in Story's words, 'supersede[s] the use of the original.'"[45]

This is particularly important to understand as it relates to a digital sample because a digital sample does not *inherently* "supersede" the original work in relation to "*the work as a whole*." In other words, a digital sample, especially a de minimis sample, never acts as a substitute for the sound recording that samples, unless the sample is a *substantial* portion of the sound recording that it samples *and* unless the two works, *as a whole*, are substantially similar. And even then the sample may still not cause excessive harm to the market of the original.

In other words, a sample typically does not act as a direct market substitute for the work that it samples. Take for instance the song "Midnight Train to Georgia" by Gladys Knight & The Pips. If someone samples a kick drum, a bass or horn-stab, and/or some other brief snippet from this song— *a song about a man returning to his home in Georgia after failing to make it in Hollywood* — and then transforms the sample(s) into a new song, with a new aesthetic and new meaning, by adding new drum sounds, a new drum framework, and vocals about a picnic in the summer, no reasonable

[45] Leval, 1124 (emphasis mine).

person would believe that the new song is a substitute for the old song that it borrows from. On the other hand, an 8-bar loop of the main melody line of "Midnight Train to Georgia" *may* be deemed a "substantial" taking under the second factor. But even so, if the use of the 8-bar loop of "Midnight Train to Georgia" is *transformative*, then harm to "Midnight Train to Georgia" is not excessive. This is because when the secondary use is transformative, market harm cannot be so readily inferred.

Next, in copyright infringement cases, the courts also look at whether potential market harm might exist beyond that of direct substitution. When it comes to sampling, some commentators believe that this points to the potential existence of a licensing market for *any* sample. But this is a grave misreading of the fourth factor and of copyright itself. A digital sample does not *inherently* require a license no more than a word taken from a book or dance move taken from a piece of choreography or sequence of notes taken from a composition. Any directive that stipulates otherwise amounts to prior restraint of sampling itself, i.e. censorship or the prohibition of free speech or other expression before it can take place. To require someone to get a permit or a license before they sample something is prior restraint. In the United States, The First Amendment forbids prior restraint, i.e. the banning of expression of ideas *prior* to their publication.

Hence, a "market" for samples that may be de minimis or fair use is no market at all. So the notion that sampling inherently interferes substantially with a copyright owner's market for licensing samples is illogical for a number of reasons. First, all samples do not require licensing. Second, all secondary uses of samples are not locked into just one type of transformation. Third, even if the notion of a market for samples was valid, not every type of market impairment goes against fair use. Fourth, "by definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. Therefore, if an insubstantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary user. And if we then gave serious deference to the proposition that it is

'undoubtedly the single most important element of fair use,' fair use would become defunct. The market impairment should not turn the fourth factor unless it is reasonably substantial….Not every type of market impairment opposes fair use."[46] Fifth, the assumption of automatic, irreparable market harm when samples are involved is wrong because hip hop/rap music has already proven that there's no limit to the level of transformativeness of a given sample; the ways in which any given sample can be transformed is infinite. Moreover, a copyright owner does not lose his right to license samples of his work simply because a secondary use of his work has already been made, especially if the secondary use was di minimis or fair use.

Finally, the aforementioned notion of a potential existence of a licensing market — for samples that would likely require a license, i.e. samples that make up a substantial portion of a sound recording — must also be addressed here. For starters, the sample licensing market in the music industry has been built largely off of sampling activity that has no doubt included many samples that were de minimis or fair use. Further, the sample clearance system (which I discuss in detail in Chapter 23) is so flawed that it raises serious questions about the very existence of the music industry's current sample clearance scheme. But in any case, it's impossible to establish a "bright line" market for licensing samples because there is no "bright line" for de minimis or fair use. So any so-called market for samples that a copyright owner establishes is still subject to copyright law.

The Fourth Factor and Clarity About "Samples" As a Derivative Market (A "Market for Samples")

The fourth factor of the fair use test also **"requires courts to define *the limits* of the 'potential market' and 'value' that the copyright owner should have the exclusive right to exploit."**[47] In this vein, a "market for samples" can't be reserved exclusively for

[46] *Ibid*, 1124, 1125 (emphasis mine).
[47] Beebe, 34 (emphasis mine).

copyright owners of sound recordings because the courts recognize that this goes beyond "the limits of the potential market," much in the same way that an exclusive right to exploit a market for quotes of literary works or a market for parodies or a market for individual dance moves or any other innumerable markets.

More specifically, *unknown* samples — i.e. *yet-to-be sampled* samples — are not a protected derivative market because no sample, no borrowing from any copyrightable subject matter, is a "per se" infringement. For every sound recording, there is an infinite number of possible digital samples and an infinite number of ways to transform those samples once they've been sampled. Just like for every book, there is an infinite number of possible word or letter combinations and an infinite number of ways to transform those those word and letter combinations once they've been borrowed ("sampled"). Therefore, in terms of "a market for samples," any debate about adverse market effect is moot because no sample of a copyrighted work is *presumptively* infringing. The exclusive right of copyright owner's is not *absolute*. Even if the copyright owner of a song samples his own song and makes *those* specific samples availabe for purchase, as, let's say, a sample pack, the sample pack, like the entire song from which the samples came, is also subject to copyright law.

Further, what is meant by "derivative" is derivative work "*as a whole*," for example, a screenplay based on a book or short story, or a graphic novel version of a book or a television show based on a book, etc. A one-off digital sample is *not* a derivative version of the sound recording that it samples.

And even if the target audience is the same — for instance, sample-based musicians for sample packs — there are two points that must be made clear. First, the target audience and the nature of content created with samples is not the same as the original work. The target audience for makers of sample and sound packs is music *creators*, ergo, any musician interested in sound packs; the target audience for sample-based musicians is music *listeners*. And in such cases where a sample-based musician may be in the business of making songs for the purpose of being sampled, that

music is also subject to copyright law.

In *Cariou v. Prince*, the Second Circuit noted that "an accused infringer has usurped the market for copyrighted works, including the derivative market, where the infringer's *target audience* and the nature of the infringing content *is the same as the original.*"[48] Hence, if the alleged infringer's target audience and the nature of the allegedly infringing content is *not* the same as the original content, the secondary user has *not* usurped the market of the original. Second, and more importantly, the market for a copyrighted work is not presumptively usurped because unknown samples — of various lengths and not yet used as raw materials and transformed in countless different ways — are not "per se" infringement. Were this to be the case, the exclusive right of copyright owners of sound recordings would be expanded beyond other copyrightable subject matter. And as I've noted earlier in this chapter, Congress made it clear that was not to be in the case. In fact, Congress clearly stated that the addition of sound recordings as a copyrightable subject matter, and the codification of fair use in the Copyright Act (of 1976), was *not* meant to treat sound recordings any differently that other copyrightable subject matter.

Next, we must remember again that no work is *100%* protected. Every letter or every single word and sentence of a book is not protected. What is protected is the book *as a whole*, i.e. the specific expression and arrangement fixed in the medium of a book. Likewise, not every single sound on, or *potential* sample of, a sound recording is protected. Again, permissive borrowing, *lawful* appropriation, means that, in limited situations, the public has free access to portions or elements — "samples" — of copyrighted works. And this right of the public is best observed through the de minimis and fair use doctrines.

So copyright does not protect a market for "unknown" samples and their subsequent "uknown" transformative uses. Let's say a copyright owner licenses a song to an online music clearance portal, something like what occurs at TrackLib. In turn, TrackLib then sub-licenses the song to users specifically for the purposes

[48] *See*: *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (Hereinafter: *Cariou* 2d Cir.), 16-18.

of sampling. This is not a "market" for samples in the way some commentators seem to believe. Even in the "blanket sample license" scenario the *entire* song — i.e. every single sound, every single expression, or every *potential* sample that someone *may* sample from the song — is *not* protected.

Again, the exclusive right that copyright law grants a copyright owner in not *absolute*. Copyright law provides "breathing room," i.e. some access to all copyrighted works. Put another way in the context of a song, copyright law does not confer a monopoly on every sound or expression captured on a sound recording or every note or expression written in a composition. Further, sampling, in and of itself, is outside a copyright owner's protectable sphere of interest, as a copyright owner can not prevent members of the public from copying *unprotectable* expressions and ideas contained within their works. If a copyright owner believes that their copyright has been infringed, they can file a copyright infringement claim in court. What they cannot do, however, is make their works immune to the the de minnimis and fair use safe harbors codified in the Copyright Act, *even if* they expressly license their works for the purpose of sampling. Copyright owners do not have an exclusive market for the *activity of borrowing*. Thus, copyright owners of compositions and sound recordings do not have an exclusive market for the activity of sampling their works. The Copyright Act makes it clear that that would be excessively broad copyright protection; therefore, the Copyright Act guards against it.

The Weight of Each of the Four Factors, Their Correlation, and Their Influence On the Overall Test Outcome

Barton Beebe used correlation analysis as a means to test the conventional wisdom on the relative importance of each of the four factors and their influence on the overall test outcome. He found that the first factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," and the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," correlated strongly with the overall test outcome and with each other. Regarding the second factor, "the nature of the copyrighted work," and the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," Beebe found that the second factor did not correlate strongly with the overall test outcome, but that the third factor, which did better than the second factor with respect to overall test outcome, paled in comparison to the impact of the first factor and the fourth factor.[49]

Next, Beebe found that the first and the fourth factors pointed in the opposite direction only *0.067*% of the time — *just 20* out 297 opinions. And out of these 20 cases, 14 of the opinions followed the outcome of factor 4, while six followed the outcome factor 1.[50]

Beebe noted that it was "certainly interesting to observe, now based on empirical evidence, that the outcome of the fourth factor appears to drive the outcome of the test, and that the outcome of the first factor also appears to be highly influential."[51] Taking Beebe's research at face value, it's hard to argue that the fourth factor isn't the "driver" of the outcome of the test. But a closer read reveals that the "driver" of the outcome the fair use test is really a *combination* of the first and fourth factors. For as Beebe observed, "in practice, *the first and fourth factors…drive the outcome of the test.*" So here, he's linking the factors rather than elevating the fourth factor above the

[49] Beebe, 584.
[50] *Ibid*, 584-85.
[51] *Ibid*, 586 (emphasis mine).

first factor.[52] If we could then say that the first and fourth factors work in tandem, then which factor is the leader of the two? Is it not factor one? And if factor one is the leader of the two factors, then isn't factor one really the driver of the outcome of the fair use test? Remember, if a use is substantially transformative, then there's harm to the potential market, or if there is some harm, the harm is *insubstantial*. On the other hand, if there is substantial harm to the potential market, then it's less likely that the use is substantially transformative. Hence, if the transformative element threshold of factor one is satisfied, then the other remaining factors will likely favor a finding of fair use; conversely if the transformative element threshold of factor one is *not* satisfied, then it's less likely that the other remaining factors will favor a finding of fair use.

So what does all this mean? Well, it means that even though the first and fourth factors work in tandem in determing the overall test outcome, the first factor — which asks, most importantly, is the secondary use *transformative* — actually carries the most weight because of how it guides the overall test outcome. Beebe even noted that "[s]ince the 1994 *Campbell* case, the consideration of whether a defendant's use qualifies as 'transformative' has emerged as among *the most important* to a court's overall fair use determination," and that "a finding of ***transformativeness*** **exerts by far the greatest impact of any finding on a court's likelihood of making an overall determination of fair use."**[53] Thus, my analysis of all the data, which includes the separate empirical studies by Beebe, Samuelson, and Sag, as well as my own careful reading of the *discussions* of the same case opinions — both those that resulted in a finding of fair use and those that did not — leads me to believe that the first factor is the most influential of the four factors. Simply put, if you borrow from a copyrighted work and you satisfy the first factor, i.e. the use is transformative under any of the four transformative use models recognized by the courts, it's more than likely that the use is fair use.

[52] Ibid,, 587 (emphasis mine).
[53] Beebe updated, 25 (emphasis mine).

So if *transformation* is crucially important to what constitutes a fair use of a copyrighted work, then the more transformative the use, the more likely the use is fair. By this metric, the conventional wisdom that fair use case law is "unpredictable" is wrong. Further, when we zero in on sampling as it's typically practiced in the hip hop/rap music tradition, we see the high level of transformation that is usually at work, which makes the predictability of fair use even higher.

And lest we forget, the typical sample-based hip hop/rap song contains the beat *and* the rhyme, i.e. a vocal performance. The beat usually contains snippets of sound recordings that are recontextualized, reconceptualized, and combined together with additional musical elements, most notably drum sounds. And the rhyme, which contains both lyrics and a vocal performance, constitutes transformation in and of itself because it is something substantially new that is added. Taken together, the beat and the rhytme clearly represent *two* new added expressions and an entirely new aesthetic *and* an entirely new meaning. As a whole — and remember, the plaintiff's work must be compared to the defendant's work *as a whole* — there is no doubt that such transformation meets the transformative element threshold of factor one

Transformative Use Expanded

Having gone through each of the four factors of the fair use analysis in detail, here, I turn to an expanded discussion of the transformative element of the first factor. As the transformative element is the most significant element of the fair use analysis, and because transformation is at the heart of the art sampling, the transformative element of the first factor requires a deeper, even more nuanced examination.

***

The principle of the transformative element of the first factor, or rather the Supreme Court derived transformative use sub-test, is that borrowing is indispensable to literature, science, and the arts. As such, works that borrow from copyrighted works — and make transformative uses of them — to produce new works is a practice that dates back more than 175 years. And it is this very practice, which benefits society, that sits at the heart of the purpose of copyright law itself. Justice Story — the judge who originally set forth the four factors of fair use that we still use today — noted in *1845*:

> 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. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copy-right which was not new and original

> in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. **Yirgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.** What is La Place's great work, but the combination of the processes and discoveries of the great mathematicians before his day, with his own extraordinary genius? What are all modern law books, but ***new combinations and arrangements of old materials,*** in which ***the skill and judgment of the author*** in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copy-right? Blackstone's Commentaries and Kent's Commentaries are but splendid examples of **the merit and value of such achievements**. [emphasis mine][54]

The purpose of copyright — "to promote the Progress of Science and useful Arts" — is grounded in the notion that the public (society) benefits from the advancement of *knowledge* that flows from science and the arts. Hence, central to the Constitutional mandate for copyright is the promotion of knowledge and, subsequently, the promotion of the public good in general. Under this objective, works that make transformative use of copyrighted works are precisely what copyright was enacted for: To benefit society. Our comprehension then of transformative uses informs our understanding of what copyright is and how fair use is supposed to function, and how copyright law in general should work. In turn, this understanding should inform judges in their undertaking of the fair use analysis.

When a new work makes transformative use of a pre-existing work, theoretically it advances knowledge and the progress of the arts; it doesn't merely repackage or free ride off of another author's creation. And this form of quotation is "vital to the fulfillment of the public-enriching goals of copyright law." This is

[54] *Emerson v. Davies*, 8 F. Cas. 615, 619 (CCD Mass. 1845) (No. 4,436); *See also*: *Campbell v. Acuff-Rose Music*, 510 U.S. 569,575 (1994).

why if the borrowing of copyrighted matter reveals no significant transformation, fair use should not be found.[55] On the other hand, when a transformative work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message"[56] to the original, fair use should be found.

Different Models of Transformative Use

Despite the overwhelming attention given to criticism, parody, and aesthetic declarations, there are innumerable other uses that qualify as transformative. In fact, despite what conventional wisdom might say to the contrary, the list of transformative uses is non-exhaustive. Still, there are four models that have been recognized. What follows in this section is a list of the four models of transformative use recognized by the courts. Also included is a discussion of how the courts have conceptualized transformative use since *Campbell v. Acuff-Rose Music, Inc.* (1994).

The New Insights Model: Transformation As New Insights

Under the "new insights" model of transformative use, what is being looked at is whether or not the "*substance and content"* of the original work is conjured up by the secondary work. Typically, the new insights transformative model refers to any enumeration of criticism, comment, or scholarship. But what the courts are specifically looking for is if there is any "effort to create a transformative work with '*new expression, meaning or message*.'"[57] Further, with this model of transformative use, judges are trying to ascertain if the secondary use "reflects transformative value" inasmuch as it provides a "social benefit by shedding light on an earlier work, and in the process, creating a new one."[58]

[55] Leval, 1111-1116.
[56] Campbell, 579.
[57] *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*,109 F.3d 1394 (9th Cir. 1997), (emphasis mine).
[58] *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

For an example of the new insights model of transformative use in the realm of hip hop/rap music, I'll discuss my song "Black Music Grandmother (Stay Alive)," which is on my latest album *Hard Target* (2024). For the beat for "Black Music Grandmother (Stay Alive)," I sampled Stevie Wonder's 1974 song "Please Don't Go." "Please Don't Go" is about a man begging a woman not to leave him, hence: *"Please Don't Go."* With my song, "Black Music Grandmother (Stay Alive)," I used the "substance and content" of the Stevie Wonder snippet "*Please Don't Go*" to make a song about the history of Black music and how it has helped Black people throughout history cope with injustice and the constant threat of death that white supremacy has historically provoked. More specifically, the song — a tribute to my grandmother who first instilled the love and respect for Black music within me — is also a direct plea to Black people suffering from the aforementioned omnipresent pressures *to not commit suicide*.

By chopping off the word "go" and reconceptualizing and recontextualizing this vocal sample snippet, I gave the two-word phrase a new meaning and a new message. Next, in the pause between the two verses of my song, I expressly say: "*Stay alive, yo*!" and "don't let this pressure get to you." In this way, the sample of the Stevie Wonder song — a sample that amounts to less than 6 seconds of a 3-minute song — further adds a new expression, a new meaning, and a new message. Moreover, the use reflects transformative value because it provides social benefit by shedding light on music history, inequality, racism, and suicide prevention.

The Raw Materials Model: Transformation As Raw Materials

To Be Transformative Doesn't Mean That the Secondary Work Must Conjure Up the Original Work

While the conjuring up of substance and content of the original work is *one* recognized model of transformative use, the raw materials model of transformative use doesn't mean that the use *must* conjure up, or comment on, the original. As Judge Leval noted, "if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."[59] Further, in *Prince*, the Second Circuit noted that a secondary work "could be transformative *without even commenting on*" the original work, "and even without" the secondary user's "stated intention to do so."[60]

So under the raw materials model, if the borrowed work, let's say a digital sample, is materially altered and the new work, let's say a new hip hop/rap song, adds some additional artistic or intellectual value beyond that of the original, like, for instance, new lyrics, a new vocal performance, a new instrumentation, and a new aesthetic, then the criteria of transformative use are met.

Thus, in the context of sample-based beatmaking, there are three primary examples of the raw materials model. First, new songs created via the use of individual drum sounds or drum breaks from older songs. Second, new songs created via the use of sound-stabs and tones sampled from older songs (used like notes on a keyboard). Third, new songs created via the use of short snippets of musical phrases, rhythms, and/or melodies from older songs (used specifically to create new rhythms and new grooves). In each of these examples, the scenario remains the same: Either combined with a rap vocal performances or not, a new aesthetic and a new song are created.

---

[59] Leval, 1111 (emphasis mine).
[60] *Cariou*, 714 F.3d at 705–712 (emphasis mine).

The Commentary Model: Transformation As Commentary

A recent commentary (and new-insights) case with high profile attention is the Southern District Court of New York's *Estate of James Oscar Smith v. Cash Money Records, et al.* — aka the Drake "Pound Cake" case. (I cover this case in detail in Chapter 22, but for our purposes here, I'll point out the "new insights" aspect of the decision.) Drake's 2013 album *Nothing Was the Same* contained the song "Pound Cake/Paris Morton Music 2" ("Pound Cake"), which used a sample of Jimmy Smith's (James Oscar Smith's) 1982 song "Jimmy Smith Rap" ("JSR"). Cash Money, Drake's then record label, obtained a license for the master recording of "JSR," but not for the composition. The estate of Jimmy Smith sued Cash Money, Drake, et. al for copyright infringement. Drake filed for summary judgment, asserting that he had made fair use of "JSR." The court agreed and granted Drake's summary judgment on the grounds of fair use, holding that "Pound Cake" fundamentally altered "the message of 'JSR' by "editing the recording from 'jazz is the only real music that's gonna last' to "only *real* music is gonna last." The court further observed that Drake had "transformed Jimmy Smith's dismissive comment into a statement of relevance and staying power of 'real music,' regardless of genre."[61] In other words, the court maintained that Drake's transformative use had not only altered the message of the original work and thereby added commentary, it also added new insights and a new message.

The New Purpose Model: Transformation As a New Purpose

What happens when there is little to no transformation — neither in terms of new insights nor raw materials — of a copyrighted work, *but* the purpose of the secondary use is different from the original use? In other words, what happens when the original work is used

[61] *Estate of James Oscar Smith v. Cash Money Records*, et al. 14-cv2703S.D. N.Y. (May 30, 2017), p. 16 [Case hereinafter, *Estate of James Oscar Smith*.

in part or whole for a *different* purpose? It's this question that makes the "new purpose" model the most controversial of the four transformative use models. Some commentators consider the new purpose model to be an absurd conception of transformative use; in their view, it's an example of how the courts "have strayed from the basic concept of transformativeness introduced in *Campbell*." Other commentators have dubbed the new purpose model as "faux transformation"[62] Nonetheless, the new purpose model may be compelling in certain contexts.

Here's a fictional scenario that exemplifies the new purpose model, at least in one context. Let's say U.S. House Speaker Nancy Pelosi *actually was* a former beauty pageant[63], and in 2016, she ran for president. Now, running as a staunch opponent of online pornography, Pelosi campaigns on a promise to get rid of online porn, or at least to regulate it with a steel hand. Then one day, out of nowhere, a seemingly damning report on Pelosi surfaces. Based on a series of nude and semi-nude photos that Pelosi allegedly took in her beauty-pageant days, the report claims that Pelosi engaged in pornography herself. Shocked by what she considers to be a terrible mischaracterization of the photos she'd taken 40 years ago, Pelosi calls a press conference and announces on television that the photos in question were taken as part of her modeling portfolio; that they were taken *for the purposes* of getting new modeling gigs and jumpstarting her acting career. Some of the photos are shown on all the cable news channels. Days after Pelosi's press release, the *New York Times* publishes an article on the whole affair, and the reporting includes the newspaper's republication of the photographs in question without the permission of the photographer who owns the copyright to the photos. So the photographer sues the *New York Times* for copyright infringement. In turn, the *New York Times* files for summary judgement, affirming fair use and claiming that

[62] Matthew D. Bunker & Clay Calvert, "The Jurisprudence Of Transformation: Intellectual Incoherence And Doctrinal Murkiness Twenty Years After *Campbell V. Acuff-Rose Music*," *Duke Law and Technology Review*, 2014, 116.

[63] "Fact Check-Photo does not show Nancy Pelosi in 1959," *Reuters* (March 19, 2021) https://www.reuters.com/article/factcheck-notpelosi-1959-idUSL1N2LH1H8 In 2021, photos of a woman in a bathing suit behind a sign that read "Miss Lube Rack" were claimed to be of a young Nancy Pelosi in 1959. This claim was proven false.

the photos were used for "news," *a different purpose* than that of the original. The court agrees and grants summary judgment, finding that that the use was fair use.

None of this ever happened of course; it's is a fictional story. But the scenario is real. In fact, a 2000 ruling by the First Circuit dealt with such a scenario. In *Núñez v. Caribbean International News Corp.*, Sixto Nunez, a professional photographer, took several nude and nearly nude photographs of Joyce Giraud, then Miss Puerto Rico Universe 1997. The photos were taken for Giraud's modeling portfolio, and Nunez sent the photos out to members of the modeling community. A controversy emerged. At question: Were nude and semi-nude photos appropriate for a pageant winner? After the photos were shown on television, newspaper *El Vocero* published three of them — without the permission of Nunez, the copyright owner of the photos — in conjunction with a number of articles detailing the controversy. Nunez sued *El Vocero* for copyright infringement, but the district court ruled that *El Vocero* made fair use of his photos. Nunez appealed the district court's decision, but the First Circuit affirmed the district court's decision and determined that *El Vocero's* use of Nunez's photographs was fair use, noting that:

> what is important here is that plaintiffs' photographs **were originally *intended* to appear in modeling portfolios, not in the newspaper;** the former use, not the latter, motivated the creation of the work. **Thus, by using the photographs in conjunction with editorial commentary, *El Vocero* did not merely "supersede[] the objects of the original creation[s]," but instead used the works for *"a further purpose,"* giving them a new "meaning, or message."** *Campbell*, 510 U.S. at 579, 114 S.Ct. 1164. ***It is this transformation of the works into news*-and not the mere newsworthiness of the works themselves-that weighs in favor of fair use under the first factor of § 107.** See id. ("central inquiry is whether defendant's use is transformative"); see also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 478, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (Blackmun, J., dissenting) (key question is whether defendant's use "result[s] in ***some added benefit to the public*** **beyond that produced by the first author's work"**). [emphasis mine)][64]

[64] *Nunez v. Caribbean Int'l News Corp.*, United States Court of Appeals, First Circuit. No. 99-2266; See also: 235 F.3d 18 (1st Cir. 2000).

The First Circuit further noted that:

> the district court also found that the pictures were shown not just to titillate, but also to inform. Puerto Ricans were generally concerned about the qualifications of Giraud for Miss Puerto Rico Universe, as is demonstrated by the several television shows discussing the photographs. This ***informative function*** is confirmed by the newspaper's presentation of various news articles and interviews in conjunction with the reproduction. Appellee reprinted the pictures not just to entice the buying public, ***but to place its news articles in context***; as the district court pointed out, "the pictures were the story." **It would have been much more difficult to explain the controversy *without* reproducing the photographs.** And although such an explanatory need does not always result in a fair use finding, see *Iowa State Univ. Research Found. v. American Broad. Cos., Inc.*, 621 F.2d 57, 60 n. 6 (2d Cir.1980), it weighs in the favor of appellee. [emphasis mine][65]

So under the context of combining copyrighted photos with editorial commentary, the use *may* be transformative and therefore fair use. But in such a scenario what we have are physical objects — photos are not altered *physically*, at least not in any significant way beyond cropping or resizing for publication, but "transformed" nonetheless. Looking at the First Circuit's opinion in *Nunez*, one might think that even if the original work is copied in whole, as long as the secondary work is used for a different purpose from the original, it's transformative and therefore fair use. But it's not as simple as that. The *purpose* matters; in *Nunez*, the purpose was "news." There's also the consideration of different *contexts*. Another case involving photos, *Cariou v. Prince,* illustrates the "new purpose/new market" model.

[65] *Id.*

The New Purpose/New Market Model: Transformation As a New Purpose When the New Purpose Is a New Market

Over the course of six years, photographer Patrick Cariou spent time among Rastafari in Jamaica, befriending them and taking their portraits. Later, he prepared a book of photos from his time there called *Yes Rasta*, and the book was published by PowerHouse Books in 2000. *Yes Rasta* contained individual portraits of Rastafari, other individuals, and landscape photos. Around 2007, artist Richard Prince used photos from Cariou's book *Yes Rasta* as part of a series of paintings and collages — 30 in total — that he created called Canal Zone. In 2007 and 2008, Canal Zone was exhibited at an art gallery, Gagosian Gallery, and portions of Canal Zone were reproduced and sold in Gagosian Gallery's catalog. In 2011, photographer Cariou filed a copyright infringement claim against artist Richard Prince.

In court, Prince asserted a fair use defense on the grounds that he'd used Cariou's photos as "raw ingredients," essentially stating that his use of Cariou's work was transformative. But the district court (S.D.N.Y.) disagreed and ruled in Cariou's favor, finding that Prince's use of Cariou's work was not fair use. What distinguished the district court's decision is that the court declared that the transformative element of the first factor "imposes a requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works." Further, the court cited Prince's testimony (and effectively used it against him as proof) that as an appropriation artist, he "has no interest in the original meaning of the photographs he uses," that he doesn't "'really have a message' when he attempts to communicate when making art," that "[i]n creating the Paintings," he "did not *intend to comment* on any aspects of the original works or on the broader culture," and that his "*intent* in creating the Canal Zone paintings was to pay homage or tribute to other painters, including Picasso, Cezanne, Warhol, and de Kooning, and to create beautiful artworks which related to musical themes and to a post-apocalyptic

screenplay he was writing which featured a reggae band."[66] Prince appealed, and in 2013, the Second Circuit ruled in his favor, holding that "the district court applied the incorrect standard to determine whether Prince's artworks make fair use of Cariou's copyrighted photographs," and that "all but five of Prince's works *do* make fair use of Cariou's copyrighted photographs." The Second Circuit further noted fiver other critical things.

First, the Second Circuit Circuit noted that "[**t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative,** and a secondary work may constitute a fair use ***even if it serves some purpose other than those*** (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute."[67]

Second, the Second Circuit noted that the *manner* in which the copied work is used is absolutely critical to a court's analysis. That is, it must be used in a manner that is "transformed in the creation of *new information*, new aesthetics, new insights and understandings," and that "for a use to be fair, 'it must be productive and must employ the quoted matter in a different manner or for *a different purpose* from the original.'"[68] In other words, when the secondary work is deployed for a different purpose or function from the original, it *may* constitute fair use.

Third, the Second Circuit noted that "[n]o such rule exists" requiring that a defendant's testimony explains or defends his or her intent, or that any such intent must be "to comment on any aspects of the original works."

Fourth, the Second Circuit noted that "there is no requirement" that courts consider how a defendant's work "*may reasonably be perceived unless" he or she "claims* that they were satire or parody," and that courts "**do *not* analyze satire or parody differently from any other transformative use."** [69] In other words, parody is not the *only* valid form of transformative use whenever a substantial portion, or heart, of the original is used.

---

[66] *Cariou*, District Court.
[67] *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (Hereinafter: Cariou 2d Cir.), 11-12.
[68] *Id.*
[69] *Id.* 13.

Fifth, and most crucial to the new purpose-new market model of transformative use, the Second Circuit noted that a use can be transformative when it is used in the creation of a work for a new *market* that is different from the original's market. In other words, the Second Circuit established a new standard: A new *market* is also a new *purpose* and thus potentially fair use:

> We turn next to the fourth statutory factor, the effect of the secondary use upon **the potential market for the value of the copyrighted work, because such discussion further demonstrates the significant differences between Prince's work, generally, and Cariou's. Much of the district court's conclusion that Prince and Gagosian infringed on Cariou's copyrights was apparently driven by the fact that Celle decided not to host a *Yes Rasta* show at her gallery once she learned of the Gagosian Canal Zone show. The district court determined that this factor weighs against Prince because he "has unfairly damaged both the actual and potential markets for Cariou's original work and the potential market for derivative use licenses for Cariou's original work."**
>
> Contrary to the district court's conclusion, the application of this factor does not focus principally on the question of damage to Cariou's derivative market. We have made clear that **"our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work."** "The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." Our court has concluded that an accused infringer has usurped the market for copyrighted works, including the derivative market, where the infringer's *target audience* and the nature of the infringing content *is the same as the original.*
>
> Although certain of Prince's artworks contain significant portions of certain of Cariou's photographs, neither Prince nor the Canal Zone show *usurped* the market for those photographs. ***Prince's audience is very different from Cariou's,* and** there is no evidence that Prince's work ever touched – much less usurped – either the primary or derivative market for Cariou's work. There is nothing in the record to suggest that Cariou would ever develop or license secondary uses of his work ***in the vein* of Prince's artworks.** Nor does anything in the record suggest that Prince's artworks had any

> impact on the marketing of the photographs. Indeed, **Cariou has not aggressively marketed his work, and has earned just over $8,000 in royalties from *Yes Rasta*** since its publication. He has sold four prints from the book, and only to personal acquaintances.
>
> **Prince's work appeals to an entirely different sort of collector than Cariou's.** Certain of the Canal Zone artworks have sold for two million or more dollars. The invitation list for a dinner that Gagosian hosted in conjunction with the opening of the Canal Zone show included a number of the wealthy and famous such as the musicians Jay-Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, *Vanity Fair* editor Graydon Carter, *Vogue* editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt. Prince sold eight artworks for a total of $10,480,000, and exchanged seven others for works by painter Larry Rivers and by sculptor Richard Serra. *Cariou on the other hand has not actively marketed his work or sold work for significant sums, and nothing in the record suggests that anyone will not now purchase Cariou's work, or derivative non-transformative works (whether Cariou's own or licensed by him) as a result of the market space that Prince's work has taken up.* **This fair use factor therefore weighs in Prince's favor.**
> [emphasis mine][70]

And there you have it. Cariou and Prince were operating in different *markets*. Cariou's market was small scale and personified mostly by close acquaintances; Prince's market, on the other hand, was the big scale art world, exemplified by wealthy collectors and high-profile celebrities. Despite the fact that some of the "changes" Prince made to Cariou's photos were minimal (in one instance Prince merely "pasted a picture of a guitar over the subject's body") the Second Circuit maintained that such "alterations create the impression that the subject is not quite human," and the thus the Second Circuit reasoned that Prince used Cariou's photos — at various amounts and to various degrees of transformation — in the creation of *new* artworks, with the *purpose* of "marketing" those new artworks to the upscale art world — a "new *market*," ergo different from Cariou's market, ergo "new purpose." Thus,

[70] *Id.*, 16-18.

the Second Circuit found that 25 of Prince's works manifested an entirely different aesthetic from Cariou's photographs, and as such, Prince's Canal Zone series of paintings and collages were transformative under the standards of the first factor. And since the new artworks that Prince created did not *usurp* Cariou's market, there was no market harm to Cariou. Therefore, the fourth factor also favored Prince. Applying these factors, as well as the second and the third factors, the Second Circuit held that Prince's use of Cariou's photos constituted fair use.

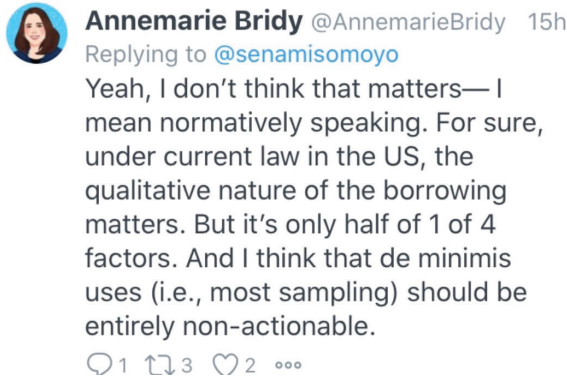
Not All Changes Are Equal; Changes Must Add Something New – But Something New Is Contextual

In addition to establishing the new purpose/new market transformative model, essentially setting a new fair use standard, the Second Circuit also noted that what constitutes a "new aesthetic" should not be taken to suggest that a secondary work that "merely presents the same material but in a new form, such as a book of synopses of televisions shows, is *not* transformative."[71] In other words, merely adding cosmetic (i.e. minor) changes or presenting a work in a new format alone does not satisfy the transformative element of the first factor. Therefore, such a work does not constitute fair use. On the other hand, a work that *does* present a fundamentally new aesthetic — by adding something new — does satisfy the transformative element of the first factor. Therefore, such work a work *does* constitute fair use.

[71] *Id.*, 15.

If Substantial Takings Can Still Mean "New Aesthetic," What About "Insubstantial" and "Insignificant" Takings?

If a substantial taking may still be transformative if it creates a new aesthetic by adding something new, what then must we conclude about an *insubstantial* taking that "adds new expression, meaning, or message" and a new aesthetic? Practically every sample-based hip hop/rap song relies on an insubstantial taking combined together with additional musical elements *and* rap lyrics. In this paradigm, "a new expression, meaning, or message" is being added twice over, and a new aesthetic — something distinctly different from the original work — is being created each time. Which means that practically every sample-based hip hop/rap song satisfies the transformative element standard of the first factor. Moreover, most sampled-based hip hop/rap songs make de minimis use of the songs that they sample — And I'm not alone in this observation. Annemarie Bridy, law professor and Copyright Counsel for Google and, has stated that she thinks that "de minimis uses (i.e. most sampling) should be entirely non-actionable."[72]



And lawyer Tim Wiseman has observed that "sampling should as a matter of policy be fair use in virtually all cases."[73]

[72] Annemarie Bridy, Twitter @AnnemarieBridy (August 28, 2020).
[73] Tim Wiseman, Twitter @TimothyAWiseman (August 29, 2020).



In any case, the transformative uses typical in the sampling tradition of hip hop/rap music go well beyond the transformation of Prince's artworks in *Cariou*.

***

For further support, context, and instruction on the matter of substantial, insubstantial, and insignificant takings as "new aesthetic" transformation, it's worth taking a look at the *Basic Books, Inc. v. Kinko's Graphics Corp.* case. In *Basic Books* (1991), "all major publishing houses in New York City…brought suit against Kinko's alleging copyright infringement." Specifically, the plaintiffs alleged that "Kinko's infringed their copyrights when Kinko's copied excerpts" from their books "without permission and without payment of required fees and sold the copies for a profit." Kinko's admitted that it copied the excerpts without permission, "compiled them into course 'packets,' and sold them to college students." But Kinko's claimed that its use of the excerpts was fair use. The court (U.S. District Court for the Southern District of New York) disagreed, finding that Kinko's did "not convincingly shown that the excerpts it appropriated without seeking permission were a fair use of the works in question."[74]

[74] *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991)..

What the District Court noted in their decision is highly instructive to our understanding of the transformative element of the first factor. Under the literal heading "Transformative Use," the court noted that:

> [i]t has been argued that **the essence of "character and purpose" is the transformative value,** that is, *productive use*, of the secondary work compared to the original. District Court Judge Leval has noted that, "[t]he use ... must employ the quoted matter in a different manner ***or for a different purpose from the original.*** A quotation of copyrighted material *that merely repackages or republishes the original* is unlikely to pass the test." Leval, *Toward a Fair Use Standard,* 103 Harv.L.Rev. 1105, 1111 (1990) (suggesting a balancing between the justification for and the extent of the taking). Kinko's work cannot be categorized as anything other than a *mere repackaging*.
>
> **Most contested instances of copyright infringement are those in which the infringer has *copied small portions, quotations or excerpts* of works and *represents them in another form*,** for example, a biography, criticism, news article or other commentary. *See, e.g., Harper & Row v. Nation Enterprises,* 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985); *New Era Publications v. Carol Publishing,* 904 F.2d 152 (2d Cir.), *cert. denied,* ___ U.S. ___, 111 S. Ct. 297, 112 L. Ed. 2d 251 (1990); *Salinger v. Random House, Inc.,* 811 F.2d 90 (2d Cir.), *cert. denied,* 484 U.S. 890, 108 S. Ct. 213, 98 L. Ed. 2d 177 (1987); *Wright v. Warner Books, Inc.,* 748 F. Supp. 105 (S.D.N.Y. 1990). In this case, there was absolutely no literary effort made by Kinko's to expand upon or contextualize the materials copied. *See Pacific & Southern Co. v. Duncan,* 744 F.2d 1490, 1496 (11th Cir.), *cert. denied,* 471 U.S. 1004, 105 S. Ct. 1867, 85 L. Ed. 2d 161 (1985) (finding infringement by a defendant who neither "analyze[d] ... [nor] improve[d]" the work, noting that "the preamble to Section 107 indicate[s] [that] fair uses are those that contribute in some way to the public welfare.").[5] **The excerpts in suit were merely copied, bound into a new form, and sold.** The plaintiffs refer to this process as "anthologizing." The copying in suit had productive value only to the extent that it put an entire semester's resources in one bound volume for students. It required the judgment of the professors to compile it, though none of Kinko's. [emphasis mine][75]

[75] *Id.* 1530-31.

The opinion continued, under the heading "The Amount and Substantiality of the Portion Used":

> ***"There are no absolute rules* as to how much of a copyrighted work may be copied and still be considered a fair use."** *Maxtone-Graham v. Burtchaell,* 803 F.2d 1253 (2d Cir.), *cert. denied,* 481 U.S. 1059, 107 S.Ct. 2201, 95 L.Ed.2d 856 (1987). This third factor considers not only the percentage of the original used but also the "substantiality" of that portion *to the whole of the work*; that is, courts must evaluate *the qualitative aspects as well as the quantity* of material copied. *See New Era Publications Int'l v. Carol Publishing Group,* 904 F.2d at 158. A short piece which is "the heart of" a work *may* not be fair use and **a longer piece which is pedestrian in nature** *may* be fair use. The balancing of the four factors must be complete, relying solely upon no one factor. The purpose of the use may be balanced against the *amount and substantiality* of the use. For example, **"[e]ven substantial quotations might qualify as fair use** in a review of a published work." *See Harper & Row,* 471 U.S. at 564-65, 105 S.Ct. at 2232-33. [emphasis mine][76]

Reading the court's opinion in *Basic Books*, there are four conclusions we can draw about what qualifies as transformative use and thus constitutes fair use. First, if the use is *not* "a mere repackaging" of the original, then the use is transformative and likely fair use. Second, if the use is *not* merely a copy of the original, then passed off as "a new form" of the same thing as the original and then sold, then the use is transformative and likely fair use. Third, if the use is "small portions, quotations or excerpts" of the original represented in a new form that is different from the original, then the use is transformative and likely fair use. Fourth, if the material copied is insignificant in quantity or altered beyond recognition, then the use is transformative and likely fair use. Each of these conclusions are relevant to sampling in the hip hop/rap music tradition.

In hip hop/rap music's sampling tradition, samples are typically small snippets of old songs (and other sound recordings) that are transformed in any number of ways. Hence, a sample-based hip hop/rap beat is never just a "mere repackaging" of the song(s)

[76] *Id.*, 1533.

that it samples. Futher, when a sample-based hip hop/rap beat (instrumental) is created and combined with rap lyrics *and* a vocal performance, two things should be clear to any reasonable observer. First, the secondary work, the hip hop/rap song, uses the sample for a different purpose than the original. Second, the secondary work represents an aesthetic different from the original. Accordingly, under the compositional rubric of sample-based hip hop/rap music, there is always "effort made to expand upon or contextualize the materials copied."

Transformative Use Is Not Limited to Parody; There Is No One "Standard" for Articulating Transformation; and the Court's "Reasonable Observer" Determination

Noting that "[w]e do not analyze satire or parody *differently* from any other transformative use," the Second Circuit made it clear that transformative use is *not* limited to parody, an interpretation mistakenly made by a number of commentators.[77]

Next, some commentators have pointed out that the *Cariou* court did not articulate a "standard" for or precise metric of transformation. But the court is not suppose to articulate a standard or precise metric, because by the intent and design of copyright law, there is no standard for transformation. Had the court articulated a standard, that would've been akin to creating a "bright line," and the articulation of a bright line is the exact opposite of what the guidelines in the fair use clause of the Copyright Act instructs the courts to do. Further, in *Campbell*, the Supreme Court noted that the task of the fair use analysis "is *not* to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis," and that Congress meant § 107 "to restate the present judicial doctrine of fair use, *not to change, narrow, or enlarge it in any way.*"[78]

[77] *Cariou* 2d Cir., 13 (emphasis mine)
[78] *Campbell v. Accuff-Rose Music*, 510 U.S. 569, 577, 578 (1994)

Finally, in gauging whether or not a secondary use is transformative (or achieves an aesthetic difference), as opposed to merely "repackaging" the same material in a new form, the Second Circuit noted that transformative use is determined by how the secondary work appears to the "reasonable observer":

> [w]hat is critical is ***how the work in question appears to the reasonable observer,*** not simply what an artist might say about a particular piece or body of work. *Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so.* **Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may "reasonably be perceived" in order to assess their transformative nature.** *Campbell*, 510 U.S. at 582; *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113-14 (2d 11 Cir. 1998) (evaluating parodic nature of advertisement in light of how it "may reasonably be perceived"). [emphasis][79]

Sample-based hip hop/rap music constitutes a "new aesthetic with creative and communicative results distinct from" the song that it sampled. Hence, any reasonable observer would recognize that a hip hop/rap song, which samples a snippet from a soul, funk, jazz, funk, or rock song , is not a "mere copy" of the soul, funk, jazz, or rock song that it sampled.

***

Thanks to the Second Circuit's decision in *Cariou v. Prince*, a decision that set a new fair use standard and included multiple clarifications of what *may* constitute as transformative use, judges are now looking more to the secondary works themselves, on their face, to determine transformative use. This is a good sign particularly for the art of sampling. Of course, this also means that in cases where jurors (i.e. reasonable observers) are involved, judges will have to provide *proper* jury instructions. Jurors should not be instructed to ask *whether or not the sample of a sound recording copies or sounds like the sound recording it sampled* – Of course it does; it's a digital sample. Instead, jurors should be instructed to ask three things.

[79] *Id.*, 14.

First: *Quantitatively speaking, is the amount taken from the original a lot or a little?* Second: *Qualitatively speaking, is the portion taken from the original substantial or insubstantial or insignificant? Not whether the portion taken from the original makes up a substantional portion of the secondary work.* Third: *Does the secondary work sound like the original as a whole?*

Transformative Use by Default: Sampling, Drums, and the Art of Rapping

Having discussed the importance of the transformative use element in the first factor of the four-factor fair use test, as well as its impact on the overall outcome of the fair use test, here, it's worth discussing why the kind of copying and transformation done in the sampling tradition of hip hop/rap music is basically transformative use by default and practically always fair use, if not de minnimis.

Original drum programming and the art of rapping play an important role in the sampling tradition of hip hop/rap music. But many commentators and copyright owners seem to believe that sampling begins and ends with the song that was sampled; the notion being that if the song was sampled, there can be no transformation. From this warped view, they ignore *anything* else that may have been *added* to make a new work. For instance, if you sample 8 seconds of a 4-minute soul-jazz *instrumental*, then add new drums along with song lyrics *and* a vocal performance to make a new work, no one can deny that the new work constitutes a *new* expression and a new aesthetic. So transformation cannot be denied in this scenario. Moreover, when analyzing two works in a copyright infringement case, the determination of a transformative use requires, in large part, an analysis of the two works in question. This means the original work (i.e. the song that was sampled) and the secondary work (i.e. the work that contains the sample) must be compared to one another "*as a whole*."

***

In the vein of comparing songs as a whole, in which small snippets of sound recordings are used to create entirely new songs, this section explains why in the hip hop/rap music tradition the typical use of samples — i.e. the sampling of small portions of sound recordings and the addition of original drum programming, rap lyrics, and a rap performance — is basically transformative by default. With regards to rap lyrics in particular, I will show why rapping, its own distinctive useful art, comprises the second dimension of hip hop/rap music's compositional process.

Rapping: The 2nd Dimension of Hip Hop/Rap Music

> "Afro-American music is primarily a vocal music."
> –Eileen Southern

> "Rhymes overflowin', gradually growin', everything is written in code so it can coincide…"
> –Rakim

There can be no serious discussion about the aesthetics of hip hop/rap music and beatmaking traditions without an analysis of the art of rapping. "Rap" or "rapping" is a unique form of vocalization that distinguishes the hip hop/rap music tradition from all other forms of vocal music. And although some of the vocal characteristics of rappers can be traced back to the Black (African American) traditions of "toasting," "signifying," and radio DJ raps, there are other factors (as I detail in this section) that help make rap the most percussive and rhythmic of all Black (African American) oral traditions. Further, it must be pointed out that rapping, like the art of beatmaking, is yet another component that greatly sets apart the hip hop/rap music tradition from the Western classical tradition. Finally, rapping, when combined together with a sample-based beat, personifies the transformative element of the first factor of fair use. This is why hip hop/rap songs are typically excellent examples of works that *add* a new "expression," a new "meaning," and a new "aesthetic."

As I mentioned in Chapter 2, the beatmaking tradition developed in part as a direct response to the development of more complex rhyme flows. The art of beatmaking grew, necessarily, as rap schemes, styles, and flows grew more advanced, more poetic, more syncopated, and more rhythmic. And as the two art forms grew together, rhyme verses expanded in length and gained a new level of density, and subject matter became more serious and varied. Such complex advancements in the art of rapping could no longer be adequately serviced by DJs backspinning breaks live or on cassette. Hence, the beatmaking tradition emerged as a means of both representing the DJs music-making role and as a means to accommodate the new complexities of rapping.

Fundamental Characteristics of Rapping

The art of rapping, which has a level of depth and complexity that rivals the art of beatmaking, is an amalgamation of many different cultural components. It's a manifestation and extension of Black vernacular; it's a vocal style heavily grounded in Black (African American) dialect and street slang; it's an American "patois" done over music; finally, it's also a highly developed form of vocalization and poetry.

The poetics and musical metrics of rapping are unlike any other vocalization style in Western popular music. On one hand, rap's *verbal rhythm* bends, cuts, and reshapes combinations of standard languages with slang and other common language nuances, illuminating words with new phonetics and metaphorical meanings. On the other hand, rap's percussive sensibility and vocal attack and release project a poetic dexterity that is both dense and astonishingly fluid.

"Yo, Kick That Rhyme" – The Mechanics of Rap: Improvisational Writing, Performance, Delivery, and Flow

Unlike typical songwriters/lyricists in modern popular music, rappers in the hip hop/rap music tradition use far more words to fill up song stanzas; and rappers typically occupy a great deal of instrumental space and time on a common 4/4 time measure. In doing so, rappers also use a more rapid rotation of words delivered in an improvisational style. This improvisational style allows rappers to respond to and accentuate the pulse of the beat (the instrumental), using vocal inflection, non-verbal sounds, and emotional tenor. In this way, rappers are charged with the job (goal) of writing more words per bar and more bars per stanza. Thus, in the art of rapping, each bar can either be its own story or serve as the basis upon which other storylines emerge. Moreover, these multiple words, lines, and bars are often connected (strung together) to accommodate one central lyrical theme, and at the same time they merge and mesh with the beat.

Finally, one other thing that distinguishes rapping in the hip hop/rap music tradition from other vocal forms in in Western popular music is the stylization and level of declamation that it requires. Rappers not only play off of the unique timbre of their individual voices, they take great pride in developing their *delivery*, i.e. the unique personification and enunciation of their rhymes, and their *flow*, i.e. the rhetorical and rhythmic pace, pitch, tone, and volume of their rhyme performance. And it is through the creation and mastery of one's own unique delivery and flow that rappers are truly able to make a beat come alive. In this light, rappers are also vocal virtuosos.

Rapping and Form – Dense Measures: More Words Per Measure

Rap lyrics, interchangeably referred to as "rhymes," contain way more words per measure than your typical song in Western popular music. Because of these dense measures, the writing/performance style of rapping relies heavily upon the ongoing recurrence of the beat. Below, consider part of the first verse to rapper Nas's song "Memory Lane (Sittin' In Da Park)" produced by DJ Premier:

> I rap for listeners, blunt heads, fly ladies and prisoners/
> Hennessey holders and old school niggaz, then I be dissin a/
> unofficial that smoke woolie thai/ I dropped out of Cooley High,
> gassed up by a cokehead cutie pie/ Jungle survivor, fuck who's
> the liver/My man put the battery in my back, a difference from
> Energizer[80]

Looking at this verse, you can read *and* hear the verbal rhythm it embodies even without any accompanying music. This verse presents a series of "cuts," "ruptures," and precise transitions that could only fit in a framework of rhythm and repetition. Such poetic dexterity is ill-suited to linear progression or constant material growth; this is one reason why the loop of a beat is essential in hip hop/rap music. Thus, rappers — especially those who use the complex lyrical rhyme style — depend on points of return, or in other words, the start *restarting again*. It is the rhythm, the repetition, and the cycle of the groove that allows for the nature of rap's orality to properly manifest itself.[81]

Rappers respond to the rhythm and the repetition. And from the drums of a beat (or the ghost pulses from drumless loops),

[80] Nas, "Memory Lane (Sittin' In Da Park)," produced by DJ Premier; from the album *Illmatic* (Columbia Records, 1994). Transcription mine.

[81] "The growth of emotional force also serves to better connect the audience to the sonic world and communal feeling created in the context of repetition," quote from Guthrie P. Ramsey, Jr., *Race Music: Black Cultures From Bebop To Hip-Hop*, (Berkley, Los Angeles, and London: University of California Press, 2003), 129. "The repetition of a well-chosen rhythm continually affirms the power of the music by locking that rhythm…," quote from John Miller Chernoff from *African Rhythm and African Sensibility: Aesthetics and Social Action in African Musical Idioms*, (Chicago and London: The University of Chicago Press, 1979), 111-12.

rappers take their cue and internalize the proper tempo. Rappers never rap to the set tempo of the beat, but instead to their own internal tempo that the beat's tempo inspires. Therefore, the weaker the rhythm, the less opportunity for a rapper to respond to it. So it must be understood that rappers naturally value and depend upon the repetitive nature of the looping of a groove. The loop returns the new starting point in strategic repetition, which supports and encourages the multiple starting points within rap rhyme stanzas. It is this response by the rapper to the rhythm and repetition that actually completes a typical song in the hip hop/rap music tradition. Since the loop itself is often composed from brief snippets of old songs — typically de minimis in nature — the very composition of the loop speaks to the transformative nature of sample-based beats. Then with the addition of rap performances that are combined with the beats to create new songs, the level of transformation is even higher.

This central focus on rhythm, repetition, and groove in the sampling tradition of hip hop/rap music is one reason why most beatmakers (producers) in hip hop/rap music's sampling tradition limit their borrowing to small snippets. The goal, and part of the purpose of hip hop beatmaking's entire aesthetic, is to create new rhythms and grooves from *small snippets* of rhythms, melodies, sound-stabs, and sound tones from old songs and other sound recordings. And this practice is in line with the third factor of fair use, which instructs the courts to look at "the amount and substantiality of the portion used in relation to the copyrighted work *as a whole*."

Given the facts of hip hop/rap music's compositional processes, specifically within its sampling tradition, as well as the impact that hip hop/rap music has had on American culture and global culture more broadly, the art of sampling, especially as it's personified in hip hop/rap music, is certainly the type of "useful Art" that copyright aims to promote.

False Factors: Good Faith, Bad Faith, Morality, Equity, and Artistic Integrity

In the first and second editions of *The Art of Sampling*, I failed to consider whether there were any additional factors that judges were applying. As it turns out, Judge Leval suggests that there are. He noted that "[t]he language of the Act suggests that there may be *additional unnamed factors* bearing on the question of fair use…. the pertinent factors are those named in the statute. **Additional considerations that I and others have looked to are *false factors* that divert the inquiry from the goals of copyright.** They may have bearing on the appropriate remedy, or on the availability of another cause of action to vindicate a wrong, but not on the fair use defense."[82] In total, Judge Leval maintains that there are three false factors: Good Faith, Artistic Integrity, and Privacy.

Good Faith

Regarding Good Faith, Judge Leval offers:

> **Good Faith.** — In all areas of law, judges are tempted to rely on findings of good or bad faith to justify decisions. Such reasoning permits us to avoid rewarding morally questionable conduct. It augments our discretionary power. *It provides us with an escape from confronting questions that are difficult to understand.* The temptation has been particularly strong in dealing with the difficult issue of fair use. **This practice is, however, misguided. It produces anomalies that conflict with the goals of copyright and adds to the confusion surrounding the doctrine.**[83]

The problem with good faith is that when it comes to sampling, which is still seen by many people (including some judges) as morally corrupt conduct, the interests of copyright owners tend

[82] Leval, 1125, 1126 (emphasis mine).
[83] *Ibid.*, 1126.

to be favored above all else. In this scenario, the main objective of copyright — to maximize the creation and publication of socially useful material — is muzzled under foot, as the copyright owner is empathetically seen as the injured party. Further, aside from the fact that the stigma of morally corrupt conduct associated with sampling is terribly misguided, "copyright is not a privilege reserved for the well-behaved." Copyright is not "a reward for goodness but a protection for the profits of activity that is useful to the public education." Moreover, an insistence on upstanding morality as a condition for fairness has nothing to doing with copyright. This means that a fair use inquiry "*should focus not on the morality of the secondary user,* but on whether her creation claiming the benefits of the doctrine is of the type that should receive those benefits." This decision is governed by the four statutory factors — "with a primary focus on whether the secondary use is productive and transformative and whether it causes excessive injury to the market for the original. No justification exists for adding a morality test. This is of course not an argument in favor of immorality. It favors only proper recognition of the scope and goals of a body of law.... Whether the secondary use is within the protection of the doctrine depends on factors pertinent to the objectives of the copyright law and not on the morality motives of either the secondary user or the copyright-owning plaintiff."[84] So generally, judges do not begin their enquiry from the premise of "theft," that is to say, whether or not a defendant has "stolen" property from a copyright owner. Further to this, judges do not proceed from the notion that a defendant has "wronged" the copyright owner. On the contrary, judges (should only) look at whether or not a defendant's use of a copyright owner's work is or isn't in violation of the Copyright Act.

[84] 1126, 1128 (emphasis mine).

Artistic Integrity

The artistic integrity false factor deals primarily with the level of control that an author has over his work. The concept of an author having right of paternity (the right to be acknowledged as author of the work) or the right to pull a work already made public or the right to determine whether or not a work is published or the right to keep a work from change or modification does not exist under United States copyright law, as this series of rights does not fit the objectives of United States copyright law. So to have these rights forcibly placed — by judges — under the umbrella of copyright would be illogical. "[I]t would be preposterous to permit…to claim, as an incident to copyright, the right to public acknowledgement of authorship, the right to prevent publication, the right to modify a published work, and to prevent others from altering their work.... Our copyright law has developed over hundreds of years for a very different purpose and with rules and consequences that are incomparable with the *droit moral,*"[85] the French law that enforces the aforementioned rights associated with the Artistic Integrity false factor.

A grocery list, a random note on a napkin, a letter to the delivery man outside your door, a to-do list — All are privileged under United States copyright law, but none are *artistic*; every copyrighted work is not of an artistic nature. Thus, it's not practical that every copyrighted work should give the copyright owner the right to public acknowledgement of authorship, the right to prevent publication, the right to modify a published work, and to prevent others from altering their work of art. Moreover, the preservation of artistic *integrity*, like the assessment of artistic *taste*, is not the job of judges, nor is it a feature built into the design of United States copyright law. United States copyright law is based on well-guarded constitutional policy that aims to protect free speech while disfavoring everything that threatens it. Therefore, the artistic integrity false factor is "antithetical to the utilitarian goals" of copyright law.

[85] Leval, 1128-1132.

Privacy

The privacy false factor deals with the notion of privacy and copyright. Many people believe that copyright law protects privacy. This is wrong. First, copyright can't generally be protected without a *public* filing in the Library of Congress. Second, United States law already protects privacy; however, this is not the domain of *copyright* law. Moreover, "the copyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so. Copyright protects only the expression, not the facts revealed, and thus fails to protect privacy interest involved." Further, while the right of privacy is highly regarded in the United States, free speech is valued equally if not more. Hence, the "occasional attempt to read protection of privacy into the copyright is…mistaken." "In this country, a right to privacy has explicitly developed to shield private facts from intrusion by publication," and "American law… maintains a powerful constitutional policy that sharply disfavors muzzling speech."[86]

[86] Leval, 1130 (emphasis mine).

Empirical Study of Fair Use Cases Involving Music, 2006 – 2023

The focus of Barton Beebe's empirical studies of U.S. copyright fair use opinions was not specifically on the subject matter of music. Moreover, Beebe's studies didn't offer any special attention on or insight to cases involving digital sampling. Beebe did note, however, that "fair use opinions involving music made up *only 6.2%* of the fair use cases studied."[87] Since music sampling is the central focus of this book, I wanted to take a closer look at fair use cases involving music, particularly cases from 2006 to 2023 because 2006 is the year after the Sixth Circuit's *Bridgeport* decision. What follows in this section are the tables for my empirical study of fair use case law involving music, along with my analysis of the data. While certainly not as extensive as Beebe's empirical studies, my empirical study nonetheless sheds some important light. Finally, I should note that all of the figures that I discussed are based on the United States Copyright Office Fair Use Index.

In the 17 years between 2006 and 2023, the U.S. Copyright Fair Use Index[88] recorded 140 cases (and the related results and opinions) that involved fair use. The number of cases in which a mixed result or remand was the result totaled 36. So 12% of the time, the results were neither clear cut fair use or clear cut not fair use. However, the number of cases in which fair use was found totaled 62; which means that fair use was found *44%* of time in all cases. And the number of cases in which fair use was *not* found totaled 61; which means that fair use was *not* found *43.5%* of the time in all cases. On the surface then, it would appear that, overall, fair use found or fair use not found is a 50/50 chance proposition in court. But this number is very misleading. If we want to have a better understanding of fair use case law – particularly if we want to identify if there's any predictability — we have to drill down

[87] 572-73.

[88] United States Copyright Office Fair Use Index (2023) https://www.copyright.gov/fair-use/fair-index.html.

further into the empirical evidence and look at the types of cases and subject matter involved in the cases. For our purposes here, those fair use cases that involved music are where my analysis takes its focus.

Of all the fair use opinions reported between 2006 and 2023, as recorded by the U.S. Copyright Fair Use Index, there were 16 cases in which music was involved. Here's how these cases break down by category.

Two cases involved the use of songs in karaoke machines: *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007) and *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522 (9th Cir.) 2008 [Jurisdiction: Sixth Circuit, Ninth Circuit]. Fair use not found in either of these cases.

Three cases involved the use of portions of a song in a documentary film: *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008), *Red Label Music Publ'g v. Chila Prods.*, 18 C 7252 (N.D. Ill. May 30, 2019), and *Brown v. Netflix, Inc.*, No. 19 Civ. 1507 (ER) (S.D.N.Y. May 27, *2020)* [Jurisdiction: Second Circuit]. Fair use found in *Red Label Music Publ'g* and in *Brown v. Netflix, Inc;* and in *Lennon*, the court noted: "Defendants likely to prevail on a fair use defense."

One case involved the use of a portion of a song in a television montage: *House of Bryant Publ'ns, L.L.C.* v. A*&E Television Networks*, No. 3:09-0502 (M.D. Tenn. Oct. 30, 2009) [Jurisdiction: Sixth Circuit]. Fair use not found in this case.

One case involved the use of "previews" of ringtones and ringback tones in mobile store — *United States v. Am. Soc'y of Composers, Authors and Publishers*, 599 F. Supp. 2d 415 (S.D.N.Y. 2009), vacated, 627 F.3d 64 (2d Cir. 2010) [Jurisdiction: Second Circuit]. Fair use not found in this case.

One case involved the use of song in political video/Parody/ Satire: *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010) [Jurisdiction: Ninth Circuit]. Fair use not found in this case.

Two cases involved digital sampling: *Estate of James Oscar Smith v. Cash Money Records, Inc., et al.*, No. 1:14-cv-02703 (S.D.N.Y. May 30, 2017) (2020 WL 522013 (2d Cir. Feb. 3,

2020)[Jurisdiction: Second Circuit]; and *Chapman v. Maraj*, No. 2:18-cv 09088-VAP-SS (C.D. Cal. Sept. 16, 2020)[Jurisdiction: Ninth Circuit]. Note: *Chapman* also condisered whether the use of a musical work for artistic experimentation is a fair use. Fair use found in both cases.

One case involved the use of short clips of someone's voice — from a YouTube video — in a song and in live musical performances: *Estate of Anthony Barré and Angel Barré v. Carter, et al.* No. 17-1057 (E.D. Lou. July 25, 2017) [Jurisdiction: Fifth Circuit]. Fair not found in this case.

One case involved the use existing lyrical phrase/pattern in new song/sound recording: *Oyewole v. Ora*, 291 F. Supp. 3d 422 (S.D.N.Y. Mar. 8, 2018) [Jurisdiction: Second Circuit]. Fair use found in this case.

One case involved the use of portions of a recorded live musical performance: *Comerica Bank & Trust, N.A. v. Habib*, No. 17-12418-LTS (D. Mass. Jan. 6, 2020) [Jurisdiction: First Circuit]. Fair use not found in this case. Additional note: There was heavy emphasis on *lack* of transformation in this case.

One case involved the use of medley of musical works for competitive show choirs: *Tresóna Multimedia v. Burbank High School Vocal Music Ass'n*, Nos. 17-56006, 17-56417, 17-56419 (9th Cir. Mar. 24, 2020) [Jurisdiction: Ninth Circuit]. Fair use found in this case.

One case involved the use of a musical work for artistic experimentation: *Chapman v. Maraj* No. 2:18-cv-09088-VAP-SS (C.D. Cal. Sept. 16, 2020) [Jurisdiction: Ninth Circuit]. Fair use found in this case.

One case involved the use of a musical work — the chorus of a children's song — to accompany a burlesque dance routine as it appears in a documentary film. *Brown v. Netflix, Inc.* 855 F. App'x 61 (2d Cir. May 18, 2021) [Jurisdiction: Second Circuit]. Fair use found in this case.

Three Critical Observations from the Fair Use Opinions Involving Music (Reported Between 2006 and 2023)

Looking at the fair use opinions involving music between 2006 and 2023, there are a number critical observations that we can make. First, in 8 out of the 16 cases, fair use was found; so *50%* of the time fair use was found. And in 1 out of the 16 cases, the court noted that "fair use was likely to be found." So we should count that as 9 out of the 16 cases fair use was found, which would bring the percentage up to *56%* of the time fair use was found when music was involved.

Second, in 5 out of 16 cases, fair use was not found; so *31%* of the time, fair use was *not* found. But these numbers are misleading. In the 5 cases in which fair use was *not* found, two of those cases were about the use of "whole songs" in "karaoke machines." Also, in the 5 cases in which fair use was not found, one case was about the use of "previews" of ringtones. Further, in the 5 cases in which fair use was not found, one case was about the use of short clips of someone's voice — from a YouTube video — in a song and in live musical performances. Finally, of the seven cases in which fair use was not found, one case was about the parody/satire of songs; and in this case, the court found that defendants used "substantial portions" of the songs, portions that went "far beyond what was needed" or necessary to "convey allegedly parodic points." Taken together, that means that in 4 out of the 5 cases in which fair use was not found, the cases turned on the *lack* of transformation. And in 1 out of the 5 cases in which fair use was not found, the case turned on, among other elements, the use of "substantial portions" of songs.

Next, the data from the fair use opinions involving music between 2006 and 2023 show that two jurisdictions — the Second and Ninth Circuits — still dominate fair use opinions, even when it comes to cases involving music.

Next, in the two cases that involved sampling (in the traditional sense, not the vocal clips from someone's voice in a YouTube video performance), fair use was found. That's a 100% success rate.

Further worth noting is this. The United States Copyright Office Fair Use Index does not include the case *Hutson v. Notorious B.I.G., LLC* (2015)[89]. In that case, the court determined that since the plaintiff, Lee Hutson, could not prove ownership of the copyright, he lacked standing to sue for the alleged infringement. So the case was decided on those grounds. However, what's worth noting is that in *Notorious B.I.G. LLC v Lee Hutson*, 2:14-cv-02415 (2014), the estate of Notorious B.I.G.'s filed for declaratory relief *prior* to Hutson's suit, and in their filing, the estate of Notorious B.I.G. affirmed fair use. Specifically, in their filing for declatory relief, the estate of Notorious B.I.G. cited their expert's findings and included Easy Mo Bee's (producer of the B.I.G. track) meticulous, multidimensional description of how he composed the beat for "The What." The estate of Notorious B.I.G. didn't deny the actual sampling; instead, it went on the offensive and, in citing its experts analysis and Easy Mo Bee's testimony, it asserted that the use did not violate any valid copyright interest held by Hutson, and, more importantly, that the "use" was both "de minimis and fair use."[90]

Next, given the fact that half of the fair use opinions involving music between 2006 and 2023 have been decided in the Second Circuit and the Ninth Circuit, and given the fact that the Second and Ninth Circuits dominate fair use opinions, there's at least one other deduction we might be able to make as far as sampling, music, and fair use are concerned. Generally speaking, sample-based hip hop/rap musicians who counter a copyright infringement claim in court with an affirmative fair use defense are likely to win, especially in the Second and Ninth Circuits.

Finally, as much of this chapter has already confirmed, conventional wisdom doesn't match up with reality when it comes to fair use, digital sampling, and hip hop/rap music. First, there's been a dearth of copyright infringement cases involving digital sampling that have made their way to an opinion. Second, in the those cases that *did* involve digital sampling and the defendant's affirmative fair use defense, fair use was found. So where does this conventional

[89] *Hutson v. Notorious B.I.G., LLC*, No. 14-cv-2307 (RJS) (S.D.N.Y. Dec. 21, 2015).
[90] Notorious B.I.G. LLC v Lee Hutson, 2:14-cv-02415 (2014).

wisdom about sampling, music, and fair use come from? Where fair use is concerned, hip hop/rap music and digital sampling has an exceptional track record in the courts. Not good record. *Exceptional*! We're talking a 100% win rate. And this includes the Supreme Court's 1994 decision in *Campbell v. Acuff-Rose Music, Inc.*, to date the most important case in terms of present-day fair use analysis, particularly with regards to the transformative element of the first factor of the four-factor fair use test.

***

Table 1: Fair Use Cases Involving Music (2006 – 2023)

Category	Case	Year	Court	Jurisdiction	Outcome
Use of songs in karaoke Machines	*Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007)	2007	6th Cir.	Sixth Circuit	Fair use not found
	Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522 (9th Cir. 2008)	2008	9th Cir.	Ninth Circuit	Fair use not found
Use of portion(s) of a song(s)/sound recordings in a documentary film	*Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008)	2008	S.D.N.Y.	Second Circuit	Plaintiffs preliminary injunction denied: "Defendants likely to prevail on a fair use defense."
	Red Label Music Publ'g v. Chila Prods., 18 C 7252 (N.D. Ill. May 30, 2019)	2019	S.D.N.Y.	Second Circuit	Fair use found
	Brown v. Netflix, Inc., No. 19 Civ. 1507 (ER) (S.D.N.Y. May 27, 2020)	2020	S.D.N.Y.	Second Circuit	Fair use found

Use of "previews" of ringtones and ringback tones in mobile store	*United States v. Am. Soc'y of Composers, Authors and Publishers*, 599 F. Supp. 2d 415 (S.D.N.Y. 2009), vacated, 627 F.3d 64 (2d Cir. 2010)	2009/ 2010	S.D.N.Y.	Second Circuit	Fair use not found
Use of portion of song in television montage	*House of Bryant Publ'ns, L.L.C. v. A&E Television Networks*, No. 3:09-0502 (M.D. Tenn. Oct. 30, 2009)	2009	M.D. Tenn.	Sixth Circuit	Fair use not found
Use of song in political video/ Parody/Satire	*Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010)	2010	C.D. Cal.	Ninth Circuit	Fair use not found
*Digital Sampling	*Estate of James Oscar Smith v. Cash Money Records, Inc., et al.*, No. 1:14-cv-02703 (S.D.N.Y. May 30, 2017) (2020 WL 522013 (2d Cir. Feb. 3, 2020) — the Drake "Pound Cake" case	2017/ 2020	S.D.N.Y.	Second Circuit	Fair use found Affirmed on appeal
Use of short clips of someone's voice — from a YouTube video — in a song and in live musical performances	*Estate of Anthony Barré and Angel Barré v. Carter*, et al. No. 17-1057 (E.D. Lou. July 25, 2017) — Beyoncé "Formation" case	2017	E.D. Lou.	Fifth Circuit	Fair use not found; prelimi-nary ruling

Use existing lyrical phrase/ pattern in new song/sound recording	*Oyewole v. Ora*, 291 F. Supp. 3d 422 (S.D.N.Y. Mar. 8, 2018) — The Notorious B.I.G. "Party and Bullshit" case	2018	S.D.N.Y.	Second Circuit	Fair use found Affirmed on appeal
Use of portions of a recorded live musical performance	*Comerica Bank & Trust, N.A. v. Habib*, No. 17-12418-LTS (D. Mass. Jan. 6, 2020)	2020	D. Mass	First Circuit	Fair use not found Note: Heavy emphasis on *lack* of transfor-mation
Use of medley of musical works for competitive show choirs	*Tresóna Multimedia v. Burbank High School Vocal Music Ass'n*, Nos. 17-56006, 17-56417, 17-56419 (9th Cir. Mar. 24, 2020)	2020	9th Cir.	Ninth Circuit	Fair use found
*Digital sampling/Use of portions of musical works (lyrics and vocal melodies) for the purpose of experimenta-tion	*Chapman v. Maraj*, No. 2:18-cv 09088-VAP-SS (C.D. Cal. Sept. 16, 2020) —"Tracy Chapman v. Nicki Minaj"	2020	C.D. Cal.	Ninth Circuit	Fair use found
Use of a musical work — the chorus of a children's song — to accompany a burlesque dance routine as it appears in a documentary film	*Brown v. Netflix, Inc.* 855 F. App'x 61 (2d Cir. May 18, 2021)	2021	S.D.N.Y.	Second Circuit	Fair use found

*In both cases involving sampling, fair use was found.

Table 1: Fair Use Cases Involving Music (2006 –2023)

The Predictability of Fair Use

What if I told you that conventional wisdom about fair use case law is wrong? And what if I told you that the small number of cases that this conventional wisdom is based on has been largely overstated?

***

There have been at least three empirical studies of all recorded fair use cases between 1976 (the year fair use was codified in the Copyright Act) and 2019, and the analysis of these studies draw the same conclusion: Conventional wisdom about fair use case law is mostly wrong. While there are many different areas in which this conventional wisdom is mistaken, the studies of Beebe and Samuelson identify and disprove six commonly held assumptions about fair use case law, including the common belief (or assumption) that fair use is "unpredictable." But this is simply not true; the empirical evidence shows that fair use is actually quite predictable and "more coherent than many commentators have perceived."[91]

First, with "disciplined focus on the utilitarian, public-enriching objectives of copyright and by resisting the impulse to import extraneous policies,"[92] something that has been increasingly happening in the courts, we can more readily identify those uses that are likely fair. And, for the most part, this is exactly what we've seen in the limited number of fair uses cases that reached the Supreme Court. In the 28 years between 1978 and 2005, just *five* cases involving fair use have made it all the way to the Supreme Court: *Sony v. Universal City Studios, Inc.70 (1984)*, *Harper & Row, Publishers*, *Inc. v. Nation Enterprises* (1985), *Stewart v. Abend* (1990), and *Campbell v. Acuff-Rose Music, Inc.*73 (1994). And one of these five these cases involved hip hop/rap music and sampling. (A serious recognition of hip hop/rap music as a "useful Art.") Said differently, in the only fair use case involving hip hop/rap music

[91] Pamela Samuelson, "Unbundling Fair Uses," *Fordham Law Review* Volume 77 Issue 5 Article 16 (2009), 2541.
[92] Leval, 1135.

and sampling to reach the Supreme Court, fair use was found. Most commentators will point to the "parody" component of the decision without discussing the Supreme Court's full analysis in *Campbell*. Sure, "parody" received the most attention, but this did not stop the high court from analyzing the transformative nature of the sample-based beat as well. (In the next chapter, I examine *Campbell v. Acuff-Rose Music, Inc.* in more detail.)

Second, the specific jurisdictions under which the bulk of fair use opinions have been recorded also speak to the predictability of fair use:

> **The district and circuit courts of the Second and Ninth Circuits dominated the sample across the twenty-eight-year period** in two closely related ways. First, their courts contributed the great bulk of the opinions sampled. **Table 1 reports that Second Circuit courts accounted for 38.6% of the circuit court opinions and 35.1% of the district court opinions, while Ninth Circuit courts were responsible for 28.4% of the circuit court opinions and 18.0% of the district court opinions.** Percentages for all other circuits, even the Seventh, were in the single digits. ***At the district court level, the Southern District of New York (S.D.N.Y.) alone accounted for 31.3% of the district court opinions,* with the Northern District of California next at 7.6%.** [emphasis mine][93]

Combined, the Second and Ninth Circuits (New York and California) accounted for nearly *70%* of *all* of the fair use circuit court opinions between 1978 and 2005. And for the period after 2005, of the 140 total fair use circuit court opinions between 2006 and 2023, the Second Circuit court accounted for 38% of the circuit court opinions and the Ninth Circuit accounted for 26% of the circuit court opinions; that's 64% combined.[94] So the Second and Ninth Circuits accounted for *67%* of *all* of the circuit court opinions involving fair use between 1978 to 2023. These numbers don't just tell us that the Second and Ninth Circuits dominate fair use case law, these numbers also suggest that the Second and Ninth Circuits are influencing other courts outside of the Second

[93] Beebe, 567.
[94] United States Copyright Office Fair Use Index (2023) https://www.copyright.gov/fair-use/fair-index.html.

and Ninth Circuits. In terms of the Second and Ninth Circuits' influence on courts outside those circuits, Beebe has noted that:

> **fair use opinions from courts of the Second and Ninth Circuits *exerted a great deal of influence* — much more than is generally thought — on fair use opinions *outside* of those circuits.** Specifically, data on the import and export of fair use case citations between the various circuits in the opinions studied demonstrate that the Second and the Ninth Circuits both enjoyed *substantial* trade surpluses. For example, circuit and district court opinions from outside the Second Circuit cited to an average of 1.55 circuit court cases from the Second Circuit per fair use analysis, and those from outside the Ninth Circuit cited to an average of 0.68 circuit court cases from the Ninth Circuit per fair use analysis. **No other circuits boasted nearly as much influence outside of their borders.**
>
> The next most influential circuit after the Ninth was the Fifth, with 0.14 Fifth Circuit cases cited per fair use analysis by circuit and district courts outside of the Fifth Circuit-and this is largely the result of the authority of pre-1981 Fifth Circuit case law for courts of the Eleventh Circuit. In fact, by this measure, **S.D.N.Y. courts were more influential than any circuit court other than the Second and the Ninth Circuits and were nearly as influential as the Ninth Circuit.**
> [emphasis mine][95]

Consequently, in terms of predictability, if we know that the Second and Ninth Circuits account for basically 7 out of 10 fair use circuit court opinons, and we know that the Second and Ninth Circuits are influencing courts outside of those circuits, and we know that the "S.D.N.Y. courts were more influential than any circuit court other than the Second and the Ninth Circuits and were nearly as influential as the Ninth Circuit," then we are firmly in the area of being able to determine the predictability of fair use.

If the Second and Ninth Circuits have "a great deal of influence" on the fair use opinions of courts outside of those circuits, then we should look more closely at (and weigh heavier) the opinions of the Second and Ninth Circuits. Specifically, we should look at the "personality" of the Second and Ninth Circuits; we should look for

[95] *Beebe*, 567-68.

bottom-line parallels between the Second and Ninth Circuits; we should pinpoint the kinds of thresholds for fair use that the Second and Ninth Circuits tend to look for; and we should identify if the Second and Ninth circuits have or have not used the objectives of copyright as the guide for their fair use analysis. This is particularly important when we turn our attention towards fair use cases involving *music*, because two of the three biggest major record labels are headquartered in New York City (under the jurisdiction of the Second Circuit), and the other "big three" major record label is headquartered in Los Angeles (under the jurisdiction of the Ninth Circuit). Thus, the fair use opinions from the Second and Ninth Circuits go a long way in demonstrating the predictability.

Regarding "personality" of the Second Circuit, there is one thing that should be noted. The "Second Circuit stands out as *a relatively fair-use-friendly circuit*"[96] I interpret this to mean that any secondary use of copyrighted work that is transformative and speaks to the objectives of copyright will likely be determined fair use in the Second Circuit.

In terms of bottom-line parallels between the Second and Ninth Circuits, it's critical to note that the Second and Ninth Circuits mirror each other in their focus on the transformative use element of the first factor of fair use. And a fact critical to sampling and hip hop/rap music is that the courts under jurisdiction of the Second and Ninth Circuits have clearly stated that the de minimis doctrine does indeed apply to sound recordings; the Ninth Circuit even created a circuit split in emphatically maintaining this fact, which was a strong rejection of the Sixth Circuit's decision in *Bridgeport*. Again, de minimis *and* fair use apply to all copyrightable subject matter. That the Second and Ninth Circuits — the two most dominate circuits in fair use case law — agree on this fact of copyright law speaks loudly to the predictability of fair use.

Another bottom-line parallel worth noting between the Second and Ninth Circuits extends also to the Supreme Court. Fair use case law in the United States essentially boils down to just "*122* opinions generated by *four* courts — the Supreme Court, the Second and

[96] *Ibid*.

Ninth Circuits, and the Southern District of New York — and the progeny of these opinions in the other federal courts."[97] Looking at this from a big-picture standpoint, we can then clearly see the primary parallel or commonality that links these four courts: Each court's emphasis on the importance of the transformative element of the first factor of fair use.

Finally, the appeals data also tells us a great deal about the stability and predictability of fair use. Conventional wisdom says that our fair use case law is especially unstable. While this may appear to be true with Supreme Court fair use case law, this is certainly not the case in the lower courts. There, circuit courts have reversed the district court's fair use holding *only 33.8%* of the time.[98] Put another way, the circuit courts have affirmed the district court's fair use holding *66.2%* percent of the time. In other words, when district courts find fair use, and the case is appealed to the circuit courts, the circuits affirm the district courts' decision roughly 7 out of 10 times! That's hardly a case for an unstable rate, lack of stability, or even *unpredictability*. If your fair use defense prevails in the district court — and the likelihood of that happening is strong when your use of a copyrighted work is transformative — then you're facing at least a *66.2%* chance that even *if* the case is appealed to the circuit, you'll prevail again. And why do I say *if* the case is appealed? That's because the data shows that *only 25%* of the district courts' fair use holdings are ever appealed, which means that *75%* district courts' fair use opinions are *never* appealed! All things considered, I don't know about you, but I like those odds, especially when cases involving sampling actually have a 100% win rate.

***

[97] *Ibid*, (emphasis mine).
[98] *Ibid*, 574.

Given the diligence of the courts, an increased focus on the utilitarian, public-enriching objectives of copyright, the increased emphasis on the transformative element of the first factor of fair use, the impact of four courts — the Supreme Court, the Second and Ninth Circuits, and the Southern District of New York — and the overall stability and predictability of the lower courts, the conventional wisdom that fair use is *not* predictable is wrong. Any defendant can affirm fair use, and perhaps this where the misconception about the predictability of fair use stems from. (There have been cases where defendants were ill-advised to affirm fair use, for example, cases involving karaoke machines.) But in terms of predictability, the threshold, as expressed by the four most influential courts, is quite clear: If the use is transformative and fulfills the utilitarian, public-enriching objectives of copyright, then the use is likely fair use. So as Beebe has noted, "when viewed as a whole, the fair use case law presents itself as far more stable and *predictable* — and unchanging — than the headline-making cases might suggest."[99]

Finally, there's another thing that stands out when we look at the available data of fair use opinions and cases over a 41-year period. Between January 1, 1978 (the effective date of the 1976 Copyright Act) and 2019, the federal courts produced 579 reported fair use opinions from 435 cases. In that span of 41 years, there were only *three* fair use opinions produced that involved digital sampling. Said differently, the three fair use opinions involving digital sampling make up 0.005% of all fair use opinions reported and 0.007% of all of the cases in which fair use was raised.[100] These are miniscule figures. Still, it must be repeated again: In each of the fair use opinions involving digital sampling and hip hop/rap music, fair use was found.

[99] *Ibid*, 37 (emphasis mine).
[100] Beebe updated, 2-3.

Chapter 19

Fair Use, Part 3: The Supreme Court, and the Music Industry

What the United States Supreme Court Says About Fair Use and How the Music Industry Prefers to View Fair Use

In the post-*Campbell* fair use world, more and more "transformative" uses have been deemed non-infringing. Since *Campbell* has had the most impact on how courts now approach the transformative use element of the first factor — the most impactful factor of the four fair use factors — it's important to explore *Campbell* in detail. Thus, what follows in this chapter, the third of three chapters that focus specifically on fair use, is a detailed examination of *Campbell v. Acuff-Rose*, a case ostensibly about parody as fair use, but a case much more deeper and instructive than that, especially since sampling and hip hop/rap music is also involved.

Fair Use in *Campbell v. Acuff-Rose*

Campbell v. Acuff-Rose (1993) was about whether 2 Live Crew's song "Pretty Woman," a parody of Roy Orbison's song "Oh, Pretty Woman," could be fair use within the meaning of the Copyright Act. This case wasn't directly about sampling; but inasmuch as "Pretty Woman" is a case about fair use — it did make use of a sample of the Orbison recording — it can, nonetheless, tell us a great deal about how fair use applies to all forms of copying and copyright material in general. So notwithstanding the fact that this case centered around parody, what's most important is that

the Supreme Court's opinion in *Campbell* allows us to understand a great deal about the scope of fair use.

Very few cases involving sampling have actually made it to the courts. This is because in most infringement suits involving sampling, the claimants and alleged infringers settle out of court. So there's nothing that we can take away about fair use in those cases. But in *Campbell*, one of the biggest fair use court cases in history, the Supreme Court made a number of things clear about the four statutory factors and the purpose and scope of the fair use doctrine. But before analyzing the Supreme Court's ruling in this landmark case and what it specifically says about fair use, it's necessary to offer a quick background on the case.

Background On Campbell

In 1989, the rap group 2 Live Crew, lead by Luther Campbell AKA Luke Skyywalker, sampled and parodied the Roy Orbison song "Oh, Pretty Woman" (1964). Roy Orbison and William Dees wrote the song and assigned their rights in it to music publisher Acuff-Rose. Before releasing the song, 2 Live Crew's manager informed Acuff-Rose of the parody, expressed that they would give all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and indicated that they were willing to pay a fee for their use of it. Acuff-Rose refused permission, stating that they would not permit the use of a parody of "Oh, Pretty Woman."

Despite this, in July of 1989, 2 Live Crew released their album *As Clean As They Wanna Be*, which contained the song "Pretty Woman," a parody of the Orbision song. The credits on the album identified the authors of "Pretty Woman" as Orbison and Dees and its publisher as Acuff-Rose. Nearly a year later, after some 250,000 copies of *As Clean As They Wanna Be* had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records, for copyright infringement.

2 Live Crew asserted that their song "Pretty Woman" made fair use of the Orbison song. The District Court (M.D. Tennessee, Nashville Division) granted summary judgment, holding that 2 Live

Crew's song *did* make fair use of the Orbison song, emphasizing that the commercial purpose of 2 Live Crew's song did not bar it from being fair use; that 2 Live Crew had not taken an excessive amount of the Orbison song; and that it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original."

But the Court of Appeals (Sixth Circuit) ruled against 2 Live Crew and remanded the district court's decision, holding that the commercial nature of the parody rendered it "presumptively" unfair under the first of four factors relevant under the Copyright Act of 1976, 17 U.S.C. § 107; and that, "by taking the 'heart' of the original and making it the 'heart' of a new work, 2 Live Crew had, qualitatively, taken too much under the third § 107 factor; and that market harm for purposes of the fourth § 107 factor had been established *by a presumption attaching to commercial uses*."[1] However, the Supreme Court later held that a commercial parody may qualify for fair use and remanded the case to the district court for further proceedings consistent with the Supreme Court's opinion. The Supreme Court did not, in the end, specifically rule that "Pretty Woman" was a parody, even though the high court's analysis left no doubt that it was. Nonetheless, the Supreme Court left the final determination in the hands of the district court, which was to apply the new ruling to the facts. But at that point, Acuff-Rose had little hope of winning.[2]

Analysis of the Supreme Court's Opinion In *Campbell*: Weighing the Four Statutory Factors Together In a Fair Use Inquiry

In coming to its opinion in *Campbell*, the Supreme Court weighed the four statutory factors together. On the first factor, "The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes…," the Supreme Court asserted that the main clause of this factor "speaks of

[1] *Campbell v. Accuff-Rose Music*, 510 U.S. 569 (1994), p569.
[2] *Id.*, p. 594.

a broader investigation into 'purpose and character,'" and points to the importance of transformation, not mere verbatim duplication, and how it figures into a fair use inquiry:

> Under the first of the four § 107 factors, "the purpose and character of the use, including whether such use is of a commercial nature . . . ," **the enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is "transformative," altering the original with new expression, meaning, or message.** ***The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.…***
>
> The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation...[emphasis mine][3]

Addressing the "...commercial nature or is for nonprofit educational purposes" part of the first factor, the Supreme Court emphasized that the commercial or nonprofit educational character of a work is not conclusive. In other words, if a work is for profit, it doesn't automatically disqualify it from fair use. While the commercial purpose of a work does not bar it from being fair use, a nonprofit educational purpose of a work does not make it presumptively fair use either:

> **the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.** [emphasis mine][4]

The Supreme Court further pointed out that the more transformative the new work, the less commercial character matters:

> Although such transformative use is not absolutely necessary for a finding of fair use, *Sony*, supra, at 455, n. 40,11 **the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at**

[3] *Id.*, 569. 579.
[4] *Id.*, 584.

> **the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright,…and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.** [emphasis mine][5]

Also, with regard to transformation, the Supreme Court stated that the transformation exhibited in the new work should be something "reasonably" perceived by the courts. In its inquiry of 2 Live Crew's parody, the Supreme Court reasonably distinguished the differences between the Orbison original and 2 Live Crew's parody as a whole:

> …**we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree.** 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete´ of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. **It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.** [emphasis mine][6]

On the second factor, "The nature of the copyrighted work," the Supreme Court added no further clarity, stating simply that:

> This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. See, e. g., *Stewart v. Abend*, 495 U. S., at 237–238 (contrasting fictional short story with factual works)…[7]

[5] *Id.*, 579.
[6] *Id.,* 583.
[7] *Id.*, 586.

Regarding the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," the Supreme Court maintained that this factor was born from Justice Story:

> ...the **quantity and value of the materials used**," *Folsom v. Marsh*, supra, at 348) **are *reasonable* in relation to the purpose of the copying.** [emphasis mine][8]

Also in its inquiry of the third factor, the Supreme Court asserted that the question isn't merely about the amount copied, but the substantiality, quality, *and* importance of the portion copied; and that the transformative character or purpose of the first factor comes back into play if there is no transformation but instead a verbatim copy of a substantial portion of the original:

> this factor calls for thought not only about the quantity of the materials used, but about *their quality and importance, too*.
>
> ...whether **"a substantial portion of the infringing work was copied verbatim" from the copyrighted work is a relevant question...for it may reveal a dearth [lack of] of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth;**...
>
> ...a work composed primarily of an original, particularly its heart, **with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.** [emphasis mine][9]

In further explaining how transformation and the purpose and character figure into the third factor inquiry in Campbell, the Supreme Court pointed out that:

> Even if 2 Live Crew's copying of the original's first line of lyrics and characteristic opening bass riff may be said to go to the original's "heart," that heart is what most readily conjures up the song for parody, and it is the heart at which parody takes aim. **Moreover, 2**

[8] *Id.*, 586.
[9] *Id.*, 587-88.

> **Live Crew thereafter departed markedly from the Orbison lyrics and produced otherwise distinctive music.**
>
> **we recognize that the extent of permissible copying varies with the purpose and character of the use**…. The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives. [emphasis mine][10]

Here, with sample-based hip hop/rap songs in mind, let's consider the Supreme Court's clarification of the third factor. When looking at the amount copied, the Supreme Court notes that courts are to be "reasonable" in determining the "substantiality, quality, *and* importance of the portion copied." So turning to the drum kick sample example that I've used throughout this book and applying the Supreme Court's guides on transformative use (factor one) and amount taken (factor two), here's the question. Is it "reasonable" to consider that a sample of a single drum kick from an old Led Zeppelin song is substantially or qualitatively important? Setting aside that such a taking is de minimis, no court could "reasonably" say that a drum kick sample that is used to create an entirely new drum program in an entirely new song — a song that also adds other musical elements, including a vocal performance — is not transformative or not consistent with the goal of copyright: "to promote science and the arts…by the creation of transformative works" like sample-based hip hop/rap songs.

I don't suggest that a drum kick sample is or should be a bright line for amount taken or the quality, substantiality, and importance of the portion copied. I use the drum kick sample to illustrate just *one* example of how such determinations should be reasonably made. Given the Supreme Court's instruction in this regard, the same guides could be used for determining whether four notes of a musical phrase or a rhythmic lick or a sound-stab or a snippet of melody isn't (or is) a quantitatively, qualitatively, and substantially important portion of the song copied. The possibilities are endless! And this is precisely why there is no bright line. Moreover, it's the

[10] *Id.*, 570, 586-87.

reason why each fair use case is considered on a case-by-cases basis, because "the extent of permissible copying *varies* with the purpose and character of the use."[11]

Finally, regarding the fourth factor, "The effect of the use upon the potential market for or value of the copyrighted work," the Supreme Court emphasized that commercial gain does *not* presumably constitute market harm. Thus, the high court reaffirmed that a work for commercial gain does not bar a work from fair use protection, just as a work for nonprofit does not presumably make a work fair use. For example, a free mixtape doesn't presumably mean that the use of samples on that mixtape are fair use. All factors must be weighed together in such an occurrence. But the "verbatim duplication" of a work does not favor a fair use finding. Therefore, a mixtape that uses the entire — unchanged — copyrighted song or beat of another recording artist tips the scale away from being a fair use. This is because a beat that is *copied whole* can be seen as a market substitute for the original. (Incidentally, this is why Mac Miller's verbatim use of Lord Finesse's beat for "Hip 2 Da Game" (1995) on Miller's "Kool Aid and Frozen Pizza" (2010) is not a fair use.)

So the question is, in the context of this factor: What is the likelihood that the new work will act as a substitute for the original that it sampled? If the sample (copying) is minimal and the use transformative, there's less of a chance that the new work will act as a substitute for the original. But if the copying is substantial and not transformative, then there's a better chance that the new work can act as a substitute for the original. Simply put, mere duplication for commercial purposes does not favor fair use:

> **The Court of Appeals erred in resolving the fourth § 107 factor, "the effect of the use upon the potential market for or value of the copyrighted work," *by presuming*…the likelihood of significant market harm based on 2 Live Crew's use for commercial gain. No "presumption" or inference of market harm…involving something beyond mere duplication for commercial purposes. The cognizable harm is market substitution, not any harm from**

[11] *Ibid*.

> **criticism.** As to parody pure and simple, it is unlikely that the work will act as a substitute for the original, **since the two works usually serve different market functions.** The fourth factor requires courts also to consider the potential market for derivative works...If the later work has cognizable substitution effects in protectible markets for derivative works, the law will look beyond the criticism to the work's other elements. [emphasis mine][12]

Regarding verbatim copying of the original in its entirety, sampling in the hip hop/rap music tradition never involves verbatim copying and use of a whole song. Although some forms of sampling may copy verbatim the heart of a recording, that's still only a portion of the original; and such instances of copying are still distinguished by the amount and level of transformation. For example, sampling a portion of The Police's hit song "Every Breath You Take" and chopping it up, transforming it beyond recognition, is one thing. But sampling the heart of "Every Breath You Take" and doing an interpolation of it, or essentially something very close to a rap *version* of it with different lyrics, is another thing altogether; that's not fair use. But the more transformation there is of the portion copied from the original, the less likely the new work can be seen as a market substitution for the original and, therefore, the less likely market harm to the original.

Furthermore, with regards to market harm to derivative works, the Supreme Court was not referring to "derivative works" in the sense of beats made using samples (snippets, phrases from recordings), but rather the high court was referencing genre versions (of the complete song), like a country music or rap *version* (same lyrics and melody) of "Oh, Pretty Woman.":

> 2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry, …**the likely effect of 2 Live Crew's parodic rap song on the market for a nonparody, rap *version* of "Oh, Pretty Woman.** [emphasis mine][13]

[12] *Id.*, 571.
[13] *Id.*, 571, 593.

Thus, here, the Supreme Court was not referring to the harm of a sample licensing market. All samples are not presumably infringement; therefore, all samples do not require permission or licensing.

What the Supreme Court Reaffirmed and Made Clear About a Fair Use Inquiry

Promoting the Purpose of Copyright Law (and the Principle of Fairness) Should Always Be the Main Concern

In its opinion in *Campbell*, the Supreme Court didn't merely express why 2 Live's Crew parody of Roy Orbison's "Oh, Pretty Woman" was fair use or why a commercial work could qualify as fair use, the hight court reaffirmed much more. First, the Supreme Court demonstrated how fair use is properly determined in accordance with the statute and common case law — i.e. the judge-made fair use doctrine — for which the statute was based on. The Supreme Court explained that the four statutory factors must be "explored and weighed together in light of copyright's purpose of promoting science and the arts," and that the four statutory factors could not be treated in isolation. In other words, the four factors are to be explored and weighed together not in the light of equity or what's *presumably* fair to the copyright owner or alleged infringer, but rather in light of the purposes of copyright.[14]

Also, the Supreme Court emphasized that a fair use analysis should "avoid *rigid* application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Further, the high court added that there could be no bright-line rules in the analysis, as Congress had "resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it *urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence."* The Supreme Court asserted that this was why "Congress had 'eschewed a rigid, bright-line approach to fair use."[15] Thus, the

[14] *Id*., 569, 578.
[15] *Id*., 584.

Supreme Court maintained that "the task is *not* to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." For as the high court pointed out, Congress intended that fair use, as codified in the Copyright Act, remain within the spectrum of the judge-made doctrine from which it came:

> Congress meant § 107 "to restate the present judicial doctrine of fair use, ***not to change, narrow, or enlarge it in any way"*** and intended that courts continue the common-law tradition of fair use adjudication.[16]

The goals of copyright law was another theme that the Supreme Court emphasized in *Campbell*. Throughout its opinion, the high court noted that courts must keep in mind the goals of copyright law when conducting a fair use inquiry, observing that, because the fair use inquiry often requires "close questions of judgment," the goals of copyright law, i.e. to promote the progress of Science and useful Arts, should underscore the inquiry:

> Because the fair use enquiry often requires close questions of judgment as to the extent of **permissible borrowing** in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, "to stimulate the creation and publication of edifying matter, are not always best served by automatically granting injunctive relief...
>
> See 17 U. S. C. § 502(a) (court "may . . . grant . . .injunctions on such terms as it may deem reasonable to prevent or restrain infringement"); Leval 1132 (while in the "vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy," such cases are "worlds apart from many of those raising reasonable contentions of fair use" where "there may be a strong public interest in the publication of the secondary work... [emphasis mine][17]

Thus, the Supreme Court strongly reaffirmed that the goal of the fair use inquiry is, ultimately, to serve the purpose of copyright

[16] *Id.*, 577. Also see H. Rpt. 94-1476.
[17] *Id.*, 578.

law, to consider the "public interest" above all, *not* to protect or privilege the copyright owner of the work copied. Overall, what's perhaps most telling about the Supreme Court's unanimous decision in *Campbell* is not just its reaffirmation of the purpose of copyright law, but its strong reminder of the necessity, value, and purpose of fair use:

> **From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought *necessary* to fulfill copyright's very purpose, "[t]o promote the Progress of Science and useful Arts . . . ."** U. S. Const., Art. I, § 8, cl. 8.5 For as Justice Story explained, "[i]n 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.**"[18]

Continuing, the high court expressly made clear that fair use is a "guarantee" to the public, not just an affirmative defense to a copyright infringement claim:

> **...the fair use doctrine's guarantee of breathing space within the confines of copyright…** [emphasis mine][19]

The "Pretty Woman" Sample-Based Beat: What Does the Supreme Court's Opinion In *Campbell* Tell Us About Fair Use and Sampling?

Again, *Campbell* wasn't about sampling *per se*; but inasmuch as "Pretty Woman" did make use of a digital sample of the Orbison recording, it can, nonetheless, tell us a number of things about how fair use applies to sampling. First, it's worth noting that the Supreme Court did not claim that the fair use doctrine does not apply to sound recordings; nor did the high court imply that sampling is presumptively barred from a fair use inquiry. In fact, the high court explained that the language Congress used in its report

[18] *Id.*, 575.
[19] *Id.*, 579.

accompanying the Copyright Act of 1976 indicates *no limitation* on the sorts of copying that courts may consider in a fair use inquiry:

> Senate Report, p. 62. The text employs the terms "including" and "such as" in the preamble paragraph to indicate the ***"illustrative and not limitative" function of the examples given,*** § 101;…, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. [emphasis mine][20]

Thus, Congress gave illustrative examples, but it purposely did not limit the "sorts of copying" that fair use may apply to. So the list of the "sorts of copying" is to be broad and non-exhaustive:

> In determining whether the use made of a work **in *any* particular case** is a fair use the factors to be considered shall include—... [emphasis mine][21]

Given the Copyright Law Revision Report that accompanied the Copyright Act of 1976, an opposite reading of what Congress intended, i.e. an interpretation that Congress intended to *exclude* sound recordings or "any particular case" from fair use, is illogical.

Next, in *Campbell*, the Supreme Court indirectly acknowledged sampling as a legitimate form of copying:

> **2 Live Crew *copied* the characteristic opening bass riff (or musical phrase) of the original [recording],** and true that the words of the first line copy the Orbison lyrics. **But if quotation of the opening riff and the first line may be said to go to the "heart" of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim.** [emphasis mine][22]

This speaks to the point that "quoting" (sampling) sound recordings is one of the "sorts of copying" that fair use applies to. But like all types of copying, it must work its way through all four factors of analysis with the purpose of copyright at the heart of any inquiry.

[20] *Id.*, 577.
[21] *Id.*, 577.
[22] *Id.*, 588.

The Supreme Court continued:

> **2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing "scraper" noise, overlaying the music with solos in different keys, *and altering the drum beat.* See 754 F. Supp., at 1155. This is *not* a case, then, where "a substantial portion" of the parody itself is composed of a "verbatim" copying of the original."**
> [emphasis mine][23]

Here, the Supreme Court recognized that although the bass riff was copied (sampled) and repeated (looped), it was combined with other added elements: "distinctive sounds" and an original "drum beat." So in describing the elements of the sample-based beat for "Pretty Woman," which represent the fundemntal elements of a typical sample-based beat in hip hop/rap music — i.e. a brief sample of a portion of an old song, combined with additional musical elements, particularly a new drum beat — the Supreme Court made it clear that a sample-based beat, in the vein of the "Pretty Woman" sample-based beat, is transformative. In other words, going by the Supreme Court's analysis of the elements that comprised the "Pretty Woman" sample-based beat, the typical sample-based beat in hip hop/rap music is transformative.

Next, the Supreme Court made it clear that the transformative nature of the use — i.e. the sample and flip of the Orbison song — was *not* a "verbatim copy" of the original Orbison song in its entirety, and as such, the use tipped the scales towards fair use.

Finally, by expressing no opinion on whether the music copied and used by 2 Live Crew was an "excessive copying," and remanding this question to the lower courts for evaluation of the amount taken, the Supreme Court signaled that fair use obviously applies to sound recordings. The Supreme Court pointed to the question

[23] *Id.*, 589. A note on repetition: Repetition is a cornerstone of groove-based music; it's invaluable to the entire art form. Without repetition, there is no beat. Therefore, repetition, in and of itself, can not be considered excessive copying when the copy is an small/insubstantial portion of the original. If a poet copies a line from another poet and repeats this one line at the beginning of 12 different stanzas, each with new and original lines following it, is it reasonable to consider the use of the copied line excessive copying?

of whether the "bass riff" sampled from the Orbison song and repeated was excessive or not. The high court did *not* question if the use (sample) *could* be fair use or if fair use (or de miminis) applies to sound recordings, because for the Supreme Court, it was clear. Hence, the remand on the factor two question of "amount taken."

Thus, the Supreme Court reaffirmed that not only does fair use apply to sound recordings — just as with other copyrighted material[24] — but also that a sample of a sound recording is not *presumptively* excessive simply because a sample is repeated in the new work.

[24] H.R. Rep. No. 92-487, at 10 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1572: **"In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title17**.

Fair Use and the Music Industry

With regards to fair use and the music industry, particularly as it pertains to sampling, there has been a huge disconnect between what fair use *is* — i.e. its fundamental purpose and what it was intended to protect— and what most music professionals falsely claim that it is. Since 1998, when the RIAA had its kerfuffle with the sample-based music group Negativland (I cover the incident later in this chapter), one might say that the music industry's official position on fair use and sampling is that some forms of sampling may in fact qualify for fair use. Nonetheless, the de facto, *unofficial* "industry standard" position is that there's such thing as a sample that's fair use or de minimis.

From the early 1990s to 2023, roughly *33 years*, the music industry has taken a "better safe than sorry" stance on sample clearance. Without any concern for whether sampling is one of the "sorts of copying" protected by fair use — as the Supreme Court has attested that it is in *Campbell* — and wihtout any regard for the fact that samples of sound recordings are not *presumptively* infringement, labels have insisted, because of fear of a copyright infringement lawsuit, that *all* samples must be cleared. Under the guise of this "industry standard" practice, the top-down philosophical stance of the music industry is this: *Clear everything! We don't care about fair use. "It's just a defense."* The problem with this stance — a stance that dismisses the fact that some samples may qualify as fair use (and de minimis) — is that it misleads the public about fair use, as it erodes the perception, meaning, and purpose of the fair use doctrine. So in effect, the music industry is denying the purpose of copyright law, undermining the objectives of copyright, and attempting to block sample-based music artists from the "gurantee of fair use."

***

After *Grand Upright* (1991) and *Bridgeport* (2006), the music industry adopted an excessive stance on sample clearance, and the perception of fair use has suffered in its wake ever since. Among music industry lawyers, the commonly held view of fair use is that fair use is only an affirmative defense to a copyright infringement suit. Dina LaPolt, one of the most well known and respected lawyers in the music business (purportedly, she was voted the #1 music business attorney in 2011 by her peers), had this to say about fair use:

> "Fair use is a misnomer. *People start screaming,* 'Fair use, fair use, fair use,' ***but it's just a defense***, which means you have to defend it."[25]

Further demonstrating an astonishingly hostile view of fair use and a lack of understanding of the objectives of copyright, LaPolt added this about fair use:

> **"It's *a useless part* of the Copyright Act. *It should be just deleted.*** No one gets it."[26]

To be certain, fair use is far from "useless." Fair use is absolutely one of the most important parts of the Copyright Act. But given that a leading music industry lawyer is so dismissive of fair use speaks volumes. But it's not just the dismissal of fair use that's the problem. First, it's the overall lack of respect for copyright law, and the intent of Congress in creating it. Second, it's the willingness to subvert the Copyright Act. For example, in a 2007 interview at Loyola University (New Orleans), LaPolt delivered a condemnation of another area of copyright law: sound recording royalties. But she also gave a telling closeup of how the music industry has long subverted copyright law through their own "industry custom." "We have the laws," LaPolt said, "and then we have what we call 'industry custom'…*We get stuck with these laws made by the blowbags in Congress, who don't have a shit's idea what the fuck we do for a*

[25] Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* , (Duke University Press Books, 2011), 238, 240 (emphasis mine).
[26] Ibid.

living. So they make these laws and we have to live with this crap. So they make these laws, then we turnaround — those that run the music industry — and we make up our own crap, and do what we think is right. *Which is called 'industry custom.'"*[27]

LaPolt is certainly not alone in her dismissal of fair use. Tim Quirk, another music industry insider who also spoke with the authors of *Creative License*, echoed LaPolt when he said: "You ask a lawyer for a record company, which I have done — if you ask Cary Sherman, head of the RIAA (Recording Industry Association of America) — he will look at you in the eye and say, 'There is no such thing as fair use.' He will actually say that. And he will say, 'It is **nothing but a *negative* defense** to a copyright infringement claim. It doesn't exist absent a claim that *you've done something wrong.*'"

The statements by LaPolt and Quirk demonstrate the music industry's hostility towards fair use. More importantly, their statements are in direct odds both with the Copyright Act and what the Supreme Court has strongly reaffirmed about fair use in *Campbell*. The authors of *Creative License* acknowledged that "*Many* of those whom we interviewed between 2005 and 2008 *exhibited ignorance* or *indifference* toward this legal doctrine [fair use]."[28] This echoes my own findings, as I received the same responses from other music industry insiders as well. But what was more alarming to me was the fact that all of the beatmakers (producers) that I interviewed conceded that they either knew very little or nothing at all about fair use; and several admitted that they had never even heard of fair use.

LaPolt did not mention fair use in her interview at Loyola University, nonetheless her explanation of "industry custom," proves that the music industry has established a custom of willingly subverting copyright law, especially when doing so serves their best interest. So it's easy to see how one of the music industry's top lawyers would describe fair use as a "useless part of the Copyright Act" that should be "deleted." To those "who run

[27] "Loyola University Forum with Music Lawyer Dina LaPolt , 2007," Artists House Music (2012) http://www.youtube.com/watch?v=umonWhEdzlw, accessed June, 2012 (emphasis mine).
[28] McLeod and DiCola, 239-40.

the music industry," fair use — a vital part of copyright law — is an inconvenient truth that they'd prefer to ignore, misrepresent, or purposely remain ignorant about when it comes to sampling.

Negativland Takes on the RIAA: What Does the Music Industry Officially Say About Fair Use and Sampling?

While a number of music lawyers and music industry insiders degrade fair use, it's worth looking at what the RIAA (Recording Industry Association of America), the lobbying and enforcement arm of the Big Five multi-national entertainment companies (Sony, Time-Warner, Universal/Polygram, BMG, and EMI), officially had to say about fair use and sampling back in 1998.

In 1998, Negativland, a self-described experimental music and art collective of "sound collagists" (i.e. sampling musicians), ran into a problem when they tried to press their CD *Over the Edge Volume 3*. Distronics, the pressing plant that they had used for four years, refused to press their CD and demanded that "Negativland provide proof that the samples on their new CD had been cleared and paid for." The plant's demands and refusal to press Negativland's CD were a direct response to the RIAA's then-recent guidelines issued to CD plants — guidelines that were purportedly aimed at stemming "piracy." The RIAA CD plant guidelines had made it clear that pressing plants were liable for infringing material, and could be fined up to $100,000 per infraction. Negativland pushed back against the RIAA and responded with a sharply direct and legally persuasive press release entitled, "DO WE REALLY HAVE TO SUE THE RIAA????" In the press release, which threatened legal action against the RIAA, Negativland expressed deep concerns over the RIAA's attempt, via its CD plant guidelines, to prevent sampling and subvert the purpose of copyright law:

> We are now faced with the very real situation that the ENTIRE corporate music industry (via the RIAA) is **preventing an ENTIRE aesthetic, completely circumventing our legal system, and keeping the raging debate over the re-use of our common culture from ever reaching a public or legal forum. The original intent of**

copyright law was to promote a public good, not a private one and no matter how valid the original intent of our nations copyright laws may have been, they are now clearly being subverted.

…**This is now about the entire corporate music industry preventing an entire legitimate aesthetic**…, completely circumventing our legal system, and keeping this raging debate over the re-use of our culture from ever reaching a public or legal forum.

…via the RIAA, the Big Five have discovered an effective end run around the "art" barrier that prevented their omnipotent control over ALL possible uses of their very public private property. **Intimidating the CD pressing plants into filtering out any and all unpaid uses prevents ANY appearance of this type of material in the marketplace which has not been cleared and paid for.**

…**Anyone who can still discern a difference between art and commerce knows that the RIAA's actions will even further reduce any form of sampling** or sound collage work because artists both outside and inside corporations, or out on culture's fringe, will simply not be able to afford the going rates charged for using this stuff. Or they will be refused outright because their use annoys the sample owner. EVERY USE will be scrutinized and runs the risk of being censored *prior* to its coming into existence for whatever reasons might enter the unknown mind of the person listening at the pressing plant (!) who will be initially monitoring this.

…do you want to see a situation in which transnational corporations are telling manufacturers to decide what is and is not acceptable art?

…NO ONE SHOULD BE ALLOWED TO CLAIM PRIVATE CONTROL OVER THE CREATIVE PROCESS ITSELF.
[all-caps emphasis in the original, additional emphasis added][29]

[29] "DO WE REALLY HAVE TO SUE THE RIAA????" http://www.negativland.com/archives/014riaa/, (Accessed March, 2012).

Negativland also used their press release to draw public attention to the difference between "piracy" and sampling; they pointed to the music industry's attempt to criminalize sampling:

> the **crucial difference between pirating or counterfeiting anothers work *straight across* in order to profit from the saleability of that single source, and the creative transformation of material from multiple sources into new, "original" works.** *This is known in the art world as COLLAGE and it has had an undisputed legitimacy in virtually all art forms since the turn of this century.* However, the owners and operators of mass marketed music, being the latest medium in which collage is being practiced, continue to naively attempt to criminalize the technique of audio collage as if it was an illegitimate intruder on originality and nothing more than a form of theft. [emphasis in the original, emphasis added][30]

Negativland further included a summary of the contact that they had with the RIAA prior to their initial press release:

> Negativland's Mark Hosler spoke to Matt Oppenheim of the RIAA about this. Mr. Oppenheim is one of the RIAA's civil litigation attorneys and handles lawsuits against CD pressing plants. He told Mark that "the RIAA does not tell plants one way or the other what they should or should not do, *but we do advise plants that they are liable if they press infringing material."* So, the "experts" of the RIAA issue specific guidelines to the plants, tell plants that they could be liable for up to $100,00 per unpaid and uncleared sample infraction, consider this to be "not telling the plants one way or the other what they should or should not do" and fail to help the CD replicators distinguish between the proper and improper use of copyrighted materials.
> **The RIAA's position is that it's ALL copyright infringement without any room for protected speech.** *The CD plants are not informed that copyright law specifically permits the fair use of copyrighted material in certain circumstances and, in cases of sampling, the plants are put into the untenable position of having to act as judge and jury on all incoming releases.*
>
> In the rest of the half-hour long conversation with Matt Oppenheim of the RIAA, Negativland's Mark Hosler tried to describe the troubling situation that Negativland was in…Mark told him that they

[30] *Ibid*.

> had taken the "offending" release to four different CD pressing plants and been turned down by them all and Mr. Oppenheim replied *"Well, that tells me that we are doing our job."* He then said, "This should tell you that you need to try and get this sample cleared." When Mark tried to explain that he felt that his transformative re-use of copyrighted material for parody, critical or other creative purposes was a fair use, **the conversation took a nose dive. The idea that anyone could suggest that there was any possible conceivable instance in which re-using a fragment of someone else's material could be done WITHOUT getting permission and WITHOUT paying sampling clearance fees was obviously totally insane to Mr. Oppenheim.** ***"Are you a lawyer?!," he demanded to know. "Because fair use is not a right, it's a defense!"***
>
> **Clearly, the RIAA believes that their interpretation of copyright and fair use is the ONLY interpretation**, and are not interested in any other point of view. Fair use IS raised as a defense when one is involved in a lawsuit for copyright infringement, but it is also one of the MAJOR EXCEPTIONS to a copyright owners exclusive monopoly of a copyrighted work....and **if fair use is seen ONLY as an affirmative defense, then this interpretation of fair use creates a situation in which prior restraint and self-censorship is inevitable.** When Mark suggested that what the RIAA was engaged in DID amount to an act of censorship, Mr. Oppenheim became furious. "You are making this into a political issue and accusing us of being censors!" When Mark suggested that if the RIAA could not be reasoned with, then perhaps the only thing to do was to sue the RIAA, Mr. Oppenheim hung up the phone.
> [emphasis and all caps in the original, emphasis added][31]

In addition to expressing deep concern over the RIAA's attempt to criminalize the art of sampling itself, deny the purpose of fair use, subvert the Copyright Act and circumvent the legal system, Negativland also raised the question of whether or not the RIAA's actions, i.e. the guidelines that were "intimidating" pressing plants into not pressing CDs that contained uncleared samples on them, were, in fact, prompting *CD plants* to break the law. Additionally, Negativland asserted that the RIAA may have exposed itself to "Constitutional liability," and pointed out that the RIAA could be on the hook for restraint of trade, adding that the RIAA's actions

[31] *Ibid*.

amounted to pre-emptive censorship:

> …**the RIAA is tarring sampling and audio collage with the same *pirate* brush. Negativland's CD plant was not interested in the fact that Negativland knew that their transformative re-use of the sampled material was a fair use under copyright law *or that Negativland was quite willing to defend this re-use as a fair use in a court of law.* They did not care that Negativland had already indemnified them or that their refusal to press the CD because of fear of the RIAA could be seen as being what is legally known as "prior restraint" and therefore illegal**…Once the plants are put on notice that a particular action (like pressing a Negativland CD) is potentially infringing, they are at risk of being held liable for what is legally known as "contributory infringement". Most plants are entirely dependent on the members of the RIAA for their livelihood and dare not cross them even in the face of outrageous and oppressive behavior.
>
> …**a system of 'prior restraint' is any scheme which denies use of a forum in advance of its publication. The First Amendment prohibits the imposition of a restraint on a publication before it is published without there first being a judicial determination that the material does not qualify for First Amendment protection.** *Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."* And The Oxford Companion To The Supreme Court Of The United States says "The prohibition on prior restraints on speech or press lies at the very core of the First Amendment....prior restraint has been equated with censorship.
>
> **…efforts to suppress the manufacture of works protected as fair use under copyright law may constitute prior restraint.** (See Supreme Court Reaffirms Rejection Of Prior Restraints in *CBS Inc. v. Davis*, ___ U.S. ___, 114 S. Ct. 912, 127 L. Ed. 2d 358, 22 Med. L. Rptr. 1285 [1994] Justice Blackmun…).
>
> **the RIAA, by actively policing federal copyright laws on behalf of its members, is performing a governmental function, and this may expose them to constitutional liability.**
>
> In a claim of constitutional liability against the RIAA, the Courts would examine the extent to which the RIAA works with the government. Although the RIAA itself is not a governmental entity, the RIAA has, for almost 30 years, worked in tandem with law

> enforcement on all levels, including training and education of law enforcement personnel, supplying expert witnesses, and the preparation of legal briefs for the government to use in the prosecution of pirated recordings. This long-standing symbiotic relationship with the government, in addition to **the RIAA's independent efforts to police federal copyright laws on behalf of its corporate members, opens up the RIAA to liability for constitutional violations arising from its activities.**
>
> "the actions of the RIAA may also constitute unlawful restraint of trade and interference with business and contractual relations." The RIAA heavily lobbies state and federal officials on behalf of corporate monopolies that control 90% of all recorded music in this country and thus the RIAA's abilities to suppress the manufacture and distribution of material it does not approve of is enormous.
>
> **The actions of the RIAA are an act of pre-emptive censorship. They deny musicians, record labels and music publishers the opportunity to work out issues of fair use in a court of law** and create a situation in which, if they successfully intimidate both large and small CD pressing plants all over the U.S., Negativland and many others will no longer be able to press ANY of their current, future or past CD's. A truly disturbing scenario.
>
> In effect, the RIAA is attempting to strong-arm manufacturers into seeing the issue from only its perspective, without technically violating any laws.
> [all-caps emphasis in the original, additional emphasis added][32]

Negativland ended its press release by calling for help from the public and launching a letter-writing (email) campaign:

> This issue is far too big for Negativland to take on alone…we need someone to organize and keep track of all those folks out their who are concerned and outraged about this. Perhaps the RIAA can be reasoned with to re-think their tactics…
>
> ***Music producers and consumers might need to consider organizing to bring a class action suit against the RIAA*** that allows them to CONTINUE their efforts to stop piracy and counterfeiting and bootlegging, but STOPS them from interfering with sampling,

[32] *Ibid*.

> STOPS them from interfering with the re-use of our common culture and STOPS THEM from blocking the fair use rights the U.S. Copyright Act gives every citizen and creator. **The RIAA has no business being art police.**
>
> If you are a lawyer, a label, a musician, an artist, a CD broker, a CD replicator, a writer...anybody who feels as freaked out about the implications of this as Negativland does, please add your name to our announce list (see below) to be kept informed about what happens next and how you can help....and please talk to each other and PLEASE write a thoughtful letter to the RIAA.
> [all-caps emphasis in the original, additional emphasis added][33]

On August 20, 1998, just *three days* after Negativland sent its press release, the RIAA responded. Hilary Rosen, then-president and CEO of the RIAA, denied that the RIAA had any involvement with Negativland's CD *Over the Edge, Volume 3* or its prevention from being pressed. She further asserted that the guidelines issued by the RIAA to record plants were "part of its longstanding efforts to eradicate music *piracy*," simply "an attempt to curtail the burgeoning *piracy* problem that begins at the plant level." She was careful to further add that the RIAA CD Plant Guidelines did not "mention, or make any recommendations about the use of samples in sound recordings." This was the RIAA's indirect, legalese-style denial that their CD Plant Guidelines: (1) Had anything to do with Negativland not being able to get its CD pressed, or (2) That they were in any way attempting to curb sampling.[34]

Three days after Rosen's/RIAA's statement, Negativland responded with another press release. This time, Negativland called Rosen out for what they described as her "sadly disingenuous denial of the actual effect" RIAA guidelines "are having out here in the real world." Negativland further added that they had talked to pressing plants and RIAA employees, "and BOTH made it clear that un-cleared samples are included in your guidelines." Negativland also sought to draw Rosen's attention to the difference between "piracy" and copying that is fair use, pointing out that fair use was

[33] *Ibid*.
[34] "Statement By the Recording Industry of America" http://www.negativland.com/archives/014riaa/riaa_statement_082298.html, (Accessed March, 2012).

a guarantee of the Copyright Act, and as such, fair issues were not for the RIAA to decide. Finally, Negativland again reminded Rosen that the RIAA's actions suggested prior restraint and censorship.[35]

On September 1, 1998, less than one month after Negativland's initial press release, the RIAA announced that it had amended its CD Plant Guidelines! In a letter addressed to "Fans of Negativland," re: "Sampling and CD Plant Guidelines," Rosen conceded that "The courts, and not the RIAA, have always been the judge in determining whether any particular sample is fair use." Additionally, Rosen reprinted the amended CD Plant Guidelines, which included the new language directly addressing sampling and fair use:

> These guidelines are intended to address *piracy*. Some recordings presented for manufacture may contain -- as part of an artist's work -- identifiable "samples" or small pieces of other artists' well-known songs. **In some instances this sampling may qualify as "fair use" under copyright law,** and in other instances it may constitute copyright infringement. There are no hard and fast rules in this area and judgments on both "fair use" and indemnification must be made on a case-by-case basis.[36] [emphasis mine]

So What Does Negativland's Fight with the RIAA Tell Us?

The major record companies largely ignore and misrepresent fair use in daily practice, but in its 1998 CD Plant Guidelines, the RIAA officially recognized what had always been true: That the sampling of sound recordings is *not* illegal, that sampling is *not* "piracy," and that some samples may qualify as fair use. So what's with the RIAA's contradiction? On the surface, it would appear that the recording industry respects (or at least acknowledges) fair use. But if we take seriously the RIAA's initial 1998 CD Plant Guidelines and its subsequent tactical denial that those guidelines didn't have anything to do with thwarting sampling — even though they linked any "un-cleared" sampling to "piracy" — what are we to believe? Add to this equation one of the music industry's top

[35] *Ibid*.
[36] "RIAA RESPONDS POSITIVELY TO NEGATIVLAND" http://www.negativland.com/archives/014riaa/positiv.html, (Accessed March, 2012).

lawyers' outrageous statement on fair use: *"It's a useless part of the Copyright Act. It should be just deleted,"* and what becomes clear is that the "big labels hate the concept of fair use."[37]

Furthermore, while most sampling musicians who operate under the protection of fair use are ready and willing to defend their art in court, the big labels and music publishers do not want a showdown in court over the issue of fair use. The music industry is not interested in opening Pandora's box on fair use and sampling. If many sample-based musicians prevailed in the courts on the basis of fair use, which I'm sure the major labels know is more than likely, this could mean a substantial loss in revenue for the labels in the realm of sample clearance (and perhaps even sync licensing). More importantly, an RIAA showdown in court over fair use would end the misguided notion that *all* samples must be cleared. Thus, the music industry is much more comfortable with misrepresenting fair use and keeping it out of the scope of artists and the general public.

[37] See "RIAA Thinking Of Backing Righthaven" http://www.techdirt.com/articles/20111118/11374416816/riaa-thinking-backing-righthaven.shtml, (Accessed May, 2012).

Chapter 20

Bridgeport and the False Bright-Line

Deconstructing the Most Infamous Court Case Involving Digital Sampling

This chapter examines *Bridgeport Music, Inc. v. Dimension Films, LLC.,* the most important and damnatory recent copyright infringement case involving sampling. Although there has been much commentary and criticism about the Sixth Circuit's highly flawed decision in *Bridgeport*, most (if not all) of that commentary, like the news and meaning of the *Bridgeport* case itself, has gone unnoticed by all but a few sample-based beatmakers (producers) and hip hop/rap fans alike. As with most music artists, sample-based beatmakers (producers) tend to know very little about copyright law; and they know even less about the details and impact of copyright infringement cases like *Bridgeport*. So I want to change that paradigm by introducing this case and its sigficance to a broader audience.

Bridgeport Music, Inc. v. Dimension Films
The District Court's Decision

Before looking at the Sixth Circuit's decision in *Bridgeport*, it's necessary to know the background of the case and the district court's ruling. *Bridgeport* centered around the use of N.W.A.'s song "100 Miles and Runnin'" in the 1998 No Limit Films produced/Dimension Film-distributed film *I Got The Hook Up*. For part of the creation of the song "100 Miles and Runnin'," N.W.A. had sampled a two-second guitar chord from Funkadelic's song "Get Off Your Ass and Jam." Presumably because they had considered the sample to be de miminis and its subsequent use transformative, N.W.A. did not seek permission from the copyright owners of "Get Off Your Ass and Jam," which included Bridgeport Music, which at the time owned the publishing rights to Funkadelic's music, and Westbound Records, which at the time owned the sound recording copyright.[1]

In May, 2001, Bridgeport Music, Westbound Records, and other plaintiffs brought the issue before federal judge Thomas A. Higgins of the District Court For The Middle District Of Tennessee, Nashville Division, and Westbound specifically claimed infringement of its sound recording copyright. The defendants, Dimension Films/No Limit, argued that the sample in question was de minimis (i.e. legally insubstantial), and therefore, it did not amount to actionable (illegal) copying under copyright law. The District Court agreed that the sample was de minimis and granted summary judgment for the defendants. In the court's findings, Judge Thomas A. Higgins demonstrated his understanding of the complexities of the matter as it pertains to sampling and copyright law, and provided the long-held understanding of the de minimis doctrine:

> The defendant argues that the amount of "Get Off" that is sampled is a de minimis use as a matter of law and therefore no actionable copying occurred. The defendant argues that the copied chord is neither quantitatively nor qualitatively significant to the plaintiffs'

[1] *Bridgeport Music, Inc. v. Dimension Films LLC*, 230 F. Supp.2d 830, 833-39 (M.D. Tenn. 2002) (hereinafter *Bridgeport—District Decision*).

copyright interests in "Get Off" and therefore any copying of the chord is not actionable as a matter of law…

The Sixth Circuit has recognized that the principle of de minimis…can be applied as a defense to copyright infringement if it can be shown that a substantial amount of the copyrighted work was not taken…. The Court's role in making a de minimis analysis is a tricky one. ***It must balance the interests protected by the copyright laws against the stifling effect that overly rigid enforcement of these laws may have on the artistic development of new works.*** …This role becomes even more challenging when presented with works from two genres of music with which many jurists (and most likely many jurors of this District) are not familiar, and the paucity of case law on the issue of whether digital sampling amounts to copyright infringement. Further complicating the process is the lack of clear road maps for de minimis analyses from the circuit courts or the Supreme Court. Still, the case law does provide loosely-defined standards and quite a bit of legal commentary has been written on digital sampling. **The Court must also be mindful not to pre-empt the jury's role in determining factual issues**…

Legal Standards for De Minimis Analysis

Among criteria for ascertaining infringement...are whether so much has been taken as would *sensibly diminish* the value of the original; and whether the labors of the party entitled to copyright are substantially to an injurious extent appropriated by another.…The de minimis analysis falls under the rubric of the substantial similarity element necessary to prove a copyright infringement claim. See *Ringgold v. Black Entertainment Television*, 126 F.3d 70, 74 (2d Cir. 1997) (de minimis applies to copying '*at such a trivial extent* as to fall below the quantitative threshold of substantial similarity'). **The plaintiff must show, *in addition to proof of copying,* that the copied work and the allegedly infringing work are substantially similar. …It is the plaintiff's burden to prove substantial similarity…One of the most common tests for substantial similarity is 'whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'**…The de minimis analysis is therefore a derivation of substantial similarity, where a defendant argues that the *literal* copying of a small and insignificant portion of the copyrighted work should be allowed….

Those courts that have addressed a de minimis defense in cases of digital sampling have focused on 'whether the defendant

> **appropriated, either quantitatively or qualitatively,** 'constituent elements of the work that are original'.'… Another court, instead of a quantitative/qualitative de minimis analysis, used Professor Nimmer's 'fragmented literal similarity' analysis to determine whether substantial similarity existed… ('this aspect of the substantial similarity test may be characterized as an inquiry as to whether the subject usage is substantial or de minimis'). Either approach in this case will result in the same outcome. [emphasis mine][2]

Citing the long-held judicial understanding of the de minimis doctrine and its application in a copyright infringement case, the District Court appropriately applied the substantial similarity analysis, comparing each work "as a whole," and found that the defendant's work was de minimis:

> ***The sample here does not rise to the level of a legally cognizable appropriation.***
>
> **The quantitative use of the plaintiffs work is only one factor in either a de minimis or substantial similarity analysis.** The Court must also evaluate the qualitative use as well… '100 Miles' is a song about four black men on the run from the F.B.I. who appear to be wrongfully pursued for some unmentioned crime. The looped segment evokes the sound of police sirens; it is a background element in the song. **Qualitatively, the looped segment bears only passing resemblance to the original chord that was copied. The looped segment has been slowed down to match the tempo of the rest of '100 Miles,' which also results in a lowering of the pitch of the notes.** Instead of producing a rising sense of anticipation, the effect of the sample is to create tension and apprehension at the sound of pursuing law enforcement. This effect is amplified by the repeated use of the sample as the *rapper* describes the men's anger, anxiety and fatalism as the chase continues.
>
> ***In comparison,* 'Get Off' is a celebratory song — it is essentially about dancing. *The work as a whole*** is characterized by a strong dance beat and a display of intricate electric guitar playing. **The *only* lyrics** are two expletives followed by "Get off your ass and jam" repeated over and over. ***There are no similarities in mood or tone between the two works.*** The guitar introduction, where the sampled chord is found, can be compared to the trumpet call at

[2] *Id.*

the start of an anthem or march — an attention-grabbing moment meant to create anticipation. **It bears no resemblance in tone or purpose to the sound of sirens in '100 Miles.'**….

The plaintiffs emphasize the importance of the sampled chord to the overall effect of 'Get Off,' and the Court does not disagree with that analysis. However, **the Court finds that the copied segment is not even recognizable to a lay observer as being appropriated from the plaintiffs' work.** The siren sounds in '100 Miles' are in the background, appear at irregular intervals, and their similarity to the guitar introduction to 'Get Off' is only apparent if one is made aware of the attribution before hearing the sample. **The Court finds that no reasonable jury, even one familiar with the works of George Clinton (the author of 'Get Off'), would recognize the source of the sample without having been told of its source.** ***This fact, combined with the minimal quantitative copying and the lack of qualitative similarity between the works, warrants dismissal of Westbound's claims arising from infringement of its sound recording.…***

The Court recognizes that the fact of blatant copying is not challenged by the defendant for the purposes of this motion, and that **the purposes of the copyright laws is to deter *wholesale plagiarism* of prior works.** *However, a balance must be struck between protecting an artist's interests, and depriving other artists of the building blocks of future works.* **Since the advent of Western music, musicians have freely borrowed themes and ideas from other musicians…If even an aficionado of George Clinton's music might not readily ascertain that his music has been borrowed, the purposes of copyright law would not be served by punishing the borrower for his creative use."**

CONCLUSION

For the reasons stated above, the motion by defendant No Limit Films for summary judgment is granted as follows: all claims based on infringement of plaintiff Bridgeport Music's interest in the musical composition '100 Miles and Runnin" are dismissed; all claims based on infringement of plaintiff Bridgeport Music's musical composition 'Get Off Your Ass and Jam' are dismissed; all claims based on infringement of plaintiff [**37] Westbound Records' sound recording of 'Get Off Your Ass and Jam' are dismissed. The plaintiffs' motion for partial summary judgment is denied as moot... [emphasis mine][3]

[3] *Id.*

Through its substantial similarity analysis, the District Court found that "the minimal quantitative copying and the lack of qualitative similarity between the works" warranted dismissal of the plaintiffs' claims. Furthermore, reading the District Court's conclusion, we find that the court's focus was on reaffirming the balance that copyright law is supposed to strike and the necessity of protecting a borrower when the use is transformative and creative.

Finally, there are a couple things that stand out about the district court's decision. First, there's the depth at which the district court conducted its substantial similarity analysis. The cistrict court properly considered the two works, the original and secondary work, "as a whole." And the district court demonstrated a serious understanding of the transformative nature of sampling in the hip hop/rap music tradition. Second, the district court did *not* break with all relevant case law, statutory language, and legislative history.

Bridgeport Music, Inc. v. Dimension Films
The Sixth Circuit's Decision

In September, 2004 (amended opinion June 3, 2005), the U.S. Court of Appeals for the Sixth Circuit reversed the District Court's earlier decision, finding that Westbound's claim of infringement of its sound recording was correct. In handing down their ruling, the Sixth Circuit purportedly established what they called a "bright-line" sampling rule, which stipulated that any unlicensed sample, no matter the quantity and/or quality, was copyright infringement.

In stating its reasons for reversing the District Court's decision, the Sixth Circuit engaged in illogical legal reasoning and offered up observations about sampling, sample clearance, and the music business that were wrong, or at best, incomplete. As some other commentators have aptly noted, the Sixth Circuit's justifications for its bright-line ruling was fraught with flaws. This section explores the main flaws of the Sixth Circuit's decision in *Bridgeport*, and it concludes with a discussion of the impact — real and perceived — of the Sixth Circuit's landmark ruling.

The Main Flaws of the Sixth Circuit's Decision
If Copying Is Found, Substantial Similarity Is Required to Prove Infringement

As I discussed previously, in order for a plaintiff to prove copyright infringement, substantial similarity must be established between the plaintiff's work and the allegedly infringing work. Therefore, in any copyright infringement case, the courts must engage in a substantial similarity analysis of the works "as a whole." And as Mueller points out, "Every circuit has held that copyright infringement requires proof of both substantial similarity and actual copying (including the Sixth Circuit in cases other than those involving sound recordings) and has rejected infringement claims where the copying was de minimis or the works were not substantially similar (also including the Sixth Circuit regarding alleged infringement of

subject matter other than sound recordings)."[4] But in *Bridgeport*, the Sixth Circuit maintained that where digital sampling of a sound recording is involved, no substantial similarity analysis is necessary to prove copyright infringement:

> **1. The analysis that is appropriate for determining infringement of a musical composition copyright, is not the analysis that is to be applied to determine infringement of a sound recording.** *We address this issue only as it pertains to sound recording copyrights.*
>
> 2. Since the district court decision essentially tracked the analysis that is made if a musical composition copyright were at issue, *we depart from that analysis.*
>
> While the question whether an unauthorized use of a digital sample infringes a musical composition may require a full substantial similarity analysis, **the question whether the use of a sample constitutes infringement of a sound recording could end upon a determination that the sampler *physically* copied the copyrighted sound recording of another.** [emphasis mine][5]

First, here, the legal reasoning the Sixth Circuit applied is deeply flawed. The de minimis doctrine applies to *all* copyrightable subject matter equally, including sound recordings. So there are no special thresholds or any other additional requirements to consider just for sound recordings. As I pointed out in Chapter 18, Congress emphasized this clearly in the Copyright Law Revision Report (H.R. Report No. 94 1476) that accompanied the Copyright Act of 1976:

> **It must be emphasized *again* that the same general standards of fair use are applicable to *all* kinds of uses of copyrighted material...** [emphasis mine][6]

Second, in order for any copyright infringement claim to be successful, the plaintiff must prove the same three elements: (1)

---

[4] Mueller, 45.

[5] *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390,399 (6th Cir. 2004), aft'd on reh'g, 410 F.3d 792 (6th Cir. 2005) (hereinafter *Bridgeport—Circuit Decision*).

[6] U.S. House. The Committee on the Judiciary. Copyright Law Revision, 1976, (to Accompany S.22) Report Together with Additional Views (94 H. Rpt. 94-1476), 65, 66. 72.

ownership of a valid copyright; (2) proof of actual copying; and (3) proof that the appropriation was *unlawful*. For the purposes of this section, it is the third element that must be emphasized because appropriation itself, the mere act of copying, is not *presumptively* infringement. Unlawful appropriation refers to substantial or "infringing similarity."[7] In determining unlawful appropriation, the courts must engage in a substantial similarity analysis in which qualitative and quantitative factors are assessed: "in determining whether two such works are so substantially similar as to reveal an infringement of one by the other, courts must decide whether the similarities shared by the works are something more than mere generalized ideas or themes,"[8] and the two works must each be considered "as a whole." Further, all copyrightable subject matter is subject to the same limitations of the Copyright Act, which means that sound recordings are *not* imune to the de minimis or fair use doctrines.

Yet, the Sixth Circuit saw it differently. In its substantial similarity analysis, the Sixth Circuit did not consider the two works "as a whole," but rather it relied on the "fragmented similarity test" approach. In a fragmented literal similarity test, the "fragmented" copyrightable elements that are copied from a copyrighted work are examined, i.e. the allegedly infringing elements are looked at *in isolation* to see if there is substantial similarity. Applying such a test to sampling creates an immediate problem because, first, a digital sample is an exact copy; and second, because the threshold of the fragmented literal similarity test is so limited, it leads to the wrong conclusion that a factual fragment — in the case of sampling, simply proof that a sound recording was sampled — is necessarily copyright infringement. To consider how illogical this is, imagine that someone copies a page from a book, completely by freehand. Since there is no "physical" copying, i.e. an exact copy of the actual page from the bounded book in which the writing was on, does that mean that copying didn't take place? Of course it doesn't. The point is that copying is always an *exact* copy; this is fundamental

[7] *Warner Bros., Inc. v. American Broadcasting Companies*, 654 F. 2d 204 - Court of Appeals, 2nd Circuit 1981.
[8] *Id.*

to the very concept of copyright law. Thus, the question, in terms of copyright infringement, is not simply whether something was copied or not, but also whether or not the copying — i.e. the specific copied material — is *unlawful* or not; and this doesn't just include consieration of the copied material but also how the copied material was used.

However, in *Bridgeport*, the Sixth Circuit insisted that this basic fact of copyright law doesn't apply to sound recordings. And for that reason, the Sixth Circuit tossed the substantial similarity test to the side and concluded that a sample, however brief — even as small as three notes — *necessarily* infringes the sound-recording re-production right. Consequently, the Sixth Circuit ruled that a sample of a sound recording is "per se" infringement. Thus, misusing the fragmented literal similarity approach, the Sixth Circuit misapplied the substantial similarity test, which holds that substantially similarity is determined by a consideration of two works "as a whole." As a result of disregarding a proper substantial similarity analysis, rejecting explicit legislative intent, misreading the language in the Copyright Act, *and* breaking with judicial precedent, the Sixth Circuit broadened the protection of sound recordings and stipulated that copyright infringement is determined differently when it involves sound recordings and digital sampling. This was a glaring error.

Neither the "sort of copying" nor the category of copyrighted subject matter changes the application of the statute, as the limitations on sound recordings are the same as all other copyrightable material: "The exclusive rights of the owner of a copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106."[9] Additionally, during the passage of the Sound Recording Amendment of 1971, Congress explicitly stated that **"this limited copyright does not grant any broader rights than are accorded to other copyright proprietors... ."**[10]

[9] U.S. House. The Committe on the Judiciary. *Copyright Law Revision*, 1976, (to Accompany S.22) *Report Together with Additional Views* (94 H. Rpt. 94-1476) (Hereinafter House Report 94-1476). See: 17 U.S.C. §106. Exclusive rights in copyrighted works; 17 U.S.C. § 114. Scope of exclusive rights in sound recordings (emphasis mine).

[10] H.R. Rep. No. 92-487, at 10 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1572

In other words, the intent of Congress was abolutely clear. Sound recordings are *not* to be treated differently than any other category of copyrightable subject matter.[11] Yet, as Mueller and other legal commentators have correctly noted, in *Bridgeport* the Sixth Circuit misinterpreted § 114(b) as an expansion of the rights of the sound recording copyright owner and "*dismissed congressional intent* as indicated in the House Reports accompanying the passage of the Sound Recording Amendment."[12]

Additionally, Congress expressly stated that with regards to the copyright infringement of sound recordings, "infringement takes place whenever *all* or any *substantial* portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords…"[13] Hence, Congress clearly indicated that any *insubstantial* portion of a sound recording that is appropriated is a lawful appropriation and therefore not actionable. So there can be no ambiguity here. The Copyright Act, and the House Reports that accompanied it, makes it quite clear that the substantial similarity analysis is to be applied in all cases of copyright infringement.[14]

[11] John Schietinger, "Bridgeport Music, Inc. V. Dimension Films: How The Sixth Circuit Missed A Beat On Digital Music Sampling," DePaul Law Review, Fall (2005) 55 DePaul L. Rev. 209, 8, citing Brief of Amicus Curiae RIAA, at 9, Bridgeport Music II (Nos. 02-6521, 02-5738 (citing 4 Nimmer on Copyright…13.03[A][2] at 13-50). According to the Nimmer on Copyright treatise, the leading secondary source on copyright law, the "practice of digitally sampling prior music to use in a new composition should not be subject to any special analysis."

[12] Mueller, 448.

[13] House Report 94-1476.

[14] Mueller, 449. Mueller points out that "the statutory language and house reports accompanying both the Sound Recording Amendment of 1971 and the Copyright Act of 1976 make clear that Congress intended that plaintiffs would still have to demonstrate substantial similarity in sound recording infringement cases."

De Minimis Is Applicable to Every Category of Copyrightable Subject Matter; and Sampling Is Not Literally a "Physical Taking"

Just as substantial similarity applies to all copyright infringement cases, so does the de minimis doctrine. Thus, while the District Court was correct to consider if the digital sample at question in *Bridgeport* was de minimis, the Sixth Circuit erred in its determination that the de minimis doctrine does not apply to sound recordings. The fact that the Sixth Circuit relied on a misinterpretation of the statute, as well as the faulty legal reasoning that sampling is a "physical taking" rather than an intellectual one, makes this error even more egregious:

> *This analysis admittedly raises the question of why one should, without infringing, be able to take three notes from a musical composition, for example,* but not three notes by way of sampling from a sound recording. **Why is there no de minimis taking or why should substantial similarity not enter the equation.** Our first answer to this question is what we have earlier indicated. *We think* this result is dictated by the applicable statute. *Second, even when a small part of a sound recording is sampled, the part taken is something of value.* No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both. For the sound recording copyright holder, it is not the "song" but the sounds that are fixed in the medium of his choice. **When those sounds are sampled they are taken directly from that fixed medium. It is a *physical taking* rather than an *intellectual* one.**
>
> **If one were to analogize to a book, it is not the book, i.e., the *paper and binding*, that is copyrightable, but its contents.** [emphasis mine][15]

Here, the Sixth Circuit's legal reasoning is flawed on several fronts. First, and most importantly, if a work is protected by copyright, it cannot be immune to de minimis or fair use, "no

[15] *Bridgeport—Circuit Decision.*

category of copyrighted material is either immune from use or completely without protection."[16] In other words, if a work is copyrighted, the de minimis and fair use doctrines apply to it. No legal gymnastics can undo this fact.

Second, sampling simply constitutes a reproduction of copyrighted material. Phonorecords, i.e. sound recordings, are not to be treated differently than any other copyrighted subject matter. That statute, which is quite clear on this in fact, says: "…the fair use of a copyrighted work, ***including such use by reproduction in copies or phonorecords***."[17] Hence, the Sixth Circuit's concept of "physical taking," as a means to exempt sound recordings from the de minimis doctrine — and thereby broaden the protection of sound recordings — is in direct opposition to United States copyright law.

Third, the type of "fixed medium of choice" is not what is copyrightable; the sounds *in* a sound recording *are* the "contents" of the recording. The wax of a vinyl record or the plastic of a CD is not what is copyrightable. An artist who samples a song doesn't literally take — i.e. physically extract — the sound out of the original recording, leaving the song with less sound than it had before it was sampled. Instead, sampling technology creates a *digital* copy — much like a photocopy machine makes copy of something, like a page from a book. Once sampled, that recorded data is transferred to a computer hard drive. There is no "physical taking" in this process. An actual "physical taking" of a vinyl record would mean that after sampling the vinyl record a digital sampler would dispense a piece of the actual vinyl record, and the original vinyl record would be missing the piece that was "physically taken" from it. This is why the Sixth Circuit's own analogy of a book and its paper binding — described as an "*intellectual* taking" — actually undermines the Sixth Circuit's own illogic.

Further, granting copyright protection to literally *every* sound, every note fixed in a sound recording would be like granting protection to every word and every letter in a book or every color

[16] Leval, 1122.
[17] 17 U.S.C. § 107.

in a photo. Again, there is no conceptual difference between the "intellectual" copying (*virtual* copying) and the so-called "physical" copying (*digital* copying) of someone's work. Both involve copying and intellectual transformation.

Some commentators have argued — perhaps prompted by *Bridgeport's* bizarre legal reasoning — that a sample is an "actual" piece of a work, and therefore, a sample without a license is copyright infringement. Again, this is flawed legal reasoning. Such illogic ignores the fact that some samples may be de minimis or fair use. Moreover, no "sort of copying" is *presumptively* an infringement; likewise, no copied material is *presumptively* infringement. The nature and form of a copyrighted work does not make it immune to de minimis or fair use. To insist otherwise is an example of prior restraint — censorship imposed on expression before the expression actually takes place. And while some appropriations — be they in literature, music, photography, etc. — may likely be an infringement, the actual determination of infringement must be made in a court of law on a case by case basis.

The "actual taking" double-talk also stems from an improper interpretation of the substantial similarity test. In determining substantial similarity in a copyright infringemen case, the secondary work is considered "substantially similar" *only* when it is nearly *indistinguishable* from the original "as a whole." Some commentators have twisted the meaning of this principle and have pushed the idea that a sample is an *exact taking* — i.e. an actual taking — because it is an "exact copy" of a piece of a sound recording. This argument is ridiculous. Again, it's like saying that words appropriated from a book are not an "exact copy" because the pages from which the words came were not "physically taken." That the Sixth Circuit subscribed to this legal double-talk is astonishing.

"The Legislative History Is of Little Help" – False

The Sixth Circuit insisted that "the legislative history" was "of little help because digital sampling wasn't being done in 1971," and that if this was "*not* what Congress *intended* or is not what they would intend now, it is easy enough for the *record industry*…to go back to Congress for a clarification or change in the law."[18] In other words, the Sixth Circuit would have the public believe that, with regards to sound recordings, the intent of Congress was *not clear,* and *"of little help*." Worse still, the Sixth Circuit implied that the language in the statute concerning the sound recording provisions of 1971 could be interpreted as a preemptive strike against digital sampling, "because digital sampling wasn't being done in 1971." First, just on the surface, the Sixth Circuit's claim that the *intent* of Congress is unclear, specifically with regards to sound recordings, is inaccurate. The House Report that accompanied the Sound Recording Amendment of 1971 explicitly identified why the amendment granting protection to sound recordings was needed:

> **The problem of record *piracy* has not been dealt with…We are persuaded that the problem is an immediate and urgent one, and that legislation to deal with it is needed now.** The seriousness of the situation with respect to record piracy…is unique…. **The committee agrees that it is necessary, without delay, to establish Federal legislation prohibiting unauthorized manufacturers from reproduction and distribution of recorded performances.** [emphasis mine][19]

Looking at the House Committee's report on the Sound Recording Amendment of 1971 and the House Report that accompanied the Copyright Act of 1976, Congress could not have been more clear about what it intended. Congress literally stated that the "reproduction in copies or *phonorecords* or by any other

[18] *Id.*

[19] The House Report on the Sound Recording Amendment of 1971, September 22, 1971 — Committed to the Committee of the Whole House on the State of the Union. In the House Committee's report, it is clear that the legislation was aimed at "manufacturers engaged in the unauthorized reproduction of records and tapes," not individuals who now use the art of sampling as a compositional method.

means is mainly ***intended* to *make clear* that the doctrine has as much application to photocopying and taping *as to older forms of use,*** and that the addition of sound recordings as a copyrightable subject matter to and the codification of fair use in the Copyright Act "is *not intended* to give these kinds of reproduction *any special status.*" But that's precisely what the Sixth Ciruit did! It gave "special status" to sound recordings, despite Congress' clear instructions to *not* do so.

Next, it's also clear that "digital sampling" was certainly not the "immediate," "urgent," and "unique" problem that Congress was focusing on curtailing in 1971. Congress was intent on curtailing "record piracy," as in the wholesale illegal duplication, manufacturing, and distribution of whole songs, i.e. the *bootlegging* of "records and tapes." Any suggestion that Congress was, in 1971 or 1976, preoccupied with curtailing something else — including digital sampling — is wrong and willfully misleading. Furthermore, Congress explicitly stated that sound recordings were not to be given any more protection than any other category of copyrighted subject material: **"[T]his limited copyright does *not* grant *any broader rights than are accorded to other copyright proprietors...* "**[20] So there's no ambiguity here. The legislative history should have been of *great* help to the Sixth Circuit.

Additionally, in using what it called a "*literal* reading" of the statute to determine that substantial similarity was not applicable to copyright infringement cases involving sound recordings and digital sampling, the Sixth Circuit wrongly misinterpreted the statute. And there are two points in specific that the Sixth Circuit got wrong. First, where the statute grants sound recording copyright owners the exclusive right "to duplicate the sound recording in the form of *phonorecords* or copies that directly or indirectly recapture the actual sounds fixed in the recording,"[21] the Sixth Circuit interpreted this to mean that "a sound recording owner has the exclusive right to 'sample' his own recording,"[22] because according to the Sixth

[20] H.R. Rep. No. 92-487, at 10 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1572 (emphasis mine).
[21] 17 U.S.C. § 114(b).
[22] *Bridgeport—Circuit Decision*..

Circuit, there is a distinction between the copying of books and the copying of phonorecords:

> **If one were to analogize to a book, it is not the book, i.e., the paper and binding, that is copyrightable, but its contents.** *There are probably any number of reasons why the decision was made by Congress to treat a sound recording differently from a book even though both are the medium in which an original work is fixed rather than the creation itself.* None the least of them certainly were advances in technology which made the "pirating" of sound recordings an easy task. **The balance that was struck was to give *sound recording copyright holders the exclusive right* "to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording."** 17 U.S.C. § 114(b). This means that the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made. [emphasis mine][23]

First, Congress did not make the decision to "treat a sound recording differently than a book;" in fact, Congress went out of its way to specifically say as much. Second, this interpretation is an illogical reading of the statute, because the sound recording copyright protects *the sounds in the recording*, not the phonorecord, i.e. the fixed medium in which the work is fixed, itself. But clearly, in light of the Sixth Circuit's book analogy, this was a distinction and basic understanding that the court overlooked or misunderstood. The House Report that accompanied the Copyright Act of 1976 explicitly clarified that the "sound recording" is distinguished from the "phonorecord" (fixed medium). Note, the statute says the exact opposite of what the Sixth Circuit reasoned:

> As defined in section 101, copyrightable "sound recordings" are original works of authorship comprising an aggregate of musical, spoken, or other sounds that have been fixed in tangible form. **The copyrightable work comprises the aggregation of sounds and *not the tangible medium of fixation.* Thus, 'sound recordings' as copyrightable subject matter are distinguished from 'phonorecords,' the latter being physical objects on which sounds are**

[23] *Id.*

> **fixed**…***As a class of subject matter, sound recordings are clearly within the scope of the "writings of an author"…*** [empahsis mine][24]

Another problem with the Sixth Circuit's interpretation of what Congress intended is the fact that Congress made quite clear in its 1971 House Report that rampant "piracy activity" — i.e. wholesale duplication and distribution of a copyrighted work — was the urgent (primary) motivating factor for sound recording copyright protection and the subsequent Sound Recording Act of 1971. Preventing digital sampling was not a motivating factor. Again, from The House Report on the Sound Recording Amendment of 1971:

> ***REASON FOR* THE LEGISLATION**
> The attention of the Committee has been directed to the widespread unauthorized reproduction of phonograph records and tapes. While it is difficult to establish the exact volume or dollar value of current ***piracy* activity**, it is estimated by reliable trade sources that the annual volume of such ***piracy*** is now in excess of $100 million. It has been estimated that legitimate **prerecorded tape sales** have an annual value of approximately $300 million …. **The problem of *record piracy* has not been dealt with**…**We are persuaded that the problem is an immediate and urgent one, and that legislation to deal with it is needed now. The seriousness of the situation with respect to record piracy…is unique**…. **The committee agrees that it is necessary, without delay, to establish Federal legislation prohibiting unauthorized manufacturers from reproduction and distribution of recorded performances.**[25] [emphasis mine]

How does one read the above excerpt from the The House Report on the Sound Recording Amendment of 1971 and draw the conclusion that Congress was not clear in its intent, or that "digital sampling" could've possibly been what Congress was trying to stop?

[24] House Report 94-1476.
[25] The House Report on the Sound Recording Amendment of 1971.

The Sound Recording Copyright Owner Has the "Exclusive" Right to Digitally Sample Their Sound Recording – False

Next, the Sixth Circuit's assertion that the statute grants the sound recording owner the "exclusive" right to digitally sample their sound recording is just as ridiculous as asserting that a book's copyright owner has the exclusive right to borrow *everything* — every line, letter, or punctuation mark — from their book.

Even more damning to the Sixth Circuit's claim that "the legislative history is of little help" is the fact that Congress explicitly noted that "infringement takes place whenever *all* or any *substantial* portion *of the actual sounds* that go to make up a copyrighted *sound recording* are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method...."[26] Thus, digital sampling, just "one sort of copying" (reproducing) sounds from a sound recording, is an infringement *only* when all or any *substantial* portion of the copyrighted sound recording is copied and used. In other words, digital sampling is not an infringement when any *insubstantial* portion of a copyrighted sound recording is copied. But infringement does not occur merely because a sound recording was sampled.

[26] House Report 94-1476.

The Proper Context and Interpretation of Derivative Works Under the Statute: The "Exclusive Right to Prepare Derivative Works" Defined

Next, the Sixth Circuit misinterpreted the definition of "remix" and "derivative works" (the proper definitions I will explain in this section), and again dismissed Congress' clear intent — and instructions — to not treat sound recordings any differently than any other copyrightable subject matter.[27] Taking what it called a "literal reading approach" to the statute, The Sixth Circuit determined that sampling *per se* — i.e. just the activity involved in sampling, the digital duplication — amounted to copyright infringement. Specifically, the Sixth Circuit looked at section 17 U.S.C. § 114(b), which states that "The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare *a derivative work* in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality." Based on its so-called "literal reading," the Sixth circuit maintained that sampling was, "*by definition*," copyright infringement:

> In fact, the copyright law specifically provides that the owner of copyright in a sound recording has **the exclusive 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." A recording that embodies samples taken from the sound recording of another is by definition a "rearranged, remixed, or otherwise altered in sequence or quality."** [emphasis mine][28]

[27] Brief of Amicus Curiae RIAA, at 9, Bridgeport Music II (Nos. 02-6521, 02-5738 (citing 4 Nimmer on Copyright…13.03[A][2] at 13-50) Seen at Schietinger, 8. According to the Nimmer on Copyright treatise, the leading secondary source on copyright law, the "practice of digitally sampling prior music to use in a new composition should not be subject to any special analysis."

[28] *Bridgeport—Circuit Decision.*

Throughout Part 2 of this study, I discussed exactly what the art of sampling is, and I specifically demonstrated why a "remix" of a song is not equivalent to a "sample" of a small portion of a song. I also pointed out in the Introduction that a "remix" is a *version*, a variant of a *whole song*. A "remix" involves using the core of the original sound recording, and always includes the lyrics of the original song, along with additional elements. Therefore, a "remix" is a derivative work of the original song. Sampling, by contrast, involves the transformative use of small portions of songs. Thus a "sample" is just a snippet from a song that is used as raw material to create a new song. Therefore, the new song that contains the "sample," along with additional musical elements — including rap lyrics and a rap performance in hip hop/rap music — is not a "derivative work" of the song it samples. If a sample-based musician samples, let's say, three notes from Michael Jackon's song "Thriller," then he transforms the sample beyond recognition and combines the sample with a new drum beat, a new bass line, a new melody, and new lyrics — lyrics that depict a rags to riches story — he has not created a "derivative work" of "Thriller," he has created a new song, one that, "as a whole," is substantially different from "Thriller."

It's further worth pointing out that 17 U.S.C. § 101 defines a "derivative work" as "a work *based upon* one or more preexisting works, such as a translation, music arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." So the context of derivative work as defined by Congress is clear.

The Sixth Circuit's Misunderstanding of the Art of Sampling, and the "Access-to-Pre-1972 Recordings" False Claim

There is tremendous aesthetic value in the art of sampling — its innovative techniques and creative processes, its historical connection, and its important place in pop culture. But it's evident that the Sixth Circuit (like many others in the music industry) is unaware of what the art of sampling really is, as the Sixth Circuit maintained that "if an artist wants to incorporate a 'riff' from another work in his or her recording, he is free to duplicate the sound of that 'riff' in the studio."[29]

To be certain, there is a difference, aesthetically and sonically, between sampling from old records and using studio instruments to do replays. Replays are not preferred by sample-based beatmakers (producers), and they are not always a real substitute for the aesthetic sound of older recordings, nor are they always the best artistic solution to a clearance problem. Sample-based beatmakers (producers) sample for the sound and feel that are intrinsic in the source material. Therefore, replays can't always conjure up the same essence that attracts most sample-based beatmakers (producers) in the first place. Further, most sample-based music (like much of today's music) is made in home studios; and most sample-based artists do not have the money for or access to live musicians who can perform replays. Nothing in the Sixth Circuit's decision suggests that the court considered any of these factors.

Additionally, the Sixth Circuit claimed that all artists who sample do so only for three reasons: To save money or to *add* something to the origianl recording — ergo, make nothing new — or to do both:

> No further proof of that is necessary than the fact that the producer of the record or **the artist on the record *intentionally* sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both.** [empahsis mine][30]

[29] *Bridgeport—Circuit Decision*.
[30] *Id*.

First, with regards to "...*intentionally* sampled," all borrowing, for the purposes of creating something new, is "intentional." One who borrows from a book to create a new literary work or one who borrows dance moves from a piece of choreography to create a new dance routine doesn't do so by *accident*. So it's odd that the Sixth Circuit would stress that the sampling (i.e. the borrowing) of a sound recording is intentional, as if borrowing from other copyrightable subject matter is *not* intentional. Second, sampling isn't as inexpensive as the Sixth Circuit would have the public believe. Sample-based beatmakers (producers), especially those who buy used vinyl records and expensive production equipment, incur recording costs just like other musicians. Third, thanks to advancing technology, many artists today record in home studios or cheaper commercial facilities, so there's not necessarily a cost advantage in this regard for sample-based beatmakers (producers). Fourth, in terms of cost of time, sampling, like any other music process, demands a great deal of time and effort.

Finally, the Sixth Circuit claimed that "there is a large body of pre-1972 sound recordings that is not subject to federal copyright protection."[31] This is untrue because pre-1972 sound recordings are protected by most state laws. Thus, sample-based beatmakers (producers) do not have "free access" to pre-1972 sound recordings.

[31] *Id.*

The Sixth Circuit's Misunderstanding of the Sample Clearance System and the Cost of Clearing Samples

Sample clearance can be expensive, time consuming, and fraught with administrative headaches. So clearing samples is often difficult and in many cases impossible. Yet the Sixth Circuit, demonstrating its total lack of understanding of the sample clearance system, asserted that the price to clear a sample was simply a fair market value issue; and thus, the price to clear a sample would naturally reform itself and be "kept within bounds" because market forces would dictate it:

> ***[T]he market* will control the license price and keep it within bounds.** *The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording***…the record industry, including the recording artists, has the ability and know-how to work out guidelines, including a fixed schedule of license fees, *if they so choose*…** [empahsis mine][32]

First, copyright owners can charge whatever they want for a license to use their work. Furthermore, music composition and sound recording copyright owners do not have to negotiate sample licenses at all! There's no legal path, like compulsory licenses for cover versions of whole songs, to compel them to do so. And emboldened by the Sixth Circuit's decision in *Bridgeport*, specifically the false claime that all sampling is "per se" copyright infringement, sound recording copyright owners have no incentive to improve the sample clearance system at all, as they can continue to charge whatever they want. Second, the Sixth Circuit's assertion that "market forces" would control the price to clear a sample, and that the record industry could apply its "know-how" to improve the sample clearance system, completely misses several points. Samples are one-of-kind; therefore, copyright owners do not compete with each other on setting prices for the uses of their copyrighted

[32] *Id.*, at 36 and 41.

works. This is not an example of buying, let's say, a hammer from a hardware store, where each hardware store in town stocks the *same* sets of hammers. Furthermore, sample-based recording artists are not interested in "duplicating" the sample; that defeats the whole point of the aesthetic.

Five Problems with the Bridgeport Bright-Line

It Subverts the Copyright Act

In detailing the "precise nature" of its decision to overturn the District Court's ruling, the Sixth Circuit further concluded that a "bright-line test" was needed going forward:

> ***The music industry,*** **as well as the courts, are best served if something approximating a *bright-line test* can be established.** Not necessarily a "one size fits all" test, but one that, at least, adds clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings. [emphasis mine][33]

There are many problems with the *Bridgeport* bright line, i.e. the Sixth Circuit's "bright-line test." The first and biggest problem is that the *Bridgeport* "bright line" is that it subverts the Copyright Act. In *Campbell*, the Supreme Court clarified that courts are *not* supposed to engage in any bright-line test, noting that the task of the fair use analysis — and by proxy the general analysis of a copyright infringement case, including considerations of de minimis takings — "is *not* to be simplified with *bright-line* rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis," and that Congress meant § 107 "to restate the present judicial doctrine of fair use, *not to change, narrow, or enlarge it in any way.*"[34]

[33] *Id.*

[34] *Campbell* 569, 577, 578 (emphasis mine).

It Does Not Strike a Balance

The second problem with the *Bridgeport* bright-line — i.e. the Sixth Circuit's bright-line test — is that it does not strike a balance between the interests of the public and the interests of copyright owners. The Sixth Circuit maintained that its bright-line test was to serve "the *music industry*, as well as *the courts*." Setting aside the fact that the Sixth Circuit mentioned "the music industry" first (which is telling), the court made no mention of the interests of the public. Moreover, the Sixth Circuit's bright-line test doesn't "strike a balance between protecting original works and stifling further creativity;" rather, it tilts the scale decidedly of protection towards the copyright owners of sound recordings and seeks to serve the interests of the music industry, first and foremost, not the interests of the public. To be certain, there is no balance when the interests of the public are ignored and dismissed by courts. Hence, the objectives of copyright are not fulfilled when courts attempt to institute a bright-line test in copyright infringement cases.

Additionally, the Sixth Circuit's bright-line test was severe and not grounded in reason. On this critical point, when I asked Dr. Ferrara for his thoughts on the Sixth Circuits bright-line test, he agreed that it was severe and reiterated that *Bridgeport* was a chilling decision:

> **It [*Bridgeport*] was a decision that seemed like it was creating a bright line that basically said...that if you take a digital sample of a master recording, without any qualification as to how much you take, if you take it, if you use a sample, you gotta license it, PERIOD.** So arguably, I don't know if this is the case, because it was three notes in that case, but arguably then if you take that literally, that would suggest that if someone took a little pop [MAKES A POPPING SOUND], just that little pop and sampled it, and through spectral analysis to prove scientifically that that "pop" [sound] was absolutely taken and used in the new work, that somehow that little "pop" [sound], which may have only occurred one time in the original sound recording, is now an infringement. That that has to be licensed. ***That kind of bright line seemed to me to be rather severe.*** And so...if one were to try to interpret that decision and how you could then advise people, who come to you

> and say, "Hey, what do you think? Can I use this or not?" **Based on that [the *Bridgeport* decision], you would have to say, "Even if you took a 'pop' [sound], you'd have to license it. That seemed really unusual**... So, yeah, it was chilling... What I'm basically saying is that it's always context bound. And how many notes is too many notes? ***There is no bright line.*** in the composition or in the sound recording.[35]

Furthermore, according to the Sixth Circuit, there was a substantial level of "uncertainty" in the music industry about what constitutes infringement in regards to the digital sampling of copyrighted sound recordings. Aside from the fact that there is no bright-line test in copyright infringement cases, how does the public, as well as the music industry, benefit from a test that actually stops short of "clarifying" the parameters that constitute *non-actionable* digital sampling? Again, let's be clear here. The Sixth Circuit's so-called bright-line test stipulates that *all* samples constitute infringement, regardless of the amount taken or the qualitative nature of the sample or if the sample was transformed. That kind of "clarity"outlaws *any* sample that isn't cleared. As such, the *Bridgeport* bright-line turns the mere act of sampling into copyright infringement and censors sample-based beatmakers (producers) and the art of sampling itself.

It Stifles Creativity

The third problem with the *Bridgeport* bright line — i.e. the Sixth Circuit's bright-line test — is that it does indeed stifle creativity. The Sixth Circuit concedes that sampling is a well-known art form, yet the court rejected the premise that de minimis applies to sound recordings (particularly in relation to digital sampling), overlooking common law de minimis and fair use adjudication. So according to the Sixth Circuit's ruling in *Bridgeport*, in order to prove copyright infringement in a digital sampling case, the only thing the copyright owner has to prove is actual copying; nothing else matters! Not the amount taken or qualtive nature

[35] Amir Said interview with Dr. Lawrence Ferrara, November 29, 2018.

of the portion copied; not how the portion was used; not how the original and secondary works compare one-to-one, "as a whole." Thus, *Bridgeport* essentially criminalizes the act of sampling itself, and raises sample clearance as the only legal pathway for sampling. This certainly stifles creativity.

It's Really Not a Test

The fourth problem with the *Bridgeport* bright line — i.e. the Sixth Circuit's "bright-line test" — is that it's not really a test at all. "Get a license or do not sample." That's not a test, that's an edict! It says that *all* samples that are not cleared constitute infringement. But this is censorship and prior restraint. A real test is the kind of examination that the substantial similarity analysis already provides for. A bright-line test is not appropriate because copyright infringement is not determined by a bright-line test. Copyright infringement can *only* be determined by a substantial similarity analysis in which qualitative and quantitative factors are assessed in effort to ascertain *if* the copying is substantial enough to constitute *improper* appropriation.

Further, sampling involves concepts of musical creativity that can't possibly be boxed in by the sort of bright-line test that the Sixth Circuit offered in *Bridgeport*. As I discussed in the Instruction Part of this study, the art of sampling includes a number of different approaches. From different chopping scopes to other transformation schemes. From music arrangement to drum pattern construction, the art of sampling relies on a variety of different methods, processes, techniques, styles, sounds, and aesthetics. And each sample-based beatmaker (producer) utilizes his own individualized approach. So any real judicial test requires a level of flexibility that, on one hand, explicitly accounts for all of these factors, and on the other hand, aims to strike a balance between protecting original works and stifling further creativity. Thus, no bright-line rule could ever fairly accommodate any art form.

It Does Not Lead to Judicial Economy

The fifth problem with the *Bridgeport* bright line — i.e. the Sixth Circuit's bright-line test — is that it doesn't lead to judicial economy. The Sixth Circuit claimed that its decision for a bright-line test was motivated, in part, by judicial economy. In announcing it's bright-line test, the court stated that the *Bridgeport* case "illuminates the kind of mental, musicological, and technological gymnastics that would have to be employed if one were to adapt a de minimis or substantial similarity analysis." Moreover, the Sixth Circuit further conceded that "[t]he district judge *did an excellent job* of navigating these troubled waters, but not without dint of great effort."[36] And then there this:

> "***The de minimis doctrine promotes judicial economy*** by ensuring that most ***cases involving trivial instances of copying will never result in a lawsuit at all.*** Where they do, they will almost certainly result in summary judgment for the defendants."[37]

So let's try to understand what the Sixth Circuit meant by this. Was the "great effort" that the district judge used to reach: (1) A practical, accurate application of the substantial similarity analysis; and (2) A practical understanding of the factors of an alleged infringement, was *unreasonable* and *too* time consuming? Copyright law — and a long history of judicial precedent in copyright infringement cases — makes it clear that a substantial similarity analysis must be conducted in *any* copyright infringement case. So in order to presumably cut down on more "great efforts" by future courts, and to subsequently increase judicial efficiency, the Sixth Circuit's solution was to remove the substantial similarity analysis from the copyright infringement case that was before it; and the court achieved this maneuver by wrongly claiming that the de minimis doctrine does not apply to sound recordings. Should we take this to mean that, with its decision in *Bridgeport*, the Sixth Circuit was simply trying to find a short cut that would

[36] *Id.*
[37] Mueller, 454.

enable future courts to bypass the substantial similarity analysis in copyright infringement cases involving sampling and sound recordings?

In conceding that the District Court did an "excellent job" with its substantial similarity analysis, the Sixth Circuit demonstrates its keen awareness of the amount of intellectual exercise, time, and resources expended by the District Court. So it appears then that the Sixth Circuit would have the public believe that the interest of justice is a pursuit worth taking, but only when it doesn't require any "great effort," specifically any "mental, musicological, and technological gymnastics."

Hence, there are three suplemental reasons why the Sixth Circuit's "judicial economy" justification for its bright-line test is illogical. First, the court's explanation inadvertently implied that cases of intellectual, cultural, and technological complexity are a waste of the judicial system's time and resources; and thus, the courts are better served by a "test" that effectively ignores this complexity — purportedly in the interest of judicial economy.

Second, the notion that the adjudication of sampling cases can be simplified by a one-sided test doesn't lead to efficient litigation. As I stated previously in this section, under the Sixth Circuit's bright-line test, to prove copyright infringement in a digital sampling case, all the copyright owner would have to prove is actual copying. Such a low threshold to infringement would likely mean a huge *increase* (as we have already seen in the courts post-*Bridgeport*), not a decrease, in the number of copyright infringement cases involving sampling. This means an even bigger burden and strain on the courts. Sound recording copyright owners, now emboldened by the *Bridgeport* "bright-line," can file even more copyright infringement claims against countless sample-based recording artists, record labels, and distributors for even the smallest of samples.

Third, presumably cut off from the de minimis doctrine, sample-based beatmakers (producers) would now have no other legal resolve against a copyright infringement claim other than an affirmative fair use defense. And we must remember that the fair use doctrine "'permits [and requires] courts to avoid rigid application

of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster,'" and that **"The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."**[38]

So if the courts are now forced to engage in countless new fair use analyses — keeping in mind that each fair use analysis is something much more complex and unpredictable than the substantial similarity analysis that satisfies a de minimis defense — where exactly is the judicial efficiency in that?

What We Can Take Away from the Sixth Circuit's Decision in *Bridgeport*

The Sixth Circuit's Bright-Line Is an Overreach that Subverts the Copyright Act

Simply stated, the Sixth Circuit's decision in *Bridgeport* was a judicial blunder of the highest magnitude. Presumably in its zeal to bring clarification to an area of law that was already confusing and noted for its paucity of case history, the Sixth Circuit dismissed the clear intent of Congress regarding the sound recording copyright, and it did not draw a distinction between transformative copying (legal appropriation) and "piracy." Even more alarming was the Sixth Circuit's break from how copyright infringement is proven in court. In *Bridgeport*, the Sixth Circuit maintained that where digital sampling of a sound recording is involved, no substantial similarity analysis is necessary to prove copyright infringement — despite the fact that *each* copyright infringement case must satisfy the same three elements: proof of ownership, proof of copying, and proof of *unlawful* appropriation. What's worse? The Sixth Circuit justified its decision to treat sound recordings differently than other copyrightable subject matter based on a bizarre reading of the statute and the House Reports that accompanied both the Sound Recording Act of 1971 and the Copyright Act of 1976.

[38] *Campbell v. Acuff-Rose,* p577, (emphasis mine, citations omitted).

Further, the Sixth Circuit's legal reasoning regarding the applicability of the de minimis doctrine to sound recordings was equally perplexing. It's well established that the de minimis concept applies to copyright law in general. The Sixth Circuit's determination that the de minimis doctrine *doesn't* apply to sound recordings, specifically as it relates to sampling, is an opinion that is at odds with the common law tradition of de minimis, sampling case law, and fair use adjudication. Moreover, blocking sound recordings and sampling — just one particular form of copying — from de minimis relief, which is essentially what the Sixth Circuit's bright-line did, not only stifles creativity by making access to the art of sampling unnecessarily difficult, it runs counter to the objectives of copyright.

With its dismissal of Congress' clear intent and instructions for the sound recording copyright; its break from how copyright infringement cases are proven in court; its deliberate elimination of the de minimis defense with regards to the copying of sound recordings; its contrary response to all relevant case law, statutory language, and legislative history; and its highly questionable bright-line test, the Sixth Circuit's decision in *Bridgeport* must be seen as a judicial overreach that subverted the Copyright Act.

So what does this all really mean now? The damage of the Sixth Circuit's decision in *Bridgeport* is that it jeopardized the validity of transformative appropriation when it involves sound recordings. But transformative appropriation of any subject matter is a method long-practiced in the arts (particularly literature and music). Additionally, the Sixth Circuit's decision in *Bridgeport* jeopardized fair and equitable access to the art of sampling aesthetic itself. In effect, with it's "Get a license or do not sample" bright-line rule, the Sixth Circuit attempted to hand over the exclusive right to sample sound recordings — and create new art using said samples — to the copyright owners of those sound recordings or those who could afford to pay sample licensing fees. Not only does this setup unequal access to sampling — as musicians without major label backing or considerable financial resources are essentially blocked from sampling because they can't afford the clearance fees — it also

undermines the progress of the art form and essentially takes the art away from the artists. This goes against the interests of the public. So there is no doubt that the Sixth Circuit's decision in *Bridgeport* stifles creativity and undermines the very purpose of copyright law.

***

And what effects have the Sixth Circuit's decision in *Bridgeport* had on the music industry's approach to the sampling quandary? For the most part, the status quo still exists. Labels, lawyers, and sample clearance houses still advise that *all* samples be cleared. Only now, the justification for such advocacy is bolstered by *Bridgeport*. So the lawsuit neurosis that hangs over the art of sampling in the music industry is even stronger. Plus, 18 years after the *Bridgeport* decision, the music industry has not reformed the sample clearance system, and there's no reason to believe that they will do so any time soon.

And what of *Bridgeport's* effect on the art of sampling overall? Well, unlike some commentators, I've never taken the Sixth Circuit's ruling as a death knell for sampling for a number of reasons. The Sixth Circuit's decision was based on improper legal reasoning, it contained key contradictions, and, most importantly, it was always at complete odds with the Copyright Act. So, I had no doubt that other courts would resoundingly reject the Sixth Circuit's opinion in *Bridgeport*, especially since it broadens copyright protection for sound recordings and grants sound recording copyright owners more rights than other copyright proprietors, something the Copyright Act explicitly guards against.

Furthermore, the art of sampling has developed and will continue to develop outside of the purview of the courts, no matter what the courts say. Most sample-based musicians are unfamiliar with sampling case law, let alone the *Bridgeport* ruling, a fact I hope to change with this book. Moreover, the majority of innovative sample-based recording artists do not take their creative cues from the judicial system. For example, most sample-based beatmakers (producers) get their cues from the sampling tradition of hip hop/

rap music itself. For sample-based beatmakers (producers), it is the collective aesthetic, historical, methodological, and ethical aspects of the art of sampling in the hip hop/rap tradition that they (we) take their (our) lead from. Plus, most new sample-based artists will continue to take full advantage of the powerful sampling tools that are today evermore affordable and evermore powerful. So as long as people want to sample, and as long as the technology exists, the art of sampling will prevail.

Finally, by 2004, the sample clearance system was already well established, and most major label-backed sampling musicians were already being encouraged not to sample, or at least get clearances for the samples that they were using. Yet, the art of sampling survived. And it continues to grow despite a sea-size departure from the tradition by many artists.

Long Live De Minimis and Fair Use!

The Sixth Circuit's decision in *Bridgeport* — a decision ripe with improper legal reasoning, factual inaccuracies, contradictions, and other questionable findings — was not supported by the Copyright Act or the legislative history that accompanied both the Sound Recording Act and the Copyright Act, nor was it in line with all sampling cases (save for *Grand Upright*) prior to its own curious "bright-line" decision. While the music industry may now consider this issue to be settled law, the truth is, sampling is not "per se" infringement, and *all* samples do *not* require a license. It's also important to note that courts outside of the Sixth Circuit's jurisdiction recognize the fact that the de minimis doctrine applies to sound recordings. In *EMI Records, LLC v. Premise Media*, the New York Supreme Court rejected the Sixth Circuit's ruling in *Bridgeport*:

> A number of reasons persuade this Court against endorsing the recommendation in *Bridgeport* Music. Putting aside that ***Bridgeport Music* does not represent controlling authority, this Court declines to follow the statutory interpretation of Section 114 relied upon by the court in *Bridgeport Music* to declare the bright line rule that a de minimis exception is not available.** The criticism of ***Bridgeport Music*** by Prof. David Nimmer best articulates this Court's basis for rejecting the holding therein.
> "Indeed, ***had Bridgeport Music [the Sixth Circuit] consulted Section 114's legislative history instead of dismissing that history as irrelevant,*** it would have discovered that Congress explicitly noted in that context that "infringement takes places whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method…." That excerpt debunks the court's imputation that Congress, when adopting Section 114, intended to dispense with traditional notions of substantial similarity." [emphasis mine][39]

[39] *Emi Records Limited v. Premise Media Corp. L.P.* 2008 N.Y. Misc. LEXIS 7485 (N.Y. Sup. Ct. Aug. 8, 2008) See also *Lennon v. Premise Media Corp*, 556 F. Supp. 2d 310 - (Dist. Court, SD New York 2008).

Equally important to remember is the fact that fair use has not gone anywhere. The unique limitation that fair use places on the exclusive rights of copyright owners is codified in the Copyright Act. The Sixth Circuit did not explore fair use in *Bridgeport*; yet another unfortunate mistake made by the court. And despite some commentators' assertions that the Sixth Circuit may have eliminated the fair use defense in cases involving copyright infringement and sound recordings, the truth is, the Sixth Circuit couldn't eliminate fair use if it tried. In fact, in 2005, the Sixth Circuit, in yet another bizarrely ironic maneuver, later amended its initial 2004 decision in *Bridgeport*, noting that since the District Court "found no infringement, there was no necessity to consider the affirmative defense of 'fair use,'" but "[o]n remand, the trial judge *is free to consider this defense* and we express no opinion on its applicability to these facts." In other words, in the end, the Sixth Circuit conceded that *fair use* applies to sound recordings. So how can fair use apply to sound recordings but de minimis cannot? More illogic.

All things considered, the *Bridgeport* bright line — i.e. the Sixth Circuit's "bright-line test" — was an unintelligible scheme for ending a so-called sampling quandary. Based on improper legal reasoning, a terrible misinterpretation of the Copyright Act, highly questionable and incomplete observations of the sample clearance system, and a complete misunderstanding of and a perhaps negative bias against sampling itself, the Sixth Circuit's decision in *Bridgeport* hurt long-established principles of copyright law and stifled creativity.

Chapter 21

Post-*Bridgeport*, Part 1

10 Key Developments that Signal Change in the Music Industry's Attitude Towards Sampling, Part 1

Since the infamous *Bridgeport* decision (2005), there have been a number of developments that punctuate how and why the music industry's hostile attitude towards sampling and fair use is going to have to change, whether they like it or not. This chapter examines seven of the 10 developments that I believe will prove to be the most impactful, especially since they will have a collective role in raising the profile of fair use.

Saregama India Ltd. V. Mosely: Why the District Court of the Southern District of Florida Did Not Follow the Direction of the Sixth Circuit's Decision in Bridgeport

One of the things most damaging about *Bridgeport* is that in its aftermath, many people wrongly believe that *any* sample that is not cleared, no matter the length or its qualitative and transformative factors, constitutes copyright infringement. *Bridgeport*'s copyright infringement "per se" rule stated that, absent a license, a digital sample of a sound recordings was copyright infringement "per se" (i.e. automatic). Never mind that there's no such thing as "per se" copyright infringement, i.e. *presumptive* copyright infringement simply if copying has taken place; never mind that each copyright infringement case must be determined in court via a specific substantial similarity analysis to determine actionable

or non-actionable copying, *Bridgeport* prompted a slew copyright infringement lawsuits involving sampling and sound recordings. All of these cases were misguided by *Bridgeport*. One such example was *Saregama India LTD. v. Timothy Mosley, et. al.*

Background, Complaint, and Decision

On August 27, 2007, Saregama India Ltd. ("Saregama"), an Indian music production and distribution company, filed a complaint in the Southern District of New York against Timothy Mosley, aka Timbaland, Aftermath Entertainment, G Unit Records, Interscope Records, Universal Music Group (et. al), alleging federal and state copyright infringement claims, and seeking damages and injunctive relief. The dispute arose from the defendants' (Mosley, et. al) sample of "Bagor Mein Bahar Hai" ("BMBH"), an Indian sound recording (whose copyright was allegedly owned by Saregama) in the song "Put You on the Game" ("PYOG"), which appeared on The Game's (Jayceon Taylor) 2005 album *The Documentary*. Both sides filed cross-motions for summary judgment. Saregama maintained that it held a valid copyright in "BMBH." Further, Saregama argued that although the "BMBH" sample only amounted to roughly a one-second snippet consisting of just three notes: D, B flat, and G, it was entitled to summary judgment *because the defendants admitted that they sampled*. In response, Mosley, et. al argued that Saregama did not actually own the copyright in "BMBH," and, irrespective of whether they sampled the "BMBH" sound recording, the "BMBH" sound recording and" PYOG" are not substantially similar.[1]

On Mosley, et. al's motion to transfer venue, the case was transferred to the Southern District of Florida, where on December 23, 2009, the court granted Mosley, et. al's motion for summary judgment on two grounds. First, the court found that Saragama did not own a valid copyright in "BMBH," therefore they lacked statutory standing to bring this copyright infringement action. Second, the court found that the two songs were not substantially similar and that the Defendants' digital sampling of "BMBH" in

[1] *Saregama India LTD. v. Timothy Mosley, et. al*. 687 F.Supp.2d 1325 (2009) Pg.1.

"PYOG" was not, therefore, actionable.[2] Seragama appealed and in 2011, the Eleventh Circuit Court of Appeals affirmed the district court's order granting summary judgment for Mosley, et. al. Since the resolution of the lawsuit (appeal) turned on the interpretation that Seragama did not hold a copyright in "BMBH," and therefore lacked standing to bring action, the Eleventh Circuit did not address the issue of substantial similarity.[3]

The Substantial Similarity Analysis

For the purpose of analysis, Saregama's lack of statutory standing is of less importance here. Because Saregama didn't own the copyright to "BMBH," the question of whether the "BMBH" and "PYOG" were substantially similar was inconsequential. Nonetheless, the court engaged in a substantial similarity analysis because, as a threshold matter, courts are obligated to perform a substantial similarity inquiry at the summary judgment stage.[4] There are two things that are important to note about the district court's substantial similarity analysis in *Saregama*. First, the substantial similarity test that the court applied reinforced the correct manner in which the substantial similarity test is supposed to be applied. The district court specified the threshold for what constitutes substantial similarity, noted precedent in the Eleventh Circuit in this regard (which the District Court of the Southern District of Florida is bound to), and pointed out that the substantial similarity analysis also requires that the two works at question be compared to one another "as a whole":

> **"Two works are substantially similar if "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."**[7] **Leigh,212 F.3d at 1214. Substantial similarity can arise from both literal and nonliteral similarities. Id. Sampling cases, like the one at bar, involve literal similarities because they deal with the "verbatim copying or paraphrasing of a copyrighted work."** *Palmer v. Braun*, 287 F.3d 1325,

[2] *Ibid*.
[3] *Saregama India Ltd. v. Mosley*, 635 F. 3d 1284 - Court of Appeals, 11th Circuit (2011).
[4] *Saregama India Ltd. v. Timothy Mosley, et. al*. 687 F.Supp.2d 1325 (2009).

1330 (11th Cir.2002). Where only a small 1338*1338 amount of literal similarity exists, also known as "fragmented literal similarity," a substantial similarity may be found *if* the "fragmented copy is *important* to the copyrighted work, *and* of *sufficient quantity*...." Id.

In a music composition copyright case, **the Eleventh Circuit recently affirmed and adopted an order granting summary judgment for the defendant because its song "In Da Club" was not substantially similar to copyrightable aspects of the plaintiff's song "Its Your Birthday."** Lil' Joe Wein Music, Inc. v. Jackson, 245 Fed.Appx. 873, 875 (11th Cir.2007). In addition to ruling that the "it's your birthday" phrase in both songs was an unoriginal aspect of the plaintiffs song, **the court ruled that the similarity between the songs was *de minimis*:**

Outside of that limited "birthday phrase," there are virtually no similarities between the contested works. Indeed, Lil' Joe Wein does not allege that any aspect of "In Da Club" infringes upon "Its Your Birthday" other than the initial "birthday" section. Once those non-protectible elements are removed, no similarities remain. **Moreover, the disputed phrase, although prominently placed at the beginning of "In Da Club," represents only approximately eleven seconds of a three-minute, thirteen-second song ... It is, therefore, the finding of the Court that Lil' Joe Wein fails the intrinsic test as well because the "average lay observer" would not confuse the two works.** No *reasonable* jury, *properly instructed*, could conclude that Lil' Joe Wein's and the Defendants' compositions are substantially similar.

Similarly, in *Jean v. Bug Music, Inc.*, 2002 WL 287786 *2 (S.D.N.Y. Feb. 27, 2002), the court ruled that two songs were not substantially similar where, "the songs, taken as a whole, [were] substantially different," and "the only identical portions of the two songs are the first three words and notes," which the court found were common musical and lyrical phrases.

In this case, the only portion of BMBH found in PYOG is an approximately one-second snippet of a female vocal performance appearing at 0:21, 0:38, 1:49, and 2:52. (See Ricigliano Report ¶ 11; Oxendale Report at 2.) In PYOG, the one-second snippet is *looped* in the refrain of the song at 1:08, 2:03, 3:08, and 3:47. **(See Ricigliano Report ¶ 15.)** Other than the one-second snippet, the songs bear no similarities. ***Taken as a whole*, PYOG and BMBH are completely different songs, with different lyrical content, tempo, rhythms,**

> **and arrangements. Indeed, it is highly unlikely that the average lay observer could discern the source of the one-second snippet without prior warning.** Saregama's expert claims that the snippet is unique, however he did not compare the works to determine the snippet's relative importance in each song or whether the songs are similar *as a whole*. By contrast, Defendants' expert opined that PYOG and BMBH are dissimilar *as a whole*. (SeeRicigliano Report ¶ 26.) **To be sure, no reasonable jury, properly instructed, would mistake PYOG for BMBH or conclude that the two works were substantially similar."** [emphasis mine][5]

The most important thing to note about the district court's substantial similarity analysis is that it highlighted the problem with *Bridgeport* and took apart several of the Sixth Circuit's errors in *Bridgeport*. Relying on *Bridgeport*, Saregama contended that sound recordings must be treated differently from "other forms of copyrightable work." However, the district court pointed out that the Sixth Circuit's *Bridgeport* decision has not been followed by the Eleventh Circuit, specifically observing that the substantial similarity requirement is as a constituent element of all infringement claims, and that the Sixth Circuit (wrongfully) created an exception for sound recordings (i.e. expanded the rights of sound recording copyright holders):

> **"…Saregama contends that sound recordings like BMBH must be treated differently from other forms of copyrightable work, relying on *Bridgeport Music, Inc. v. Dimension Films***, 410 F.3d 792 (6th Cir.2005). There the Sixth Circuit held that any sampling of a sound recording constitutes infringement, no matter how small the sampled snippet. Id. at 798-805. **However, the Sixth Circuit's decision to carve out an exception for sound recordings has not been followed in this Circuit. Indeed, the Eleventh Circuit imposes a "substantial similarity" requirement as a constituent element of *all* infringement claims:**
>
> **No matter how the copying is proved, the plaintiff also must establish specifically that the allegedly infringing work is substantially similar to the plaintiffs work with regard to its protected elements.** Even in the rare case of a plaintiff with direct

[5] *Ibid*, pgs. 14-16.

evidence that a defendant attempted to appropriate his original expression, **there is no infringement unless the defendant succeeded to a *meaningful* degree.** *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir.2000) (citations omitted) (emphasis supplied). Therefore, although factually similar, **the *Bridgeport* court's exception for sound recordings presents a departure from Eleventh Circuit precedent.**

***Saregama* also fails to persuade the Court that, in the future, the Eleventh Circuit will depart from the black-letter consensus, which requires proof of substantial similarity, to follow the Sixth Circuit's exception for sound recordings.** In *Bridgeport*, the defendant sampled a two-second snippet of the plaintiff's copyrighted guitar solo, lowered and extended its pitch, and looped the snippet at five places throughout the background of the song. *The district court held that, although the sampled portion may have been important to the plaintiff's work, it would not be recognized by a lay observer, let alone an observer familiar with the plaintiff's work and was therefore not substantially similar.* Bridgeport Music, Inc. v. Dimension Films, 230 F.Supp.2d 830, 842 (M.D.Tenn.2002).

The Sixth Circuit reversed. In essence, the Sixth Circuit held that the copyright statute dictated a broader scope of protection for sound recordings than that afforded to musical compositions or other types of copyrightable work. *Bridgeport*, 410 F.3d at 800-01. Rather than couching this distinction in the "copyright-granting" statutory provisions of 17 U.S.C. § 106,[8] the Sixth Circuit looked to 17 U.S.C. § 114(b),[9] which clarified and limited the scope of copyright protection for sound recordings, to proclaim that "a sound recording [copyright] owner has the exclusive right to `sample' his own recording."

It is not clear to this Court, however, why the *Bridgeport* court's reading of Section 114(b) follows inexorably from its text. First, Section 114(b)'s derivative-work provision addresses the scope of protection given to derivative works, not original works. **There is no indication that Congress sought to expand the scope of protection for original works by redefining the term "derivative work" to include all works containing any sound from the original sound recording, whether those works bear substantial similarities to the original work or not.** In other words, Section 114(b)'s derivative-work provision does *not* allow the Court to conclude that PYOG is a "derivative work" of, and thereby infringes on, BMBH *merely because it contains a one-second snippet* of BMBH.

Second, the *Bridgeport* court's reading of Section 114(b)'s similar-sounding work provision is more expansive than its text and legislative history suggest. The similar-sounding work provision reads:

> The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.
> 17 U.S.C. § 114(b).

The *Bridgeport* court appears to interpret this language to mean that protection in a copyrighted sound recording extends to *every* sound fixed in the work such that a sample of any sound *automatically* constitutes infringement. However, a more plausible reading of this provision is that protection in a copyrighted sound recording "do[es] not extend" to sound recordings which, although similar-sounding, do not capture any sounds from the copyrighted sound recording. On this reading, an appropriate implication is that PYOG infringes on BMBH if PYOG both: (1) samples any sound from BMBH; and (2) "imitate[s] or simulate[s]" BMBH.[10]

Thus, Section 114(b)'s similar-sounding work provision governs the relationship between similar-sounding sound recordings and whether they share captured sound. There is no indication, however, that this provision relates to works which are not similar-sounding or that Congress otherwise sought to abandon the substantial similarity inquiry.[11] Section 114(b)'s legislative history supports this view:

> Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever *all* or any *substantial* portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

> 17 U.S.C. § 114, H. Rep. No. 94-1476, p. 106, U.S.Code Cong. & Admin.News 1976, pp. 5659, 5721 (emphasis added).
>
> **In sum, Section 114(b) does not seem to support the distinction between sound recordings and all other forms of copyrightable work that the *Bridgeport* court imposes.** Apart from its reading of the statute, the *Bridgeport* court proffers a variety of policy-based arguments for treating sound recordings differently than other copyrightable work. See *Bridgeport*, 410 F.3d at 800-05. **The *Bridgeport* court's policy prescriptions, however accurate they may be, do not present grounds for this Court to follow its direction.** Therefore, the Court will grant Defendants' motion and deny Saregama's motion on this issue. [emphasis mine][6]

The Impact of Saregama

In terms of sampling and the implications that de minimis and fair use hold for it, *Saregama, Ltd. v. Mosley* is thus far the second most important post-*Bridgeport* development (the first most important post-*Bridgeport* development, which I cover in the next chapter, is the Ninth Circuit's circuit split with the Sixth Circuit). In the Eleventh Circuit Court of Appeals, the decision in *Saregama* turned on the question of a valid copyright ownership. So it's the decision in the District Court for the Southern District of Florida which is highly instructive, both in regards to the application of the substantial similarity analysis and the reasons why courts outside of the Sixth Circuit's jurisdiction do not follow the Sixth Circuit's direction in its *Bridgeport*.

By holding that the substantial similarity analysis applies to sound recordings, just as it does to all forms of copyrightable work, *Saregama* dispels the *Bridgeport* fallacy that the substantial similarity test was eliminated for sound recordings. Moreover, *Saregama* demonstrates the appropriate manner in which the courts are to apply the substantial similarity test. Additionally, *Saregama* successfully rebuts the notion that *Bridgeport* is the "law of the land," making it clear that other courts outside of the Sixth Circuit are not bound by the Sixth Circuit's decision in *Bridgeport*.

[6] *Ibid*, pgs. 16-22.

Girl Talk and the Court Room Showdown the Music Industry Has Been Unwilling to Have

Between 2002 and 2010, Girl Talk (Greg Gillis), the most famous mashup artist to date, sampled well over one thousand different songs. Many of the songs that he sampled were contemporary popular hits; and neither he nor his then record label, Illegal Art, cleared any of the samples. Girl Talk used these samples as the bedrock for five different albums that were released in that same eight-year span. For his album *Feed the Animals* (2008), his label listed all of the artists and songs that were sampled per each track. That's upwards of 300 tracks, including songs by the likes of Queen, Led Zeppelin, Janet Jackson, Gwen Stafani, Hall & Oates, and Jay-Z. Clearly, Girl Talk and Illegal Art weren't *hiding*. So why hasn't Girl Talk been sued yet? If the labels really feel empowered by *Bridgeport*, then why haven't they gone after Girl Talk?

I believe it's because the major record companies — themselves pieces of large, multinational corporations — don't want a showdown in the courts over fair use and sampling, because they're worried about what will happen: A huge spotlight on fair use! So their stance is to make no waves and just carry on with the status quo, which means two things. First, reinforce the notion — through fear and lies — that *all* samples, no matter how small or no matter what the qualitative factors are, must be cleared. Second, continue to stoke the fear that you will be sued if you don't clear a sample.

The underlying point here is that the labels thrive on ignorance and fear. And not just when it comes to sampling and copyright law. (They have long benefited from artists not understanding their one-sided, boilerplate contracts and ad-hoc customs.) The music industry has continuously perpetuated the lie that fair use is "just a defense." As a consequence, they have kept the safe harbors of fair use and de minimis out of the view of sample-based beatmakers (producers). Further, since the mid-'90s, the labels have used a campaign of fear to pressure artists into clearing even the most miniscule samples; at the same time they have deterred many would-be sample-based beatmakers (producers) from sampling.

What makes this more troubling is that the culture of fear that the labels created has now led to a sub-culture of *safety*. There is no shortage of commentators willing to discuss how and why you should clear samples; and there are countless articles online detailing how to sample "safely." Usually, these kinds of articles go into great detail about how to clear a sample, but none of these articles ever highlight what I call the "three pertinent facts of sample clearance." First, there's a difference between *sampling* and a *sample*; sampling *is a form of copying,* it's activity; a sample is a snippet, a portion of copyrighted work. Sampling is an art form, and it represents the "sort of copying" protected by fair use. Second, *all* samples do *not* need to be cleared; nowhere in the Copyright Act does it say that a license *must* be obtained for a digital sample of a sound recording before the sample is used. Third, de minimis and fair use are public "guarantees." In other words, all of the "safety first"/"how-to-clear-a-sample" articles and commentary do nothing but serve the interests of the music industry, they do not serve the interests of the pubblic. By overlooking the fact that de minimis and fair use are permissive borrowing pathways for sample-based beatmakers (producers), the "safety-first"/"how-to-clear-a-sample" commentary paints an incomplete picture of sampling and the implications that it holds for copyright law. Moreover, such commentary helps the music industry subvert the Copyright Act and undermine the objectives of copyright.

This is the real reason why the labels see Girl Talk as a problem: They don't want to deal with the fallout. Sue Girl Talk, and the music industry shines a bright light on fair use. Shine a bright line on fair use, and the music industry in turn shines a bright light on other unfair dealings that it would prefer to keep out of public eye. The music industry has never lacked an appetite for filing lawsuits against alleged copyright infringers! But in the case of Girl Talk, it's not simply that Girl Talk might prevail against them; it's that a high profile lawsuit against Girl Talk — no matter if copyright infringement is found or not — represents a watershed moment for fair use and digital sampling.

Some commentators have maintained that the reason that Girl Talk has avoided legal action is because he's white. But the notion that labels have refrained from suing Girl Talk simply because he is white is misguided. That the labels — and literally thousands of music publishers and sound recording copyright owners — conspired together to *not* sue Gillis and his label for copyright infringement because Gillis is white is not plausible. The music industry is notoriously litigious, *especially* around the copyrights that they hold. Plus, we've already had an example in Beastie Boys, who were white. Beastie Boys were the defendant in of one of the most impactful copyright infringement lawsuits involving sampling.

So the Girl Talk conundrum isn't about race. The reason Girl Talk hasn't been sued isn't because he's white, it's because lawsuits against him, in which fair use will most certainly be at issue, pose a serious threat to the music industry's status quo. The major labels don't want to open Pandora's box! So the labels have reserved their right *not* to sue Girl Talk. From the labels' perspective, this is the most prudent approach. *Let sleeping dogs lie!* Whether they win court battles against Girl Talk or not, they risk losing the war, because copyright infringement lawsuits against Girl Talk will certainly open up the floodgates on fair use. And this will not only remove the veil surrounding fair use — thereby alerting others whose sample-based works are also likely fair use — it will also diminish the music industry's role in framing the debate about the art of sampling, the implications that it holds for copyright law, and the current sample clearance system. But, if the labels ever do get around to suing Girl Talk for copyright infringement, he'd be wise to enlist the counsel of Karen Shatzkin.

The Rising Profile and Importance of Fair Use Crusader Karen Shatzkin

In the music and documentary film spaces, there has been no shortage of aggressive lawyers going after alleged copyright infringers. But now, the other team — i.e. the team that correctly sees fair use as a vital part of copyright law and the Constitution

— has someone equal to the task. Her name is Karen Shatzkin. Karen Shatzkin, partner at Shatzkin & Mayer, P.C., is a well known and highly regarded attorney who represents numerous fiction and documentary filmmakers, designers, publishers, musicians, and fine artists. She has extensive litigation experience, particularly in the area of copyright law and fair use, and as such, she holds a firm understanding of the music industry's dismissive attitude towards fair use. A regular speaker on various panels covering media, documentary studies, and fair use, Shatzkin is a highly sought after voice in this space. And she's someone I consider to be the ultimate fair use crusader. In the fall of 2015, I attended the Volunteer Lawyers for the Arts (VLA) "Fair Use: Current Developments Panel," at which Karen Shatzkin spoke and so graciously shared her insight and stories from the trenches. In this section, I include some Shatzkin quotes and highlights — both from her talk at the VLA panel as well as her 2012 talk at the New School — along with my commentary.

Karen Shatzkin On the Absurdity of Sums that Copyright Holders Feel Entitled To; and the General Public's Unfamiliarity With Fair Use

> If you go to sources who own copyrighted materials, you will be shocked at the sums that they consider themselves *entitled* to.
> A client of mine, who actually teaches documentary film at M.I.T., is making a wonderful documentary and wanted to use a headline. A headline from the *Chicago Tribune*, I think it was the *Chicago Tribune*. And if I'm not mistaken, my recollection is that when she called them to ask, they said it would be $7,000 to put their headline in her film. And I said, 'Did you have to get it from them?' She said, 'No.' So I said, 'Then, forget about it. You're not going to pay them $7,000, and you're gonna put it in your film. Why? Because of the doctrine of fair use.[7]

Here, Shatzkin not only demonstrates the absurdity that some copyright owners engage in, but also just how little most people

[7] Karen Shatzkin speaking at "Fair Use: Current Developments Panel," Voluntary Lawyers for the Arts, October 6, 2015.

(copyright owners included) actually understand how fair use works. For example, Shatzkin recalled a situation involving a former client and the *Chicago Tribune*. To use a headline from their newspaper in her documentary, the *Chicago Tribune* reportedly wanted to charge a wopping $7,000, presumably for no reason other than the fact that they *could* charge *any* amount that they wanted to. But Shatzkin's client had no idea that she didn't need the *Tribune's* permission to simply use one *headline* of theirs in her documentary, because it was a clear instance of fair use.

Karen Shatzkin On the Key Principle of Fair Use

> **Transformative is now the key principle that underlies fair use law,** Transformative doesn't mean that you take a scene from a movie or the text from a book and you literally alter that. It doesn't mean that in *Gone With the Wind* [the movie], she's suddenly walking up the stairs, instead of down the stairs, or that something different happens in the [new] film than what happened in [*Gone With the Wind*]. It doesn't mean that you have to alter the work itself. If you add new expression, which can be your own expression about it; if you add new meaning to it, if you add a new message to it. So it means, for example, that you put it in a new context. [emphasis mine][8]

Here, Shatzkin is discussing how the transformative principle is what courts look more closely at. The transformative nature of a given use is the leading factor in cases where fair use is found.

Karen Shatzkin On Fortuitous Capture

> Often, filmmakers have substantially more negotiating power and greater rights to use pre-existing material than they initially perceive. We can often help filmmakers avoid spending countless hours and scarce dollars obtaining permissions that were totally unnecessary — *or worse, excising material from their films that they have every right to include*. [emphasis mine][9]

[8] *Ibid*.
[9] *Ibid*.

In detailing her dealings with major labels when she represented the producers of the film *Prom Night in Mississippi* (2009), a documentary about a high school in Mississippi that had its first non-segregated prom in the school's history, Shatzkin discussed how the labels wanted her clients to clear *all* of the music that was playing in the background at the prom:

> There's no way you can understand without hearing the music, this was an example of fortuitous capture, i.e. *incidental recording*. With many of the things that you film, first of all, you might not even be able to filter out music. But if you're in a restaurant, whatever's playing is actually what's part of what's actually happening there. And so, if you catch those things in your film…if you use something because it's actually part of the events that you are filming, then, that's gonna be fair use. ... **The Sony's of the world, the Universals of the world, they don't want to admit that anything is fair use. *They don't care about fair use.***..But what happens when the music is the subject,"[emphasis mine][10]

One point that Shatzkin was making was that the music, which was a representative mix of the tastes of the prom goers, was incidental even though it was critical to better understanding the story. After the label threatened a lawsuit for copyright infringement, Shatzkin wrote a letter to the label and dared them to sue:

> I made the point that's really not in your interest…If you don't like what I'm saying, then sue me.[11]

Karen Shatzkin on Not Expecting Copyright Holders to Acknowledge Fair Use

> I'm a firm believer that if you go to sources who own materials, you will be shocked at the sums that they consider themselves entitled to…They can put any price on it that they choose…If you can get access; if you have it [access] from the owner of the intellectual property, the owner of the copyright, then, there's no point in

[10] *Ibid*.
[11] Ibid.

> discussing fair use. Because if you have to go to the owner to get it, they're not interested in fair use. If they charge $45 a second with a minimum of a minute, and every clip is separate, then, they're gonna charge it to you whether you think it's fair use, or I think it's fair use, or not." [emphasis mine][12]

This issue reminds me of all of the commentary about sampling music "safely." But sampling "safely" should be about informing the public about sampling and de minimis and fair use just as much, if not more, as it is about sampling and sample clearance. Again, *sampling* is just one "sort of borrowing" that is fair use. And a *sample* is an actual appropriation, which *may* also be fair use, if not de minimis. Additionally, dicussions of sampling "safely" should also include examples of samples that are likely fair use or de minimis. Such commentary should further include guides for using samples in transformative ways, i.e. ways that that are likely fair use. Shatzkin speaks to this point when she suggests that documentary filmmakers *first* look for ways to incorporate fair use, *before* seeking licenses. Similarly, sample-based beatmakers (producers) should first incorporate samples in ways that are likely fair use, not focus on the "clear-all-samples" mantra of a music industry that hates fair use.

Karen Shatzkin On Fair Use as Free Speech

> **Without the fair use doctrine, copyright law would run afoul of the free speech protections afforded by the First Amendment.** It's not an invitation to poach the intellectual property of others instead of creating your own work… Fair use is the lubricant between copyright law and your First Amendment right to express yourself…" [emphasis mine][13]

Here, Shatzkin reminds us that fair use is a critical component of free speech; that fair use is protected by the U.S. Constitution; and that because fair use is a "gurantee" of the Copyright Act, it protects the interests of the public above all.

---

[12] Karen Shatzkin On Fair Use," The New School's "Doc Talk Podcast," (November 29, 2012) https://vimeo.com/53536025 (emphasis mine).
[13] *Ibid*.

Notorious B.I.G. LLC v Lee Hutson: The Will to Fight Back and Affirm Fair Use In Court

It looks like the late Notorious B.I.G.'s impact on music may have a second act. Only this time, the impact will likely hold critical implications for fair use and digital sampling. On March 31, 2014, in what was considered to be a preemptive lawsuit, the estate of Notorious B.I.G. filed for declaratory judgment in a California federal court, seeking relief that B.I.G's 1994 song "The What" — off of the classic album *Ready to Die* — was not a copyright infringement of the 1974 song "Can't Say Enough About Mom," performed by Leroy Hutson (co-written by Hutson and Michael Hawkins). While the suit raised the issues of valid copyright ownership, statute of limitations, the doctrine of laches (waiting too long to file the claim), and producer indemnification, it was the fair use defense that undoubtedly had many of those on both sides of the sampling/copyright law quandary closely watching how this case would turn out.

The Complaint

According to the complaint filed by lawyers on behalf of B.I.G.'s estate, Leroy Hutson "began a campaign of accusations against Plaintiff [Christopher Wallace PKA 'Notorious B.I.G.,' 'Biggie,' and 'Biggie Smalls'], claiming that the Recording ['The What,' produced by Easy Mo Bee and featuring Method Man] violated his alleged copyright in 'Can't Say Enough About Mom.'" The complaint describes Hutson's "campaign of accusations" as having began in 2012, when lawyers for Hutson sent Bad Boy Records notice of alleged copyright infringement, and having included numerous requests for financial compensation (as much as 50% of all income attributable to the recording) and part ownership (also as much as 50%); each request routinely made with the accompanying threat of a copyright infringement lawsuit.[14] In other

[14] *Notorious B.I.G. LLC v Lee Hutson*, 2:14-cv-02415 (3/31/14).

words, Hutson repeatedly harassed Bad Boy Records (and Atlantic Records, Warner Music Group, and EMI), likely in an attempt to force a quick financial settlement in exchange for not filing a copyright infringement lawsuit. These "ongoing, intensifying, and ultimately baseless accusations," especially Hutson's recent (and second) attempt to get a "legal hold" placed on "all royalties of the Recording" and to put a stop to "all distribution of the album [Ready to Die]," are what prompted the estate of Notorious B.I.G. to file civil action for declaratory relief.

They Were Never Scared

Rather than cave to the threat of a copyright infringement lawsuit and settle out of court (as the labels tend to do), the estate of Notorious B.I.G. retained an expert to help assist them in analysis and comparison of the two songs at question. Citing in the complaint their expert's findings and including Easy Mo Bee's (the producer of the B.I.G. track) meticulous, multidimensional description of how he composed "The What," the estate of Notorious B.I.G. asserted in the complaint that the use did not violate "any valid copyright interest held by" Hutson, and that the "use" was both "de minimis and fair use." Thus, the estate of Notorious B.I.G. rejected the infringement shakedown and fought back against his threat of a lawsuit. Having done their due diligence, B.I.G.'s estate concluded that "The What" did not infringe upon "Can't Say Enough About Mom," and they demonstrated their will to prove it in court. In other words, Hutson's infringement shakedown attempt was thwarted mainly because the estate of Notorious B.I.G. was never scared to affirm fair use in court.

As I detailed earlier in this study, when determining unlawful appropriation, the courts engage in a substantial similarity analysis in which quantitative and qualitative factors are assessed. An allegedly infringing work is considered *substantially* similar when it is nearly indistinguishable from the copyrighted work it appropriated. Quantitative analysis examines whether the piece taken constituted a *substantial* portion of the appropriated work, *not* whether it made

up a substantial portion of the allegedly infringing work. So in the case of digital sampling, qualitative analysis considers whether the sample (copied portion) is qualitatively important to the allegedly infringed work "as a whole." This means how critical, qualitatively speaking, is the sample to the appropriated work, and how similar are the allegedly infringing song and the song it sampled "as a whole." In order to determine proof of substantial similarity in a copyright infringement case, the courts conduct a two-part test of extrinsic similarity and intrinsic similarity. The extrinsic test is objective in nature and requires the party who brought the infringement claim to identify specific criteria which it alleges have been copied.

So at question were three things. First, how similar was "The What" and "Can't Say Enough About Mom?" "as a whole?" Second, how critical, qualitatively speaking, was the sample (copied portion) to "Can't Say Enough About Mom"? Third, was the sample a *substantial* portion of "Can't Say Enough About Mom"? In my own analysis and comparison, I found no substantial similarity between "The What" and "Can't Say Enough About Mom." Quantitatively and qualitatively speaking, the sample is just a 4-second snippet of a barely audible fade out that appears — only once on the entire 5:54 long song — at the 5:50 mark. This snippet is not substantial to the melody, rhythm, chorus, or main theme of "Can't Say Enough About Mom." Further, an ordinary observer, properly instructed, could tell that "Can't Say Enough About Mom" is a soul song about a son's tribute to his mother, wherein he repeatedly professes his love and respect for his mother, while "The What" is a braggadocios, hip hop/rap song about a skeptical worldview — the hook says, "Fuck the World!..." — in which the protagonists praise the values of being independent, street wise, and well armed. The estate of Notorious B.I.G. came to a similar conclusion in their own analysis.

A Perfect Test Case for Fair use and Sampling

Whether the estate of the Notorious B.I.G. was simply shielding itself from any potential lawsuit from Leroy Hutson or aiming for some grander statement, I think it's clear that this case, one way or the other, is a watershed moment in the history of the sampling/copyright law quandary. Notwithstanding the other issues raised in the filing, namely the validity of Hutson's copyright ownership, this is a perfect test case for fair use and samplings.

On April 2, 2014, two days after the estate of the Notorious B.I.G. filed their complaint, Hutson formally filed a lawsuit for copyright infringement in the U.S. District Court, Southern District of New York, in Manhattan — *Hutson et al v. The Estate of Christopher Wallace et al* — against the estate of B.I.G., Bad Boy, EMI, Universal Music Group, and Warner Music Group. This New York case was stayed, pending a resolution of Hutson's Motion to Dismiss the California case. On July 3, 2014, the preemptive suit brought by the estate of Notorious B.I.G. was dismissed (as perhaps it should have been, given that the California court had no jurisdiction), and legal action continued to move forward in the New York court — where the estate of Notorious B.I.G. filed a motion to dismiss on September 5, 2014 — all the way up until October 24, 2014. And on December 21, 2015, the New York court filed its decision, granting B.I.G.'s estate's motion to dismiss.

However, none of the fair use issues raised by B.I.G.'s estate were addressed in the court's decision. Instead, the court held that since Hutson could not prove ownership of the copyright in "Can't Say Enough About Mom" (Hutson acknowledged a settlement that he made with Rhino and Warner Records in 2008 over Curtom Records recordings in which he granted copyright ownership of "Can't Say Enough About Mom" and other recordings to Rhino), he lacked standing to sue B.I.G.'s estate for copyright infringement.

So what now? Does this mean that B.I.G.'s estate will face a lawsuit from Rhino for the same alleged infringement? That's highly doubtful. But if they do, I can't see the defense by B.I.G.'s being any less willing to affirm fair use. So while Judge Sullivan

didn't get into the fair use issues that B.I.G.'s estate raised in its defense, this case is still important two reasons. First, B.I.G.'s estate showed the will to fight this copyright infringement lawsuit; their preemptive action serves to prompt others to do the same in the face of similar lawsuits. Second, the action taken by B.I.G.'s estate raises the profile of fair use and helps encourage others to affirm fair use in copyright infringement cases involving sampling.

TufAmerica vs. Jay-Z: Who Says a Sample Can't Be De Minimis?

Ask any music industry lawyer if a sample of a song, no matter how small or insignificant, constitutes copyright infringement if it's not cleared, and chances are they'll say, "Yes." This despite the fact that (1) Copyright infringement is not determined outside a court of law; and (2) No "sort of copying" is automatic infringement, i.e. infringement simply by the act of copying. When it comes to copyright law, the major labels have always had a one-sided stance, a stance that places the interests of copyright owners above the interests of the public. But *Bridgeport* made matters worse by backing up this stance, and by spreading false information about United States copyright law. But a ruling in a high profile copyright infringement suit involving Jay-Z shattered the music industry's long-held dismissive stance on samplng, sound recordings, and the de minimis doctrine.

TufAmerica Inc. v. WB Music Corp. et al: Background and Complaint

In November 2013, Record label TufAmerica Inc., a sampling troll (much like Bridgeport Music) that buys up rights to old songs then looks for samples of said songs so that they can sue people for copyright infringement, brought a claim against Atlantic Recording Corporation, Jay-Z (Shawn Carter), his entertainment company, Roc Nation LLC, Roc-a-Fella Records, LLC, WB Music Corp, and Warner-Tamberlane Publishing Corp in a federal court in New York,

alleging copyright infringement. TufAmerica specifically claimed that Jay-Z, et. al used unauthorized samples of Eddie Bo's 1969 song "Hook & Sling," which TufAmerica holds the exclusive rights to, in the 2009 Jay-Z song, "Run This Town," which features guest performances by Kanye West and Rihanna, and which appeared on Jay-Z's 2009 album *The Blueprint 3* and the greatest hits compilation *The Hits Collection Vol. 1*, as well as in a music video. Specifically, TufAmerica's complaint alleged that "defendants used one or more unauthorized samples of *significant* portions of the Hook & Sling Master and Composition in Run This Town," and that TufAmerica did not authorize "defendants to release, exploit or publicly perform ['Hook & Sling']."[15]

In response, in September 2014, Jay-Z filed a motion to dismiss. He argued that, while he did indeed use the sample, the sample was too insignificant to warrant copyright protection: "Plaintiffs entire, *misguided* copyright infringement lawsuit is based on an alleged 'sample' of the most fleeting one-syllable word — 'oh' — in defendants' sound recording entitled, 'Run This Town' ('Defendants' Recording'), performed by the artist Jay-Z." But Jay-Z's lawyers also demonstrated their own misunderstanding of copyright law: "Plaintiff does not allege that any musical element of Plaintiffs Works was copied - only the spoken word 'oh,' which appears just once in the introduction to Plaintiff's Works at approximately the 3-second mark, lasts for a fraction of a second in Plaintiffs Recording and is not repeated. Plaintiff apparently believes that it has a monopoly on the use of the word 'oh' and that it can stop others from using this word in recorded form." The reality is that any element — musical or otherwise, and no matter how long it lasts — on the Eddie Bo recording *may* be protected by U.S. copyright law; it depends on the actual element. Whether the borrowing of said elements is de minimis, fair use, or copyright infringement is a separate matter altogether.

The first point that Jay-Z's lawyers argued was that "words and short phrases are simply not protectable under the Copyright Act.

[15] *Tufamerica, Inc. v.. WB Music Corp. et al*, 1:13-cv-07874 S.D.N.Y. (2014) (emphasis mine).

Thus, Plaintiff cannot state a claim based on the alleged infringement of a generic lyric such as, 'oh,' or the sound recording thereof, and Plaintiffs claims should be dismissed as a matter of law." Jay-Z's lawyers' second point was that "even if the word 'oh' or the *miniscule portion* of Plaintiffs Recording featuring the single word was somehow original enough to warrant copyright protection, the alleged copying here of a sound lasting a fraction of a second in Plaintiffs Works *is de minimis* and thus *not actionable*." That because the snippet in question "lasted less than one second, [it] is not quantitatively significant." Jay-Z's lawyers bolstered this point offering examples of where courts had found much longer sampled phrases to be not quantitatively significant, e.g. "by TufAmerica, 968 F. Supp. 2d at 605-606 (a three-second sample and a six-second sample were not quantitatively significant); Poindexter, 2012 U.S. Dist. LEXIS 42174 (concluding on a motion to dismiss that the use of a single note sounding for close to two seconds was de minimis); Newton, 388 F.3d at 1258 (a six-second sample comprising *2%* of plaintiffs work was not quantitatively significant)."[16]

Another boost for Jay-Z's lawyers' second point of de minimis, and perhaps most damning to TufAmerica's claim of infringement, was TufAmerica's own history in the very court they were suing Jay-Z in: "Plaintiff is well aware that this suit is baseless because it recently suffered dismissal of similarly misguided infringement claims based on more significant phrases than the single word at issue here. Indeed, in *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588 (S.D.N.Y. 2013), this Court dismissed several of Plaintiff's claims, including composition and sound recording infringement claims, based on the alleged sampling of the phrase, 'Now I want y'all to break this down,' finding such alleged infringements were *quantitatively and qualitatively insignificant* as a matter of law. One would think that, faced with this decision and the host of authority upon which it is based, Plaintiff would re-evaluate its objectively weaker 'claims' herein. Yet, it has refused, without explanation, to withdraw its claims here based on the objectively less significant sound of 'oh.'"[emphasis mine][17]

[16] *Id.*, see defendants' memorandum of law in support of their motion to dismiss • declaration in support of motion to dismiss 1:13-cv-07874-LAK.
[17] *Id*.

The Decision

On December 8, 2014, Judge Lewis A. Kaplan dismissed the case brought by TufAmerica against Jay-Z, et al. That's the headline. But the real gem in *TufAmerica* is the court's decision itself, as it served as a thorough walkthrough of copyright law, particularly how copyright infringement is determined; and it delivered an emphatic smack down of *Bridgeport*. "Not *every* instance of copying of a protected work is copyright infringement," Judge Kaplan plainly states in his decision, making two things clear. First, sampling is simply one "sort of copying" protected by fair use; it's not "stealing" as TufAmerica described it in their complaint. Second, a sample of sound recording does not automatically constitute copyright infringement. Here, Judge Kaplan also offered up a strong rebuke of *Bridgeport's* misguided assertion that sampling itself requires a license, and that all samples of sound recordings are illegal without a license.

Judge Kaplan struck down Jay-Z's argument that the "oh" that he sampled and used in "Run This Town" was not original, and clarified that, "with respect to the word 'oh' as it appears in the Composition, defendants almost surely are right. The word 'oh' is a single and commonplace word. Standing alone, it likely is not deserving of copyright protection," but the court "assumes, *arguendo*, that 'oh,' as it appears in 'Hook & Sling Part I', is protectable," and "For purposes of this motion alone, the Court assumes that Eddie Bo's rendition of 'oh' in the Master is protectable." In other words, Judge Kaplan correctly noted that "oh" *standing alone* was not protectable, but as part of "the master" (the sound recording master) it was protectable; and further, that whether it was protectable or not wasn't important to the resolution of the motion because the "...defendants' motion to dismiss may be decided on other grounds."[18]

The "other grounds" that Judge Kaplan was referring to was the substantial similarity test, in which he found that "the relevant works bear no substantial similarity to one another," and thus, "It

[18] *Id.* (emphasis mine).

would be impermissible to conclude that defendants are liable in this case." In other words, having undergone a substantial similarity test — which Kaplan notes that both parties agreed "on the basic framework of the substantial similarity test," but "quarreled over its particulars" — "the court found that the sampling of 'oh' in 'Run in This Town' is "sufficiently *de minimis* to render moot whatever otherwise might have been made of the alleged copying with respect to the qualitative significance of that which was copied."[19] That is to say, the court found that the sampling of "oh" was so minor and trivial, too quantitatively insignificant, that the qualitative significance didn't matter to the resolution of the motion.

TufAmerica's argument, specifically their response to Jay-Z's motion to dismiss, which, in part, relied on the notion that because Jay-Z used the sample 42 times in "We Run This Town," was that the sample was *automatically* quantitatively and qualitatively significant. But this demonstrated a common misunderstanding of copyright law in general and how quantitative and qualitative significance are determined within the substantial similarity test in particular. Thus, Judge Kaplan took the opportunity to make some key clarifications:

> **"Plaintiff's tautological argument that 'oh' must be qualitatively significant to Hook & Sling Part I and to the Hook & Sling Master because defendants' sampled it more than 40 times in Run This Town misunderstands copyright law generally and the substantial similarity test in particular**… *First, and most importantly, the substantial similarity test in all cases considers only 'the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole.'* Its significance to the defendants' works is irrelevant. Were it the other way around, a devious defendant could evade liability for copying substantial or qualitatively significant portions of another's work merely by scattering those portions within his own, lengthy work. **Such a rule would fly in the face of Justice Story's admonition more than 170 years ago that the focus of copyright law is on the original work, not the subsequent one**: '*If so much is taken,* that the value of the original is sensibly diminished, or the labors of the original author are *substantially* to an injurious extent appropriated

[19] *Id.*

> by another, that is sufficient, in point of law, to constitute a piracy.' Ultimately, of course, **the fact that defendants allegedly sampled 'oh' 42 times in Run This Town says absolutely nothing about the recording's qualitative significance to Hook & Sling Part I or to Eddie Bo's performance thereof in the Hook & Sling Master."** [emphasis mine][20]

Further, in addressing TufAmerica's argument that "the bar should be set low when evaluating whether a work is or is not 'qualitatively significant' in order to protect 'impecunious artists' in the face of 'unlicensed use' of their work by 'successful artists and increasingly-large record labels and music publishers,'" the court's clarifications are again instructive:

> "If the allegedly copied portion 'arguably includes a creative component,' plaintiff urges, 'it should be considered . . . qualitatively significant.' Were the Court to grant the motion to dismiss, plaintiff warns, would-be infringers would have an implicit license to 'use for free the work that other artists created.' **This argument too is quite wide of the mark.** Indeed, it is one thing to set a low bar. It is quite another to set no bar at all… **plaintiff's argument necessarily — and incorrectly — assumes that every copying of *any* part of another artist's protected work is infringement.** But as Judge Newman explained for the Second Circuit, in a case plaintiff relies upon, **factual copying and actionable copying are not coextensive concepts.** The former 'requires only the fact that the infringing work copies something from the copyrighted work; the latter . . . requires that the copying is *quantitatively and qualitatively* sufficient to support the legal conclusion that infringement . . . has occurred."[emphasis mine][21]

As I've said before in this study, and as some commentators have also noted, the *act* of sampling — i.e. factual copying — is not copyright infringement. With regards to *Bridgeport*, this is an important point to make, because when opponents of sampling and copyright infringement hawks talk of "unauthorized sampling" or argue that all samples require a license, *Bridgeport* is the case

[20] *Id.*
[21] *Id.*

that they cite as what "the law says." But here's the big fact that gets lost in conjecture, myth, and a general misunderstanding of copyright law. **There is no law in the United States code that expressly prohibits sampling or any other form of copying**. Moreover, copyright law does not distinguish the level of protection of a copyrighted work or access to de minimis or fair use based on copyrightable subject matter.

A Beacon for Cases Involving Digital Sampling

Because it spotlights the fact that quantitatively insignificant samples of sound recordings fall first under the scope of de minimis (small, trifle, insignificant, usages) rather than fair use, which triggers a fair use analysis and is more taxing on courts, *TufAmerica Inc. v. WB Music Corp. et al* is a beacon for the future of copyright infringement cases involving digital sampling. Following *TufAmerica*, where it is easier for courts to determine a finding of de minimis, rather than conduct a fair use analysis, courts will adopt that approach. Likewise, defendants will increasingly argue that the sample at question is de minimis *along with* fair use to cover both bases. Hence, *TufAmerica* establishes another precedent for de minimis sampling and sets up a pathway for other artists facing similar lawsuits. *TufAmerica* also sends a strong signal that these kind of frivolous lawsuits will be thrown out. This will deter parties, especially sample trolls like TufAmerica and Bridgeport Music, from filing these kinds of frivolous lawsuits. Finally, with regards to sampling and copyright law, *TufAmerica* demonstrates that reason and fact-finding are winning out over misguided perceptions, logical fallacies, and poorly-drawn conclusions.

It's been 18 years since the infamous *Bridgeport* ruling, but the damage of *Bridgeport* still runs deep. For instance, many people still believe that there is such a thing as "unauthorized sampling." But you do *not* need "authorization" *to sample*! *Sampling* itself is a one "sort of copyting," an activity. In other words, the form of copying, isn't what infringes a copyrighted work; what *may* infringe a copyrighted work is the actual portion taken from a

copyrighted worked and used in a new work that is published and made available to the public. Unfortunately, many people conflate the word "sampling" with the word "sample," i.e. they confuse the process with the result. The process, the activity, the form of copying — like photocopying a page from book or recording an excerpt from a podcast — is never copyright infringement. Hence, it's not *illegal* to sample something, just like it's not *illegal* to photocopy something, just like it's not *illegal* to record something. So the term "unauthorized sampling" is a misnomer. *TufAmerica* sheds light on this fact.

The "Gold Digger" Case: *Steward v. Kanye West*

Trena Steward v. Kanye West: Background, Complaint, and Decision

On April 5, 2013, the heirs of musician, composer, and recording artist David Pryor of the music group Thunder & Lightning filed a complaint (which they amended *four* times) in the Central District Court of California alleging that Kanye West et al. infringed the copyright of Thunder & Lightning's 1975 song "Bumpin' Bus Stop," which Pryor recorded and composed. Specifically, the heirs accused Kanye West of "illegally sampling" both the lyrical verses and Pryor's actual vocal performance of "Bumpin' Bus Stop" and using the samples for his 2005 hit song "Gold Digger." West responded to the complaint with an affirmative defense of de minimis use. On June 16, 2014 both parties filed cross-motions for judgment on the pleadings, and on August 14, 2014, finding that West's copying to be de minimis, the court granted West's motion for judgment on the pleadings and denied Plaintiffs' cross-motion.[22]

Among several issues raised in their motion, West et. al (Defendants) argued that Steward et. al (Plaintiffs) had failed to state a claim for direct copyright infringement. And in their motion, Plaintiffs **argued solely "that the Court should *not consider***

[22] *Trena Steward Et Al. V. Kanye West Et Al.* Cv 13-02449 Bro (Jcx) United States District Court Central District Of California August 14, 2014 (Hereinafter: *Steward*), 2-3, 19-22.

***Defendants' defense* that any copying was *de minimis*."**[23] Specifically, Defendants argued that Plaintiffs' claims for copyright infringement should be dismissed because "Plaintiffs cannot establish infringement because the elements copied were not protectable under copyright law **and because any copying was *de minimis* and thus not actionable."** With regards to the elements copied, Defendants contended that "the allegedly copied portions of Plaintiffs' sound recordings were not sufficiently original to warrant copyright protection."[24] Since the elements copied *were* "sufficiently original," the court held that the elements copied were protectable under copyright law. However, the court agreed with West that the elements were *de minnimis* and determined that the use was *not* an infringement on the Thunder & Lightning song "Bumpin' Bus Stop." It is here that we must look more closely at U.S. District Judge Beverly Reid O'Connell's careful examination and the court's findings.

First, in undertaking its examination, the court did not examine the sampled snippets from "Bumpin' Bus Stop" separately from the song "as a whole." In an effort to support their position that the elements of "Bumpin' Bus Stop" (and other songs) were just short portions of the recordings provided by Plaintiffs, West had provided a supplemental lodging of the isolated snippets. However, the court declined to consider the supplemental digital snippets, noting that "the Court must consider the sampled portions ***in the context of the entire songs at issue.***"[25]

Next, although the court found that the "short phrases in the copied portions of Plaintiffs' Song do not possess adequate originality to warrant copyright protection in the musical composition," it noted however that while "the phrases at issue lack sufficient originality as a *musical composition*," it "does not necessarily mean that *sound recordings* of these phrases sung, spoken, or otherwise performed in some manner similarly lack originality." Quoting *Feist*, the court further explained that the threshold for "originality" is low:

---

[23] *Id.*, 11 (emphasis mine).
[24] *Id.*, 11-13 (emphasis mine).
[25] *Id.*, 4 (emphasis mine).

> "*Original*, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least *some minimal degree* of creativity. **To be sure, the requisite level of creativity is *extremely low*; even a slight amount will suffice."** *Feist*, 499 U.S. at 345 (citations omitted). Nevertheless, "copyright law denies protection to 'fragmentary words and phrases' and to 'forms of expression dictated solely at functional considerations' on the grounds that these materials do not exhibit the minimal level of creativity necessary to warrant copyright protection." *Stern v. Does*, 978 F. Supp. 2d 1031, 1040 (C.D. Cal. 2011) (quoting CMM *Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504 (1st Cir. 1996)), aff'd sub nom. *Stern v. Weinstein*, 512 F. App'x 701 (9th Cir. 2013). [emphasis minne][26]

Continuing, the court maintained that what was at question was whether or not the copied snippets from "Bumpin' Bus Stop" (and other songs) were sufficiently original despite the fact that the phrases *by themselves* were not sufficiently original and therefore protectable:

> **The fundamental issue is thus whether Plaintiffs have adequately alleged that the sound recording of the copied snippets provides sufficient originality to warrant copyright protection, even if the phrases themselves are not protectable. Two cases from the Southern District of New York dealing with similar issues are instructive.** First, in *Santrayll v. Burrell*, defendants argued that the relevant portion of the allegedly infringed songs, which consisted of the word "uh-oh" repeated four times to a particular rhythm, was not sufficiently original to warrant copyright protection. No. 91 CIV. 3166 (PKL), 1996 WL 134803, at *1 (S.D.N.Y. Mar. 25, 1996). While the phrase "uh-oh" is a short and common phrase that would not be protectable as a lyric, the court nevertheless found that "the repetition of the non-protectible word 'uh-oh' ***in a distinctive rhythm*** comprises a sufficiently original composition to render it protectible by the copyright laws." Second, in *Tin Pan Apple, Inc. v. Miller Brewing Co.*, the court addressed the originality of "'Brrr' and 'Hugga Hugga' sounds" that were allegedly copied from the plaintiffs' sound recording. 88 CIV. 4085 (CSH), 1994 WL 62360, at *2 (S.D.N.Y. Feb. 24, 1994). In denying the defendants' motion for summary judgment, the court held that "a jury could find that

[26] *Id.*, 11-13.

> the Hugga Hugga and Brrr sounds, used as lyrics in the copyrighted work, are sufficiently creative to warrant copyright protection." [emphasis mine][27]

Following the instruction of the Southern District of New York, the court came to the conclusion that the sound recordings of the short phrases did meet the minimal level of creativity required to warrant copyright protection:

> As in *Santrayll* and Tin Pan Apple, the Court finds that the sound recordings of the short phrases allegedly copied here exhibit the minimal level of creativity necessary to warrant copyright protection. ***Plaintiffs have alleged in their Fourth Amended Complaint that the phrases at issue here — all of which come from the introduction to Plaintiffs' Song—***were performed by "David Pryor's signature voice," and that the recording contained "original music played by Pryor's band, The Play Boys." (4AC ¶¶ 9, 12.) **Indeed, while the *introductory* words are spoken,** they are not spoken in monotone; rather, just as in *Santrayll*, the phrases are recited with a distinctive rhythm. Plaintiffs' allegations that **the *introductory* phrases** from Plaintiffs' Song feature David Pryor's "signature voice" are therefore sufficient to satisfy the "extremely low" requisite level of creativity to warrant copyright protection. Feist, 499 U.S. at 345.
>
> In coming to this conclusion, the Court agrees with the similar analysis performed by the court in *Pryor v. Warner/Chappell Music, Inc.*, in which the Honorable Ronald S.W. Lew found that the "Get Down" snippet from Plaintiffs' Song contained sufficient originality to warrant copyright protection. CV 13-04344 RSWL, 2014 WL 2812309, at *6 (C.D. Cal. June 20, 2014). Accordingly, the Court rejects Defendants' argument that Plaintiffs have failed to state a claim for lack of originality. [emphasis mine][28]

What's especially revealing in the court's determination is not that the copied snippets were sufficiently original and thus protected, but rather the court's emphasis in noting that the snippets were sampled from the "introduction" of the song that was copied. What

[27] *Id.*, 11-13.
[28] *Id.*

does the court's emphasis on and careful attention to the *introductory* part of song say about how courts approach a de minimis or fair use analysis? Posed differently, is the brief introduction of a song — the introductory musical or lyrical phrases and words — to be considered *less* significant because it is qualitatively and quantitatively significant than the heart of the song or other more substantial portions of the song, like the main groove or main melody? If this is so, it would suggest then that the sampling of brief introductions (and outros) of songs — a common practice in hip hop/rap music's sampling tradition — is more likely to be de minimis if not fair use.

Finally, turning to the question of whether or not Kanye West's use of "Bumpin' Bus Stop" was de mininis, the court's analysis was very well done. First, in response to the plaintiffs' argument that the court shouldn't consider the de minimis issue "because it is not an independent defense to copyright infringement, but is instead 'subsumed within the fair use defense," the court stated that de minimis is not tethered to fair use. In other words, a court can determine that a use is *not* infringement by determining that the use was de minimis alone, i.e. after de minimis is determined, nothing further is needed:

> "Defendants also argue that, even assuming Plaintiffs' work is original, Plaintiffs have not alleged actionable copying because the copying alleged by Plaintiffs is *de minimis* as a matter of law. **In their motion, Plaintiffs argue that the Court should not consider the *de minimis* issue because it is not an independent defense to copyright infringement, but is instead "subsumed within the fair use defense." (Dkt. No. 129 (citing *Norse v. Henry Holt & Co.*, 991 F.2d 563, 566 (9th Cir. 1993)).)** ***Plaintiffs misunderstand the de minimis analysis in arguing that it does not apply when actual copying is already established.*** Indeed, as the Ninth Circuit has made plain, "even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is *substantial*." *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004). A plaintiff must therefore prove not only that the defendant copied his or her work without authorization, **but also that the defendant's copying is *substantial.***
> [emphasis mine][29]

[29] *Id.* 14-15.

Next, the court described specifically what de minimis is and how it is determined:

> **A use is de minimis — or not "substantial" enough to be actionable — "only if it is so meager and fragmentary *that the average audience would not recognize the appropriation."*** Id. (quoting *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986)). In making this determination, courts must consider both the quantitative and qualitative significance of the copied portion **relative to the plaintiff's *work as a whole.*** [emphasis mine][30]

Applying the contours of the de minimis analysis, the court noted that the portions of "Bumpin' Bus Stop" that Kanye West sampled were *not* quantitatively significant:

> **[q]uantitatively, the portions allegedly copied by Defendants are *quite minimal.*** As Defendants point out, **most of the sampled portions alleged to have been used in Defendants' various songs *last only about a half-second in time.*** By contrast, the **recording of Plaintiffs' Song is over *seven minutes* in length.** As a result, **each of these samples represents *very little quantitative significance* to Plaintiffs' Song. See, e.g., *VMG*, 2013 WL 8600435, at *11 (finding a quarter-second sample not quantitatively significant to a seven-minute recording);** *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 605 (S.D.N.Y. 2013) (finding *a three-second drum sequence* not quantitatively significant to a six-minute song).[emphasis mine][31]

But the court correctly pointed out that even if the borrowed portions are not quantitatively significant, they still may be *qualitatively* significant and therefore *substantially* similar:

> **Nevertheless, "[e]ven if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity."** *Newton*, 204 F. Supp. 2d at 1257 (quoting *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987)).
> [emphasis mine][32]

[30] *Id.*
[31] *Id.*
[32] *Id.*

In this regard, the court was not persuaded by West's argument that the "qualitative significance of the individual samples" was undermined by the fact that the snippets were all sampled by a portion of the song that was *spoken* rather than sung. But the court agreed with West that "the individual snippets — taken individually and not considered as a part of the introduction as a whole—" were "qualitatively insignificant to Plaintiffs' Song." Which is to say, "the fact that Defendants' songs **sample *only short portions from the introduction*, rather than the introduction *as a whole*, greatly increases the chance that 'the average audience would not recognize the appropriation.'"** *Newton*, 388 F.3d at 1193.[33]

The court then went on to explain what further distinguished this case from other cases in which the qualitative aspect made the copying *substantial*:

> [T]his case is distinguishable from cases in which the qualitative aspect of the song has rendered the copying substantial. For instance, in *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980), the defendant copied a sample of just the phrase "I Love" from the song "I Love New York." Although it described the copying as "relatively slight" due to the short length of the sample, it rejected the de minimis defense **because the portion sampled from the plaintiff's song was "the *heart* of the composition."** Similarly, in *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 274–77 (6th Cir. 2009), the court applied a substantial similarity analysis to determine whether copied elements of the song "Atomic Dog" were unique to that song. There, the defendant had sampled the phrase "Bow wow wow, yippie yo, yippie yea," which comprised the refrain of the infringed song. Finding this to be "the most well-known aspect of the song — in terms of iconology, perhaps the functional equivalent of 'E.T., phone home'"— the court upheld the jury's determination that the two songs were substantially similar. Id. at 276–77; accord *Newton*, 388 F.3d at 1196 (considering whether portions of a song constituted the "heart or hook" of the song for purposes of determining its qualitative significance). **By contrast, the sampled portions here, even if considered together, *simply constitute a spoken introduction* to the song.** That this portion comes first makes it memorable to be

[33] *Id.*, 15-16.

> sure, ***but one cannot say that this introduction is the "heart and hook" of Plaintiffs' Song,*** particularly because it is spoken without any significant musical accompaniment. *Newton*, 388 F.3d at 1196. [emphasis mine][34]

Next, the court emphasized the significance of the "ordinary observer" test in determining substantial similarity:

> After considering the two sound recordings of Plaintiffs' Song and the sound recordings of Defendants' allegedly infringing songs — which the Court may consider due to their references in the Fourth Amended Compliant, Zella, 529 F. Supp. 2d at 1128 — ***the Court cannot find that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal [of the two works] as the same."*** *Newton*, 388 F.3d at 1193 (alterations in original) (quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Grp.*, Inc., 150 F.3d 132, 139 (2d Cir. 1998)). Rather, it is clear from the recordings that ***"the average audience, or ordinary observer,"*** **would *not recognize these works as the same.*** Id. [emphasis mine][35]

Going further still, the court spoke to the transformative use element, noting that the samples were not only short but that Kanye West had also *transformed* them:

> In coming to this conclusion, **the Court notes that *the samples used in each of Defendants' songs are not only short, but they are also distorted so that the samples are sped up and often presented in a higher pitch.*** As the following chart illustrates, each of Defendants' recordings takes only short phrases from the spoken introduction, and in each case the sampled portion is distorted — sped up and in a higher pitch — **and accompanied by musical instruments, vocals, or some other musical element that obscures the sampled portion.**
>
> The result of these distortions and the short length of the samples is that the average audience would not recognize Plaintiffs' Song in any of Defendants' songs without actively searching for it. **In the Ninth Circuit, *digital sampling is de minimis* when "the**

[34] *Id.*
[35] *Id.*, 16-17.

> **average audience *would not recognize* the appropriation."** *Newton*, 388 F.3d at 1193. **Accordingly, the Court finds Defendants' alleged copying to be de minimis and therefore GRANTS Defendants' motion**…"[emphasis mine][36]

Key Takeaways from *Steward v. Kanye West*

A Guide for Determining De Minimis When Digital Sampling Is Involved

The first key takeaway form *Steward* is that the case essentially represents a "How to" guide for determining de minimis in copyright infringement cases involving digital sampling and sound recordings. U.S. District Judge Beverly Reid O'Connell's analysis in *Steward* was thorough and comprehensive, and it showed an acute awareness of some of the intricacies of the art of sampling that often make samples transformative.

More Clarity On Transformative Use In the Context of Digital Sampling

"Distortion" — the descriptor used by Judge O'Connell to describe one of the ways that Kanye West had altered samples of the song "Bumpin' Bus Stop" — is a form of "transformation." In this scope, recognized distortions (transformations) of samples shall include (but are not limited to): pitch changes of samples, additional musical element accompanying the samples, and the addition of vocals accompanying the samples. These are the kinds of transformations that the courts recognize *may* occur with the use of digital samples. And as the court noted in *Steward*, when these kinds of transformations are made, it increases the likelyhood that the use fulfills the transformative use element of the first factor of fair use. Specifically important to hip hop/rap music is the recognition that added vocals, i.e. the raps that accompany the beat, qualify as a

[36] *Id.*, 17-19.

transformation of the sample. This is key, because rapping — hip hop/rap music's unique vocal performance — is central to hip hop/rap songs. This means that the rap performance *always* makes transformative use of a sample. And while this element alone does not assure a finding of fair use, it goes a long way in that direction.

De Minimis Is Not Subsumed by Fair Use, De Minimis Is a Valid Defense to a Copyright Infringement All Its Own

The de minimis doctrine is separate from the fair use doctrine. The purpose of each doctrine is to fulfill the objectives of copyright; however, the de minimis doctrine is not subsumed by fair use. In other words, when facing a copyright infringement claim, a defendant can affirm a de minimis defense *and* a fair use defense. *Steward* reaffirms what *Newton V. Diamond* made clear before, that that a de minimis defense is a valid defense in the context of digital sampling and sound recordings. In this regard, what makes *Steward* even more significant than *Newton* is that *Steward* explicitly involved the digital sampling of the *sound recording*, whereas *Newton* involved the use of the *composition* (the sound recording was licensed from the record label). So in a strict sense, *Steward* is more critical to the illogical question raised by *Bridgeport* : Whether or not de minimis applies to sound recordings. *Steward* rightfully says: *Of course it does*!

Courts Are Getting Better at Analyzing Samples and What Constitutes Transformative Use In Relation to Them

The More Defendants Affirm De Minimis and Fair Use Defenses, the More Claims Will Be Dismised Early On

In an interview with Law360 after the court's ruling in *Steward*, Ilene S. Farkas of Pryor Cashman LLP, lead counsel for West and the rest of the moving defendants, hailed the ruling and offered a very revealing statement:

> We are very pleased with today's decision, **as it confirms that Courts are continuing to examine infringement claims, including sound recording sampling claims, *at the pleading stage* and *dismissing these claims early on*, when the Court can examine the two works at issue and see for itself that the alleged use of the plaintiff's work is de minimis, or not substantial** enough to be actionable as a matter of law.
> [emphasis mine][37]

Farkas is on to something here. As Judge O'Connell's analysis in *Steward* confirms, courts are getting *better*, not worse, with how they analyze samples. This will only continue. And as courts are increasingly examining infringement claims involving sampling and sound recordings at the pleading stage, the rate of early dismissals of these claims will mount.

37 David McAfee, "Kanye West Gets 'Gold Digger' Copyright Action Gutted," *Law360* (August 14, 2014) https://www.law360.com/cases/5163290d37450d216a009183 McAfee quoting Ilene S. Farkas.

EMI's "Sample Amnesty"

A Sobering Reality About the Future of Sample Clearance

In September 2015, EMI, the world's largest music publisher, announced it's "sample amnesty" program. Basically what EMI said to sample-based musicians was this. You have "six months" to come to us from out of the shadows and turn in your sample-based songs that utilize samples of songs from our Production Music Division's catalog. In return we will *give* you a license and we won't penalize you for your prior unauthorized use. But here's what EMI did not say: *We recognize that some of your sample-based works may have made fair use (or de minimis use) of songs in our catalogs, and thus you do not necessarily need a license.*

So what EMI's "sample amnesty" program really offered — as forward thinking, innovative, and sampling-friendly as it might've seemed — was a scheme to increase revenue in their Production Music Division catalog through sampling. First, EMI's amnesty program allows EMI to expand its catalog with sample-based songs with no hassle. Via its so-called "sample amnesty," EMI doesn't have to grapple with adding sample-based songs that would otherwise not be so easily obtainable. Absent of EMI's unawareness of the existence of these songs — or without EMI's unwillingness to mount a wave of copyright infringement lawsuits against artists that it suspects has used samples from its Production Music Division's Catalog — such songs would be difficult to identify. Second, and more importantly, EMI's "sample amnesty" serves as a way to draw attention to their Production Music Division catalog and to invite sample-based beatmakers (producers) to sample songs from their catalog, which includes songs for which it owns both the master recording and composition copyrights. A key point, since owning both rights allows EMI to easily and quickly clear samples.

In the press release for EMI's sample amnesty program, Alex Black, then-EMI Production Music Global Director and the main man driving the program, said, "Our vision for this amnesty is to highlight the wealth of possibilities open to producers working with

samples." OK. Still, in addition to highlighting the possibilities of sampling their Production Music Division catalog, EMI also wants to license a large swath of uncleared sample-based songs — songs which may have never needed to be cleared in the first place. That was the end game. EMI's sample amnesty wasn't about an appreciation for the art of sampling or becoming an ally to the sample-based beatmakers (producers) community. It was about trying to get sample-based beatmakers (producers) to enter into licensing agreements with EMI.

"Amnesty" is about pardoning someone who has been *convicted* of a crime or allowing someone to come forward to *admit* their crimes without fear of punishment. But inviting someone to turn themselves in when it's unknown if they have or haven't committed a crime isn't "amensty." Like the illogic of *Bridgeport*, EMI was under the impression that *all* samples of sound recordings that are not cleared constitute copyright infringement "per se." Hence, EMI's "invitation" for artists who used a sample from songs in EMI's Production Music Division to come to forward and admit what they'd sampled. Therein, EMI would negotitate a license deal with the artists. But what if the samples that the artist used were de minimis or fair use?

Remember, copyright infringement must be proven in a court of law. Thus, pre-emption, not just a pre-emptive lawsuit, is often used to circumvent the law. So what do you do if you're EMI and you want to add many sample-based songs (including those that may have made de minimis or fair use of EMI songs) to your catalog? Offer "amnesty." By getting people to come forward, admit use, and do a licensing deal with them, EMI gets access to the new sample-based songs and there's no worry of an artist claiming de minimis or fair use later on. In essence, once licensed, the artist who made the sample-based song has conceded that the sample *needed* to be cleared, even if it actually didn't need to be cleared.

The reason the EMI sample amnesty program concerned me was because it created a new mechanism that the music industry could use to block artists from copyright law's guarantee of de minimis and fair use. Despite this, I applauded Alex Black and EMI,

to some small degree, for having engaged with the sample-baseed beatmakers (producers) community in this way. It was refreshing to see EMI's description of the art of sampling in a creative context. Further, the fact that EMI offered a licensing deal at "current market rates" (*there really isn't a standard market rate in sample clearance*) and that it was not seeking back royalties for any earnings made from songs that featured samples of their catalog *seemed* great. But if we put aside the actual implications of the so-called "amnesty" itself and focus on the licensing component of EMI's initiative, there remained some serious questions that should've given every sample-based beatmaker (producer) pause.

First, how was this amnesty actually supposed to work on the publishing splits? In exchange for coming forward, did sample-based beatmakers (producers) simply receive a license and no penalty? Or did they also receive a split of the publishing? Better yet, did they have to forfeit *100%* of the publishing to EMI? Furthermore, what did EMI's boilerplate amnesty agreement look like? What sort of stipulations did it contain? Also, if an artist did come forward with a sample-based song that incorporated a sample(s) of a song(s) from EMI's Production Music Division catalog, were they required to submit the song first, offering up details on *which* songs from EMI's catalog that they actually sampled? In this scenario, if an artist changed their mind, EMI had the song and, because of the artist's notification, was aware of the sample(s) used. So if an artist couldn't work out a license with EMI — because they couldn't afford it; remember, what EMI really offered was an "opportunity" for the artist to *pay* EMI for a license — did that mean that the artist was then in jeopardy of being sued by EMI for copyright infringement?

The way that I saw this was, EMI had all the leverage. Another way it could be seen is, by gaining a license, sample-based beatmakers (producers) had a chance to earn revenue by shopping the now-licensed works to outlets that they previously didn't have access to. For those samples that actually *needed* to be cleared, this was a good thing for sample-based beatmakers (producers).

***

Any way you look at EMI's amnesty offer, one thing is clear: This short-lived "amnesty" scheme is another strong indication of where the music industry is headed with sample clearance. The major labels and music publishers have left (and continue to leave) a lot of money on the table by treating sampling as some sort of bandit activity and continuing to insist that *all* samples require a license. I think EMI's move was a recognition that they were missing out on money by *not* reaching out to the sample-based beatmakers (producers) community. Moreover, I believe that EMI's Alex Black was sincere when he said that EMI's program aimed "to encourage new creative use of the expansive archives of the multiple participating EMI libraries." However, I also believe that Black was aware of the burgeoning realities of sampling and copyright law. As more musicians take part in sampling in general — what Lawrence Lessig calls an ever growing "Remix Culture" — they will inevitably learn more about copyright law, and they will shift their aim towards uses that are de minimis or fair use.

Thus, armed with a better understanding of copyright law, as well as the knowledge of recent court cases in which there was a finding of de mininis or fair use, these sample-based beatmakers (producers) will be less inclined to seek licenses for their works — where none are needed — and less intimidated by threats of copyright infringement lawsuits. Consequently, in regards to sample clearance, I believe that EMI's sample "amnesty" offer was also the music industry's first sober acknowledgement of reality.

Chapter 22

Post-*Bridgeport*, Part 2

10 Key Developments that Signal Change in the Music Industry's Attitude Towards Sampling, Part 2

Since the infmaous *Bridgeport* decision, there have been a number of developments that punctuate how and why the music industry's hostile attitude towards sampling is going to change, whether they like it or not. In the previous chapter, I examined 7 out of the 10 developments that I believe will prove to be the most impactful, especially since these events will have a collective role in raising the profile of fair use. In this chapter, I examine the remaining three developments and consider their collective role in raising the profile of fair use.

Batiste v. Najm: The Same Rules Apply to Sound Recordings, and How this Fact Informs the Depth of a Court's Analysis

A "sample troll" is an individual or entity that files frivolous copyright infringement lawsuits based on the digital sampling of sound recordings. Sample trolls take the Sixth Circuit's ruling in *Bridgeport* as gospel. In *Bridgeport*, the Sixth Circuit held that de minimis doesn't apply to sound recordings and that, without a license, a digital sample of a sound recording constitutes copyright infringement. Embolden by *Bridgeport*, sample trolls are convinced that digital sampling is infringement "per se." But aside from the fact that the Sixth Circuit erred in *Bridgeport*, particularly with regards to de minimis and sound recordings, sample trolls overlook the fact that *Bridgeport*, even with its flaws, still correctly noted

that sound recordings were not exempt from fair use; ergo, fair use applies to sound recordings. Which means that there's no copyright infringement "per se" where digital sampling of sound recordings is involved, or any other copyrightable subject matter. Hence, even if a court follows the *Bridgeport* standard (most courts have not), a defendant could still affirm a fair use defense. And this is really where de minimis, fair use, and summary judgment come into play.

When a defendant facing a copyright infringement claim files for summary judgment with a de minimis *and* fair use defense, as his *first* response to an copyright infringement claim, it triggers the court's de minimis and fair use analyses. Consequently, the depth of analysis and recognition for what sampling actually is signals that courts are aware of the frivolous lawsuits that are brought forth based on the digital sampling sound recordings. As such, scrutiny over the facts of each case has risen to the point where courts are using a "filter" analysis, i.e. determining what elements of work is or isn't protected. So in cases where the digital sample at question is minimal (quantitatively speaking) and the use transformative, defendants who affirm a de minimis and/or fair use defense have a great chance of the court's opinion going their way. One case that's highly instructive in this regard is *Batiste v. Najm*, (2014).

Batiste v. Najm Background

In 2013, Paul Batiste , the musician and founding member of the Batiste Brothers Band, filed a complaint of copyright infringement against "dozens of defendants," including Faheem Rasheed NAJM p/k/a T-Pain, "alleging that *45* of his music *compositions*" were infringed in 63 of T-Pain's songs. Specifically, Batiste's claim, which was filed in the United States District Court for the Eastern District of Louisiana, alleged infringement of "various beats, lyrics, chords, melodies, chants, hooks, horns, and 'gliss' within his songs." In response to Batiste's complaint, T-Pain filed a Motion to Dismiss, and the court treated the motion "as one for summary judgment,"

pursuant to T-Pain's affirmative defense.[1] Batiste made no claim that the copyrights in the *sound recordings* were infringed. Nonetheless, *Batiste v. Najm* remains highly instructive because of how much it reveals about the substantial similarity test; and how this test applies to all copyrightable subject matter, including music compositions *and* sound recordings.

Factual Copying and Determining What's Not Protected

As I noted in Chapter 14, even where copying has been established, i.e. factual copying, this fact only satisfies *one* of the requirements for proof of copyright infringement. This is because the copying (the use) must also be legally *actionable*, i.e. not permitted by copyright law without authorization of the copyright owner. Hence, if the copying (the use) is *not* actionable, then there's no infringement. In *Batiste*, the court was careful to make this distinction clear from the start:

> In some cases, the plaintiff has direct evidence of copying. Indeed, *it is not unusual for a defendant to admit copying* a small element of the plaintiff's work and **defend the suit solely on grounds that the copied element is *unprotectable*** or that the portion copied was not substantial.
>
> **"[T]he mere fact that [a plaintiff's works] are copyrighted does not mean that all aspects of those [works] are *automatically* protected." *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 533 (5th Cir.1994). Although the work itself may be original and subject to copyright, it may contain constituent elements that are not subject to copyright because they are not original or because they are otherwise unprotectable,** *e.g.,* because they constitute a concept, method, or idea or fall under the doctrine of public domain or *scènes à faire.* In such a case, the copyright does not extend to the unprotectable element. With some caveat,[5] similarity deriving from such unprotectable elements is not actionable." [emphasis mine][2]

[1] *Batiste v. Najm*, 28 F. Supp. 3d 595 - Dist. Court, ED Louisiana 2014.
[2] *Id.*

Additionally, in noting how actionability is determined — i.e. whether a use is actionable or not — the court noted, in a section titled "Substantial Similarity—***Determining Actionability***," that:

> **[t]he 'substantial similarity' inquiry determines whether factual copying is 'quantitatively and qualitatively sufficient' to support *liability.*[11] In other words, it tests whether the appropriation is *'legally actionable.'*** *Positive Black Talk, Inc.*, 394 F.3d at 368 n. 7. The test has its root in the second step of the Arnstein test—i.e., whether 'the copying (assuming it to be proved) went so far as to constitute improper appropriation.' 154 F.2d at 468. [emphasis mine][3]

Thus, the court was careful to point out that if the use is *not* substantially similar to the copyrighted work that it borrows from, then it is not actionable, i.e. it does *not* constitute "improper appropriation;" ergo, it's not copyright infringement.

What the Batiste Court's Substantial Similarity Analysis Tells Us

That the *Batiste* court conducted a substantial similarity test tells us two things. First, it tells us that the court conducted business as usual. In other words, the court did not treat music compositions differently from other copyrightable subject matter. By applying the same substantial similarity analysis requirement that applies to any other copyright infringement case, the court illustrated that the substantial similarity analysis is a fundamental, unavoidable requirement of every analysis of every copyright infringement case. Ergo, courts *never* eliminate the substantial similarity analysis according to the copyrightable subject matter. Whether it's literary works, musical works, dramatic works, choreographic works, pictoral works, motion pictures, architectural works, *or* sound recordings, courts must apply the substantial similarity test. Second, it tells us that the court was not persuaded by the Sixth Circuit's opinion in *Bridgeport*.

[3] *Id.*

The Batiste Court's Analysis
"The Care with which the Court Undertook its Task"

In *Batiste*, the court made *124* side-by-side comparisons, an examination of *248* songs, and found no similarity at all in *122* out of *124* possible instances. How the court arrived at its decision — through great care in the undertaking of its task — was exhibited by the nature of its analysis and approach. And the nature of the court's approach to the substantial similarity analysis was underscored by the fact that the court highlighted four different but commonly known approaches to the substantial similarity analysis. These approaches included: The "Laymen" or "Ordinary Observer" Approach; The Ninth Circuit's "Extrinsic/Intrinsic" Test; The Second Circuit's "Abstractions" and "Filtration" Analyses; and the reconciliation of the "Filter" and "Total Concept and Feel" tests.

The Approach the Batiste Court Applied

In its consideration of the various ways that a court *could* approach the substantial similarity analysis, the *Batiste* court settled on a two-fold approach, a dissection or filter test and a side-by-side comparison test using the "'layperson' standard." And the court did an excellent job in explaining why it chose this approach:

> In light of the foregoing, the substantial similarity inquiry employed herein shall be two-fold: a dissection and "filtering" of unprotectable constituent elements, as prescribed in *Kepner-Tregoe*, followed by a side-by-side comparison using the "layperson" standard articulated in *Creations Unlimited.* **Given the plaintiff's allegation that the Defendants have infringed *particular constituent elements* of his songs (*e.g.*, melody, hook, lyrics), it also seems clear that a side-by-side comparison of these individual elements is appropriate.** In *Positive Black Talk*, the plaintiff argued that the district court erred in its jury instructions by suggesting that the jury was required "to compare the two works *as a whole*" to determine whether there was "*overall* similarity" between the songs. 394 F.3d at 373-74 (emphasis added). The court found that by instructing the jury to compare the expressions in the two works "that are shared,"

> the district court had "correctly indicate[d] that the jury should compare the *parts* of the two songs that are similar in determining substantial similarity." Id. at 374. **Thus, a finding of substantial similarity *may* be based on a similarity between *constituent elements*, even where the songs "as a whole" are overall dissimilar.** [emphasis in the original and mine][4]

In other words, you can't just slap a rap (rap-style vocal performance) over a 2-minute sample of a country song, then claim that there's no substantial similarity because the original work, *overall*, is a country song and the secondary work is rap song.

Next, the court noted that even when similarity is observed between constituent elements, the appropriated elements must be assessed both quantitatively *and* qualitatively:

> Upon a finding of such similarity between constituent elements, **the importance of the similar element(s) would then be assessed both *quantitatively* and *qualitatively* to determine whether the similarity qualifies as "substantial" and, thus, is actionable. *Id.* at 373 & n. 12.** [emphasis mine][5]

This assessment is a requirement of all copyright infringement cases, and it applies to all copyrightable subject matter; there is no exception for sound recordings. So what's key here is that if we apply this sample principle to a digital sample of a sound recording, then of course a digital sample is, in the abstract, "substantially similar" because it's an exact copy of a "constituent element." Note, however, that all appropriations are exact copies of constituent elements, hence the reason for the test. But the copied constituent element that is examined must be assessed quantitatively and qualitatively. How much — quantitatively — was sampled and what was the level of significance — i.e. the qualitative factor — of the portion sampled.

Next, in expressing that it was unclear if the "total concept and feel" test should be applied in its analysis, the court noted how the test was nonetheless instructive in honing the court's substantial

[4] *Id.*
[5] *Id.*

similarity analysis, and further noted how substantial similarity was not found in *122 out of 124* possible instances, using *any* substantial similarity test:

> What is less clear is the extent to which the Ninth Circuit's 'total concept and feel' analysis should play a role in this Court's analysis. The district court in *Positive Black Talk* used the Ninth Circuit's 'extrinsic/intrinsic' test, and even instructed the jury that the test was whether the intended audience would find the 'total concept and feel' of the two songs to be substantially similar. 394 F.3d at 373. On review, the Fifth Circuit found no plain error in the jury instruction and stated that the 'test articulated in *Creations Unlimited* is similar to the Ninth Circuit's intrinsic test, which ... asks whether the ordinary reasonable person would find the *total concept and feel* of the works to be substantially similar.' 394 F.3d at 374 n. 13. This of course raises the "unique combination" question.
>
> The question is more than academic in this case, for as to several songs the plaintiff's allegations of infringement are based: (1) on similarity as to a *single* element (*e.g.,* beat), ***which the Court has found to be unprotectable*, (2) on similarity between multiple elements, all of which the Court has found to be unprotectable, or (3) on similarity between multiple elements, certain of which are protected and certain of which are unprotectable. Where the alleged infringement is based solely on the alleged copying of a *single unprotectable* element, it seems clear that a finding of substantial similarity would be directly contrary to the Fifth Circuit's holding in *Kepner-Tregoe. See*** 12 F.3d at 533 **(a conclusion that the defendant** 'only copied unprotectable elements' of the plaintiff's work would mandate reversal of district court's judgment finding infringement). Thus, **where the plaintiff has claimed infringement of a particular song *based solely on the copying of a single unprotectable element, the Court has found the claim to be non-actionable as a threshold matter.*** In all other cases, including claims based upon alleged similarity as to two unprotectable elements, the Court has performed a side-by-side comparison of the allegedly infringed and infringing songs.
>
> In short, the Court has evaluated the song pairs under every possible analysis set forth above. With the exception of three claims, the Court was unable to find substantial similarity utilizing *any* test.
> [emphasis in the original and mine][6]

[6] *Id.*

Side-by-Side Comparison

In detailing how a side-by-side comparison between two musical works (the original work and the secondary work) is supposed to be conducted, the *Batiste* court — relying on guidance from the Fifth Circuit and specifying what it saw as the "standard" for the side by side comparison test — noted that this test asks whether an ordinary listener would consider the two works substantially similar or not:

> **One thing that can be said with certainty is that the Fifth Circuit has traditionally applied the "layman" or "ordinary listener" test, which was articulated in *Creations Unlimited:* "To determine whether an instance of copying is legally actionable, a side-by-side comparison must be made between the original and the copy to determine whether a layman would view the two works as 'substantially similar.'"** *Creations Unlimited, Inc. v. McCain,* 112 F.3d 814, 816 (5th Cir.1997). This formulation was tacitly approved in *Positive Black Talk,* and both sides here agree that this is **the basic applicable standard** for determining substantial similarity." [emphasis mine][7]

Since this is the "basic applicable standard for determining substantial similarity," it must be applied to sound recordings, just as it is applied to music compositions and all other copyrightable subject matter. Hence, if the "layman" or "ordinary listener" would not view the two works as substantially similar, then the instance of copying is *not* legally actionable; ergo, it's not copyright infringement. This is especially significant to digital sampling. Consider again a digital sample of a single drum kick, or even three notes, from a 3-minute long Led Zeppelin song. Once converted into a hip hop beat, via chopping, pitch adjustments, distortion, or any other common beatmaking process, then combined with rap lyrics, the "layman" or "ordinary listener" would not view the two works as substantially similar.

[7] *Id.*

A Side-by-Side Comparison: Dissection and Parts

The *Batiste* court reminds us that when doing a side-by-side comparison of *parts* of work, the parts must meet thresholds that are both sufficiently qualitative and quantitative:

> **[S]ubstantial similarity necessitates only that *parts* of a work be similar (provided the similar parts are *sufficiently qualitatively and/or quantitatively important*)**. [emphasis mine][8]

Thus, even when taking the "dissection" approach and comparing "parts" of a work, the parts must still be "**sufficiently *qualitatively* and/or *quantitatively important.*"** Here, notice the sigficance of the word "important." Now, ask yourself, is a digital sample of a single drum kick from a 3-minute long Led Zeppelin song "qualitatively" or "quantitatively" *important*? While there is no bright line — and I'm against the idea of developing one specifically for digital sampling — I'd argue that digital samples of single-hit drum sounds are de minimis in nature.

Further to this, the "sufficiently qualitatively and/or quantitatively important" aspect of the substantially similarity analysis is especially critical to determining substantial similarity in cases involving digital sampling and sound recordings, particularly because of the small snippets often involved. Digital sampling, notably how it's usually done in the hip hop/rap music tradition, always relies on "parts" or small snippets of sound recordings. While these snippets can range in length, in many cases they don't amount to more than 3 or 4 seconds — from old songs that are often 3 minutes in length or longer. Still, *length*, i.e. the quantitative threshold, is just one factor, and it's considered in tandem with the qualitative factor *and* in relation to the work from which it's taken. In other words, what if the secondary work borrows 8 or even 16 seconds from the lead up to the intro of a 7-minute long song? See how the amount matters in relattion to the work that the sample is taken from? The

[8] *Id.*

same principle applies to literary works. A stanza taken from a 4-stanza poem is different that a paragraph taken from an article, which is different still from paragraph taken from a 400-page book. Again, there's no bright line to follow. Courts must only apply the substantial similarity *standard* on a case by case basis; and the relative facts, including the quantitative and qualitative factors, are different in each case.

A Side-by-Side Comparison Is Supposed to Be "Reasonable"

Finally, another important thing that the *Batiste* court made clear about the side-by-side comparison test is that the side-by-side comparison is supposed to "reasonable":

> **Virtually everything about these song pairs is different: the genre, *the themes, the melodies, the harmonies, the lyrics, the vocals, and the instrumentation*. Indeed, *it is difficult to overstate how different* they sound to the lay ear.** Moreover, **this lay perception of *lack of similarity*** is supported by the detailed and methodical musicological analysis of the defendant's expert, Dr. Ferrara. *See* Rec. Docs. 58-4, 113-2. **No *reasonable* juror could find *substantial*** similarity **as to any of these claims.**
>
> Using a "dissection" analysis and relying heavily on the export reports, the Court was able to hear ***faint similarities* in certain of the specific elements** (melody or hook) alleged to be similar with respect to these claims. **On closer listening, however, the melodies and hooks in question prove to be *quite different*. Thus, *the similarity is very slight* — certainly *not substantial*, even when the somewhat similar element is isolated.** Under a "total concept and feel" analysis, these songs are scarcely more similar than those discussed above, wherein the Court found no similarity at all. ***No layperson* would find them to be even remotely alike. Moreover, the similarities are based on features (*e.g.,* a jingling or pulsing synthesizer element) that are common in nearly all pop genres.**
>
> Thus, as to all of the claims in these two charts, **the Court finds that no *reasonable* juror could find *substantial* similarity — as to the constituent elements stated in the complaint, as to any**

> **combination of those elements, as to *the songs taken as a whole*, *or as to any part(s) thereof.*** As to these claims, the Defendants are entitled to judgment as a matter of law. [emphasis mine][9]

Thus, in doing a side-by-side comparison of one work and the secondary work that allegedly infringes upon it, a court's observation, like a layman's observation, is supposed to be "reasonable." Conversely, the side-by-side comparison is not supposed be *unreasonable*, i.e. absurdly narrow, unrealistc, or over analyzed. In other words, this doesn't mean that there can't be *any* similarity between the two works. There can be *some* similarity between the two works, but the substantial similarity inquiry is concerned with *substantial* similarity, i.e. what's "reasonable" to the "layperson."

Filter Test

The filter test looks for and excludes "*unprotectable* elements" of a copyrighted work, i.e. those elements that are not legally actionable, ergo, *not* copyright infringement. The *Batiste* court followed this standard in applying its filter test. And what's worth observing is how the court used the filter test as more support for the fact that substantial similarity is a requirement in all copyright infringement cases, regardless of the copyrightable subject matter. This means that the same substantial similarity tests apply to *all* copyrightable subject matter; there's no exception for music compositions, sound recordings, "or **any other artistic expression"**:

> It also seems fairly clear that the Fifth Circuit would endorse the threshold use of a **'filter' to exclude *unprotectable* elements from the substantial similarity analysis.** The Circuit did so expressly in *Kepner-Tregoe*, stating: 'To determine the scope of copyright protection in a close case, a court may have to filter out ideas, processes, facts, idea/expression mergers, **and other *unprotectable*** elements of plaintiff's copyrighted materials to ascertain whether the defendant infringed protectable elements of those materials.' 12

[9] *Id.*

> F.3d at 533-34. The court stated further that if the defendant had copied *only* 'unprotectable elements' of the plaintiff's work, it would be required to 'reverse the district court's judgment' finding infringement. *Id.* at 533.
>
> Although *Kepner-Tregoe* did not deal with music or any other artistic expression, ***the opinion contains nothing to suggest that the filtering of unprotectable elements should not be done in such cases.*** **At least two other Sections of this Court have utilized a 'filter' analysis in determining substantial similarity in a music copyright case.** See *Positive Black Talk, Inc. v. Cash Money Records*, 2003 WL 1921999 *2 (E.D.La.2003) **('[D]etermination as to infringement of a copyright — the issue in this case —involves identification and isolation of the work"s unprotectible elements.... Such identification is necessary because *a finding of infringement cannot be premised solely upon copying of non—protectible elements* of a musical composition.');** *Landry v. Atlantic Recording Corp.,* 2007 WL 4302074 *4 (E.D.La.2007) **('Where there are both protectible and unprotectible elements of a work, *the court must attempt to extract the unprotectible elements from* ... consideration and ask whether the protectible elements standing alone are substantially similar.')** (quoting *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2nd Cir. 1995)). Of course, *Kepner-Tregoe* must be read in light of the Supreme Court's opinion in *Feist.* [emphasis mine][10]

Consequently, how the filter test could work in the context of digital sampling and sound recordings is this. The sample at question would first be "filtered," i.e. examined, to determine *if* it was legally actionable. In this scenario, the most brief snippets, like digital samples of single drum kick, snare, and hi-hat sounds would likely be filtered out, as these types of samples — typically no more than .05-.08 seconds in length, sampled from songs upward of 3 minutes — and deemed de minimis, i.e. unproctectable.

"Total Concept and Feel": The Batiste Court's 7 Points of Difference

Another critical substantial similarity test that courts often turn to is the "total concept and feel" test. In its application of the total concept

[10] *Id.*

and feel test, the *Batiste* court noted a list of seven things that may establish a difference between one work and the secondary work that allegedly infringes it. This list includes: Genre, theme, melodies, harmonies, lyrics, vocals, and instrumentation. Deferring to these seven areas of specific comparison, the *Batiste* court observed that "virtually everything" was different about Batiste's songs and T-Pain's songs:

> A few of the plaintiff's songs have a popular jazz *style* reminiscent of that which was popular in the late 1960s and early 1970s. **Virtually everything about these song pairs is different: the genre, *the themes, the melodies, the harmonies, the lyrics, the vocals, and the instrumentation.*** [emphasis mine][11]

Looking at the *Batiste* court's seven points of difference under the total concept and feel test, we can see the specific aspects that distinguish one musical work from another. Giving due weighting to these seven points, based on the order that the *Batiste* court listed them, we should understand that "genre" is the most important of the seven points of difference for several reasons. First, to the "layperson" or "ordinary" listener, the first area of obvious difference is genre. When we consider genre, we understand that it's the difference that all of us register immediately when we hear different genres of music. We know classical music when we hear it; we know the blues when we hear it; we know jazz when we hear it; we know rock when we hear it; we know reggae when we hear it; we know country music when we hear it; and we know hip hop/rap music when we hear it. So nearly by default, music works that represent two different genres will likely not be *substantially* similar. Aside from intentional hybrid combinations of genres, one normally wouldn't confuse a typical country song (that's created for a country audience) with a typical hip hop/rap song (that's created for a hip hop/rap audience). So it follows, at least at first glance, that a country song and a hip hop/rap song would not have the same total concept and feel.

[11] *Id.*

Second, genre is the main point that the the other six points of difference defer to. Turning to "melodies, harmonies, lyrics, vocals, instrumentation," *and* rhythm — all of the components that comprise a typical song in Western popular music, and all of the things that form the total feel and concept of a song — we would expect that these things would be different as well. And in hip hop/rap music, this difference is further emphasized because instrumentation typically comes in the form of a *beat* made by beatmakers (producers), not instrumental accompaniment played by multiple traditional musicians. Finally, turning to lyrics and vocals and grouping them as an interdependent pair, we recognize that here, too, we will find considerable difference based on genre. This is particularly the case when it comes to hip hop/rap music, where the lyrical and vocal stylings are highly distinguishable.

Additionally, "tempo" is an aspect that can also be used to help establish substantial similarity between two musical works. In *Batiste*, in *1* instance out of 124, the court found "a similarity between the melody (carried by the vocals) in the chorus of both songs," and noted that this melody was "echoed in the chord progressions throughout both songs," and further observed that both songs share a very similar *tempo*."[12] Thus, tempo is another musical element that can help determine substantial similarity between two *works as a whole*. If two songs share a "very similar tempo," this may be one point that shifts determination towards substantial similarity. Conversely, however, if two songs do *not* share a "very similar tempo," then this may be a point leaning against a determination of substantial similarity.

Side-by-Side Comparison and "Total Concept and Feel" Applied in Tandem

Conducting its side-by-side comparison with an eye on "total concept and feel," and after great care to detail, including listening to both dissected elements of the works as well as the "works as

[12] *Id.* (emphasis mine).

a whole," *and* after giving the plaintiff the benefit of the doubt, the *Batiste* court still found "no similarity *at all*" in virtually all of Batiste's works and T-Pain's works:

> For all claimed infringements as to which the plaintiff alleged similarity as to melody, hook, or a combination of elements, **the Court performed a side-by-side comparison to determine whether an *ordinary reasonable listener would find the works (or parts thereof)* to be *substantially* similar. The Court listened for similarities in 'dissected' elements and also for similarity as to combinations of elements and in the *works as a whole*.** Because of the sheer number of claims and because the Court ***made every conceivable effort to give the plaintiff's claims the benefit of the doubt,* the process was a long and tedious one. Despite the care with which the Court undertook its task,** in the overwhelming majority of claims, ***it found no similarity at all***. …the Court was unable to find even a slight similarity."
>
> The most that can be said with respect to these claims in terms of similarity is that the plaintiff's songs and the allegedly infringing songs can all be categorized as popular music and, thus, share the same basic (usually danceable) beat ubiquitous in popular music and occasionally share one of the basic chord progressions ***common to all popular music genres***. **That is where the similarity ends. The '*total concept and feel*' of the plaintiff's songs are *dramatically different* from the songs that allegedly infringe them.** The Defendant's songs are rap and/or hip-hop. The plaintiff's songs range from classic rhythm and blues, to disco, to the classic New Orleans funk style that can be heard at venues throughout this city on any given evening. [emphasis mine][13]

The *Batiste* court's observations here are quite revealing, mainly because they stress two critical points. First, that there are aspects "common to all popular music genres." Second, that a "rap song" typically has a "total concept and feel" that is distinguished and "dramatically different" from popular music genrres, like "classic rhythm and blues," "disco," and "the classic New Orleans funk style." This is significant because it further clarifies what the "total concept and feel" test should look at when it's applied to musical

[13] *Id.*

works. **The *genre, the themes, the melodies, the harmonies, the rhythm, the lyrics, the vocals,* and *the instrumentation,*** these are all things that distinguish the "total concept and feel" of a musical work. Collectively, these things sit at the heart of the question of substantial similarity between two musical works *as a whole*. A shared musical element between two works — be it a digital sample or some other building block of music — does not *automatically* mean that the two works *as a whole* will be *substantially* similar. For instance, you could use the same backbeat, or digital of sample of a backbeat, in a country song and in a rap song, and the layperson would still recognize that both songs, *as a whole*, are dramatically different.

Weeding Out What's Not Protected: A Critical Aim of Courts in All Copyright Infringement Cases

Looking at the filter test, the side-by-side comparison test, and the "total concept and feel" test in tandem, we can see that in all copyright infringement cases, courts aim to weed out those elements of a copyrighted work that are *not* protected. This focus by courts is critical because it fundamentally serves the objectives of copyright, as too much protection undermines the purpose of copyright. Additionally, even if we could say that there's a presumptive bias for copyright owners, courts aim to locate and filter out what's *not* protected more than they search for ways to deem that something *is* protected. The Sixth Circuit's error in *Bridgeport* was that it did not properly apply the principle of the "filter test." Instead of filtering out what was *not* protected, the Sixth Circuit searched for a way to justify its claim that sound recordings were treated differently — i.e. protected differently — from all other copyrightable subject matter. Unfortunately, it would appear that the Sixth Circuit did this because it had no desire to conduct the appropriate substantial similarity analysis. Hence, in *Bridgeport*, the Sixth Circuit invented an exception for sound recordings, and in doing so, it did not follow a fundamental aim of all courts in copyright infringement cases: To filter out what elements of a copyrighted work that are *not* protected.

"A Word About Sampling": Other Circuits Reject Bridgeport! Substantial Similarity Standard Does Apply to Sound Recordings

Since the plaintiff, Batiste, only filed claims of copyright infringement in the music composition copyright, *not* the sound recording copyright, the *Batiste* court did not need to address the issue of digital sampling. Nonetheless, under the heading "A Word About Sampling," the court addressed the issue anyway and noted that the digital sampling of sound recordings, like all appropriations of any copyrightable subject matter, is subject to the substantial similarity analysis. Consequently, the *Batiste* court "strongly cautioned" the plaintiff against amending his complaint by adding digital sampling claims. This is because in the *Batiste* court's view, the substantial similarity standard *does* apply to sound recordings. Ergo, there is no special exception for sound recordings as the Sixth Circuit maintained in *Bridgeport*. Thus, the *Batiste* court made it clear to the plaintiff that digital sampling claims would not "be exempt from the analysis already applied herein":

> The plaintiff's expert, Archie Milton, makes several allegations of *digital* "sampling" throughout his report. *See* Rec. Doc. 111-2. He bases these allegations on results he claims to have obtained from a computer software called "Melodyne." *Id.* at 3. The defendant's sampling expert, Paul Geluso, raises serious questions concerning Mr. Milton's methodology. *See* Rec. Doc. 113-3. The Court need not address these questions today, however, for the plaintiff has made no allegations in his complaint that would give rise to a claim of digital sampling. For example, he has made no allegations that any copyright in sound recording has been infringed. **Rather, his allegations are limited to alleged infringements of copyrights in his music compositions. *This, of course, raises the specter of an amending complaint.*** The Court will shortly issue a scheduling order with pretrial deadlines, including a deadline for amending pleadings. **However, the Court strongly cautions the plaintiff that he should consider very carefully any decision to add sampling claims. First, while the Sixth Circuit has applied a different standard to digital sampling (*i.e.*, where sounds from the plaintiff's sound recording are not imitated, but rather are**

> **literally lifted from the recording and incorporated into the defendant's recording),** ***other circuits have continued to apply the substantial similarity test to claims based on sampling.*** **Thus, it is far from clear that such claims would be exempt from the analysis already applied herein.** [emphasis mine][14]

"The Court *strongly cautions* the plaintiff that he should consider very carefully any decision to add sampling claims." Here, it's clear that the *Batiste* court was warning the plaintiff. The implicit warning being this. Under the same substantial similarity standard, the same results would likely be found. In other words, the *Batiste* court was telling the plaintiff that even if he ammended his complaint to add claims of infringement in his sound recordings, based on digital sampling, copyright infringement would still likely not be found. Moreover, that the court directly noted that it was not inclined to follow the Sixth Circuit's decision in *Bridgeport*, and that "***other circuits have continued to apply the substantial similarity test to claims based on sampling,"*** demonstrates how in tune with the issue the *Batiste* court was. Finally, in expressing its concerns that adding any sampling claims would not be "good faith," the *Batiste* court also exhibited its awareness of frivolous lawsuits that arise from digital sampling claims:

> Second, aside from possible impediments in the law, there is the serious concern of a ***good faith*** factual basis. While the plaintiff is certainly entitled to bring his *bona fide* grievances to this Court, ***he is not entitled to throw everything he has against the proverbial wall*** to see what might adhere. **The Court has limited resources, and the plaintiff has already taken more than his share by loading his complaint with over a hundred claims** ***that had no realistic chance of success.*** **The Court will not again sift through a mountain of chaff to find a tiny handful of viable grains. If an amending complaint is similarly laden,** ***leave to file it will be denied.*** [emphasis mine][15]

[14] *Id.*
[15] *Id.*

What the Batiste Court's "...Word About Sampling" Further Confirms About Digital Sampling and Music Making

In calling attention to the fact that the substantial similarity analysis applies to both music compositions and sound recordings, just as it does to all other copyrightable subject matter, and that the, the substantial similarity applies to *digital* sampling, the *Batiste* court also confirmed that all *forms* of borrowing are also treated equally. For example, whether you take a screenshot of text from a book or copy the same paragraph by hand, both forms of borrowing are equal. There's no exception based on whether you copied the text by hand or by another means. For example, if you *digitally* copied the text from the book using a photocopying machine or the camera on your smart phone, it counts as the same; photocopying isn't privileged above digital sampling. Under copyright law, both forms of copying are treated equally. The Ninth Circuit spoke to this fact, noting in V*MG Salsoul LLC v. Madonna Louise Ciccone* that "[a] computer program can, for instance, 'sample' a piece of one *photograph* and insert it into another photograph or work of art."[16] Additionally, and more importantly for our purposes here in this sub-section, if the same substantial similarity analysis applies to music compositions as it does to sound recordings, then, as the *Batiste* court confirms, a digital sample in, the abstract sense, can be used as a basic building block of music.

However, while a sample shares some commonalities with other building blocks of music, like chord progressions, rhythmic feels, or common melodies, it also differs in other ways as well. For instance, a typical funk backbeat is always the same, and musicians can build around it with other music elements to create new *funk* songs. Some digital samples are typical, too. For example, samples of kick drums, snares, and hi-hats. All of these sampled sounds can be used to make new drum programs for new songs. But the

[16] *VMG Salsoul LLC v. Madonna Louise Ciccone et al.*, case number 12-cv-05967 (9th Cir. June 2, 2016) (emphasis mine).

new songs that these samples help enable are not limited to any *one* music genre. Instead, these samples can be used to craft various genres, from rock to reggae to country to R&B and everything in between. Similarly, the potential of a given sample's use manifests itself much differently than other common basic building blocks of music. For example, a sample of a brief melodic phrase can be transformed into a rhythm phrase; a sample of a brooding melody can be transformed into a happy melody; a sample of a riff from a jazz song can be transformed and turned into the foundation of a hip hop/rap song or an R&B song or even a new jazz song that's completely different in context and feel.

Technology has enabled the "digital" sample much in the same way that the electric guitar enabled "electric" melodies, rhythms, and chords. Remember, the world of music has existed far longer without electric instruments than with them! And when the "electric" guitar was first invented, for some it was considered all but an evil invention, something not fit for "real" musicians. Sound familiar? Calls to mind how some so-called traditional musicians — especially those musicians who play the electric guitar — try to discredit drum machines and digital samplers today. In any case, the advent of the electric guitar didn't change the basic concept of music creation; the use of building blocks of music to make new music remained. What the advent of the electric guitar did, however, was *expand* not only *how* building blocks of music could be used, but also how new building blocks of music *could be made*. Likewise, the digital sampler hasn't changed the basic concept of music creation; again, the use of building blocks of music to make new music remains a critical part of the music process. Like the electric guitar (or the electric piano, aka the keyboard), the digital sampler has simply *expanded* not only how building blocks of music can be used, but also how new building blocks of music *can be made*. And it's also worth noting that a digital sampler is in some ways more flexible than the electric guitar in this regard, because the range of music making capabilities that are present in a digital sampler is greater than that of an electric guitar. In fact, for all intents and purposes, a digital sampler can be used as a keyboard, a drum kit, and even an electric guitar.

The Decision and What It Further Reveals About the "Fragmented Literal Similarity" Test and Digital Sampling

Having concluded its substantial similarity analysis, the *Batiste* court granted T-Pain's Motion to Dismiss — which the court converted into a motion for Summary Judgment — in all respects except *3* out of the *47* songs that the plaintiff *Batiste* had filed his claims on. In other words, the court dismissed all of Batiste's claims, save for the three songs in which the court deemed that some substantial similarity *could* be observed:

> Accordingly;
> IT IS ORDERED **that Defendant's Motion to Dismiss (Rec. Doc. 58), which has been converted into a Motion for Summary Judgment** pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, is hereby **DENIED IN PART,** in that it is denied as to (1) "Move That Body" (allegedly infringed by Nelly's "Move That Body"); (2) "I Like Your Way" (allegedly infringed by T-Pain's "Put It Down"); and (3) "Blues Man" (allegedly infringed by T-Pain's "Reggae Night"), and **GRANTED IN PART, in that it is granted *in all other respects.***
>
> Thus, as to all of the claims in these two charts, **the Court finds that no *reasonable* juror could find substantial similarity — as to the constituent elements stated in the complaint, as to any combination of those elements, as to *the songs taken as a whole, or as to any part(s) thereof.*** As to these claims, the Defendants are entitled to judgment as a matter of law.
> [emphasis in the original and mine][17]

Hence, one thing that's particularly instructive for digital sampling is the fact that the *Batiste* court found no substantial similarity in the neither the *isolated "constituent elements*," nor "any *combination* of those elements," nor "the songs taken *as a whole*, as to any parts) thereof." This speaks directly to the so-called "fragment" test that tends to be misapplied to digital samples.

[17] *Id.*

As I noted in Chapter 20, the illogic that's associated with a *digital* sample, when it's considered under the lens of the fragment test, is that since a *digital* sample is a "digital" copy, it's an *exact* copy of the fragment of the sound recording that it samples, and therefore it's substantially similar by default. But this reasoning is flawed for two reasons. First, as I've mentioned before, *all* copying that is proven to be "factual" copying is an *exact* copy of the work that it borrows from. Second, this is not how substantial similarity is determined because the entire premise of the substantial similarity test is premised on the fact that the secondary work has appropriated an *exact* copy of the work that it has "factually" copied. And thus, the substantial similarity analysis, which first "**determines whether *factual* copying is '*quantitatively* and *qualitatively* sufficient,"**[18] looks at the *use* of the appropriation, i.e. the fragment (the "factual" copy) in the secondary work. Therefore, if the fragment — which, again is always an *exact* copy of what it borrows — is used in a manner that is *not substantially* similar to the work that it borrows from, then there is no infringement. Hence, what's critical to note is how the *Batiste* court confirmed that the fragment test and such analysis must be considered *in tandem* with the analysis of the fragment(s) — "constituent element" — in isolation *and* combination, as well as the two "*works as a whole*."

Batiste Confirms That the Question Is Moot; Congressional Intent was Clear: All Copyrightable Subject Matter Is Subject to the Same Limitations

Some commentators have stated that since only two circuit courts have addressed the issue, it's an open question as to "whether unauthorized, de minimis use of sound recordings constitutes actionable infringement."[19] But other circuit courts need not address this issue, because there really isn't a question. Until the Sixth

[18] *Id.*

[19] Bobby Ghajar and Lori Levine, "Sound Recordings and the De Minimis Exception: A Circuit-by-Circuit Analysis," BNA's Patent, Trademark & Copyright Journal, 93 PTCJ 2628, 12/23/16. The Bureau of National Affairs, Inc. http://www.bna.com.

Circuit's error in *Bridgeport*, there wasn't a question if de minimis, like fair use, applied to *all* copyrighted works; it was an observed fact of copyright law that all copyrightable subject matter is subject to the same limitations of copyright law. In *Bridgeport*, the Sixth Circuit invented a new standard for sound recordings, and it based its "bright-line" standard on what it called a lack of "Congressional intent." More specifically, the court asserted that Congressional intent wasn't clear, and that the legislative history was of no help in the matter. But if the question turns on "Congressional intent," then the question is moot! Because Congress was quite clear in its intent that sound recordings are *not* to be treated any differently than other copyrightable subject matter. In fact, Congress was careful to emphasize, twice, that the same exceptions apply to sound recordings just as they do to all copyrightable subject matter:

> It must be emphasized *again* that t**he same general standards of fair use are applicable to *all* kinds of uses of copyrighted material**... [emphasis mine][20]

It's illogical to think that Congress intended that "the *same general standards* of fair use are applicable to *all* kinds of uses of copyrighted material," but the same general standards of de minimis do not apply to all kinds of uses of copyrighted material. So if de minimis applies to one category of copyrightable subject matter, it applies to them all. Hence, the legislative history on this — which the Sixth Circuit obviously declined to read — is very clear and of immense help in this matter.

And while some commentators have claimed that this question is "ripe for Supreme Court review," this is also not true. It only takes 10 minutes to read the House Report in which Congress expressly states its intent and makes it clear that sound recordings are *not* to be treated differently than other copyrightable subject matter. Lastly, district courts need not look at the laws of its circuit courts (or other circuit courts) for guidance on this issue. If district courts need guidance or if district courts are in doubt about whether de minimis

[20] U.S. House. The Committee on the Judiciary. Copyright Law Revision, 1976, (to Accompany S.22) Report Together with Additional Views (94 H. Rpt. 94-1476), 65, 66. 72.

applies to sound recordings — and all district courts who have addressed the question thus far have observed that it does — they need only read the Copyright Law Revision Report (H.R. Report No. 94 1476) that accompanied the Copyright Act of 1976.

The Circuit Split: VMG Salsoul v. Madonna

Ninth Circuit Court of Appeals Says De Minimis Applies to Sound Recordings

In *Bridgeport*, the Sixth Circuit declared that de minimis doesn't apply to sound recordings. The music industry agreed with the Sixth Circuit and carried on business as if *Bridgeport* was the "law of the land" on the matter of digital sampling. But *Bridgeport* was never the law of the land. And in 2016, eleven years after *Bridgeport*, the Ninth Circuit Court of Appeals ruled, in *VMG Salsoul, LLC v. Madonna*, that de minimis does indeed apply to sound recordings, just as it applies to all copyrightable subject matter. The Ninth Circuit's opinion, which reflected the same judgement of courts outside the Sixth Circuit's jurisdiction, contradicted *Bridgeport* and created a Circuit Split.

VMG Salsoul, LLC v. Madonna Louise Ciccone et al: Background, Complaint, and Decision

In July, 2012, VMG Salsoul, LLC filed a copyright infringement suit in a California district court against Madonna, Shep Pettibone, WB Music Corp., and others. VMG alleged that Pettibone, the producer of Madonna's 1990 hit song "Vogue," sampled a horn stab — a *0.23-second* snippet of horns — from its 1977 disco song "Love Break." (*According to the complaint, prior to filing its suit, VMG sent Madonna, Pettibone, and WB Music Corp. a notice of infringement in July 2011, and sent another notice of infringement in February 2012.*) The district court ultimately held that the horn stab, which the court noted appeared eleven times in "Vogue," was "neither sufficiently original to merit copyright protection,

and that even if the alleged appropriation was subject to copyright protection, *any copying was de minimis*." Thus, the district court granted summary judgment in favor of Madonna et al.[21]

VMG Salsoul appealed the district court's decision, and in June 2016, the Ninth Circuit Court of Appeals affirmed the district court's summary judgment in favor of Madonna, et al., and upheld the district court's application of the longstanding legal rule that de minimis copying does not constitute infringement:

> Affirming the district court's summary judgment, the panel held that ***any copying that occurred was 'de minimis'*** **and not an infringement of either the composition or the sound recording of Love Break.** The panel agreed with the district court that, as a matter of law, a general audience would not recognize *the brief snippet* in Vogue as originating from Love Break. ***Disagreeing with the Sixth Circuit,*** **the panel held that Congress did not eliminate the de minimis exception to claims alleging infringement of a sound recording in 17 U.S.C. § 114(b).**
>
> The snippets of the composition that were (as we must assume) taken here are much smaller than the sample at issue in *Newton*. The copied elements from the Love Break composition are very short, **much shorter than the *six-second* sample** in *Newton*. The single horn hit lasts less than a quarter-second, and the double horn hit lasts — even counting the rests at the beginning of the measure — less than a second.
>
> Similarly, the horn hits appear only five or six times in Vogue, rather than the dozens of times that the sampled material in Newton occurred in the challenged song in that case. [emphasis mine][22]

The Ninth Circuit's 4-Point-Set of Criteria for Determining Transformation of a Digital Sample

Next, the Ninth Circuit spoke to the level of transformation involved in the alleged infringement:

---

[21] *VMG Salsoul LLC v. Madonna Louise Ciccone et al*., case number 12-cv-05967 (9th Cir. June 2, 2016) (emphasis mine).
[22] *Id.,* pp. 3, 4, 14.

> Moreover, the horn hits in Vogue *do not sound identical* to the horn hits from Love Break. As noted above, assuming that the sampling occurred, **Pettibone truncated the horn hit, transposed it to a different key, and added other sounds and effects to the horn itself. The horn hit then was added to Vogue along with many other instrument tracks."** [emphasis mine and in the orignal][23]

Aside from the sample being de minimis, the Ninth Circuit also took the opportunity to note the level and kind of transformation that occurred. What stands out here is that the Ninth Circuit identified four types of transformation that rendered the use transfortmative. First, Pettibone "truncated the horn hit;" in beatmaking terms, he *chopped* the horn it. Second, Pettibone "transposed" the horn hit "to a different key," i.e. he transformed the pitch of the horn hit. Third, Pettibone "added other sounds and effects" to the horn hit. Fourth, "many other instrument tracks" were added around the horn hit. Collectively, these four categories of transformation — chopping, pitch shaping, adding sound effects, and adding new musical elements — represent how samples can meet the transformative threshold. And all four of these kinds of transformation are native to hip hop beatmaking; in fact, they're the the kind of thing that personifies a typical hip hop beat.

By detailing its examination of transformation of the use of the sample, the Ninth Circuit did three important things. First, the Ninth Circuit established a 4-point set of criteria for other courts to follow when determining the transformation of a sample. This is significant because the same criteria can be applied in both a de minimis analysis and a fair use analysis. Second, the Ninth Circuit demonstrated that transformation helps confirm whether an appropriation is de minimis or not. Third, the Ninth Circuit exhibited an understanding of the kinds of different transformation that occurs in the art of sampling. This distinction further legitimizes the transformational creative process of the art of sampling.

Additionally, when it noted that the changes made to the sample were so transformative that VMG Salsoul's expert couldn't recognize the source of the sample, the Ninth Circuit restated the

[23] *Id*., p. 16.

significance of transformation:

> **"Plaintiff's primary expert originally misidentified the source of the sampled double horn hit**… In other words, a highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied, and he could not do so accurately. An average audience would not do a better job." [emphasis mine][24]

Five Critical Points of the Ninth Circuit's Decision

In its written opinion, the Ninth Circuit Court of Appeals made five critical points. First, and I cannot overstate the importance of this fact, the Ninth Circuit affirmed that the de minimis exception applies to sound recordings, just as it does to all copyrightable subject matter. Second, the Ninth Circuit affirmed that even where copying is established, that fact alone does *not* constitute infringement, i.e. there is no such thing as "per se" copyright infringement. Thus, a sample of a sound recording is not *automatic* infringement. Third, the Ninth Circuit affirmed that if the copying is not *substantial*, then it is de minimis and therefore not infringement. Put another way, to establish an infringement claim, the plaintiff must show that the copying was *greater than* de minimis. Note, however, that even if the plaintiff succeeds in proving that the copying was greater than de minimis, this does not mean that the copying is precluded from being fair use. Under fair use, even if the amount taken is substantial, if the use is transformative, it *may* still be fair use. Fourth, in calling attention to the Sixth Circuit's error in *Bridgeport*, the Ninth Circuit highlighted the Sixth Circuit's misreading of the copyright statute. Fifth, the Ninth Circuit asserted that Congress clearly intended to maintain the de minimis exception for sound recordings. Hence, the court made it clear that there are no new rules for sound recordings or copyright infringement cases that involve digital sampling and sound recordings.

[24] *Id.*, pp. 16, 17.

Two Things the Ninth Circuit Inadvertently Implied That Are Not Accurate

While I agree with the Ninth Circuit's decision in *VMG Salsoul*, there are two things that the Ninth Circuit inadvertently implied that are not accurate. First, the notion that to reach the de minimis threshold, an appropriation must not be recognizable to an average audience. Although the Ninth Circuit's instruction here regarding de minimis is accurate, the court's overall depiction is (unintentionally) misleading. De minimis is not solely the concept of something being "unrecognizable" by the average audience. An appropriation can be recognizable yet still be de minimis. For instance, if one was to sample a small James Brown vocal stab like the word, "feelin'" from his song "Get On Up," the "average audience" would be able to recognize the appropriation. But this recognition alone would not preclude the taking from being de minimis. This is because the taking, roughly one second in length, could still be deemed trivial.

In its "Application of the De Minimis Exception" section of its opinion, the Ninth Circuit considered the de minimis exception as being, in part, something based on the *unrecognizability* of an appropriation. Using *Newton* as its primary guide, the Ninth Circuit maintained that:

> "a use is de minimis **only** if the average audience *would not recognize the appropriation.*" Newton, 388 F.3d at 1193; see id. at 1196 (affirming the grant of summary judgment because 'an average audience would not discern Newton's hand as a composer…from Beastie Boys' use of the sample'); *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986)**('As a rule, a taking is considered de minimis only if it is so meager and fragmentary that the average audience *would not recognize* the appropriation.')** see also *Dymow v. Bolton*, 11 F.2d 690, 692 (2d Cir. 1926) ('[C]opying which is infringement must be something which ordinary observations would cause to be recognized as having been taken from the work of another.'….Accordingly, we must determine whether a reasonable juror could conclude that the average audience would recognize the appropriation. We will consider the composition and the sound recording copyrights in turn.

> After listening to the recordings, we conclude that a *reasonable* jury could not conclude that an average audience would recognize the appropriation of the composition. Our decision in *Newton* is instructive here." [emphasis mine][25]

While the *unrecognizability* of the appropriation does indeed point to a finding of de minimis in this regard, not recognizing the use is just one factor, it's not the *only* pathway to de minimis. Put another way, an appropitation is not immune to de minimis simply because the average audience *can* recognize it.

The second thing that the Ninth Circuit inadvertently implied is that the number of times an appropriation appears in the new work matters. It doesn't. By making note of how many times an appropriation appears in the new work, the court inadvertently raises the specter that this is an important observation. Perhaps this is a key observation inasmuch as this observation shows that the new work has transformed the appropriation and built something new; that's a good thing. But the danger in such an observation is that it can also be misinterpreted to mean that multiple uses of the same appropriation in the new work amount to a highly *quantitative* use. It does not. For example, if one samples a two-second horn hit and uses it 40 times in the new work, the actual appropriation is still only two seconds, not 80 seconds.

"We Were Convinced That Our Sister Court Erred": The "Logical Fallacy" of Bridgeport and Why the Ninth Circuit Created a Split With the Sixth Circuit

The Ninth Circuit minced no words in its description of why it disagreed with *Bridgeport*. In the following section, I will explore the main reasons why the Ninth Circuit contradicted the Sixth Circuit's holding in *Bridgeport* and took the unusual step of creating a circuit split.

[25] *Id.*, pp. 12,13.

One Circuit Court Is Not Obligated to Follow Another

In its ruling, the Ninth Circuit stressed the fact that one circuit court is not obligated to follow the decision of another:

> **"…the goal of avoiding a circuit split cannot override our *independent duty* to determine congressional intent.** Otherwise, we would have no choice but to blindly follow the rule announced by whichever circuit court decided an issue first, even if we were convinced, as we are here, that ***our sister court erred***."
> [emphasis mine][26]

The Longstanding Principle of De Minimis

Copyright law has a long-standing principle that a de minimis taking, i.e. an appropriation that is *not substantial*, does not constitute copyright infringement. This long-standing principle was crucial to the Ninth Circuit's opinion in *VMG Salsoul* — and its split with the Sixth Circuit's decision in *Bridgeport.* Following copyright law's long-standing principle regarding fair use, the Ninth Circuit observed that de minimis applies to sound recordings, "just as it applies to all other copyright infringement actions.":

> "For an unauthorized use of a copyrighted work to be *actionable*, the use must be *significant enough* to constitute infringement." See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997). **This means that *even where the fact of copying is conceded,* no legal consequences will follow from that fact unless the copying is *substantial.*** See *Laureyssens v. Idea Group, Inc.* 964 F.2d 131, 140 (2d Cir. 1992); 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[A], at 13-30.2. **The principle that trivial copying does not constitute actionable infringement has long been a part of copyright law. Indeed, as [a judge] observed over 80 years ago: "Even where there is some copying, that fact is not conclusive of infringement. *Some copying is permitted.* In addition to copying, it must be shown that this has been done to an *unfair* extent."** *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909). This principle reflects the legal

[26] *Id.*, p. 29.

> maxim, de minimis non curatlex (often rendered as, 'the law does not concern itself with trifles.'). See *Ringgold*, 126 F.3d at 74-75.' *Newton*, 388 F.3d at 1192-93. **In other words, to establish its infringement claim, Plaintiff must show that the copying was greater than de minimis."**
>
> **"We recognize that the Sixth Circuit held to the contrary in *Bridgeport Music, Inc. v. Dimension Films*, 400 F .3d 792 (6th Cir. 2005), but — like the leading copyright treatise and several district courts — we find *Bridgeport's* reasoning unpersuasive. We hold that "de minimis" exception applies to infringement actions concerning sound recordings, just as it applies to all other copyright infringement actions.** Accordingly, we affirm the summary judgment in favor of Defendants."[emphasis mine][27]

De Minimis and Sound Recordings

One unfortunate effect of *Bridgeport* was that it raised the open question of whether the de minimis exception applies to sound recordings. In *VMG Salsoul*, the Ninth Circuit answered this question and took the liberty to point out the Sixth Circuit's errors in *Bridgeport*:

> "We squarely held in *Newton*, 388 F.3d at 1193, that the de minimis exception applies to claims of infringement of a copyrighted composition. But it is an open question in this circuit court whether the exception applies to claims of infringement of a copyrighted sound recording."
>
> "Plaintiff argues, in the alternative, that even if the copying here is trivial, that fact is irrelevant because the de minimis exception does not apply to infringements of copyrighted sound recordings. **Plaintiff urges us to follow the Sixth Circuit's decision in *Bridgeport Music, Inc. v. Dimension Films*,** 410 F.3d 792 (6th Cir. 2005), which adopted a bright-line rule: For copyrighted sound recordings, any unauthorized copying — no matter how trivial — constitutes infringement."
>
> **"The rule that infringement occurs only when a *substantial* portion is copied is firmly established in the law... It follows that to infringe this right a *substantial* copy of the whole or**

[27] *Id.*, pp. 10, 4, 5, 11, 17.

> **of a material part must be produced.")**; Dymow, 11 F.2d 690 (applying the rule in 1926)." [emphasis mine][28]

Next, the Ninth Circuit isolated *Bridgeport* as the outsider decision and noted that courts have consistently applied the de minimis rule in *all* cases alleging copyright infringement, and that it has stated before in a case involving music sampling that de minimis applies to all copyright infringement actions, including cases involving sampling and sound recordings:

> **"Other than *Bridgeport* and the district courts following that decision, we are aware of no case that has held that the de minimis doctrine does not apply in a copyright infringement case. Instead, courts consistently have applied the rule in *all* cases alleging copyright infringement. Indeed, we stated in dictum in *Newton* that the rule 'applies throughout the law of copyright, *including cases of music sampling.*'** 388 F.3d at 1195." [emphasis in the original and mine][29]

Misled by *Bridgeport*, the plaintiff in *VMG Salsoul* argued that Congress intended to eliminate the de minimis exception for sound recordings. In response, the Ninth Circuit — which relied on the Copyright Act and the actual legislative history — noted that Congress did *not* make any differential treatment between the categories of copyrightable subject matter. The Ninth Circuit further noted that even if there "were some ambiguity as to congressional *intent*..., the legislative history *clearly* confirms" that "Congress *clearly* understood that the de minimis exception applies to copyrighted sound recordings, just as it applies to all other copyrighted works.":

> Plaintiff nevertheless argues that Congress intended to create a special rule for copyrighted sound recordings, eliminating the de minimis exception. We begin our analysis with the statutory text. Title 17 U.S.C. § 102, titled "Subject matter of copyright: In general," states, in relevant part:
> (a) Copyright protection subsists, in accordance with this title,

[28] *Id*., p.11.
[29] *Id*. p. 18.

in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. **Works of authorship include the following categories:**
(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works. [emphasis in the original]

That provision treats sound recordings *identically* to all other types of protected works; nothing in the text suggests differential treatment, for any purpose, of sound recordings compared to say, literary works. Similarly, nothing in the neutrally worded statutory definition of "sound recordings" suggests that Congress intended to eliminate the de minimis exception.

"Title 17 U.S.C. § 106, titled "Exclusive rights in copyrighted works," states:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audivisiual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Again, nothing in that provision suggest differential treatment of de minimis copying of sound recordings compared to, say,

sculptures. Although subsection (6) deals exclusively with sound recordings, that subsection concerns public performances; nothing in its text bears on de minimis copying.

Instead, Plaintiff's statutory argument hinges on the third sentence of 17 U.S.C. § 114(b) which states:

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists *entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recordings.*

Like all the other sentences in § 114(b), the third sentence imposes an express limitation on the rights of a copyright holder: 'The exclusive rights of the owner of a copyright in a sound recording … do not extend to the making or duplication of another sound recording [with certain qualities].' (first sentence: 'exclusive rights…do not extend' to certain circumstances; second sentence: 'exclusive rights … do not extend' to certain circumstances; fourth sentence: 'exclusive rights … do not apply' in certain circumstances). *We ordinarily would hesitate to read an implicit expansion of rights into Congress' statement of an express limitation on rights.* **Given the considerable background of consistent application of the de minimis exception across centuries of jurisprudence,** *we are particularly hesitant to read the statutory text as an unstated, implicit elimination of that steadfast rule.*

A straightforward reading of the third sentence in § 114(b) reveals Congress' intended limitation on the rights of a sound recording copyright holder: A new recording that mimics the copyrighted recording is not an infringement, even if the mimicking is very well done, so long as there was no actual copying. That is, if a band played and recorded its own version of Love Break in a way that sounded very similar to the copyrighted recording of Love Break, then there would be no infringement so long as there was no actual copying of the recorded Love Break. **But the quoted passage does not speak to the question we face: whether Congress intended to eliminate the longstanding de minimis exception for sound recordings in all circumstances,** even where, as here, the new sound recording as a whole sounds nothing like the original."

Even if there were some ambiguity as to congressional intent with respect to § 114(b), the legislative history clearly confirms

our analysis on each of the above points. Congress intended § 114(b) *to limit*, not expand, the rights of copyright holders: "The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow." **Thus, everything in section 106 is made 'subject to sections 107 through 118,' and must be read in conjunction with those provisions."** H.R. Rep. No. 94-1476, at 61 (1976), reprinted in 1976 U.SC.C.A.N. 5659, 5674.

With respect to § 114(b) specifically, a House Report stated:

Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recordings consists, and would not prevent a separate recording of another performance in which those sounds are imitated. **Thus, infringement takes place whenever all or any *substantial* portion of the actual sounds that go to make up a copyrighted sound recording** are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute copyright infringement even where one performer deliberately sets out to simulate another' H.R. Rep. No. 94-1476, at 106, reprinted in 1976 U.SC.C.A.N. at 5721. (emphasis added) That passage strongly supports the natural reading of § 114(b), discussed above. Congress intended to make clear that imitation of a recorded performance cannot be infringement so long as no actual copying is done. **There is no indication that Congress intended, through § 114(b), to *expand* the rights of a copyright holder to a sound recording.**

Perhaps more importantly, the quoted passage articulates the principle that 'infringement takes place whenever all or any *substantial* portion of the actual sounds … are reproduced. That is, when enacting this specific statutory provision, ***Congress clearly understood that the de minimis exception applies to copyrighted sound recordings,* just as it applies to all other copyrighted works.** In sum, the statutory test, confirmed by the legislative history, reveals that Congress intended to maintain the de minimis exception for copyrighted sound recordings.

In coming to a different conclusion, the Sixth Circuit reasoned as follows:

> "[T]he rights of sound recording copyright holders under clauses (1) and (2) of section 106 'do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.' 17 U.S.C. § 114(b). The significance of this provision is amplified by the fact that the Copyright Act of 1976 added the word 'entirely' to this language. Compare Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (Oct. 15, 1971) (adding subsection (f) to former 17 U.S.C. § 1) ('does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds'). In other words, a sound recording owner has the exclusive right to 'sample' his own recording." *Bridgeport*, 410 F. 3d at 800-01.
>
> **We reject that interpretation of § 114(b). *Bridgeport* ignored statutory structure and § 114(b)'s express limitation on the rights of a copyright holder. *Bridgeport* also declined to consider legislative history on the ground that 'digital sampling wasn't being done in 1971.' 410 F.3d at 805.** But the state of technology is irrelevant to interpreting Congress' intent as to statutory structure. **Moreover, as Nimmer points out, *Bridgeport's* reasoning fails on its own terms because contemporary technology plainly allowed the copying of small portions of a protected sound recording.** Nimmer § 13.03[A][2][b], at 13-62 n.114.16."
> [emphasis in the original and mine][30]

Bridgeport's Interpretive Method

The Ninth Circuit further took the Sixth Circuit to task for the interpretive method that it used in *Bridgeport*, stating that the Sixth Circuit's interpretive method amounted to "logical fallacy":

> **Close examination of *Bridgeport's* interpretive method *further exposes its illogic.*** In effect, *Bridgeport* inferred from the fact that 'exclusive rights….do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds," 17 U.S.C § 114(b) (emphasis added), the conclusion that exclusive rights do extend to the making of another sound recording that does not consist entirely of an independent fixation of other sounds. As pointed out by Nimmer, ***Bridgeport's* interpretative method 'rests on logical fallacy.'** Nimmer §

[30] *Id.* pp. 20-26.

13.03[A][2][b], at 13-61; see also Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1340-41 (S.D. Fla, 2009) (critiquing *Bridgeport's* interpretive method for a similar reason). **A statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional.** E.g., Joseph G. Brennan, A Handbook of Logic 79-80 (2d ed. 1961).

For example, take as a given the proposition that 'if it has rained, then the grass is not dry.' It does not necessarily follow that 'if it has not rained, then the grass is dry.' Someone may have watered the lawn for instance. We cannot infer the second if-then statement from the first. The first if-then statement does not tell us anything about the condition of the grass if it has not rained. **Accordingly, even though it is true that, 'if the recording consists entirely of independent sounds, then the copyright does not extend to it,' that statement does not necessarily mean that 'if the recording does not consist entirely of independent sounds, then the copyright does extend to it.**

The Sixth Circuit also looked beyond the statutory text, to the nature of a sound recording, and reasoned:

"[E]even when a small part of a sound recording is sampled, the part taken is something of value. No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both. For the sound recording copyright holder, it is not the 'song' but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a *physical* taking rather than an *intellectual* one." *Brigeport*, 410 F 3d at 801-02 (footnote omitted).

We disagree for three reasons. First, the possibility of a "*physical* taking" exists with respect to other kinds of artistic works as well, such as photographs, as to which the usual de minimis rule applies. See, e.g., *Sandoval v. New Line Cinema Corp.*, 147 F. 3d 215, 216 (2d Cir. 1998)... A computer program can, for instance, "sample" a piece of one photograph and insert it into another photograph or work of art. We are aware of no copyright case carving out an exception to the de minimis requirement in that context, and we can think of no principled reason to differentiate one kind of

> 'physical taking' from another. **Second, even accepting the premise that sound recordings differ qualitatively from other copyrighted works and therefore could warrant a different infringement rule, that theoretical difference does not mean that Congress actually adopted a different rule. Third, the distinction between a "*physical* taking" and an "*intellectual* one," premised in part on "sav[ing] costs" by not having to hire musicians, does not advance the Sixth Circuit's view.** The Supreme Court has held unequivocally that the Copyright Act protects only the expressive aspects of a copyrighted work, and not the 'fruit of the [author's] labor.' *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) Indeed, the Supreme Court in *Feist* explained at length why, though that result may seem unfair, protecting only the expressive aspects of a copyrighted work is actually a key part of the design of copyright laws. Id. at 340-54... **Accordingly, all that remains of *Bridgeport's* argument is that the second artist has taken some expressive content from the original artist. But that is always true, regardless of the nature of the work, and the de minimis test nevertheless applies.** See Nimmer § 13.03[A][2][b], at 13-63 to 13-64 (providing a similar critique of *Bridgeport's* physical/intellectual distinction and concluding that it 'seems built on air')." [emphasis in the original and mine][31]

Here, what's particulary revealing — in terms of how sampling is often viewed by opponents as merely a "*physical* taking," i.e. something *non-intellectual* — is that the Ninth Circuit spoke directly to the physical/intellectual dichotomy that digital sampling represents. That *physical taking* is placed inside of quotation marks in the Ninth Circuit's decision suggests that the Ninth Circuit sees "*physical* taking" contextually, not *conceptually*. In other words, using a computer program to "'sample'a piece of one photograph and insert it into another photograph or work of art" is the same concept as using a digital sampler to "physically sample" a piece of one sound recording and insert it into another sound recording or work of art. Both are forms of copying — neither is privileged above the other — and both also represent an *intellectual* taking. What this means is that the possibility of a "*physical* taking" of other kinds of copyrighted works has always existed. Moreover, the physical aspect of the copying cannot remove the intellectual aspect that underscores all forms of copying.

[31] *Id.*, pp. 26-29.

Why Bridgeport Is Not "Superior Policy"

Next, the Ninth Circuit addressed the plaintiff's argument that the ruling in *Bridgeport* was superior policy:

> Finally, Plaintiff advances several reasons why *Bridgeport's* rule is superior as a matter of policy. For example, the Sixth Circuit opined that its bright-line rule was easy to enforce; that 'the market will control the license price and keep it within bounds'; that "sampling is never accidental" and is therefore easy to avoid. *Bridgeport* 410 F.3d at 801. **Those arguments are for a legislature, not a court. They speak to what Congress *could* decide; they do *not* inform what Congress actually decided.**
>
> **We hold that the 'de minimis' exception applies to actions alleging infringement of a copyright to sound recordings.**
>
> Plaintiff next argues that, because Congress has not amended the copyright statute in response to *Bridgeport*, we should conclude that *Bridgeport* correctly divined congressional intent. We disagree. **The Supreme Court has held that congressional inaction in the face of a judicial statutory interpretation, even with respect to the Supreme Court's own decisions affecting the entire nation, carries almost no weight.** See *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." **Here, Congress' inaction with respect to a decision by *one* circuit court has even less import, *especially considering that many other courts have declined to apply Bridgeport's* rule."** [emphasis mine][32]

In other words, *Bridgeport* was not, is not, nor ever could be the law of the land merely because of congressional inaction. Instead, *Bridgeport* just represents a decision held by *one* circuit court — A decision, it must again be emphasized, that many other courts have declined to follow.

[32] *Id.*, pp. 31, 32 (emphasis in the original, additional emphasis added).

Bridgeport Is Unpersuasive Policy

The Ninth Circuit further pointed out why, as policy, the *Bridgeport* rule is unpersuasive and stifiling to creativity:

> **It is also not clear that the cited policy reasons are necessarily persuasive…it is not necessarily true that the market will keep license prices "within bounds" —** it is possible that ***a bright-line rule against sampling would unduly stifle creativity*** in certain segments of the music industry because the licensing costs would be too expensive for the amateur musician. [emphasis mine][33]

Acknowledging the Circuit Split

The Ninth Circuit acknowledged that it was fully aware that it was creating a circuit split and that its decision had consequences. However, the Ninth Circuit asserted that such a step was necessary for two reasons. First, because it strongly disagreed with its sister court. Second, because its independent duty to determine Congressional intent took precedent over avoiding a circuit split. Going a step further, the Ninth Circuit maintained that the Sixth Circuit not only erred (for a number of reasons), but that it failed in its fundamental duty to determine congressional intent:

> **Because we conclude that Congress intended to maintain the "de minimis" exception for copyrights to sound recordings, we take the unusual step of creating a circuit split by disagreeing with the Sixth Circuit's contrary holding in *Bridgeport.* We do so only after careful reflection...We acknowledge that our decision has consequences.** But the goal of avoiding a circuit split cannot override our independent duty to determine congressional intent. [emphasis mine][34]

As for the "consequences" of creating a circuit split, the Ninth Circuit correctly pointed out that there was already a deep split among the courts regarding *Bridgeport*, that many other courts —

[33] *Ibid.*
[34] *Id.*, p. 26.

nearly every district court outside of the Sixth Circuit's jurisdiction — had "declined to apply *Bridgeport's* rule," and that the Ninth Circuit is certainly not alone in its analysis of *Bridgeport's* decision:

> Moreover, other considerations suggest that the "troublesome" consequences ordinarily attendant to *the creation of a circuit split are diminished here.* In declining to create a circuit split in *Seven Arts*, we noted that "the leading copyright treatise," Nimmer, agreed with the view of our sister circuits. 733 F.3d at 1255. As to the issue before us, by contrast, Nimmer devotes many pages to **explaining why the Sixth Circuit's opinion is, in no uncertain terms, wrong.** Nimmer § 13.03[A][2][b}, at 13-59 to13-66.
>
> "Additionally, as a practical matter, a deep split among the federal courts already exists. **Since the Sixth Circuit decided *Bridgeport*, almost every district court not bound by that decision has declined to apply *Bridgeport's* rule.** See, e.g., Saregama, 687 F. Supp. 2d at 1340-41 (rejecting Bridgeport's rule after analysis); *Steward v. West*, No. 13-02449, Docket No. 179 at 14 n.8 (C.D. Cal. 2014) (unpublished civil minutes) **("declining to follow the per se infringement analysis from *Bridgeport*' because *Bridgeport* 'has been criticized by courts and commentators alike')**; *Batiste v. Najm*, 28 F. Supp. 3d 595, 625 (E.D. La. 2014) (noting that, because some courts have declined to apply *Bridgeport's* rule, 'it's far from clear' that *Bridgeport's* rule should apply); *Pryor v. Warner/Chappell Music, Inc.*, No. CV13-04344, 2014 WL 2812309, at *7 n.3 (C.D. Cal. June 20, 2014) (unpublished) (declining to apply *Bridgeport's* rule because it has not been adopted by the Ninth Circuit); *Zany Toys, LLC v. Pearl Enters., LLC*, NO. 13-5262, 2014 WL 2168415, at *11 n.7 (D.N.J. May 23, 2014) (unpublished) (stating *Bridgeport's* rule without discussion); see also *EMI Records Ltd v. Premise Media Corp.*, No. 601209, 2008 WL 5027245 (N.Y. Sup. Ct. Aug. 8, 2008) (unpublished) (expressly rejecting *Bridgeport's* analysis).
>
> Although we are the first circuit court to follow a different path than *Bridgeport's*, we are in well-chartered waters." [emphasis mine][35]

[35] *Id.* pp. 29, 30.

The Impact of VMG Salsoul LLC v. Madonna

In terms of sampling and the implications that de minimis and fair use hold for it, *VMG Salsoul LLC v. Madonna* is the most important post-*Bridgeport* development thus far. While the case hinged on the question of whether or not de minimis applies to sound recordings, the ultimate ramifications of this case are much broader. By holding that de minimis applies to sound recordings, just as it does to all copyrighted works, *VMG Salsoul* dispels the myth created by *Bridgeport*. Moreover, *VMG Salsoul* also rebuts the myth that a digital sample is "per se" copyright infringement.

VMG Salsoul also bodes well for the future of fair use. Since *Bridgeport*, much attention has been given to the so-called elimination of the de minimis exception for sound recordings. But what's often overlooked is that the Sixth Circuit later amended its decision in *Bridgeport*, adding that No Limit, the defendant in the case, wasn't barred from using a fair use defense on appeal. In other words, after being criticized by courts and commentators alike, the Sixth Circuit, perhaps in an effort to save face, amended its opinion to state that No Limit could argue that its use of the sample was fair use. So in effect, the Sixth Circuit stated that Congress kept the fair use exception for sound recordings, but eliminated the de minimis exception for sound recordings. That's illogical. So given *Bridgeport's* own acknowledgement of fair use, one primary side effect of the Ninth Circuit's decision in *VMG Salsoul* is that, by demonstrating *why* the de minimis exception applies to sound recordings and how transformation takes place in sampling, it greatly strengthens the health of fair use.

Fair Use Sampling: Jimmy Smith v. Drake

New York District Court Confirms That Sampling Can Be Fair Use; Reinforces the Weight of the Transformation and Purpose Factors In Determining Fair Use

Estate of James Oscar Smith v. Cash Money Records, Inc. et al.: Background, Complaint, and Decision

In 1982, jazz legend Jimmy Smith (James Oscar Smith) released the album *Off the Top* (Elektra/Asylum). The last track on the album was a spoken-word recording titled "Jimmy Smith Rap" ("JSR"). On September 24, 2013, Cash Money Records and Universal Republic Records released the album *Nothing Was the Same* by Drake. The last song on the album was "Pound Cake/ Paris Morton Music 2" ("Pound Cake"). "Pound Cake" contained a sample of "JSR." Cash Money and Universal Republic obtained a license for the master recording of "JSR," but not for the "JSR" composition — at the time, the "JSR" composition copyright was not registered with the U.S. Copyright Office or any performing rights organization. Nonetheless, the "JSR" recording license that Cash Money received — from the music licensing company that it hired to clear the sample — granted "all requisite consents and permissions of…the copyright owners of the musical composition."[36]

One week before the release of *Nothing Was the Same*, Stephen Hacker, owner of Hebrew Hustle, a music publisher that represents songwriters for licensing their copyrights, received and reviewed an advance copy of the album from Cash Money; the purpose was for Hacker "'to look for opening in rights, sign those rights and then disclose that to the Drake representatives' after the release of the album."[37] After noticing that Cash Money had secured a

[36] *Estate of James Oscar Smith v. Cash Money Records, et al.* 14-cv2703S.D. N.Y. (May 30, 2017), p. 4 [Case hereinafter, *Estate of James Oscar Smith v. Cash Money Records*]
[37] *Id*. p.4.

license for the "JSR" recording copyright but not the composition copyright, Hacker contacted Raymond Janifer, Jimmy Smith's nephew and co-manager of Smith's Estate. The Estate entered into a co-publishing agreement with Hacker's company Hebrew Hustle, assigning 50% of the copyright in the "JSR" composition to the publisher and granting the exclusive right to exploit the work. Hacker then promptly registered the "JSR" composition with the U.S. Copyright Office — listing Hebrew Hustle as the only claimant and leaving out the Estate of Jimmy Smith as co-claimant. Two months after the release of *Nothing Was the Same*, the Estate sent Cash Money/Universal a cease and desist letter.

On April 13, 2014, The Estate and Hebrew Hustle brought a copyright infringement action in the United States District Court for the Southern District of New York against Drake, Cash Money, Universal, EMI, Republic, Boi-1da and Jordan Evans (the producers of the track), Apple, Amazon, and others. In their complaint, the Estate alleged that Drake, et. al infringed on their copyright of the "JSR" composition and sought damages of no less than $300,000.[38]

Both parties filed motions for summary judgment, and on May 30th, 2017, the court granted Drake, et. al's summary judgment on the grounds that the use of "JSR" in "Pound Cake" was fair use.

Fairly Sampled: Why Drake's Use of "JSR" Is Not Copyright Infringement and the Important Takeaways of Jimmy Smith v. Drake

On Authorship and Valid Copyright: Is Jimmy Smith the Author of "Jimmy Smith Rap"?

Before getting into the fair use analysis that the district court performed in *Estate of James Oscar Smith*, it's worth noting that the court stated that neither party was entitled to summary judgment, as there was a dispute of copyright ownership of "Jimmy Smith Rap":

[38] *Estate of James Oscar Smith v. Cash Money Records, et al.* 14-cv2703S.D. N.Y. [COMPLAINT] (April 13, 2014), p. 14.

> "Because there is a genuine dispute of material fact as to ownership and copying, neither party is entitled to summary judgment on Plaintiffs' infringement claims."[39]

To establish copyright infringement, the first element that must be established is ownership of a valid copyright. In *Estate of James Oscar Smith*, the question of ownership of "JSR" presented some interesting facts. First, Jimmy Smith is actually not credited for "JSR" in the album credits, and prior to the release of "Pound Cake," 31 years *after* the release of "JSR," there was no "JSR" composition copyright registered with the United States Copyright Office.

Second, after Stephen Hacker observed, just one week before the release of *Nothing Was the Same*, that there was no license for the "JSR" composition copyright, he contacted the Estate and proposed a scheme for shaking down Drake, et. al. Obviously, no one knows (except for those parties directly involved) the actual conversation that took place between Hacker and the Estate, but court records reveal what transpired. Hacker and the Estate entered into a 50/50 publishing agreement, with Hacker being the exclusive administrator. Given the common infringement shakedown practice[40] and Hacker's willingness to avoid informing Drake's people of the possible infringement issue (as it appears he was hired to do) and instead notify the Estate, I'm thinking the conversation initiated by Hacker went something like this:

Hey, Estate, I think that you can sue Drake and his labels for big bucks because they never cleared the "JSR" composition copyright. And I can help you do it! It Doesn't matter that there wasn't a copyright for the "JSR" composition registered for the United States Copyright Office, we can just register it now. I'll take care of everything, but I'm going to need a 50/50 split on ownership of the "JSR" composition. After I register the "JSR" composition copyright with the U.S. Copyright Office, we hit Drake, the record labels, everybody, with cease and desist letters, letting them know we mean business. And they'll pay because the law

[39] *Estate of James Oscar Smith v. Cash Money Records,* p.21.
[40] See chapter 21, "The Notorious Fair Use: Notorious B.I.G. LLC v Lee Hutson and Proof That the Will to Test Fair Use in the Courts is Getting Stronger."

is on our side. Have you heard of Bridgeport? Plus, everybody settles eventually in copyright infringement cases involving sampling. Trust me, I'll handle everything…

But there was a genuine dispute of material fact as to ownership of the "JSR" composition copyright that Hacker and the Estate failed to recognize. While copyright registration normally constitutes *prima facie* (legally sufficient) evidence of copyright ownership, the court noted that Jimmy Smith did not own the copyright as the author of "JSR," and that the Estate had registered the "JSR" composition copyright 31 years *after* "JSR" was originally published, and only in response to Drake's sampling of "JSR." Under these circumstances, Judge William H. Pauley III ruled that the Estate's (Hacker's) registration certificate held "minimal weight" and was insufficient to establish ownership:

> "For the Estate to hold the copyright, Jimmy Smith must have owned the copyright *as the author of the work*. However, the record evidence does not resolve the question of JSR's authorship. As an initial matter, this Court affords the January 2013 registration of the composition copyright in JSR minimal weight. **While copyright registration normally constitutes prima facie evidence of validity, "[t]he evidentiary weight to be accorded the certificate of a registration made [more than *five* years after the first publication] shall be within the discretion of the court." Here, the Estate registered the JSR composition copyright *thirty-one years* after initial publication, and only in response to Defandants' sampling of JSR on the album. "Accordingly, the registration does not constitute prima facie evidence that the copyright is valid,** and [Plaintiff] has the burden of proving validity of its copyright."[emphasis mine][41]

Further, the court found that the song listings on Jimmy Smith's album *Off the Top* were not helpful, as they listed the writers for each song *except* JSR. In an attempt to bolster their claim of ownership in the "JSR" composition copyright, the Estate argued that the website discogs.com listed Jimmy Smith as the writer of

[41] *Id.*, pp. 6, 7.

"JSR." But the court rejected this as proof of ownership, observing that discogs.com is a user-built database to which anyone can contribute and that there was no evidence that whoever entered this data had any personal knowledge of "JSR"'s authorship. Thus, the court concluded that a genuine issue of material fact exists as to the authorship of "JSR."[42]

The Estate of James Oscar Smith Court's Fair Use Examination: Applying the Four Factors of Fair Use

While the district court actually declined to rule on whether Drake, et. al infringed the copyright, the court found that the use of "JSR" would constitute fair use. In the following, section I examine the court's analysis of the four factors of fair use.

As I detailed in chapter 10, when determining fair use, courts consider the following four nonexclusive factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Before dutifully applying the four non-exclusive factors for determining whether a use meets the threshold of fair use, Judge Pauley pointed out how the factors are supposed to work as a guide and not an exact science:

> **Because the fair use determination is an "open-ended and context-sensitive inquiry," the examples and factors in the statute are "illustrative and *not limitative*.**..[and] provide only general guidance about the sorts of copying that courts and Congress most

[42] *Id.*, pp. 8, 9.

> commonly had found to be fair uses." *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Campbell, 510 U.S. at 577-78)). **Ultimately, fair use analysis asks a simple question: Is this the type of use that *furthers the essential goal of copyright law* and should be excused from liability for infringement?"** [emphasis mine][43]

In looking at the first factor, the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, Judge Pauley first made it clear that courts generally accord the first factor the most weight:

> "'The first statutory factor, which courts have referred to as '[t]he heart of fair use inquiry," focuses on the nature and purposes of the allegedly infringing use. *Davis v. The Gap, Inc.* 246 F.3d 152, 174 (2d Cir. 2001).'" [emphasis mine][44]

Next, Pauley explained that the "central question of this factor is whether and to what extent the new work is *transformative*." In other words, the crux of this factor is about whether or not the secondary work merely supersedes the first work (the work that was copied), or instead "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Pauley further explains that this "is a critical issue because **'[t]he more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives.**"[45]

Examining the purpose and character of the use of the "JSR" sample in "Pound Cake," Judge Pauley considered three different ways that Drake's lawyers argued the use was transformative; but he rejected two of these arguments. Pauley wasn't persuaded by the argument that because Drake omits all references to the recording of Jimmy Smith's album *Off the Top*, the words used are applicable

[43] *Id.*, p. 13.
[44] *Id.*, p. 14.
[45] *Ibid.* (emphasis mine),

to the process of making Drake's album rather than Jimmy Smith's. Judge Pauley also didn't agree with the argument that because additional background music is added, some words are rearranged, and the recording is placed in a seven-minute hip hop track, the use is transformative. What Judge Pauley did find compelling, however, is the argument that "Pound Cake" fundamentally alters the message of "JSR." That is to say, by editing the recording from "jazz is the only real music that's gonna last" to "only **real** music is gonna last," "Drake transformed Jimmy Smith's dismissive comment into a statement of relevance and staying power of 'real music,' regardless of genre.":

> Defendants first argument, on the other hand, strikes on a compelling reason to find this use transformative. There can be no reasonable dispute that the key phrase of JSR — "Jazz is the only real music that's gonna last. All that other bullshit is here today and gone tomorrow. But jazz was, is and always will be." — is an unequivocal statement on the primacy of jazz over all other forms of popular music. **Defendants' use of JSR, by contrast, transforms Jimmy Smith's brazen dismissal of all non-jazz music into a statement that "real music," with no qualifiers, is "the only thing that's gonna last." The Defendants' "purposes in using [the original work] are sharply different from the [the original artist's] goals in creating it."** *Blanch V. Koons*, 467 F.3d 244, 252 (2d Cir. 2006). **This is precisely the type of use that "adds something new, with further purpose or different character, altering the first [work] with new expression, meaning, or message."** [emphasis mine][46]

In other words, Judge Pauley noted that Drake's transformative use had not only altered the message of the first work and thereby added commentary (Drake commented on Jimmy Smith's "dismissive comment"), it also added new insights and a new message.

The lawyers for the Estate contended that the use could not be transformative because the copied portions were not readily identifiable as "JSR" and because the track does not identify Jimmy Smith. But Judge Pauley rejected the Estate's argument, noting that

[46] *Id*. p. 16 [emphasis mine].

the argument fails because the Estate wants to apply the standard for fair use in parody:

> "Thus, the plaintiffs argue, there can be no viable claim that Pound Cake is commenting on a obscure spoken-word track by a relatively unknown jazz musician (at least outside of the jazz community). This argument fails because Plaintiffs seek to apply the standard for fair use in parody to this non-parodic use. **Although it is certainly true that the object of a parody must be ascertainable to average observer — and with reason, for what good is parody if the listener cannot identify the target of derision? — this is not a universal prerequisite for finding a transformative use."** [emphasis mine][47]

In other words, Judge Pauley correctly asserted two things. First, parody is not the only space where *meaning* can be changed. Second, a use can be transformative regardless of whether the average listener would identify the original source or comprehend the purpose of the new work or not. Judge Pauley gave an example to bolster his assertion before pointing out that Drake's use of "JSR" is transformative regardless of whether the average listener would recognize "JSR" or comprehend Drake's purpose — which is "sharply different" from Jimmy Smith's — in using it as a source, and thus, this factor weighed in favor of finding fair use:

> For example, the court in *Blanch v. Koons* found that the defendant's appropriation of a small part of a magazine advertisement (specifically, a picture of a woman's legs and feet) into a larger mixed-media artwork was a transformative use even though no reasonable observer would identify the legs as being from the original advertisement. 467 F. 3d 244, 252 (2d Cir. 2006). **Because the defendant used the copyrighted work as "raw material…in furtherance of a distinct creative or communicative objectives," the *Blanch* court found that the use was a transformative one.** 467 F.3d at 253."
>
> **Similarly, Defendants' use of JSR is transformative regardless of whether the average listener would identify the source of the sample and immediately comprehend Drake's purposes. The critical question is "how the work in question appears to the**

[47] *Id.,* p. 16 [emphasis mine].

> ***reasonable* observer," not the quality or accessibility of the commentary.** *Cariou*, 714 F.3d at 707 (emphasis added). The *average listener* of Pound Cake would understand the sampled portions of JSR as a statement that, regardless of how a song was made or how one might classify it, "only real music is gonna last." **Because this purpose is "sharply different" from Jimmy Smith's purpose in creating the original track, Defendants' use is transformative and this factor weighs in favor of finding fair use.** Blanch, 467 F.3d at 252." [emphasis mine][48]

On its face, the change of the wording from "*jazz* is the only real music that is gonna last" to "only *real* music is gonna last," might strike some as a minor change. In terms of amount copied and used this is a small change. However, under the first factor, "change" is not tethered to the *amount* that is copied from the first work and used in the secondary work, but rather "change" refers to the overall composite meaning of the new (secondary) work.

Some commentators might believe that this provides a broad interpretation of what constitutes a transformative use, but I disagree. The idea that a small change in lyrics — which changes their meaning and results in a new message and expression — can constitute sufficient transformation is reasonable, especially when considered in light of the purpose of copyright law. In fact, Judge Pauley's examination of the first factor demonstrates how the heart of this case is about *transformation*. That Judge Pauley found Drake's use of "JSR" added new expression, new meaning, and a new message fulfills the goal of copyright law.

Turning to the second factor, the nature of the copyrighted work, Judge Pauley explained that when courts consider this factor, what they're looking at is whether the first work is fiction or non-fiction and whether the work was published or unpublished, with greater leeway being allowed to a claim of fair use where the work is factual or informational, and considerably less leeway when the work is unpublished. Because Judge Pauley found "JSR" to be a work of creative expression, this factor weighed against a finding of fair use.[49]

---

[48] *Id.,* p. 17 [emphasis mine].
[49] *Id.*, pp. 17, 18.

But is there a genuine question as to whether "JSR" should even be considered as a "song", i.e. creative expression? "JSR" consists of Jimmy Smith just talking extemporaneously about what it was like making the album *Off the Top*. In fact, it would not be odd to think that Smith was interviewed and his replies were gathered together on "JSR." In any event, "JSR" isn't really a *composition*, but rather a seemingly unprepared spoken-word narrative about the album's recording process and sessions; a narrative in which Smith takes shots at all other forms of music that are not jazz. On the surface, there's nothing particularly original about "JSR," and I'm hardly persuaded that it should be called a "rap" in the first place. Taken in this light, one might argue that the second factor actually weighed *in favor of* a finding of fair use.

Looking at the third factor, the amount and substantiality of the portion used in relation to the copyrighted work, Judge Pauley concluded that even though "Pound Cake" uses a large portion of "JSR," the amount taken was "reasonable in proportion to the needs of the intended transformative use." "Pound Cake" samples 35 seconds of "JSR," a substantial amount in sheer terms of length in relation to the full length of "JSR." Lawyers for the Estate argued in court that using 35 seconds of the one-minute "JSR" track was unreasonable, and that "any statement on the staying power of 'real' music would necessitate the use of only that single line." But Judge Pauley disagreed and ruled that Drake's use of the lines describing the recording of *Off the Top* served "to drive the point home" — that "many musicians make records in similar ways (e.g. with the help of A&R experts or the stimulating effects of champagne), but that only 'real' music — regardless of creative process or genre — will stand the test of time." Thus, this factor weighed in favor of a finding fair use.[50]

It's worth noting that when considering the third factor, many courts tend to just look at the overall amount used, and if it's a large amount this factor tends to not weigh in favor of a finding fair use. "The 'clear implication' of this inquiry 'is that a finding of fair use is more likely when small amounts, or less important

[50] *Id.*, p. 19.

passages, are copied than when the copying is more extensive, or encompasses the most important parts of the original." But relying on the ruling in the *Authors Guild v. Google* case (804 F.3d at 221), Judge Pauley noted that the question here is whether or not the amount of copying was "reasonable in relation to the purpose of the copying."[51]

Lastly, as to the fourth factor, the effect of the use upon the potential market of the copyrighted work, the court found that Drake's track does not usurp any market for "JSR." Judge Pauley explained in great detail:

> **At this stage, courts ask "whether the copy brings to the marketplace a competing substitute for the original, or its derivative,** so as to deprive the rights holder of significant revenues because of the likelihood that the potential purchasers may opt to acquire the copy in preference to the original." *Authors Guild*, 804 F.3d at 223; *Cariou*, 714 F.3d at 708-09 (noting that **"the concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work.** The fourth factor is also, however, closely linked to the first, in the sense that **"the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original."** *Authors Guild*, 804 F.3d at 223; *Castle Rock*, 150 F.3d at 145 (The more transformative the secondary use, the less likelihood that the secondary use substitutes for the original.)'" [emphasis mine][52]

Further to this, Judge Pauley observed that the markets for jazz and hip hop are sharply different markets:

> "JSR, a spoken-word criticism of non-jazz music at the end of an improvisational jazz album, **targets a sharply different primary market than Pound Cake, a hip-hop track.** Further, Plaintiffs never attempted to establish a market for licensed derivative uses for the JSR composition copyright until Defendants used the recording on the album." [emphasis mine][53]

---

[51] *Ibid.*.

[52] *Id.*, p. 20 [emphasis in the original; additional emphasis added].

[53] *Ibid.* [emphasis mine].

Thus, "having considered the four factors in light of the goals of copyright law and the facts in the record," Judge Pauley concluded that "Pound Cake's" use of "JSR" was fair and did not infringe the Estate's composition copyright.

Note: With regards to "a market for licensed derivative uses for the JSR composition copyright," this is ill-informed and conflates what a derivative is. An attempt at such a market, where sampling is concerned, pre-empts the fact that samples can be de minimis or fair use.

The Impact of Jimmy Smith v. Drake: The Reality of How Far We've Come (and More Clarity on *Transformation*)

While this case may not be *the* case that some fair use sampling advocates have hoped for, it is a landmark decision nonetheless for several reasons. First, no court case demonstrates how far we've come in this grand conversation about sampling and fair use than *Estate of James Oscar Smith v. Cash Money*. Consider this. 33 years ago in *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.*, we had the first case to directly address digital sampling. That case was handed down in the same district court in New York as *Estate of James Oscar Smith v. Cash Money Records, Inc.* And that case, Judge Duffy not only offered a ruling that conflated digital sampling with "stealing," he also obscured the meaning of copyright infringement. Avoiding the principle of fair use altogether, Judge Duffy framed the issue in incomplete black and white terms — *You can't just use somebody else's property without their consent*:

> **"Thou Shall not steal."** has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that *stealing* is rampant in the music business and, for that reason, their conduct here should be excused. **The conduct of the defendants herein, however, violates not only *the Seventh Commandment,* but also the copyright laws of this country.** [emphasis mine][54]

[54] *Grand Upright v. Warner Bros. Records*.

Next, consider the disastrous ruling of *Bridgeport* fourteen years ago, where the Sixth Circuit concluded with this false maxim: *"Get a license or do not sample."* — A statement just as alarming, ill-informed, and counter to the purpose of copyright law as Duffy's "Thou shall not steal."

The ruling in *Estate of James Oscar Smith* (and some other cases previously discussed in this study) reflects the reality that the courts are learning and increasingly considering sampling in the proper context, or more simply stated, the same context as any other form of borrowing. *Estate of James Oscar Smith* also reflects a prevailing attitude change (a seismic shift since 1991) in the courts. Today, courts are increasingly observing that not only is sampling *not* stealing, it's a useful and important art form that allows for critical commentary.

The second reason why *Estate of James Oscar Smith* is a landmark decision is this. Given the fact that very few cases involving digital sampling have actually made it to court and that this case involves Drake, one of the most popular recording artists and the most well-known rapper in the world in 2017 (and 2024), this case is now highly instructive, both because of its meticulous fair use analysis and its high profile.

Lastly, the third reason why *Estate of James Oscar Smith* is a landmark decision is because it deals a blow to those in the music industry who are dismissive of fair use sampling. In this regard, perhaps the record labels' worst nightmare has happened: A high profile sampling case decided on the grounds of fair use. This is something that the labels feared would happen if they took on Girl Talk. Make no mistake, *Estate of James Oscar Smith* is a case that makes clear something that many sample-based musicians and commentators have already known: That sampling is an art form that can and most often does make de minimis or fair use of copyrighted sound recordings.

Transformation Is Transformation – "as a Whole" – No Matter What the Copyrighted Material Is

Given that *Estate of James Oscar Smith* deals with the copyright in the composition and not the recording, is this case instructive for cases where the copyright in the recording is at issue? Yes, just as *Batiste* is instructive. In fact, Judge Pauley's examination in this case exposes the double standard and unnecessary complexity when it comes to sound recordings and determining sufficient transformation. Despite the fact that a song may have two copyrights (music/performance and words), the music, lyrics, and performance — the unique fixed expression and different components — of a sound recording are hitched together, i.e. the recorded words and their expressed meanings are as one. Thus, the court's conclusions in *Estate of James Oscar Smith* on factors 1, 2, and 4 of the fair use inquiry must still apply. Otherwise, we are back to the question of whether sampling is *just* a "*physical* taking" and not an intellectual taking. In this regard, what's instructive about *Estate of James Oscar Smith* is that it demonstrates how transformation can be more than "physical;" it can also be *conceptual* both in terms of music arrangement and in the case of a song's lyrical meaning and impact.

For example, if you were to copy a brief paragraph from a printed magazine article, cut the page itself and paste the appropriated portion on to a canvas, does the use cease to be fair use simply because a literal copy of the "physical" page from the magazine was used rather than the words rewritten directly onto the canvas? Of course not. The transformation threshold, as the Ninth Circuit so aptly points out in *VMG Salsoul,* is not barred merely because a taking is a physical one. Rather, transformation can be exhibited (expressed) both in physical form and/or in intellectual meaning. Just as the altering of linguistic meaning of one work can lead to a finding of transformative use — as is in *Estate of James Oscar Smith* — so too can the altering of a horn stab, drum sound, a bass line, a guitar riff, an organ stab, or the like — as in *VMG Salsoul*.

Perhaps the next frontier question involving fair use and sampling is this. If lyrics are added to a sampled instrumental, *unchanged*, thereby adding new meaning and a new expression, is it fair use? According to factor 1, if quoted (copied) material is used as raw material, transformed in the creation of new information, new understanding, or new meaning, the use is likely fair. Further, let's remember, when the transformation serves copyright's goal of enriching public knowledge, sufficient transformation has occurred. So if the two works are to be compared to each other "*as a whole*," this poses an interesting debate. Thus, another important feature of *Estate of James Oscar Smith* is the way in which it clarifies and reaffirms how the scope of transformation is to be considered.

At the crux of substantial similarity is the determination of transformation, i.e. to what degree the copy is transformed when used in the new work. It must be remembered that transformation is examined by comparing the first work and the secondary work in part and as "*as a whole*," not merely examining the part of the first work that was copied. This is key because the copied part, whether it be literature, a photograph, or a sound recording, is always an exact copy. Isolated by itself, it's always more than substantially similar because it is always the exact same. This is why the emphasis is on *what* is copied — quanititively and qualitatively — and how it is used in the secondary work.

Let's take for instance one of Shakespeare's most famous lines, "To be, or not to be," and let's imagine for the moment that it's currently copyrighted. Used *as is*, this line from Shakespeare's *Hamlet* is always the *exact same*. If it were copyrighted and used in a new work, any assessment of substantial similarity — i.e. determination of transformation — would be based on the firstt work and the secondary work "*as a whole*." Thus, if the secondary work transforms the line, by giving it a new meaning and new context, then it's not substantially similar. Consider the below demonstration of transformation:

> To be, or not to be. This is neither a question nor an answer, but rather the tyranny of choice that all college-bound students must, at some point, come face to face with. Any resulting

> thoughts that occur upon the precipice of your decided action is but the philosophy, the individual fancy, of which college environment you dare to employ. To be a student on the campus of a small liberal college; or to be a small fish on a large campus that's notorious for partying? That is the question.

In the above passage that I created, the appropriated line, "To be, or not to be," is sufficiently transformed and therefore the use is not substantially similar. The above passage contains a new meaning: It's about the angst of choosing the right college. It's not about the son of a murdered king considering death and suicide, as is the case in *Hamlet*.

Likewise, in *Estate of James Oscar Smith*, Judge Pauley did three important things. First, he considered transformation in terms of both works "*as a whole*." Second, he granted less weight to the literal amount of the copying. Third, he stressed the importance of determining whether the use is transformed to a level at which new meaning (or information) is expressed. Because of these three things, I believe the impact of *Estate of James Oscar Smith* will be huge. And when considered alongside the Ninth Circuit's ruling in *VMG Salsoul*, I'm certain that this case is going to significantly change the way sampling and fair use are perceived in the courts and the music industry for years to come.

Part 5
SAMPLE RIGHTS vs. SAMPLE CLEARANCE

Chapter 23

The Sample Clearance System

How the Sample Clearance System was Born, What It Looks Like Today, and the Climate of Sampling In the Music Industry

The Beginning of the End of the "Wild West" Era of Sampling

Before hip hip/rap music made its way on to the music industry's radar, it was largely considered a fad. Notwithstanding the runaway success of the Sugar Hill Gang's smash hit "Rapper's Delight" (1979) or the promise of Afrika Bambaataa and the Soul Sonic Force's "Planet Rock" (1982) or Run-DMC's "Sucker M.C.'s (Krush-Groove 1)" (1984), the music industry just didn't understand hip hop/rap music in the beginning. On one hand, the major labels didn't consider hip hop/rap music to be a viable money maker, so the majors weren't interested in backing it. On the other hand, hip hop/rap music was created mostly by using methods and styles that the music industry wasn't familiar with, so the labels were slow to invest in something that they couldn't understand or market. Even as hip hop/rap music's profile continued to grow in the late 1980s (in spite of the big labels' initial ambivalence), sampling, the main compositional technique in hip hop/rap music at the time, was still something that the major record companies were not accustomed to.

But familiarity matters little when money's being left on the table. And the music industry soon recognized that, by not taking

hip hop/rap music seriously, it was losing out on lots of money! Thus, the rise of hip hop/rap music coincided with the major record companies' growing recognition of hip hop/rap music's marketing power. As the success of hip hop/rap music grew, driven in large part by sample-based music, the profile of sampling — the music technique that was integral to this success — gained new attention as well. Once older recording artists, whose music was being sampled, took note of the success of sample-based hip hop/rap music and figured that there was big money to be had by filing copyright infringement lawsuits, litigation inevitably followed. Soon after, music publishers and copyright aggregators joined in, a lawsuit neurosis began to set over sampling. Thus began the end of the era that Marley Marl and others have affectionately called the "Wild West era" of sampling. What would emerge, particularly after three high profile law suits involving sampling, was the ad hoc sample clearance system that still exists to this day.

The Lawsuits That Ended the "Wild West": What Happened When the Sugar Hill Gang, Beastie Boys, De La Soul, Vanilla Ice, and Biz Markie All Got Sued

The Sugar Hill Gang Gets Sued by Chic

It could be argued that the beginning of the end of the "Wild West era" of sampling, an era in which hip hop/rap artists sampled whatever they wanted without ever seeking clearance, began with a case that didn't actually involve sampling at all. Contrary to popular belief, the Sugar Hill Gang's seminal hit song, "Rapper's Delight" (1979), did not include a sample of the song "Good Times" (1979) by the band Chic. Instead, "Rapper's Delight" was constructed from a re-play that was built around a verbatim cover version of the signature bass line from Chic's song. While the re-play by the Sugar Hill Records house band made it unecessary to obtain a license for the sound recording of "Good Times," Sugar Hill Records was still on the hook for the composition copyright that it didn't clear.

Songwriters Nile Rogers and Bernard Edwards (of Chic), owners of the copyright in the composition of "Good Times," sued Sugar Hill Records for copyright infringement of the composition of their song. But before a verdict could be reached, the two parties settled out of court, with Rogers and Edwards reportedly being awarded *100%* of the publishing to "Rapper's Delight."

The Sugar Hill Gang's "Rapper's Delight" was the first legal conflict to involve hip hop/rap music and the appropriation of a pre-existing song. And while the "Rapper's Delight" suit may not have been the first sampling lawsuit *per se*, it did however foreshadow the infringement law suit/settlement pattern that would emerge around sampling beginning with Beastie Boys in 1986.

Beastie Boys Get Sued by Jimmy Castor

In 1986, Beastie Boys released their debut album *License to Ill*. One song on the album, "Hold it Now Hit It," contained a brief but recognizable sample of the song "The Return of Leroy, Pt. 1" (1977) by The Jimmy Castor Bunch. Songwriter/recording artist Jimmy Castor sued Beastie Boys and Def Jam Records for unlawful taking of his song. But the parties settled out of court, with Castor reportedly receiving a sizable fee and a percentage of the sales of *License to Ill*, which sold more than 7 million copies. Castor is widely regarded as the first performer to sue over sampling, and the suit became the first to legally document the use of the word "sampling" in music.[1]

De La Soul Gets Sued by The Turtles

In 1989, De La Soul released their debut album, *3 Feet High and Rising*. Among the many influential sample-based songs on the album was a skit, not a song, called "Transmitting Live from Mars." The skit contained a sample of the song "You Send Me" by the 1960s pop group The Turtles. The Turtles sued De La Soul and

[1] "Artist Interview: Adrock (Beastie Boys) Deleted Scenes," http://youtu.be/ablqkjmWW4s, (Accessed October, 2010).

their then-label Tommy Boy Records for copyright infringement. But just as in the Beastie Boys case several years earlier, the parties settled out of court, with The Turtles reportedly receiving a payment of nearly $2 million — De La Soul and various commentators have suggested that the true amount was far less. Whether the big payout was a rumor or not, the labels were certainly spooked by the lawsuit and the purported figure that *was* paid out to The Turtles.

One interesting note about the De La Soul/The Turtles case is this. De La Soul and Tommy Boy didn't "overlook" clearing The Turtles sample; rather, they intentionally did not clear the sample. In an 1989 interview with MTV News, Lawrence Stanley, then Director of Business Affairs at Tommy Boy Records, has stated that **"[w]e didn't clear The Turtles soundbite because first of all, *the use was so minimal that no one would ever think that it was an infringement.*** They [De La Soul] digitally manipulated it so that our sound source is actually different from the sound source of The Turtles' record. So there was **no reason for us to think that this would constitute infringement, or that anyone would complain about it."**[2] Stanley's statement is a clear indication that De La Soul and Tommy Boy believed that The Turtles' sample was de minimis, and therefore did not merit clearance. I agree with Stanley's assessment. Unfortunately, however, De La Soul and Tommy Boy declined to answer the lawsuit in court with an affirmative de minimis and fair use defense.

Vanilla Ice Gets Sued by Queen and David Bowie

For the making of his 1990 hit song "Ice Ice Baby," Vanilla Ice used a sample — the signature bass line — of the song "Under Pressure" (1981), a collaboration by the group Queen and David Bowie. "Ice Ice Baby" made use of a slight alteration (i.e. no substantial transformation at all) of the "Under Pressure" bass line, and because of this slight alteration, Vanilla Ice neither sought a license or permission for the use, nor gave credit. Queen and

[2] Mini-documentary on 'sampling' circa 1989 MTV News Report, ca. 1989 https://youtu.be/tUuPC7712Vo (emphasis mine).

David Bowie saw otherwise, and sued Vanilla Ice for copyright infringement. Just as Beastie Boys and De La Soul had done, Vanilla Ice settled out of court with Queen and David Bowie for an undisclosed amount and percentage of the publishing of the song "Ice Ice Baby."

Taken together, these four cases — each settled out of court with substantial payments and huge publishing concessions being made — helped create the lawsuit neurosis that hangs over the use of samples to this day. But it would be the verdict in the *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.* case (1991) that would make the labels take a firm "clear all samples" stance going forward.

Grand Upright: The Criminalization of Sampling and the Birth of the Sample Clearance Scheme

There have been a number of copyright infringement cases involving the art of sampling. But no single case, prior to *Bridgeport*, has impacted the sample clearance system more than *Grand Upright v. Warner Brothers Records*. The truth is, *Grand Upright* kicked off the precarious (perhaps nefarious) sample clearance system.

Prior to *Grand Upright*, sample-based beatmakers presumably didn't have to secure a license (clearance) from the copyright owners of the songs that they sampled. At the time, the recording industry hadn't yet recognized hip hop/rap music as a legitimate and viable money maker. Moreover, beatmakers, a rapidly emerging new category of musicians, were completely unfamiliar to the record companies. Again, before the late '80s, the major record companies regarded hip hop/rap music as a fluke and a fad, a defunct sub-genre of urban music that would not survive. For some people, this sentiment ran well into the early '90s; long after hip hop/rap had proven its commercial viability. So before 1991, beatmakers sampled sound recordings at will, without fear of legal penalty. Subsequently, the vast amount of sampling simply went unnoticed during that era. And although there were several lawsuits involving sampling and copyright infringement that were

brought, none of these cases were ever decided in court; all were settled out of court. However, the publicity surrounding these cases alerted older recording artists to the possibility of big paydays in the form of hefty sample clearance fees — post litigation. Thus, "a song that had ceased bringing in royalties decades ago could suddenly yield a big check."[3]

It was against this backdrop that *Grand Upright* emerged. *Grand Upright* was a seminal event for three reasons. First, *Grand Upright* was the first copyright infringement case involving digital sampling, sound recordings, and hip hop/rap music to be decided in court. Until *Grand Upright*, there wasn't a court decision on the books. So *Grand Upright* became a landmark decision. Second, *Grand Upright* was, albeit inadvertently, one of the earliest events to recognize and, ironically, reinforce sampling as a much-valued and common compositional practice in the hip hop/rap tradition. Third, *Grand Upright* became the primary catalyst for the creation of the sample clearance system, one of the most ad hoc, one-sided, unreasonable systems in the history of the recording industry. After *Grand Upright*, major labels insisted that all samples — regardless of length, character, or use — be cleared.

Grand Upright Background

In 1991, Grand Upright Music, Ltd. filed for a preliminary injunction against rapper Biz Markie and his then-record label Cold Chillin' Records, its distributor, Warner Bros. Records, and other parties, on the grounds that the song "Alone Again," a song on Biz Markie's 1991 album, *I Need A Haircut*, contained an unauthorized use (a "digital sample") of Gilbert O'Sullivan's composition for the hit 1972 song "Alone Again (Naturally),"a composition for which Grand Upright owned the copyright.[4] Specifically, the

[3] Vaidhyanathan, 141.

[4] Chuck Philips, "Songwriter Wins Large Settlement in Rap Suit – Pop Music: Following a court ruling, Biz Markie and Warner Bros. agree to pay Gilbert O'Sullivan for rapper's 'sampling' of 'Alone Again (Naturally),'" *Los Angeles Times*, January, 1, 1992. Also see, *Grand Upright Music, Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

"proceeding was instituted by Order *To Show Cause* to obtain a preliminary injunction against the defendants for the improper and unlicensed use of a composition 'Alone Again (Naturally)' written and performed on records by Raymond "Gilbert" O'Sullivan." Since the defendants admitted that Biz Markie's album embodied the song "Alone Again," which used "*three words* from 'Alone Again (Naturally)' composed by Gilbert O'Sullivan and *a portion* of the music taken from the O'Sullivan recording," the court declared that "[t]he only issue, therefore, seems to be" is "who owns the copyright to the song 'Alone Again (Naturally)' and the master recording thereof made by Gilbert O'Sullivan."[5]

In other words, since Biz Markie, Warner Bros., et al. didn't deny the use of a sample from O'Sullivan's song, the case was more about determining who was the true owner of the copyright for the composition of O'Sullivan's song; the case was less about sampling in a larger context. And with the court concluding that Grand Upright did indeed own the copyright to the composition and the master recording of O'Sullivan's song, the court found that the defendants had violated the plaintiff's rights in the song "Alone Again (Naturally)" and granted the application for the preliminary injunction. Additionally, the court referred the matter to the United States Attorney for the Southern District of New York for consideration of criminal prosecution of the defendants. But before sentencing, the parties settled out of court for an undisclosed sum.

An Absurd Defense, A Missed Opportunity, and The Criminalization of Sampling

Given that the defendants in *Grand Upright* admitted to the copying, the defense that they offered was absurd. Rather than insist that the copying was *not* actionalbe, based on fair use defense[6], the

[5] *Id.* (emphasis mine).

[6] Had the defendants taken this approach, it's ikely that the sample-clearance system would be dramatically different today. Sampling would've been considered within the scope of fair use, and this would've prompted two critical questions: When is a sample *not* actionalble? and Can a sample be fair use? This would've been the direction of the discussion surrounding sampling, not the criminalist tone or the negative stigma of *thievery* and "piracy" has been attached to sampling.

defendants chose another ill-fated defense. First, the defendants challenged the ownership of the copyright to O'Sullivan's song. This was a weak defense for two reasons. First, "[p]rior to the time that Biz Markie's album was released, the various defendants apparently discussed among themselves the need to obtain a license. They decided to contact O'Sullivan and wrote to his brother/agent, enclosing a copy of the tape."[7] This certainly indicates that the defendants knew who owned the copyright to the song, or at least the defendants knew who to properly contact in regards to clearance or any questions of ownership in the copyrights of O'Sullivan's song. In court, Grand Upright Music, Ltd. not only produced documentation that supported their claim of ownership, Gilbert O'Sullivan testified that he had transferred ownership to them. This leads us to a second problem with this defense. Based on an illogical technicality, the defendants objected to the authenticity of the certificate of copyrights:

> Defense counsel objected to the admission of copies of the certificates of copyright because they were not "authenticated." It was apparent that defense counsel was not using this term "authenticated" in the sense that it is normally used in the law, particularly in the law of evidence. Since the original copyright was in the name of NAM Music, Inc., defense counsel seemed to argue that someone authorized by NAM Music, Inc. would have to identify the certificates in order to "authenticate" them. Of course, the reader should be aware that NAM Music, Inc. had long been dissolved, as defense counsel knew. It was clear to me that the use of the word "authenticate" by defense counsel had nothing whatsoever to do with self-authentication of public records under Rule 902 of the Federal Rules of Evidence. Nor did counsel believe that the certificate was anything less than a true and complete copy of the public record." [emphasis mine][8]

Next, the defendants objected to the injunction based on what they considered to be "common industry practice." Essentially, the defendants argued that, since so many others in the music industry were commonly engaged in "unauthorized" digital sampling, they

[7] *Grand Upright Music, Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).
[8] *Id.*

should be excused. That defense was also absurd and destined to fail. Had the defendants mounted a fair use defense, it's ikely that the sample-clearance system would be dramatically different today. At the very least, there would've been a more a balanced discussion of *Digital* sampling. And given the scope of de minimis and fair use, this discussion would've helped produced a better understanding of how sampling relates to these two safe harbors of copyright law. More specfically, had the defendants in *Grand Upright* actually challenged whether the copying of O'Sullivan's song was *actionable*, this would've prompted the court to consider the character of the copying. Which means that a substantial similarity analysis would've been performed. Moreover, an affirmative fair use defense would've prompted the court to conduct the fair use test.

As it was, however, Judge Duffy didn't perform the substantial similarity analysis — despite the fact that the substantial similarity anlaysis is a requirement of every copyright infringement case. More significantly, Judge Duffy didn't simply observe that Biz Markie's use of O'Sullivan's song was an ulawful use *under copryight law*; he did something that was much more damning. According to Judge Duffy, since the defendants knew who the copyright owner of O'Sullivan's song was and didn't obtain proper clearance, the defendants "*knew* that they were violating the plaintiff's rights as well as the rights of others," and, therefore — according Judge Duffy — the defendants' "*only aim* was to sell thousands upon thousands of records." But what if the defendants believed that they weren't violating the plaintiff's rights? What if the defendants believed that the copying was *not* actionable? Nevertheless, because of his interpretation of the *intent* of the defendant's conduct, Judge Duffy ruled that "[t]he **conduct** of the defendants violated" the "Seventh Commandment."[9] Consequently, Judge Duffy (inadvertently) criminalized sampling itself.

It's important to note, here, that *Grand Upright* never stated that "sampling without a license is copyright infringement," as many commentators have claimed. In fact, *Judge Duffy* didn't actually say anything expressly about sampling (one way or the other) in

[9] *Id.*

his opinion. Even so, the ruling in *Grand Upright* — which was less about sampling itself and more about the ramifications of the "improper and unlicensed use of a composition," ergo, not obtaining a license for the use of one particular sample in *one* specific case — gave the impression that sampling itself was equivalent to criminal theft. And this fostered (and for some, cemented) the perception of sampling as something that's *criminal* if it's done without a license.

The Truth About Grand Upright

Recall the fact that *Grand Upright* was a proceeding that was "instituted by Order *To Show Cause* to obtain *a preliminary injunction*." *Grand Upright* was not a proceeding that was instituted to determine *if* copyright infringement had taken place; *Grand Upright* was a proceeding that was instituted on the *presumption* that copyright infringement had taken place. Although the defendants in *Grand Upright* admitted to the copying (defendants often admit to the copying in copyright infringement cases), the plaintiff never even attempted to prove that the copying was *actionable*, nor did the court itself actually take up this issue. Instead, Judge Duffy delcared that, since the defendants admitted that Biz Markie's album embodied a portion of the song "Alone Again," "[t]he *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."[10] But this was not the "only" issue that needed to be resolved! The issue that remained was whether or not the defendants' copying actually constituted copyright infringement.

In truth, Judge Duffy conducted an improper determination of copyright infringement in *Grand Upright*. The facts of the ruling — or perhaps better stated, what's missing from the ruling — make this clear. There was no substantial similarity analysis conducted in *Grand Upright*, which is a requirement of courts in every copyright infringement claim. Furthermore, when we consider the impact of *Grand Upright*, we would expect to see a robust decision, one

[10] *Id.*

complete with the sort of inquiry and subsequent revelations that we find in *Batiste v. Najm*, *VMG Salsoul LLC v. Madonna*, and *Estate of James Oscar Smith v. Cash Money Records, Inc.*. But the truth is, the actual opinion in *Grand Upright*, its impact notwithstanding, was not as profound as we would expect (the entire opinion is barely more than one page). *Grand Upright* didn't raise any of the big questions about digital sampling and sound recordings that have emerged in the past 30 years. For instance, *Grand Upright* didn't address whether de minimis or fair use applied to sound recordings. Nor did *Grand Upright* specifically address whether the "digital" sampling of sound recordings was any different from the "sampling" — i.e. borrowing — of any other copyrightable subject matter. So are we to assume then that neither of these things are true, simply because *Grand Upright* didn't address them? Again, *Grand Upright* specifically focused on the "improper and unlicensed use of a composition" **for the purpose of granting a preliminary injunction.** And that's where Judge Duffy's inquiry in *Grand Upright* prematurely stopped at.

"Prematurely" remains the critical word because Judge Duffy stopped well short of what's required in *every* copyright infringement lawsuit. If the plaintiffs were required to "show cause" to obtain the preliminary injunction, and the "cause" for the preliminary injunction, as alleged by the plaintiffs, was *copyright infringement*, then copyright infringement needed to be determined before the court granted the premilinary injunction. But proof of copyright infringment was never properly established in *Grand Upright*. This is because there are *three* things that a plaintiff must do to prove copyright infringement; and the plaintiffs in *Grand Upright* only did the first of the three. "To *prove* copyright infringement, the *plaintiff* must establish that he or she owns a valid copyright, that the defendants copied a *protectible* expression, *and* that the copying is *substantial enough* to constitute *improper* appropriation of plaintiff's work."[11] In *Grand Upright*, only the proof of copyright ownership was established by the plaintiff. It was never argued or

[11] Jarvis v. A&M Records, 827 F. Supp. 282, 290 (D.N.J. 1993), at 288, B. (emphasis added).

proven in court that the defendants copied a "protectable" portion of O'Sullivan's song; nor was it ever argued or proven in court that the portion that was copied was "*substantial enough* to constitute *improper* appropriation" of the plaintiff's work. Instead, Judge Duffy simply surmised that, since the defendants had admitted to the copying, and that since the defendants had tried to obtain a license before the release of Biz Markie's album, the use constituted coopyright infringement. But that's not how copyright infringement is determined. Had Judge Duffy addressed the two remaining requirements for determining copyright infringement — and focused on the prescriptions of United States copyright law rather than the Seventh Commandment — perceptions of sampling, as well as the sample-clearance system, would be dramatically different today.

In hindsight, the impact of *Grand Upright* — which was actually based more on what the ruling *didn't* say than what it did say — was deafening. After *Grand Upright*, record companies insisted that *all* samples be cleared, regardless of the source and amount used. This promptly led to the solidification of the onerous and precarious sample clearance system. A system that has gone on to more directly undermine hip hop/rap music than even *Grand Upright* itself.

***

So Just What Is the Sample Clearance System?

The sample clearance system has been in effect since the early 1990s. So it's no surprise that most sample-based beatmakers (producers) are familiar with the term "sample clearance." For the past two decades, there have been numerous reports of sample-based songs that were held up, reworked with replays, or scrapped from albums altogether because a sample couldn't be cleared. Stories and rumors about exorbitant clearance fees or uncooperative copyright owners have been common for a long while. However, most sample-based beatmakers (producers) are unfamiliar with what the sample clearance system is and how it actually works. In this section, I break down what sample clearance is and how the sample clearance system works (or doesn't for that matter).

The Basics of Clearing a Sample

To truly understand the inefficiency and unfairness of the current sample clearance system, it is necessary to break down how the system (or lack thereof) actually works. The current procedure for clearing samples (obtaining licenses) involves a considerable amount of time and money. A copyright of a particular music performance, as it is "frozen in time" as a sound recording, belongs to whomever owns the rights to the masters of that sound recording; in most cases this means the majors. That being said, there are two sets of rights that must be obtained in the sample clearing process: the sound recording copyright and the musical composition copyright. The sound recording copyright covers the fixed sounds of the recording, i.e. the captured sound performance, everything that can't be notated. This is known as the master recording copyright. The musical composition copyright covers the actual melody, harmony, rhythm, and lyrics that make up a musical work, i.e. all of the elements that can be notated/transcribed on a piece of sheet music. In addition to these rights, in some cases the "moral approval" of the artist(s) who originally performed the recording that was sampled must be granted. Moral provisions in recording

contracts stipulate an artist's right to maintain approval over types of uses of their recorded performances. Even though an artist may have a moral approval provision in their contract, labels can (and often do) work their way around this by simply persuading (paying) the artist to waive the provision.

To obtain permission and get a license to use a digtal sample, there are a number of different types of agreements that can be made. There's a flat fee (buyout) license agreement where a license is granted for one flat fee. There's a royalty agreement where a license is granted for a royalty percentage split, either from sales of the song that contains the sample or from sales of the song and the album that the song containing the sample is included on. There's a co-ownership agreement where a license is granted in exchange for co-ownership of the song that contains the sample. There's an assignment of rights agreement where the rights to the song with the sample are assigned to the copyright owner of the song that was sampled. Finally, there's also a free license agreement where the copyright owners grant a license for free.

The Flaws of the Sample Clearance System

The Expense-Cost Factor

Although there are a number of different ways to clear a sample, normally a flat-fee advance is made. The flat-fee advance to clear a sample can range anywhere from $2,500 to $200,000. There really is no limit; copyright owners can charge whatever amount they like. Deborah Mannis-Gardener, the foremost authority on sample clearances and the most widely recognized sample clearance agent in the business, says that "the standard fees, which ranges between, you know, the masters side [master recording copyright] is between $2500 and $12,000. And on the publishing side, if it's a non-recoupable fee, it's between $1,500 and $2,500."[12] Note, however, that technically speaking, there are no "standard" fees or rates for samples, even given the figures that Mannis-Gardener cites.

[12] Author interview with Deborah Mannis-Gardener, July 10, 2018.

This is because the actual figures vary widely. And the main reason that the clearance fees are so expensive and can vary so widely is because there's no limit on what copyright owners can demand. Each negotiation for the use of a sample is private and takes place on a case-by-case basis; so fees can (and often do) escalate very quickly, especially for samples of well-known artists and/or hit songs. "You know, there's nothing typical about sample clearances," says Mannis-Gardener. Therefore, despite any myths put forth, there is no such thing as an "industry standard flat fee" for clearing a sample. The fees for clearing a sample are at the sole discretion of copyright owners. When I interviewed Mannis-Gardener, she also added that "you've got these huge budgets, 100-, 200-, 300 hundred thousand dollars to clear samples! *It's a money-making business.* You've got the heyday of Bad Boy, of Puff and Mase and Biggie. *We're spending huge amounts of money.* Then, it gets to the point where the smaller guys aren't able to sample. It gets cost prohibitive."[13]

In addition to the flat fee that's paid, usually the party that's seeking to clear a sample must also grant a percentage of ownership in the new work's musical composition copyright. In some cases, copyright owners even demand an advance based on future *anticipated* publishing revenue! Also, the flat fee can be based on a variety of other things, such as an artist's notoriety and credibility, the existing negotiating history between publishers, managers, and record companies, and/or whether a sample might reinvigorate the back catalog of the sampled artist. Each of these factors can drive the price up. But in many cases, the price is simply untenable, especially for independent or DIY artists. With copyright owners demanding large, often unreasonable fees, or requesting disproportionate percentages of royalties for even the most minute fragments of music, artists often just give up on clearing the sample in question and move on.

Finally, there's also the expense of the sample clearance house, the music licensing company that handles the entire process and clears the sample for you. Most record labels and publishing

[13] *Ibid*.

companies won't even consider a clearance request unless you've previously done business with them, which makes clearing a sample by yourself all but impossible. This is why enlisting the services of a sample clearance house — which typically employ seasoned sample clearance experts who have record label and publishing company contacts — is usually necessary. Sample clearance houses have done business with many recording artists, record labels, and publishing companies, and they know how to cut through the bureaucracy. So naturally, sample clearance houses charge fees for their services, as much as $300-$1,500 per clearance (*publishing and master clearances are separate clearances*) up front before they even begin the process. But given the minefield that sample clearance is, if you have to clear a sample, it's best to do so through a reputable sample clearance house or well known sample clearance agent.

The Time-Cost Factor – It Can Take Forever, or At Least Long Past When You Need It

Clearing a sample takes time. Simply tracking down all of the copyright owners to both sets of copyrights isn't always easy; in fact, the search process can take months. And although the enlisted help of a sample clearance house or a skilled sample-clearance agent may speed up the search, it can still take a long time. This is certainly the case when copyrights have been sold or split or transferred multiple times in the last several decades, or when the sample is from a song that's under ownership of a well-known publishing catalog. So even for major label artists with access to in-house sample clearance departments and sizeable budgets, this time-cost factor can be extremely taxing. So just as in the case of high flat-fee demands, artists often give up trying to clear a sample and move on simply because of the time that it takes. When I asked Deborah Mannis-Gardener about the time-cost factor involved in clearing samples, she elaborated this way:

> "You know, **there's nothing typical about sample clearances**… I was doing some research to find out what percentage of writers and artists do copyright holders need to approach before they can

> turn around and give a quote. It's about 50%. The other 50% can spit out a quote right then and there. And then you have to be clever as a clearance agent to find out, Does this need to go out for consent? Who is their approval party? Does it need to go to someone else within the label? You've got the company Universal. But sometimes they need to go to Def Jam for consent. You've got the label Warner but they may need to go to Atlantic to get consent. So you might not need the writer/artist consent, but you need the label or company consent. And on the publishing side, there's obviously going to be a lot more copyright holders. You can have one song with eight publishers.[14]

Even if you're successful in finding all of the copyright owners, the negotiation itself will still add another time clock. Remember, in most cases, the copyright owners *and* the recording artists have to give their consent, so the demands can be extreme. This is especially the case when you consider that, historically, many music rights owners and older recording artists have had a negative perception of sampling. Most of the older recording artists who are sampled, as well as the vast majority of music industry lawyers and music publishers, do not understand or relate to beatmaking as a compostional process. Because they are less informed about what goes into the making of a beat or the art of sampling more specifically, they tend to see sampling as nothing more than "cut and paste," not a "real" music-making process or art form. And with sample-based hip hop/rap songs like Puffy's "I'll Be Missing You" (1997) — which samples considerably The Police 1983 hit "Every Breath You Take" (1983) — serving as a go-to reference for many of those unfamiliar with sampling, the notion of sampling as a fine art that typically uses small snippets of sounds as building blocks of music is either lost on most older recording artists, music industry lawyers, and music-rights owners or broadly rejected by them. Consequently, they have a limited understanding of sampling, particularly how samples are typically used and how copyright law actually encourages sampling, both as an art form and a music-making process. Plus, given the criminalization of sampling by *Grand Upright*, and later *Bridgeport*, it's easy to see

[14] *Ibid*.

why they would also have a perception of sampling as something that is tantamount to criminal theft.

Lastly, there are other factors that can determine the full price that copyright owners (and sampled artists) demand. For instance, which song was sampled? Was the song that was sampled well-known? Was the song that was sample a hit itself long before someone sampled it? What about how the sample was used in the new song? Bear in mind, the amount taken or the level of transformation matters little to copyright owners who desire a big payday.

It's also important to remember that outright refusal always looms before a sample-clearance negotiation even begins. And even if you track down all of the copyright owners and the artists, even if you have the money and are willing to pay considerably to clear a sample, there's still no guarantee that you'll be able to get the sample(s) cleared. One or both of sets of copyright owners can refuse your submission request outright, or an influential recording artist can nix everything by not giving their consent. And it doesn't matter if the owner of one set of rights grants you clearance: If you're missing clearance from the other rights holder, you don't have clearance. So for instance, if the owner of the master recording copyright grants a license, but the owner of the music composition copyright does not, the sample is not cleared. And whatever fees that you've already paid to the owner of the master recording copyright is gone, you don't get that money back. There's no reembursement because you failed to clear the other set of rights.

Finally, it's widely known that there are many recording artists who have a negative bias against hip hop/rap music. So typically, these recording artists will not clear a sample if they know it will be used by hip hop/rap music artists. Moreover, there are music publishers who flatly deny license requests for samples used in hip hop/rap music. And again, remember this. Whatever fees that you pay to *attempt* to clear a sample, like, upfront license fees, administrative fees, etc., and the sample clearance house's fee, those fees are not refundable.

***

Sidemen Do Not Usually Get Paid Royalties

In the grand scheme of sample clearance, some commentators have suggested that sidemen, i.e. hired band members or studio session players, should be paid royalties on the records that they performed on that were later sampled. But let's be clear here: Long before sampling emerged, there were musicians for hire. Musicians have always accepted gigs, short and long stints in bands, and studio-session work for pre-determined payment without expectations of royalty payments for songs they *peformed* on but did not compose. Usually payment was in the form of flat fees, paid before or after the gig or through weekly salaries. And sidemen played under the direction of the bandleaders, composers, arrangers, or producers who hired them for the gig. Although these musicians undoubtedly contributed to the collective creative process of some the twentieth century's most impactful popular music, we cannot ignore the realities of their respective arrangements with the bandleaders, composers, arrangers, producers, recording artists, record labels, and recording studios that employed them.

In short, sidemen (and studio-session players) are *not* being wronged if they don't receive royalties on record sales or a cut of sample-clearance fees. So when musicians like Clyde Stubblefield — former James Brown drummer — make claims that imply that they are *owed* or deserve royalties or that they have been robbed or not paid for samples of songs that they performed on, they're misleading people. "All my life I've been wondering about *my* money," Stubblefield told *New York Times* reporter Ben Sisario in 2011. "People use my drum patterns on a lot of these songs," Clyde Stubblefield further said, alluding to the widespread sampling of James Brown's song "Funky Drummer" (1970), which Clyde Stubblefield played the drums on. "They never gave me credit, never paid me. It didn't bug me or disturb me, but I think it's disrespectful not to pay people for what they use."[15] First, Clyde Stubblefield was indeed credited as the drummer on "Funky Drummer." Crediting

[15] Ben Sisario, "Living Legend Tries to Make a Living," *New York Times* (March 29, 2011) (emphasis mine).

Clyde Stubblefield in a new song that samples *at most* 3 seconds of the drum break from "Funky Drummer" is unrealistic. Second, the majority of the so-called "Funky Drummer" samples have been single-hit drum sounds (upwards of just .04-.08 seconds) that beatmakers (producers) have gone on to create *new* drum patterns with. So most sample-based beatmakers (producers) who have sampled "Funky Drummer" have *not*, in fact, used Clyde Stubblefield's drum patterns.

Next, in the same *New York Times* article, Clyde Stubblefield claims that James Brown didn't direct him — "Nobody directs me," he said. "We just put down what we think it should be." Yet, not only did James Brown feature as many as *seven* different drummers, all of which he directed or at least strongly instructed in what he wanted played (see Chapter 8), James Brown was notorious for fining his musicians for *missing a beat*. Still, there's no doubt that Clyde Stubblefield's talent and individual musical instincts figured into the collective grooves or overall magic that made up the James Brown songs that he played drums on. Moreover, musicians are always responsible for their own improvised solos; for instance, take John Coltrane playing in the Miles Davis Quintet. John Coltrane's solo on Miles Davis's "So What" (1959) is the stuff of legends. But John Coltrane, like Clyde Stubblefield, was nevertheless a sideman in *Miles Davis's* band. John Coltrane was a hired tenor saxophone player for Miles Davis; he was not a composer, arranger, or producer for Miles Davis.

Likewise, Clyde Stubblefield was a hired drummer for James Brown; and he was paid for his work (performances) at the time. Under this specific paradigm — again, a typical work arrangement for sidemen — he was not expected to be paid any royalties on record sales, regardless if one of his improvised solos or drum breaks on a song was popular or not. Sidemen do not receive additional payment, writing credit, or royalties for the improvised solos that they perform on records that they were hired to play on. So it's misleading for Clyde Stubblefield to say that "they never paid me" or that he deserves money for samples of *James Brown's* song "Funky Drummer," which he played the drums on.

Clyde Stubblefield deserves respect (see Chapter 8). But as a sideman in James Brown's band, his situation, in terms of work-for-hire, was like that of every drummer who played for James Brown. Or, for that matter, any other sidemen and studio/backing musician who worked with James Brown. In fact, Clyde Stubblefield's position as a paid sideman was similar to that of those sidemen who played in Motown's renowned house band, The Funk Brothers. The same could be said for band members, sidemen, and session players who played for other oft-sampled recording artists, like Curtis Mayfield, The Stylistics, and The Delfonics, just to name a few.

Further, I would say that this situation is not entirely different from beatmakers (producers) Dr. Dre, DJ Toomp, Buckwild, and Metro Boomin hiring session musicians to play on their productions. Do the session musicians that Dr. Dre, DJ Toomp, Buckwild, and Metro Boomin hire deserve *royalties* on record sales for the songs that they produced? It would depend on the level of contribution and the nature of the agreements with each session musician. This is what *co-production* and *co-writing* credits exist for.

More than 50 years ago, hired sidemen, band members, and studio session players also received similar credits (and splits) where applicable. So it's unreasonable to think that all sidemen, every session player, and every hired band member, that only *performed* on a record (think of all of the big jazz bands) should receive royaltiies on record sales or a cut of sample-clearance payments, just because the record included their performances. Obviously, not all situations and circumstances are ever the same. But the notion that a former sideman, a hired band member — albeit a pivotal player like in the case of Clyde Stubblefield — has been "robbed" because he didn't receive royalites for the songs that he performed on or because he didn't receive a cut of the sample clearance fees that were paid out to clear samples of songs that he played on is terribly misguided. If there is any unfairness (or exploitation) in the financial arrangements that sidemen made (make) with bandleaders, composers, arrangers, and producers, then that's where the blame perhaps rests. It does not, however, shift to potential profit sharing in royalties for record sales or fees paid from sample clearance.

The Sample Clearance "Tax" and the Primary Beneficiaries of the Sample Clearance System

When the music industry first took notice of sampling, their burning question had to have been: *How can we profit from this?* Their answer wasn't exactly a new practice in the realm of recording licenses and song usage rights. In fact, the practice of "clearing" song performances for uses in other works (most notably film and television) had been around long before the landmark *Grand Upright* ruling. However, when it came to sampling in hip hop/rap music, the major record companies created an entirely new style and form of music rights clearance, one that sought to monetize (and perhaps penalize) sampling — the musical process that utilized fragments of old sound recordings, most of which the majors owned the copyrights to. Further, the major record companies, who have historically discriminated against and exploited Black music artists, also indirectly created a system of sample clearance that serves as a sort of tax on hip hop/rap artists, who, at the time of *Grand Upright*, were mostly Black and sample-based.

Make no mistake, the sample clearance system was (is) not meant to benefit those recording artists who are sampled. On the contrary, the sample clearance system was (is) designed to benefit the owners of the copyrights to musical compositions and sound recordings. And the owners of these copyrights are practically never the artists who have been sampled, but rather the major record labels and music publishers. In fact, the major labels, or better stated, the major conglomorate groups, own the rights to basically *all* of the master recordings of soul, blues, jazz, and funk sound recordings recorded between the late 1940s on through the mid-1970s. In fact, according to a regulatory filing, there are just four groups who own roughly *90%* "of the music streamed on Spotify." These groups include: the "big three" labels — Universal, Sony, and Warner Music — "along with Merlin, an agency that represents smaller labels."[16]

[16] Anna Nicolaou, "Spotify shakes record labels by dealing directly with artists," *Financial Times*, June15, 2018 (emphasis mine).

This makes the major labels that make up the major music groups the primary benificiaries of the sample clearance system. So in this paradigm, the pecking order goes like this. First, the owners of the ccopyright to the sound recording, usually the major record companies. Second, the owners of the copyright to the music composition, usually the large music publishers, which are mostly owned by the major music groups. Third and last are the recording artists who were sampled.

The Effects of Sample Clearance on Hip Hop/ Rap Music and the Art of Sampling

Sample clearance has negatively impacted hip hop/rap music in many ways. First, sample clearance has become a means through which the major labels, in effect, control what kinds of hip hop/ rap music are *allowed* to be made, manufactured, and distributed. By creating a system of harsh sample clearance practices, the major labels, in their persistent quest to make as much money as they could off of the creative works of others, actually did (and still continue to do) a disservice twice over. The major labels did (do) a disservice to the former recording artists whose best interest they purportedly had (have) in mind. By making the process of actually clearing samples difficult, the labels actually block these recording artists from accessing new revenue streams, both in the form of additional royalties and new sales on their reinvigorated back catalogs. More importantly, by propping up such a draconian and onerously flawed sample clearance system as the "industry standard," the major labels contributed to the decline in the use of sampling as a compositional method in hip hop/rap music between the late '90s and mid-2010s.

The sample clearance system is one of the main factors that pushed the widespread use of sampling in hip hop/rap music into second class citizenry. Consequently, the "sample clearance factor" effectively contributed to making sampling a less desirable compositional method for the majority of new beatmakers (producers) between the late '90s and mid-2010s. At the same

time, sample clearance prompted many veteran sample-based beatmakers (producers) to move away from sampling as their chief compositional method for making beats.

After sampling was effectively *outlawed* — due in large part to the onerous sample clearance system that was spawned by *Grand Upright* and further cemented by *Bridgeport* — creativity was stifled by the virtual lockout on sampling that the sample clearance system enacted. To some degree, this caused the value of music artistry in hip hop/rap music to diminish, especially as rampant redundancy emerged. Instead of seeking to bolster the art form and to distinguish themselves in terms of style and originality, many beatmakers (producers) chose to employ the synthetic-sounds-based compositional method, simply as a means to making the same, barely indistinguishable types of beats that were seemingly easier to make and more appealing to the rappers of the same period who actively avoided sample-based beats due to sample clearance.

In fact, the broad shift away from sampling as a compositional method of hip hop/rap music led to a move away from some of the core tenets of hip hop culture. No more was this clear than in the area of competition. The art of sampling itself has always been seen as a form of competition in the hip hop/rap tradition. It's a competition to find the rarest records; it's a competition to reimagine even the most well-known records; it's a competition to use and flip the illest samples; it's a competition to make the dopest sample-based art. Because of this long-understood dimension of competition and ethics among sample-based beatmakers (producers), the practice of "biting" (copy-catting) other beatmakers (producers) was not accepted. But once sampling was furthered outlawed by sample clearance, "biting" became much more acceptable and prevalent among a number of beatmakers (producers). And the idea of competition became more about who could *copycat* the best.

Next, the move away from sampling also led to a decline in the "hip hop/rap" style of musicianship; and at the same time, it led to an increase in a rock-, EDM-, and club-pop influenced style of hip hop/rap music. In these new scenarios, the importance of lyrics and lyricism declined overall between the late '90s and mid-2010s,

the era in which so-called "mumble rap" emerged. Therefore, the quality of lyricism also dropped dramatically, which caused a sharp decrease in the number of weighty, intelligent rhyme narratives, and in turn, prompted a rise in the number of shallow, low-quality rhymes. Even the notion of what once constituted a "dope" rhyme took on a bizarre new context as a result of the widespread move away from sampling.

Finally, although the sample clearance system had a number of negative effects on hip hop/rap music, it must be noted that it also had a couple of good side effects. Since the Electronic Drum Machine Period (1983-1987), the third major beatmaking period (see Chapter 2), the art of sampling had been steadily evolving. But along with the emergence of the sample clearance system came a new level of evolution in the creative processes and complexity of sampling. Also, sampling in the hip hop/rap tradition evolved, both as a result of pioneering beatmakers (producers) competing with one another and pushing the envelope. This, due in part to the fact the sample clearance prompted — necessitated — an even deeper transformations of samples.

Another other good side effect that the sample clearance system has had can be seen in the emergence of trap music. There's no doubt that sample clearance greatly contributed to the environment that led to the development of trap music, a style and sound of hip hop/rap music that relies more on the Synthetic-Sounds-Based (no samples *featured*) compositional style. Whatever side of the trap music fence you sit on, there's no disputing the role that it has played in the popularity and expansion of contemporary hip hop/rap music around the world.

Additionally, it must be noted that, despite the damage done to hip hop/rap music by the sample clearance system, there has been a reawakening in the sampling tradition of hip hop/rap music. In recent years — specifically a period in which sampling saw a decline in terms of being the *featured* compositional style for most beatmakers (producers) — there has been a return to sampling, both in terms of the use of the sample-based compositional style and the hybrid compositional style, which combines the sample-based

and synthetic-sounds-based compositional styles. This widespread return — boom bap focused beatmakers (produders) never left sampling — to the compositional roots of hip hop/rap music has been orchestrated by many beatmakers (producers) who are usually not associated with boom bap but rather trap music, drill, and hyphy. This demonstrates the staying power of the sampling tradition of hip hop/rap music.

One recent reminder of the staying power of sampling and its influence on the qualityy of lyricism is Kendrick Lamar's "6:16 in LA" (2024). "6:16 in LA" is a "diss" record, a response to Drake, with whom at the time of this writing, Kendrick Lamar is engaged in a rap beef. "6:16 in LA" is high-quality lyricism at its best: It's loaded with incredible metaphors, double (even triple) entendres, and intelligent rhyme narratives. And the beat that powers "6:16 in LA" is a sample-based beat built around a chopped sample of Al Green's "What A Wonderful Thing Love Is" (1972).

***

A Case of Burning Dollars to Make Pennies: RIAA vs. Napster and The Biggest Mistake the Major Labels Ever Made

In 1999, the Recording Industring Association of America (RIAA) sued Napster, the one-time preiminent music file-sharing site, for copyright infringement and petitioned a Federal District Court in California to shut down the website and stop it from offering it services. Two years later, on July 12, 2001, the Ninth Circuit Court of Appeals ordered Napster closed.[17] Although the RIAA won their court battle against Napster, shutting down the once-mighty internet file sharing site, the RIAA effectively lost the sales war — in a big way. Thanks to their absolute ignorance of the actual flow of technology and the power of the world's most unstoppable vanguard that is the internet, the major record labels

[17] "Napster, RIAA Spar In Court," *Billboard* December 11, 2002 https://www.billboard.com/music/music-news/napster-riaa-spar-in-court-77473/.

not only shot themselves in the foot, they managed to hit both ankles, a knee, and a pinky toe while they were at it.

Soon after its victory against Napster, the RIAA made another huge blunder. In its nearsighted gluttony (once again), the RIAA announced plans to sue as many as *30,000 individuals* for file sharing infractions! Apparently, the greedy blokes didn't realize what this would all lead to. First, the advent of new and better music file sharing services. Second, the creation of a culture that attaches little to no monetary value to music consumed or obtained online. Third, declining record sales. Fourth, litigation hell.

It's been nearly 23 years since the beginning of the RIAA's infamous crusade against file-swappers, and what's the result? The music industry has been forced to deal with the reality of the culture and climate of music streaming that they themselves helped to create but do not control. The RIAA could have gone into business *with* Napster. Actually, the RIAA could have *bought* Napster, like any self-respecting, monopolistic corporation would have done. But to the RIAA, the upstart Napster didn't respect *its right* to rip off artists, centralize product, and curb the quality of popular music. (How dare Napster.) So here we are with Spotify, Apple Music, Google Play, Amazon Music, Pandora, Deezer, and the like — rather than one RIAA-created and controlled streaming service.

What Do the Napster Case and Recent RIAA Woes Signal for Sampling?

It's clear that labels are not making the money they used to — even with streaming booming as it is. But after adapting (somewhat) to the reality of how music is bought (or not) and consumed today, the music industry — overall, not just the majors — is experiencing some success again (not exactly thriving), albeit in a smaller context. Still, today there are 60% fewer employees at the major record labels than there were nearly two decades ago. In all, the major labels have decreased employment from roughly 25,000 to 10,000 people total. Also worth noting, over this same period, the major labels went from the "Big Six" to the "Big

Five'"(UMG buying Polygram) to the "Big Four" (Sony and BMG merging) to the "Big Three" of today (Universal buying EMI).[18] More importantly for the purposes of this section on the RIAA and sampling, when you look back at the RIAA's massive layoffs in 2009, it was clear that they didn't have the money, the resources, and/or the man power to continue to fight any of their terror-style litigation battles.

I've long maintained the end of "fake law" in sampling would eventually have to come to an end. That is to say, given the growing popularity of the art of sampling and the increased awareness of copyright law — in particular a renewed focus on how the de minimis and fair use safe harbors help fulfil the objectives of copyright law — I still hold that the music industry's attitude towards sampling and sample clearance will eventually have to reverse itself. In other words, I still see the ultimate moment coming in which the RIAA will be forced to firmly acknowledge, as part of a more streamlined sample clearance systtem, that there are instances in which digital samples of sound recordings may be de minimis or fair use.

Finally, it should be understood that the RIAA's fight with Napster was, in reality, a continuum of the RIAA's sometimes bizarre fight against technology itself — A fight that the RIAA was destined to lose, and one that the RIAA should have known that it could not win in the end. In truth, the RIAA failed to realize that by going after Napster, instead of *working with* Napster, they actually helped to *further* cripple their already non-existent end-user distribution system. In turn, this not only opened the door for multiple music streamers that the RIAA could never control, it also brought about the demise of countless music executives and other music insiders, many of whom were likely gun ho about shutting Napster down at all costs.

The RIAA could have seized the opportunity of the moment, much in the same way that the film industry did 50 years ago. In

[18] Mike Masnick, "RIAA Insists That, Really, The Music Industry Is Collapsing; Reality Shows It's Just The RIAA That's Collapsing," https://www.techdirt.com/articles/20120217/15023417795/riaa-insists-that-really-music-industry-is-collapsing-reality-shows-its-just-riaa-thats-collapsing.shtml (Accessed April, 2015).

the 1970s, the motion picture companies urged Congress to restrict the sale of video cassette recorders in the United States, fearing that duplication of films would limit their first-run movie profits. But after losing the anti-video battle in Congress, *and* in the courts, the film industry embraced the technology, seized the opportunity of the moment, and opened up a whole new sector for redistributing its products. And thus was born the highly lucrative home video market. By contrast, when the major record companies tried to prevent Digital Audio Taping (DAT) equipment from making its way to the consumer market in the late 1980s — *because the RIAA feared that high quality home music copying would limit compact disc sales* — they didn't embrace the technology or take advantage of the moment. Instead, the RIAA saw technology — in this case digital audio recording technology — as a threat to their business. The RIAA maintained that better consumer (home) copying technology would hurt *CD* sales, so the RIAA fought to keep consumer digital audio recording formats, like DAT, off the market. But the RIAA's efforts ultimately failed, as Congress passed the Audio Home Recording Act (AHRA) in 1992, which enabled the release of recordable digital formats such as Sony and Philips' Digital Audio Tape without fear of contributory infringement lawsuits.[19]

***

If the major labels continue to work against the development of a fair and balanced system sample clearance system, one that is practical, just, low-cost — and something just as easy to obtain as a compulsory cover license — they're going to lose big once again. Sampling is only going to continue to grow in popularity, not decline. And making it harder to clear samples only leads to the advent of alternative sample clearance systems and processes. And here, we can already see that at least one upstart company, Tracklib, has beaten RIAA to the punch, just as Spotify did in streaming.

[19] For further information on RIAA's fight against digital audio technology, see legislative history on the Audio Home Recording Act (AHRA)—17 U.S.C. §§ 1001–10: Senate Report 102-294; House Report 102-780; House Report 102-873 (Part 1); House Report 102-873 (Part 2).

And who signed on with Tracklib as a principal in 2018? Deborah Mannis-Gardener, the foremost authority on sample clearances and the most widely recognized sample clearance agent in the business! You think she didn't (doesn't) see the writing on the wall?

Finally, as recording technology continues to improve, further facilitating the ease of the technical component of sampling, the art of sampling will inevitably become a compositional process even more widely used. So rather than continuing to stifle creativity, via its impractical sample clearance system, the RIAA should instead be trying to develop an automated and more equitable and simplified sample-clearance system. The current sample-clearance system is, in effect, a non-system; it's onerous, there are no regulatory parameters, and sampling itself is, for all intents and purposes, criminalized by it. Such a scenario assures that only the most resourceful and well-positioned recording artists have the access to clear samples (*when they actually need clearing*). And this issue of unequal access certainly stands in direct odds to the equal access that the Copyright Act, under the compulsory license for nondramatic musical works provision, already grants to the public.

***

Important Conclusions About the Sample Clearance System

The present sample clearance system is costly and deeply flawed. It's a system that is hopelessly one sided, especially since all of the real power belongs to the owners of the copyrights to sound recordings and music compositions. And basically 90% of these copyrights are owned by just four large music groups. Not only does this system grant veto power over any license request, there's also no mechanism in place, like a compulsory licensing scheme, to compel copyright owners to grant licenses to license seekers. Outrageous demands and outright denial by copyright owner(s) or sampled recording artists can be made for any reason. And because sample clearance involves high costs, both in terms of money and time, it's a system that puts the likelihood of clearance squarely on the side of those with greater resources. In effect, this blocks sample clearance from those who aren't able to pay. In other words, the present sample clearance system is rigged to favor the most successful artists with major label backing, music business connections, or extensive financial resources. Additionally, let's not forget that there's no regulation or Congressional oversight of the sample clearance system; all of the ground rules, ad hoc as they are, are entirely made up and enforced by the music industry alone.

Can the Sample Clearance System Be Reformed?

The music industry is notorious for hurting its own interests, so I suspect that the RIAA won't take the lead in reforming the sample clearance system — that is until they're forced to play ball, much in the same way that music streaming has forced the major music labels to play ball. Even though it's in the music industry's best interest to streamline the sample clearance system, to make it more accessible, more affordable, and to implement change that makes it possible for all clearance requests to be granted for a minimal fee and uniform mechanical and publishing royalty splits, I doubt seriously that the music industry will do so until

they're forced to do so. And this pressure will likely come either by more samplers openly affirming de minimis and fair use; or by yet another headline-making court decision that reaffirms that de minimis applies to sound recordings; or by an upstart company that comes along with the technology, innovation, and foresight to revolutionize the entire sample clearance system.

In the mean time, the music industry, which prefers to work only withn its own (often counterintuitive) bubble, will continue to operate based on the top-down perspective of its own biases, its constant fears of copyright infringement suits, and its deliberate distortion and misrepresentation of copyright law. This is why clarity about copyright law is especially important to sample-based hip hop beatmakers (producers) and other musicians who sample. A solid grasp of copyright law — what the Copyright Act actually stipulates and what the objectives of copyright law are — means that all sample-based musicians are better informed about when a sample is less or more likely *in need* of clearance.

But what if, in an attempt to head off the floodgates that de minimis or fair use are going to inevitably open up, the music industry came together and tried to establish its own "industry custom" parameters for what types of sampling are de minimis or fair use? Would that work? No! For one thing, the music industry is incapable of setting truly fair parameters. The major record labels and music publishers hold all the leverage in the present sample-clearance system. So who exactly would be called upon to help set up these parameters? Would it be a panel frontloaded by major label executives, music lawyers, music publishers, and sampled recording artists? Would this panel include copyright scholars? Would this panel include sample-based musicians, and if so, *which* sample-based musicians would be invited? More specifically, if sample-based musicians, especially beatmakers (producers) from hip hop/rap music's sampling tradition, were even invited to a music industry panel charged with setting parameters or guidelines for samples that the RIAA recognizes as de minimis or fair use, what sort of real input would they be allowed to have? Point is, why should anyone believe that the music industry would do anything

other than draft parameters that represent the thinnest concept of de minimis or fair use? In any event, we must remember that no matter what the music industry could established in terms of its own parameters, such guidelines could never supersede copyright law. Which means that, since there is no bright line for de minimis or fair use, any attempt to actually establish such a bright line would ultimately be futile. What perhaps could be established, however, is a system based on the quantitative and qualitative nature of the sample. But even this could never override what copyright law already permits.

"Clear All Samples" is Not About Copyright Law, It's About "Industry Custom"

It's important to remember that music executives, lawyers, and sample licensing professionals — who may or may not know that most digital samples used in the hip hop/rap music tradition tend to make de minimis or fair use of the sound recordings that they borrow from — insist that *all* samples, no matter the amount of the sample, the character of the sample, or even the level of transformation of the sample, must be cleared. This view is not grounded in a solid understanding of copyright law or a proper reading of the Copyright Act. Instead, this view is born from the major labels' insistence that *all* samples must be cleared, not because it's the law — there is no law expressly prohibiting sampling as an activity, nor is there any law that stipulates that a digital sample of a sound recording cannot be fair use — but because it's "industry custom" to do so. We also can't forget the views of the sampled artists, the other stakeholders in all of this. Like many in the music industry, most of these stakeholders lack a firm grasp of copyright law. Moreover, they often don't have a realistic understanding of the nature or complexity of the art of sampling; typically, they believe that *any* digital used without permission or payment is automatically copyright infringement. But that's certainly not the case.

Thus, achieving a middle ground or some kind of a fair compromise in the sample clearance system can't really happen if

the starting point for any such negotiation takes place from where we are now. The music business has leverage based on common music industry business practices as well as the *Grand Upright* and *Bridgeport* decisions. The music industry does not, however, have leverage when it comes to de minimis, fair use, and what the actual statutory language of the Copyright Act stipulates, or how courts have long interpreted de minimis and fair use. So any middle ground or fair compromise discussion must begin with the recognition that some digital samples of sound recordings may indeed be de minimis or fair use.

Further, consider this. If the music industry maintains that one incentive to license samples is reciprocity and revenue, might there be another incentive? Could it be that the music industry's other incentive is to maintain the climate of illusion that *all* samples must be cleared, thereby pre-empting the trouble that successful affirmative de minimis and fair use defenses would cause?

Coda

The Advancement of Digital Sampling Technology: Have Courts Finally Started to Catch Up? And What Does This Signal for Sample Clearance?

In terms of more context, there are two critical questions that we should ask about the decisions in key copyright infringement cases involving digital sampling and sound recordings. First, Why have the functionality and availability of digital audio equipment increased dramatically in the last 20 years? Is it by mistake that digital audio equipment manufacturers and software developers have continued to develop digital samplers with *more* sampling time and *more* functionality, even after *Grand Upright* and *Bridgeport*? And if sampling, the mere activity, was in effect "legal" only for those who can pay a clearance fee, but "illegal" for those who can't afford exorbitant and unregulated sample clearance fees (which are virtually all common beatmakers and other musicians), then *who* exactly are the digital audio equipment manufacturers and software developers developing their products for? And when you consider that, in both respects, the target market is now independent pro-consumers, who then are these audio equipment manufacturers and software developers mass marketing these samplers to? The affordability and availability of high-powered samplers are at its highest level since the advent of consumer digital samplers more than 40 years ago. Surely these digital audio equipment manufacturers and software developers are bringing these products to market for a reason, no?

Furthermore, are these digital audio equipment manufacturers and software developers on the right or wrong side of copyright law? Seems clear to me that they're well embedded on the right side of copyright, which is part of the reason why they're not slowing down. For instance, in 2024, Akai released "MPC Stems," a new technology that allows users to separate audio and samples into 4 layers. With MPC Stems, users can now remove vocals or drums

from any song that they sample! Such technology, which will help sample-based musicians transform samples to an even higher degree, is in demand precisely because there are far more conumers using samplers these days than ever before. And if the potential for an even bigger society of sample-based musicians (especially sample-based beatmakers (producers), didn't exist, it's unrealistic to think that digital audio equipment manufacturers and software developers would even bother to continue to upgrade and market *new* samplers.

Next, consider this. If the courts are truly concerned with the "*conduct"* of the contemporary business structure, as Judge Duffy implied in his ruling in *Grand Upright*, why then have the courts not taken their lead from the top manufacturers and software developers of digital samplers? Clearly, this is an example of technology being way ahead of the courts. That is to say, if the makers of digital audio products consider sampling to be a major staple in the contemporary music production process, shouldn't the courts at least look into *why* that is? Moreover, we must assume that the courts know very well that in a market economy, product availability generally reflects consumer demand. Therefore, shouldn't the courts be concerned with *why* digital samplers have continued to grow in demand? Today's music is being crafted by using both traditional instruments — guitar, piano, bass, drums, etc. — as well as non-traditional instruments — EMPIs like drum machines, digital samplers, sound modules, sequencers, and the like. More importantly, EMPIs are not only increasingly becoming the choice of many different musicians, EMPIs are becoming an unavoidable part of the contemporary music-making process. Plus, lest we forget, digital sampling has actually been embedded deeply within the fabric of modern music production practices for over 40 years.

So instead of trying to rewrite the fundamental themes of a free market society; and instead of trying to dictate to the public what is and isn't art or what is or isn't "real" music; and instead of stifling the creativity and advancement of an entire music genre and art form; and instead of only trying to protect past recording

artists and past art forms, the courts should be trying to preserve the objectives of copyright law and the principles of a free market society. Fortunately, as evidenced by more reccent copyright infringement cases involving music sampling, like *Saregama India Ltd. v. Mosely*, *Notorious B.I.G. LLC v. Lee Hutson*, *TufAmerica Inc. v. WB Music Corp., Trena Steward v. Kanye West*, *Batiste v. Najm*, *VMG Salsoul LLC v. Madonna*, and *Estate of James Oscar Smith v. Cash Money Records, Inc.*, this is exactly the direction that the courts are headed in. And this is a strong indication that the sample clearance system is about to change.

Chapter 24

How to Fix Sample Clearance, Part 1

How the Sample Clearance System *Should* Work

Before addressing how to fix the sample clearance system, it's first necessary to point out why amending the Copyright Act to include a compulsory license for digital samples of sound recordings is a bad idea.

"The Framers of the Constitution were excellent social psychologists." Their premier foresight was about the balance of power, the establishing of checks and balances, so that democracy could prevail and a monarchy could never take hold. Embedded within this premier foresight was the Framers' understanding that "democratic communities are subject to 'the turbulence and weakness of *unruly passions*,' and that society needeed to be protected from itself. So the Framers built mechanisms into the Constitution "to slow things down, cool passions, require compromise,"[1] recognize practical sense, and protect the right of the public against the tyrany of its leaders. This is why the Framers of the Constitution made it difficult to amend or change the Constitution. They intended for the process to be complicated so that only changes that were essential to the advancement of society and the protection of the public could be made to the Constitution. United States copyright law was constructed with this same foresight. It was built with mechanisms that are meant to advance society and place the interests of the public above the rights of copyright owners. Any

[1] Jonathan Haidt, "Why The Past 10 Years Of American Life Have Been Uniquely Stupid," *The Atlantic*, May 2022 Issue https://www.theatlantic.com/magazine/archive/2022/05/social-media-democracy-trust-babel/629369/].

amendment to the Constitution that can disrupt these mechanisms must be considered carefully on the grounds of whether it does or does not serve the objectives of copyright law.

A compulsory license for cover songs is not the same thing as a proposed compulsory license for digital samples. A cover song is definite, it has a clear beginning and end, and it's *absolute* as a product. There's a set fee to record a version of an *entire* song, to remake a pre-existing song in one's own vision, while preserving the basic character of the primary song (lyrics, main melody, etc.) in the secondary work. A digital sample of a sound recording, by contrast, is not absolute; there's an infinite number of possibilities involved with the use of a sample. Sampling (borrowing) *pieces* of a song or any sound recording is not the same thing as doing a cover version of a song. Congress well understood the difference between covering (copying) an entire sound recording (song) and borrowing pieces from a sound recording. Congress didn't make a compulsory license for *samples* — small takings — of sound recordings when it added sound recordings to the list of copyrightable subject matter in 1971. The point being that there are no compulsory licenses for small (insubstantial) takings of *any* copyrightable subject matter.

With the Copyright Act of 1976, Congress could have added a compulsory license for *all* takings that did not constitute a full song (ergo *samples* of any size). But Congresss didn't do that. Instead, Congress codified fair use in the Copyright Act and made it clear that fair use applies to all copyrightable subject matter, including sound recordings. In other words, Congress made it clear that sound recordings are subject to the same rules and limitations of copyright law as all other copyrightable subject matter. Which means that, as with all other copyrightable subject matter, a copyright owner's exclusive right in sound recordings is *not* absolute; there are indeed instances in which borrowing from copyrighted sound recordings, *without* permission of the copyright owner, are permitted. A compulsory license for digital samples of sound recordings would undermine this specific permission that copyright law grants to the public.

More significantly, a compulsory license for digital samples of sound recordings would severly disrupt the objectives of copyright law. First, it would *expand* the rights of copyright owners of sound recordings. Second, and more troubling, it would lead to similar changes to the other copyrightable subject matter. Once you imagine a world in which a compulsory license for "samples" of literary works exist — a world wherein the public must pay a statutory rate to borrow even one word from a literary work — you quickly recognize how ridiculous and harmful it would be to amend the Copyright Act to include a compulsory license just for the digital samples of sound recordings. Such an amendment, which would claw back the protections that fair use and de minimis provide for permissive borrowing, would throw the system of copyright law completely out of whack and end permissive borrowing as we know it.

Beyond the major chaos that a compulsory license for digital samples of sound recordings would create, there are several other reasons why a compulsory license for digital samples of sound recordings is not the answer to the problem. First, such a compulsory license suggests that all samples should be cleared simply because they *could* be cleared. One *could* pay a licensing fee to use the headline from a newspaper in a documentary film, but that's not a requirement because such use is fair use. Imagine commentators arguing that there should be a compulsory license for borrowing excerpts from newspaper articles. It's neither practical nor necessary. Like a complete song, an article is an absolute, so newspapers and magazines have the sole discretion to set their licensing rates for *full republication* of their articles. But they cannot set rates for every element — every *possible* "sample" — of their articles. Every individual sentence, word, letter, or marking within each article is *not* protected by copyright law, and it would be absurd to attempt to create licensing fees for every individual element. See where this is going? While you can set a compulsory license to do a cover version of a complete song, you can't possibly set a compulsory license for every single sound embodied in a song or other sound recording.

Next, a compulsory license for digital samples of sound recordings would rely inherently on an ad-hoc, unfair method for determining the types of digital samples (borrowings) and corresponding durations. This does not benefit the public, and it's the sort of thing that the Constitution protects the public from.

Finally, a compulsory license for digital samples of sound recordings would mostly benefit the bureaucracy that would have to be created to administer such a license. Following the bureaucracy, in order of who would benefit, would be the major labels and music publishers, followed by recording artists. Sample-based musicians, who essentially reflect the public and who create new works and contribute to the advancement of society via these works, would be the last beneficieries. In this paradigm, the critical thing to remember is that the purpose of copyright is to advance society, and this pupose places the interest of the public above all. Hence, any change to the Copyright Act that harms the interests of the public will harm the interests of society and undermine the objectives of copyright law.

Again, we must remember that, while copyright law grants an exclusive monopoly to the owner of a copyrighted work, that monopoly is *limited*. So on one hand, copyright law promotes the advancement of society by encouraging people to create things, which yields new knowledge. On the other hand, copyright law *ensures* the advancement of society by making copyrighted works, in certain circumstances, accessible to the public free of charge and without any need of permission from the copyright owner.

Some commentators argue that one aim of a compulsory license for digital samples of sound recordings is to bring certainty to the issue. The idea being that, while de minimis and fair use exist, there's no certainty as to when a sample is or isn't de minimis or fair use. But the absence of bright lines for what is or isn't de minimis or fair use is intentional; it's one of the mechanisms purposely built into copyright law to advance society and protect the interests of the publcic. There's no "certainty" when an author borrows lines from a book, there's no bright line for determining if an author's appropiation of a literary work is de minimis or fair use. Yet no

one argues for a compulsory licenses for "samples" of literary works. This is because using a compulsory licensed scheme that's designed for the certainty of using a *full* work — like covering an *entire* song — for the uncertainty (unpredictable nature) of borrowing *pieces* (elements) of a copyrighted work, is illogical and counterintuitive.

Finally, do we really want Congress tampering with the most critical built-in mechanisms that protect the public's right to persmissive borrowing? What happens when Congress recognizes that, in order to maintain parity among all eight categories of copyrightable subject matter, it can't stop at creating a compulsory license just for digital samples of sound recordings? What happens when Congress turns its sights on making a compulsory license for borrowing ("sampling") from literary works, books in particular, which have served as source material far longer than song recordings have? If we're to understand that making a compulsory license for borrowing from books and other literary works is impractical, we should then understand that it's also impractical to create a compulsory license for sound recordings or any other copyrightable subject matter.

Now, this all said, what follows in this chapter are my thoughts, proposals, and possible solutions for reforming the sample clearance system.

How to Fix the Sample Clearance System

First, I suppose it's worth asking if the sample clearance system actually can be fixed. Sure, it *could* be fixed; it certainly needs to be. But it's not likely to happen because the level of cooperation needed by the major record labels, music publishers, and recording artists is high. Major record labels and music publishers — who own roughly 90% of the music on Spotify, etc. — would have to give up much of their discretion, and they'd have to be willing to streamline the sample clearance process. Most notably, they'd have to create standard low-cost clearance fees and establish standard publishing splits. They'd also have to forfeit the right to deny clearance. This

is one area where a compulsory license for cover songs is instructive. No one is restricted from doing a cover song. Similarly, if a digital sample *needs* to be cleared and the license seeker is willing to pay the standard fee to clear it and accept the associated publishing splits, then the license seeker shouldn't be restricted from using it.

In theory, overhauling or streamlining the structure of the present sample clearance system could be done (later in this chapter, I explore how a new sample clearance service called Tracklib has done it). But there are many in the music industry who ignore, or perhaps do not recognize, the need for an overhaul of the sample clearance system. And let's not forget that there are many copyright owners in the music industry who lack a proper understanding of both the art of sampling and copyright law. So, any change in the sample clearance status quo would be seen by them as an affront against their (mostly flawed) interpretation of copyright law and so-called common industry practices. Still, if the sample clearance system was properly fixed, it would be much more efficient and acessible. This efficency would make it easier to clear samples — *that need to be cleared* — as well as increase the amount of revenue that record labels, music publishers, and sampled artists could potentially receive from licenses for digital samples.

Centralize the Sample Clearance System; Create the Recording Industry Sample Clearance Agency (RISCA)

The first step to fixing the sample clearance system involves creating a centralized agency or clearing house to handle all sample clearance requests and issues. The present sample clearance system is an ad-hoc, every-person-for-themselves mechanism where access is not equitable, pricing is not formally tiered or even capped, and the time costs are uncertain. A centralized sample clearance system, let's call it the Recording Industry Sample Clearance Agency (RISCA), could bring much needed uniformity to the sample clearance system.

Set up and monitored by a committee that would include sample-based musicians, copyright scholars, record labels, music publishers, and sampled artists, and acting under the authority of the RIAA, RISCA could establish a number of key things. RISCA could set tier pricing and price caps for all sample license requests for samples that fall below the predetermined length that RISCA establishes. Indie or low-budget pricing and major label pricing, including reasonable fee minimums and caps based on the major label artist's popularity, could be formally set up. Additionally, RISCA could establish standard publishing splits. And RISCA could also standardize publishing payments through a mechanism that's similar to ASCAP's and BMI's payment systems.

Next, RISCA could set time constraints for RISCA sanctioned clearances. For example, after receiving a sample license request and a RISCA "clear sheet," which would include the corresponding tier pricing and other RISCA information, like publishing details, the license seeker would have 30 days to send the sample clearance fee and other required information to RISCA. If the license seeker fails to send payment and the required information within the allotted 30 days, the license is invalidated. Such formal pricing tiers and time constraints would create a firm transaction time window, and would thereby remove much of the unpredictability from the process.

Next, RISCA could institute an industry-wide acknowledgement that some digital samples may be de minimis. Despite *Bridgeport*, which actually has no controlling authority on the matter, not all digital amples of sound recordings are infringement *per se* without a license. Therefore, one key to fixing the sample clearance system would be establishing a "de minimis safe harbor" tier that's free of charge. While I'm against any bright line, I recognize that the establishment of such a tier would be helpful, because, at the very least, it would establish the types of digital samples and uses that RISCA does not require clearance for. Using its "RISCA De Minimis Standards and Best Practices" statement, RISCA could publish its parameters for what it considers to be a "de minimis safe harbor" sample, i.e. an insubstantial sample that doesn't require

clearance. For example, these parameters could include a fixed time length cap of 3 seconds, and a reasonable transformative requirement for uses of 3 to 5 seconds; anything 5 seconds or more would not be shielded by RISCA's De Minimis Standards and Best Practices. In any case, RISCA could serve as the music industry's adjudicator and assessor of all samples that do not clearly meet RISCA'S own de minimis threshold. Under this structure, consider a license seeker who's unsure if he should request a license for the use of a digital sample of a single drum kick sound from a Led Zeppelin song. In this scenario, the "RISCA De Minimis Standards and Best Practices" statement and accompanying parameters would make it clear to the license seeker that no license is required.

Finally, RISCA could also create an automated system by which the entire sample clearance process is handled. For instance, on RISCA's website, license seekers could see RISCA's tiered pricing, its De Minimis Standards and Best Practices statement, and accurate information about copyright law, specifically what constitutes copyright infringement and a detailed explanation of fair use. The hope is that this information would help license seekers determine if they even need clearance for a particular use. Also, such information would clearly outline the penalties for copyright infringement.

License seekers could also initiate the clearance process on the RISCA website by submitting a simple online form. Since the license seeker can't be expected to know the names of all of the copyright owners, menu prompts could include the name of the recording artist and the recording artist's work that the license seeker is interested in, the length of the sample, and the tier level the license seeker is making the request under, along with the name and contact information of the license seeker.

Of course, this automated system would require record labels and music publishers to sign on to RISCA. But perhaps as a recognized sub-body of the RIAA, the RIAA could stipulate that all major record labels are already opted in unless they formally opt out. Those record labels opted in would be submitted to the RISCA online database, where license seekers could see their contact information and perhaps even current catalog. For record

companies to opt out, they'd have to make a formal request, and maybe even pay for a RISCA "opt out" waiver. I'm not sure how record labels and music publishers could be compelled to sign on to RISCA, but I'm convinced that most would sign on if they understood how much revenue they'd stand to earn (more regularly) from a streamlined sample clearance system. By fixing the sample clearance system via a centralized clearing agency like RISCA, record labels, music publishers, and sampled artists could tap into a more consistent and lucrative revenue stream. Hence, I think this would provide the incentive necessary for all of these stakeholders to opt in with RISCA.

The Parameters of RISCA's Tiered System

Before I delve into the specific details of my proposal for the parameters of RISCA'S tiered system, it's necessaary to outline the required elements that make for a proper sample clearance system. First, a proper sample clearance system should be on par with the scheme that copyright law already stipulates for "covers" of songs. Again, I'm strongly against an amendment to the Copyright Act that would include a compulsory license for digital samples of sound recordings. Nevertheless, I do believe that some kind of compulsory license scheme must be at the foundation of a properly functioning sample clearance system. And since the music industry prefers to operate under its own "industry custom," it makes more sense to make sample clearance complustory *within* industry custom. Second, a proper sample clearance system should include a clearly defined and standaradized compensation and publishing split scheme that's fair to copyright owners, sampled artists, and sample-based musicians. Third, a proper sample clearance system should remove any obligation of a license when the appropriated portion of a copyrighted sound recording is substantially different, both quantatively and qualitatively.

***

Material Scope of the RISCA Parameters

Guaranteed Clearance

The material scope of my proposal for RISCA's parameters would include the guarantee that copyright owners grant a license for any sound recording or audiovisual work that has been distributed to the public in the United States under authority of the copyright owner, and from any publicly broadcast television program (whether received through traditional, cable, or satellite transmissions).

Purpose

Individuals would be permitted to use the RISCA license only if one's purpose was to distribute the musical works embodying the digital sample to the public. In other words, for the purpose of creating new works (beats) that include the appropriated elements of the copyrighted sound recording.

Usage, Clearance Fees, Publishing, and Royalties

It's widely recognized by consumers, the music industry, and the courts alike that hip hop/rap music first popularized and developed the art of sampling as it's commonly known today, and that it's hip hop/rap music that continues to lead advancements in the art form. Additionally, the overwhelming majority of digital sampling that has taken place in the last 40 years has occurred (and still occurs) in hip hop/rap music. Hence, RISCA usage parameters should be based on the compositional practices of the hip hop/rap music tradition and, more significantly, the standards and best practices established in the sampling tradition of hip hop/rap music. Moreover, RISCA usage parameters should use hip hop/rap songs as the guiding examples for lengths of samples and the various ways that samples are commonly used to make new music.

In hip hop/rap music, most sample-based beats are based on a 1-, 2-, 4-, or 8-bar phrase (looped). And often the samples used for one beat are taken from the same sound recording. Further, the average duration (i.e. length) of a typical sample used in a hip hop/rap sample-based beat is usually between 0.5 - 4 seconds on the small side, 5-11 seconds on the medium side, and 12-24 seconds on the longer side. Thus, the length of the digital sample(s) cleared by RISCA would be calcuated cumulatively, i.e. by the total length of all samples used, *not* how many times the sample appears in the secondary work. So two samples totaling 4 seconds each would count as a 8-second usage; three samples totaling 4-, 6-, and 8-seconds respectively would count as a 18-second usage.

Next, a RISCA sample license would grant license seekers the right to use digital samples from the licensed sound recording within *one* new musical work. If a license seeker wishes to use the same or different samples from the same sound recording in another work, the license seeker would be required to obtain a new RISCA license for the additional work.

Next, usage should be divided into four levels and categories that are distinguished by the amount taken, quantitatively and qualitatively. Quantitatively, the four levels should range between 4 and 24 seconds. (Any *one* sample beyond 24 seconds would require a sync license; RISCA could establish standard sync rates for longer samples.) Qualitatively, the level should be categorized by whether the amount taken is or isn't taken from the "heart" of the song, i.e. the hook or the main melody or main rhythm — *taken as a whole*. Fragments taken from the "heart" of song do not meet the "heart" of song threshold.

In terms of fees related to usage, there should be one standard RISCA fee for each of the four levels and categories. Broken down into detail, it looks like this:

Level 1: 4-7 seconds, Non-Heart of song: $30
Level 1: 4-7 seconds, Heart of song: $50
Level 2: 8-11 seconds, Non-Heart of song: $75
Level 2: 8-11 seconds, Heart of song: $100
Level 3: 12-15 seconds, Non-Heart of song: $200

Level 3: 12-15 seconds, Heart of song: $300
Level 4: 16-24 seconds, Non-Heart of song: $400
Level 4: 16-24 seconds, Heart of song: $500

Under RISCA, all samples 0-3 seconds in length should require no clearance.

The point that I hope to stress with these levels is that there shouldn't be arbitrary clearance fees, and clearance fees should be tethered to reality, not *presumption*. What I mean here is that, the *presumptive* value of a given sample must not outweigh reality. For instance, a sample taken from an Al Green song should not be treated presumptively more valuable than a sample taken from a David Ruffin song or a sample taken from the song of any other recording artist. There's no assurance that *any* sample, whether taken from a well-known song performed by a well-known artist or not, will be profitable. For instance, the cover of a well-known song by a well-known recording artist does not ensure the success of the cover song. Likewise, the use of samples from original works does not ensure the success of the song that embodies the samples. Hence, fees and publishing splits should be tied to the *actual* success of the secondary work, not the *presumptive* success of the secondary work or the value appraisals of the rights holders. So there are to be no "advances" paid on (anticipated) royalties. For example, the compulsory license for cover songs is one flat rate, regardless of the song that's being covered or who's song it is; and there are no advances paid.

So in this paradigm under RISCA, after the initial clearance fee is paid up front to RISCA, rights holders and sampled recordings share in a capped percentage of the success of the secondary work. In other words, under no circumstances should the copyright owners and the sampled artists ever receive more than a combined 10% of the publishing in the secondary work. The main reason for this has to do with rap lyrics and rap performance.

Under the current broken sample clearance system, rap lyrics and the rap performance are treated as being *less* valuable than the sample(s) used. Even though rap lyrics are written and performed

without the recording artist who performed the sampled song and without the copyright owners to the sound recording and music composition of the sampled song, these recording artists and rights holders typically receive between *50-100%* of the publishing. This is absurd! Remember, we're talking about *samples* of songs, not cover versions of *entire* songs. So it's unreasonable to think that a 4-8 second-sample of a song — a sample that's transformed and combined with additional musical elements and recontextualized and reconceptualized — should command *50-100%* of the publishing in an entirely new song. Remember, the new song contains new lyrics *and* a new vocal performance that's written and performed by someone other than the rights holders or the recording artist of the song that was sampled. Since neither the recording artist of the sampled song nor the copyright owners to the sampled song have absolutely no hand in the writing or performance of rap lyrics, they should not receive the lion's share of the publishing, let alone even half of the publishing.

Mechanical Lincense Royalty: Context and Reasonable Rates

Before I detail my proposal for RISCA's mechanical royalty rates, it's necessary that I provide some critical context. And this context relates to the fundamental difference between cover songs and sample-based songs (more specifically, songs that employ sample-based beats). You see, unlike what happens with a cover song, wherein the entirety of the musical work — the music composition and the accompanying lyrics — are being borrowed, what's being borrowed when a digital sample is used is *not* the entire song, i.e. the entire music composition, nor the entire essence of the song, nor the lyrics. When a digital sample is used, only a fragment, a *snippet* — usually insubstantial quantitatively and qualitatively — of the sound recording and music composition is being used. And where the sample is of a sound that is *not* part of the music composition, the music composition is not even being used at all. Examples of samples that do not take from the music

composition include, but are not limited to: A sample of a mic dropping, a sample of equipment feedback, or a sample of verbal discussions and asides.

Next, when a cover song is created, none of the sounds in the original sound recording are used in the cover version. So the only copyright that must be cleared is the music composition copyright, not the sound recording copyright. Since there are no sounds from the sound recording being used in the cover version — and note, *imitation* of the sounds from the sound recording do not constitute use of the sound recording — infringement of the copyright in the sound recording cannot take place. This is why for cover songs, musicians pay the compulsory license rate *only* for the music composition, not the sound recording.

Finally, in terms of market potential — ergo, "market harm" — there's a huge difference between a cover song and a sample-based song that merely contains a sample of another song. While a cover song can compete in the same market of the song that it covers or even replace the market for the song that it covers, a sample-based song typically never competes in the same market of the song that it samples, nor does it ever replace the market of the song that it samples. For example, take No Doubt's hit song "It's My Life" (2003), which is actually a cover of Talk Talk's 1980s hit "It's My Life" (1984). No Doubt's version of "It's My Life" *competes* with Talk Talk's original. In fact, today, in commercials and at retails stores and venues, No Doubt's version of "It's My Life" is heard much more than Talk Talk's original. So it could be argued that that No Doubt's version of "It's My Life" has replaced the market for Talk Talk's original.

On the other hand, a song like 50 Cent's "Window Shopper" (2005), produced by Chris Styles and Sire, does *not* compete with The Wailers' 1970s song "Burnin' and Lootin' (1973), the song which "Window Shopper" samples a small snippet of. 50 Cent's "Window Shopper" is *not* a cover version of The Wailers's "Burnin' and Lootin'." Moreover, "Window Shopper" and "Burnin' and Lootin" represent two different and clearly defined music genres. "Window Shopper" is a hip hop/rap music song, while "Burnin' and

Lootin'" is obviously a reggae song. By contrast, No Doubt's and Talk Talk's versions of "It's My Life" are both obviously rock songs.

RISCA Royalty Rates Using the Section 115 Model

Section 115 of the Copyright Act (17 U.S. Code § 115) "provides a compulsory license" to make cover songs and to "make and distribute phonorecords" of those cover songs, "subject to certain terms and conditions of use."[2] Under this provision, anyone can obtain a compulsory license to make a cover song and distribute it. Section 115 also specifies that this "compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary ***to conform it to the style or manner of interpretation* of *the performance involved."*** In other words, a compulsory license for cover songs allows anyone to do their own *version* of a pre-existing song.[3] As of December 12, 2023 the rates for the compulsory license for cover songs are as follows. For physical phonorecords: "12.4 cents or 2.38 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital." For Permanent downloads: "12.4 cents or 2.38 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital." And for Ringtones: "24 cents per ringtone."[4]

Since a digital sample is only a fragment — and often an unrecognizable snippet — of a sound recording, and since a sample-based song can never harm the market of the song that it samples, RISCA's mechanical license royalty rates for digital samples should be in line with — not greater than — the Copyright Act's mechanical license royalty rates for cover songs. The only difference is that RISCA's mechanical license royalty rate for digital samples should be linked to the levels of amounts taken that I noted earlier.

[2] "Notice of Intention to Obtain a Compulsory License Section 115," U.S. Copyright Office, https://www.copyright.gov/licensing/sec_115.html last accessed May 13, 2024.
[3] 17 U.S.C § 115 (U.S. Code, Title 17: Copyrights, Section 115).
[4] "Mechanical License Royalty Rates," Copyright Royalty Board/Licensing Section: Copyright Royalty Board Library of Congress M-200a rev: 03/2024.

And in this case, RISCA's mechanical license royalty rates for digital samples should be as follows:

> Level 1: 4-7 seconds, Non-Heart of song: For physical phonorecords: 6 cents or 0.1 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. For Permanent downloads: 6 cents or 0.1 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. And for Ringtones: 8 cents per ringtone.
>
> Level 1: 4-7 seconds, Heart of song: For physical phonorecords: 6.5 cents or 0.2 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. For Permanent downloads: 6.5 cents or 0.2 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. And for Ringtones: 8 cents per ringtone.
>
> Level 2: 8-11 seconds, Non-Heart of song: For physical phonorecords: 7 cents or 0.6 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. For Permanent downloads: 7 cents or 0.6 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. And for Ringtones: 10 cents per ringtone.
>
> Level 2: 8-11 seconds, Heart of song: For physical phonorecords: 8 cents or 1 cent per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. For Permanent downloads: 8 cents or 1 cent per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. And for Ringtones: 12 cents per ringtone.
>
> Level 3: 12-15 seconds, Non-Heart of song: For physical phonorecords: 9 cents or 1.4 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. For Permanent downloads: 9 cents or 1.4 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. And for Ringtones: 12 cents per ringtone.
> Level 3: 12-15 seconds, Heart of song: For physical phonorecords:

10 cents or 1.6 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. For Permanent downloads: 10 cents or 1.6 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. And for Ringtones: 12 cents per ringtone.

Level 4, 16-24 seconds, Non-Heart of song: For physical phonorecords: 11 cents or 2 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. For Permanent downloads: 11 cents or 2 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. And for Ringtones: 12 cents per ringtone.

Level 4: 16-24 seconds, Heart of song: For physical phonorecords: 11.5 cents or 2.2 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. For Permanent downloads: 11.5 cents or 2.2 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital. And for Ringtones: 18 cents per ringtone.

Additional revenue, like for example, revenue from sync licenses for the new sample-based works, would be split as follows:
Level 1: 2%, Level 2: 5%, Level 3: 10%, Level 4: 20%.

Notice Requirements

After a RISCA license is granted and the license seeker has uploaded all of the required information and fees, the responsbility of serving notice and making payment to the rights holders is the responsibility of RISCA alone.

Why the RIAA Should Implement My Proposed RISCA Clearance Fees and Rates

When it comes to publishing (and clearance fees), the current sample-clearance system is unreasonable. This is largely because sample clearance, as we know it today, is not a fair and balanced proposition. A fair a balanced proposition would mean that profit sharing goes both ways. While rights holders and sampled artists insist on ridiculous publishing splits in the new works — i.e. the new songs created by sample-based musicians using samples as raw materials and building blocks for new music — what about the reinvigoration of the back catalog of the rights holders and the sampled artists? What percentage of the publishing and sales from a reinvigorated back catalog do the rights holders pay to the sample-based musicians who are responsible for that reinvigoration? The answer is *0*! So under the current broken sample clearance system, rights holders and sampled artists *benefit* twice over from the creativity and production of new works by sample-based musicians.

Thus, for righs holders and sampled artists, it would be a shame if this whole scheme were to go away. I mean, *0% of $0 = $0. This is the reality that's missed on most rights holders and sampled artists. As you read on, remember this equation: 0% of $0 = $0.*

***

Even with the music industry's "clear all samples" propaganda, the truth is, there are far more samples that are not cleared than are cleared. This is because most sample-based beatmakers (producers) do not bother to seek clearances for samples that they already know, intuitively, are either de minimis or fair use. So at the end of the day, sample-based beatmakers (producers) don't have to use RISCA. What supersedes RISCA, what supersedes any sample clearance system, is copyright law itself. Thus, sample-based beatmakers (producers) can always rely on "a statutory limitation or

exception, such as fair use."[5] And one important statutory limitation stipulates that copyright infringement only takes place when all or any *substantial* portion of a copyright work is used without the permission of the copyright owner of the work. Thus, the use of an *insubstantial* portion — i.e. de minimis portion — of copyrighted work does *not* constitute copyright infringement; therefore, it does not require permission from the copyright owner. Congress made this especially clear with regards to sound recordings:

> Subsection (b) of section 114 **makes clear that statutory protection** for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, **infringement takes place whenever *all* or any *substantial* portion** of the actual sounds that go to make up a copyrighted sound recording are reproduced…" [emphasis mine][6]

And in its handout "Sampling, Interpolations, Beat Stores and More: An Introduction for Musicians Using Preexisting Music," the U.S. Copyright Office observes that: "…*samples*, remixes, and mashups will infringe a copyright owner's exclusive rights, **unless** the use is authorized or qualifies for ***a legal exception*** or ***limitation, such as fair use.***[7]

And what about AI recording technology? Using AI recording technology, consumers can make songs that match the style, sound, and feel of any song. From the Motown sound to the Philly Sound to Led Zeppelin, musicians can make up their own songs that are in the same vein of whatever song that they prompt their AI recording tool with. These new songs, which are created essentially by mimicking the characteristics of whichever songs a consumer specifies, do not contain any actual sounds from the

[5] U.S. Copyright Office, "What Musicians Should Know about Copyright," https://www.copyright.gov/engage/musicians/ last accessed May 13, 2024 (emphasis mine).
[6] 17 U.S.C. § 114, H. Rep. No. 94-1476, p. 106, U.S.Code Cong. & Admin.News 1976, pp. 5659, 5721.
[7] U.S. Copyright Office, "Sampling, Interpolations, Beat Stores and More: An Introduction for Musicians Using Preexisting Music,"" https://www.copyright.gov/engage/musicians/ last accessed May 14, 2024 (emphasis mine); See: 17 U.S.C § 115 (U.S. Code, Title 17: Copyrights, Section 115).

sound recordings that they *imitate*. And since these new songs are not actual cover versions of the songs that they are imitating but rather mimics of the style, sound, and feel of the song *and* more broadly the song's era, they also do not contain any protectable compositional element. Hence, there is no infringement of either the sound recording copyright or the music composition of the songs that are being imitated. If consumers then sample their own newly created songs, there's nothing to be cleared because they created their own source material.

Viewed together in this light then, we should understand that the RIAA's biggest concern or challenge shouldn't be getting rights holders and sampled artists to opt into a (formal) default sample clearance system like RISCA. On the contrary, just as with the present sample clearance system, the biggest challenge for RIAA is getting *sample-based beatmakers (producers)* to opt into a (formal) default sample clearance system. Having listened to and carefully reviewed more than 1,000 hip hop/rap music releases between 1988 and 2024, I estimate that *100%* of *all* sample-based hip hop/rap music released to Spotify contains *at least* three digital samples that were never cleared (*and never will be cleared*).

***

Another factor that gives us some indication of the future of sample clearance has to with the top-line hip hop/rap music artists and their attitudes towards sample clearance. Top-line hip hop/rap music releases only make up a fraction of the sample-based music that has been released since 1988, with an explosion of independent releases beginning in the early 2000s and increasing each year ever since. In terms of sample clearance, the music industry has tried to indoctrinate top-line hip hop/rap music artists with its default "all samples must be cleared" mantra. But top-line hip hop/rap music artists have repeatedly ignored this, releasing lots of music that contained samples that were not cleared.

One recent example of this is Kendrick Lamar's 2024 smash hit "Not Like Us," a sample-based song, produced by Mustard, that

was actually as response diss record to Drake. This song was on Spotify less than 24 hours after it first appeared on *YouTube*, where Kendrick Lamar himself released it. It's obvious that the samples contained on the song were not cleared. (*And to my listening, the samples didn't need to be cleared; but that's a moot point, for the moment.*) So what's worth noting is that Kendrick Lamar opted to not clear the samples before the release of the song, which is an evident rejection of the music industry's "all samples must be cleared" mantra. So if Kendrick Lamar, one of the top-hip hop/rap music artists of all time, a veritable Pulitzer Prize winner on top of that, is, in 2024, releasing sample-based songs that contain samples that were *intentionally* not cleared, what do you think that the non top-line hip hop/rap music artists are doing?

Once you understand the bigger picture, you recognize that the RIAA, rights holders, and sampled artists need an efficient sample clearance system like RISCA more than sample-based musicians need it. Under the current broken sample clearance system, rights holders and sampled artists are leaving a whole lot of money on the table. And the only way that they stand to get even a fraction of that money is to formalize a fair and an easy-to-use sample clearance system. Otherwise, they run the risk that even top-line music artists will increasingly scoff at clearing samples, not simply because they want to drop quick releases, but because they are informed about the facts copyright law — particularly the statutory limitations and exceptions within the Copyright Act.

So if the RIAA doesn't get ahead of this soon, it's going to find itself in world where basically all sample-based artists reject the "all samples must be cleared" stance in favor of this stance: *"I believe that the samples I used were de minimis and fair use, and I'm willing to affirm that in court should I ever be hit with a copyright infringement lawsuit."* At that point, the RIAA can try to sue a multitude of artists who've released sample-based songs. But with every new summary judgment that finds that a defendant made de minimis or fair use of a sound recording, the common threshold for the courts becomes more clear and the profiles of the de minimis and fair use safe harbors rise. And this leads to fewer people thinking

that they must clear a sample first. Again, *0% of $0 = $0.* So it's better that rights holders and sample artists make some concessions now, *while they can*.

Chapter 25

How to Fix Sample Clearance, Part 2

The Tracklib Model and the Danger of Conflating "Sampling" With "Sample Clearance"

As I stated in Chapter 24, amending the Copyright Act to include a compulsory license for digital samples of sound recordings is a bad idea. So while I believe that my proposal for the RISCA compulsory license for digital samples of sound recordings is the best model to follow, I don't think that a system such as that could be adopted any time soon, mainly because I have little faith in the RIAA doing what's best for all stakeholders involved. Therefore, in addition to educating the public about copyright law — with a special focus on the de minimis and fair use exceptions — I believe that the next best option after the RISCA model (see chapter 24) is Tracklib's record store/samples model. Just as with RISCA, I've always believed that the future of sample clearance will be some form of automation that's linked to an online record store/samples model. In the following chapter, I explore Tracklib, a sample clearance service that presents the kind of automated system and record store model that I believe could revolutionize sample clearance and become the new model for clearing samples — when samples *need* to be cleared.

Why Tracklib's Sample Clearance Model Could Be the Future of Sample Clearance

In 2017, a new online music store and sample clearance service called Tracklib was launched by a Swedish company of the same name. That fall, I was granted early access to Tracklib's beta site, and, in the spring of 2018, just days after Tracklib's official launch, I spoke extensively over the phone with Tracklib's chief product officer, Oskar Sundberg.

Tracklib's site and service left me with a number of good impressions. My first impression was that Tracklib — the name stands for both "track liberation" or "track library" according Sundberg — targets itself to sample-based musicians, especially hip hop beatmakers/producers, while also offering messaging that should appeal to copyright holders. Also, Tracklib does a great job at billing itself as a record store, crate digging service, and sample clearance service.

My second impression of Tracklib deals with the sound recordings (i.e. source material) in their catalog, which at the time of this publication is 100,000+ tracks (up from 70,000 tracks in 2018). The quality of the so-called "pre-cleared" songs that are offered on Tracklib is very good. I was able to quickly and easily find lots of tracks worth sampling because the site features a terrific search engine that allows you to search for tracks in various ways, including by: popularity, alphabetically, what's new, region, release date, genre, and track type, ie. bass, drums, and percussion sounds, and even sound FX (sound effects). Tracklib's site also features "Curated Collections" by various music producers, like hip hop legends Prince Paul and Erick Sermon. This feature is particularly helpful because it enables users to gain indirect guidance from seasoned crate diggers who have built up an encyclopedic knowledge of source material. Another great feature of Tracklib is that a lot of the tracks in Tracklib's catalog come with access to the stems. A stem file contains a track split into four musical elements: A drums stem, a bassline stem, a melody stem, and a vocal stem for example. (*As of May, 2024, stem separation technology, which allows*

stem separation of any song, is availabe from at least two digital audio equipment manufacturers and software developers, Akai and Logic. So Tracklib no longer has an advantage is the area.)

In terms of using Tracklib's clearance service, the entire process is automated and quite easy. You buy a track for $1.99, download it, and when you need to clear a sample, you simply return to the site and buy the appropriate license. Licenses are split into three categories. Category C covers what Tracklib calls "Short samples," which Tracklib describes as being "no more than 2 seconds in length." Category B covers what Tracklib calls "Standard samples," which Tracklib describes as being "up to 15 cumulative seconds." Lastly, Category A covers what Tracklib calls "Full samples," which Tracklib describes as being "15 seconds up to 1 minute." According to Tracklib's flat-rate licensing scheme, Category A is the most exclusive (expensive) and Category C is the most affordable. This means that within each category, there are three separate sample amounts that must be taken into consideration. The fee for a category C license is $50; the fee for a category B license is $500, and the fee for a category A license is $2,500. All fees are to be considered as an "advance fee" on publishing royalties.

Once you've paid for the appropriate license and are ready to release (sell) your music, Tracklib stresses that you must register your work with a "collecting society," i.e. a performance rights organization, either ASCAP, BMI, or PRS. Publishing splits are connected to the license category that you buy. For category C (short sample), you share 2% of your total revenue; Category B (standard samples), it's 10%; and for Category A, (full samples), it's 20%. Bear in mind that each category's publishing split actually depends on the amount, i.e. the length of the sample of the song from Tracklib's catalog. In other words, the 2%, 10%, and 20% splits refers only to category C licenses at the corresponding short, standard, and full amounts. The splits change accordingly with each category. So according to the publishing graph on Tracklib's licensing page at the time of this publication, for category B at the corresponding short, standard, and full amounts, the splits are: 5%, 15%, and 30%. And for category A at the corresponding short, standard, and full amounts, the splits are: 10%, 25%, and 50%.

Given these fee categories and associated sample lengths, essentially what you're paying for with Tracklib is peace of mind, especially when it comes to Category C. Category C isn't really needed, since most samples "up to 2 seconds" are likely de minimis or fair use. And "more than 90%" of Tracklib's catalog "is in category C."[1] But Tracklib also has royalty-free Sounds section. Songs found in this section do not need to be cleared. Where Tracklib shines is in its Category B, which allows for up to 15 seconds with a clearance fee of $500. In this scenario, "loops" of four bars are covered. Also, another key factor in Tracklib's system is that Tracklib makes no distinction as to what is actually sampled from its pre-cleared recordings, which means vocal parts and/or the "heart" of the tracks are treated equally. Lastly, payment for the licenses can be made by credit card or PayPal and the entire process is automated and done online; you never have to contact or communicate with copyright holders, labels, or sampled artists.

Not incidentally, anonymity is another huge plus with Tracklib. Every user pays the same fees regardless of status. This means whether you're a well-known music producer or a bedroom producer who's just starting out, you can't be arbitrarily charged a higher fee because of your notoriety (or lack thereof). Since all of the songs in Tracklib's catalog are already "pre-cleared," rights holders can't up-charge; they don't know who's buying the license, and that's how it should be. When I interviewed Deborah Mannis-Gardener, a partner at Tracklib and owner of DMG Clearances, she spoke about this democratized approach, noting that "it's democratic because they [music rights holders] don't know who's using it. So we can have an A-, B-, or C-list artist using Tracklib to sample, and again, the quote [fee] is based on the sample, which is the way [sample clearance] should be done." (*Note: Anonymity already exists with a compulsory license for a cover song; in that paradigm, rights holders do not know up front who's doing the cover.*)

Because the songs in Tracklib's system are already "pre-cleared" (Tracklib only has agreements with rights holders who own the

[1] Tracklib.com https://www.tracklib.com/how-it-works/licensing (last accessed May 20, 2024.

global rights to both the music composition and master recording copyrights), the licensing process is quick and easy. This is the primary reason why I believe that Tracklib's automated model could eventually replace the present ad-hoc sample clearance system.

How Tracklib's Messaging Conflates Sample Clearance with Sampling and Misleads the Public About the Legality of Sampling

Another major problem with sample clearance that needs to be fixed is the messaging associated with it. By and large, the messaging associated with sample clearance comes down to two issues. First, the messaging is one-sided, top down, and heavy handed, meaning it's all about the rights of the rights holders; there's practically never any serious mention of the rights of the public or any reference to the permissive borrowing that copyright law allows for. The second issue is that the messaging associated with sample clearance tends to criminalize sampling itself. Since Tracklib's messaging is the epitome of this problem, it's worth looking at Tracklib's messaging in closer detail.

Tracklib's sample clearance service is a great example of how the automated sample clearance model can work for all stakeholders. Nonetheless, Tracklib's framing of and messaging about sampling is problematic. And I believe that a proper sample clearance system should feature honest messaging about copyright law and the art of sampling. In the following section, I examine Tracklib's messaging about sampling, particularly the way it misleads the public about sampling and, in effect, presents *sampling* as something "illegal" if done without a license.

For all of the promise that Tracklib's sample clearance service presents, its messaging about sampling poses a real threat to the public understanding and perception of the art form. Tracklib's descriptions of sampling and the use of samples are clearly designed to appeal to copyright holders. This aside, Tracklib's messaging about sampling, which in part criminalizes sampling, must change to better reflect what sampling is and to properly present the balance

that copyright law tries to strike with the public and copyright owners. I believe that Tracklib understands this. When the service was in beta, Tracklib described itself as being "based on a powerful insight: ***sampling*** is broken because music licensing is way too complicated."[2] Of course, the true insight is that ***sample clearance*** — the process for clearing samples — is broken. Sampling itself is an *activity* that can never be broken because it's an art form, music process, and aesthetic.

Next, in describing its service as a "game-changer," Tracklib says the following:

> **"By making sampling fast, easy, affordable and legal...**
> **We want to enable every music maker in the world** – from aspiring bedroom producers to Grammy award winning superstars – ***to create freely*...Our vision is to give everyone, everywhere *access to sample...*** [emphasis mine][3]

As of 2024, the above statement from Tracklib in 2018 has been updated:

> Tracklib makes sampling **and** sample clearance fast, easy, legal and affordable for every music producer in the world. By radically simplifying music licensing we unlock creative opportunities for all the world's music creators, new revenue for the whole music industry, and change the way the world can make music. Our vision is to liberate creativity.
>
> *Tracklib unlocks Creative potential* – when you can suddenly use an original song as an instrument and know beforehand how much a sample clearance will cost, it changes the way you can create.

Notwithstanding Tracklib's heightened focus on sample clearance, Tracklib's statement, "By making ***sampling...****fast, easy, affordable and legal*" is problematic. With this description, Tracklib makes no distinction between sampling — the private, free-speech

[2] Tracklib.com https://www.tracklib.com/about (accessed February 12, 2018). NOTE: When accessed April 12, 2018 and again January 1, 2019, this statement did not appear on Tracklib's about page or anywhere else.

[3] *Ibid* (accessed February 12, 2018; and when accessed again one year later on February 24, 2019, this messaging still appears on their about page.).

activity and art form and music process — and *sample clearance*, a process for obtaining licenses for digital samples of sound recordings. Further, this description implies that sampling is an activity that is illegal without a license. This echoes *Bridgeport's* bright line and the RIAA's former attempt at prior restraint. This aspect of Tracklib's messaging is not necessarily an assault on copyright law or prior restraint in disguise; it is, however, a statement that misinforms the public about what *sampling* is.

Further, Tracklib's mischaracterization of sampling as an activity that has a "legal" way of being done is intentionally designed to make Tracklib users believe that *sampling* is illegal without clearance. Without participation from copyright holders, Tracklib's sample-clearance model could never work, so I can see why the folks behind Tracklib would consider any comprehensive discussion of copyright law and the statutory limitations that it allows for permissive borrowing as a turn off for rights holders. On the other hand, without sample-based musicians, Tracklib wouldn't have any users at all. Nevertheless, by insisting that *sampling* requires clearance, Tracklib stands to gain users who believe that they *need* sample clearance in order to engage in the art of sampling "legally." But this aspect of Tracklib's messaging not only misinforms and misleads users, it fails to point out that copyright law actually contains safe harbors for art forms and practices like sampling.

Tracklib's description of sampling omits the fact that sampling is a form of permissive borrowing. "[T]o enable every music maker in the world…to create freely," i.e. to sample freely, is not a right that is granted by sample clearance. Musicians can sample and create freely by default, they don't need Tracklib to do it. And everyone in the world already has "access to sampling;" there's no gray area in this regard. No one needs Tracklib to have "access *to sample*." To conflate *sampling* — the activity, the art form and music process — with *sample clearance* is a grave error. There's no gray area here; sampling and sample clearance are not the same thing. The real gray area is in the details of the actual *usage* of samples and their subsequent publication and distribution. The team behind Tracklib knows this. Which is why their messaging

cannot be seen as anything other than their willingness to play loose with terms and concrete realities about creativity. Further, the "lack of access" that Tracklib mentions is really something that refers to the lack of access to easy and affordable *sample clearance*, not access to *sampling* itself.

When Tracklib was in beta, and just after it's official launch in spring 2018, I initially gave this aspect of the company's messaging the benefit of doubt. I considered their mixed messaging — that sampling is an art form and that *sampling* is "broken" and that, presumably, all samples need to be cleared — as a clumsy (accidental) conflation of terms and issues. But after reading Pär Almqvist's statements in the press (Almqvist is Tracklib's co-founder and CEO), I'm convinced that this isn't the case. Tracklib deliberately conflates the art of *sampling* with *sample clearance*, intentionally distorts the issues surrounding sampling, and attempts to criminalize sampling by stating that sampling as an activity that is "legal" only when done with sample clearance.

Next, on its "About" page, Tracklib states that "Sampling is an art form that **has been massively repressed** by the extremely complicated copyrights that surround original music." This is not true. While some musicians have moved away from sampling because of an unreasonable sample clearance system, most sample-based musicians have remained with it and many new musicians continue to turn to it. Recent sample-based hit songs by veteran and emerging beatmakers (producers), as well as countless new samplers and associated product offerings by digital audio equipment manufacturers and software developers are just two things that attest to the fact that sampling has not been "repressed." Instead, sampling continues to live a long life. And as for copyrights that surround music, those are not "extremely complicated." For every song, there are two copyrights: the sound recording copyright and the music composition copyright, which includes the accompanying music and lyrics. That's not "extremely complicated." What's *unnecessarily* complicated, however, is the process for clearing digital samples of sound recordings — when they *need* to be cleared. Hence, sample clearance is complicated,

copyrights surrounding music, like copyrights surrounding other copyrightable subject matter, are not.

Next, Tracklib makes this strangely misleading statement: "when you can *suddenly use* an original song as an instrument and know beforehand how much a sample clearance will cost." Musicians don't need Tracklib to use songs as raw materials and building blocks for new music or as instruments. The right to do so, the capacity to do so, is not something that has been furnished suddenly by Tracklib. Further, it's not necessary to know beforehand how much sample clearance will cost in order to sample. A sample doesn't *automatically* require clearance.

***

Under its "Music Sampling FAQ" page is where Tracklib really makes some of its most harmful errors:

> **What are *the rules for sampling* songs?**
> **The most important ground rule: you cannot sample music without permission.** *So always make sure to clear the samples you use.* **In short, that means *when you create a new track*, you need to send it to the original rightsholders (both of the original sound recording and the original composition) for approval.** On a creative level, there are certain "rules" and common practices ingrained in each genre. But generally speaking: music sampling means full creativity. *It goes without saying that here at Tracklib, we absolutely love the art of sampling.* [emphasis mine][4]

First, there are no "rules for *sampling* songs." Once again, Tracklib conflates *sampling* with *sample clearance*. Moreover, in terms of copyright law, the same "rules" for *borrowing* from songs — sound recordings and music compositions — apply to all other copyrightable subject matter equally.

Second, Tracklib says that "[t]he most important ground rule: you cannot sample music without permission." This is false! You

[4] Tracklib, "Music Sampling FAQ" https://www.tracklib.com/blog/music-sampling-guide#sampling-issues (emphasis mine). https://www.tracklib.com/blog/music-sampling-guide#music-sampling-faq (Last accessed May 20, 2024).

don't need permission *to sample* music, just as you don't need permission *to sample* literary works or photographs, or any other copyrightable subject matter. To illustrate this point further, let's consider painting. Is the art form *painting* illegal without permission? Do you need permission *to paint* photographs? What about if you *paint* a portion of a copyrighted painting and use this portion as one of the creative building blocks for creating your new painting, does that *activity* require permission? And once you create your new painting, do you have to send your new painting to the rights holder of the copyrighted image that you "sampled" — i.e. borrowed from? No and no. So again, aside from being an art form, *sampling* is an activity, a *kind* of borrowing. You don't need permission to engage in any *kind* of borrowing. If you copy a sentence from an article by hand, that's simply the form by which you copied the sentence; you could also take a screenshot of the sentence or make a photocopy of it — you don't need permission to take a screenshot of something. Hence, *to sample*, to engage in the *activity* of sampling music, to engage in the art of sampling, you don't need permission.

This is not a game of semantics. *Sampling*, *to sample*, *a sample*, and *sample clearance* — These terms do not mean the same thing. By falsely misrepresenting sampling as something that needs permission, Tracklib, and others who use the same messaging, conflate *sampling* with *sample clearance* and distort the facts in such a way that sampling itself is criminalized. The effects of this is that it leads the public to believe that *sampling* or *to sample* is illegal without permission, and that therefore a sample — *any* sample — requires permission. This is not true! The truth is, before you publish or distribute the new work that contains the samples that you sampled, you *may* need to get permission to use *those* samples — that's *sample clearance*. But whether a sample *needs* to be cleared or not is something that should be considered on a sample by sample, case by case, basis. Clearance is not an *automatic* requirement because there's no such thing as copyright infringement *per se*, i.e. a digital sample of a sound recording is not inherrently copyright infringement. It all depends on the specific samples involved; for

instance, their length and qualitative nature, as well as how the samples were used in the secondary work, including the level of transformation. As I noted in Chapter 24, even the United States Copyright Office is careful to explicitly express that the public can always rely on "a statutory limitation or exception, such as fair use."[5] And one important statutory limitation stipulates that copyright infringement only takes place when all or any *substantial* portion of a copyright work is used without the permission of the copyright owner of the work. Thus, the use of an *insubstantial* portion — i.e. a de minimis portion — of copyrighted work does *not* constitute copyright infringement. Thus, the use of an *insubstantial* portion (sample) of a copyrighted work does *not* require permission from the copyright owner. And Congress made this especially clear with regards to sound recordings:

> Subsection (b) of section 114 **makes clear that statutory protection** for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, **infringement takes place whenever *all* or any *substantial* portion** of the actual sounds that go to make up a copyrighted sound recording are reproduced…" [emphasis mine][6]

Third, "when you create a new track," you don't "need to send it to the original rightsholders (both of the original sound recording and the original composition) for approval." Broad, blanket statements like these are terribly misleading and harmful to the public's understanding of sampling, copyright law, and permissive borrowing. The point of creation is entirely different than and separate from the point of publication and the point of distribution. When you create a new track, a new literay work, or a new piece of choreography, or any new work within the eight categories of copyrightable subject matter, you don't need to send it to the rights holders of the works that you borrowed from for approval. Again,

[5] U.S. Copyright Office, "What Musicians Should Know about Copyright," https://www.copyright.gov/engage/musicians/ last accessed May 13, 2024 (emphasis mine).
[6] 17 U.S.C. § 114, H. Rep. No. 94-1476, p. 106, U.S.Code Cong. & Admin.News 1976, pp. 5659, 5721.

there is a difference between *sampling* and a *sample*. There is no rule, no statutory language in copyright law that states that, *once you create* a new (sample-based) track, you need to send it to the rights holders of the song(s) you sampled for approval.

Besides its own self-interest in making sample clearance the default stance for sample-based musicians, Tracklib's messaging problem also stems from its desire to have it both ways. Tracklib wants to assure rights holders that *rights holders* are in control; that rights holders have all the power; that Tracklib, only along with rights holders, can "lock" or "unlock" creativity. At the same time, Tracklib wants to assure sample-based musicians that Tracklib is their friend — that friend who only has their best intentions in mind. If this was true, however, Tracklib would frame the dynamic in a way that puts the objectives of copyright law above all, not the interests of rights holders. Moreover, if Tracklib was truly dedicated to creativity and the rights associated with it, it would spend less time pushing copyright law out of its users' view and more time informing its users about the actual facts of copyright law. But doing this would inform its users that you don't actually have to clear every sample by default.

Next, Tracklib's "Legal & Ethical Issues Around Sampling" page of its "Music Sampling Guide" offers further evidence that Tracklib's messaging is intentional and in no way accidental:

> Is *sampling* music *legal*? Sampling music is legal, **as long as you get permission for the sample usage from the original artists, writers, and copyright owners.** Music is protected by copyright law, so **reusing any portion of music — no matter how short or long — needs to be cleared and licensed.** Copyright law is very complex and differs in regions around the world, so what goes for one country might not be the case in another country. [emphasis mine][7]

"[R]eusing any portion of music — no matter how short or long — needs to be cleared and licensed" — This is absolutely false! I've already discussed at length why sample clearance is not an automatic feature of copyright law, and how the length of each

[7] Tracklib, "Legal & Ethical Issues Around Sampling" https://www.tracklib.com/blog/music-sampling-guide#sampling-issues, (Last accessed May 20, 2024)

sample — of each portion of any copyrightable subject matter — does indeed matter in terms of what's permitted under copyright law *without the need of clearance*.

Next, while Tracklib correctly notes that copyright law differs in regions around world, two facts remain. First, Tracklib markets its service primarily to the United States, and it's obvious that Tracklib takes its lead from the American music industry. So it's disingenuous for Tracklib to suggest that *United States* copyright law is not its focal point. Second, "other regions around the world," or better stated other countries around the world, have provisions in their copyright laws that address permissive borrowing. Moreoever, other countries around the world have modeled their copyright laws (and recent revisions) on United States copyright law and UK copyright law, the *first* copyright law. For example, Germany — where the largest annual festival for sample-based musicians is held every year — has its own exceptions or copyright limitations:

> Although the concept of fair use does not exist in Germany, **there are exceptions to the use of other people's works without their consent (so-called copyright limitations).** These include, for example, the **"right to quote", the use of "works in the public domain", *"free use"*** or use for the purpose of caricature, parody and pastiche. Admittedly, the terms are less memorable, but **grant the user similarly far-reaching rights like the concept of fair use."** [emphasis mine][8]

Furthermore, "*free use*," Germany's version of fair use, rivals the United States version in terms of it specificity. Just as with United States copyright law, "the basic idea" of free use (fair use) has long been a part of Germany's copyright law. But after the reform to its Copyright Act in 2021, Germany fortified the principle of free use and brought it under more specific regulation. Prior to the Copyright Act in 2021, in Germany, "new works were allowed to

[8] Judith Kircher, "International Copyright Law – A Comparison of the USA and Germany," Hofa College https://hofa-college.de/en/blog/international-copyright-law-a-comparison-of-the-usa-and-germany/#:~:text=Although%20the%20concept%20of%20fair,so%2Dcalled%20copyright%20limitations).

be published by using *features* of the original, provided they could be classified as an '*independent* work,' i.e. as 'free use.'" As Judith Kircher notes, "[**t]he decisive factor for this,"** i.e. the factor that determined whether a work was free use (fair use) or not, **"was *a clearly recognisable distance* from the used work, *i.e. a high degree of individuality* was required.**" In other words: *transformation*!

Today, Germany's free use principle "is now regulated in § 23 UrhG and was complemented by a more specific regulation for the creation of caricatures, parodies and pastiches in § 51a UrhG." Perhaps more significantly, German copyright law stipulates that "[**f]ree use is to be *separated from the adaptation of a work* mentioned in § 23 UrhG,** which always requires the consent of the author. **In the case of an adaptation, the original essentially retains its essence, such as in the case of a translation of a book into another language."** Thus, Germany's copyright law explicitly makes the distinction between adaptation, which United States copyright law also recognizes as a "*derivative work*," and free use. Additionally, Germany's free use (fair use) draws specific attention to the fact that the borrowing of "features" — ergo, samples, portions, snippets, etc. — of original works is permissible when the new work is "***a clearly recognisable distance* from the used work,"** which is essentially another way of saying that a work is free use when it's transformative and recognizably different from and *not* substantially similar to the work it borrows from.[9]

Next, on the same "Legal & Ethical Issues Around Sampling" page, under the header "Is sampling music stealing?," Tracklib continues its double talk and misrepresents sampling as being illegal unless samples are cleared:

> Is sampling music stealing? Sampling is an artistic expression; a way to give music new life. **It's not stealing, *as long as you treat sampling in a fair way***. Carefully clear and license music to respect another musician's hard work and rights. [emphasis mine][10]

[9] Kircher (emphasis mine).
[10] Tracklib, "Legal & Ethical Issues Around Sampling" https://www.tracklib.com/blog/music-sampling-guide#sampling-issues.

You see the sleight of hand? First, Tracklib preaches that sampling is an "artistic expression; a way to give music new life," then states that "it's not stealing" — Only before adding, just as long you do it in a "fair way." What?! So according to Tracklib, *sampling* is stealing whenever it's not done "in a fair way." And "a fair way," again, according to Tracklib, is when all samples are cleared and the sampled musician's "hard work and rights" are respected. What about the hard work and rights of sample-based musicians? And again, what about the fact that's there's no such thing as copyright infringement *per se*? Sampling a portion of a song, taking a screen shot of a page from a book, borrowing a dance move from a piece of choreography — All of these things are fair, none of these activities or *kinds of borrowing* are illegal.

Four Key Instances Where Tracklib's Messaging Deliberately Misleads the Public About the Legality of Sampling

If you think that Tracklib's messaging is just something in force on its web pages, think again. In this section, I examine four separate instances where Tracklib's messaging, particularly from its CEO/co-founder, Pär Almqvist, deliberately misleads the public about sampling. (As Tracklib did a press run for the launch of its service, there are perhaps more examples of its misleading rhetoric.) But the four instances that I explore here make it clear that the language that Tracklib is using is no accident.

Tracklib's Press Call to Hip Hop DX on Twitter

Outside of the language that exists on Tracklib's website, which I examined earlier in the previous section, the first instance of Tracklib's misleading messaging about sampling that I found appeared as a tweet from in May of 2017 from the official Tracklib Twitter. It read:

> @HipHopDX Hello! We're trying to get in touch with you to tell you our story about how we're going to *fix sampling* in hip hop. Interested?[11]

It's clear from this carefully worded tweet, which was Tracklib's call for press and promotion for its service, that Tracklib was focused right from the start on framing *sampling*, rather than sample clearance, as something that is broken. It's also clear that Tracklib was (is) conscious of the fact that sampling is most prominent in hip hop/rap music, which also suggests other factors that may be at work in their misleading messaging about sampling.

Songtrust Interview With Pär Almqvist, Tracklib Co-Founder and CEO

The second instance of Tracklib's misleading messaging about sampling appears in a June 27, 2018 interview with *Songtrust*. In this interview, Pär Almqvist continued with the same faulty messaging that can be found in Tracklib's website and initial press call to *Hip Hop DX* on Twitter. While Almqvist's interview with Songtrrust is less contentious than his *Hypebot* guest op-ed, which I examine later in this section, it nevertheless offers further evidence that Tracklib's misleading messaging is deliberate. And because this interview, which was not entirely about Tracklib, also gives us a window into the psyche of Tracklib's co-founder and CEO, we can again gain a clearer picture of what's behind Tracklib's messaging. So it's worth examining some of the contents of this interview, especially as it demonstrates Tracklib's continued effort to criminalize sampling.

First, there's the introduction of this *Songtrust* interview. It reads in part:

> Tracklib is the world's first and only music service that **enables music creators to discover, sample,** and license original recordings.… **Tracklib was founded in 2014 to *liberate* sampling** by creating a music service that makes it possible for music creators to sample original recordings without looking over their shoulders.

[11] Tracklib's official Twitter account May 24, 2017.

[emphasis mine][12]

Again, music creators already can *sample* original recordings with no worries. *Sampling* and *sample clearance* are not the same thing. Next, when Almqvist is asked, "Why do you think sampling has been such a conflicting idea in the music industry?," he replies:

> **The main challenge has been the complexity of music rights.** A song has two copyrights: master rights (the recording) and publishing rights (the composition). So to clear a sample, all rights have to be obtained. This is a costly, complicated and time-consuming process. Rights holders (labels and publishers) have, to some extent, to protect the value of music copyrights, acted more as gatekeepers than access enablers – ***sampling*** **has never been simplified, automated, and made affordable and accessible.** When ambulance chasing lawyers started going after **samples** in the 1990s, producers increasingly became reluctant to sample because of the potential legal complexities. **This meant that the practice of sampling reduced in popularity, and was – *until Tracklib* – mainly reserved to those who had access to knowledge about music rights and the budget required to manually clear samples. …the majority of sampling today is *pirate sampling* where people simply *sample*, don't clear the rights**…[emphasis mine][13]

Let's be clear, the main reason that sampling has been "such a conflicting idea in the music industry" has nothing to do with the complexity of music rights. The existence of music rights is not an ambiguous or complex fact to understand. There are two sets of rights to clear for every song, as Almqvist points out, and it is often a complicated process; there's nothing controversial about this and it's not a conflicting idea. In reality, the reason why the art of sampling has been such a conflicting idea in the music industry is this. There are some people in the music industry who understand and respect that sampling is an art form and music process, but there are others who cast sampling off as a non-music process. And there are many more who consider any sample that isn't cleared as an

[12] Chantelle St. Clair, "Industry Spotlight: Discussing Sampling with Tracklib," June 27, 2018 https://blog.songtrust.com/industry-spotlight-tracklib (last accessed April 28, 2019).
[13] *Ibid.*

instance of "piracy" (theft); this largely stems from *Grand Upright*. So getting people to understand that *sampling* is a form of permissive borrowing — not *piracy* — that is protected by copyright law is still one of the greatest challenges in the music industry. Thus when Almqvist repeatedly uses made-up terms like "*pirate sampling,*" he is deliberately propping up the lie that sampling is "piracy" and flaming the fires of this conflict.

Looking closer at Almqvist's response, we can uncover even more bias and deliberate misleading messaging about sampling. Almqvist speaks of rights holders and how the value of music copyrights have to be protected, but he doesn't speak of the rights of music makers — the public. For Almqvist, it's a one-sided affair, where copyright law only protects rights holders. But this is not how copyright law works. A true supporter of the art of sampling would consider both the rights of the public and the rights of copyright holders.

And why does Almqvist say that *sampling* has never been simplified, rather than say *sample clearance* has never been simplified? It's more of the same deliberate conflated messaging. Because Almqvist consistently avoids making the clear-cut distinction between *sampling* — the art form, music process, the activity, and the *kind* of borrowing — and *sampling clearance*, the process for obtaining a license for digital samples of sound recordings, then we can safely assume that his actions are intentional.

Finally, when Almqvist states that "the practice of sampling reduced in popularity, and was — *until Tracklib* — mainly reserved to those who had access to knowledge about music rights and the budget required to manually clear samples," he's not only mythologizing Tracklib's role in the resurgence of sampling, he's making up facts that are at great odds with reality. Sampling, as a music process chosen by musicians, waned in popularity after cases like *Grand Upright and Bridgeport*, but sampling was not something reserved only for those with access to knowledge about music rights. Once again, Almqvist conflates *sampling* with *sample clearance*.

But Almqvist's statement: "mainly reserved to those *who had access to knowledge about music rights*" is revealing for another reason.

To have access to knowledge about music rights is to have access to knowledge about copyright law. So first, if Tracklib has "access" to knowledge about copyright law, why are they not sharing it in an honest and comprehensive manner with its users? Second, is Almqvist suggesting that when you have "access to knowledge about music rights" — i.e. access to knowledge about copyright law — you only have access to knowledge about just *one* aspect, or just one *side* of copyright law? In other words, is Almqvist suggesting that when you have access to knowledge about music rights — i.e. access to knowledge about copyright law — you only have access to what copyright law says about the rights of copyright owners, but not what copyright law says about the rights of the public? Further, is Almqvist suggesting that when you have access to knowledge about music rights — i.e. access to knowledge about copyright law — you don't also have access to copyright law's stated purpose, or the facts about permissive borrowing, notably that copyright law has statutory limitations and exceptions such as fair use and de minimis? Additionally, is Almqvist suggesting that when you have access to knowledge about music rights — i.e. access to knowledge about copyright law — you don't also have access to the fact that the use of an *insubstantial* portion (for example, a de minimis portion) of copyrighted work does *not* constitute copyright infringement, or that the use of an *insubstantial* portion (sample) of a copyrighted work does *not* require permission from the copyright owner?

There are two more instances where Almqvist conflates sampling with sample clearance. When asked, "What new technology has surfaced in the past few years to help artists utilize sampling better and more efficiently?," Almqvist concludes his response (which is mostly mentions of software and hardware gear) with this: "On the service side, Tracklib has a big catalog of original recordings that music creators can instantly sample and license – *liberating sampling* and *making it accessible to anyone* in the world."[14]

Tracklib may have an impressive catalog of original recordings, but Tracklib is not "liberating" sampling — the art form, music process, and *kind* of borrowing — and "making it accessible to

[14] *Ibid*.

anyone in the world." Conflating *sampling* and *sample clearance* once is an accident, twice it's negligence. But three, four times? That's deliberate and a mainstay of the company line. And as such, this misleading messaging intentionally clouds the clear distinction between sampling and sample clearance in a manner that can only be described as deceptive. I understand branding and Tracklib's hard use of the word "liberate," but Tracklib can better achieve its objectives by clearly stating that what's actually being liberated and made more accessible by its service is *sample clearance*, not sampling. Left unchecked, sleight-of-hand language like this misrepresents sampling as an activity in need of a legal apparatus, and it falsely presents Tracklib as the company that made the art of sampling — not sample clearance — accessible to everyone.

SonicScoop Interview With Pär Almqvist, Tracklib Co-Founder and CEO

The third key instance of Tracklib's misleading messaging about sampling appears in an August 13, 2018 interview published by SonicScoop, a creative techniques and technology website for music and audio production enthusiasts. The title of the article, written by David Weiss, is called "Sampling Will Never Be the Same: Tracklib Has Arrived." That it says "sampling," not sample clearance, will never be the same demonstrates (again) how misleading language can impact the way that journalists write about sampling. When journalists get it wrong, this further helps to misinform the public. And as the title of the *SonciScoop* interview indicates, Tracklib's specific misleading messaging is already impacting the way in which others think about sampling and how they use language to describe it. (Later in this section I provide a number of different headlines that are in the same vein.)

Weiss's Tracklib-prompted title notwithstanding, the primary example of Tracklib's misleading messaging in this article can be seen in the following Almqvist quote: "We're bringing back *the original creative impulse behind sampling records*, and making it fast, easy, and affordable – empowering music creators and liberating

the next evolution in music making."[15]

First, the "creative impulse behind sampling" is not something that is driven by sample clearance. Second, Tracklib is making *sample clearance* — not *sampling* — "fast, easy, and affordable." Third, the art of sampling itself is not being liberated, sample clearance is.

Hypebot Op-Ed by Pär Almqvist, Tracklib Co-Founder and CEO

Finally, the fourth and most damning instance of Tracklib's deliberate attempt to mislead the public about sampling happened in January, 2019. In a guest op-ed written by Pär Almqvist himself, and published on the popular music, technology, and business website *Hypebot*, Almqvist offered the most damning proof that Tracklib's misleading messaging is deliberate. Because this op-ed offers a window into Almqvist's (Tracklib's) thinking about sampling, we can get a better picture of what's really behind Tracklib's messaging. Hence, it's worth examining this op-ed in detail as it demonstrates a concerted effort on Tracklib's part to criminalize sampling.

To comprehend the weight of this op-ed, you must first recognize the three things that Pär Almqvist does throughout it. First, he misrepresents what sampling is. Second, he shrouds sampling in "piracy" by implying that any that sample that's not cleared is "piracy." Third, he plays up the rights of copyright owners and plays down the importance of copyright law as it pertains to the rights of the public.

Looking at the title of op-ed Almqvist's piece, "The Liberation of Music Sampling," we can see the sleight of hand already at play. The piece is not titled "The liberation of *Sample Clearance*," which would have been more apt. Like the title of the piece, the biggest problem with this op-ed are Almqvist's descriptors and patterned

[15] David Weiss, "Sampling Will Never Be the Same: Tracklib Has Arrived," Aug. 13, 2018 https://sonicscoop.com/2018/08/13/sampling-will-never-tracklib-arrived/?singlepage=1 .

attacks against sampling that is not what he calls "*legal* sampling." This is key, because it points directly to Tracklib's attempt to criminalize sampling itself.

Next, the introduction to Almqvist's op-ed (presumably written by someone at *Hypebot* and not Almqvist himself) demonstrates once again that Tracklib's misleading messaging is already having an impact on the way others use language to talk about sampling:

> While many music creators are eager to draw on elements of music from the past, actually ***legally sampling*** tracks is typically a slow and expensive project. In this op-ed, Pär Almqvist discusses an emerging platform aimed at streamlining the *sampling* process. [emphasis mine][16]

The term "legally sampling" is a misnomer. Sampling — the art form, music process, and the *kind* of borrowing — does not require permission or clearance. And the phrase "streamlining the *sampling* process" is also more of the same misleading messaging. Sample clearance does not streamline the art of sampling, Tracklib's service streamlines the *sample clearance* process.

Next, Almqvist opens his op-ed with a mixed bag of overstated, inaccurate, and misleading information:

> **"Today's music makers are inspired by the music of the past.** They want to use small parts of older recordings in the music they are making today. Unfortunately, the slow, expensive, and difficult sample clearance process has forced today's music makers to re-record similar sounding song sections, use samples without permission or rights, or skip sampling altogether. This robs the original artists and songwriters of both their share of recognition and revenue for the contribution they made to the future of music."[emphasis mine][17]

First, Almqvist makes no attempt to quantify exactly which musicians are inspired by the past and want to "use small parts of older recordings." Instead, he does a catch-all that says, "today's music makers." Surely, many of today's music makers are inspired

[16] Pär Almqvist, "The Liberation of Music Sampling," *Hypebot* (January, 2019) https://www.hypebot.com/hypebot/2019/01/the-liberation-of-music-sampling-op-ed.html.
[17] *Ibid*.

by the past, but certainly not *all* of today's musicians engage in digital sampling or are concerned with trying to make "similar sounding song sections" found in past recordings. Likewise, there are non-musicians who engage in digital sampling for other purposes than making new songs. But the catch-all of "today's music makers" works to imply that all of today's musicians are engaging in sampling. This overstatement makes sampling appear to be the go-to music process of all of today's music makers when in fact it is not.

Second, the traditional sample clearance process is indeed slow, expensive, and difficult, and it has deterred many people from digital sampling; Almqvist is correct in pointing this out. However, his error is in implying that all samples need to be cleared.

Third, by using the "...this robs..." language (i.e. "theft" language), Almqvist attempts to criminalize sampling and suggest that there's a "legal" way ***to sample***.

In the second paragraph of his op-ed, Almqvist drives home his theme of "illegal" sampling by once again doing the old trick of linking sampling to "piracy." Next, he pivots to a point about "access" before underscoring his core theme — "*illegal sampling*" — with the implication that the "right" thing to do is to clear all samples. Almqvist makes no attempt to clarify that *all* samples do not need to be cleared. Instead, he portrays sampling as an illegal activity if it is done without clearance:

> Convenience always beats ***piracy***. Offer simple access to lots of songs at a fair price point, and **people will do *the right thing*** because it's instant and affordable.[emphasis mine][18]

Next, in an attempt to draw a parallel between music streaming and sampling — not sample clearance and streaming — Almqvist offers his take on the cause of the success of music streaming services Spotify and Apple Music:

> Streaming services like Spotify and Apple Music have driven three straight years of global revenue growth after 15 years of music

[18] *Ibid.*

> business decline, according to the IFPI's Global Music Report 2018. That's because it's a lot easier and quicker to pay $10 a month for instant access to nearly every song ever made than to spend hours finding songs on illegal sites, downloading or ripping them, tagging them, and uploading them to various devices…Of course, we are far from out of the woods; visits to internet piracy sites increased 1.6% in 2017, with TV and film included, according to a report from antipiracy consulting firm Muso. But the fact remains that streaming has restored a sense of stability to an industry that had previously been crippled by theft. Despite this, ***sample piracy*** has increased.[emphasis mine][19]

There's no such thing as "sample piracy." And while Almqvist correctly observes that streaming has restored a sense of stability to a music industry that was crippled by theft, he does this in an effort to link *sampling* to "piracy;" and he explicitly uses the term "sample piracy," which is an oxymoronic term that holds prior restraint implications.

Almqvist's theme of "illegal" sampling continues in the fourth paragraph and he includes the misleading accusation that new music makers are "freely sampling" — as if one is barred from sampling without prior permission:

> **These new music makers are *freely sampling*** parts of old music in their new creations, **without legal rights or permission.** Typically, this goes unnoticed because *sampling* happens behind the scenes, the province of music makers looking to inject some soul into their tracks by tapping into the work of those who came before. In addition, tracks featuring uncleared samples usually don't find their way onto official albums… [emphasis mine][20]

Almqvist's characterization of peopling sampling in the shadows, if you will, does nothing but further his (Tracklib's) agenda of framing *sampling* — not *sample clearance* — as an illegal activity if clearance isn't involved. Remember, this is not accidental language. Almqvist knows very well what sample clearance is and that it is not the same thing as *sampling* itself. But he delibarately

[19] *Ibid*,
[20] *Ibid*.

blurs the lines and makes the conflation anyway; probably because he knows that the general public is less aware of these issues and are none the wiser. Thus, with such sleight of hand, he (Tracklib) can — if left unchecked and propped up by publications who do not do their own due diligence — shift the general public's understanding of sampling and sample clearance in a way that makes people believe that sampling itself falls under the rubric of sample clearance, rather than the reality that sampling rests separately as an art form, music process, and *kind* of borrowing.

Further, Almqvist's assertion that "tracks featuring uncleared samples usually don't find their way onto official albums, instead being relegated to free mixtapes that never make it to the mainstream" is too narrow of a statement. While this may be true in some cases, there are plenty of official albums on Spotify and Apple music that include songs with uncleared samples. Moreover, all samples are not alike; consequently, it's a simple fact that *all* samples do not require clearance.

It should also be pointed out that Almqvist's talking points about "piracy," "sampling freely," and "do the right thing" is shades of Judge Duffy's statement in *Grand Upright*: "*Thou shalt not steal*."[21] has been an

In the fourth paragraph of his op-ed, Almqvist blends the fact that hip hop is the most sample-heavy music genre — and currently the most dominant music genre in the world — with the implication that all new ("young") artists trying to break into hip hop are sample-based musicians who will have their efforts stymied by sample clearance:

> Hip-hop, currently **the most sample-heavy of any music genre,** is now the most dominant genre in the world. **That means young artists trying to break into the industry's biggest genre will have their efforts stymied by huge sample licensing fees (typically several thousands of dollars)**, even bigger fines for uncleared samples (as much as $150,000 per sample, per copy of the song distributed), and an inability to spread their work beyond their immediate circle of friends, family, collaborators, and supporters.[emphasis mine][22]

[21] *Grand Upright*.

[22] Pär Almqvist, "The Liberation of Music Sampling," *Hypebot* (January, 2019) https://www.hypebot.com/hypebot/2019/01/the-liberation-of-music-sampling-op-ed.html.).

Here, Almqvist makes a messy mashup of different talking points, including: the historical use of sampling in hip hop/rap music, hip hop's current popularity as a genre, and how the ad-hoc sample-clearance system can stymie creativity. In doing this, Almqvist rings a false alarm and invents an crises — one allegedly caused by "huge sample license fees" — that simply doesn't exist. To be certain, all new ("young") artists trying to break into hip hop are not sample-based musicians; in fact, most are not. This is an obvious fact when you consider that trap music, currently the dominant style and sound in hip hop, relies less on sampling. By not distinguishing between the fact that only a minority of new artists may be facing the hurdle of sample clearance, Almqvist is using the popularity of hip hop to mischaracterize what's really going on.

In the fifth paragraph of his op-ed, Almqvist again blurs and oversimplifies two talking points about original artists and songwriters being paid and the fact that samples of old songs can revitalize stagnant music catalogs:

> It's important that the original artists and songwriters must be paid and credited for any usage of their music, **especially sampling**... the time has come to streamline the process so creators can focus on creating, ***rather than studying the intricacies of copyright law*** and taking the risk of being sued. [emphasis mine][23]

Rights holders of songs — whether they be original artists or songwriters — should be paid and credited when samples of their work go beyond the permissive borrowing thresholds that copyright allows for. This does not mean, however, that rights holders must be paid for *all* types of samples. Almqvist fails to make this important distinction. And by categorizing all samples as the same, i.e. promoting the untruth that *all* samples "must" be cleared, he's attempting to criminalize sampling.

Perhaps the most chilling thing that Almqvist says also appears in this same paragraph: "But the time has come to streamline the process so creators can focus on creating, *rather than studying the*

[23] *Ibid.*

intricacies of copyright law..."[24] Again, in terms of a sample clearance system that's quick, easy to use, and affordable, Tracklib is ideal. I give Almqvist and the Tracklib team props for that. But, here, Almqvist is basically telling the public that they shouldn't even bother learning about copyright law because it's too "intricate." That's a terrible message to pass on to its users. The purpose of copyright law is "to promote the Progress of Science and the useful Arts." In order to fulfill this purpose, Copyright law aims to balance the interests of the public with the *limited* exclusive right of copyright owners. Thus, the objectives of copyright law place the greater good of society (and the *intended* purpose of copyright law) above all. Educating yourself about the facts of copyright law actually helps you to appreciate the value of a service like Tracklib. So the CEO of a sample clearance company, one who stresses the importance of respecting copyright law, shouldn't be urging people to *not* study copyright law. Dissuading people from studying copyright law is not only counterproductive for Tracklib, it's also an open admission that Tracklib wants its users (the public) to be ignorant about what copyright law actually states. Understanding copyright law makes it more clear why and when someone *should* use Tracklib in the first place. Moreover, an uneducated consumer base is an unsustainable base. Consumers who know the true value of a service are always more likely to use that service than consumers who do not know the true value of the service.

Next, Almqvist continues with more misnomers and "legal sampling" propaganda when he says that "the answer is to make *sampling* as easy to understand as music streaming; to liberate the process so that anyone can do it and do it legally." [25] Again, *sampling* is an art form, music process, and *kind* of borrowing; whereas music streaming is a means of distributing and consuming music. There should be no conflation or confusion here. Yet Almqvist makes the case that sampling — he's careful not to say *sample clearance* — is parallel to music streaming. By shifting the definition of and language around sampling, so that there is a question of legality

[24] *Ibid.*
[25] *Ibid.*

where sampling is involved, Almqvist (Tracklib) can sway the public's perception of *sampling* as being something that must be attached to sample clearance. Of course, the goal of this is to make the public believe that sampling without sample clearance is illegal.

As for: "The answer is to make sampling as easy to understand as music streaming; to liberate the process so that anyone can do it and do it legally. That's what we do at Tracklib," Almqvist uses a misnomer designed to expand the definition of sampling into something that it is not, i.e. an activity that is illegal without sample clearance. Such a claim amounts to prior restraint!

Prior restraint, which is a form of censorship that the First Amendment protects the public against, is a government action that prohibits speech or other expression before the speech or expression happens. Further to this, prior restraint "is when the government requires any review or approval process before the speech or expression occurs."[26] This is parallel to Tracklib's statement: "The most important ground rule: you cannot sample music without permission. *So always make sure to clear the samples you use.* In short, that means *when you create a new track,* you need to send it to the original rightsholders (both of the original sound recording and the original composition) *for approval.*"[27] Prior restraint is also when an entity declares that something is illegal before it even takes place or is proven illegal in a court of law. A digital sample is not inherently copyright infringement; and there are balances that are in place in copyright law that protect this fact.[28]

So while Tracklib tries to position itself as the "liberator" of *sampling*, its messaging does the exact opposite. By framing *sampling* as something that is illegal when it's done without

[26] Kevin Goldberg, "Prior Restraint: When (and How) the Government Can Censor You" Freedom Forum https://www.freedomforum.org/what-is-prior-restraint/ (emphasis mine).
[27] Tracklib, "Music Sampling FAQ" https://www.tracklib.com/blog/music-sampling-guide#sampling-issues (emphasis mine). https://www.tracklib.com/blog/music-sampling-guide#music-sampling-faq (Last accessed May 20, 2024).
[28] Author interview with Dr. Lawrence Ferrara, November 29, 2018. When I asked about Dr. Ferrara his thoughts on why crticis of sampling often like to refer to sampling as "piracy," "theft," "stealing" and the like, Dr. Ferrara replied: "It's difficult to understand why some people use rhetoric about anything. I don't know why they do it, but as you and I know, not all sampling is an infringement. And there are balances that are currently in place."

permission or clearance, by not stating that *sample clearance* — rather than sampling itself — is the process that needs liberating, and by concluding that sampling needs to be "legalized," Almqvist is deliberately misinforming the public and alienating the very same sample-based musicians he hopes to attract to Tracklib.

Almqvist (Tracklib) would be wise to remove all of the misleading messaging from Tracklib's website and refrain from these "legal sampling" claims, as Tracklib could find itself on the wrong end of a lawsuit. Tracklib isn't the RIAAA, Tracklib doesn't have the power to interfere with the decisions of music streamers or CD and vinyl manufacturers. So ultimately, a prior restraint lawsuit against Tracklib would likely prove difficult to win. Nevertheless, by specifically stating, especially as a means to get customers to use its service, that *sampling* is "illegal" or that "to sample" without permission is illegal or that *all* samples that are not cleared are "illegal," Tracklib is providing misinformation about the public's right to engage in expression that is protected by the First Amendment. Consequently, this has perhaps exposed Tracklib to a lawsuit on the grounds of fraud, because these are deceptive business practices.

In the eighth paragraph of his op-ed, Almqvist sings the praises of the art of sampling, putting the art form in the best perspective that it deserves. But because Almqvist spent the bulk of his op-ed actually making some of the same sort of talking points against sampling that opponents of sampling have long made against sampling, it comes off as just lip service. Not to mention that it makes for a bizarre contradiction of the messaging that appeared in the preceding paragraph.

For instance, Almqvist says that "Most importantly, we need to get beyond **outdated modes of thinking about sampling — that it's lazy, <u>that it's theft</u>..."**[29] Yet he himself pushes this very narrative! In his op-ed, he pushes the narrative that there is a "legal" way to sample and an illegal way to sample. And when he uses made-up language like "sample piracy," Almqvist does nothing more than reinforce the idea that sampling, done without permission or clearance from copyright holders, is *theft*.

[29] *Ibid.*

Next, Almqvist makes a strong case for sampling as a complex art form: "Sampling is an art form unto itself — you can argue its roots go back to the Dadaists, and while you don't have to play an instrument to sample, what it takes to do it well can be incredibly complicated."[30] But here again, while he correctly points out that sampling is an art form, he makes no attempt to reconcile the fact that he links this very art form to "piracy."

In the final paragraph of his op-ed, Almqvist's once again conflates *sampling* with *sample clearance*:

> "it will be up to rights-holders, artists, and songwriters to determine whether they get onboard and **make it easy for music makers to sample their work**, thus **reducing the amount of *pirate samples*** and creating a new source of revenue. **We encourage them to choose *the path of liberation*."** [emphasis mine][31]

Rights-holders can make *sample clearance* easier — when people seek clearances. But rights-holders hold no bearing on making *sampling* — the art form, music process, and *kind* of borrowing — easy or not. Put another way, rights-holders are not a barrier to *sampling*; but they can be a barrier to *sample clearance*.

All told, Almqvist's op-ed is littered with propaganda designed to make you believe that sampling is an activity only made "legal" via sample clearance. Throughout his op-ed, he conflates *sampling* with *sample clearance* and he repeatedly links sampling to "piracy." I make no assessment as to whether Almqvist's actions here are nefarious in nature. Though there can be no doubt that his talking points in this op-ed are meant to be good for Tracklib's bottom line. Also, whether or not Almqvist fully understands what sampling is, its implications for copyright law, and the historical debates surrounding it is something that's not entirely clear. What is clear, however, is that Almqvist's (Tracklib's) campaign to broaden the definition of sampling into something that is done "legally" is deliberate.

---

[30] *Ibid.*
[31] *Ibid.*

No matter how good Tracklib's sample clearance service may be, Tracklib's misleading messaging about the legality of sampling is bad. To insist that there's a "legal" way to sample is an affront to copyright law. This is why Tracklib's messaging can also been seen as an attempt to subvert copyright law. Plus, the "all samples must be cleared" stance, which builds off of *Grand Upright* and *Bridgeport*, is something that works counter to the purpose of copyright law. As I have noted within my discussion of *Bridgeport* in Chapter 20 and elsewhere throughout this study, there is danger in framing sample clearance as a "liberator" or an extension of creativity and the act of borrowing itself. Some of the language expressed by Almqvist (Tracklib) bears the threat of indoctrinating the public with the idea that *all* samples must be cleared, and that *sampling* without clearance is illegal. Consequently, if Tracklib grows to become the dominant sample clearance service, its messaging around sampling could prove to be seriously harmful.

Consider that Tracklib is already influencing others with its misleading messaging. Take a look at these headlines from various publications between 2017 and 2018:

> "Producers Rejoice: ***Legal Sampling*** Is Now As Easy As Online Shopping (Video)."[emphasis mine][32]
>
> "New Service Tracklib **Makes Music *Sampling* as Easy as Online Shopping"**[emphasis mine]33
>
> "Tracklib Gives Music Creators Access to ***Legally Sample*** and License Music in Minutes"[emphasis mine][34]
> "Attention Producers: Tracklib Has **Made *Sampling* Music *Easy***" [emphasis mine][35]

---

[32] El Scribes, "Producers Rejoice: Legal Sampling Is Now As Easy As Online Shopping (Video)," (July, 2017) https://ambrosiaforheads.com/2017/07/tracklib-sample-licensing-service/.

[33] PRESS RELEASE PR Newswire, "New Service Tracklib Makes Music Sampling as Easy as Online Shopping," Dec. 18, 2017 https://markets.businessinsider.com/news/stocks/new-service-tracklib-makes-music-sampling-as-easy-as-online-shopping-1001951686.

[34] "Tracklib Gives Music Creators Access to Legally Sample and License Music in Minutes," *EMusician* (April 11, 2018) https://www.emusician.com/gear/tracklib.

[35] Sydney Hill, "Attention Producers: Tracklib Has Made Sampling Music Easy," *Online Crates* (Nov. 29, 2017) from the article: One of the biggest hurdles for up and coming producers today is figuring out how to **sample music legally.**" https://onlinecrates.com/2017/11/29/attention-producers-tracklib-has-made-sampling-music-easy/.

"Legendary Producers Support **New *Sampling* Service** Tracklib" [emphasis mine][36]

"Tracklib **Makes *Sampling* Affordable** for Producers"[emphasis mine][37]

"Tracklib: **Making *Sampling* Into An Easy 3-Step Process**" [emphasis mine][38]

"**Legal Sampling** Is Now As Easy As Online Shopping" [emphasis mine][39]

"Tracklib launches to help **make *sampling* simple and legal**" [emphasis mine][40]

"Tracklib makes it easy to **buy songs and then sample them legally**" [emphasis mine][41]

When you read carefully through all of these headlines, a pattern emerges and it begins to become clear that publications are not doing their due diligence; instead, they're regurgitating Tracklib's misleading messaging about the legality of sampling. Unchecked over time, Tracklib's false notions become embedded in the public psyche. Moreover, Tracklib's misleading messaging about the legality of sampling completely overshadows copyright law's key statutory limitations and exceptions, like fair use (and de minimis). This, in effect, makes the public believe that sample clearance is

[36] Illseed, "Legendary Producers Support New Sampling Service Tracklib," *AllHipHop.com* (Nov. 30, 2017) https://allhiphop.com/news/legendary-producers-support-new-sampling-service-tracklib-m_Ve5iiMcU6ienNoaRvzPQ/.
[37] Todd Kelley, "Tracklib Makes Sampling Affordable for Producers,' Todd.Digital (July 25, 2018) http://todd.digital/blog/tracklib-makes-sampling-affordable-for-producers/.
[38] "Tracklib: Making Sampling Into An Easy 3-Step Process," *Represent* (March 28, 2018) https://representbeta.wordpress.com/2018/03/28/tracklib-sampling-made-easy/]
[39] "Legal Sampling Is Now As Easy As Online Shopping," Stonestrhow.com (Sept. 16, 2017), board.stonesthrow.com › Topics › Il B.S http://board.stonesthrow.com/index.php?/topic/28388-legal-sampling-is-now-as-easy-as-online-shopping/.
[40] Jessica Over, "Tracklib launches to help make sampling simple and legal," *Mixdown Mag* (Apr 13, 2018") http://www.mixdownmag.com.au/tracklib-launches-help-make-sampling-simple-and-legal..
[41] Ben Rogerson, "Tracklib makes it easy to buy songs and then sample them legally," *Music Radar* (April 12, 2018) https://www.musicradar.com/news/tracklib-makes-it-easy-to-buy-songs-and-then-legally-sample-them.

the only legitimate safe harbor to using samples in new works. This is dangerous, not merely because it clouds the issue and pushes musicians towards a "all samples must be cleared" stance, but also because it undermines the reality that permissive borrowing is the bedrock of all creativity and an essential aspect of copyright law. In the specific case of music sampling, Tracklib's false notions give off the impression that the only *kind* of borrowing that is permissive is borrowing that is cleared and paid for.

***

I appreciate Tracklib as a sample clearance service. After all, I support any model that effectively streamlines *sample clearance*. But any model, no matter how innovative, that does not respect the full balance of copyright law is not an option that I can fully support. Tracklib's misleading messaging about sampling should not be the true price that the public has to pay for its service.

It may seem that it's against Tracklib's best interest to even give lip service to de minimis and fair use on its site. But to erase de minimis and fair use from the psyche of sample-based musicians, by way of misleading messaging that states that sampling done without clearance is illegal, is a terrible thing. Sample-based musicians need to be aware of de minimis and fair use, not only because it strengthens their understanding of copyright law, but also because sampling that is done with de minimis or fair use in mind leads sample-based musicians on a creative path that is different than a path that is inspired by a catch-all sample-clearance safety net. This is not to say that the prior path to sampling leads to more creativity than the latter, but rather that the prior — because of built-in restraints — ensures a fundamental level of creativity that the latter perhaps does not.

I believe that easy-to-use sample clearance services should exist, but not to the detriment of the protections that copyright law already provides. We must remember that the mere act of copying is not illegal. For instance, writers copy passages and rework them, building new passages with the phrases that they have taken and

transformed; this is a well-recognized part of the writing process. A parallel can be drawn with sampling and all other kinds of permissive borrowing. After a work containing a portion of a copyrighted work has been published and made available to the public, copyright infringement can only be determined in a court of law. And copyright law stipulates that copyright infringement only occurs when the copying of a copyrighted work is proven to be *substantial*. In other words, when the copied portion is *insubtsantial*, it's not infringement. And when the copying is done privately for one's own use, like for practicing or experimentation, this is permitted by copyright law. As I pointed out in Chapter 17 (Fair Use, Part 1), this fact was made clear in *Chapman v. Maraj* (2020). In this case, brought by Tracy Chapman against Nicki Minaj, Minaj argued that her sampling and use of Chapman's song "Baby Can I Hold You" constituted fair use. The district court of the Central District of California agreed, and found that Nicki Minaj's sampling and use of Tracy Chapman's *did* amount to fair use, and the court granted Minaj partial summary judgment, noting that:

> In determining whether a use is fair use, courts consider four factors…
>
> These factors should not be treated in isolation, and **instead must be explored and *weighed in light of copyright's purpose.***
>
> **The Supreme Court has found that transformative uses "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright" because such works generally further "the goal of copyright, to promote science and the arts[.]"**
>
> Courts should also ***"consider the public benefit resulting from a particular use*** notwithstanding the fact that the alleged infringer may gain commercially." The public benefit need not be direct or tangible, but may arise because the challenged use serves a public interest. (Id. at 1523). As explained above, artists usually experiment with works before seeking licenses from rights holders and rights holders typically ask to see a proposed work before approving a license. **A ruling uprooting these common practices would limit creativity and stifle innovation within the music industry. This is contrary to Copyright Law's primary goal of promoting the arts**

> **for the public good.** This factor thus favors a finding of fair use.
>
> Maraj's creation of the new work **for the purpose of artistic experimentation** and to seek license approval from the copyright holder thus did *not* infringe Chapman's right to create derivative works.
>
> …**this Court finds that any liability for Maraj's creation of the song is barred by the fair use doctrine.** The Court therefore DENIES Chapman's Motion for Partial Summary Judgment and GRANTS Maraj's Motion for Partial Summary Judgment."[42]

Further, using phrases like "legal sampling" is ridiculous even on the surface. Just as we don't say "legal writing" or "legal painting" or "legal dancing," it's absurd to say "legal sampling." Sampling — the art, the music process, the activity, and the kind of borrowing — is not illegal. Just as the act of writing, painting, or dancing are not illegal. Conflating an instance of copyright infringement, which must be proven in a court of law, with engaging in an art form and/or any form of permissive borrowing is just flat out wrong.

As I've stated before, I'm not in favor of any messaging that pushes people towards the "all samples must be cleared" stance. This stance undermines the purpose and objectives of copyright law. *If you need* to clear a sample — That should always be the message when it comes to sample clearance, not "all samples must be cleared." Tracklib could make these kind of tweaks to its messaging. Tracklib could even frame sample clearance as one of several safe harbors for samples of digital reccordings without even mentioning copyright law or, for that matter, de minimis and fair use. In this way, Tracklib could couch its service within the context of copyright law in a way that shows Tracklib's support for sampling in an honest, comprehensive, and forthright context. Thus, an easy quick fix for Tracklib would be to simply make clear the distinction between *sampling* and *sample clearance*; i.e. simply describe sample clearance for what it really is, rather than conflate sampling with sample clearance.

[42] *Chapman v. Maraj* No. 2:18-cv-09088-VAP-SS (C.D. Cal. Sept. 16, 2020).

Lastly, I have to reiterate that I like Tracklib as model for sample clearance. It's a very useful service that makes sample clearance more affordable and generally more efficient, and it's beatmaker (producer) friendly. The scope and roll out of the service — as well as my in-depth conversation with Tracklib's head of product — tell me that the folks behind Tracklib understand, to some degree, the culture surrounding the art of sampling. Because Tracklib's system is streamlined and headache free and benefits rights holders just as much as it does sample-based musicians, I have no doubt that its catalog of pre-cleared sound recordings will grow. As this happens, I'm confident that Tracklib's sample clearance model (which could very well be copied by competitors) will replace the present ad hoc sample clearance system that the music industry currently employs. If Almqvist (Tracklib) just stuck to these talking points, and only these points, points that showcase the strength and fairness of Tracklib's sample clearance service, he (Tracklib) would be on solid ground. Going with a bottom line marketing tagline, like: "Why take the risk. Let Tracklib give you peace of mind" — That's a solid, good-faith approach! It's certainly more accurate and honest message than: "legal sampling" and "pirate sampling" and the like. Thus, aside from being dishonest, confusing, and dangerous, Tracklib's concerted effort to frame *sampling* as an illegal activity when it's done without clearance misses the true selling power of its sample clearance service.

It's wrong to hijack sampling itself just to sell a sample clearance service. And it's wrong to misrepresent copyright law as a one-sided affair where the interests of copyright owners supercede "copyright law's primary goal of promoting the arts for the public good."[43] Copyright law strikes a balance between the public good and the limited exclusive right of copyright owners. Whenever anyone attempts to undermines this balance — in this case, by falsely framing permissive borrowing of copyrighted works as illegal or by prioritizing the rights of copyright holders above the public good — the purpose of copyright law is left unfulfilled. Given this context, we should understand then that supporting the art of

[43] *Chapman v. Mara.*

sampling means just that. It means respecting sampling as a useful art form that serves a a public good. It does not mean supporting the art of sampling *only* when samples are cleared.

***

As an author and publisher of literary works, I take copyright ownership of my books, essays, and other writings seriously. As a creative, whether it be in the capacity of writing, music making, designing, or filmmaking, the guarantee of permissive borrowing that copyright law grants to the public is also something that I take seriously. As such, it's important to me to be informed about the facts about copyright law; and I view these facts from both sides of the equation, as an author (creator) *and* as a copyright owner.

The problem with Tracklib's messaging about the legality of sampling is that it omits or distorts fundamental facts about copyright law, concerns itself only with the limited right of copyright owners, avoids the relevant nuance associated with permissive borrowing, and mischaracterizes and misrepresents sampling altogether as an illegal activity when it's done without sample clearance.

To be certain, the art of sampling and the implications that it holds for copyright law is a nuanced subject that requires a balanced discussion. And while copyright law is complicated in some areas, the black and white areas outweigh the gray areas by far. Fact: The purpose of copyright law is to "Promote the progress of Science and the useful Arts." Fact: The primary goal of promoting science and the arts is the public good. Fact: The objectives of copyright law and the interests of the public good far outweigh the interest of copyright holders. Fact: The exclusive right granted to a copyright owner is *limited*. Fact: Copyright law contains statutory limitations and exceptions, such as fair use. None of these facts can be dismissed. Hence, any stance on sample clearance that does not account for all of these facts is not a tenable stance to hold. And any honest conversation about the art of sampling and sample clearance must always account for all of these facts. That's why in the next and final chapter of this book, I bring this all together and examine this

discourse exactly for what it is: A battle between sample rights for the public and sample clearance propaganda.

Chapter 26

Sampling Rights vs. Sample Clearance

> "Well, any kind of borrowing is subject to a de minimis threshold for infringement — whether a sound recording or any other kind of work. There's just a dumb ruling from CA6 (now conflicting with one from CA9) that says there's no de minimis threshold for sound recordings."
> —Annemarie Bridy

> "[S]ampling should as a matter of policy be fair use in virtually all cases."
> —Tim Wiseman

All of the major themes of this study, including: art, originality, authorship, creativity, fairness, justice, and the progress of society — the fundamental objective of copyright law — have led us to this chapter and one major point. Which is this. Once you narrow everything down, once you take into account the evolution of science and the useful arts and the history of copyright law, you see the fight for what it is: A battle to preserve permissive borrowing, the likes of which copyright law was designed to protect. Seen from this light, we can better see the "all samples must be cleared" stance as an attack on permissive borrowing. A we can better understand how to use copyright law to fight it.

You see, a hyper focus only on the clearance of what one borrows, while rejecting the reality that not all borrowings require clearance (permission) is not a serious discussion; and it's certainly not respectful of copyright law. Moreover, a *clearance*-led discussion about art, originality, authorship, and creativity is not sustainable if we're to maintain a healthy copyright system. Permissive borrowing

is not an insignificant component of our copyright system, it's not something that copyright owners can dismiss or uproot from copyright law. Permissive borrowing is absolutely vital to United States copyright law. In 1845, Supreme Court Justice Joseph Story affirmed this, noting that "[i]n 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."[1]

***

In the second edition of *The Art of Sampling*, I offered my own proposal for what a license for digital samples of sound recordings might look like. While I maintained that I wasn't convinced that a compulsory license was the way to go — partly because I believe that copyright law proscribes solid guidelines for samples that do not infringe and partly because I believed that it was unlikely to happen — I nevertheless offered my take. My thinking at the time was that it was better to have a proposal from someone well-versed in these issues than not. However, because my thinking on this matter has evolved, I have removed that proposal from this edition of *The Art of Sampling*. I now firmly believe that the only proposal is one that focuses on sampling *rights*, not sample *clearance*. Under this model, I endorse more forcefully the idea that the sampling rights agenda is a public good agenda or public first agenda. In contrast, the sample clearance agenda is a copyright owners first agenda.

As evidenced throughout this book, I have shown that I'm a strong supporter of copyright law and an advocate for *fact-based* copyright law education. I own numerous copyrights to various creative works, including, but not limited to, books, sound recordings, and photographs. Copyright law grants me the exclusive right, a *limited* monopoly, to exploit my works for monetary gain. Under this limited monopoly, those who wish to use my

[1] *Emerson v. Davies*, 8 F. Cas. 615, 619 (CCD Mass. 1845) (No. 4,436); See also: *Campbell v. Acuff-Rose Music*, 510 U.S. 569,575 (1994) (emphasis mine).

works must get my permission *when permission is necessary*. That said, I acknowledge and embrace the fact that there are instances when permission from me is *not* necessary. In these instances, the public has limited, permission-free access to my works. And I'm completely ok with that because I respect and benefit from our copyright system.

Like other copyright owners who continue to create, I'm a representative of both sides, the public and copyright owners. So it's precisely because of my unique position that I'm compelled to speak the truth about copyright law and reveal how sample clearance is used to misrepresent and distort copyright law. Aside from the purpose of copyright law, which is "to promote the sciences and useful arts," the biggest truth about copyright law is that it is a deal created by Congress that **you must opt in to**. And once you opt in, you're bound by the deal. Period. Full stop! You accept the fact that all of the same rules apply to *every* copyright owner of *every* kind of copyrightable subject matter. This means that literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works *all* adhere to the same rules. You don't get to skate around the parts of copyright law that you don't like or the parts of copyright that you don't want to acknowledge or the parts of copyright law that you are not aware of. Copyright law grants copyright owners a "*limited* monopoly;" the owner of a copyright retains the exclusive right to exploit his work and he receives protection for his copyrighted work. But this protection is limited and subordinate to the statutory limitations and exceptions of copyright law. And these statutory limitations and exceptions are designed to protect and foster the public good.

The statutory limitations and exceptions of copyright law don't change with the type of copyrightable subject matter, nor do they change because a copyright owner believes that *every* element of his copyrighted work is protected. For example, the *ideas* that lie beneath a copyrighted work are *not* protected by copyright law (this refers to the idea/expression dichotomy, which I covered in

Chapter 13). More importantly for our purposes in this chapter, there are aspects, elements, parts, and portions of copyrighted works that are not protected. In this regard, any *insubstantial* portion of a copyrighted work is not protected. Further to this, *all* copyrighted works are subject to the same statutory limitations exceptions, including, but not limited to, the fair use exception, which stipulates that there are certain instances wherein the public can indeed use — i.e. *sample, borrow, appropriate* — portions of a copyrighted work *without* permission from the copyright owner. This is part of the deal that copyright owners, like me, opt in to when they choose to publish and distribute their work to the public. However, many copyright owners, music rights holders in particular, refuse to accept this deal. Most music rights holders — just like sample clearance agents — would have you believe that whenever you use *any* sample from a sound recording, you have to get permission and clear it. This is flat out wrong!

Finally, as I noted in Chapter 16, broadening our understanding of what the public domain actually is means understanding that the public domain is not limited to just copyrighted works whose term of copyright have expired. Public domain refers to *all* elements and aspects of copyrighted works that are *not* actionable (i.e. not protected). And here, we must understand that public domain *includes* de minimis and fair use. Additionally, we must remember that the nature of United States copyright law is such that the benefit to the public supersedes the benefit of copyright owners. Which means that the *rights* (permissions) that copyright law grants to the public comes before the *clearance* that any copyright owner may want to demand. A sample, digital or otherwise, *may* need to be cleared, and I fully respect that. But a digital sample of a sound recording, just like any appropriation of any copyrightable subject matter, is not *inherently* in need of permission or clearance just because it's a *digital* sample. This is the context to keep in mind as you continue to read this chapter.

Key Misconceptions About Sampling

When it comes to sampling and copyright infringement, there are several key misconceptions. The first misconception is that the copyright owner is *automatically* right. (As discussed in Chapter 11, the media plays in big role in shaping this narrative.) The second misconception is that the alleged infringer (whom the copyright owner alleges infringed their work) is *inherently* wrong. (*It doesn't work like that; copyright infringement can only be proven in court.*) *Lastly*, the third key misconception is that the use of *all* digital samples of songs and other sound recordings require permission and clearance, otherwise they're "illegal."

The fact is, today, there's far too much attention placed on sample clearance, and there's little to no attention given to sample *rights*, i.e. permissive borrowing — the public's right to borrow from copyrighted works without permission from copyright owners. In this chapter, you'll see that these misconceptions are the product of a campaign to make the public believe that the use of *all* samples requires permission and clearance. This campaign, which is pushed by music rights holders, music labels, and sample clearance agents — and supported (sometimes unwittingly) by the media — has now resulted in a fight between sample rights for the public and sample clearance propaganda. Thus, on a larger scale, what follows in this chapter is an examination of what I consider to be a proxy war over permissive borrowing.

Final note of preface. If you're a creative of any kind, but especially a writer, you better pay careful attention to the sampling rights versus sample clearance fight. Because today, it's your right to sample music that they're going after, tomorrow it's your right to sample lines from books, articles, and other literary works...

Lack of Awareness

When it comes to misconceptions about sampling, the biggest problem is that there's a tremendous lack of awareness of copyright law itself. There's a lack of awareness of the purpose and primary objectives of copyright law. There's a lack of awareness of copyright law's primary guarantees, notably that copyright law guarantees that, in some cases, the public *can* borrow from copyrighted works *without* the permission of copyright owners. There's a lack of awareness that de minimis and fair use are two safe harbors that protect these guarantees. There's a lack of awareness of what permissive borrowing actually is and how it's vital to the progress of society. Lastly, there's a lack of awareness of the most important copyright cases. This is why the cases that I highlight in Chapter 20, Chapter 21, and Chapter 22 are absolutely vital to your understanding of copyright law.

The Big Confusion

After lack of awareness, the most challenging thing about discussing copyright law, especially in terms of the exceptions that it provides for permissive borrowing, is that there's a lot of confusion surrounding copyright law. Even highly knowledgeable people sometimes get things mixed up and unintentionally present information that's either incomplete, wrong, or lacking much needed context. I find this to be the case especially with regards to the use of the terms like "sampling laws" and blanket statements and questions about and descriptions of fair use, like "*Is sampling fair use?*"

First, there is no such thing as "sampling laws;" this is a terribly misleading misnomer. Congress has passed no laws concerning sampling, and clauses that specifically reference sampling have not been added to the Copyright Act. In other words, there's no language in the statute that expressly mentions "*sampling.*" There have only been a handful of copyright infringement cases in which sampling was at the center or at least a part of the dispute,

but there has been no "sampling law" created in their wake. And despite the blunder of *Bridgeport*, there is no "sampling law" that serves today as the law of the land. Instead, individual court cases have resulted in different opinions based around the question of whether or not de minimis applies to sound recordings. But even this is a moot point because United States copyright law makes it clear that the same statutory limitations and exceptions (like fair use and de minimis) apply to sound recordings just as they do to all of the other categories of copyrightable subject matter. Moreover, if there's no open question as to whether fair use applies to sound recordings — even the *Bridgeport* court recognized that fair use applies to sound recordings — then a sample that is de minimis is fair use essentially by default, as de minimis sample is, by definition, an *insubstantial* taking; and copyright law only protects *substantial* takings. Thus, with regards to sampling, the only real law of the land that remains in full force is the Copyright Act, which no copyright holder or sample clearance agent can nullify no matter what they say.

Second, the question "Is sampling fair use?" is not the right question to ask because that's not the question that fair use seeks to pose. Fair use considers the specific *use* of *any* copyrighted work, and whether that use was fair, i.e. permitted under copyright law *without* permission of the copyright owner. Fair use is enshrined in the Copyright Act and it applies to all eight categories of copyrightable subject matter. So a better question, one that speaks to the context of sampling, is: "Does fair use *apply* to sound recordings?" Again, the answer is yes!

As I mentioned elsewhere in this study, sampling is an art form, an *activity,* a *kind* of borrowing, and a specific act of creativity, just like writing or dancing and all other parallel activities and acts of creativity. No one asks, "Is *copying a dance move* fair use?" because the question makes no sense. A *dance move* borrowed from a copyrighted piece of choreography may call into question whether the specific use of a *dance move* is fair use or not, but the mere *act of copying a dance move* itself, like the mere act of copying a piece of writing itself or the mere act of sampling itsef, is not what's at

question when fair use is considered. Fair use deals with the specific *use* of a copyrighted work, and it goes without question that the *activity* which made the appropriation possible in the first place is also the sort of thing that fair use protects.

In this light, we understand then that generally *all* acts of creativity are "fair," inasmuch as the *use* in question is not possibly actionable (i.e. possibly infringing) until the new work containing the element of the copyrighted work is published and made available to the public. For instance, let's say you watch a music video in which the choreography in the video has been copyrighted. Next, you *copy* (download) that music video to your phone. Then you study the choreography and speficific dance moves from that music video. Next, you *copy* the choreography and practice all of the dance moves. All of this is perfectly fine because fair use protects that sort of *activity*. But the moment you publish your own music video with the exact same choreography, or a dance routine that is *substantially* similar, then that's when a copyright infringement issue *may* arise, depending on your own unique expression of the same choreogrpahy. On the other hand, if you simply borrow a few dance steps from the original choreography and then *add* your own choreography to it — making an entirely new dance routine — then you're less likely to run into any copyright infringement issue. This is because you've signficantly transformed what you borrowed, both by tweaing the dance moves that you took from the original choreography and by virtue of the addition of the new dance moves and new choreography that you added. In any event, simply *dancing* — or even copying the music video (that contains the choreography) for the purpose of studying it — is always fair. Same goes for the *act of* copying a song or literary work.

If you copy an entire article from an online publication and save it to a Word file for your reference, is it copyright infringement? No, it isn't. The mere *act* of copying something is not inherently infringement. To further clarify this point, let's say you're at the library. If you photocopy the article, is it infringement? No. What if that same article is only available on microfiche? If you use your smartphone to take photos of the article, is it infringement? Nope.

How about if you proceed to hand write, word for word, the article so that you have it for reference, is that infringement? Still no! The point here is that these are all methods for or kinds of *copying*, and a method or technology, like digital sampling technology or video recording technology, that enables *copying* is not infringement. And once you *quote* from the copyrighted source that you've copied, that still doesn't automatically make it copyright infringement. In our everyday lives we copy and quote copyrighted sources all the time. Ever screenshot an excerpt from a book, a social media post, or an article? The copyright owner *could* sue for infringement, but they wouldn't unless the level of the use rose beyond what fair use generally allows for.

Of course, this principle extends to the sampling of sound recordings. Merely the *act of* sampling a song does not constitute infringement, neither does using some of the exact sounds from the sound recording. Infringement takes place only when any *substantial* piece of a copyrighted work is used in another work without the copyright owner's permission. And even a substantial piece of a copyrighted work can still be fair use because the amount taken is only *one* of the four factors of the fair use test.

Finally, aside from the distinction between *activity, act of,* and *use*, another important thing we must understand is that every borrowing, every taking, every appropriation is *potentially* fair use. The spectrum narrows — or broadens — based on the character of the specific use, which includes amount borrowed, level of transformation, and purpose of the use. Declaring that *all* samples must be cleared, effectively says that there aren't any samples that are potentially fair use (or de minimis for that matter). And this is not only is this false, it's also a message that goes directly against the objectives of copyright law.

Fair Use Borrowing In Music Was the Norm Among Classical Musicians In the Eighteenth Century– Before "Nuisance" Lawsuits Began

Borrowing didn't just occur randomly in music in eighteenth-century England, it was standard practice, even for great composers the likes of Bach and Mozart:

> [T]o this day when people hear the name Mozart, the image of Amadeus' whimsically childish genius replete with glass-shattering cackle instantly comes to mind. Yet beyond the liberty Shaffer took with Mozart's personality,
> *two important exaggerations of his remain in our collective imagination: Mozart's supposed abilities to both instantly conjure masterworks of the utmost ingenuity and then to perfectly dictate them from his head to staff paper in the form we now hear them.* In fact, Mozart wasn't only more workmanlike than many of us think, crafting numerous sketches and drafts of his pieces just like other composers. He was what you might politely call a "creative collaborator." "Calling Mozart a plagiarist would be going too far; **the musicians from within his theatrical community borrowed freely from each other as colleagues and partners who made livings off ticket sales. And it's not uncommon for classical-music composers to quote one another; *using age-old tunes…"*** [emphasis mine][2]

During the eighteenth century, borrowing practices were so prevalent that borrowed music could be found in three out of four operas.[3] This is largely because traditional borrowing practices had long been regarded as a "composer's liberty." In fact, the practice of borrowing from old songs dates back to before the eighteenth-century.[4] Three hundred years ago, "[o]ne composer

[2] Adam Baer, "Wolfgang Amadeus Copycat: Did Mozart plagiarize?" Slate (February 13, 2002) https://slate.com/culture/2002/02/did-mozart-plagiarize.html.
[3] Olufunmilayo B. Arewa, "From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context," 84 *N.C. L. REV.* Note 312 » Note 269: "*See*, e.g., FISKE, supra note 105, at 274 (stating that borrowed music can be found in about three out of four operas after 1762); (forthcoming 2006) (discussing evolution of musical borrowing practices from eighteenth-century England to present)."
[4] Michael W. Carroll, "The Struggle for Music Copyright," 57 *Fla. L. Rev* 907, 934 (2005) 958.

would rearrange, rescore or adapt another composer's music;" it was even "considered flattering to have your work used by another composer."[5] "In the 16th century, as earlier in the Renaissance, various kinds of borrowing had played an important part in the art of musical composition." In fact, "to work from an earlier model was not only permissible, but commendable."[6] Moreover, the reuse or recycling of older compositions in newer ones was mandatory:

> The **common nature of borrowing in music** *allowed eighteenth-century English music publishers to play both sides, acknowledging wide-spread borrowing in music* and using it as a defense to their unauthorized publications of composers compositions: "Implicit in the [music] publishers' challenges to musical authorship" was "the view that old songs were free to be re-used in the creation of new ones ***and could be freely republished."*** [emphasis mine][7]

Composers of the eighteenth century held different views about the scope of borrowing from each other, but the borrowing of melodies, harmonies, *and other compositional elements* was nonetheless fair game and practiced among them. However, the question of the scope of legitimate borrowing changed dramatically after *Bach*, as "originality" became a central conceptual concern. After *Bach*, with music having been brought under copyright, borrowing continued of course, but the views about borrowing started to stiffen. *Bach* regularized the means for obtaining and enforcing rights in music, and embolden by *Bach*, music publishers — who had quickly embraced music copyright as a means of protecting their profits, via registration at Stationers' Hall — grew overprotective of the works that they registered and began a pattern of "nuisance" lawsuits against upstart music publishers whose printed works that contained only small parts of compositions that they owned the copyrights to.[8]

[5] UPI, "Musicologist says Mozart, Bach 'borrowed'" UPI (May 31, 1985) https://www.upi.com/Archives/1985/05/31/Musicologist-says-Mozart-Bach-borrowed/4034036016018/.
[6] Franklin B. Zimmerman, "Musical Borrowings in the English Baroque," *The Musical Quarterly*, Vol. 52, No. 4 (Oxford University Press, Oct., 1966), 483.
[7] Carroll, 955.
[8] *Ibid*, 934, 946. *See: Pyle v. Falkener*, C33/442 London Public Record Office (1772), reprinted in Rabin & Zohn, supra note 163, at 144. Falkener alleged that Bickerstaff was the putative author of both Thomas and Sally (rather than Arne) and Love in a Village (co-authored with Arne). Id.

Sound familiar? Today, it's music publishers and other music rights holders who demonize sampling the most. They are also among the main groups who push the sample clearance agenda, a misinformation campaign designed to get the public to believe that only samples that are cleared — ergo, only "borrowings" that are cleared — are legitimate.

What's important to note here is that attitudes about borrowing shifted primarily because of the music publishing trade, not because of composers. Certainly, the explosive consumer growth — i.e. increased concerts, an increase in the number of new performance spaces, and the increased social value of music — also had an effect on how composers viewed borrowing. This prompted composers to center "originality" as the "principle criterion for value of any composer's works." Once music had been brought into copyright; once composers — especially those who published their works under their own imprints — had property to protect; and once composers had begun to establish social status on par with authors of literary works, their views on borrowing narrowed, and they began to place a deeper importance on the concept of originality. Still, this wasn't the main reason why composers began to focus on "originality" as the "principle criterion for value of any composer's works." The main reason why borrowing came to be considered especially "sinful" during the eighteenth century was due to the fact that "keen competition within the music publishing trade made it an *economic* issue."[9] Music publishers had "suggested that authorship of music required a higher standard of originality to qualify for protection under any legal theory;"[10] this sentiment, along with the music publishers wave of "nuisance" litigation, is what led composers to become fixated on "originality." Questions

[9] Franklin B. Zimmerman, "Musical Borrowings in the English Baroque," *The Musical Quarterly*, Vol. 52, No. 4 (Oxford University Press, Oct., 1966), 484 (emphasis mine).
[10] Carroll, 907, 934, 950. *See Pyle v. Falkener*, C33/442 London Public Record Office (1772), reprinted in Rabin & Zohn, supra note 163, at 144. Falkener alleged that Bickerstaff was the putative author of both Thomas and Sally (rather than Arne) and Love in a Village (co-authored with Arne). Id.: "Roberts and Johnson suggested that Arne may have only rearranged "some old Songs made by Shakespear [sic] and other Authors. Falkener similarly defended with respect to the Bickerstaff opera, claiming that he did not know of any 'New Tunes or New Music' that Bickerstaff had composed and instead he had relied on "Old Tunes which had been Used in Common by all persons for many years before the said Isaac Bickerstaff wrote the said Opera."

around legitimate borrowing and originality in music would intensify in the nineteenth century and they continue to be debated to this day.

What's critical to note is that fair use speaks to the kind of borrowing that was typical among the great classical composers of the eighteenth century, just as it is among sample-based beatmakers (producers) and so many other creatives today. Further, we must recognize that making music from pieces of music that was already made is not new; it was a common practice even among classical musicians in eighteenth-century London. What is relatively new, however, is using pieces of sound recordings (not only compositions). Given the classical musicians' penchant for borrowing from one another, they too would have used pieces of sound recordings to make new music if the technology had existed in their time.

Is Fair Use Only Fair Use If It's Proven in Court?

There is a commonly held belief about fair use that misidentifies the role of the courts. This is the is the belief that a use is only fair use *if* it's proven to be so in court. But this belief, dominant among copyright owners, rests on illogic. As I outlined in the previous sections, fair use is at play in vastly different ways in our daily life. Read an article online, copy a couple of paragraphs from it and paste it in a Word or Google Doc so that you can formulate commentary — *That's fair use*! And this kind of activity doesn't need to be proven in court. It's impractical to think that one would contact the author of an article or the website that published it to ask permission to copy two paragraphs, which will not be published verbatim if at all. The reason why one doesn't need permission to engage in such copying is because fair use makes it possible. Without fair use, basic creativity, the development of ideas, news gathering, the sharing of facts, and so many other things would be stifled or walled off altogether.

Thus, there are two serious problems with the belief that *fair use is only fair use if proven in court*. First, this belief implies that the Copyright Act has made the courts a prerequisite to determing

what is fair use in all situations. Put another way, this belief implies that the only way something *can* be fair use is if it is *first* deemed to be so in a court of law. In other words, the implication is that one must be sued for copyright law infringement, then they must prevail on a fair use defense in order for the use in question to be fair. But the Copyright Act does not insist on such a an absurd prerequisite. The Copyright Act describes, in intentionally broad terms, what fair use is and it provides a non-exhaustive list of the *kinds* activities and uses that *may* be fair use. Said differently, the Copyright Act provides a short but non-exhaustive exemplary list of what fair use *could* be or *likely* is. From the Copyright Act's guidelines for fair use, or rather descriptions of what fair use *could* be and likely is, the public proceeds by making fair use of copyrighted works based on the parameters outlined in the Copyright Act. Hence, the public doesn't wait on the courts to determine every *possible* instance of fair use. Moreover, even though the Copyright Act outlines four factors that courts "shall" consider when determining whether a use is fair, these four factors are not, for the public, a prerequisite to making fair use of a copyrighted work. Rather, these four factors are simply the mandatory four factors that courts must consider if and only if the question of fair use is raised in a copyright infringement lawsuit.

Suppression of Fair Use Cuts Against the Benefits of Fair Use – Notably the Revival and Awareness of Past Works and Creators

This book cannot solve all of the problems with sample clearance, but it can shed light on the sample clearance agenda that's propagandized by music rights holders and sample clearance agents. In this regard, we must recognize how the music industry tries to suppress de minimis and fair use, how this suppression cuts against the benefits of fair use, and how this suppression of fair use is actually harmful to the recording artists that it purports to protect.

In all art forms, the author whose work was appropriated usually enjoys a revival of not only the work that was appropriated, but also other works that he may have published. In turn, this can lead to a

financial benefit for the author as a new or renewed prestige. This is one of the benefits of fair use. Some artists may be outraged by the fair use of their works, either because they don't properly understand fair use or because they simply believe that they're being "ripped off." But this is spiting logic. Typically, artists and creators *want* their work to be discovered. So if an artist is sitting on a back catalog of material that hasn't seen much attention in decades, the outcry is misplaced. Revival means rediscovery, and rediscovery often leads to a number different benefits for the author whose work was made fair use of. Thus, to suppress fair use when it comes to sampling means to dramatically limit the level of revival and awareness that many recording artists could enjoy. Furthermore, the public also benefits by being made aware of an artist's older work, because the discovery of older works pays new dividends to society in the form of generating new works, new ideas, new processes, new methods, and new technology. And this is precissely one of the fundamental objectives of copyright law.

Minority Rule: Submitting to the Preferences of the Music Industry Is Unrealistic and Unsustainable

In the Introduction of this book, I mentioned how the music industry — historically known for cheating music artists, forcing music artists to sign draconian record contracts, and fighting technology that they could *not* control — has never had the public's (or even recording artists') best interest at heart.[11] And since the early 1990s, the music industry — aided by a music journalism complex that is dominated by music journalists who prize their proximity to major labels and artists, and who are ill-equipped to discuss the intricacies of the art of sampling and the facts of copyright law — have worked to negatively influence the public's opinion of sampling. This work has been done through a distortion of the facts about copyright law, and by turning sample clearance

[11] In Chapter 15, I covered the nefarious practices of the music industry, specifically as the relate to Black music artists.

into a campaign-style agenda designed to make the general public believe that *any* sample that is not cleared is illegal. But the music industry is a minority, albeit a very powerful one.

In his article "The Most Intolerant Wins: The Dictatorship of the Small Minority," Nassim Nicholas Taleb observed that:

> [i]t suffices for an intransigent minority – a certain type of intransigent minorities – to reach a minutely small level, say three or four percent of the total population, ***for the entire population to have to submit to their preferences.*** Further, **an optical illusion comes with the dominance of the minority**: **a naive observer would be under the impression that the choices and preferences are those of the majority.** If it seems absurd, it is because our scientific intuitions aren't calibrated for that (fughedabout scientific and academic intuitions and snap judgments; they don't work and *your standard intellectualization fails with complex systems, though not your grandmothers' wisdom*)." [emphasis mine][12]

One of the optical illusions that the music industry runs on the public is the stance that copyright law doesn't apply to sound recordings the way that copyright law applies to all other copyrightable subject matter. But as I've noted elsewhere in this book, all copyrightable subject matter is treated the same. Which means every limitation and exception that applies to one category of copyrightable subject matter applies to them all; there's no special exemption for sound recordings.

Where This Discussion Must Begin: The Copyright Act – Majority Rule or Minority Rule?

Right now, the music industry's minority rule is winning. But this can change rapidly. In noting the power of the minority rule, Taleb also noted that the minority rule can "show us how all it takes is a small number of intolerant **virtuous people with skin in the**

[12] Nassim Nicholas Taleb, "The Most Intolerant Wins: The Dictatorship of the Small Minority," *Medium* (August 14, 2016) https://medium.com/incerto/the-most-intolerant-wins-the-dictatorship-of-the-small-minority-3f1f83ce4e15.

game, in the form of courage, for society to function properly."[13] When it comes to sampling, no one has more skin in the game than sample-based hip hop/rap beatmakers (producers), the pioneers and leading practitioners of the art of sampling.

In the sampling rights vs. sample clearance fight, we see a classic struggle: Minority rule vs. majority rule. But are sample-based beatmakers (producers) actually the majority and the proponents of the clear-all-samples stance the minority? Depends on how you look at it. If we're to divide the two sides into two classes, borrowers and owners, then the borrowers represent the larger, and presumably more powerful, class. (All owners also borrow, so they actually belong to both classes.) In theory, then, we should expect that the more powerful class, the class of borrowers, is the class that rules. This, in fact, is the case. And how do we know? Because of the Copyright Act itself.

The Copyright Act clearly states that the exclusive right of the copyright owner is *limited*, not absolute. More specifically, as it must continue to be stressed, every copyrighted work is subject to the de minimis and fair use exceptions. Thus, when it comes to copyright law, majority rules. When it comes to sampling and copyright law, however, the minority (i.e. music rights holders and the major labels) wants the public to believe that the minority rules. They want the public to believe that where *sound recordings (songs)* are concerned, there's a special exemption. (Again, there is no special exemption for songs and other sound recordings!) Even more alarming, this minority wants the public to believe that they are actually the majority and on the right side of copyright law. The music industry aids in spreading this perception by maintaining a hostile stance on fair use, and by insisting that *all* samples must be cleared, regardless of length or unique use of each sample. So the goal of the minority's propaganda is to make public believe that *any* sample not cleared is "illegal," i.e. *inherently* copyright infringement. This is absurd.

For context, we must recognize that "sampling" is just another word for a specific kind of *borrowing*. Borrow a few words from

[13] *Ibid* (emphasis mine).

a book or movie, that's still just "sampling" in a different form, a kind of borrowing, with no special name. It would be ridiculous to say that *any* word taken from a book or a movie is "illegal" without the permission of the owner of the copyright to the book or movie. Again, none of the eight categories of copyrightable subject matter receive special exemptions; all eight categories are subject to the same rules and limitations of the Copyright Act. If a work is copyrighted in the United States, it's subject to United States copyright law. This means that, among other things, the exclusive right of a copyright owner of one category of copyrightable subject matter cannot rise above (or below) the exclusive right of a copyright owner of different category of copyrightable subject matter. This is not complicated. This not complex. This is a simple fact from which any serious discussion about sampling rights vs. sample clearance must begin.

So Why Does the Music Industry Insist That *All* Samples Be Cleared? Is It Really Because of the Fear of a Lawsuit?

Minuscule Number of Cases Involving Copyright Infringement and Digital Sampling Say Otherwise

Conventional wisdom is that the reason why the music industry insists that *all* samples be cleared is because there's a huge fear of a (costly) lawsuit awaiting labels and recording artists if they don't clear every sample. Allegedly, the music industry is extremely risk adverse in this way. So music labels presumably want to avoid a copyright infringement case at all cost, right? But this is not really the main reason why labels insist that *all* samples be cleared. Sampling has been popular now for more than 36 years, yet the number of copyright infringement lawsuits that have resulted in substantial payouts or trials won by the copyright owners of the works that were sampled is minuscule. The evidence supporting this fact isn't even close, it's overwhelmingly clear. (See Chapter 18 on the empirical analysis of copyright infringement cases involving sampling.)

Between January 1, 1978 (the effective date of the 1976 Copyright Act) and 2019, the federal courts produced 579 reported fair use opinions from 435 cases. In that span of *41 years*, there has only been *three* (three!) fair use opinions that involved digital sampling. Said differently, the three fair use opinions involving digital sampling make up 0.005% of all fair use opinions reported

and 0.007% of all of the cases in which fair use was raised.[14] So is this really a reflection of a "fear of losing"? Or is this really a reflection of something else?

In the grand scheme of things, the numbers simply don't add up. Given hip hop/rap music's popularization of the art of sampling — for more than *36 years* now — you'd expect to have seen hundreds, maybe thousands of copyright infringement lawsuits inlvolging digital sampling and sound recordings. But the truth is, in relation to the massive number of songs containing samples that have been — and continue to be — released, relatively few sample-based hip hop/rap musicians have actually been hit with even a single copyright infringement claim! This, despite the fact that the vast majority of sample-based hip hop/rap songs released between 1988 and 2024 contain samples that were never cleared.

Forget the big headline cases; don't let that fool you. The number of sample-based hip hop/rap musicians has increased, *not decreased*, over the past 36 years. So we should expect to see much more case law on this. But we don't. Why? One reason is, sometimes all it takes is a "cease and desist" letter to prompt payment from a sample-based hip hop/rap musician to pay up. Other times, the formal complaint in court is often enough to spook out a sample-clearance fee. But even these occurrences are terribly thin in number, especially in comparison to the number of sample-based hip hop/rap songs that contain samples that have not been cleared. The fact is, since 1988, most sample-based hip hop/rap albums continued to be made and released the same way they've been for the past 36 years: *Without* any clearance of samples whatsoever. Even albums that did contain samples that were cleared also contained samples that were not cleared. Whether those uses likely did or didn't require clearance is a moot point. The reality still remains: Of the *0.005%* percent of the copyright infringement cases involving digital sampling and sound recordings that did result in an opinion, fair use was found every, single, time. Yet practically ever sample-based hip hop/rap musician who has ever

[14] Barton Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019," *NYU Journal of Intellectual Property & Entertainment Law*, Volume 10, Number 1, (December 31, 2020), 2-3.

been hit with a claim of copyright infringement has never affirmed a fair use defense in court.

But as I also explained in Chapter 18, where fair use is concerned, hip hop/rap music and digital sampling have an exceptional track record in the courts. Not a *good* record. An *exceptional* record! We're talking a 100% win rate. And this includes the Supreme Court's opinion in *Campbell v. Acuff-Rose Music, Inc.* (1994). Becuase of the Supreme Court's statements about the transformative element of the first factor of the four-factor fair use test, *Campbell* is, to date, the most important fair use decision in terms of present-day fair use analysis. It's telling then that, in terms of copyright law at least, hip hop/rap music has figured into one of the most important Supreme Court decisions of all time.

Also, here, it's worth noting that I examined data from empirical studies of all fair use opinions that were issued between 1978 – 2021, and there were number of critical observations that I was able to make. But for the purposes of this chapter, what stands out are two things. First, fair use opinions are not often appealed; they often live and die in the district court. Second, in the *two* copyright infringement cases that involved digital sampling and sound recordings, fair use was found!

And there's something else from Chapter 18 that I should mention here again in this chapter. It's in district court during the summary adjudication where fair use is mostly handled. Which means that in most cases, the determination of fair use is usually not being made by an "ordinary observer" but rather a district court judge. This iimportant to note, because judges typically understand copyright law (*and are senstitive to the objectives of copyright law*) much more than the odinary observer.

***

Looking at music more broadly, **fair use opinions involving music made up *only* 6.2% of the fair use cases examined in Barton Beebe's notable study of United States Copyright**

fair use opinions.[15] So where does the common wisdom come from that you're "taking a chance" with fair use when it comes to sampling? Truth is, there really isn't that much case law involving sampling — cases are often settled out of court and never advance in court. But of the cases in which defendants did *not* settle out of court and asserted a fair use defense — for example, Beastie Boys, Jay-Z, Salsoul Music, and Drake — they prevailed overwhelmingly. So it's not that fair use isn't being found, it's that defendants in copyright infringement cases involving digital sampling and sound recordings aren't affirming fair use when they are hit with a copyright infringement claims. Instead, they're following the misguided conventional wisdom that they'll lose in court no matter what; and this is leading them to settle out of court without even attempting to mount a defense.

But what about Girl Talk, the self-described "mash up" artist who sampled more than 700 well-known songs, and loudly proclaimed that he and his then-label Illegal Art did not clear any samples because, as he and Illegal Art saw it, *his* works made fair use of the copyrighted works that he sampled. Girl Talk even published a list of all of the samples that he used, which contained samples of sound recordings whose mastering rights and publishing rights were owned or managed by the three biggest music publishing companies in the industry: Universal Music Publishing Group, Sony Music Publishing, and Warner Chappell Music. Yet, not a single label filed a copyright infringement complaint against Girl Talk or his Illegal Art! Hmmm. Why didn't the labels go after Girl Talk? The answer to that question, in large part, is part of the real reason why the music industry insists that *all* samples be cleared. The labels don't want to open Pandora's box because they fear the precedent that will be set. Lots of money is made from sample clearances fees. So if Girl Talk were to win in court, i.e. if the courts were to affirm that Girl Talk made fair use of the copyrighted sound recordings that he sampled, then fair use would become big news and more sample-based musicians would follow the path of Girl Talk. Which

[15] Barton Beebe, "An Empirical Study Of U.S. Copyright Fair Use Opinions, 1978-2005," University of *Pennsylvania Law Review* Vol. 156, No. 3 (January 2008), 572-73 (emphasis mine).

would mean that sample clearance fees would decline significantly.

So the main reason — the *real* reason, the more cost-effective reason — the music industry insists on *all* samples being cleared is simply because going full "clear-all samples" allows the music industry to not have to distinguish between uses of samples that are fair (this includes de minimis) and those that are not.

And who does this benefit? It benefits the major record company groups, owners of the major labels and the largest collective of owners of master recording and publishing copyrights in the world. So the industry wants "*all* samples cleared" because such an approach not only keeps things simple, it also maintains a lucrative revenue stream for the major labels and their partners. Thus, by establishing a clearance mandate that dictates that *all* samples must be cleared as "industry standard," then misrepresenting this industry standard to the public as a fact backed by copyright law, the music industry is able to not only maintain this profitable scheme, but also reinforce the status quo hierarchy of the ownership class associated with music rights.

Naturally, then, talk of de minimis and fair use in the music industry is taboo. Not because it's a risky proposition (*where hip hop/rap music sampling is concerned, the evidence says quite the opposite*). Talk of de minimis and fair use is discouraged in the music industry because it's counter to the way the music industry prefers to interpret copyright law. As with many copyright owners, the music industry believes that the purpose of copyright law is to protect copyright owners. Thus, music industry perceives de deminis and fair use as thorns in a copyright owner's side. But the purpose of copyright law, as plainly stated in the Copyright Act, is "to promote the Progress of Science and useful Arts."[16] And the purpose of de miminis and fair use is to help fulfill the objectives of copyright law, which, above all, is to benefit the public.

So, again, the insistence on clearing *all* samples — regardless of length or specific type of use, i.e. level of transformation involved, etc. — has very little to do with the fear of copyright law infringement suits. Where samples and sample clearance

[16] U.S. Const. art. I, § 8, cl. 8. See also 17 U.S.C. § 102 (1976).

are concerned, if the music industry fears anything at all, it's the crumbling of its status quo. So the real "fear" is of the majority that I mentioned in earlier in this chapter. The real fear is opening up Pandora's box and letting loose that watershed moment when the vast majority of sampled-based musicians gain a deeper understanding of copyright law and, more specifically, an awareness of de minimis and fair use. Once this moment arrives, every sample-based musician who understands copyright law and is aware of de minimis and fair use will reject the music industry's "*all* samples must be cleared" sample-clearance scheme. And this will lead to a revolt against other unfair music industry business practices. Put another way, those who run the music industry aren't afraid of losing copyright infringement lawsuits in cases that involve digital sampling and sound recordings, they're afraid of fair use becoming such a precedent that it not only dramatically changes the music industry's default sample clearance system, but that it also disrupts other areas of "industry standard" practices.

False-Crisis Narrative: The "Safer Choice," But at What Cost?

In Chapter 9, I discussed the false-crisis narrative that surrounds sampling. Here, it's important to look at this narrative more closely, particularly as it relates to the music industry. Under this faux crisis, so-called solutions for sample clearance are based on a problem that actually doesn't exist — or where it's more of a problem for labels and rights holders than it is for the public. What drives the false-crisis narrative is the belief (fake rule) that *all* samples, no matter the length, type, or level of transformation must be cleared. It's one thing for the music industry to enforce its own "industry standard" and practices; it's another thing for the music industry to misstate facts about copyright law or to summarily undermine the rights of the public that are protected by copyright law.

The proponents of the false-crisis narrative present their "*all* samples must be cleared" stance as something that's the right thing to do, the *fair* thing to do. But fair to *who?* Is it fair to the

public that the public should have to forfeit its right to permissive borrowing as prescribed by copyright law? Is it fair to recording artists? Is it fair to make recording artists believe that de minimis and fair use do not apply to sound recordings?

Copyright infringement can't be automated or determined in a court of music industry or rights holders opinion. Copyright infringement can only be determined in court, on a case-by-case basis. If sample-based musicians believe, based on the safe harbors of copyright law, that their works contain samples that do *not* infringe the copyrighted works of others, they are entitled to that position. Likewise, they are entitled to defend their position *if* and when a copyright owner files a claim of copyright infringement against them. In the latter scenario, the burden of proof is on the copyright owner.

However, the music industry prefers to avoid this reality and instead focus on convincing the public that no sample, under any circumstance, is permissible without clearance. This is false, but the music industry perpetuates this lie nonetheless. Misinformation and propaganda like this — which is often regurgitated by journalists and other commentators who tend to conflate key facts, ideas, and scenarios — has consequences when recording artists are trying to understand what they are permitted to do. Effectively, the major labels and music rights holders don't want the public to know what copyright law says about permissive borrowing.

Furthermore, proponents of the "all-samples must be cleared" stance don't just misrepresent their stance as being supported by copyright law, they also present their propaganda like it's simply the prudent thing to do, i.e. the "safer" course of action. But this catch-all approach, which is designed to keep record labels from landing on the wrong side of a copyright infringement lawsuit, ignores the facts about copyright law and perpetuates the myth that *any* sample that is not cleared is "illegal." As I noted in the previous chapter, this is akin to prior restraint. "[A] system of 'prior restraint' is any scheme which denies use of a forum *in advance of its publication*. **The First Amendment prohibits the imposition of a restraint on a publication before it is published without**

there first being a judicial determination that the material does not qualify for First Amendment protection." Through its "*all* samples must be cleared" stance, the RIAA, the governing body of the major labels (ergo, the music industry), is, in effect, actively policing federal copyright laws; and, in doing so, the RIAA is "performing a governmental function, and this may expose them to constitutional liability."[17]

From this perspective then, we need only ask two questions. First, do sound recordings represent one of the eight categories copyrightable subject matter as codified in the Copyright Act? Yes! Second, do the de minimis and fair use exceptions apply to music compositions and sound recordings? Yes! Since the answer is *Yes* to both of these questions, all discussions about sample clearance must *begin* here and not at clearance.

[17] "DO WE REALLY HAVE TO SUE THE RIAA????" http://www.negativland.com/archives/014riaa/, (Accessed March, 2012) Negativland first recognized this more than 25 years ago!

The Music Industry's Policy On Sample Clearance Is Prior Restraint, and the RIAA Must End It

Copyright law promotes the fact that originality, authorship, and creativity are inextricably linked. From this, we understand that copyright law recognizes two important facts. First, the fact that originality and authorship cannot exist without borrowing. Second, the fact that the practice of borrowing from existing works to create new works is vital to the advancement of society. In this way, copyright law underscores the reality that communication itself always involves borrowing. Thus, the art of sampling — like the art of writing or the art of painting — is not only an art form, it's also a form of communication.

So assuming that the biggest threat to public discourse is the silencing of the individual speaker by the state, we can understand how prior restraint enters the equation when an organization like the RIAA tries to criminalize sampling by allowing the labels under its watch to maintain that *any* sample that's not cleared is "illegal." Thus, we must recognize then that sampling is also a free speech issue. *Sampling* — the activity, the art form, the music process, the *kind* of borrowing — is not prohibited by copyright law. And no digital sample is copyright infringement *per se*. Yet the sleight-of-hand-language that the RIAA condones implies that sampling done without clearance is prohibited and that *any* sample not cleared is "illegal." Consequently, the RIAA's insistance that all samples are illegal before they've even been published is a violation of free speech, because it imposes a restraint on a publication — in this case a digital sample — before it is published and without there

first being a judicial determination that the digital sample does not qualify for First Amendment protection. Hence, the other major problem with sample clearance, specifically as its portrayed by the music industry, is that it's really a form of de facto regulation, suppression of free speech, and prior restraint.

By insisting that "*all* samples must be cleared," the RIAA-backed labels are not merely taking a prudent, "better-safe-than-sorry" stance, they are deliberately saying that *any* sample that is not cleared is "illegal." In effect, then, the RIAA is not only undermining a fundamental right of the public, it's also attempting to regulate *which* speech or expression can be publicly released. In other words, as Negativland first noted in 1998,[18] the RIAA-approved "*all*-samples must be cleared" stance is actually a form prior restraint. And it's prior restraint that should alarm us the most.

By definition, prior restraint is a type of censorship that restricts speech and expression and unlawfully places a restraint on that speech and expression before it's published. Under prior restraint, a government or authority — like the RIAA — controls what speech or expression can be publicly released. The First Amendment of the United States Constitution protects speech (expression) and freedom of the press. Prior restraint, which is deemed unconstitutional, is not limited to speech. It can impact all forms of expression including writing, art, and media. "It legally takes the form of ***licenses,*** gag orders, and injunctions." What happens is, the government or authority prevents distribution of the writing, art, or media, *either outright or by placing conditions that make it difficult for the distribution to occur.*[19] This is exactly how sample clearance is being used by the music industry today.

Although the RIAA represents record labels and distributors, it describes itself as a trade organization that "supports and promotes the *creative* and financial vitality of the major music companies."

---

[18] *Ibid*.

[19] "What Is Prior Restraint? Definition and Examples," Thought Company https://www.thoughtco.com/prior-restraint-definition-4688890#:~:text=Prior%20restraint%20is%20a%20type,oppression%20in%20the%20United%20States.][FN: "What Is Prior Restraint? Definition and Examples," Thought Company https://www.thoughtco.com/prior-restraint-definition-4688890#:~:text=Prior%20restraint%20is%20a%20type,oppression%20in%20the%20United%20States.

The RIAA further claims that its members, which it says comprise the "most vibrant record industry in the world," invests "*in great artists to help them reach their potential*."[20] If we take the RIAA at its word — that it supports and promotes the creative vitality of music companies, and that it backs the idea that record companies invest in artists to help them reach their potential — then the RIAA should be an advocate for the facts about copyright law and an ally to sample-based musicians. This means that, with regards to the digital samples of sound recordings, the RIAA should take the lead in educating the music industry about permissive borrowing and the objectives of copyright law.

Again, the false-crisis narrative is an invented problem. The reality is that there is no crisis. As such, the RIAA could announce that it takes copyright law seriously for *all* stakeholders — the public, which include artists who create music using digital samples sound recordings, and music rights holders. The RIAA could also openly acknowledge that de minimis and fair use applies to sound recordings; and, as such, the RIAA could formally announce a directive that instructs its member companies to recognize that some samples may be de minimis or fair use. Abiding by this default directive and recognition, the RIAA could create its own "industry standard" guidelines for what it considers to be clear cases of de minimis or fair use samples. Under such clearly defined guidelines — which still could never supersede the statutory limitations and execptions already codified in the Copyright Act — the RIAA could assert specific guidelines that detail when a sample does not need clearance. The RIAA could share these guidelines with recording artists and musc rights holders alike.

With regards to the recognition that some samples are fair use, there's already precedent for this. In 1998, the RIAA formally recognized fair use with regards to sampling. In announcing an amendment to its CD Plant Guidelines, the RIAA had this to say:

> These guidelines are intended to address *piracy*. Some recordings presented for manufacture may contain — as part of an artist's

[20] RIAA website: https://www.riaa.com/about-riaa/ accessed December 15, 2021.

> work — identifiable "samples" or small pieces of other artists' well-known songs. ***In some instances this sampling may qualify as "fair use" under copyright law,*** and in other instances it may constitute copyright infringement. There are no hard and fast rules in this area and judgments on both "fair use" and indemnification must be made *on a case-by-case basis.* [emphasis mine][21]

Does the RIAA still stand by its statement that, in some instances, some samples may qualify as fair use under copyright law? If so, the "*all* samples must be cleared" stance runs counter to the RIAA's 1998 statement. Consequently, I think it's time for the RIAA to reaffirm the statement it made in 1998 when it was under threat of a lawsuit for prior restraint. Otherwise, the RIAA may soon find itself once again facing the threat of a lawsuit for prior restraint. Only this time, given developments since 1998, the case against the RIAA is much stronger.

[21] "RIAA RESPONDS POSITIVELY TO NEGATIVLAND" http://www.negativland.com/ archives/014riaa/positiv.html, (Accessed March, 2012); see also: "Statement By the Recording Industry of America" http://www.negativland.com/ archives/014riaa/riaa_statement_082298.html, (Accessed March, 2012).

How Lawyer Bias Distorts the Discussion

I'm not a lawyer. You don't need to be a lawyer to take an interest in or have a firm grasp of the Constitution and copyright law. Of the 55 Framers of the United States Constitution itself, 23 were *not* lawyers. That said, I have a deep understanding of copyright law and how copyright infringement cases tend to pan out. And one thing's for certain: Lawyers represent both sides! So they are often far more "neutral" than they might appear. That is, until they reveal their personal bias.

Let me explain. If someone has been sued for copyright infringement and they believe that they haven't infringed, a lawyer will advise that person and help devise a defense. Conversely, if someone retains the same lawyer and wants to sue another party because they believe that their copyright has been infringed, that lawyer will advise them as to how to prove infringement. In both cases, the lawyer will advise their client as to the likelihood and probability of their case. In this regard, lawyers are not *inherently* for one side or another. But again, this doesn't mean that some lawyers don't hold their own personal biases. And the personal biases of lawyers also contribute to the propaganda surrounding sample clearance.

To illustrate what I mean, here I want to share a Twitter exchange that I had in 2020 with the law firm TorMarkLaw (@TorMarkLaw), Mark Jaffe (@MarkJKings), and entertainment lawyer Kevin Casini:



TorMark Law LLP @TorMarkLaw · Aug 25, 2020

Excellent question @amirsaid. One reason is for any kind of work, a lawyer often can't give a definitive answer on fair use or de minimis. It'll be based on what a court would "likely" or "probably" hold.

> **Said (Sa'id)** @amirsaid · Aug 25, 2020
> Replying to @amirsaid @TorMarkLaw and @MarkJKings
> Where sampling is concerned, an interesting (deceptively simple) question is *why is there so much focus on "risk" & "clearance" but so little focus on educating the public on de minimis and fair use, two long-standing safe harbors of permissive borrowing enshrined copyright law.

3 3 2

Kevin Casini @KCEsq · Aug 26, 2020

have to agree: one way is watertight and locked down sure that you're good. the other may be reliant on demonstrating fair use at trial. even winning litigation costs money.

1 1 1

Said (Sa'id) @amirsaid · Aug 26, 2020

What Tormark is saying, which I agree with and acknowledge, is *how a lawyer must advise. But with regards to your "watertight" comment, I think you've missed my point. The *clear everything* approach, regardless of the amount/nature of the sample, ignores safe harbors.

1

Said (Sa'id) @amirsaid · Aug 26, 2020

With other copyrightable material, like writing, photography, film, there's lots of caselaw — no bright line! And de minimis and fair use are well established. But with sampling, we're supposed to just act like de minimis and fair use doesn't apply to sound recordings?

1



Said (Sa'id) @amirsaid · Aug 26, 2020
Creatives working as writers, filmmakers, photographers, know (even if only intuitively) that borrowing small pieces from previous works and transforming (building upon) those takings is normal and necessary. Sampling is no different; in fact, it's often even more transformative.

1

Kevin Casini @KCEsq · Aug 26, 2020
I'm not ignoring Fair Use; far from it. But you asked (rhetorically I presume) why so much time is spent. clearances and not on educating and relying on fair use or de minimus use. And its because with a license, you know you're covered.

2

Said (Sa'id) @amirsaid · Aug 26, 2020
Ah, but the rhetorical question wasn't for me😉...
Ostensibly, this is all just about *why take the chance*.
But in reality, this is more about normalizing the idea that ANY sample is illegal without a license. And that's false.

2

Said (Sa'id)
@amirsaid

In the paradigm were the public *believes that ALL samples are inherently illegal, the public is lead to believe ALL samples must be cleared. Who benefits in this paradigm, the public OR copyright holders and the sample clearance regime?🤔

6:03 PM · Aug 26, 2020



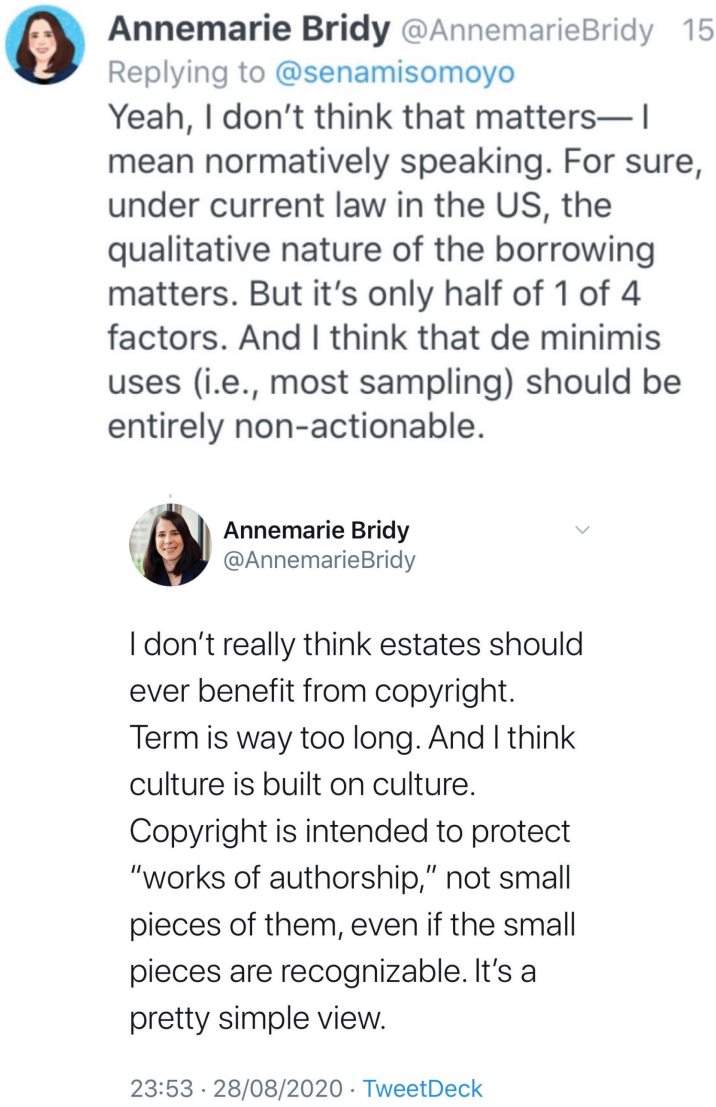
Casini's question, "Tell me this- what could a de minimis sample possibly lend to a song? If *legitimately* de minimis, *why use it*?" is very revealing. First, Casini makes a logical fallacy. He suggests that if something is "*legitimately* de minimis," then it has no legitimate artistic value and can't possibility contribute — "lend" — anything to a song. So "*why* use it?" Did you catch his bias? Where sampling is concerned, Casini doesn't believe that a de minimis sample can contribute anything of value to a song; and therefore, he's skeptical that a (useful) sample *can* be de minimis. In other words, according to Casini's view, *if* a sample is de minimis, it has no value, which conversely means that only samples that are *more* than de minimis — samples that are *substantial* — can have "legitimate" value.

Further, Casini raises a question of intent. The reason *why* a musician uses a given sample (de minimis or otherwise) is the same reason that any other musician borrows: Because he wants to, because it's part of the creative path that he's chosen to work within, because he finds value in doing so. In other words, the musician who uses a de minimis sample does so precisely because he knows what the sample will lend to a song. Moreover, the *intention* of the borrower has no bearing on whether the use is de minimis or fair. And *why* any musician borrows any piece of music from another piece of music — or for that matter, why any creative borrows any element from another creative — is not a matter of legitimacy but rather a matter of usefulness and creativity.

Putting aside Casini's obvious lack of understanding of sampling as an art form, particularly the fact that de minimis samples are always used in hip hop/rap's sampling tradition, and putting aside what seems to be Casini's bias against the basics of permissive borrowing overall, it's clear that Casini doesn't believe that, as far as sampling is concerned, sample-based musicians can make legitimate use of de minimis takings. This further suggests that Casini doesn't see sampling as an art form at all. Or perhaps he sees sampling as an art form but only when samples that are more than de minimis are used.

Given statements from various music lawyers throughout the past 36 years, Casini is not alone in his misunderstanding of sampling or his skepticism of sampling as an legitimate art form where de minimis takings are concerned. However, on the question of de minimis samples, not all lawyers share Casini's bias or misunderstanding of the art of sampling. For example, in 2020, Annemarie Bridy, a prominent IP and tech lawyer, observed that "[u]**nder current law in the US, the qualitative nature of the borrowing matters.** But it's only half of 1 of 4 factors. And ***I think that de minimis uses (i.e., most sampling) should be entirely non-actionable."*** And while discussing her support for the idea that authors should be rewarded appropriately for the use of their works, Bridy drew this distinction: "I think it's appropriate to reward authors where their works are used fully or almost fully — not

where ***little pieces of them are used in highly creative ways***." Bridy further noted that she thinks that "culture is healthiest where transformative creative uses are free."[22] Thus, for Bridy, de minimis samples *can* be used in highly creative ways.



[22] Annemarie Bridy, Twitter, Aug 29, 2020 (emphasis mine).

Turning back to Casini, we can detect a different dimension of bias with his praise of Girl Talk:



So if we're to understand Casini correctly, fair use is "more likely to be successful especially in the case of 'mash-ups'," where, according to Casini, "an *arguable* transformative work is created." Riiiight. So in sample-based hip hop/rap music, for example, where de minimis takings are used all the time, an "*arguable* transformative work" is *not* created? First, let's remember that de minimis comes before fair use. So how can a song that uses a de minimis sample be *less* likely to meet the fair use threshold than a song that uses a sample that's more than de minimis? Second, why does Casini present Girl Talk and mash-ups as the beacon of transformative sample-based music, even though hip hop/rap music — *which touts the likes of DJ Premier, RZA, Pete Rock, J Dilla, Marley Marl* — has pioneered and continues to lead the art form? If we take Casini's view seriously, it means that mashups — which typically include much longer, more recognizable samples but do not include any added vocal performance — are *more likely* to be

fair use and are "arguably transformative." But sample-based *hip hop/rap* songs, where typically smaller, unrecoginzable samples are used and combined with lyrics and vocal performances — both distinct creative additions that are protected by copyright law — do *not* result in a transformative work created? Thus, we can see the problem with the personal bias of some music lawyers and how this bias can negatively impact the discussion of sample clearance, especially as it relates to hip hop/rap music.

Five Critical Takeaways and The Battle Over Permissive Borrowing

Having arrived at the conclusion of this chapter, what I've hoped to impress upon readers are five things. First, the rights of copyright owners are limited, not absolute. Second, while copyright law seeks to strike a balance between the interests of the public and the interests of copyright owners, the interests of the public supersedes the interests of copyright holders, especially whenever the greater harm is likely to be done to the public. Two examples of greater harm that must be acknowledged in the discussion of sample rights vs sample clearance are: The stifling of creativity and prior restraint. Third, permissive borrowing is necessary to the author (creative) process, and copyright law has been designed with this fact in mind. Fourth, fair use is omnipresent in our daily lives, and it's key to fulfilling the objectives of copyright law. Fifth, no digital sample of a sound recording is copyright infringement *per se.* This fact cannot be nullified no matter what rights holders or music lawyers try to tell you.

In reality, whether any music lawyer or copyright lawyer — or anyone else for that matter — personally believes that there's legitimate value in using digital samples of sound recordings doesn't matter in the end. What matters in the end is the fact that copyright law recognizes the importance of permissive borrowing and defends its role in society. Thus, via specific statutory limitations and exceptions, including, but not limited to, fair use, the Copyright Act guarantees the public's right to permissive borrowing. So the Copyright Act not only protects the public's right *to sample* copyrighted works, it also protects the public's right to use, in some instances, samples — i.e. portions, snippets, takings, parts, etc. — of copyrighted works *without* the permission of the copyright owner. With this understanding, we should understand then that the "*all* samples must be cleared" stance is an assault on the public's right to permissive borrowing. Which means that the sample rights versus sample clearance fight is fundamentally a proxy war over permissive borrowing. And since this is really a battle for the public to preserve its right to permissive borrowing, there is really only one side that all of us must choose.

Chapter 27

Sampling, AI-Generated Music, and the Continuum of Permissive Borrowing

AI-generated music will undoubtedly have an impact on the art of sampling, so in this chapter, I discuss what AI-generated music will mean for sampling, permissive borrowing in general, and sample clearance. Additionally, since one of the objectives of this book is to show how the art of sampling applies to all creative works, and that all creative works and authors share a connection with sample-based beats and sample-based beatmakers (producers), I will also use this chapter to demonstrate how the issues and questions surrounding AI-generated creative works make this connection even more clear.

AI-Generated Content and the Copyright Office

The United States Copyright Office is the agency that oversees the copyright registration system. Hence, what the Copyright Office has to say about registering works that include AI-generated content is especially instructive for the ideas that I cover and the points that I hope to make in this chapter. So I will begin with an examination of the Copyright Office's official statement of policy entitled "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence."

Human Authorship Requirement

Setting the parameters for the depth of its policy dealing with AI-generated content, the Copyright Office notes that, since the origins of United States copyright law in the 1870s, the Copyright Office has overseen copyright registration and has "developed substantial experience and expertise regarding 'the distinction between copyrightable and noncopyrightable works.'" And according to the Copyright Office, one of the fundamental requirements for copyright registration is "human authorship":

> The second edition of the Compendium, published in 1984, explained that the "term 'authorship' implies that, for a work to be copyrightable, it must owe its *origin* to a human being." And in the current edition of the Compendium, the Office states that "to qualify as a work of 'authorship' a work must be created by a human being" and that **it "will not register works produced by a machine or *mere mechanical process that operates randomly or automatically without* any creative input** or intervention from a human author." [emhasis mine][1]

[1] United States Copyright Office, "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence" March 16, 2023 16190 Federal Register, Vol. 88, No. 51 Rules And Regulations 37 Cfr Part 202 Action.

In 2018, the Copyright Office denied an application for copyright registration because the Copyright Office's Review Board determined that the work was made "without any creative contribution from a human actor."[2] With regards to AI-generated content, this raises one important question. When does the "human actor" actually enter the creative equation? Or better stated, when does creativity actually begin? To give a textual instruction, i.e. a "prompt," is that not, to some degree, a human contribution? An AI generator only generates what it's *prompted* to generate. So if there's no limitation on the textual instruction that can be given (imagined), why isn't the "creative contribution from a human actor" element a part of the creative equation? For instance, what if the textual prompt is detailed, comprehensive, and expressive all on its own? Again, where does creativity begin? To whom does a work owe its true origin? And if all creativity relies on the referencing of other creative works, isn't the combination of creative references creative in and of itself?

So if you come up with specific creative references, ergo, "prompts," is this not a creative contribution from a human actor? According to the Copyright Office, a "prompt," no matter how detailed, is not sufficient to qualify as a contribution from a human actor. This would suggest that the underlying question here is about the *execution* of a fixed expression and not the *idea* for the fixed expression. And the answer to this question lies at the root of the idea/expression dichotomy. Copyright law protects a fixed expression, but copyright law does not protect the *ideas* that lie beneath a fixed expression. In this case then, the creative "prompt," which is essentially an idea, does not figure into the fixed expression if the AI tool, and not the human actor, executes the creation of the final work:

> "If a work's ***traditional elements of authorship*** **were produced by *a machine*, the work *lacks* human authorship** and the Office will not register it. For example, **when an AI technology receives *solely a prompt*** **from a human and produces complex written, visual, or musical works in response, the 'traditional elements**

[2] *Ibid*.

> **of authorship' are *determined* and *executed* by the technology — not the human user.** Based on the Office's understanding of the generative AI technologies currently available, **users do not exercise *ultimate creative control* over how such systems *interpret prompts* and *generate* material. Instead, these *prompts function more like instructions to a commissioned artist* — they identify what the prompter wishes to have depicted, *but the machine determines how those instructions are implemented in its output.*** For example, if a user instructs a text-generating technology to 'write a poem about copyright law in the style of William Shakespeare,' she can expect the system to generate text that is recognizable as a poem, mentions copyright, and resembles Shakespeare's style. ***But the technology will decide the rhyming pattern, the words in each line, and the structure of the text.* When an AI technology determines the expressive elements of its output, the generated material is not the product of human authorship.** As a result, that material is not protected by copyright… [emphasis mine][3]

This is where the art of sampling enters the chat! When is a "prompt" more than just a prompt of simple instructions? What if the instructions are not intended to serve as the basis of the final work? Moreover, when is an AI-generator just another tool and not responsible for the *conception* and *execution* of the final work? Which is to say, what if the human actor samples some of the "expressive elements" that the AI technology generates, and then uses these samples as raw materials to create the final work? In such cases, is that final work protected by copyright? The Copyright Office says yes:

> In other cases, however, **a work containing AI-generated material will also contain *sufficient human authorship* to support a copyright claim.** For example, ***a human may select or arrange AI-generated material in a sufficiently creative way*** that **"the resulting work *as a whole* constitutes an original work of authorship." Or an artist may modify material originally generated by AI technology to such a degree that the modifications meet the standard for copyright protection.** In these cases, copyright will only protect the human-authored aspects of the work, which are "independent of " and do "not affect" the copyright status of the AI-generated material itself. [emphasis mine][4]

[3] *Ibid*.
[4] *Ibid*.

With regards to: "In these cases, copyright will only protect the human-authored aspects of the work, which are "independent of " and do "not affect" the copyright status of the AI-generated material itself," this simply means that the AI-generated material itself (if identified in the copyright application) is not protected and the public is free to use it without permission from the copyright owner of the work.

With regards to: "A human may select or arrange AI-generated material in a sufficiently creative way," here, the Copyright Office is explicitly stating that the selection and arrangement of source material in a sufficiently creative way warrants copyright protection. In other words, if the work resulting from such human activity warrants copyright protection, then the work *as a whole* is *substantially* different than the work that it borrows from, and thus it constitutes "an original work" of authorship.

Next, the Copyright Office makes it clear that works made using a combination of a creative contribution from a human actor, like human-authored text, and AI-generated material can be protected:

> More recently, the Office reviewed a registration for **a work containing human-authored elements *combined with* AI-generated images.** In February 2023, **the Office concluded that a graphic novel comprised of *human-authored text combined with images generated by the AI service* Midjourney constituted a copyrightable work,** but that the individual images themselves could not be protected by copyright. [emphasis mine][5]

So what does this say about music made using AI technology? Well, it certainly means that song lyrics — the written text — can be protected. But as for the sound recording, well, it depends. Under the Copyright Office's guidelines, the music instrumental part of the sound recording cannot be protected if the insttrumental was "conceived and executed" by the AI technology. But if the vocal performance isn't AI-generated, that can be protected. In this scenario, does this mean that the sound recording *can* be registered, but only with the stipulation that vocal performance alone is

[5] *Ibid*.

protected but not the music instrumental? And what if the music instrumental contains a combination of AI-generated music and music made by a human? How is the sound recording supposed to be treated then? According to the Copyright Office's guide lines, since the work contains human-authored elements *combined with* AI-generated content, the "work as a whole" is copyrightable.

Further to this, under the section header "The Office's Application of the Human Authorship Requirement," the Copyright Office has clarified that:

> [a]s the agency overseeing the copyright registration system, the Office has extensive experience in evaluating works submitted for registration that contain human authorship *combined with* uncopyrightable material, including material generated by or with the assistance of technology. It begins by asking "whether the 'work' is basically one of human authorship, ***with the computer [or other device] merely being an assisting instrument,*** or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were ***actually conceived and executed not by man but by a machine."*** In the case of works containing AI-generated material, the Office will consider **whether the AI contributions are the result of "mechanical reproduction" or instead of an author's "own original mental conception, to which [the author] gave visible form." The answer will depend on the circumstances, particularly *how the AI tool operates* and *how it was used to create the final work*. This is necessarily a case-by-case inquiry. [emphasis mine]**[6]

Two things stand out here. First, to the extent that any technology is just a tool and not responsible for the conception and execution of the final work depends on the human actor's "own original mental conception." This reaffirms the fact that creativity and the creative process are always an intellectual endeavor. To use a camera, an electric guitar, a digital sampler, graphic design software, a word processor — all of these things are tools that authors use in such ways that "the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.)" are actually conceived and executed" by the

[6] *Ibid*.

author, not by the tool (the "machine"). Second, in determining the extent to which AI technology was used just as a tool or if the AI contributions were simply "the result of 'mechanical reproduction,'" i.e. free of human "original mental conception," the Copyright Office states that applications will be considered on a "case-by-case" basis. And as a fundamental part of this determination, the Copyright Office notes that it will consider the "circumstances" surrounding the AI contributions, including, in particular, "how the AI tool operates and how it was used to create the final work." What this means for music instrumentals, in particular, is that music instrumentals made through a combination of human musicianship — i.e. the playing of an instrument, arrangement of sounds/notes, etc. — and an AI music generator *can* still be protected and will not be rejected by default. Put another way, when AI-generated music instrumentals are used as *source material* by sample-based beatmakers (producers), the final work, i.e. either the beat by itself or the beat and the rhyme together as a song, is copyrightable.

What's also reassuring about the Copyright Office's guidelines is its explicit recognition that AI technology can be used just as a tool in the creative process:

> This policy ***does not mean that technological tools cannot be part of the creative process.*** Authors have long used such tools to create their works or *to recast, transform, or adapt* their expressive authorship. For example, a visual artist who uses Adobe Photoshop to edit an image remains the author of the modified image, and a musical artist may use effects such as guitar pedals when creating a sound recording. In each case, **what matters is *the extent to which the human had creative control over the work's expression* and "actually formed" the traditional elements of authorship.** [emphasis mine][7]

Here, the Copyright Office's statements fortify the legitimacy of using electronic music production instruments like digital samplers and drum machines, as well as other recording technology like

[7] *Ibid.*

DAWs, to compose, arrange, and program rhythms, melodies, and other musical elements.

Next, under the section "Guidance for Copyright Applicants" and the sub-section "How To Submit Applications for Works Containing AI-Generated Material," the Copyright Office essentially concedes that it's often not possible to detect if and when a work contains AI-generated material:

> Consistent with the Office's policies described above, **applicants have a *duty* to disclose the inclusion of AI-generated content in a work submitted for registration** and to provide a brief explanation of the human author's contributions to the work. As contemplated by the Copyright Act, such *disclosures* are "information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.
>
> **Individuals who use AI technology in creating a work may claim copyright protection for their own contributions to that work.** They must use the Standard Application, and in it identify the author(s) and provide a brief statement in the "Author Created" field that describes the authorship that was contributed by a human. For example, an applicant who incorporates AI-generated text into a larger textual work should claim the portions of the textual work that is human-authored. **And an applicant who creatively arranges the human and non-human content within a work should fill out the "Author Created" field to claim: "Selection, coordination, and arrangement of [describe humanauthored content] created by the author and [describe AI content] generated by artificial intelligence."**
>
> **AI-generated content that is *more* than *de minimis* should be explicitly excluded from the application.** This may be done in the "Limitation of the Claim" section in the "Other" field, under the "Material Excluded" heading. Applicants should provide a brief description of the AI-generated content, such as by entering "[description of content] generated by artificial intelligence." Applicants may also provide additional information in the "Note to CO" field in the Standard Application.
>
> Applicants who are unsure of how to fill out the application may simply provide a general statement that a work contains AI-generated

> material. The Office will contact the applicant when the claim is reviewed and determine how to proceed. ***In some cases, the use of an AI tool will not raise questions about human authorship,*** and the Office will explain that ***nothing needs to be disclaimed*** on the application. [emphas mine][8]

Ok, wow. First, the issue of disclosure. This is the other elephant in the room. The Copyright Office knows that, even when a work contains AI-generated content — and some cases, like deep fake vocals, are more obvious than others — it's not always clear if AI-generated content is included. Thus, the Copyright Office recognizes that it can't always detect if AI-generated content is contained in the work. So the Copyright Office's only recourse is to tell applicants that they must disclose this information. But will most people actually disclose the inclusion of AI-generated content when there's really no apparatus in place to force them to do so? The Copyright Office says that applicants for copyright registration "have a *duty* to disclose the inclusion of AI-generated content in a work submitted for registration." So, like the honor system? The truth is, there's nothing that can stop applicants from *not* disclosing the inclusion of AI-generated content in a work. Moreover, the Copyright Office itself notes that only AI-generated content that is "*more* than de minimis" needs to be disclosed.

Now, consider this parallel. Labels instruct artists to report all digital samples that are contained on the songs that they submit to for release. But it's not always possible to do that. In fact, if and when recording artists do report the digital samples contained on the songs that they submit, they usually only report the larger, more recognizable samples; they never report all of the samples, especially not the de minimis samples. This leads us to the next point.

The second matter in question under the Copyright Office's "Guidance for Copyright Applicants" and "How To Submit Applications for Works Containing AI-Generated Material" deals with de minimis use. The Copyright Office expressly states that AI-generated content that is "*more than* de minimis" should be

[8] *Ibid*.

explicitly excluded from the Standard Application, and that such information should be noted in the "Limitation of the Claim" section in the "Other" field, under the "*Material Excluded*" heading. And here, applicants 'should provide a brief description of the AI-generated content." Alternatively, applicants "may also provide additional information in the 'Note to CO' field in the Standard Application." Thus, if the Copyright Office instructs that AI-generated content that is "*more than* de minimis" must be disclosed in work submitted for registration, we should understand then that AI-generated content that *is* de minimis need not be disclosed; therefore, it should *not* be mentioned at all.

Note that the Copyright Office's direct mention of "de minimis" in its guidelines is deliberate. Thus, with the mention of de minimis in this context and with such specificity, the Copyright Office's statement here represents a frim acknowledgement of the legitimacy of de mininis use in creative works. Accordingly, this is instructive to our understanding of the use of de mininis digital samples of sound recordings.

Next, under the section header **"**How To Correct a Previously Submitted or Pending Application," the Copyright Office further demonstrates its focus on getting applicants to self-report when AI-generated content — that is *more than* de minimis — is included in the work:

> Applicants who have already submitted applications for works containing AI-generated material *should check that the information provided to the Office adequately disclosed that material.* If not, they *should* take steps to correct their information so that the registration remains effective.
>
> For applications currently pending before the Office, applicants *should* contact the Copyright Office's Public Information Office *and report* that their application omitted the fact that the work contained AI-generated material. Staff will add a note to the record, which the examiner will see when reviewing the claim. If necessary, the examiner then will correspond with the applicant to obtain additional information about the nature of the human authorship included in the work."

> **For applications that have already been processed and resulted in a registration,** the applicant *should* correct the public record by submitting a supplementary registration. A supplementary registration is a special type of registration that may be used "to correct an error in a copyright registration or to amplify the information given in a registration." In the supplementary registration, the applicant should describe the original material that the human author contributed in the "Author Created" field, disclaim the AI-generated material in the "Material Excluded/Other" field, and complete the "New Material Added/Other" field. **As long as there is sufficient human authorship, the Office will issue a new supplementary registration certificate with a disclaimer addressing the AI-generated material.** *Applicants who fail to update the public record after obtaining a registration for material generated by AI risk losing the benefits of the registration. If* the Office becomes aware that information essential to its evaluation of registrability "has been omitted entirely from the application or is questionable," it *may* take steps to cancel the registration. [emphasis mine][9]

In other words, a number of works that include AI-generated content — but *without* disclosure — have already received copyright registration, and there's no way for the Copyright Office to know to what extent that AI-generated content was included in these works. So the Copyright Office is relying on copyright holders of such works to "correct the public record by submitting a supplementary registration." Hence, the Copyright Office wants these copyright owners to self-report and update the record to show the inclusion of AI-generated content. The Copyright Office says that it will then issue a new "supplementary registration certificate with a disclaimer addressing the AI-generated material." Under this self-report scenario, copyright owners who fail to submit a supplementary registration "risk losing the benefits of the registration." Here, the point is that either the AI-generated content information has been omitted from the application or the registration is "questionable," presumably based on evidence (later discovered by the Copyright Office) that the work included AI-generated content, or that the copyright owner "knowingly provided the Office with inaccurate

[9] *Ibid*.

information." But will submitting a supplementary registration — that's meant to disclose the inclusion of AI-generated content in a work that has *already* received copyright registration — become something that most people do? Again, it's the honor system. Plus, when you take into account that the Copyright Office implicitly says that *de minimis* AI-generated contented need not be mentioned, and I imagine that lots of people will not bother to self-report.

***

The Proper Reading of the Copyright Office's Guidelines

The proper reading of the Copyright Office's "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence" is not simply that the Copyright Office is keenly focused on highlighting human authorship or excluding AI-generated content from copyright protection. The underlying focus of the Copyright Office's guidelines is what best serves the objectives of copyright law. And in this regard, the Copyright Office is super focused on alerting the public to a new limitation and exception: *the AI-generated content limitation and exception*. At some point, there may be an amendment to the Copyright Act to include statutory language that stipulates the AI-generated content limitation and exception. But until then, this is the next best thing. Thus, with its "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence," the Copyright Office is not merely saying that AI-generated content is not copyrightable, it's implicitly saying that the AI-generated content that's included in a copyrighted work can be used by the public freely, without any permission from the copyrighted owner of the work that includes AI-generated content.

The Art of Sampling and AI-Generated Source Material

What Music Made Using AI Reaffirms About Permissive Borrowing

Ever heard of the rock band Greta Van Fleet? If you haven't, do a Google search for "Greta Van Fleet Sounds Like Led Zeppelin." But more on Greta Van Fleet later in this section. First, I want to turn our attention to rap beef.

In April, 2024, a rap beef erupted between Kendrick Lamar and Drake. And within hours of the first round of diss records being posted online by both rappers, bystanders posted AI-assisted response songs. Without official confirmation from Drake or Kendrick, it wasn't *immediately* clear if the songs were official releases or if they were AI-assisted deep fakes made by random social media users. In other words, the deep fake rap vocals, the AI-assisted songs, were so believable that they were able to pass for the real thing.

Next came the parody AI-assisted songs that were created with instrumentals that featured '60s and '70s music styles. Beyond the laughter and unserious nature of songs like "BBL Drizzy," created by comedian @KingWillonius, is something quite serious and groundbreaking. It's the nature of what I call AI-source-material-based beats, which is to say, sample-based beats that aren't made via samples of actual songs from bygone eras, but rather samples of songs made today using AI-generated music that *sounds like* music from bygone eras.

When you listen to @KingWillonius's "BBL Drizzy," it makes you think of songs from the '60s and '70s. It makes you think of Motown style and sound and similar music of the same era. However, for the making of "BBL Drizzy," there wasn't any specific Motown song or any other song in particular that was *sampled*. And

this is the case for all of the similar AI-assisted songs because they all share the same basic process. What's going on here is that a user gives a "prompt" to an AI music generator, which has already been "trained" on hundreds of thousands of hours of various styles and sounds of music, dating as far back as 80 years. So the AI music generator spits out music based on whatever descriptive prompt the user feeds it. This prompt can include a description of a specific recording artist or a specific genre or a mood or a specific style and sound like the Motown style and sound or the Philly International Records style and sound (aka "the sound of Philadelphia") or the Stax style and sound, whatever. Once the AI music generator has its prompt, it can generate an new instrumental based on the musical instructions given by the user of the AI music generator.

It's important to note, however, that, in terms of these AI-generated instrumentals, this isn't "deep fake." Because rather than using one specific style or sound of one particular recording artist, what's actually being used — i.e. what's actually being *referenced* — are the style, sound, and features of an entire era. And once you add lyrics and use the AI-music generator to generate a vocal performance in the style of your choosing, you have a song made today that *sounds like* a song from the '60s and '70s.

Note: While the use of AI in this scenario is new, the use of "song models" and the practice of making songs that sound like eras from the past are certainly nothing new. Later in this chapter, I examine more in depth how the use of song models factors into AI-generated music.

AI-Generated Music Is Not a Novelty

To get a better idea of how AI-generated music technology is not a novelty but rather a serious tool for music creation, let's look at the product description by Hubx, the developer behind the AI-music app AI Music Generator. In its product description in the iTunes store, Hubx describes its AI music generator as a "tool." This is signficant because this description is in line with the Copyright Office's own conclusion that AI technology can be used as a tool. Hubx further says that its AI music generator permits users to explore the "limitless possibilities of music with Al." While this is Hubx's marketing, the limitless possibilities of AI technology are not restricted to any one AI music generator or AI service.

Next, Hubx notes that you can simply post the link to the song you want to cover or you can go to its "Discover" page where many AI music styles are available to choose from. Once you've posted the audio link, you can choose the length of the song. So the song doesn't have to be, let's say, 3 or 4 minutes long, the typical length for a song. The song can be 3 or 4 *seconds* if you like. On the surface, Hubx markets its AI music generator as a tool for creating AI "cover" songs. But below the surface, Hubx is well aware of the ultimate power of AI technology. This is why Hubx points out that you can "[d]ive into a world of *musical interpretation* using AI cover," and, with its AI music generator, you can "reinterpret" and "reimagine…tracks with Al generated music, **including *unique instrumentals***." Hubx specifically notes that its AI music generator "creates melodies, harmonies, and rhythms," adding that, "**[a]ll you have to do is enter a prompt."**[10]

For sample-based beatmakers (producers), this is huge! First, what this means is that you can create your own unique source material to sample. Second, the source material that you create using AI-generated music is free of any copyright issue, because, as the Copyright Office notes in its guidelines, AI-generated content, in this case the AI-generated music instrumental, is

[10] Product description for AI Music Generator by Hubx, iTunes store, last accessed June, 2024.

not copyrightable. Third, while the AI-generated content is not copyrightable — and we must remember that any AI-generated content that's de minimis should not be reported on a copyright registration application — "**a work containing human-authored elements *combined with* AI-generated"** content constitutes a copyrightable work.[11]

AI-Created Source Material, "AI Sampling," and Why Sample-Based Hip Hop/Rap Beatmakers (Producers) Are Well Suited for AI-Generated Music Technology

As I said before, using "song models" to make new music is not new. Recycling a style, a sound, a vibe, a mood, or a feeling — none of these things are revolutionary. And when it comes to music from the '60s and '70s, the most sampled source material among hip hop/rap sample-based beatmakers (producers), there's no shortage of supply of '60s and '70s songs that AI-music generators can use as song models or as models for music styles. Hence, in this section, I want to drill down on where AI-generated music technology *is* revolutionary and why it's especially useful for sample-based hip hop/rap beatmakers (producers). I also want to show why sample-based hip hop/rap beatmakers (producers) are well-suited for the emerging era of AI-gerated music technology.

Even though AI technology can replicate music genres, styles, and sounds, it cannot replicate intricate sample-based *beat* styles in the same way that it can music styles associated with specific genres and recording artists. One reason is because sample-based hip hop/rap beatmakers (producers) do not make rhythms, melodies, and harmonies in the same manner that traditional musicians do. Sample-based hip hop/rap beatmakers (producers) think in terms of making *beats*, and this is distinctly different from the approach that, let's say, a typical rock musician takes. In the paradigm of

[11] United States Copyright Office, "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence" March 16, 2023 16190 Federal Register, Vol. 88, No. 51 Rules And Regulations 37 Cfr Part 202 Action.

beatmaking, anything goes! If a beat is dope, it's dope! Its conception need not defer to any "rule" and it need not be the product of the beatmaker (producer) aiming for a pre-conceived rhythm or melody. This is because sample-based beatmakers (producers) typically convert snippets of sound recordings — music phrases, sounds, and tones — *into* rhythms, melodies, and harmonies. But these rhythms, melodies, and harmonies are often the byproducts that can be identified by pitch and key *afterwards*. The beat itself, however, is always driven first and foremost by the individual beatmaker's (producer's) specific use of hip hop beatmaking's aesthetics. And the intricacies of sample-based beats, especially those beats that are composed from precise sample chops, whose individual chops are completely unpredictable in origin.

Even if an AI music generator trains itself on sample-based beats made by DJ Premier or J Dilla — which is to say, even if an AI music generator trains itself on the specific sample (audio clips) that it *can* identify — it cannot replicate what's going on in the beats made by DJ Premier and J Dilla because the source material — the chops, the *choices* behind the chops, and the arrangement of the chops — defer to the unique logic of DJ Premier and J Dilla; it does not prescribe to any logic that the AI music generator can build a solid reference upon. This is different than a Led Zeppelin song where the AI music generator *can* replicate the sound by referencing Led Zeppelin's style and sound, which lends itself to the general style and sound shared by all progressive rock bands between the late 1960s and late 1970s.

Another reason why AI-generated music technology cannot replicate intricate sample-based *beat* styles is because there is no "prompt" that can match the infinite number of directions that an individual sample-based beatmaker (producer) could go in with just *one* sample, let alone multiple samples. Certainly, AI technology can probably replicate sample-based beats that are built around single, recognizable loops — think of the beat for Puff Daddy's "I'll Be Missing You" (1997), which relies on The Police's hit song "Every Breath You Take" (1983). Or think of drumless loops, which basically rely on looped samples of melodies and rhythms

from songs that can be identified. But there's a stark difference between a sample-based beat made using loops of samples *left unchanged* and a sample-based beat made using unrecognizable chops of samples of songs.

AI-generated music technology would be hard pressed to replicate loops and grooves that are constructed from disparate samples of phrases, snippets, riffs, parts, tones, and sound stabs taken from *various* songs. It's easy for AI technology to replicate and emulate the features of the Motown style or "the style of the '70s" with a simple prompt. But how about a prompt for "'90s style sample-based hip hop/rap beats, combined with the 2000s style of sample-based hip hop/rap beats, combined with RZA's drums, combined with Pete Rock's horn style?" Yeah, good luck with that.

While an AI music generator can likely generate weak versions of "type beats," like a "DJ Premier type beat," for instance, an AI music generator can't get at the heart of what makes a DJ Premier beat, particularly because the essence of what Premier does comes more from his background as a DJ than his background as a "traditional" musician. In other words, AI technology simply can't emulate the intricacies of sample-based beats because these beats aren't based on the same identifiable metrics and references that AI music generators "train" on.

Next, while you can usually tell that an AI-generated cover song was made using AI, this isn't the case with sample-based hip hop/rap beats made using AI-created source material. Remember, sampling, fundamentally, is not about doing "covers" or derivative versions of songs. Sampling is about taking small pieces of songs (and other sound recordings) and using these pieces as raw material for creating beats (new music) with them. So the same methods, processes, techniques, and aesthetics apply to the use of AI-created source material.

Another advantage to creating and using AI-generated source material, an advantage especially for sample-based hip hip/rap beatmakers (producers), is obscurity. Sample-based hip hop/rap beatmakers (producers) are record diggers by nature. So having a vast knowledge of and thirst for obscure songs and sound

recordings that most people have never heard of comes with the territory. And this knowledge of obscure songs — covering multiple genres — broadens the possibilities of the kinds of prompts that sample-based hip hop/rap beatmakers (producers) can give to AI music generators. For example, let's say a sample-based beatmaker (producer) gives his AI music generator a prompt like, "music style of John Klemmer's 'Free Soul.'" Most people aren't familiar John Klemmer, a jazz musician who made his name in the sub-genre of jazz fusion. Still, there have been a number of hip hop/rap songs that feature samples of John Klemmer's music. But it's hard to know that because John Klemmer is simply too obscure for most people today.

On the other end of the obscurity spectrum, we have well-known songs that can be used to generate something that can be rendered obscure. For example, let's say a sample-based beatmaker (producer) gives his AI music generator a prompt like, "music style of Al Green's 'Love and Happiness.'" The AI music generator will generate music that *sounds* like "Love and Happiness," meaning it will share certain characteristics with "Love and Happiness," perhaps even the same mood and feel, but the music that the AI music generator generates, based on the "Love and Happiness" *prompt*, will not be "Love and Happiness." It may contain a similar rhythm or even a similar melody, and it will certainly have similar sonic qualities, but no matter how much it *may* sound like"Love and Happiness," it will not contain any of the actual sounds from the copyrighted sound recording of "Love and Happiness," nor will it include any of the exact same elements or arrangements from the copyrighted music composition of "Love and Happiness."

This leads us to another important thing about AI-generated source material. It's sample-clearance proof! Looking at the Al Green "Love and Happiness" example again. Since none of the actual sounds from "Love and Happiness" sound recording have been used in the new instrumental, the copyright in the sound recording and the copyright in the music composition are not at issue. When a beatmaker (producer) samples the new instrumental — created using AI technology — what he's actually sampling is

the AI-generated "Love and Happiness" *sound-alike* instrumental, *not* Al Green's "Love and Happiness." In this way, AI-generated source material further exposes the music industry's "*all* samples must be cleared" for the illogic that it is. Not only that, AI-generated source material further cripples the "industry standard" sample clearance system, because, in theory, thanks to AI-generated source material, a sample-based hip hop/rap beatmaker (producer) need never sample a record ever again. So whether the RIAA formalizes sample clearance or not, AI technology is more evidence that we've arrived at the end of sample-clearance as we've known it.

Lastly, in terms of the different methods, processes, and techniques used for transforming samples, sample-based hip hop/rap beatmakers (producers) are masters of disguise by nature. So AI-generated source material empowers sample-based hip hop/rap beatmakers in ways that are simply not comparable for other musicians. Hence, AI-generated source material has now added an entirely new sub-genre of sample-based beatmaking processes.

Will There Still Be the Same Feeling With AI-Generated Source Material?

Earlier in the previous section, I noted that, thanks to AI-generated source material, a sample-based hip hop/rap beatmaker (producer) need never sample a record ever again. Although, I believe that sample-based beatmakers (producers) will always sample records, I expect most sample-based beatmakers (producers) will also sample AI-generated source material. But if a big part of the appeal of sampling, especially for sample-based hip hop/rap beatmaers (producers), is about interacting with and commenting on history, is this element lost when AI-generated source material is used? I would argue that it isn't. Creating AI-generated source material, specifically for sampling in the hip hop/rap music tradition, still requires that you know music and that you're familiar with the many different recording artists and songs that could be converted into the hip hop/rap music aesthetic. In this regard, sample-based hip hop/rap beatmakers (producers) are naturally adapt at giving

unique "prompts" to AI-music generators. And I suspect that many sample-based hip hop beatmakers (producers) will develop a knack for dictating detailed prompts that generated tailor-made source material, "sample packs" if you will, for their own use. Something no different than core drum sounds that many sample-based beatmakers (producers) have already created. In any event, users will still be interacting with history, because they only way to really reference a feel from a bygone era, is to actually hear it and study it. From there, sample-based hip hop/rap beatmakers (producers) will do what they always do: Flip the samples!

Additionally, while it might be argued that the "soul" of the music of the '60s and '70s is not present if the source material that is generated by an AI music generator, we still have to remember that the AI-generated source material is referencing the music of the '60s and '70s. We also can't forget that the entire vision and execution of the music "as a whole," i.e. the final work, is being created by the human actor — the sample-based beatmaker (producer) — who breathes in the soul of this music as a direct result of interacting with it.

We won't always be able to tell the difference between music actually made in the '60s and '70s and the AI-generated source material made today. But will we be able to *feel* the difference? Here, I'm torn. Simple and plain, I don't know? But I've never heard Mozart actually play the piano, nor have I heard an eighteenth-century performance of any of Mozart's compositions. Yet when I hear a performance of one of Mozart's compositions today, I still feel it. So if AI-generated source material is faithful to the styles, sounds, and aesthetics that sample-based hip hop/rap beatmakers (producers) *prompt* it to be, I believe, in the end, I'll still feel that music too.

Nonetheless, the music of the '60s and '70s, the actual sound recordings made by some of the most influential and little-known artists alike, can never be replaced. Furthermore, within the sampling tradition of hip hop/rap music, there is a long-established sub-tradition of digging for records; here, I believe hip hop/rap's "digging in the crates" tradition will never die. Still, I do believe

that AI-generated source material will become a complement to digging for music in this traditional sense. But it remains to be seen if creating AI-generated source material will ever rival digging for music in the traditional since.

***

Having examined the Copyright Office's guidelines on AI-generated content, and having looked at how AI-generated source material will impact the art of sampling, we can clearly see a continuum. The fundamental thing that continues to underscore all of this, whether it's sampling or AI-generated music, is permissive borrowing. This is an important point, becauese one of the goals of this book has been to show how the art of sampling illustrates the power of permissive borrowing. In particular, I've tried to show three things. First, how the art of sampling exemplifies the necessity of permissive borrowing in the creative process. Second, how permissive borrowing always leads to the creation of new works, with varying degrees of *transformation*. Third, how the art of sampling demonstrates the benefits that permissive borrowing can hold for society. With that all said, I will now close out the final chapter of this book with an assessment of how permissive borrowing and AI-generated music will ultimately change the music industry forever.

What Does AI-Generated Music Ultimately Mean for the Music Industry?

Most rights holders, especially music rights holders, believe that there's no such thing as "permissive borrowing." Instead, they've convinced themselves that the rights to the works that they own are absolute; and as such, they believe that *any* use of their copyrighted works requires their permission and payment. This is why Universal Music Group, the world's largest music company, asked major music streamers like Spotify and Apple Music to "block artificial intelligence companies from using its music to 'train' their technology." Speaking to the *Financial Times*, a UMG spokesperson, who confirmed UMG's request to Spotify and Apple, had this to say: "'We have a moral and commercial responsibility to our artists to work to prevent the unauthorized use of their music and to stop platforms from *ingesting* content that violates the rights of artists and other creators. We expect our platform partners will want to prevent their *services from being used in ways that harm artists*.'" The UMG spokesperson further stated that UMG had "'become aware that certain AI systems might have been ***trained on copyrighted content*** **without obtaining the required consents from, or paying compensation to, the rightsholders who own or produce the content.,'"** and added that "'[w]e will not hesitate to take steps to protect *our rights* and those of *our artists*.'"[12] This statement is important, not for what it says, but for what it *doesn't* say.

In terms of rights, UMG is on less solid ground than it thinks. The truth is, the music industry has arrived late to the AI party; and it finds itself (once again) on the wrong side of technology and

[12] Jem Aswad, "Universal Music Asks Streaming Services to Block AI Access to Its Songs," *Variety* April 13, 2023 https://variety.com/2023/music/news/universal-music-streaming-services-block-ai-1235582612/amp/ (emphasis mine).

looking to try "block" it. Too late, and too wrong. For one thing, music streaming services have had access to AI companies long before the spring of 2023, the year UMG first made its request. And in reality, AI companies don't even need the major streamers to continue using copyrighted songs in its AI training. AI companies need only an audio clip or a link to an audio clip. So essentially, UMG's request to major music streamers to block AI companies is a request to block *access* to its music.

But *access* to music is not copyrightable. More importantly, AI companies, like the rest of the public, already have *access* to any music that has ever been published and made available to the public. That an AI company uses publicly available material, in this case songs, to train its AI generator isn't copyright infringement. If the AI company is not republishing or redistributing the music (in whole or substantial part) that it analyzes and learns from, i.e. "trains" on, then that's *not* copyright infringement. It's also worth noting that at the time of the publication of this book, there's no law that specifically prohibits the use of copyrighted works in AI training. In fact, the Copyright Office, whose primary concern with regards to policy is the public good, has only recently begun to weigh in on this. And reading the Copyright Office's initial reaction, it's clear that the Copyright Office isn't convinced that the use of copyrighted works in AI training is illegal. The Copyright Office has even noted that it's still "seeking *public input* on additional legal and policy topics, including how the law *should* apply to *the use of copyrighted works in AI training* and the resulting treatment of outputs."[13]

Again, it doesn't matter if the AI company *accesses* music through a major streamer like Spotify and Apple Music or if it accesses the music through YouTube or a direct upload from a user or whatever *point of access*. If an AI company's music generator simply analyzes the characteristics of the music and songs that it ingests (digests), then *imitates* ("uses") what it's learned to create *sound-alike* songs or

[13] United States Copyright Office, "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence" March 16, 2023 16190 Federal Register, Vol. 88, No. 51 Rules And Regulations 37 Cfr Part 202 Action. As a member of the public and the author of *The Art of Sampling*, it's my hope that the Copyright Office consults this section of *The Art of Sampling* as part of any policy determination it makes regarding the use of copyrighted works in AI training.

sound alike musical elements, that's also not copyright infringement.

Viewed in this light, when you get right down to it, every musician, every recording artist since the *1930s* — roughly the dawn of the music industry — has been "trained" on copyrighted music! Any musician who's ever listened to a copyrighted song played on the radio or contained on a vinyl record or a cassette tape or a CD or in a download or on *any* capture media known to date has "trained" himself on copyrighted music. Led Zeppelin "trained" on music by the great blues musicians Robert Johnson, Willie Dixon, Muddy Waters, and Howlin' Wolf. And Greta Van Fleet "trained" on songs by Led Zeppelin. Either representatives at UMG don't understand this fact or they're entirely in the dark about what AI generated music actually entails.

Essentially, an AI generated music generator works like this. Any prompt (written description) that you give an AI music generator will generate music. In the grand scheme of things, an AI music generator — which has typically ingested/digested (*analyzed*) literally 100s of thousands of hours of music, spanning roughly 70 years — studies all of the musical characteristics, including the music, lyrics, vocal performances, music styles, and sonic qualities of every song or sound recording that it's ever accessed. Having digested and studied all of these musical characteristics, the AI music generator "trains" itself on all of these musical characteristics, which then permits it to make new music using everything its learned. So basically, when you give an AI music generator a prompt, it calls up the musical *references* which it has stored and creates new music using these references as a guide, all in deference to your specific prompt. In this light, what's the difference between musicians studying Led Zeppelin's music, digesting all of its key characteristics and learning specific musical references, and using what they've learned to "train" themselves to make songs that *sound like* Led Zeppelin? Is it the speed and depth with which an AI-music generator can do all of this "referencing" and "training" that troubles UMG?

***

You may have noticed that, throughout this book, I have mentioned Led Zeppelin a number of times in relation to sampling and borrowing. I've done this for three reasons. First, Led Zeppelin is one of the most notorious serial "borrowers" of other people's music of all time! Yet Led Zeppelin remains one of the most celebrated bands of all time. Second, I wanted to draw attention to the fact that, if one of the greatest bands of all time frequently borrowed — and some of this borrowing even blurred the lines of what was fair use — then what does this reveal about permissive borrowing and fair use? Third, I wanted to use Led Zeppelin to illustrate how the basic concept of AI-music generation relies, fundamentally, on *imitation* and *referencing* — The same thing that helped Led Zeppelin make new music.

A "style," "vibe," "mood," or similar "riff"— these things can't be copyrighted, but they are the kinds of things that musicians borrow, "train" on, learn from, and copy all of the time. Just go listen to Led Zeppelin, then listen to Greta Van Fleet's 2018 song "Highway Tune." Or listen to Rush, the band once dubbed "the Canadian Led Zeppelin." Check out Rush's 1974 song "What You're Doing." It's a riff of Led Zeppelin's1969 song "Heartbreaker." If Greta Van Fleet can be praised and celebrated for "reviving" the '70s hard rock sound pioneered by Led Zeppelin, what can be said of AI's ability to "revive" the '60s/'70s soul sound? And in the case of both Greta Van Fleet and Rush, what they did was fair game; no copyrights in Led Zeppelin's songs were violated, even though Led Zeppelin's songs were obviously *accessed*.

The copyright in a music composition is restricted to the specific words and music, i.e. arrangement of the specific music composition. And the copyright in a sound recording is restricted to *only* those sounds in the sound recording. So if a new song *sounds like* an older song, but it doesn't actually use any of the actual sounds from the sound recording and it doesn't use the same arrangement, melody, rhythm, or harmony of that older song, there's no copyright infringement — no matter how much the style, vibe, and mood *sounds like* the primary recording. And it doesn't matter if the secondary song, the sound-alike song, was made by a cover band

or if it was made using an AI music generator. Likewise, if a new song *sounds like* an older song, but it doesn't actually sample the older song, there's no copyright infringement, because the *imitation* and *referenccing* of various musical characteristics of a copyrighted song is not copyrightable. At the core, *imitation* and *referencing* are taking place when AI music generation is at work. It's still the same concept: *Imitation* and *referencing* via analysis, "digestion," "learning," and "training." When you look at it this way then, an AI music generator isn't doing anything new. The only difference is that technology has made it possible for the machine to do it faster and, in some cases, better. So in reality, what's really going on is this. AI technology has accelerated an age-old music process and amplified permissive borrowing.

More significantly, and this is something that bothers many musicians, AI-generated music technology doesn't require that you be a musician. But even this is nothing new in the music industry. In fact, the music industry has a long history of propping up recording artists who were not musicians but rather fronts for the musicians behind the music. When we look at Milli Vanilli, for example, we understand the scam for what it was. The guys that made up Milli Vanilli weren't the real singers or the musicians behind their hit songs, they just fit their record company's desired marketing image. Some might argue that at least, there were "real" musicians and vocalists behind the songs of Milli Vanilli. But to that I say, who cares!

I'm a musician and I take my music seriously. But I'm also a fan of music, and my taste is not necessarily tethered to *how* the music was made or *who* made it. I've long been aware of the fact that the real creators behind much of the music we listen to have never been credited. Moreover, in most cases, we never know how the music was actually made in the first place. So if a comedian makes a catchy tune using AI technology, am I not supposed to like it because he's not a "real" musician? In the end, the only thing that matters to consumers is whether the music sounds good. If you're on the dance floor having a great time, what do you do when a song made with AI technology comes on? You gonna stop dancing?

***

New music technology always introduces a new class of musicians. And typically, this new class of musicians is made up of consumers who simply like music and who have been casually making music themselves or who have always dreamed of making music. Just like the advent of the electric guitar and the digital sampler introduced a new class of musicians, the same is happening with the advent of AI-music generation technology. And while AI-generated music making can't entirely replace traditional musicians or traditional music processes, consumers using AI to create music — to varying degrees — can compete with traditional musicians in the marketplace.

Here, let's recall what I said in Chapter 3 about the definition of music. Often people confuse the definition of what music *is* with their own particular music tastes, preferences, and/or prejudices. And music taste varies with the cultural background, socio-economic status, perceptions, assumptions, and priorities of the observer. But technically speaking, what is music really? Can it not be simply defined as "the organization of sound?" So then, what distinguishes music from other forms of organized sound? For instance, the sound of a telephone ringing? One useful definition of music describes it as being "the art, the craft, and the science of organizing sound and silence in the framework of time." To that definition I would add that music is distinguished by the conscious and willful *intent* to make music through the use of pre-established musical elements and properties. So speaking without any bias one way or the other and without any notions about music knowledge or talent level, a musician is simply one who makes music with the willful intent to do so. By this crude definition then, anyone who makes music using AI technology — and let's remember that a number of traditionally trained musicians are already using AI technology as part of their music process — is a musician.

We can also now throw into the mix the fact that today's technology allows us to create new music using only our voices! For example, Dubbler, a software program by developer Vochlea Music, allows users to convert sounds that they hum, chant, or

sing into music notes. Using just a microphone and choosing the instrument you want to "play" inside Dubbler, the possibilities are limitless. And, again, this is all done with the voice. Recall what I said in Chapter 8 about James Brown's use of his voice and how the premier musical instrument is the brain:

> James Brown challenged the premise that one needs to be able to play a traditional instrument in order to get out of it the sound and feel that you desire. Do you *need* to know how to play a traditional instrument, in the *conventional* sense, in order to play it? **What if you know what a trombone is *supposed* to sound like? Can you then instruct a trombonist to play the sounds and phrases that you hear in in your head? That's what James Brown did, and not only with trombonists, but with trumpet players, bassists, guitarists, *and* drummers.** This is one of the things that made James Brown any particular instrument an extraordinary musician, producer, and recording artist.
>
> Second, when we consider James Brown in this light, he serves as reminder that **the premier instrument is the brain, followed closely by the heart.** Traditional instruments and electronic instruments alike are a distant third. James Brown biographer RJ Smith has noted that while James Brown did not read music and could not always talk music to his musicians, he *knew* music. James Brown "quickly grasped the skills new instrumentalists brought to the show. He reacted to them, and used them to challenge himself." Knowing music, and more specifically the *Know-how* for making music, particularly in regards to instrumentation, is not limited to simply whether you can play an instrument or not. Know-how extends to one's ability to create musical ideas, it extends to one's understanding of how sounds go together — even when logically the combination is "wrong" — and how instruments, via musicians, can bring those sounds, ideas, and arrangements together.[14]

Like James Brown, today, anyone who has a musical idea can translate that idea into actual music using programs like Dubbler. And what's the technology that powers Dubbler? That's right, you guessed it: AI technology.

[14] See Chapter 8.

Music Industry 3.0: Vocal Licensing, the New Power of Original Song Lyrics, and Remakes of AI-Generated Songs

One fundamental thing that the Copyright Office's guidelines make clear is that AI-generated content is here to stay. So what does this mean for the future of music? This means that AI-Generated music will completely change the music industry, and I believe this change will be reflected in three significant areas: The advent of vocal licensing; the advent of a remake market for AI-generated songs; and a renewed importance on original song lyrics specifically for AI-generated music.

What happens when someone makes an AI-generated song, complete with the deep fake voice of a Drake or The Weeknd, and that song sounds *good*? Drake and The Weeknd *could* kill that song, perhaps citing the unauthorized use of their name and likeness since no copyright law is actually violated. But if the song sounds good, killing the song actually means killing a potential hit. Who's interest does this actually serve? Plus, again, Drake and The Weeknd *couldn't* kill the lyrics or the beat, they have no claim to the lyrics or the beat even it was made using AI. And even if Drake and The Weeknd kill this particular song, the genie's already out of the bottle. Are recording artists and music rights holders going to try to kill *every* AI-generated "deep fake" song that someone makes? Yeah, good luck with that! The RIAA can't sue its way out of this situation.

There are millions of consumers who have access to AI music generation tools. And if only a fraction of these consumers turn to making music, even part time, it will simply be impossible to keep up with of the number new songs released literally every day. This why I believe that a new "vocal license" market will emerge as the result of AI-generated music. Since artists and labels can't stop consumers for making AI-generated deep fake songs, nor can they kill these songs once they're made available to the public, what can be done if the AI-generated deep fake song is actually good? One thing that can be done is to simply sell a flat-rate vocal license that anyone can purchase. Under the terms of AI vocal license, the

artists who are being deeped faked would grant their approval and share in a pre-determined royalty split. Another alternative could be that the artists who are being deep faked would do a remake of the AI-generated deep fake song, and the creator of the deep fake song and the artists would co-own the remake.

The biggest key in all of this is the lyrics. Increasingly, popular recording artists will either simply license their voice or remake the AI-generated song. In either scenario, lyrics are gold. And while AI-generated music is ushering in a renewed attention on the importance of song lyrics, we should remember that recording artists have long performed the lyrics written by other songwriters; and they have often used a reference vocal performed by the songwriter to do so. (In hip hop/rap music, this is commonly referred to as using a ghostwriter. Something Drake, one of the biggest rappers of all ttime, is already well-known for doing.)

This reaffirms one long-held truth widely known within the music industry: There are lots of *songwriters* who are not necessarily successful *performers*. These individuals earn their living by writing songs for other recording artists. In this light, an AI-generated song is the ultimate reference vocal. Except, the song is already done and can be released *as is*, without any actual vocal performance needed from the recording artists themselves. Not sure how (or why) you fight this if you're the recording artist. Best bet is to get ahead of it with vocal licensing or do a remake version. This is why I believe that AI-generated songs as the basis for remakes will come to represent their own sub-genre. Especially since the era of AI-music stars is coming.

How the Music Industry's Attitude Towards Sampling and Sample Clearance Cost Them the Future

As shown through its defunct sample clearance system, the rights holders who underscore the music industry believe that the public cannot use any copyrighted song, under any circumstance, without permission from the rights holders of the music. In terms of AI-generated music, it's precisely this attitude that has cost the music industry the future. The RIAA *could have* invested in AI technology and created its own AI company — Just like RIAA *could have* invested in its own music streaming company. And the RIAA *could have* created direct-to-consumer stems, which makes it easier for consumers to make AI sound-alike songs. And in doing these things, the RIAA *could have* created a licensing apparatus that linked AI-generated music and stems with exclusive label offerings and partnerships. But the RIAA failed to do any of these things. And consumers are already making AI sound-alike songs and using stems, thanks innovattive companies outside of the control of the RIAA. And there's nothing the major record companies can do about it.

Of course, in terms of the future of the music industry, this is far more significant than digital sampling, because we are at the dawn of a level democratization of the music industry that not has been seen since the inception of the modern music industry. And the main reason is this. AI sound-alike songs will now compete with legacy music-industry produced songs. So we are now entering a world in which the major record labels release songs, then, within hours, sound-alike songs are made by equally or more talented musicians and other creatives outside of the music industry system. In this new world, the music industry, which has historically been fueled by control, will no longer be the single biggest producer of new songs. In the future, the biggest producers of new songs will be consumers outside of the music industry. At that point, the music industry will have no choice but to shift its main focus from music *making* to music marketing.

Afterword

> "My hypothesis is that we may learn to make better judgments if we can become aware of some of the factors that influence their formation."
> —M.L.J. Abercrombie

You probably began this book with a number of assumptions in mind. Perhaps you were certain in your beliefs about what the art of sampling is and how copyright law works. As this book draws to a close, you may have reversed those assumptions and rethought your ideas and opinions. If you didn't begin reading this book with the view that sampling is the most revolutionary and controversial music process in the history of Western popular music, I'm sure that you hold that view now. If you did or didn't begin this book under the opinion that sampling is an art form every bit as much as a music process, you clearly now understand why that is so. Additionally, as you have now become more conversant on the topic of sampling, you recognize that the art form personifies the essence of creative borrowing, embodies the cultural practice of using something old to create something new, and illustrates how the safe harbors of copyright law *should* operate. At this point, you also know why the art of sampling is a great example of the fundamental cultural practice of borrowing. Likewise, you can make sense of the causes of the controversy that surrounds sampling. Elsewhere, you can readily identify how sampling illuminates the strengths (and weaknesses) of copyright law. Finally, you now understand why the sampling tradition of hip hop/rap music is the most dominant expression of music sampling.

Next, you should now understand that copyright law is not something only for lawyers. United States copyright law was created and later amended by lawmakers. But not every "lawmaker" is a lawyer. Lawmakers — members of Congress (elected officials) —

have different professional and social backgrounds. In fact, the most common professions held by members of Congress are in law, business, public service, and education. And while quite a few members of Congress have been lawyers, especially in the Senate, lawmakers have also been made up of community organizers, physicians, musicians, former college athletes, nurses, military vets, radio talk show hosts, veterinarians, journalists, ministers, social workers, farmers, and more. So if the people who have written copyright law — and who have the power to amend it — are not all lawyers, why does the perception persist that copyright law is something only for lawyers to be concerned with? Copyright is a major part of our everyday lives. Being an informed citizen means that we should know something about it. Being an author, artist, or creative of any kind requires that you know a lot about it.

7 Critical Takeaways

This book is packed with a number of important takeaways, and here I'd like to renforce seven specific takeways that I believe are critical to your understanding of the siginficance of the art of sampling and the implications that it holds for copyright law.

Borrowing and Originality

The first critical takeaway deals with borrowing and originality. How you follow an idea leads you to your understanding of an idea. If you replace the verb "borrow" with "sample," then you understand that the sampling of sound recordings is just one sort of borrowing, an activity no different from borrowing from books, movies, dance routines, photographs, or any other copyrightable subject matter. And this understanding allows you to fully grasp the fact that, under United States copyright law, whatever exception applies to one copyrightable subject matter applies to them all. Again, how you follow an idea leads to your understanding of an idea. If you recognize that originality is the product of one's own

creative ingenuity and the gathered influences of the works of other creatives, then you recognize that originality is never wholly individualized, but rather the results of one creative (author) building off of pre-existing ideas, styles, and aesthetics.

The Dynamic and Complex Art of Sampling

The second critical takeaway deals with the dynamic and complex nature of the art of sampling. Beatmaking, a tradition that grew out of the broader hip hop culture and hip hop/rap music tradition, has changed modern music forever. Fifty years after hip hop/rap music first emerged, it has substantially reconfigured the approach to modern music-making. Specifically within the last quarter of the twentieth century, the hip hop/rap music and beatmaking traditions have ushered in a number of pivotal developments that have both transcended and built upon previous musical approaches. Of these developments, few have been as dynamic and complex as the art of sampling.

For those who engage in the art of sampling, it's not only important to have a detailed knowledge of its history, mechanics, priorities, and standards and best practices, it's also important to have a fundamental understanding of copyright law. Although the vast majority of sample-based beatmakers (producers) will likely never deal with the sample clearance system, it's still helpful to understand how the sample clearance system works (or for that matter how it doesn't), why the sample clearance system actually exists, and, more importantly, the implications that the sample clearance system holds for copyright law. Thus, in this book, I have aimed to provide deep insight into the sampling tradition of hip hop/rap music, and I have also sought to lay out a comprehensive, detailed to guide to understanding copyright law. I have not compromised the complicated nature of these issues; rather, I've attempted to discuss them in a way that is much more accessible to the public in general and sample-based beatmakers (producers) in particular. In this book, I've shown how the art of sampling in the hip hop/rap tradition contains its own aesthetic priorities, recording

practices, philosophies, standards and best practices, and specific nuances. And I've shown the art of sampling in the hip hop/rap music tradition as one that maintains and adheres to its own cultural predilections and musical goals. Additionally, I've demonstrated how the art of sampling in the hip hop/rap tradition makes use of revolutionary technology in its own way, directly in accordance with the sensibilities of its own tradition. I've also illustrated the various functions of the art of sampling. Finally, I've conveyed the value of the art of sampling and how (and why) the criticism and discussion around sampling have generally missed this point.

Collectively, all of this makes two things clear. First, the art of sampling is a "useful art" that's here to stay. Second, fair use is as much about the past as it is about the present and the future.

New Music-Making Technology Always Leads to New Music Traditions

The third critical takeaway deals with the fact that new music-making technology always leads to new music traditions. Beatmaking and the beat machines beatmakers (producers) used to make music have proven two important things. First, that music-making is not the sole province of *traditional* musicians; and when new tools of music creation develop, the definition of traditional musicians expands anyway— *Mozart never played an electric guitar!* Second, that beatmakers (producers) — working *only* from beat machines and computers — can contribute to the continuum of ideas about rhythm, melody, and harmony. In the latter case, it's not merely that beatmakers (producers), whom I call the common composers, are disruptive to traditional music practices, it's that beatmakers (producers) have become the *leaders* of new musical horizons that traditional musicians, long locked into the grand ideas of music theory, have been blocked from due to the limitations of human of performance and traditional instruments.

The Negotiation Between Performance Authenticity and Recording Practice Has Never Been A Problem In Hip Hop/Rap Music

The fourth critical takeaway deals with the reality that, in hip hop/rap music, there has never been a conflict between performance authenticity and the use of machines. The machine/human feel duality has always been a featured aesthetic in drum creation in the hip hop/rap music tradition precisely because beatmakers (producers) wanted listeners to hear and feel the human-like drums they made on a *machine*. Hip hop beatmakers (producers) are proud of their machines, not ashamed of them. This is a great departure from rock artists who took great pains to hide their use of machinery, particularly the use of drum machines.

Copyright Law and the Beautiful Collision of Culture, Art, and Technology

The fifth critical takeaway deals with the fact that culture, art, and technology always collide with copyright law; and it's for this very reason that copyright law seeks to protect the interest of the public above all else. Ideas about the ownership of artistic works shifted dramatically in the twentieth century. But while revolutionary advances in technology continue to be made, and the number of creatives in various fields has exploded within the last 20 years, two things remain relatively unchanged. First, the public's distorted view of copyright law, or more precisely, the public's general misunderstanding of copyright law. Second, the public's deference to the Romantic conception of authorship, originality, and creativity. Both of these things make it difficult to highlight the purpose copyright law, which is to "promote the progress of Science and useful Arts." And both of these things influence how people perceive art forms like sampling, which necessarily borrow from pre-existing copyrighted material.

Today, considerations of public policy that underlie the current statute of copyright protection are not born out of what benefits the public good. On the contrary, such considerations are formulated from views that are based on attitudes about copyright law that are extreme and terribly at odds with the original purpose of copyright law. But as more people move from the ranks of consumers into the ranks of producers and content makers, be it as sample-based musicians or not, I believe there will be another widespread shift in ideas about the ownership of artistic works and the implications they hold for copyright law. As this happens, I anticipate that copyright terms will eventually be rolled back to where copyrighted works enter the public domain much sooner. Given the beautiful collision of culture, art, and technology, what alternative will there be?

The Reality for a Growing Number of Musicians

The sixth critical takeaway deals with the fact that sampling has become a fundamental part of the music process for a growing number of musicians. The ability to record and release music today is easier than ever before. And with more musicians doing exactly that, pretending that sampling isn't a part of the equation for a growing number of these musicians is irrational. Also, as more musicians move towards a business model that relies less on direct music sales, musicians will place fewer creative restraints on themselves. This means, just as musicians will increasingly ignore "traditional" or legacy record company business and recording practices, they will also ignore stigmas against the usefulness of the art of sampling. Further, I believe attitudes towards copyright law, particularly as a deterrent against sampling, will fade, as more musicians grow to fully understand how copyright law actually protects and encourages the very kind of borrowing that the art of sampling is based upon.

Everybody Borrows; and Borrowing Is *Borrowing*, No Matter What You Call It

The seventh critical takeaway deals with the fact that everybody borrows! All art is created from the process of combining other people's art with one's own. An artist may refer to this as "drawing on his influences," but the truth is, artistry emerges from the process of blending our own talents and innovations with the influences of the arts that shape and inspire us. Therefore, art is always a combination and collaboration; art is always the product of what the artist borrowed and what he has *added*. If we drill down further on this point and focus on the word, "influence," what are we really talking about? Is not every borrowed influence a "sample" in the abstract?

The word "sample" can apply to any type of appropriation. When we borrow words from a book, are not those borrowings *samples*? Likewise, when we borrow images from a photo, those borrowings are *samples*. So it follows then that when we borrow sounds from a sound recording, those borrowings are samples. Still, the art of *sampling* has the dubious distinction of working double time. All other forms of copyrightable subject matter are associated with the word "borrowing." But it's the same thing. Borrowing is borrowing, no matter what you call it. Whether it be digital or physical or virtual, when we borrow from the works of our influences, we are *sampling* those works. Semantics aside, whichever verb we use to describe the process of using our influences as source material — and I'm not talking about "inspiration" — *borrowing is borrowing*.

Copyright law recognizes this spectrum exactly for what it is: *Everybody borrows from everybody*; society operates in this orbit and necessarily so. Without borrowing, the progress of science and useful arts can't happen and society can't advance. In this paradigm, copyright law also recognizes that the greater the number of members of society who create/produce useful works, the more society advances.

My Hopes for This Book

What should we make of the way copyright law is distorted and the way that sampling is misrepresented? My hope is that this book has helped you to have a better understanding of the history and mechanics of copyright law, as well as a deeper understanding and appreciation of the history and aesthetics of the art of sampling. I also hope that this book has enhanced your understanding of originality, authorship, and creativity. And, in some places, I hope that this book has challenged you.

Finally, and more broadly speaking, I also hope that this book helps lead to a more comprehensive and more honest dialogue about the sample *rights* vs. sample *clearance* fight. Overwhelmingly, dialogue about sampling and the implications that it holds for copyright law is centered on the rights of copyright holders, but very little is said about the rights of the public. And what little is mentioned about the public's rights, for example the de minimis and fair use exceptions, is often treated either as something *less* important than the rights of copyright holders or as barely tolerated exceptions to the exclusive rights of copyright holders — rather than the safe harbor rights of the public that they are. Such attacks on the public's rights ignore and deflect from the fact that a copyright holder's rights are *not* absolute, that a copyright holder has a *limited* monopoly, that the public has access, in certain circumstances, to copyright works without the need of a copyright holder's permission. All of these things are central to the Copyright Act and fundamental to the objectives of copyright law.

This book cannot solve the entire riddle of the implications that the art of sampling holds for copyright law no more than it can resolve the tensions between the Romantic idea of originality, authorship, and creativity and the reality of the creative process, and the fundamental purpose and principles of copyright law. This does, however, make clear why sampling is a useful art as well as a music process, and how copyright law safeguards it.

The Advancement of Society Through Hip Hop Culture

In many ways, this book speaks to how culture shapes and advances society, and how copyright law promotes this prospect. Authors (creatives) borrow elements from the works of other authors (creatives) and use these elements as raw materials and building blocks to create new works. In turn, new works produce new building blocks and the cycle repeats. The result of all of this is not simply new useful sciences and arts, but, more importantly, the advancement of society.

So if the underlying debate around sampling is really about the relative benefits of openness and enclosure, then we need only look at the power and influence of hip hop/rap music throughout the world to see the benefits of the art of sampling. Hip hop culture has added tremendous value to world culture and has helped society to advance in countless meaningful ways. And hip hop culture's most powerful component has always been its music. Hip hop/rap music would not be where it is today — the world's number one genre — had it not been propelled by the art of sampling.

Appendix

Interviews

DJ Premier • Marley Marl • Buckwild • True Master • 9th Wonder • Marco Polo • Rich Keller • Rsonist (of The Heatmakerz) • Minnesota • EZ Elpee • !llmind • DJ Supa Dave • Steve Sola • DJ Toomp • John King • Dame Grease • Ari Raskin • DJ Clark Kent • Bangout • Reefa • D.R. Period

Discography

Hip Hop/Rap

2 Live Crew. *As Nasty As They Wanna Be* (Luke, 1989); *Banned in the U.S.A.* (Luke, 1990).
3rd Bass. *The Cactus Album* (Def Jam, 1989).
9th Wonder [also see Little Brother]. *The Dream Merchant, Vol. 2* (6 Hole, 2007).
50 Cent. *Get Rich or Die Tryin'* (G-Unit, Aftermath, Shady, Interscope, 2003); *The Massacre* (G-Unit/Aftermath/Shady/Interscope, 2005); *Curtis* (G-Unit/Aftermath/Shady/Interscope, 2007).
A Tribe Called Quest. *People's Instinctive Travels and the Paths of Rhythm* (Jive, 1990); *The Low End Theory* (Jive, 1991); *Midnight Marauders* (Jive, 1993); *Beats, Rhymes and Life* (Jive, 1995).
A.Z. *Doe or Die* (EMI, 1995); *Pieces of A Man* (Virgin, 1998); *Aziatic* (Motown, 2002); *A.W.O.L.* (Quiet Money, 2005); *The Format* (Quiet Money/Fast Life, 2006).
Afrika Bambaataa. "Jazzy Sensation" (Tommy Boy, 1981); "Planet Rock" (Tommy Boy, 1982); "Looking for the Perfect Beat" (Tommy Boy, 1982); "Renegades of Funk" (Tommy Boy, 1983).
The Alkaholiks. *21 & Over* (Loud, 1993); *Coast II Coast* (Loud, 1995); *Likwidation* (Loud, 1997).
Akinyele. *Vagina Diner* (Interscope/Atlantic, 1993); *Put It In Your Mouth* (Stress/Zoo/BMG, 1996).
BDP (Boogie Down Productions). *Criminal Minded* (B-Boy, 1987); *By Any Means Necessary* (Jive/RCA, 1988); *Ghetto Music: The Blueprint of Hip Hop* (Jive/RCA, 1989); *Edutainment* (Jive/RCA, 1990).
Beanie Sigel. *The Truth* (Roc-A-Fella, 2000); *The Reason* (Roc-A-Fella, 2001); *The B. Coming*, (Dame Dash Music Group/Def Jam, 2005).
Beastie Boys, The. *Licensed to Ill* (Def Jam, 1986); *Paul's Boutique* (Capitol, 1989).
Beatnuts, The. *Intoxicated Demons: The EP* (Relativity/Violator, 1993); *Stone Crazy*(Relativity/Violator/Epic/Sony, 1997).
Big Daddy Kane. *Long Live the Kane* (Cold Chillin', 1988); *It's A Big Daddy Thing* (Cold Chillin', 1989).
Biz Markie. *Goin' Off* (Cold Chillin'/Warner Bros., 1987); *The Biz Never Sleeps* (Cold Chillin/Warner Bros., 1989); *I Need A Haircut* (Cold Chillin'/Warner Bros., 1993).
Black Moon. *Enta Da Stage* (Nervous, 1993).
Black Sheep. *A Wolf in Sheep's Clothing,* (Mercury/Polygram, 1991).
Black Star (Mos Def and Talib Kweli). *Mos Def & Talib Kweli Are Black Star* (Rawkus, 1998).
Bumpy Knuckles (aka Freddy Foxxx). *Industry Shakedown* (Landspeed, 2000).
Cam'Ron. *Confessions of Fire* (Untertainment/Epic, 1998); *Come Home With Me* (Diplopmat/Roc-A-Fella/Def Jam, 2002).
Clipse. *Lord Willin'* (Star Trak/Arista, 2002).
The Cold Crush Brothers. "Fresh, Fly, Wild, and Bold" (1984); "Cold Crush Brothers Battle Tape,"

Pts. 1-5 (Ca.
1981). [CCB music only on cassette between 1978-1979]
Cormega. *The Realness* (Legal Hustle, 2001); *The True Meaning,* (Legal Hustle, 2002); *Legal Hustle* (Legal Hustle/Koch, 2004).
Common (previously known as Common Sense). *Can I Borrow a Dollar* (Relativity, 1992); *Resurection* (Relativity, 1994); *One Day It'll All Make Sense* (Relativity, 1997); *Like Water for Chocolate* (MCA/Universal, 2000); *Be* (G.O.O.D./Geffen, 2005); Finding Forever (G.O.O.D./Geffen, 2007).
Cypress Hill. *Cypress Hill* (Ruffhouse/Columbia, 1991).
The D.O.C. *No One Can Do It Better* (Ruthless, 1989).
De La Soul. *3 Feet High and Rising* (Tommy Boy, 1989); *De La Soul Is Dead* (Tommy Boy, 1991); *Buhloone Mindstate* (Tommy Boy, 1993); *Stakes Is High* (Tommy Boy, 1996).
Disco Daddy & Captain. "The Gigolo Rapp" (1981).
DJ Quik. *Way 2 Fonky* (Profile, 1992).
DMX. *It's Dark and Hell Is Hot* (Ruff Ryders/Def Jam, 1998); *Grand Champ* (Def Jam, 2003).
Dilated Peoples. "Worst Comes to Worst" (Capitol, 2001).
Diamond D. *Stunts, Blunts and Hip Hop* (Chemistry/Mercury, 1992).
Double Dee & Steinski – "Lesson 1," "Lesson 2," "Lesson 3"(1985).
Double X Posse. "Not Gonna Be Able to Do It" (Big Beat, 1992).
Doug E Fresh (with the Get Fresh Crew). "The Show" (Reality, 1985); "La Di Da Di" (Reality, 1985).
Dr. Dre. *The Chronic* (Death Row, 1992); *2001* (Aftermath, 1999).
EPMD. *Strictly Business* (Fresh/Sleeping Bag, 1988); *Unfinished Business* (Priority, 1989); *Business As Usual* (Priority, 1990); *Business Never Personal* (Def Jam, 1992).
Ed O. G and Da Bulldogs. *Life of a Kid in the Ghetto* (PWL/Mercury, 1991).
Eminem. *The Slim Shady LP* (Aftermath, 1999); *The Marshall Mathers LP* (Aftermath, 2000).
Eric B & Rakim. *Paid In Full* (4th & B'way, 1987); *Follow the Leader* (Uni/Mercury, 1988); *Let the Rhythm Hit 'Em* (MCA, 1990); *Don't Sweat the Technique* (MCA, 1992).
Fat Boys, The. *Fat Boys* (Sutra, 1984).
Fat Joe. *Represent* (Relativity, 1993); *Jealous One's Envy* (Terror Squad/Relativity, 1995).
Freeway. *Philadelphia Freeway* (Roc-A-Fella, 2003).
Funky Four (aka Funky Four Plus One). "That's the Joint" (1981); "Rappin' & Rockin' the House."
The Game. *The Documentary* (Aftermath/G-Unit, 2005); *Doctor's Advocate* (Geffen, 2006).
Gang Starr. *No More Mr. Nice Guy* (Wild Pitch, 1989); *Step in the Arena* (Chrysalis, 1991); "Doe In Advance" (1992); *Daily Operation* (Chrysalis, 1992); *Hard to Earn* (Chrysalis, 1994); *Moment of Truth* (Noo Trybe/Virgin, 1998); *Full Clip: A Decade of Gang Starr* (Noo Trybe/Virgin, 1999); *The Ownerz* (Virgin, 2003).
The Geto Boys. *We Can't Be Stopped* (Rap-A-Lot, 1991).
Ghostface Killah [also see Wu-Tang Clan]. *Iron Man* (Razor Sharp/Epic, 1996); *Supreme Clientele* (Razor Sharp/Epic, 2000); *Bulletproof Wallets* (Epic, 2001); *The Pretty Toney Album* (Def Jam, 2004); *Fishscale* (Def Jam, 2006); *The Big Doe Rehab* (Def Jam, 2007).
Grandmaster Flash. *The Adventures of Grandmaster Flash on the Wheels of Steel* (Sugar Hill, 1981).
Grandmaster Flash and the Furious Five. *The Message* (Sugar Hill, 1982).
Grandmaster Melle Mel. "White Lines" (Sugar Hill, 1983).
Group Home. Livin' Proof (Payday, 1995).
The GZA [also see Wu-Tang Clan]. *Liquid Swords* (Geffen, 1995); *Beneath the Surface* (MCA, 1999).
House of Pain. *House of Pain* (Tommy Boy, 1992).
Ice Cube. *AmeriKKKa's Most Wanted* (Priority, 1991); *Death Certificate* (Priority, 1991); *The Predator* (Priority, 1992).
Ice T. *Rhyme Pays* (Sire/Warner, 1987); *Power* (Sire/Warner, 1987); *O.G. Original Gangster* (Sire/Warner, 1991).
Inspectah Deck [also see Wu-Tang Clan]. *Uncontrolled Substance* (Loud, 1999).
J-Dilla. Another Batch (1998); *Welcome 2 Detroit* (Barely Breaking Even, 2001); *Donuts* (Stones Throw, 2006).

Jadakiss. *Kiss Tha Game Goodbye* (Ruff Ryders, 2001); *Kiss of Death* (Ruff Ryders, 2004).
Jay-Z. *Reasonable Doubt* (Roc-A-Fella, 1996); *In My Lifetime, Vol. 1* (Roc-A-Fella, 1997); *Vol. 2... Hard Knock Life* (Roc-A-Fella, 1998); *Vol. 3… Life and Times of S. Carter* (Roc-A-Fella, 1999); *The Dynasty: Roc La Familia* (Roc-A-Fella, 2000); *The Blueprint* (Roc-A-Fella, 2001); *The Blueprint²: The Gift & The Curse* (Roc-A-Fella, 2002); *The Black Album* (Roc-A-Fella, 2003); *Kingdom Come* (Roc-A-Fella, 2006); *American Gangster* (Roc-A-Fella, 2007).
Jeru the Damaja. *The Sun Rises in the East* (Pay Day/FFRR, 1994).
Jurrassic 5. "What's Golden" (Interscope, 2002).
Juvenile. *400 Degreez* (Cash Money, 1998).
Kanye West. *The College Dropout* (Roc-A-Fella, 2004); *Late Registration* (Roc-A-Fella, 2005); *Graduation* (Roc-A-Fella, 2007); *808s & Heartbreak* (Roc-A-Fella, 2008).
KMD. *Mr. Hood* (Elektra, 1991).
KRS-One [also see BDP]. *Return of the Boom Bap* (Jive, 1993).
King Tee. *Act a Fool* (Capitol, 1988); *At Your Own Risk* (Capitol, 1990).
Kool G Rap & DJ Polo. *Road to the Riches* (Cold Chillin', 1989); *Wanted: Dead or Alive* (Cold Chillin', 1990); *Live and Let Die* (Cold Chillin', 1992).
Kurtis Blow. *Kurtis Blow* (Mercury, 1980);
LL Cool J. *Radio* (Def Jam, 1985); *Bigger and Deffer* (Def Jam, 1987); *Walking with a Panther* (Def Jam, 1989); *Mama Said Knock You Out* (Def Jam, 1990); *14 Shots to the Dome* (Def Jam, 1993); *Mr. Smith* (Def Jam, 1995).
Large Professor [also see Main Source]. *1st Class* (Matador, 2002).
Leaders of the New School. *A Future without a Past* (Elektra, 1991).
Lil Jon & the East Side Boyz. *Get Crunk, Who U Wit: Da Album* (Mirror Image, 1997); *Kings of Crunk* (TVT, 2002); *Crunk Juice* (TVT, 2004).
Lil Wayne. *Tha Block is Hot* (Cash Money, 1999); *Tha Carter* (Cash Money, 2004); *Tha Carter III* (Cash Money/Young Money, 2008).
Little Brother. *The Listening* (ABB, 2003); *The Minstrel Show* (Atlantic/ABB, 2005).
The Lox. *Money, Power & Respect* (Bad Boy, 1997).
MC Breed & DFC. "Job Corp" (1991).
MC Hammer. *Let's Get It Started* (Capitol, 1988).
MC Lyte. *Lyte As a Rock* (First Priority, 1988); *Eyes On This* (First Priority, 1989).
M.O.P. *To the Death* (Select, 1994); *Firing Squad* (Relativity, 1996); *First Family 4 Life* (Relativity, 1998); *Warriorz* (Loud, 2000).
Madlib (as Quasimoto). *The Further Adventures of Lord Quas* (Stones Throw, 2005).
Madvillain [Madlib with MF Doom]. *Madvillainy* (Stones Throw, 2004).
Main Source. *Breaking Atoms* (Wild Pitch, 1991).
Marley Marl. *In Contol* (Cold Chillin', 1988).
Method Man [also see Wu-Tang Clan]. *Tical* (Def Jam, 1994); *Tical 2000: Judgement Day* (Def Jam, 2000).
Method Man and Redman. *Blackout* (Def Jam, 1999).
Mobb Deep. *Juvenile Hell* (4th & B'Way, 1993); *The Infamous* (Loud, 1995); *Hell On Earth* (Loud, 1996); *Murda Muzik* (Loud, 1999); *Infamy* (Loud, 2001); *Blood Money* (G-Unit, 2006).
Mos Def. *Black on Both Sides* (Rawkus, 1999).
N.W.A. *Straight Outta Compton* (Ruthless, 1988); *100 Miles and Runnin'* (Ruthless, 1990); *Niggaz4Life* (Ruthless, 1991).
Noreaga. *N.O.R.E.* (Penalty, 1998).
NYGz. *Welcome 2 G-Dom* (Year Round, 2007).
Nas. *Ilmatic* (Columbia, 1994); *It Was Written* (Columbia, 1996); *I Am* (Columbia, 1999); *Nastradamus* (Columbia, 1999); *Stillmatic* (Ill Will/Columbia, 2001); *Nasir Jones: God's Son* [aka God's Son] (Ill Will/Columbia, 2002); *Street's Desciple* (Ill Will/Columbia, 2004); *Hip Hop Is Dead* (Def Jam, 2006).
Nature. *For All Seasons* (Track Masters, 2000).
Naughty By Nature. *Naughty By Nature* (Tommy Boy, 1991); *19 Naughty III* (Tommy Boy, 1993).
Notorious B.I.G. [aka Biggie Smalls]. *Ready To Die* (Bad Boy, 1994); *Life After Deathi* (Bad Boy,

1997).
O.C. *Word…Life* (Wild Pitch, 1994); *Jewelz* (Payday, 1997).
Ol' Dirty Bastard [also see Wu-Tang Clan]. *Return to the 36 Chambers: The Dirty Version* (Elektra, 1995); *Nigga Please* (Elektra, 1999).
Onyx. *Bacdafucup* (Def Jam, 1993).
Outkast. *Southernplayalisticadillacmuzik* (LaFace, 1994); *ATLiens* (LaFace/Arista, 1996); *Aquemini* (LaFace/Arista, 1998); *Stankonia*, (LaFace/Arista, 2000); *Speakerboxxx/The Love Below* (LaFace/Arista, 2003).
The Pharcyde. *Bizarre Ride II the Pharcyde* (Delicious Vinyl, 1992); *Labcabincalifornia* (Delicious Vinyl, 1995).
Public Enemy. *Yo! Bum Rush the Show* (Def Jam, 1987); *It Takes a Nation of Millions to Hold Us Back* (Def Jam, 1988); *Fear of a Black Planet* (Def Jam, 1990).
Q-Tip [also see A Tribe Called Quest]. *Amplified* (Arista, 1999).
Raewkon [also see Wu-Tang Clan]. *Only Built 4 Cuban Linx* (Loud, 1995); *Immobilarity* (Loud, 1999); *Only Built 4 Cuban Linx… Pt. II* (Ice H2O, 2009). *Reflection Eternal* [Talib Kweli and Hi-Tek]. *Train of Thought* (Rawkus, 2000).
Redman. *Whut? Thee Album* (Def Jam, 1992); Muddy Waters (Def Jam, 1996).
Rich Boy. "Throw Some D's," 2006.
Royal Flush. *Ghetto Millionaire* (Blunt, 1997).
Royce Da 5'9. *Street Hop* (M.I.C./One, 2009).
Run-DMC. *Run-DMC* (Profile, 1984); *King of Rock* (Profile, 1985); *Raising Hell* (Profile, 1986); *Tougher Than Leather* (Profile, 1988).
The RZA [also see Wu-Tang Clan]. *Bobby Digital in Stereo* (Gee Street/V2, 1998).
Salt-N-Pepa. *Hot, Cool & Vicious* (Next Plateau, 1986); *A Salt with a Deadly Pepa* (Next Plateau/London, 1988).
Scarface [also see The Geto Boys]. *The Diary* (Rap-A-Lot, 1994); *The Fix* (Def Jam South, 2002).
Screwball, *Y2K The Album* (Tommy Boy, 2000); *Loyalty* (Landspeed, 2001).
Sean Price. *Monkey Barz* (Duck Down, 2005); *Jesus Price Supastar* (Duck Down, 2007).
Showbiz & AG. *Runaway Slave* (Payday, 1992).
Slum Village. *Fantastic, Vol. 2* (Good Vibe, 2000).
Slick Rick. *The Great Adventures of Slick Rick* (Def Jam, 1988).
Smif N' Wesson. *Dah Shinin'* (Wreck, 1995).
Smoothe Da Hustler. *Once Upon a Time in America* (Profile, 1996).
Snoop Doggy Dog. *Doggytyle* (Death Row, 1993); *Tha Doggfather* (Death Row, 1996).
Soulja Boy Tell 'Em. *souljaboytellem.com* (Collipark/Stacks on Deck/Interscope, 2007).
Souls of Mischief. *93 'til Infiinity* (Jive, 1993).
Special Ed. *Youngest In Charge* (Profile, 1989).
Spoonie Gee. "Love Rap" (ca. 1979/80).
Styles P. *A Gangster and a Gentleman* (Ruff Ryders, 2002); *Super Gangster* (Extraordinary Gentleman) (Koch, 2007).
T.I. *I'm Serious* (Ghett-O-Vision/LaFace, 2001); *Trap Muzik* (Grand Hustle/Atlantic, 2003); *Urban Legend* (Grand Hustle/Atlantic, 2004); *King* (Grand Hustle/Atlantic, 2006); *T.I. vs. T.I.P.* (Grand Hustle/Atlantic, 2007); *Paper Trail* (Grand Hustle/Atlantic, 2008).
Talib Kweli [also see Reflection Eternal]. *Quality* (Rawkus, 2002).
Three Six Mafia. *When the Smoke Clears: Sixty 6, Sixty 1* (Loud, 200); *Da Unbreakables* (Columbia, 2003); *Most Known Unknown* (Sony, 2005).
Too Short. *Born to Mack* (Dangerous/Jive, 1987); *Life Is…Too Short* (Jive, 1988).
Treacherous Three. "Feel The Heartbeat" (1981).
Tupac. *2Pacalypse Now* (Jive, 1991); *Strictly 4 My N.I.G.G.A.Z.* (Atlantic, 1993); *Me Against the World* (Atlantic, 1995); *All Eyez On Me* (Death Row, 1996).
Whoodini. Escape (Jive, 1984).
Wu-Tang Clan. *Enter the Wu-Tang* (36 Chambers) (Loud, 1993); *Wu-Tang Forever* (Loud, 1997); *The W* (Loud, 2000); *Iron Flag* (Loud, 2001); *8 Diagrams* (SRC, 2007).
Young Jeezy. *Let's Get It: Thug Motivation 101* (Corporate Thugz Entertainment/Def Jam, 2005); *The Inspiration* (Corporate Thugz/Def Jam, 2006); *The Recession* (Corporate Thugz

Entertainment/Def Jam, 2008).
Yo Yo. *Make Way for the Motherlode* (East West America, 1991).
Young Black Teenagers. *Dead Enz Kidz Doin'* Lifetime Bidz (MCA, 1993).

Blues

Dixon, Willie. *Willie's Blues* (Bluesville, 1959).
Hooker, John Lee. "Hobo Blues" (Modern, 1948); "Boogie Chillen" (Modern, 1948).
Howlin' Wolf. *Moanin' in the Moonlight* (Chess, 1959); "Spoonful" (Chess, 1960); "Shake It For Me" (Chess, 1964).
King, B.B. *Singin' The Blues* (Crown, 1956); *The Blues* (Crown, 1958); *My Kind of Blues* (EMI, 1961).
Little Walter. "Juke" (Chess, 1952); "My Babe" (Chess, 1955).
Muddy Waters. "Rollin' Stone" (Chess, 1950); "Hoochie Coochie Man" (Chess, 1954); "Got My Mojo Working" (Chess, 1956); *The Best of Muddy* (Chess, 1958); *Waters* (Chess, 1958).
Smith, Bessie. "Downhearted Blues" (ca. 1923); "Ain't Nobody's Business" (ca. 1925).
T-Bone Walker. "Mean Old World" (Capitol, 1942); "Call It Stormy Monday (But Tuesday Is Just as Bad)" (1947).
Turner, Big Joe. "Roll 'Em, Pete" (1938); "Shake, Rattle, and Roll" (1954); *The Boss of the Blues* (Atlantic, 1956).

Jazz

Armstrong, Louis. "St. Louis Blues" (1929, Okeh); "All of Me" (Columbia, 1932); *Louis Armstrong Plays W. C. Handy* (Columbia, 1954); Porgy and Bess (Verve, 1958); "Hello Dolly!" (Kaap, 1964); "What a Wonderful World" (ABC, 1968).
Blakey, Art (with the Jazz Messengers) *Art Blakey with the Original Jazz Messengers* (Columbia, 1956); *Moanin'* (Blue Note, 1958).
Count Basie. *Swinging the Blues 1930-1939* (Jazz Legends, 2004) [orignal recordings 1930-1939].
Count Basie [with Joe Williams]. *One O'Clock Jump* (Verve, 1957).
Coltrane, John [also see Miles Davis Quintet, I]. *Coltrane* (Prestige, 1957); *Blue Train* (Blue Note, 1957); *Soultrane* (Prestige, 1958); *Giant Steps* (Atlantic, 1960); *My Favorite Things* (Atlantic, 1961); *Coltrane Plays the Blues* (Atlantic, 1962).
Davis, Miles. *Birth of Cool* (Capitol, 1949); *Blue Haze* (Prestige, 1954); *Miles Davis and the Modern Jazz Giants* (Prestige, 1956); *Miles Ahead* (Columbia, 1957); *Milestones* (Columbia, 1958); *Porgry and Bess* (Columbia, 1958); *Kind of Blue* (Columbia, 1959); *Sketches of Spain* (Columbia, 1960);
Davis, Miles Quintet (I). *Miles: The New Miles Davis Quintet* (Prestige, 1956); *Cookin' with The Miles Davis Quintet* (Prestige, 1957); "So What" (Robert Herridge Theater [television show] "The Sound of Miles of Davis" CBS, 1959).
Davis, Miles Quintet (II). *E.S.P.* (Columbia, 1965); *Miles Smiles* (Columbia, 1966); *Miles in the Sky* (Columbia, 1968); *Filles de Kilimanjaro* (Columbia, 1969).
Ellington, Duke. "Mood Indigo" (Brunswick, 1930); *It Don't Mean a Thing* (If It Ain't Got That Swing) (Brunswick, 1932); Take the "A" Train (1939).
Fats Waller. "Honeysuckle Rose" (1929); "This Joint Is Jump'in'" (ca. 1934).
Hancock, Herbie [also see Miles Davis Quintet, II; also see The Headhunters]. *Inventions and Dimensions* (Blue Note, 1964); *The Prisoner* (Blue Note, 1969); *Fat Albert Rotunda* (Warner, 1969); *Sextant* (Columbia, 1973).
Holiday, Billie. "Strange Fruit" (Columbia, 1939); "God Bless the Child" (Okeh, 1942); "Mack the Knife" (Columbia, 1955); *Lady Sings the Blues* (Verve, 1956); "Ain't Nobody's Business" (Decca, ca. 1945).
Jamal, Ahmad. *The Awakening* (Impulse, 1970).
Jones, Quincy. *The Quintessence* (Impulse, 1961); *Walking in Space* (A&M, 1969); *Body Heat*

(A&M, 1974).
Klemmer, John. *Blowin' Gold* (Cadet, 1969).
Monk, Thelonius. *Monk* (Prestige, 1954); *The Unique Thelonious Monk* (Riverside, 1956); *Thelonious Monk with John Coltrane* (Milsesone, 1957); *Thelonious Himself* (Riverside, 1959).
Parker, Charlie. "Ko-Ko" (Savoy, 1945); "Ornithology" (Dial, 1946).
Roach, Max (with Miles Davis). *Birth of Cool* (Capitol, 1949).
Rollins, Sonny. *The Bridge* (Bluebird, 1962).
Thomas, Joe. *Joy of Cookin'* (Groove Merchant, 1972).

Gospel

Caravan, The. "Swing Low, Sweet Chariot" (1958).
Clara Ward Singers, The. "How I Got Over" (1950); "Didn't Rain" (ca. 1952); "Swing Low, Sweet Chariot" (ca. 1952).
Dixie Hummingbirds, The. "When the Gates Swing Open" (ca. 1950s); "Holding On" (ca. 1950s).
Dorsey, Thomas A. "Take My Hand, Precious Lord" (aka "Precious Lord, Take My Hand") (ca. 1932).
Franklin, Aretha. *Aretha Frankilin Amazing Grace (with James Cleveland and the Southern California Community Choir)* (Atlantic, 1972).
Golden Gate Quartet (aka The Golden Gate Jubilee Quartet). "The General Jumped at Dawn" (1944); "Golden Gate Gospel Train" (Ca. early 1940s); "Joshua Fit the Battle" (1949).
Jackson, Mahalia. Bless This House (Columbia, 1956).
Sister Rosetta Tharpe. "Down By The Riverside" (ca. 1944); "Didn't It Rain" (ca. 1964).
Soul Stirrers. "Wade in the Water" (ca. 1946); "I'm A Pilgrim" (ca. 1947).
Soul Stirrers with Sam Cooke. "Nearer to Thee" (ca. 1950); "Peace in the Valley" (Specialty, 1950).
Ward, Clara [also see The Clara Ward Singers]. "When the Gates Swing Open" (ca. 1949).

Country

Autry, Gene. "Back in the Saddle Again" (Columbia, 1939).
Cash, Johnny. "I Walk the Line" (Sun, 1956); *Now Here's Johnny Cash* (Sun, 1968).
Rodgers, Jimmie. "Blue Yodel No. 1" (T for Texas) (Victor, 1927).
Williams, Hank. *Moanin' the Blues* (MGM, 1952); *Ramblin' Man* (MGM, 1954).

Rhythm & Blues

Brown, Ruth. "Teardrops From My Eyes" (Atlantic, 1950); "(Mama) He Treats Your Daughter Mean" (Atlantic, 1952).
Charles, Ray. *Hallelujah I Love Her So* (Atlantic, 1957); *What'd I Say* (Atlantic, 1959); *Ain't Nobody Here But Us Chickens* (Atlantic, 1960). *The Genius Hits the Road* (ABC, 1960); *Dedicated to You* (ABC, 1971).
Cooke, Sam. *Ain't That Good News* (RCA, 1964).
Otis, Johnny. "Willie and the Hand Jive" (Capitol, 1958).
Jordan, Louis. "Ain't Nobody Here But Us Chickens" (1946); "Let the Good Times Roll" (1946); "Beans and Cornbread" (1949); "Saturday Night Fish Fry" (1949).
Thomas, Rufus. *Walking the Dog* (Stax, 1963).

1950s Rock 'n' Roll

Berry, Chuck. "Maybellene" (Chess, 1955); "Roll Over Beethoven" (Chess, 1956); "No Particular Place to Go" (Chess, 1964).

Bill Haley and His Comets. "Shake, Rattle and Roll" (Decca, 1954) [originally recorded by Big Joe Turner]; "Rock
Around the Clock" (Decca, 1954).

Fats Domino. "The Fat Man" (Imperial, 1949); "Hide Away Blues" (Imperial, 1950); "Ain't That a Shame" (Imperial,
1956); "My Blue Heaven" (Imperial, 1956); "Blueberry Hill" (Imperial, 1956); "I'm Walkin'" (Imperial, 1957).

Soul

Brown, James. *Please, Please, Please* (King, 1956); *Prisoner of Love* (King, 1963); Out of Sight (Smash, 1964).

Cooke, Sam. *Sam Cooke* (Keen, 1957); *Night Beat* (RCA, 1963); *Ain't That Good News* (RCA, 1964).

Chaka Khan, *Chaka* (Warner, 1978); *Naughty* (Warner, 1980).

Charles, Ray. *Hallelujah I Love Her So* (Atlantic, 1957); *What'd I Say* (Atlantic, 1959); *Ain't Nobody Here But Us Chickens* (Atlantic, 1960); *The Genius Hits the Road* (ABC, 1960); *Ingredients in a Recipe for Soul* (ABC, 1963).

Connors, Norman. *You Are My Starship* (Buddah, 1976).

Delfonics, The. *La La Means I Love You* (Philly Groove, 1968); *Sound of Sexy Soul* (Philly Groove, 1969); *The Delfonics* (1970).

Dells, The. *Love Is Blue* (Cadet, 1969); *Like It Is, Like It Was* (Cadet, 1971); *Sweet As Funk Can Be* (Cadet, 1972); *Give Your Baby a Standing Ovation* (Cadet, 1973); *The Dells* (Cadet, 1973); *The Mighty Mighty Dells* (Cadet, 1974); *The Dells vs. The Dramatics* (Cadet, 1975).

Dramatics, The. *Whatcha See Is Whatcha Get* (Volt, 1972); *A Dramatic Experience* (Volt, 1973); *The Dells vs. The Dramatics* (Cadet, 1975).

Earth, Wind & Fire. *That's the Way of the World* (Columbia, 1975); *Gratitude* (Columbia, 1975); *Spirit* (Columbia, 1976).

Emotions, The. *So I Can Love You* (Stax, 1970); *Untouched* (Stax, 1972); *Flowers* (Columbia, 1976).

Franklin, Aretha. *I Never Loved a Man the Way I Love You* (Atlantic, 1967); *Lady Soul* (Atlantic, 1968); *Soul '69* (Atlantic, 1969); *Aretha's Gold* (Atlantic, 1969); *The Girl's In Love With You* (Atlantic, 1970); *Spirit in the Dark* (Atlantic, 1970); *Young, Gifted and Black* (Atlantic, 1972); *Hey Now Hey* (The Other Side of the Sky) (Atlantic, 1973); *Let Me in Your* Life (Atlantic, 1974); *You* (Atlantic, 1975); *Sparkle* (Atlantic, 1976).

Green, Al. *Let's Stay Together* (Hi, 1972); *I'm Still In Love With You* (Hi, 1972).

Harold Melvin and The Blue Notes featuring Theodore Pendergrass. *I Miss You* [aka If You Don't Know Me by Now] (Philadelphia International, 1972).

Hathaway, Donny. *Everything is Everything* (Atco, 1970); *Donny Hathaway* (Atco, 1970); *Come Back, Charleston Blue* (Atco, 1972); *Roberta Flack & Donny Hathaway* (Atlantic, 1972); *Extension of a Man* (Atco, 1973).

Hayes, Isaac. *Hot Buttered Soul* (Enterprise, 1969); *The Isaac Hayes Movement* (Enterprise, 1970); … *To Be Continued* (Enterprise, 1970); *Shaft* (Enterprise, 1971); *Black Moses* (Enterprise, 1971).

Hutch, Willie. *Soul Portrait* (RCA, 1969); *Fully Exposed* (Motown, 1973); *The Mack* (Motown, 1973); *Foxy Brown* (Motown, 1975).

Impressions, The. *The Impressions* (Paramount, 1963); *Keep on Pushing* (Paramount, 1964); *People Get Ready* (Paramount, 1965); *Ridin' High* (Paramount, 1966); *We're a Winner* (Universal/MCA, 1968); *This Is My Country* (Curtom, 1968); *The Young Mod's Forgotten Story* (Curtom, 1969).

Intruders, The. *The Intruders Are Together* (Gamble, 1966); *Cowboys to Girls* (Gamble, 1968); *When*

We Get Married (Gamble, 1970); *Save the Children* (Gamble, 1973).
Jackson, Michael [also see The Jackson 5 and The Jacksons]. *Off The Wall* (Epic, 1979); *Thriller* (Epic, 1982).
Jackson 5, The. *ABC* (Motown, 1970); *Third Album* (Motown, 1970); *Maybe Tomorrow* (Motown, 1971); *Lookin' Through the Window* (Motown, 1972); *Dancing Machine* (Motown, 1974).
Jacksons, The. *The Jacksons* (CBS, 1976); *Goin' Places* (CBS, 1977); *Destiny* (CBS, 1978).
James, Etta. *At Last* (Chess, 1961).
Kendricks, Eddie. *Peoople…Hold On* (Motown, 1972); *Eddie Kendricks* (Motown, 1973).
Gladys Knight & The Pips. *If I Were Your Woman* (Motown, 1971); *Neither One of Us* (Motown, 1973); *Imagination* (Motown, 1973); *Claudine* (Buddah, 1974).
Marie, Teena. *Wild and Peaceful* (Motown, 1979); *Lady T* (Motown, 1980); *Irons in the Fire* (Motwon, 1980);
It Must Be Magic (Motown, 1981); *Robbery* (Epic, 1983); *Starchild* (Epic, 1984).
Mayfield, Curtis [also see The Impressions]. Curtis (Curtom, 1970); Roots (Curtom, 1971); Super Fly (Curtom, 1972);
Back to the World (Curtom, 1973); *Sweet Exorcist* (Curtom, 1974); *There's No Place Like America Today* (Curtom, 1975).
Moments, The. *A Moment with the Moments* (Stang, 1970); *Those Sexy Moments* (Stang, 1974).
O'Jays, The. *Back Stabbers* (Philadelphia International, 1972); *Ship Ahoy* (Philadelphia International, 1973); *Survival* (Philadelphia International, 1975); *Family Reunion* (Philadelphia International, 1975); *Message in the Music* (Philadelphia International, 1976).
Paul, Billy. *360 Degrees of Billy Paul* (Philadelphia International, 1972).
Redding, Otis. *Pain in My Heart* (Atco, 1964); *Otis Blue: Otis Sings Soul* (Stax, 1965).
Ripperton, Minnie. *Perfect Angel* (Epic, 1974); *Minnie* (Capitol, 1979).
Rufus (aka Rufus featuring Chaka Khan) *Rags to Rufus* (ABC, 1974); *Rufus Featuring Chaka Khan* (ABC, 1975).
Scott-Heron, Gil. *Winter in America* (Strata-East, 1974).
Sly and The Family Stone. *Dance to the Music* (Epic, 1968); Stand! (Epic, 1969); *There's a Riot Goin' On* (Epic, 1971).
Smokey Robinson. *A Quiet Storm* (Tamla, 1975).
Staples Singers, The. *Be Attitude: Respect Yourself* (Stax, 1972); *Let's Do It Again* (Curtom, 1975).
Stevie Wonder. *Innervisions* (Tamla, 1973); *Songs in the Key of Life* (Tamla, 1976); *Hotter than July* (Tamla, 1980).
Taylor, Johnnie. "Who's Making Love" (Stax, 1968); "Jody's Got Your Girl and Gone" (Stax, 1970); "Doin' My Own Thing" (Stax, 1972); "Cheaper to Keep Her" (Stax, 1973).
Wilson, Jackie. "Lonely Teardrops" (Brunswick, 1958); "That's Why (I Love You So)" (Brunswick, 1959).

Pre-Hip Hop Rap/Spoken Word

Last Poets, The. *The Last Poets* (1970); *This Is Madness* (Douglas, 1971).
Lightnin' Rod. *Hustler's Convention* (United Artist, 1973).
Scott-Heron, Gil. *Small Talk at 125th and Lenox* (Flying Dutchman, 1970); *Pieces of a Man* (Flying Dutchman, 1971); *Winter in America* (Strata-East, 1974).

African Soul/Afrobeat

Fela Kuti. *Why Black Man Dey Suffer* (Wrasse, 1971); *Open & Close* (Wrasse, 1972); *Expensive Shit* (Wrasse, 1975).
Hugh Masekela. *The Promise of a Future* (Uni, 1968); *Masekela Uni*, 1968); *The African Connection* (Impulse, 1973).

Funk

Bar-Kays, The. *Soul Finger* (Votl, 1967); *Gotta Groove* (Volt, 1969); *Black Rock* (Volt, 1971).
Baby Huey. *The Baby Huey Story: The Living Legend* (Curtom, 1970).
Bataan, Joe. *Mr. New York & The East Side Kids* (Fania, 1971); *Sweet Soul* (Fania, 1972); *Saint Latin's Day Massacre* (Fania, 1972); *Salsoul* (Mericana, 1973).
Beginning of the End, The. *Funky Nassau* (Alston, 1971).
Blackbyrds, The. *The Blackbyrds* (Fantasy, 1973).
Black Heat. *Black Heat* (Atlantic, 1972); *No Time to Burn* (Atlantic, 1974).
Black Ivory. *Don't Turn Around.* (Today, 1972); *Baby, Won't You Change Your Mind* (Today, 1972).
Black Nasty. "Party on 4th Street" (1972).
Booker T. & the MGs. *Soul Limbo* (Stax, 1968); *The Booker T. Set* (Stax, 1969); *McLemore Avenue* (Stax, 1970); *Melting Pot* (Stax, 1971); *The MGs* (Stax, 1973).
Boris Gardiner Happening, The. *Is What's Happening* (Dynamic, 1973).
Brown, James. *Out of Sight* (Smash,1964); *Papa's Got a Brand New Bag* (King, 1965); *Cold Sweat* (1967); *Say It Loud—I'm Black and I'm Proud* (King, 1968); *It's a Mother* (King, 1969); "Get Up I Feel Like Being A Sex Machine" (1969); *Sex Machine* (King, 1970); *On the Good Foot* (Poyldor, 1971); *The Payback* (Polydor, 1973); *Hell* (Polydor, 1974).
Byrd, Bobby [also see James Brown]. "I Need Help" (1970); "I Know You Got Soul" (1971).
Carbo, Chuck. "Can I Be Your Squeeze" (1970).
Collins, Lynn. *Think* (About It) (People, 1972).
Counts, The (aka The Fabulous Counts). *What's Up Front That Counts* (ca. 1971).
Creative Funk. "Moving World." (ca. early 1970s).
Cymande. Cymande (Janus, 1972); *Second Time Around* (Janus, 1973); *Promised Heights* (Janus, 1974).
David Batiste & The Gladiators. "Funky Soul" (Soulin', ca. 1971).
Dayton Sidewinders. *Let's Go Down To Funksville* (1972).
Dells, The. *Sweet As Funk Can Be* (Cadet, 1972).
Dynamics, The. *What A Shame.* (Black Gold, 1973).
Earth, Wind & Fire. *That's the Way of the World* (Columbia, 1975); *Gratitude* (Columbia, 1975); *Spirit* (Columbia, 1976).
Eliminators, The. *Loving Explosion.* (1974).
Fabulous Originals, The. "It Ain't Fair But It's Fun" (1971).
Fatback Band, The. "Let the Drums Speak" (1975).
Fabulous Three. "Answer Me Softly" (Psycho, ca. 1972).
Freddie and the Kinfolk. "Mashed potato popcorn" (ca. 1972).
Gaturs, The. "Gator Bait" (1970); *Wasted* (1970).
Harvey & The Phenomenals. *Soul & Sunshine* (1971).
Headhunters, The. *The Head Hunters* (1973); *Thrust* (Columbia, 1974).
Hitson, Herman. "Ain't No Other Way" (Sweet Rose, 1972).
Honey Drippers, The. "Impeach the President" (1973).
Huck Daniels Co., The. "Foolish Man (Pt.2)" (Kent, 1971).
Identities, The. "Hey Brother" (1970).
Jackson 5, The. *Dancing Machine* (Motown, 1974).
Jimmy Castor Bunch, The. *It's Just Begun* (RCA, 1972).
Kool and The Gang. *Kool and The Gang* (De-Lite, 1969); *Music Is the Message* (De-Lite, 1972); *Good Times* (De-Lite, 1973); *Wild and Peaceful* (De-Lite, 1973).
Latin Breed, The. "I Turn You On" (ca. 1971).
Lucien, Jon. *I Am Now* (RCA, 1970); *Rashida* (RCA, 1973).
Majestics, The. "Funky Chick" (ca. 1969).
Meters, The. *The Meters* (Sundazed, 1969); *Look-Ka Py Py* (Josie, 1969); *Struttin'* (Josie, 1970).
Mobile Blue, The. "Puffin'" (1969).
Mohawks, The. "The Champ" (Contillion, ca. 1969).
New Birth. *The New Birth* (RCA, 1971); *Ain't No Big Thing, But It's Growing* (RCA, 1971); *Birth*

Day (RCA, 1973); *It's Been a Long Time* (RCA, 1974); *Blind Baby* (Buddah, 1975).
Nite-Liters, The [also see New Birth]. *Nite-Liters* (RCA, 1970); *Morning, Noon & the Nite-Liters* (RCA, 1971); *Different Strokes* (RCA, 1972).
Ohio Players, The. *Paint* (Westbound, 1972); *Pleasure* (Westbound, 1972); *Ecstacy* (Wettbound, 1973); *Skin Tight* (Mercury, 1974); *Fire* (Mercury, 1974); *Honey* (Mercury, 1975) .
Reid, Clarence. "Funky Party" (ca. 1971); "Winter Man" (ca. 1973).
Nina Simone. "Ain't Got No...I've Got Life;" (RCA, 1970); *Black Gold* (RCA, 1970).
Sexton, Ann. "You're Losing Me" (1973).
Skin Williams and the Soulfadelics. "Skins Funk" (ca. early 1970s).
Skull Snaps. *Skull Snaps* (GSF, 1974); "It's a New Day." (1973); "All of Sudden" (1974).
Sly and The Family Stone. *Dance to the Music* (Epic, 1968); *Stand!* (Epic, 1969); *There's a Riot Goin' On* (Epic, 1971).
Thomas, Rufus. "Do That Breakdown Chillin'" (Stax, ca. 1973); "The Funky Chicken" (Stax, ca. 1973).
Yellow Sunshine. "Yellow Sunshine" (1973).

Dub

Big Youth. *Screaming Target* (Gussie/Jaguar, 1972).
Upsetters, The. *Musical Bones* (DIP, 1975).
U-Roy. "Earth's Rightful Ruler" (1969); "Wake the Town" (1970).

'60s and '70s Rock/Progressive Rock/Art Rock/Hard Rock/Southern Rock

Allman Brothers, The. *The Allman Brothers Band* (Capricorn/Atco, 1969); *Idlewild South* (Capricorn/Atco, 1970); *Eat a Peach* (Capricorn, 1972); *Brothers and Sisters* (Capricorn, 1973).
Band, The. *Music from the Big Pink* (Capitol, 1968); *The Band* (Capitol, 1969).
Beatles, The. *Please, Please Me* (Parlophone, 1963); *Meet the Beatles* (Capitol, 1964); *The Beatles' Second Album* (Capitol, 1964); *A Hard Day's Night* (Parlophone, 1964); *Beatles '65* (Capitol, 1964); *Beatles VI* (Capitol, 1965); Revolver (Capitol, 1966); *Sgt. Pepper's Lonely Heart Club Band* (Capitol/Parlophone, 1967); *Magical Mystery Tour* (Capitol/Parlophone, 1967); *The Beatles* (aka "The White Album") (Capitol/Apple/Parlophone, 1968); *Yellow Submarine* (Apple/Capitol, 1969); *Abbey Road* (Capitol/Parlophone, 1969); *Let It Be* (Apple/Capitol, 1970).
Bluesbreakers with Eric Clapton. *Bluesbreakers with Eric Clapton* (Decca, 1966).
Clapton, Eric. *Eric Clapton* (Atco, 1970); *461 Ocean Boulevard* (RSO, 1974).
Cream. *Fresh Cream* (Atco, 1966); *Disraeli Gears* (Atco, 1967).
Doobie Brothers, The. *The Doobie Brothers* (Warner, 1971); *Toulouse Street* (Warner, 1972); *The Captain and Me* (Warner, 1973); *What Were Once Vices Are Now Habits* (Warner, 1974); *Takin' It to the Streets* (Warner, 1976).
Hendrix, Jimi. *Are You Experienced* (Track, 1967); *Electric Ladyland* (Reprise, 1968).
Joel, Billy. *Piano Man* (Columbia/Family Productions, 1973); *Streetlife Serenade* (Columbia/Family Productions, 1974); *Turnstiles* (Columbia/Family Productions, 1976).
Jethro Tulle. *This Was* (Reprise, 1969); *War Child* (Chrysalis, 1974).
Joplin, Janis. *Pearl* (Columbia, 1971).
Led Zeppelin. *Led Zeppelin* (Atlantic, 1969); *Led Zeppelin II* (Atlantic, 1969); *Led Zeppelin III* (Atlantic, 1970); *Led Zeppelin IV* (Atlantic, 1971); *House of the Holy* (Atlantic, 1973); *Physical Graffiti* (Swan Song, 1975).
Morrison, Van. *Astral Weeks* (Warner, 1968); *Moondance* (Warner, 1970).
Rolling Stones, The. *The Rolling Stones* (Decca, 1964); *The Rolling Stones No. 2* (Decca, 1965); *Out of Our Heads* (London, 1965); *Aftermath* (London, 1966); *Between the Buttons* (London, 1967); *Their Satanic Majesties Request* (London, 1967); *Beggars Banquet* (London, 1968); *Let It Bleed* (London, 1969); *Exile on Main Street* (Rolling Stones/Atlantic, 1972).
Santana. *Santana* (Columbia, 1969); *Abraxas* (Columbia, 1970); *Santana [aka Santana III]* (Columbia, 1971); *Borboletta* (CBS, 1974).

Toussaint, Allen. *Toussaint* (Scepter/DJM, 1970).
The Yardbirds [also see Eric Clapton]. *For Your Lovei* (Epic, 1965); *Having a Rave Up* (Epic, 1965); *Roger the Engineer* (Epic, 1966); Little Games (Epic, 1967).

Punk/British Ska/New Wave/80s Pop Rock

Beat, The (aka The English Beat). *I Just Can't Stop It* (Go Feet/Sire, 1980); *Wha'ppen* (Go Feet/Sire, 1981); *Special Beat Service* (Go Feet/IRS, 1982).
Clash, The. *The Clash* (CBS, 1977); *London Calling* (CBS, 1979); *Combat Rock* (Epic, 1982).
Police, The. *Outlandos d'Amour* (A&M, 1978); *Reggatta de Blanc* (A&M, 1979); *Zenyattà Mondatta* (A&M, 1980); *Ghost in the Machine* (A&M, 1980); *Synchronicity* (A&M, 1983).
Specials, The (aka The Specials AKA). *Specials* (2 Tone, 1979); *More Specials* (2 Tone, 1980).
Talking Heads. *Talking Heads: 77* (Sire, 1977); *More Songs About Buildings and Food* (Sire, 1978); *Fear of Music* (Sire, 1979); *Remain in Light* (Sire, 1980).

Western Classical

Beethoven, Ludwig van. *Beethoven Symphony No. 5 in c minor; Symphony No. 9 in d minor;* performed by The Philadelphia Orchestra (2005).
Mozart, Wolfgang Amadeus. *Piano Concerto No. 24*, performed by Philharmonia Orchestra of London (1997).
Copland, Aaron. *Symphony no. 3 (aka Third Symphony)*, performed by the New York Philharmonic (Deutsche Grammophon, 1990).
Bernstein, Leonard. *Serenade for Solo Violin, Strings, Harp and Percussion (after Plato's "Symposium")*, performed by New York Philharmonic. From the album Bernstein: *Symphony No. 2; Serenade after Plato's Symposium* (Sony, 1998).

Bibliography

Arewa, Olufunmilayo B. "From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context," *North Carolina Law Review*, Vol. 84, No.2, 1/1/2006.
Aswad, Jem. "Universal Music Asks Streaming Services to Block AI Access to Its Songs," Variety April 13, 2023 https://variety.com/2023/music/news/universal-music-streaming-services-block-ai-1235582612/amp/.
Bailyn, Bernard. *The Ideological Origins of the American Revolution*, Enlarged Edition. Cambridge: Harvard University Press, 1990.
Berman, Marshall. *All That Is Solid Melts Into Air: The Experience of Modernity.* New York: Simon and Schuster, 1982.
Burkholder, J. Peter. "Museum Pieces: The Historicist Mainstream in Music of the Last Hundred Years," The Journal of Musicology, Spring, 1983, Vol. 2, No. 2 (Spring, 1983), (University of California Press).
Burnim, Mellonee V. and Portia K. Maultsby. *African American Music: An Introduction.* New York: Routledge, 2006.
Chang, Jeff. *Can't Stop Won't Stop.* New York: St. Martin's Press, 2005.
Chapple, Steve and Reebee Garofalo. *Rock 'N' Roll Is Here to Pay: The History and Politics of the Music Industry.* Chicago: Nelson/Hall, 1978.
Charnas, Dan. Dilla Time: The Life and Afterlife of J Dilla, the Hip-Hop Producer Who Reinvinted Rhythm (Kindle version) (New York: Farrar, Straus and Giroux, 2022).
Chernoff, John Miller. *African Rhythm and African Sensibility*. Chicago: University of Chicago Press, 1979.
Demers, Joanna. *Steal This Music: How Intellectual Property Law Affects Musical Creativity*. Athens: the University of Georgia Press, 2006.
Dixon, Melvin. "White Critic-Black Art???", in Black Art Notes (1971), re-published by Primary

Information, (Brooklyn, 2020).
Fitch, Robert. *The Assassination of New York*. New York: Verso, 1993.
Flash, Grandmaster with David Ritz. *The Adventures of Grandmaster Flash: My Life, My Beats.* New York: Broadway Books, 2008.
Floyd, Jr., Samuel A. *The Power of Black Music: Interpreting Its History From Africa to the United States.* New York: Oxford, 1995.
Gates, Jr., Henry Louis. *Black Literatue & Literary Theory*. New York: Methuen, 1984.
Hager, Steven. *Hip Hop: The Illustrated History of Break Dancing, Rap Music, and Graffiti.* New York: St. Martin's Press, 1984.
Hebdige, Dick. *Cut 'N' Mix: Culture, Identity and Caribbean Music.* New York and London: Metheun, 1987.
Heller, Michael. "The Groove Robbers' Judgement; Order on `Sampling' Songs May Be Rap Landmark," *Washington Post*, December 25, 1991, d1.
Holloway, Joseph E. *Africanisms in American Culture.* Bloomington: 1990.
McLeod, Kembrew and DiCola, Peter. *Creative License: The Law and Culture of Digital Sampling*. Durham and London: Duke University Press, 2011.
Miller, Michael. *The Complete Idiot's Guide to Music Theory, Second Edition.* New York: Penguin, 2005.
Mueller, Jennifer R. R. "All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling," Indiana Law Journal, Vol. 81, Issue 1, Article 22 (2006)
Neal, Mark Anthony. *Soul Babies: Black Popular Culture and The Post-Soul Aesthetic.* New York: Routledge, 2002.
Norek, Josh. "'You Can't Sing Without the Bling': The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need For a Compulsory Sound Recording Sample License System," 11 *UCLA Ent. L. Rev.* 83, 90 (2004).
Patterson, Lyman Ray, *Copyright in Historical Perspective*. Nashville: Vanderbilt University Press, 1968.
Perkins, William Eric. *Droppin' Science: Critical Essays on Rap Music and Hip Hop Culture.* Philadelphia: Temple University Press, 1996.
Poe, Randy. *Music Publishing:: A Songwriter's Guide, Revised Edition.* Cincinnati: Writer's Digest Books, 1997.
H. Raine. 'US Housing Program in South Bronx Called a Waste by Moynihan.' *New York Daily News* 20 Dec 1978, p. 3.
Rose, Tricia. *Black Noise: Rap Music and Black Culture in Contemporary America*. Hanover: Wesleyan University Press, 1994.
'Text of the Moynihan Memorandum on the Status of Negroes.' *New York Times*, 30 January 1970, p. 3.
'Taki 183 Spawns Pen Pals.' *New York Times,* 21 July 1971.
"Plunderphonics: An Interview with John Oswald, Norman Ingma, *Retrofuturism Magazine,* Jan. 1990, no. 12, 1533-38.
Ramsey, Jr., Guthrie P. *Race Music: Black Cultures From Bebop to Hip Hop.* Berkeley: University of California Press, 2003.
Said, Amir "Sa'id". *The BeatTips Manual: Beatmaking, the Hip Hop/Rap Music Tradition, and the Common Composer*. Brooklyn: Superchamp Books, 2009.
Schloss, Joseph. *Making Beats: The Art of Sample-Based Hip-Hop*. Middletown: Wesleyan University Press, 2004.
Schietinger, John. "Bridgeport Music, Inc. V. Dimension Films: How The Sixth Circuit Missed A Beat On Digital Music Sampling," DePaul Law Review, Fall (2005) 55 DePaul L. Rev. 209.
Small, Christopher. *Music—Society—Education: An Examination of the Function of Music in Western, Eastern and African Cultures With Its Impact On Society and Its Use In Education.* New York: Schirmer Books, 1977.
Snead, James A. "On Repetition in Black Culture." In *Black American Literature Forum*, vol. 15, no. 4, 1981.
Southern, Eileen. *The Music of Black Americans: A History.* New York: W.W. Norton & Company, 1971.

Toop, David. *The Rap Attack: African Jive to New York Hip Hop*. New York: Pluto Press, 1984.
United States Copyright Office, "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence" March 16, 2023 16190 Federal Register, Vol. 88, No. 51 Rules And Regulations 37 Cfr Part 202 Action.
Vaidhyanathan, Siva. *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity.* New York: New York University Press, 2001.
Wallace, Deborah and Rodrick Wallace. *A Plague On Your Houses: How New York Was Burned Down and National Public Health Crumbled*. New York: Verso, 1998.
Walser, Robert. "Rhythm, Rhyme, and Rhetoric in the Music of Public Enemy," Ethnomusicology, Spring - Summer, 1995, Vol. 39, No. 2 (Spring - Summer, 1995) (University of Illinois Press on behalf of Society for Ethnomusicology).
WBUR/Radio Boston, "'Say It Loud': 50 Years Ago, James Brown Redefined Black Pride," WBUR/Radio Boston, July 24, 2018 https://www.wbur.org/radioboston/2018/07/24/james-brown-black-pride.
Weber, William. "Mass Culture and the Reshaping of European Musical Taste, 1770-1870," International Review of the Aesthetics and Sociology of Music, Jun., 1977, Vol. 8, No. 1 (Jun., 1977), (Croatian Musicological Society).

Legal Cases

Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).
Batiste v. Najm, 28 F. Supp. 3d 595 - Dist. Court, ED Louisiana (2014).
Bridgeport Music, Inc. v. Dimension Films LLC, 230 F. Supp.2d 830, 833-39 (M.D. Tenn. 2002).
Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390,399 (6th Cir. 2004), aft'd on reh'g, 410 F.3d 792 (6th Cir. 2005).
Brown v. Netflix, Inc., No. 19 Civ. 1507 (ER) (S.D.N.Y. May 27, 2020).
Campbell v. Accuff-Rose Music, 510 U.S. 569 (1994).
Cariou v. Prince, 714 F. 3d 694 (2d Cir. 2013).
*Chapman v. Mara*j No. 2:18-cv-09088-VAP-SS (C.D. Cal. Sept. 16, 2020).
Comerica Bank & Trust, N.A. v. Habib, No. 17-12418-LTS (D. Mass. Jan. 6, 2020).
Dred Scott v. Sandford, 60 US 393 (1857).
Emerson v. Davies, 8 F. Cas. 615, 619 (CCD Mass. 1845).
Estate of Anthony Barré and Angel Barré v. Carter, et al. No. 17-1057 (E.D. Lou. July 25, 2017).
Estate of James Oscar Smith v. Cash Money Records, et al. 14-cv2703S.D. N.Y. (May 30, 2017).
Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).
Grand Upright Music, Ltd. v. Warner Brothers Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).
Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985).
Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010).
House of Bryant Publ'ns, L.L.C. v. A&E Television Networks, No. 3:09-0502 (M.D. Tenn. Oct. 30, 2009).
Hutson v. Notorious B.I.G., LLC, No. 14-cv-2307 (RJS) (S.D.N.Y. Dec. 21, 2015).
Jarvis v. A & M Records, 827 F. Supp. 282 - Dist. Court, D. New Jersey 1993.
Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522 (9th Cir.) (2008).
Lennon v. Premise Media Corp., 556 F. Supp. (2d 310 - Dist. Court, SD New York, 2008)
Marlon Williams v. Calvin Broadus No. 99 Civ. 10957 (MBM), 2001 WL 984714 (S.D.N.Y. Aug. 27, 2001).
Newton v. Diamond. 388 F.3d 1189 (9th Cir. 2003).
Nunez v. Caribbean Int'l News Corp., United States Court of Appeals, First Circuit. No. 99-2266; See also: 235 F.3d 18 (1st Cir. 2000).
Notorious B.I.G. LLC v Lee Hutson, 2:14-cv-02415 (2014).
On Davis v. The Gap, Inc., 246 F.3d 152 (2nd Cir. 2001).
Oyewole v. Ora, 291 F. Supp. 3d 422 (S.D.N.Y. Mar. 8, 2018).
Pyle v. Falkener, C33/442 London Public Record Office (1772).
Quality King Distributors, Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135 (1998).

Red Label Music Publ'g v. Chila Prods., 18 C 7252 (N.D. Ill. May 30, 2019).
Ringgold v. Black Entertainment Television, 126 F.3d 70, 74 (2d Cir. 1997).
Saregama India LTD. v. Timothy Mosley, et. al. 687 F.Supp.2d 1325 (2009).
Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596,602 (9th Cir. 2000).
Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).
Stewart v. Abend, 495 U.S. 207 (1990).
Trena Steward Et Al. V. Kanye West Et Al. Cv 13-02449 Bro (Jcx) (United States District Court Central District Of California August 14, 2014).
Tresóna Multimedia v. Burbank High School Vocal Music Ass'n, Nos. 17-56006, 17-56417, 17-56419 (9th Cir. Mar. 24, 2020).
United States v. Am. Soc'y of Composers, Authors and Publishers, 599 F. Supp. 2d 415 (S.D.N.Y. 2009), vacated, 627 F.3d 64 (2d Cir. 2010).
VMG Salsoul LLC v. Madonna Louise Ciccone et al., case number 12-cv-05967 (9th Cir. June 2, 2016).
Warner Bros., Inc. v. American Broadcasting Companies, 654 F. 2d 204 - Court of Appeals, 2nd Circuit (1981).
Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574 (6th Cir. 2007).

Index

Symbols

"'Don't Have to DJ No More'", 885, 888–891, 893, 895–897, 899, 901, 903, 905, 907, 909, 911–913, 915, 917, 919, 921, 923, 925–927, 929, 931, 933, 935, 937, 939, 941, 943, 945, 947
"BBL Drizzy", 1679
"Brokenness" and Dance, 621–622
"Brooklyn Uprock" or "Brooklyn Rock", 67
"burning" (b-boy dance), 66
"Dilla Drums", 508, 521, 563–564, 579–581, 594, 596–597, 601, 620, 627, 649, 662, 664–665, 668, 670
"Étude aux chemins de fer", 342
"Fish" by Ghostface Killah feat. Raekwon and Cappadonna, produced by True Master, 317, 325, 592–594, 600, 629, 686
"Going Off", 66
"Good Foot", 66, 86
"Hustler Toasts", 74, 76–77, 83
"Intellectual Property" and the Corporatization of Copyright Law and Policy, 1012
"Locking", 72, 139
"Merry-Go-Round" Technique, 67, 131, 544
"Popping", 72
"Property Talk" and the Property Model for Copyright Law and Policy, 1011
"Radio DJ toasts", 4
"Scorpio" and Planet Rock: The Electro Template and Organic Sampling, 141
"Signifyin' Toasts", 74–76
"Style wars", 64
"The Message", 79–80, 84, 135–136, 519
"Toasters", 74, 86, 115
"Toasts", 4, 74–78, 83, 110, 114
"Trickster" Tales, 74
"True Art", 844
"True Art" and the Associated Value Assumptions, 844
"Whole Car", 65
"Wild West" Era of Sampling, 1529–1530
"Windmill", 71
'70s Black American Cinema — aka "Blaxploitation" Films — As a Cultural Space, 786
17 U.S.C. § 107, 1280, 1289, 1294, 1305, 1365, 1403
2 Live Crew, 146, 553, 852, 992, 1299, 1307, 1363–1365, 1367–1368, 1370–1371, 1375–1376
26 Albums That Personified the Fundamental Developments in Hip Hop Beatmaking, 151
3 Feet High and Rising (De La Soul), 151
5 Beat Pattern, 578, 613, 628, 660, 707–708
50 Cent, 289, 317, 323, 363, 598–599, 857, 1580
8Ball & MJG, 152, 159–160, 163, 169, 636, 673, 677, 702, 714
9th Wonder, 2, 32, 127, 172, 371, 385, 418, 602, 683, 825–826, 874, 918
@KingWillonius, 1679

A

A Broader Understanding of What "Transformative" Can Be, 1301
A Guide for Determining De Minimis when Digital Sampling is Involved, 1461
A Sampler: Musical Instrument or Commodity?, 893
A Tribe Called Quest, 151–152, 155–158, 160,164–165, 471, 553, 597, 672, 677, 802, 806
Abstractions Test, 1026–1027
Acculturation, 479
Actual Sounding Events vs. Virtual Reference Structures, 493, 505
AES (Audio Engineering Society), 347
Affordance of Drum Machine Samplers and the Experimentation It Provokes, The 639
African Rhythmic Sense, 450, 458, 460, 475, 478, 491, 532, 559–560, 574, 609
Afrika Bambaataa, 45, 60, 67–68, 70, 79, 109, 120, 122, 127, 129–130, 132, 137–139, 141, 145, 348, 374, 381, 822, 1246, 1529
Afrobeat, 515, 569, 664, 708
Afrobeats, 515, 532, 578, 628, 637, 660–661, 664, 707–708
AI Sampling, 1682
AI-Generated Content, 1668–1669, 1672, 1674–1678, 1681–1682, 1688, 1696
AI-Generated Music, 1667, 1669, 1671–1673, 1675, 1677, 1679–1685, 1687–1689, 1691, 1693–1698
AI-Generated Source Material, 1679, 1684–1688
Akai MPC, 31, 47, 148, 166, 168–169, 171, 173, 175, 178, 269, 292, 294, 298–299, 349, 386, 390, 394–396, 414–415, 418, 420, 426–427, 444–445, 551, 584, 593, 598, 601, 605, 615, 639, 682, 717, 720, 736, 745, 756
Akai MPC 60, 47, 148, 298, 349, 390, 426, 551, 639, 717
Akai MPC 2000, 166

Akai MPC 3000, 168, 171, 173, 178, 682, 720
Akai MPC 4000, 47, 169, 171, 173, 178, 292, 299, 386, 390, 394–396, 414–415, 418, 420, 444, 736, 745
Akai MPC One, 47, 292, 390, 394, 736
All Souled Out (Pete Rock & CL Smooth), 151
Alternating Snares, Clap-Hits and Chopped Chimes, Velocity Modification, and Delayed-Snares, 438
Alternating-Pitch Technique, 513–514
American Popular Music, 116, 183–184, 197–198, 205, 262–263, 307, 437, 449, 460, 535, 617, 684, 819, 831–832, 836, 861, 883, 908, 1062, 1071, 1243
Amp Fiddler, 597, 605
An Overview of Copyright Law, 953, 955, 959,961, 963, 965, 967, 969, 971, 973, 975, 977, 979, 981, 983, 985, 987, 989, 991, 993, 995, 997, 999, 1001, 1003, 1005, 1007, 1009, 1011, 1013, 1015, 1017
Applying the Primary Characteristics of the Author-Function to Sample-Based Musicians, 1189
Architects and Pioneers of the Hip Hop/Rap Music and Beatmaking Traditions, The, 203
Armstrong, Louis, 183, 533, 561, 569–570, 573, 579, 601–602, 615, 634, 637, 664, 667, 672–673, 678–686, 688–689, 692, 698, 701–703, 706–708, 712, 714, 1131
Arne v. Roberts and Johnson, 982
Arrangement, 11, 34, 142, 148, 154–157, 159, 170–171, 173, 179, 187–188, 214, 235, 238, 243, 271, 275–281, 288, 291, 293–296, 300–303, 306, 312, 314, 316–317, 319, 321–324, 327, 336, 339–340, 367–369, 371, 373, 375, 377, 379, 381, 383, 385, 387, 389, 391, 393, 395, 397–405, 407, 415–416, 422, 427, 429, 436, 439, 487, 493, 504, 506, 511, 518–519, 542, 546–547, 558, 611, 623, 625, 627, 638, 646, 648–651, 685, 688, 734, 739, 742, 746, 748, 750, 756, 830, 846, 850, 880–881, 963, 971–972, 1028, 1030, 1032, 1034, 1037, 1134, 1162, 1167–1168, 1185, 1232, 1314, 1411, 1418, 1524, 1548, 1581, 1671–1674, 1683, 1692
Arrangement Scope, 734
Art of Beatmaking, The, 12, 40–41, 70, 112, 125, 137, 151, 155, 188, 245, 271, 273, 280, 331, 339, 616, 830–831, 902–903, 1159, 1179, 1269, 1340–1341
Art of Rapping, The, 4, 40, 43, 73, 78–79, 83–85, 111, 133–134, 245–246, 523, 623–624, 660, 663, 1339–1342
Artist is Never Alone, The 1132
Assigning Sounds, 292
Assumptions of Consonance and Dissonance, 235
Atlantic Slave Trade, 458, 485
Audio Bandwidth, 344, 386–387
Audio Source, 374
Author-Artiste, 1191, 1194, 1196, 1204, 1206,1211–1212, 1215, 1232, 1235–1236
Author-Entrepreneur, 1191–1193, 1197, 1200, 1202–1204, 1206, 1212, 1214–1216, 1218, 1224, 1229, 1232, 1235–1238
Author-Entrepreneur vs. The Author-Artiste, The, 1191, 1206
Author-Function and the Myth and Sanctification of the Individual Author, The, 1182
Author-Genius, The 1124
Authorship, 2–3, 5, 7, 21, 34, 46, 51, 812, 823, 832, 835, 889, 892, 921–923, 945, 960–967, 970, 972–973, 988, 993, 995, 998–999, 1003, 1010, 1013, 1019, 1043, 1057, 1059, 1081, 1095–1097, 1099, 1101–1103, 1105–1107, 1109, 1111, 1113, 1115, 1117, 1119, 1121, 1123, 1125–1127, 1129, 1131, 1133, 1135, 1137, 1139–1145, 1147–1159, 1161, 1163–1175, 1177, 1179, 1181–1183, 1185–1189, 1191–1193, 1195, 1197, 1199, 1201, 1203, 1205, 1207, 1209, 1211, 1213, 1215, 1217, 1219, 1221, 1223–1225, 1227, 1229, 1231, 1233, 1235, 1237–1241, 1244, 1247, 1270, 1273, 1347, 1364, 1407, 1501, 1512, 1514–1515, 1627, 1637–1638, 1653, 1668–1678, 1705, 1708
AZ, 22, 82, 365

B

B-Boy/B-Boying, 57, 66–68, 71–73, 82, 86, 106, 113, 135, 259, 264, 548, 553
Bach v. Longman, 982, 984, 986–988, 990–991, 994, 996, 998 Bach,
Bach, Johann Christian, 977, 984–985, 998
Balance of Copyright Law Explained, 1008
Bangout, 598–599
Basic Concepts of Traditional Drum Programming and Arrangement, 429
Basic Properties and Elements of Music Theory, 206
Bass Fill-Ins, 727–728
Bass Filtering (Filtering), 164, 187, 395, 436
Batiste v. Najm, 629–630, 1024, 1469–1471,

1509, 1539, 1565
Beastie Boys, 22, 39, 53, 143, 652, 806, 872–873, 912, 945, 1020, 1038, 1255, 1437, 1496, 1530–1533, 1648
Beat Structure, 153, 294–295, 298, 300, 308, 740
Beat Structure: The Basic Components — The Sequence and the Loop, 295
Beatmaking, 5, 7, 11–13, 16, 20, 22, 29–35, 37, 40–42, 45–48, 51, 55, 65, 69–70, 73, 88, 97, 112, 125, 127, 129, 131, 134, 136–140, 142–145, 147–149, 151–156, 158, 160–161, 163–176, 178–180, 187–188, 191, 193–196, 198–200, 203, 205, 207, 212, 227, 229, 231–232, 234–235, 237–246, 251–255, 257–264, 267–269, 271, 273, 275–281, 283–287, 289–291, 294–296, 299, 301, 309–310, 313–315, 318–319, 321, 323–326, 328, 331, 338–340, 348–351, 354, 358, 366, 369–371, 374, 378, 384, 388–389, 397–398, 407–410, 413–415, 427–428, 431, 437–438, 442, 445–446, 454, 471, 484, 493–494, 498, 501–502, 513, 516, 532, 541–547, 551–552, 555, 560–561, 565, 569–572, 574–577, 579, 588, 590, 598, 600, 603–607, 612, 616, 618, 622, 635, 638, 642, 645, 650, 652, 654–657, 673–674, 677–678, 683–688, 692, 698–699, 701–703, 706–707, 716–717, 721–722, 731, 734, 739, 741–743, 745, 748, 756, 760–761, 780, 809, 811, 828, 830–831, 837, 875–878, 881, 892, 902–903, 914, 946, 1037, 1110–1111, 1159, 1179–1180, 1269, 1323, 1340–1341, 1344, 1476, 1494, 1545, 1553, 1683, 1686, 1703–1704
Beatmaking Through The Prism of Sampling, 284
Beatmaking Traditions, 7, 139, 144, 191, 193–196, 198–199, 203, 229, 234–235, 237–238, 240, 242–243, 245, 251–255, 257–259, 261–263, 267–269, 323, 348, 811, 1340, 1703
BeatTips Manual, The, 20, 40, 59, 112, 117, 142, 162, 188, 271, 331, 353, 361, 387, 467, 499, 576, 592, 599, 601, 657, 722, 809, 811, 826, 837–838, 874, 895, 1175
Before "The Message" There Was "How We Gonna Make the Black Nation Rise?", 84
Best Way of Doing Things: How to Rise Up in the Skills Hierarchy, The, 273
Big Bill Bronzy, 1068
Big Daddy Kane, 81, 83, 154, 554, 818, 909, 911
Biting, 244, 371, 1552
Biz Markie, 52, 151–152, 154, 608, 873, 940, 945, 1530, 1534–1538, 1540
Black (African American) Music Tradition, 127, 183–184, 197, 201, 203, 227, 234, 249, 339, 342–343, 435, 445, 819, 829, 863, 883, 1244, 1246–1247
Black American Life, 777, 1064
Black Art, 189, 357, 777, 785, 803, 824, 1042, 1056, 1073, 1087
Black Celebratory Party Culture, 780
Black Music Artists, 5–6, 13, 28, 469, 532, 710, 719, 774–775, 817–818, 837, 852, 861, 882, 886–887, 890, 893, 1041–1042, 1051, 1053–1057, 1059–1060, 1062–1065, 1067–1072, 1074, 1076–1079, 1086, 1088, 1090–1092, 1550, 1641
Black Radio DJs, 75, 906, 1063
Black Thought, 82, 519
Black, Alex, 1464–1465, 1467
BLADE ONE, 64
Blind Spots: Race, Racism, and Copyright Law — Sampling Criticism's Catch 22, 817
Block Letters, 64
Blue Notes, 183, 206, 233, 333, 462, 466–469, 472–473
Blues, The, 1, 8, 13, 17, 27, 115–116, 120, 183–184, 186, 197, 207, 266–267, 435, 462, 468–470, 472, 481, 488–489, 491, 559, 570, 588, 617, 683, 777–778, 806, 819, 831, 838, 1063–1064, 1068, 1087, 1162, 1244, 1481
Bomb Squad, The, 127, 146–147, 153, 349, 651–653, 684
Bombing, 62–65
Boogie Down Productions (BDP), 82
Borrow, 51, 59, 80, 188, 308, 335, 779, 855, 865–867, 921, 940, 942, 1000, 1030, 1095–1096, 1100–1101, 1104, 1107, 1114, 1117–1118, 1122, 1131, 1134, 1137, 1171, 1184, 1235, 1238, 1243, 1273, 1309, 1317, 1319, 1374, 1409, 1561, 1569, 1628, 1630–1632, 1634, 1643, 1692, 1702, 1705, 1707, 1709
Borrowing, 2–3, 5, 51, 57, 78, 82, 86, 142, 192, 271, 341, 560, 603, 719, 820–821, 823, 832–833, 848, 857, 865–867, 870, 891, 894, 899–900, 921–922, 925, 928–931, 935, 938, 942–943, 992–998, 1007, 1020, 1025–1026, 1035, 1082, 1094, 1096, 1099–1103, 1107, 1111–1112, 1114–1115, 1118–1119, 1122, 1128, 1132–1133, 1135–1136,

1144–1145, 1147, 1149–1150, 1153–1154, 1170, 1172, 1187, 1189, 1206, 1215–1216, 1237–1238, 1240, 1243–1244, 1247, 1249, 1251, 1258, 1260, 1264, 1267, 1287, 1313–1315, 1319, 1321, 1344, 1373, 1413, 1436, 1441, 1447, 1487, 1523, 1539, 1568–1569, 1571, 1593, 1595, 1597–1599, 1601–1603, 1606–1607, 1610, 1613–1615, 1618–1619, 1621–1625, 1627–1628, 1631–1633, 1635–1639, 1643–1644, 1651, 1653, 1655, 1661, 1665, 1667, 1679, 1688–1689, 1692–1693, 1701–1702, 1706–1707
Borrows, 83, 188, 335–336, 340, 744, 751, 820, 865, 879, 923, 929–930, 1030, 1095, 1100–1101, 1115–1118, 1137, 1171, 1216, 1220, 1243, 1245, 1308, 1311, 1319, 1374, 1413, 1472, 1477, 1490, 1570, 1602, 1627–1628, 1661, 1671, 1707
Bowie, David, 1532–1533
Bradford, Perry, 1067
Break Dancing, 45, 61, 66, 71, 73, 142
Break-Beat, 113–114, 127, 129, 131–132, 144, 152, 155, 238, 372, 399, 608, 687, 753, 910
Break-Beat Period, 127, 129, 131–132
Breaking, 100, 108, 152, 156–158, 608, 749, 758, 857, 955, 978, 1062, 1254, 1400
Breaking Atoms (Main Source), 152
Bridgeport Music v. Dimension Films, 336, 1022, 1036, 1272
Bright-Line, 997, 1037–1038, 1264, 1271, 1275, 1286, 1289, 1337, 1372–1373, 1391, 1393, 1395, 1397, 1399, 1401, 1403, 1405, 1407, 1409, 1411, 1413, 1415–1423, 1425–1426, 1491, 1499, 1507–1508
Bright-Line Test, 1415–1420, 1426
Broadway Style, The, 64
Bronx, The 59, 62–64, 71–72, 101–102, 105, 107, 109–111, 113–114, 116–117, 121, 123, 139, 142–143, 340, 645, 652, 687
Brooklyn, 61–63, 67, 71–72, 83, 90, 127, 133, 143, 183, 645, 656, 757, 1002
Brother D with Collective Effort, 84
Brown v. Netflix, Inc., 1350–1351
Brown, James, 42, 66, 76–77, 86, 109, 114–115, 118–119, 130, 152–153, 181, 213, 361, 449, 471, 481, 497, 515, 532–549, 561, 569–570, 573, 579, 581–582, 602, 607, 609, 615, 620, 634–635, 637, 664, 667, 672–673, 678–679, 683, 686, 688–689, 698–703, 706–708, 712, 714, 784–785, 795, 809, 906, 909, 1071, 1104, 1220, 1222, 1496, 1547–1549, 1695
Brown, John, 67, 109, 114–115, 127, 130, 544, 821, 1246
Bubble Letters, 64, 87
Buckwild, 127, 161, 165, 360, 371–372, 555, 577, 608, 640, 650, 652, 671, 702, 717, 720–722, 806, 815, 823, 873, 1549
Build Your Sampling Ear, 382
Building Blocks of Music, 490, 629, 694, 1487–1488, 1545
Building Your Drum Frameworks with Your Samples, 435
Bumping-the-Sample, 728–729

C

Call and Response, 183, 217, 462, 466, 470–471, 473, 479, 497, 500
Campbell v. Acuff-Rose Music, 53, 1101, 1260–1261, 1320–1321, 1325, 1354, 1357–1358, 1628, 1647
Can't Stop, Won't Stop, 112, 118
Canal Zone, 1328, 1330–1332
Canell Johnson, 71–72, 117
Cappadonna, 176, 317, 513, 593, 600, 686
Cariou v. Prince, 1314, 1327, 1329, 1338, 1516
Castor, Jimmy, 1531
Categories of Copyright (CopyrightableSubject Matter), 899–900, 902, 921–923, 927, 929, 936, 938, 973–975, 982, 984, 987, 996, 1021, 1035, 1167, 1256, 1267, 1313–1314, 1360, 1398–1399, 1401–1402, 1406–1407, 1410, 1413, 1421, 1452, 1470–1472, 1474, 1476, 1479, 1484–1485, 1487, 1490–1492, 1495, 1500, 1539, 1568–1569, 1571, 1597–1599, 1601, 1629–1630, 1633, 1642, 1644, 1652, 1702, 1707
Chaka Khan, 1, 25–28, 472, 606
Chamberlin, 345
Chamberlin, Harry, 345
Chang, Jeff, 107, 112, 118–119
Changing Patterns of Social Control, The 1181
Chapman v. Maraj, 1261–1262, 1351, 1622–1623
Chaucer, Geoffrey, 1131
Chopping, 81, 131, 145, 155, 164, 280, 285, 314, 339, 351, 367–368, 383–385, 387–392, 401–402, 413, 438, 577, 607, 646, 650–651, 656, 698, 714–718, 726, 746–750, 874, 1130, 1309, 1322, 1371, 1418, 1476, 1494
CIA, 65

Circle of Tones, 689–692
Clayton, Roger, 127
Click-and-Clock Rhythmic Feel, 151, 167, 471, 482, 492, 505, 508–509, 512, 514, 522–524, 530–531, 538, 548, 556, 561, 563–565, 567–569, 571–573, 575, 578–597, 599–605, 607, 609–613, 615, 617, 619–630, 635–641, 643, 645–651, 653, 655, 657, 659, 661–673, 675–679, 681–687, 689, 691, 693–703, 705–713, 715, 717, 719, 721, 723
CLIFF 159, 64
Clock Theory, 68
Club Negril, 122–123
Cold Crush Brothers, 77–79, 81
Coleridge, Samuel Taylor, 1106
Coltrane, John, 273, 561, 569–570, 573, 579, 601–602, 615, 634–635, 637, 664, 667, 672–673, 678–679, 683, 686, 688–696, 698–699, 701–703, 706–708, 712, 714, 1548
Comerica Bank & Trust, N.A. v. Habib, 1351
Comin' Out Hard (8Ball & MJG), 152
Commentary Model, The: Transformation as Commentary, 1324
Commerciality Element of the First Factor, The (of Fair Use), 1295–1296, 1298
Common Nature of Borrowing in Music, The 993, 1637
Commonplace Book, 1185–1187
Communal Creativity, 87–88, 819–821, 823–824, 886, 893, 1243–1245, 1247, 1249, 1251, 1253, 1255, 1257, 1259, 1261, 1263, 1265, 1267, 1269, 1271, 1273, 1275, 1277
Communal Creativity and the Concept of Originality in the Black Music Tradition, 819
Competition, 63–65, 67, 88, 192, 196, 252, 343, 370–371, 374, 811, 869, 960, 970, 995, 1011, 1103, 1111, 1124–1125, 1130–1131, 1151, 1191, 1194, 1197–1210, 1212–1214, 1217, 1219, 1221, 1552, 1638
Complete Phrase, 307, 313, 384, 387, 402–403
Composer's Copyright: How Music Became a Copyrightable Subject Matter and Its Lasting Impact, 973
Composers of the Eighteenth Century and Borrowing, 192–195
Composers' Fight for Copyright, The, 978, 995
Composing Bass Lines Using the Same "Anchor" Bass Sound, 309
Composition and Arrangement in the Art of Sampling, 367
Composition, Arrangement, Programming, andSequencing, 397
Compositional Ethic, 168, 197, 221, 223, 251–255, 261–262
Compositional Ethic and the Eight Periods of the Beatmaking Tradition, 261
Compositional Ethic of the Hip Hop/Rap Music and Beatmaking Traditions, 251–252
Compositional Ethic of the Western Classical Tradition, 197, 221, 253
Compulsory License for Digital Samples, 1567–1570, 1575, 1589
Computer Music Melodian, 345
Concept of Authors' Rights, The and The Extension of "Authorship" Beyond Literary Works, 988
Confirmation Bias, 951–952, 955
Conflating Sampling and Sample Clearance, 1608
Congress, 41, 855–857, 899, 922, 926–927, 935–936, 960, 974–975, 999, 1003, 1005–1006, 1009–1010, 1014–1016, 1082, 1165, 1167, 1251, 1263–1268, 1273–1274,1279–1283, 1288, 1290–1291, 1299, 1314, 1337, 1348, 1372–1375, 1379, 1398, 1400–1401, 1405–1411, 1415, 1421–1422, 1425, 1432–1433, 1491, 1493, 1495, 1500–1504, 1506–1508, 1510, 1515, 1557, 1568, 1571, 1581, 1585, 1599, 1629, 1632, 1701–1702
Congressman Mike Doyle, 854–858
Connection Between Music and Dance In the Black Music Tradition, 481–486
Connection Between Music, Social Status, Blackness, Whiteness, and Criticism, 836
Consistent Offbeat Accent, 582, 619–620
Constitutional Convention, 959
Continuum Record Collections as a Black Cultural Space, 813
Contours and Objectives of Fair Use, 1285
COOL EARL, 62
Copyright Act, 52, 898–899, 921, 926, 928, 936, 986–988, 990, 1000, 1003–1004, 1010, 1014, 1023, 1251, 1257, 1263–1268, 1273–1274, 1280, 1284–1286, 1289–1291, 1293, 1314–1315, 1337, 1346, 1357, 1362–1363, 1365, 1373, 1375, 1379–1380, 1384, 1387–1389, 1398–1401, 1405–1407, 1415, 1421–1423, 1425–1426, 1436, 1441, 1447, 1492, 1500, 1504, 1506, 1558, 1560–1562, 1567–1570,

1575, 1581, 1587, 1589, 1601, 1632–1633, 1639–1640, 1642–1645, 1649, 1652, 1655, 1665, 1674, 1678, 1708
Copyright Act of 1790, 1004, 1010, 1251
Copyright Act of 1909, 1268, 1280
Copyright Act of 1976, 899, 921, 926, 936, 1003, 1257, 1263–1264, 1266, 1268, 1280, 1286, 1290, 1293, 1365, 1375, 1398, 1401, 1405, 1407, 1421, 1492, 1504, 1568
Copyright Infringement, 2, 22, 34, 39, 52–54, 166, 628–629, 844, 852, 868, 873, 901, 923, 925, 928–929, 932, 940, 945, 954–955, 973, 997, 1007, 1016, 1019–1023, 1025–1027, 1029–1031, 1033–1039, 1076, 1086, 1093–1094, 1155, 1157, 1163, 1165, 1168–1170, 1172–1173, 1252, 1254–1257, 1259, 1261, 1266, 1269–1270, 1285, 1304, 1311, 1315, 1324–1326, 1328, 1334–1335, 1339, 1353, 1364, 1374, 1378–1380, 1383–1384, 1388, 1391, 1393–1394, 1397–1402, 1404, 1406, 1410, 1414–1422, 1426–1428, 1433, 1436–1437, 1440, 1442–1447, 1449, 1451–1454, 1457, 1461–1462, 1464–1467, 1469–1472, 1474, 1476, 1479, 1484–1486, 1492, 1495, 1498–1500, 1503, 1510, 1512–1514, 1522, 1530–1534, 1537–1540, 1554, 1560–1561, 1563, 1565, 1574, 1585, 1587, 1598–1599, 1603, 1607, 1616, 1622–1623, 1631–1632, 1634–1635, 1640, 1643, 1645–1648, 1650–1651, 1653, 1656–1657, 1665, 1690–1693
Copyright Law Is Complicated, Not Complex, 7, 951, 953
Copyright Law Revision Report (H.R. Report No. 94 1476), 1280, 1284, 1398, 1492
Copyright Office, 926, 929, 1021, 1076, 1185, 1349, 1353, 1358, 1511–1513, 1581, 1585, 1599, 1668–1678, 1681–1682, 1688, 1690, 1696
Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 1668, 1678, 1682, 1690
Copyright Term Extensions and the Corporatization of United States Copyright Law and Policy, 1009
Copyright-by-Appropriation Pattern, 1076–1077
Copyright-by-Hostage Pattern, 1076, 1078
Copyrightable Subject Matter, 899–900, 902, 921–923, 927, 929, 936, 938, 973–975, 982, 984, 987, 996, 1021, 1035, 1167, 1256, 1267, 1313–1314, 1360, 1398–1399, 1401–1402, 1406–1407, 1410, 1413, 1421, 1452, 1470–1472, 1474, 1476, 1479, 1484–1485, 1487, 1490–1492, 1495, 1500, 1539, 1568–1569, 1571, 1597–1599, 1601, 1629–1630, 1633, 1642, 1644, 1652, 1702, 1707
Core Drum Sounds, 411, 418, 420, 442, 1687
Core Drum Sounds and Unique Style, 411
Core Set (limited) Drum Sounds vs. Unlimited Set of Drum Sounds, 409
Core Track, 324, 384, 397, 402–403
CORNBREAD, 62, 806
Cowboy (Keith Wiggins), 78
Crazy Legs, 71, 143
Creating and Programming Sequences, 298
Creating Your Own Customized Drum Signature, 418
Creatio, 1105–1106, 1111, 1116, 1118, 1121, 1123, 1125
Creativity Overtly Embodies Work, 1240
Creator Economy, 1194, 1197–1199, 1201–1202, 1204–1205, 1208, 1213–1214, 1229, 1232, 1237
Criminalization of Sampling, 1094, 1533, 1535, 1545
Critical Beatdown (Ultramagnetic MCs), 151
Criticism Surrounding Sampling, 763
Chronic, *The* (Dr. Dre), 152
Crocker, Frankie, 75, 84
Cross-Fertilization of the Four Elements of Hip Hop Culture and Cross-Participation by the Architects of Hip Hop in the Four Elements, 87
Culture of Sampling, 34, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85–87, 89, 91, 93, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 117, 119, 121, 123, 252, 332, 905, 1249
Curtis, Bill, 589, 602, 707
Customizing and Sampling Your Own Drums, 409
Cut 'N' Mix, 108–109

D

Daily Operation (Gang Starr), 152
Dance Music as a Function of Hip Hop, 549,
Datsunn, 594
De minimis, 2, 6, 21, 49, 51, 153, 248, 336, 384–385, 751, 853, 889, 891, 893, 899, 902, 921–923, 925, 928–930, 935, 937–939, 941–943, 952–954, 997,

1000, 1007, 1022–1023, 1035–1036, 1062, 1075, 1082, 1090, 1093–1094, 1144, 1150–1151, 1154, 1157–1158, 1174, 1252–1256, 1260, 1272, 1282, 1291, 1308, 1310–1312, 1314, 1333, 1344, 1353, 1360, 1369, 1378, 1392–1394, 1397–1399, 1402–1404, 1415, 1417, 1419–1422, 1425–1426, 1430, 1434–1436, 1441, 1443, 1446–1448, 1450, 1452–1454, 1457–1465, 1467, 1469–1470, 1477, 1480, 1490–1503, 1505–1508, 1510, 1522–1523, 1532, 1537, 1539, 1556, 1560–1562, 1569–1570, 1573–1574, 1584–1585, 1587, 1589, 1592, 1599, 1607, 1620–1621, 1623, 1627, 1630, 1632–1633, 1635, 1640, 1643, 1649–1652, 1655,1660–1663, 1674–1676, 1678, 1682, 1708
Deanna Greaux, 453–454
Default Drum Programs, 445
Default Drum Programs and Sequence Templates, 445
Derivative Art, 335
Derivative Sample, 403–404
Determining Fair Use, 1264, 1274, 1279, 1281–1283, 1285–1287, 1289, 1291, 1293, 1295, 1297, 1299, 1301, 1303, 1305, 1307, 1309, 1311, 1313, 1315, 1317, 1319, 1321, 1323, 1325, 1327, 1329, 1331, 1333, 1335, 1337, 1339, 1341, 1343, 1345, 1347, 1349, 1351, 1353, 1355, 1357, 1359, 1361, 1511, 1515
Dichotomy of Copyright Law, 971, 1268
Didley, Bo, 500, 711, 906, 1069
Different Models of Transformative Use, 1321
Digging in the Crates, 1, 20, 148, 174, 179, 341, 367–368, 373–374, 380, 760, 809, 811, 1687
Digging in the Crates as Competition and A Means for Harnessing History, 374
Disco, 44, 66, 75, 84, 93–103, 105–106, 111, 114, 122, 127, 129, 132, 139–140, 148, 183, 191, 279, 343, 428, 559, 578, 588, 599, 908, 1483, 1492
Disco Daddy & Captain Rapp, 139–140
Disco Narrative, The, 94, 100
Distinct Differences between African and European music, 466
Distinction Between the Promotion of Authorship and the Promotion of Authors, 1152
Distortion Pattern, 1076–1077
Divine Arrival vs. Work, 1105
DJ, 1–2, 4, 11, 19, 22, 29, 32–33, 44, 47, 60–61, 66–70, 74–78, 81, 83–84, 87, 90–91, 94–105, 107–111, 113–115, 117–120, 127, 129–137, 139, 141, 143, 145–148, 152–153, 155–169, 171, 178, 191–192, 204, 238, 240, 245, 247, 249, 271, 277, 287, 309, 322, 333, 343, 349, 357, 360, 366–367, 371–372, 381, 385–387, 390, 395, 397–400, 407, 418, 428, 442, 484, 498, 501, 510, 517, 519, 541, 544, 546–547, 551, 553–555, 564, 572, 577, 580, 583, 585, 590–592, 594–604, 607–608, 610, 626–627, 630, 636, 638, 640, 645–646, 648–652, 655–657, 669, 671, 673–674, 677, 682–684, 686–687, 690, 698, 702, 713–722, 726, 745, 748–749, 755–757, 759, 781, 798, 806, 810–811, 814–815, 821–823, 825, 841–842, 844, 851, 855–857, 862, 873–875, 885, 888–893, 895–897, 899, 901, 903, 905–909, 911–915, 917–919, 921, 923, 925–927, 929, 931, 933, 935, 937, 939–941, 943, 945–947, 989, 991, 1062–1063, 1110, 1122, 1132, 1246, 1340, 1343, 1549, 1663, 1683–1684
DJ Green Lantern, 627
DJ Hollywood, 84, 95
DJ Paul and Juicy J, 160, 163, 169, 636
DJ Premier, 1–2, 11, 19, 22, 29, 32, 69, 127, 153, 155–158, 160–165, 167–168, 192, 240, 247, 271, 309, 322, 349, 360, 367, 371–372, 385, 387, 390, 395, 400, 407, 418, 428, 442, 498, 501, 510, 517, 519, 551, 553, 555, 564, 572, 577, 583, 585, 591–592, 594–604, 607–608, 610, 626, 630, 638, 640, 645–646, 648–652, 655, 657, 669, 671, 673–674, 677, 682–684, 686, 698, 702, 713–721, 726, 749, 755–757, 759, 806, 811, 814–815, 823, 851, 873, 911–912, 918, 945, 989, 991, 1110, 1122, 1132, 1343, 1663, 1683–1684 DJ Quik, 11, 29, 127, 152, 156, 165, 553, 577, 583, 590, 600, 604, 677, 684, 686
DJ Toomp, 11, 22, 29, 32, 117, 127, 146–147, 160, 165, 168–169, 171, 240, 360, 366, 372, 407, 428, 547, 555, 580, 604, 626, 636, 640, 652, 669, 673–674, 682, 702, 713, 720, 722, 810–811, 874, 1549
DJing, 61–62, 66–68, 70, 77, 79, 95–98, 101, 103, 105, 108–111, 117–119, 130–131, 135, 145, 148, 151, 166, 204, 279, 332, 343, 357–358, 360, 544, 553, 716, 721, 821, 874, 882, 904, 917, 919, 1062, 246

Doggystyle (Snoop Doggy Dogg), 152
Dolby, Thomas, 346
Don Campbell, aka "Don Cambellock", 72
DONDI, 65
Double Dee & Steinski, 127
Douglas "Jocko" Henderson, 75
Dr. Daddy-O, 1063
Dr. Dre, 11, 118, 127, 139–140, 149–150, 152, 156–159, 164–165, 168, 170–171, 240, 289, 317, 323, 334, 349, 428, 517, 553, 572, 577, 599, 604, 608, 655, 669, 671, 673–674, 677, 682, 684, 686, 702, 706, 713, 807, 815, 903, 912, 945, 1110, 1549
Dragging drums, 162, 521, 581, 586, 597, 627, 648, 667
Drake, 2, 53, 497, 519, 1020, 1324, 1355, 1511–1523, 1554, 1587, 1648, 1679, 1696–1697
Dred Scott v. Sandford, 1043–1045, 1049–1051, 1054–1056
Drill Rhythmic Feel, 524, 580
Drum Framework, 236, 278, 295–297, 302, 304–305, 308–310, 312, 315, 321, 388, 398–399, 402–403, 418–419, 422, 433, 436, 439–442, 626, 733, 746, 1310
Drum Pattern, 11, 155, 187, 299, 397, 399, 402, 408, 425–427, 429–433, 435–436, 439–441, 443, 446–447, 509, 514–515, 522, 593–594, 734, 744, 746, 1418
Drum Programming, 142, 155, 159, 162, 252, 278, 398–401, 428–429, 442, 516, 568, 577, 591, 604, 608, 643, 668, 729, 802, 830, 912, 1122, 1339–1340
Drum Sound Categories, 407
Drum Sound Customization and Building Your Own Drum Sound Library, 413
Drumless hip hop, 176–177, 501, 663
Drumless loops, 127, 161, 175–176, 178, 501–502, 555, 663, 892, 1343, 1683
Drums and Sampling, 407, 409, 411, 413, 415, 417, 419, 421, 423, 425, 427, 429, 431, 433, 435, 437, 439, 441, 443, 445, 447
Drumwork, 156, 163, 316, 318–320, 322, 645
Duffy, Judge Kevin Thomas, 1522–1523, 1537–1540, 1564, 1613
Duke Bootee, 79, 136, 138
Dymow v. Bolton, 1001–1002, 1496
Dynamic Attending, 493
Dynamics, 3, 206, 216, 218, 239, 309–310, 409, 428, 441, 506, 508, 512, 522, 582, 611–612, 737, 799, 883, 1185
Dynamics In The Hip Hop/Rap Music Tradition, 239

E

E-digging, 374–379, 386
E-Digging vs. Record Digging, 374
Ear for Music, 717, 721–722
Earn Out, 1227, 1230–1231
East Coast Sound, 164
Easy Mo Bee, 29, 127, 160, 577, 593–594, 604, 607, 677, 682, 684, 702, 713, 811, 1353, 1442–1443
Ed Fletcher, 79, 127, 136, 138
Eddie "Mr. Ness/Scorpio" Morris, 78
Effects of Sample Clearance on Hip Hop/Rap Music and the Art of Sampling, 1551
Egyptian Lover, 127
Eileen Southern, 184–185, 191–192, 245, 249, 342, 862, 1340
Electronic Boogaloo Lockers, The 72–73
Electronic Drum Machine Period, 127, 139–140, 146–147, 172, 351, 607, 1553
Eliot, T.S., 1111–1120, 1133
Elizabethan Era, 1187
Ellington, Duke, 679, 1087
Emerson v. Davies, 1101, 1171, 1320, 1628
Emerson, Ralph Waldo, 1095, 1133–1134, 1137
EMI Sample Amnesty, 1465
Empirical Study of Fair Use Cases Involving Music, 2006 - 2023, 1349
English Crown, The, 961, 964–965, 1139
Enslaved Africans, 6, 249–250, 450, 458–460, 464–466, 469–470, 472–476, 478–481, 483, 485, 559–560, 609, 719, 822, 863, 1041, 1060, 1082
Enter The Wu-Tang (36 Chambers) (Wu-Tang Clan), 152
Estate of Anthony Barré and Angel Barré v. Carter, et al., 1351
Estate of James Oscar Smith v. Cash Money Records, et al., 1324, 1511–1512
Everybody Borrows; and Borrowing is Borrowing, No Matter What You Call It, 1707
Evolution from Hip Hop to "Rap Music", 89
Extrinsic and Intrinsic: Two-Part Substantial Similarity Test, 1031

F

Fab 5 Freddy, 65, 122–123
Factor Four (Fourth Factor of Fair Use), 902, 1296, 1306–1307, 1309–1312, 1316,

1332, 1370–1371, 1521
Factor One (First Factor of Fair Use), 941, 1295–1296, 1298–1300, 1303–1304, 1317–1318, 1369
Factor Three (Third Factor of Fair Use), 1306–1309, 1316, 1336, 1344, 1368–1369, 1520
Factor Two (Second Factor of Fair Use), 279, 1305, 1311, 1316, 1367, 1519–1520
Factual Copying, 1023–1024, 1451, 1471–1472, 1490
Fair Use, 2, 6–7, 14, 21, 42, 49, 51–54, 237, 819–821, 846, 857–858, 868, 889, 891, 893, 898–899, 901–902, 921–923, 925, 928–930, 937–939, 941–942, 944, 952–954, 997, 1000, 1005, 1007, 1016, 1023, 1035, 1062, 1075, 1082, 1085–1086, 1090, 1093–1094, 1100, 1118, 1144–1145, 1150–1151, 1157–1158, 1169, 1174, 1243–1245, 1247, 1249, 1251–1277, 1279–1291, 1293–1307, 1309–1321, 1323–1341, 1343–1347, 1349–1367, 1369–1381, 1383–1389, 1398–1399, 1402–1404, 1406, 1415, 1417, 1420–1422, 1425–1427, 1434–1443, 1445–1447, 1449, 1452, 1457, 1461–1465, 1467, 1469–1470, 1491, 1494–1495, 1498, 1510–1513, 1515–1516, 1518–1520, 1522–1526, 1532, 1535, 1537, 1539, 1556, 1560–1562, 1568–1570, 1574, 1584–1585, 1587, 1589, 1592, 1599, 1601–1602, 1607, 1620–1623, 1625, 1627, 1630, 1632–1636, 1639–1641, 1643, 1645–1652, 1655–1656, 1663–1665, 1692, 1704, 1708
Fair Use As De Facto Policy Maker, 1264
Fair Use Borrowing in Music, 1636
Fair Use Ensures That Copyright Protection Is Not Excessively Broad, 1260
Fair Use Ensures That There Are No Bright-Line Rules for Sampling, 1264
Fair Use Opinions, 42, 821, 1257, 1303–1305, 1349–1350, 1352–1353, 1358–1362, 1645–1648
Fair Use Preserves Consumer Autonomy and the First Sale Doctrine, 1268
Fair Use Preserves the Idea-Expression, 1268
Fair Use Serves as a Guardian of Free Speech, 1261
Fairlight CMI, 346
Fairlight II, 346
Fairlight III, 346
False Factors: Good Faith, Bad Faith, Morality, Equity, and Artistic Integrity, 1345
False-Author Pattern, 1076, 1078–1079
False-Crisis Narrative, 935, 938–939, 1650, 1655
Feed the Animals, 1085, 1435
Ferrera, Dr. Lawrence, 1255
Fifth Circuit (Court of Appeals), 1351, 1359, 1475–1476, 1479
Fillyau, Clayton, 183, 534–537, 540
Filtering, 1–2, 11, 155, 164, 187, 387, 392, 394–396, 409, 420, 729, 747, 1033, 1035, 1382, 1473, 1480, 1484
First Factor of Fair Use, 902, 1118, 1340, 1360–1362, 1461
First Generation Sounds, 312
Five Categories or Types of Samples, 383
Five Classes of Works that Make Up the Public Domain, 1151
Flaws of the Sample Clearance System, 1542
Flaws of the Sample Clearance System, 1542
Flipping "Golden Apples in Silver Dishes", 1121
Floyd, George, 1080–1081
Form or Structure in the Hip Hop/Rap Music Tradition, 237
Forms of Sampling, 373, 399–401, 910, 916, 1371, 1378
Foucault, Michel, 1182–1183
Found Sounds: Sampling in Hip Hop/Rap Music Is a Form of Music Making Through Found Sounds, 337
Four Elements of Hip Hop Culture, 35, 55, 87
Four Factors of Fair Use, The, 941, 1257, 1279–1280, 1289, 1293, 1319, 1515
Four Parts of Rhythm, The, 487
Fourth Factor of Fair Use, 902
Fourth Factor and Clarity About "Samples" as a Derivative Market, 1312
Fragmented Literal Similarity, 1025–1026, 1394, 1399–1400, 1430, 1489
Framers of the Constitution, 6, 41, 959–960, 974, 999, 1001, 1003–1004, 1010–1011, 1060, 1567, 1657
Francis Grasso Did Not Directly Influence Hip Hop DJs, 96
Function and Value of the Art of Sampling, 771, 776
Function of Hip Hop/Rap Music, The, 249, 862
Functions and Roles of Fair Use, The, 1258
Functions of the Art of Sampling, The, 859
Fundamental Characteristics of Rapping, The 246

G

G-funk, 127, 140, 150, 156–157, 165, 670, 686
Gabriel, Peter, 346
Gang Starr, 1, 152, 155–156, 158, 365, 442, 509–510, 553, 591–592, 596, 600, 671–672, 677, 717, 726, 802, 806, 903
Gay v. Read, 982
Genius, 12, 181, 297, 305, 341, 389, 437–438, 570, 574, 584, 599, 610, 621, 643–644, 688–693, 698–699, 714, 717–718, 720, 828, 832, 868, 891–892, 963, 992, 1005, 1009, 1060, 1090, 1100–1101, 1106–1107, 1110, 1114, 1121, 1124, 1127–1128, 1134, 1137, 1144, 1175, 1215–1216, 1319–1320, 1636
Genius of 1-Bar Core Sequences, The, 305
Genius of Chopping Before "Auto-Chop" The, 389
Germany's Free Use Principle, 1602
Ghostface Killah, 21, 82, 176, 317, 362–363, 513, 592–593, 600, 629, 686, 755, 783–784, 818
Gillespie, Dizzy, 601, 683, 1131
Girl Talk, 14, 19, 22, 39, 846–848, 851–852, 854–856, 858, 1085–1086, 1263, 1435–1437, 1523, 1648, 1663
Goethe, Wolfgang von, 1121
Goin' Off (Biz Markie), 151
Graffiti, 43, 45, 61–65, 68, 70, 72, 79, 86–87, 121–123, 143, 172, 357–358
Grand Upright Music, Ltd v. Warner Bros. Records Inc., 52, 166, 1379, 1425, 1522, 1533–1540, 1545, 1550, 1552, 1562–1564, 1606, 1613, 1619
Grandmaster Caz, 77–79, 81, 83, 143
Grandmaster Flash, 60, 67–70, 78, 99, 102, 111, 118, 120, 127, 129–131, 135–138, 141–142, 191, 268, 348, 374, 428, 544, 652, 687, 822, 908, 913–914, 1246
Grandmaster Flash and the Furious Five, 135–136, 141
Grasso, Francis, 94, 96–101, 103
Greta Van Fleet, 1679, 1691–1692
Grime Rhythmic Feel, 523
Griselda Effect, The 178
Groove, 68, 101, 111, 120, 129–131, 138, 148–149, 153, 157, 159, 164, 175, 177, 213, 229–230, 248, 252, 261–262, 304, 308, 327–328, 402, 449, 466, 470–471, 487, 491, 493–494, 496–502, 504–506, 509, 511, 515, 548, 550, 556, 558, 582, 611–612, 621, 650–652, 666, 677, 715, 738, 742, 744–745, 747, 784, 907, 1162, 1343–1344, 1376, 1457, 1529
Group Home, 152, 158, 162, 167, 520, 564, 583, 592, 597, 599–600, 686
Guccione, Jr. Bob, 885
Guiding Principals in the Absence of a Bright-Line Definition of Fair Use, 1286
Guy, Buddy, 1069

H

Hager, Steven, 45, 109
Handel's Impact: The Well-Funded DYI Composer Who Set Everything Off, 978
Handel, George Frideric, 977–978
Harlem, 77, 95, 687, 789, 806
Harmony, 175, 180, 206, 208–211, 216–217, 221–223, 229–230, 232–236, 242–243, 251, 254–255, 261–263, 265, 269, 282–283, 449, 454, 457, 466, 473, 483, 499, 501, 528–529, 544, 558, 609, 617, 623, 629, 651, 704, 750, 823, 827–828, 834, 933, 1541, 1692, 1704
Harper & Row, Publishers, Inc. v. Nation Enters, 1297–1298
Hebdige, Dick, 108, 112, 906, 913
Henley v. DeVore, 1350
Herbie Hancock, 347, 589
Herder, Johann Gottfried, 1107
Higgins, Judge Thomas A., 959, 1392
Hip Hop & R&B Hybrid, 525
Hip Hop Attitude, 85, 89, 254, 516, 523, 525
Hip Hop Sensibility, 85, 87–89, 136, 138, 199, 252, 254, 332, 370, 523, 525, 1213
Hip Hop Theory, 188, 227–229, 269
Hip Hop's False Origin Stories, 93
Hip Hop/Rap Music, 1, 3–13, 15–22, 24–25, 27–31, 33–36, 39–41, 46, 50–54, 57, 61, 65, 77, 81, 84–85, 89–90, 94, 97, 99, 104–105, 107, 112–116, 119–121, 125, 129–130, 132–135, 137–139, 141–142, 144–145, 147–149, 152–153, 155, 157, 159, 161, 163, 165, 167–168, 176, 179–180, 185–189, 191, 193–200, 202–206, 227–245, 248–252, 254–269, 271, 275, 279–280, 286–287, 290, 293, 296, 300–301, 304, 308–309, 313, 316, 319, 322–324, 328, 331, 333, 337–340, 344, 348–349, 351, 353–361, 369–370, 373–374, 397, 400, 405, 413, 427, 449–450, 454–455, 469, 471, 482, 484–486, 491–494, 496, 499, 504–505, 507, 511–512, 515–519, 521, 523–526, 531–532, 534, 538, 541–544, 546–549, 551–561, 563–566, 568–569, 571–572, 575–576, 578–581, 586–588, 590–592,

594–596, 599–604, 607, 611–612, 614–616, 621, 623–627, 634–641, 645–646, 650, 652, 659–663, 665–672, 674–675, 677, 679, 681–684, 686–688, 692, 698–714, 716–717, 721–722, 727–731, 733, 738, 747–748, 750–751, 760, 774–778, 781, 783–784, 786, 793–794, 797, 800–801, 803, 805, 807–812, 815, 817–819, 821, 823–824, 826–839, 841–844, 846, 848–849, 851, 857, 859–864, 867, 869, 871–872, 875–878, 880–881, 883, 885–886, 888, 890, 892–894, 896–897, 900–906, 908–916, 918, 920, 941–946, 948, 991–992, 997, 1015, 1030, 1035, 1039, 1042, 1056–1057, 1062, 1068, 1072, 1074, 1087–1088, 1092, 1110–1111, 1130, 1133, 1164, 1179–1180, 1190, 1212–1213, 1246–1247, 1275–1276, 1298, 1309, 1312, 1318, 1322, 1334, 1336–1340, 1342–1344, 1353–1354, 1357, 1360, 1362, 1371, 1376, 1396, 1411, 1457, 1461–1462, 1477, 1481–1482, 1529–1531, 1533–1534, 1540, 1546, 1550–1554, 1560–1561, 1576–1577, 1580, 1586–1587, 1604, 1614, 1646–1647, 1649, 1663–1664, 1686–1687, 1697, 1701, 1703–1705, 1709

Hip Hop/Rap Music As the "Other", 826

Hip Hop/Rap Music Is A Social Art, 864

Historical Clarity on Copyright Law and Policy in the United States, 959

History and Evolution of Sampling in the Hip Hop/Rap and Beatmaking Traditions, 348

History of Pre-Modern Samplers, 345

Holman, Michael, 45, 122

House of Bryant Publ'ns, L.L.C. v. A&E Television Networks, 1350

How Copyright Infringement is Determined, 929, 1449, 1540

How Fair Use is Calculated: Question-Framing vs. Outcome-Determinative, 1288

How Many Drum Sounds Are Enough?, 409

How Misconceptions of the Art of Sampling Affects Criticism of It, 865

How the Author-Entrepreneur and Self-Promotion Expose the Myth of "Purity" and the Myth of Originality, 1214

How the Primary Elements of Music Theory Translate to Hip Hop Theory, 229

How to Listen to Source Material, 382

Howlin' Wolf, 1069, 1691

Human Authorship Requirement, 1668, 1672

Hustlers Convention, 76–77, 79, 82, 109, 114–115, 906

Hutson et al v. The Estate of Christopher Wallace et al, 1445

Hutson v. Notorious B.I.G., LLC, 1353

Hutson, Leroy, 1442, 1445

Hybrid Approach: The Sample-Based and Synthetic-Sounds-Based Styles Combined, 289

Hypocrisy of "Natural" vs. "Artificial" Recording Practices, 920

I

Idea-Expression Dichotomy, 971, 1001, 1268, 1301

Illmatic, 152, 160–162, 247, 600, 1343

Imitation As a Constant of Genius, 1127

Impact of Cultural Prejudice Against Hip Hop/Rap Music, 827

Impact of Drum Sounds on Rhythm in Hip Hop/Rap Music, 557

Impact of the Sampling Pioneers and the Response of EMPI Manufacturers, 350

Impact of Technology On Originality, 1129

Influence of Cultural Spaces on Perceptions of the Art of Sampling, The, 777

Influence of Music Training on Perceptions of The Art of Sampling, The, 824

The Intellectual Themes and Conceptual Impact of *Bach v. Longman*, 987

The Implications That Sampling Holds for Authorship and Copyright Law, 921

The importance of Style, 85

In Control (Marley Marl), 151

Influence on Music, 201, 705

Instrumentation and Vocalization in the Western Classical and the Hip Hop/Rap Music and, 257

Intellect, Art, Musical Hierarchy, and Social Status, 989

Intellectual Property, 7, 266, 818, 937, 962, 966, 969, 972–974, 983–984, 987–988, 995, 1012–1013, 1019, 1060, 1075–1076, 1089–1091, 1139–1141, 1148, 1151, 1153, 1241, 1252, 1304, 1440–1441, 1646

Intellectual Taking, 1403, 1506, 1524

Intricate sampling, 399–400, 910

Inventio, 1105–1106, 1112–1113, 1116, 1118–1121, 1123

Is Sampling an Intellectual Appropriation or Just a "Physical" Taking?, 865

It Takes a Nation of Millions to Hold Us Back (Public Enemy), 151

J

J Dilla, 12, 19, 22, 29, 151, 162–163, 172–173, 309, 356, 364–365, 385, 400, 418, 428, 482, 492, 517, 521–522, 531, 548, 554, 556, 561, 564–587, 589–591, 593–597, 599–605, 607, 610, 612, 614–616, 618–622, 624, 626–628, 630, 633–649, 655–657, 659, 661–679, 681–686, 688–689, 692–707, 709–721, 723, 749, 756–757, 814–815, 823, 837, 851, 858, 873, 915, 989, 991, 1110, 1131, 1663, 1683
Jamaican-Roots Narrative, 107–108, 112–114, 121
Jay-Z, 1–2, 53, 158, 165, 169, 362–363, 365, 441, 519, 656, 718, 802, 818, 915, 1020, 1155, 1331, 1435, 1446–1450, 1648
Jazz, 1, 6, 8, 16, 73, 115–116, 120, 161, 165, 179, 183–184, 207, 213, 241, 266, 300, 341–342, 375, 435, 453, 462, 468–469, 481, 484, 489, 491, 521, 527, 548, 559, 570, 587–588, 595, 601–602, 617, 628, 636–637, 651, 655, 679–685, 690, 692, 699, 707, 711–712, 715, 721, 756, 781, 800, 820–821, 823, 831, 834, 906, 1056, 1064, 1073–1074, 1082, 1087, 1091–1092, 1164, 1245–1246, 1324, 1338–1339, 1481, 1488, 1511, 1517–1521, 1549–1550, 1685
Jefferson, Thomas, 1003–1004, 1058, 1060, 1244
Jeru the Damaja, 152, 158, 501, 592
Jimmy Castor Bunch, 1531
JOCKO & The Rocket Ship Show, 75
Judicial Economy, 1419–1420
JULIO 204, 62

K

Kanye West, 53, 127, 159, 167–169, 171, 356, 363, 428, 589, 642, 657, 675–676, 683, 705, 713, 815, 823, 915, 1447, 1453, 1457–1458, 1460–1461, 1463, 1565
Kaplan, Judge Lewis A., 1449
Key Differences Between the Western Classical and Hip Hop/Rap Music and Beatmaking Traditions, 254
Key Misconceptions About the Art of Sampling, 1631
Key Twentieth-Century Developments in United States Copyright Law and Policy, 1009
Kid Creole (Nathaniel Glover), 78
Killer Mike, 885
King Tim, 90, 133
King Tubby, 906–908
Knowledge or Products of Authorship As Commodities, 1144
Kool G Rap, 81–83, 154, 690, 818
Kool Herc, 60–62, 66–68, 70, 73–74, 77–78, 87, 95–96, 98, 100, 105, 107–111, 113–121, 127, 129–131, 374, 544, 546, 821, 906, 908, 1246
Kool Moe Dee, 78–79
KRS-One, 81–82, 152, 157, 818
Kurtis Blow, 79–82, 127, 135, 138, 143

L

Lamar, Kendrick, 82, 519–520, 1554, 1586–1587, 1679
LaPolt, Dina, 52, 1379–1380
Large Professor, 11, 22, 29, 127, 154–156, 160, 240, 309, 349, 365, 428, 520, 572, 577, 604, 607–608, 640, 673–674, 677, 682, 684, 702, 713, 715, 717, 806, 811, 815, 823, 851, 873, 911–912, 945
LaVorgna, Bill, 589, 707
Lawyer Bias, 1657
Layering, 145, 164, 216, 385, 392, 414, 417, 420, 444, 510, 612, 651, 653, 725, 727, 734, 750, 1159
Leadsinger, Inc. v. BMG Music Publ'g, 1350
Leaning Letters, 64
Led Zeppelin, 300, 345, 522, 1154, 1158, 1369, 1435, 1476–1477, 1574, 1585, 1679, 1683, 1691–1692
LEE 163, 62
Lennon v. Premise Media Corp., 1350
Letter from an Author Concerning Literary Property, 970
Leval, Judge Pierre, 54
Lightnin' Rod, 76–77, 79, 112, 906
Lil Nas X, 1072–1073
Linear Progression, 170–171, 173–174, 201, 221, 223–224, 229, 234, 244, 248, 251, 254, 301, 304, 500, 558, 748, 828, 1343
Little Richard, 183, 526–527, 852, 1071, 1078, 1088
Live-Instrumentation Sampling Revolution, 755, 760–761
Livin' Proof (Group Home), 152, 162–163, 167, 564, 583, 592, 597, 600
LL Cool J, 81, 143, 652, 818
Lo-fi (style, sound, and aesthetic), 127, 603–604, 663, 699, 740
Locke, John, 1058–1059
Lomax, Alan, 1068

Loop, 96, 127, 132, 145, 153, 171, 175–177, 180, 201, 207, 232, 248, 262, 277, 295–296, 300–301, 304, 312, 314, 317, 320, 322, 382–384, 386–388, 397, 402–403, 423, 427, 434, 439–440, 496, 501–502, 522, 531, 541, 547, 549, 558, 605, 623, 627, 638, 641, 643, 656–657, 668, 696, 728, 734, 736, 740, 744, 746–749, 753, 843, 892, 1036, 1038, 1159, 1311, 1343–1344
Lord Chancellor, 986
Lord Mansfield, 986–990
Low End Theory, The (A Tribe Called Quest), 152

M

Machine-Made Music, 549–551, 639
Madison, James, 998, 1003, 1244
Madonna, 1487, 1492–1493, 1510, 1539, 1565
Magnetophon K1, 345
Main Ingredient, The (Pete Rock & CL Smooth), 152
Main Ingredients of a Successful Loop, 295
Main Source, 152, 154, 156–157, 553, 677, 721, 802, 806
Manhattan, 1, 64, 71, 95, 97, 122, 143, 645, 840, 1445
Marco Polo, 127, 174, 309, 372, 385, 484, 755–756, 759, 781, 815
Marhsall, Justice Thurgood, 1057, 1069
Marley Marl, 2, 11, 19, 22, 29, 32, 81–82, 90, 135, 142, 144–147, 149, 151–156, 164–165, 240, 331, 349, 360–361, 407, 428, 547, 553, 555, 572, 577, 604, 607–608, 651, 673–674, 677, 682, 684, 686–688, 690, 698, 702, 712–714, 717, 720, 802, 809, 811, 814–815, 823, 851, 873, 911–912, 945, 1110, 1132, 1530, 1663
Marlowe, Christopher, 1131
Mason, Harvey, 589, 602, 707
Master Ace, 501
Masuc, Hartwig, 1053
Matching/Fitting Drum Sounds and Patterns with Samples, 442
Material Growth, 174, 221, 223–224, 248, 251, 254, 301, 1343
Mayfield, Curtis, 472, 528, 553, 706, 785, 1549
MC Breed & DFC, 590
McLauren, Malcolm, 122
Mecca and the Soul Brother (Pete Rock & CL Smooth), 152
Mechanics of Rap: Improvisational Writing, Performance, Delivery, and Flow, 246, 1342
Melismatic Music, 472
Melle Mel (Melvin Glover), 78, 136
Mellotron, 345
Melody, 66, 81, 129–130, 138, 156–157, 170–171, 175, 177, 180, 206, 208–212, 216–217, 220–221, 223, 229–230, 232–233, 235, 237, 239, 244, 254, 261–263, 269, 280, 282–283, 300, 302, 310–312, 325, 328, 339–340, 401–402, 434, 444, 454, 457, 483, 496, 499, 501–502, 525, 613, 623, 638, 651, 665, 680, 695, 704, 718, 738, 748, 750, 752, 756, 820, 823, 827, 834, 924, 933, 1154, 1245, 1307, 1311, 1369, 1371, 1411, 1444, 1457, 1473, 1478, 1482–1483, 1488, 1541, 1568, 1577, 1590, 1683, 1685, 1692, 1704
Melody and Harmony in the Hip Hop/Rap Music Tradition, 232
Meters, The 183, 481, 535, 588, 602, 707, 721
Melorhythm, 613–614
Meter, 79–81, 86, 213–215, 224, 487–489, 495
Methods for Customizing Drum Sounds, 413–414
Metro Boomin, 127, 178, 418, 519, 580, 626, 669, 1549
Metronomicity, 498
Michelangelo, 885, 1108–1111, 1114, 1118, 1222, 1240
Micro-chop, 714–716, 718
Micro-chopping, 385, 388, 577, 646, 651, 698, 714–718, 1309
Micro-Temporal Deviations, 504, 550, 611, 613
MIDI, 284, 291–292, 294–295, 309–310, 344, 347–348, 368, 389, 411, 445, 639, 736, 895
Midnight Marauders (A Tribe Called Quest), 152
Milton, John, 966–968, 1192–1194, 1201, 1218–1219
Misconception of "Funky Drummer," The, 540
Mix, The 118, 164, 315, 444, 511, 527, 565, 607, 626, 820, 822, 906, 908, 1162, 1214, 1245–1246, 1694
Mobb Deep, 127, 162, 165, 314, 362, 509, 627, 649, 671, 677, 802, 818, 915
Modeliste, Ziggy, 588, 602, 707
Modern Rapping, 78, 80
Mozart, Wolfgang Amadeus, 181, 185, 187,

189, 191, 195, 197, 199, 201, 203, 205, 207, 209, 211, 213, 215, 217, 219, 221, 227, 229, 231, 233, 235, 237, 239, 241, 243, 245, 247, 249, 251, 253, 255, 257, 259, 261, 263, 265, 267–269, 985, 992–993, 1087, 1107, 1110, 1114, 1118, 1222, 1240, 1636–1637, 1687, 1704
MTV News, 1532
Muddy Waters, 1069, 1691
Muldrow, Georgia Anne, 127, 602–603, 622
Multi-Sampling, 725–726
Multi-Sampling,, 725
Music Defined, 200
Music Industry 3.0, 1696
Music Publishers vs. Literary Publishers, and the Shelf Life of Printed Music, 979
Music Theory, 38, 188, 191, 193, 195–200, 203–206, 208–209, 221–223, 227–229, 235, 240–244, 254–255, 257–261, 264, 266, 269, 281, 283, 311–312, 323, 467, 489, 704, 730–731, 733, 739, 743, 825–826, 886, 918, 1189, 1704
Music Theory Defined, 205
Musical Genius, 181, 570, 574, 688, 690–693, 698–699, 714
Musical Hierarchies, 771, 776, 831, 833, 836, 841, 844, 846, 851–852, 854, 858
Musicianship (Creativity) Above Technology, 891–892
Musique Concrète, 342, 345, 849, 1248
Mystic Stylez (Three 6 Mafia), 152
Myth of Originality, The, 1214–1215, 1235

N

N.W.A., 157, 802, 1392
Napster, 50, 1554–1556
Nature of The loop, The 549, 558
Needle Drop, 748
Negativeland, 997
Neo-Soul, 505, 525, 531, 571, 586, 626, 635–637, 660–669, 675, 685, 692, 701, 703, 707, 709–711
New Insights Model, The: Transformation as New Insights, 1321
New Music-Making Technology Always Leads to New Music Traditions, 1704
New Orleans, 115–116, 120, 146, 183, 185, 480–481, 515, 526–527, 534–535, 537, 564, 587, 609, 616, 681, 711, 1063, 1220, 1379, 1483
New Purpose/New Market Model: Transformation as a New Purpose When New, 1328
New York, 32, 44–45, 59–66, 68, 70–75, 82, 85, 90, 94–98, 100–102, 105–108, 110, 112–113, 116–119, 122–123, 133, 137, 139–140, 142, 144, 147, 149, 160, 163–165, 169, 179–180, 185, 188, 192, 200, 223, 229, 241, 273, 286, 342, 372, 427, 499, 524, 567, 572, 596, 636, 644–645, 713, 722, 779, 785, 787, 790–792, 795–796, 802, 809, 811, 813, 826, 840, 874, 908, 916, 973, 1019, 1029, 1063, 1079, 1220, 1222–1223, 1262, 1324–1325, 1334, 1358, 1360–1362, 1425, 1428, 1445–1446, 1455–1456, 1459, 1511–1512, 1522, 1535, 1547–1548
New York's Record Grapevine, 105–106
Nicki Minaj, 53, 505, 708, 1261–1262, 1356, 1622
Nigga Twins, The 67, 71
Nietzsche, Friedrich, 1135
Ninth Circuit (Court of Appeals), 2, 935, 954, 1028–1029, 1031–1033, 1302, 1350–1351, 1353, 1358–1360, 1434, 1457, 1460, 1473, 1475, 1487, 1492–1500, 1504, 1506–1510, 1524, 1526, 1554
Nonliteral Similarity, 1025
Notes About The DJ: Revolutionizing State-ofthe- Art Recording Technologies, 103
Notorious B.I.G. LLC v Lee Hutson, 1353–1355, 1442, 1513, 1565
Núñez v. Caribbean International News Corp., 1326–1327
Nuriddin, Jalal, 76–77, 112
Nuts and Bolts of Composition, Programming, and Arrangement in Hip Hop/Rap Music, 291

O

O'Connell, Judge Beverly Reid, 1454, 1461
O'Sullivan, Gilbert, 1534–1536, 1538
O.C., 82, 152, 161, 501, 818
On the Question of Amending Fair Use and Judicial Intervention, 1273
One, The Rhythmic Feel, 547
One Drop Rhythmic Feel, 526, 530, 568, 628, 708, 711
One-Off Digital Sample, 1313
Ordinary Observer Test, The 973, 1034
Originality, 2–3, 5, 7, 21, 34, 38, 51, 85, 88, 287, 368, 370–371, 629–630, 780, 811–812, 819–824, 832, 865, 869–870, 872–873, 880, 886, 905, 917, 973, 989, 992, 994–995, 1013, 1043, 1057, 1081,

1083, 1085, 1088, 1095–1097, 1099–1103, 1105–1109, 1111–1137, 1139, 1141–1145, 1147–1149, 1151, 1153, 1155–1161, 1163–1175, 1177, 1179, 1181, 1183, 1185, 1187, 1189, 1191, 1193, 1195, 1197, 1199, 1201, 1203, 1205–1207, 1209, 1211, 1213–1217, 1219, 1221–1225, 1227, 1229, 1231, 1233, 1235–1241, 1244–1247, 1383, 1454–1456, 1552, 1627, 1637–1639, 1653, 1702–1703, 1705, 1708
Originality Paradox, The, 824, 1101, 1103, 1125, 1135
Originality and the Presumption of a Proprietary Authorial Impulse, 1142
Originary vs. Reactionary, 1101
Oswald, John, 939–941
Oyewole v. Ora, 1351, 1356

P

Pan-African synthesis of music, 462, 464
Paradise Lost, 967, 1136, 1192
Pattern Test, 1026–1027
Paul C., 127, 154, 484, 717, 798, 811, 815, 945
Peoples Instinctive Travels and the Paths of Rhythm (A Tribe Called Quest), 151
Permissive Borrowing, 51, 833, 857, 865, 867, 870, 891, 894, 900, 996, 1082, 1094, 1132, 1187, 1267, 1314, 1436, 1569, 1593, 1595, 1599, 1601, 1606–1607, 1614, 1621–1625, 1627–1628, 1631–1632, 1651, 1655, 1661, 1665, 1667, 1679, 1688–1689, 1692–1693
Personal Brand, 1197, 1200–1202, 1204–1205, 1207, 1214
Pete Rock, 1–2, 11, 22, 29, 127, 151–153, 156, 160, 162, 240, 309, 349, 365, 385, 418, 428, 499, 513, 517, 520, 553, 558, 572, 576–577, 600, 604, 607–608, 646, 655, 657, 673, 677, 682–684, 698, 702, 713, 715, 717–718, 749, 757, 802, 811, 814–815, 831, 851, 873, 903, 911–912, 945, 991, 1110, 1132, 1663, 1684
PHASE 2, 62, 64, 87
Phat Kat, 596–597, 599, 647
Physical Taking, 336, 1402–1403, 1505–1506, 1524
Philosophical Approach, The, 367–368, 748
Philosophy of Fear, The,1275
Pierre Schaeffer, 342, 1248
Pioneers/Avant-Garde Period, 127, 140, 147–148, 150–151, 158, 161, 163–165, 172, 294, 428, 607, 640, 800
Polyrhythm, 457, 459, 497, 500, 582, 585, 608–609, 617
Pope v. Curll, 965–966, 968–969, 1193
Pope, Alexander, 966–968, 1192–1194, 1201, 1218–1219
Popular Culture, 18, 115, 196, 774, 825, 844, 1061, 1064–1065
Post-Disco: Uptown Meets Downtown — Hip Hop, Punk, and the Art World, 122
Post-Pioneers Period, 127, 165, 167, 361, 428
Pre-Copyright and Stationers' Company, 961
Preamble of Section 107, 1289–1290, 1293
Predictability of Fair Use, 1318, 1357–1360, 1362
Primary Sample, 155, 161, 177, 308, 311–312, 318, 320, 325, 350, 384, 402–404, 435–436, 442–444, 501, 597, 727–728, 735, 738
Primary Sub-Elements of Musi, The: Texture, Dynamics, Timbre, and Form/Structure, 216
Prior Restraint, 937, 1093–1094, 1311, 1384–1385, 1388, 1404, 1418, 1595, 1612, 1616–1617, 1651, 1653–1654, 1656, 1665
Probative Similarity, 1023
Problem with Copyright Infringement Cases Involving Music, The, 1019
Product of the Mind, The: Authors' Rights and the Concept of Intellectual Property, 969
Programming, 11, 142, 152, 155, 159, 162, 179, 187–188, 231, 252, 271, 275–280, 282, 291, 294, 298, 304, 320–321, 339–340, 367–368, 384, 397–401, 408, 410, 414, 423–425, 427–429, 438, 442, 445, 504–505, 516, 550, 568, 571, 577, 588, 591, 604–605, 608, 610, 643–644, 649, 668, 677, 686, 729, 742, 802, 830–831, 912, 1122, 1159, 1339–1340
Programming, Conducting, Performing, and Playing (In Beatmaking, It's All Interrelated), 275
Public Domain, 879, 1003, 1010–1011, 1071–1072, 1147–1151, 1153, 1155–1158, 1169, 1174–1175, 1471, 1601, 1630, 1706
Publication vs. Performance / Authors vs. Composers and Musicians, 976
Publishing, 9, 18, 23, 35–37, 786, 843, 853, 888, 961–964, 967–968, 975–977, 980–981, 983, 994–995, 1059, 1078, 1092, 1178, 1180–1181, 1198, 1212, 1215, 1219, 1225–1229, 1232, 1234, 1237–1238, 1255, 1334–1336, 1392, 1446, 1466, 1512–1513, 1531, 1533, 1542–1545, 1559, 1571–1573,

1575–1576, 1578–1579, 1584, 1591, 1605, 1638, 1648–1649
Punch Phase, 69, 131, 544
Purity, 1191–1192, 1194–1195, 1210, 1214–1216, 1222, 1225, 1227, 1232, 1235, 1238
Purpose of Copyright Law, The, 3–4, 8, 938, 989, 997, 1001, 1003, 1005–1009, 1094, 1100, 1149, 1152, 1169, 1287, 1319, 1372, 1374, 1378, 1381, 1519, 1523, 1615, 1619, 1624–1625, 1629, 1649
Purpose of Copyright Law Is Not About the Consent of Creators, The, 1006
Purpose of Copyright Law is Not to Protect Copyright Owners, The, 1005

Q

Q-Tip, 11, 22, 29, 127, 155, 158, 160, 165, 240, 349, 418, 428, 572, 576–577, 597, 600, 604, 607–608, 646, 673–674, 677, 682, 684, 698, 702, 713, 806, 811, 814–815, 823, 851, 911–912, 945, 991, 1110, 1132
Quality King Distributors, Inc. v. L'Anza Research International, Inc., 1268
Queen, 567, 962, 985, 1068, 1435, 1532–1533
Queens, 82, 645
Quik is the Name (DJ Quik), 152
Quik Mix Theory, 69, 131

R

Race Records, 1064–1068, 1070–1071
Raekwon, 165, 176, 317, 513, 593, 600, 647, 686, 771, 813, 818, 915
Rakim, 31, 81–83, 154, 192, 245, 271, 541, 598, 719, 810, 818, 903, 1340
Rap Music, 1, 3–13, 15–22, 24–25, 27–31, 33–36, 39–41, 45–46, 49–54, 57, 61, 63, 65, 77, 81, 84–85, 89–91, 94, 97, 99, 103–105, 107, 112–116, 119–121, 123, 125, 129–130, 132–135, 137–139, 141–142, 144–145, 147–149, 151–153, 155, 157, 159, 161, 163, 165, 167–168, 176, 179–180, 185–189, 191, 193–200, 202–206, 223, 227–245, 248–269, 271, 275, 277, 279–280, 286–287, 290–291, 293, 296, 300–301, 304, 308–309, 313, 316, 319, 322–324, 328, 331, 333, 337–340, 344, 348–349, 351, 353–361, 366, 368–370, 373–374, 397, 400, 405, 413, 427, 435, 449–450, 454–455, 469, 471, 482, 484–486, 491–494, 496, 499, 504–505, 507, 511–512, 515–519, 521–526, 531–532, 534, 538, 541–544, 546–549, 551–561, 563–566, 568–572, 575–576, 578–581, 586–588, 590–592, 594–596, 599–604, 607, 611–612, 614–616, 621–627, 634–641, 645–646, 650, 652, 656, 659–663, 665–672, 674–675, 677, 679, 681–684, 686–688, 692, 698–714, 716–717, 721–722, 727–731, 733, 738, 744, 747–748, 750–751, 760, 774–778, 781, 783–784, 786, 793–794, 797, 800–801, 803, 805, 807–812, 815, 817–819, 821, 823–824, 826–839, 841–844, 846, 848–849, 851, 857, 859–864, 867, 869, 871–872, 875–878, 880–881, 883, 885–886, 888, 890, 892–894, 896–897, 900–916, 918–920, 941–946, 948, 991–992, 997, 1015, 1030, 1035, 1039, 1042, 1056–1057, 1062, 1068, 1072, 1074, 1087–1088, 1092, 1110–1111, 1130, 1133, 1164, 1179–1180, 1190, 1212–1213, 1246–1247, 1275–1276, 1298, 1309, 1312, 1318, 1322, 1334, 1336–1340, 1342–1344, 1353–1354, 1357, 1360, 1362–1363, 1371, 1376, 1396, 1411, 1424, 1457, 1461–1462, 1477, 1481–1482, 1529–1531, 1533–1534, 1540, 1546, 1550–1554, 1560–1561, 1576–1577, 1580, 1586–1587, 1604, 1614, 1646–1647, 1649, 1663–1664, 1686–1687, 1697, 1701, 1703–1705, 1709
Rapping, 4, 40, 43–44, 61, 70, 73–81, 83–85, 111, 133–134, 140, 151, 163, 177, 229–230, 245–247, 257–258, 338, 340, 358, 523, 623–624, 660, 663, 745, 755, 877, 908, 1180, 1190, 1339–1343, 1462
Rapping and Form — Dense Measures: More Words Per Measure, 247, 1343
Rapping and Rhythm, 623
Raw Materials, 340, 401, 607, 848, 881, 1144, 1147, 1159, 1248, 1308, 1314, 1323–1324, 1584, 1597, 1670, 1709
Raw Materials Model: Transformation as Raw Materials, 1323
Ready to Die (The Notorious B.I.G.), 152
Reality Hunger: An Example of Validated Sampling, 867
Recording Industry Sample Clearance Agency (RISCA), 1572
Red Label Music Publ'g v. Chila Prods., 1350, 1354
Reggae, 6, 107, 109–112, 114–115, 119–120,

339, 453, 491, 504, 515, 526–530, 559, 568–569, 578, 613, 628, 637, 661, 664, 707–708, 711, 781, 1329, 1481, 1488–1489, 1581
Remix Culture, 18, 1467
Retro-Eclectic Period, 127, 171–173, 179
Retrun of the Boom Bap (KRS-One), 152, 157–158
Revival of Sampling, The, 353, 359
Rhythm, 1, 6, 66, 75, 79, 83–84, 104–105, 120, 123, 127, 130, 133, 135, 137–138, 143, 147–148, 151, 155, 157–159, 164, 168, 170, 175, 183–184, 201–202, 206, 208, 211–216, 221, 223–224, 229–232, 235–237, 241, 246–248, 251–252, 254, 261–262, 266–267, 269, 279, 284, 293, 301–303, 308, 310, 316, 328, 334, 341–342, 368, 375, 384, 397, 402, 424, 433, 435, 437, 439, 444–445, 449–450, 453–455, 457, 459–463, 465–467, 469–473, 475, 477–479, 481–497, 499–503, 505–507, 509–517, 519, 521, 523, 525–527, 529–539, 541, 543, 545–561, 564–566, 568, 570–574, 577–579, 583–584, 586–588, 591–592, 596, 602, 605, 609, 611–613, 616–620, 622–625, 627, 629–630, 636, 640, 644, 646–647, 651, 661, 680–681, 684, 689, 694–696, 701, 703–704, 710–711, 715, 717–719, 725, 737–740, 750, 756, 801, 814, 828, 831, 834, 841–843, 877, 880, 887, 930, 933, 1063–1064, 1092, 1341, 1343–1344, 1444, 1455–1456, 1482–1484, 1488, 1541, 1577, 1683, 1685, 1692, 1704
Rhythm Punctuation, 494
Rhythm, Time Correct, and Natural Feel, 231
Rhythmic Feel, 127, 151, 160, 163, 165, 167, 471, 482, 489–492, 497, 503–512, 514–518, 521–526, 529–532, 538, 541, 547–548, 550, 556, 561, 563–565, 567–569, 571–573, 575, 578–597, 599–605, 607, 609–613, 615–617, 619–630, 634–641, 643–651, 653, 655, 657, 659–673, 675–679, 681–687, 689, 691, 693–715, 717, 719, 721, 723
Rhythmic Feels, 449–450, 489–491, 497, 503–508, 515, 517–519, 521, 523, 530, 532, 537, 543, 549, 556, 559, 568, 573, 578–579, 588, 593, 611–613, 623–626, 628, 660–662, 664, 670, 678, 681, 686, 694, 699, 704, 707–708, 710, 1487
Rhythmic Pattern, 213, 215, 312, 444, 454, 489, 503, 518, 618, 623, 933, 1162
RIAA, 266, 855, 870, 997, 1277, 1378, 1380–1389, 1401, 1410, 1554–1560, 1573–1574, 1584, 1586–1587, 1589, 1595, 1652–1656, 1686, 1696, 1698
RIFF 170, 63
Ringgold v. Black Entertainment Television, Inc. (1997), 1306
Riza Blue, aka Kool Lady Blue, 122
Roberts, Chief Justice John, 1049
Robinson, Sylvia, 90, 135–136, 138–139, 287, 589
Roc Marciano, 127, 175–177, 501, 663, 823
Rock 'n' Roll, 3, 6, 17, 183–184, 193, 197, 229, 267, 300, 435, 445, 462, 491, 516, 525–526, 530, 559, 581, 684, 711, 727, 778, 831, 852, 897, 901, 908, 954, 991, 1063, 1088, 1092, 1162, 1179–1180
Rock Steady Crew, 71, 143
Rockwell Association, 71
Role of Education in Musical Hierarchies, 841
Romantic Period, 46, 832, 835, 1096, 1126–1127, 1187, 1214
Romantic Poets, 1095, 1099, 1103, 1105–1111, 1114, 1116–1117, 1119, 1123–1125, 1127, 1130–1131, 1191, 1194, 1198, 1206–1207, 1210, 1213–1214, 1219, 1221, 1238
Romantic Poets' Lazy-Man's Concept of Originality, The, 1105
Romantics, The, 51, 1099–1102, 1105, 1111, 1119–1120, 1123–1124, 1126–1129, 1131, 1144, 1147, 1156, 1168, 1171–1172, 1273
Roots of the Art of Rapping, The, 73
Roxy, The 122–123
Roy Orbison, 1307, 1363–1364, 1372
RTW, 65
Rubin, Rick, 80, 143–144, 147, 484, 651–654, 798, 811, 815, 1088
Run-DMC, 80–81, 143–144, 1077, 1160, 1529
Ryrie, Kim, 346
RZA, 11, 19, 22, 29, 156, 159, 164, 176, 240, 309, 349, 418, 428, 513, 517, 572, 577, 583, 591, 593–596, 599–604, 607–608, 610, 626, 630, 638, 640–646, 648–650, 655, 669, 671, 673–674, 677, 682–684, 686, 698, 702, 713, 715, 717, 749, 756, 783, 806, 811, 814–815, 823, 851, 873, 911–912, 945, 989, 991, 1110, 1132, 1663, 1684

S

Safe Harbors (of Copyright Law), 2–3, 5–7, 49, 867, 891, 936, 952–953, 996, 1082–1083, 1094, 1169, 1174, 1260, 1315, 1435, 1537, 1556, 1587, 1595, 1623, 1632, 1651, 1701
Sagan Standard, 678
Sam "Boogaloo Sam" Soloman, 72
Sample Blending, 725
Sample Clearance, 5, 7, 9, 33–35, 42, 51–52, 170, 285, 353, 356, 362, 383–384, 870, 876, 889, 923, 928, 937–938, 952–953, 992, 994–996, 1074, 1143–1144, 1150, 1266, 1275–1276, 1312, 1378–1379, 1389, 1397, 1414, 1418, 1423–1424, 1426, 1436–1437, 1441, 1464, 1466–1467, 1527, 1529–1531, 1533–1535, 1537, 1539–1547, 1549–1553, 1555–1561, 1563, 1565, 1567, 1569, 1571–1575, 1577–1579, 1581, 1583–1587, 1589–1601, 1603–1621, 1623–1631, 1633, 1635, 1637–1641, 1643–1645, 1647, 1649–1655, 1657, 1659, 1661, 1663–1665, 1667, 1686, 1698, 1703, 1708
Sample Clearance Scheme, 52, 1312, 1533
Sample Clearance System, 870, 937, 1275–1276, 1312, 1414, 1423–1424, 1426, 1437, 1529–1531, 1533–1535, 1537, 1539–1543, 1545, 1547, 1549–1553, 1555, 1557–1561, 1563, 1565, 1567, 1571–1573, 1575, 1578, 1584, 1586–1587, 1593, 1596, 1615, 1624, 1650, 1686, 1698, 1703
Sample Rights vs. Sample Clearance, 995, 1527, 1708
Sample Vamping, 741–742
Sample-Based (Samples-Featured) Beatmaking — The High Art of Sampling, 279
Sample-Based Beatmaking, 273, 279, 338, 366, 371, 374, 442, 721, 761, 1269, 1323, 1686
Sample-Based Compositional Style, 280, 287–288, 313, 339, 341, 369, 741, 743, 876, 1276, 1553
Sample-Spotting Culture, 359, 365
Sampler's Code, The: The Ethics and Unwritten Rules of Sampling in the Hip Hop/Rap Music Tradition, 369
Sampling, 2–40, 42, 44, 46–55, 57, 59–91, 93–123, 127, 129–132, 134, 136, 138, 140–142, 144–150, 152–158, 160, 162, 164, 166–172, 174–176, 178, 180–181, 184, 187–189, 194, 196, 198, 200, 202, 204, 206, 208, 210, 212, 214, 216, 218, 220, 222, 224, 228, 230, 232, 234, 236, 238, 240, 242, 244, 246, 248, 250, 252, 254, 256, 258, 260, 262, 264–268, 273, 275–276, 278–282, 284–286, 288–290, 292, 294, 296, 298, 300, 302, 304, 306, 308, 310, 312, 314, 316, 318, 320, 322, 324, 326, 328, 331–405, 407–447, 454, 458, 460, 462, 464, 466, 468, 470, 472, 474, 476, 478, 480, 482, 484, 486, 488, 490, 492, 494, 496, 498, 500, 502, 504, 506, 508, 510, 512, 514, 516, 518, 520, 522, 524, 526, 528, 530, 532, 534, 536, 538, 540–544, 546, 548, 550, 552, 556, 558, 560, 563, 566, 568–570, 572, 574, 578, 580, 582, 584, 586, 588, 590, 592, 594, 596, 598, 600, 602, 604, 606–608, 610, 612, 614, 616, 618, 620, 622, 624, 626, 628, 630, 633, 636, 638, 640, 642, 644, 646, 648–654, 656, 658, 660, 662, 664, 666, 668, 670, 672, 674, 676, 678, 680, 682, 684, 686–688, 690, 692, 694, 696, 698, 700–702, 704, 706, 708, 710, 712, 714–718, 720–722, 725–761, 763, 765–767, 771, 773–815, 817–883, 885–914, 916–922, 924, 926, 928, 930, 932, 934–936, 938–948, 952–954, 956, 960, 962, 964, 966, 968, 970, 972, 974, 976, 978, 980, 982, 984, 986, 988–990, 992, 994–998, 1000, 1002, 1004, 1006, 1008, 1010, 1012, 1014–1017, 1019–1020, 1022, 1024, 1026, 1028, 1030, 1032, 1034–1036, 1038–1039, 1041–1042, 1044, 1046, 1048, 1050–1052, 1054, 1056–1060, 1062, 1064, 1066, 1068, 1070, 1072, 1074–1076, 1078, 1080, 1082–1088, 1090, 1092–1094, 1097, 1100, 1102, 1104, 1106, 1108, 1110, 1112, 1114, 1116, 1118, 1120, 1122, 1124, 1126, 1128–1130, 1132–1134, 1136, 1140, 1142–1144, 1148, 1150, 1152, 1154, 1156, 1158, 1160–1162, 1164, 1166, 1168, 1170, 1172, 1174, 1176, 1178–1180, 1182, 1184–1190, 1192, 1194, 1196, 1198, 1200, 1202, 1204, 1206, 1208, 1210, 1212, 1214, 1216, 1218, 1220, 1222, 1224, 1226, 1228, 1230, 1232, 1234, 1236, 1238, 1240, 1246–1249, 1252–1256, 1258, 1260–1264, 1266–1277, 1280–1284, 1286, 1288, 1290, 1294, 1296, 1298, 1300, 1302, 1304, 1306, 1308–1312, 1314–1316, 1318–1320, 1322, 1324, 1326, 1328, 1330, 1332–1334, 1336, 1338–1340, 1342, 1344–1346,

1348–1350, 1352–1358, 1360–1364, 1366, 1368, 1370–1372, 1374–1376, 1378–1389, 1391–1394, 1396–1406, 1408–1418, 1420–1432, 1434–1438, 1440–1442, 1444–1446, 1448–1454, 1456–1458, 1460–1467, 1469–1470, 1472, 1474, 1476–1478, 1480, 1482, 1484–1490, 1492, 1494–1496, 1498, 1500, 1502, 1504, 1506–1508, 1510–1512, 1514, 1516, 1518, 1520, 1522–1526, 1529–1540, 1542, 1544–1548, 1550–1558, 1560–1565, 1568, 1570–1572, 1574, 1576, 1578, 1580, 1582, 1584–1586, 1588–1590, 1592–1600, 1602–1665, 1667–1698, 1701–1709
Sampling and Arrangement The Three Forms of Sampling, 399
Sampling and Improvisation, 741
Sampling As a Compositional Method, 1405, 1551–1552
Sampling Equation, The, 367–369, 371, 373, 375, 377, 379, 381, 383, 385, 387, 389, 391, 393, 395, 397, 399, 401, 403, 405
Sampling Is A Technique, Method, and Compositional Style, 338, 849
Sampling Is Arrangement, Not "Cut-and-Paste", 340
Sampling Is Music Recycling, 343
Sampling Is Musique Concrète, 342, 849
Sampling Is Referential Music-Making, 341, 849
Sampling Is Sound Collage, 337, 849
Sampling Is Versioning, 339, 849
Sampling Tradition of Hip Hop/Rap Music, The, 5, 8–9, 12, 15–16, 21–22, 29, 34–35, 39–40, 57, 94, 107, 148, 187–188, 337–338, 353–354, 357–358, 370, 750–751, 774, 778, 783, 786, 793, 803, 811, 830, 859, 872, 878, 892–893, 896–897, 910, 913–914, 1042, 1130, 1133, 1309, 1334, 1339, 1344, 1553–1554, 1576, 1687, 1701, 1703
Sanjek, David, 885, 888–889, 892–893, 895, 897, 899, 901, 903, 905, 907, 909, 911, 913, 915, 917, 919, 921, 923, 925, 927, 929, 931, 933, 935, 937, 939, 941, 943, 945, 947
Saregama India LTD. v. Timothy Mosley, 1427–1429, 1431–1432, 1434, 1505, 1509, 1565
Scope of Borrowing in Music, The, 992
Scope of Fair Use in the Statute, The, 1280
Scott, Dred, 1043–1045, 1049–1051, 1054–1056
Second Circuit, 1001, 1025, 1253, 1314, 1323, 1329–1332, 1337–1338, 1350–1351, 1353, 1358–1360, 1451, 1473
Second Factor of Fair Use, 1305
Secondary Creativity, 1252, 1258–1259, 1270
Section Pieces, 383, 385
Sedgewick Rec Party, 60
Sequencing, 294, 309, 314, 352, 367–368, 397, 446, 544
Sequential Circuits, 347
Severity of Late and Earliness (or Degrees of "Brokenness"), 620–622
Shading Samples, 725, 727
Shadow of the Romantics, The, 1099, 1102
Shakespeare, William, 1670
Shared Foundations of Drum Patterns, 431
Shatzkin, Karen, 1437–1441
Shawty Redd, 22, 127, 160, 169, 178, 580, 626, 636, 669
Sherman, Cary, 1380
Shifting Attitudes Regarding Copyright Protection, 1273
Showbiz, 155, 428, 577, 607, 677
Side-by-Side Comparison, 1473, 1475–1479, 1482–1484
Signal Chain, 367–368, 386, 731–732
Signature Sound, 418, 573, 579, 603, 640, 655–656, 661, 670, 672
Silver Fox, 81
Sixth Circuit (Court of Appeals), 2, 853, 954, 997, 1349–1350, 1360, 1365, 1391–1393, 1397–1410, 1412–1423, 1425–1427, 1431–1432, 1434, 1469, 1472, 1484–1486, 1491–1493, 1495, 1497–1499, 1503–1510, 1523
Slick Rick, 81–83
SLY II, 62
Sly Stone, 551–552, 569
Smith, Dave, 347
Smith, Larry, 127, 135, 138, 143–144, 147, 651–653, 1088
Smith, Mamie, 1066–1068
Smith, Ronald 589
Song Structure, 165, 301, 305–306, 437
Sonic Properties, 244
Sonic Quality, 116–117, 333–334, 393, 401, 443, 516, 729, 735, 737–738
Sony Computer Entertainment, Inc. v. Connectix Corp., 1302
Sony Presumption, 1296, 1298–1300
Sony v. Universal City Studios, Inc., 1297–1298, 1357
Soul, 1, 6, 16, 22, 26–27, 31–32, 40, 52, 72–73, 77, 84, 94–95, 101, 106, 114,

123, 127, 129, 141, 151–154, 156, 159, 164, 177, 179, 183, 192, 229, 241, 264, 266, 279, 284, 333–334, 343, 350, 375, 428, 435, 445, 468–470, 472, 481, 484, 491, 497, 499, 505, 516, 525, 529, 531, 535, 537, 544, 553–554, 556, 559, 569–571, 581, 586–588, 594–595, 626, 635–637, 646, 653, 660–669, 675–677, 685, 692, 701, 703, 707, 709–712, 721, 727, 739, 753, 756, 781, 783–785, 800–803, 806, 813, 815, 831–832, 873, 903, 908, 912, 940, 945, 1055, 1069, 1082, 1092, 1106, 1161–1162, 1164, 1294, 1338–1339, 1444, 1529–1533, 1550, 1612, 1685, 1687, 1692
Soul and Essence of the Hip Hop/Rap Music Tradition, The, 264
Sound and "Sounds" in the Hip Hop/Rap MusicTradition, 242
Sound and Time Aspects of Rhythm, 506
Sound Recording Amendment of 1971, 1014–1016, 1400–1401, 1405, 1408
Sound Rendition and Timbre, 243
Sound-Stab, 152–153, 282, 369, 385, 718, 726, 1369
Sound-Tone, 385, 718
Source Material As a Cultural Space, 809
Southern Bounce Period, 168–173
Spann, Hank, 84
Spare-Part Phrase, 369, 384, 403
Spin Back, 68–69, 131, 544, 547, 748
Spot-Listening, 382
Spot-Note, 725–726
Standards and Best Practices of the Sampling Tradition of Hip Hop/Rap Music, 750–754, 1276, 1573–1574, 1576, 1703–1704
Starks, Jabo, 497, 536–541, 543–544, 546–547, 557, 607
Staten Island, 641
Statute of Anne, The, 959–961, 964–966, 974–975, 979–980, 982–988, 1257
Step In the Arena (Gang Starr), 155–156
Stevie Wonder, 346, 472, 548, 553, 692, 706, 715, 795, 1131, 1160–1164, 1322
Stewart v. Abend (1990), 1297, 1357
Story of Fair Use, The, 1251
Story of Rhythm, The, 449–450, 454–455, 457, 459, 461, 463, 465–467, 469, 471, 473, 475, 477–479, 481, 483, 485–487, 489, 491, 493, 495, 497, 499, 501, 503, 505, 507, 509, 511, 513, 515, 517, 519, 521, 523, 525, 527, 529, 531, 533, 535, 537, 539, 541, 543, 545, 547, 549, 551, 553, 555, 557, 559–561, 565, 570, 602, 701, 704, 719
Story, Justice Joseph, 1095, 1171, 1243, 1257, 1628
Straight Time, 490, 493, 508, 513, 521, 579, 582, 616, 622
Structure, 8, 79–81, 134, 140, 153, 165, 206, 213, 216, 219–222, 237, 251–252, 265, 267, 278, 294–296, 298, 300–301, 303, 305–308, 314, 316, 322, 326, 351, 429, 437, 457, 474, 493–494, 500, 506, 516, 518, 547–548, 550, 558, 611, 618, 625–626, 646, 737, 740, 871, 880–881, 899, 936–937, 1025, 1029–1030, 1034, 1042, 1075, 1094, 1121, 1140, 1167, 1265, 1504, 1564, 1572, 1574, 1670
Stubblefield, Clyde, 183, 410, 534, 536, 540–542, 544, 546, 557, 607, 909–910, 912, 1547–1549
Studio-Band Period, 127, 132–134, 137–140, 760
Sub-Factor of Factor One (of Fair Use), 899, 902, 1118, 1295, 1297, 1300
Substantial Similarity, 628, 930, 935, 973, 1019, 1021–1022, 1024–1026, 1031, 1033–1039, 1168–1169, 1254, 1393–1394, 1396–1402, 1404, 1406, 1418–1421, 1425, 1427, 1429–1434, 1443–1444, 1449–1450, 1458–1460, 1471–1480, 1482, 1484–1487, 1489–1490, 1525, 1537–1538
Substantial Similarity Analysis, 1022, 1036–1038, 1254, 1394, 1396–1401, 1418–1421, 1427, 1429, 1431, 1434, 1443, 1459, 1472–1473, 1479, 1484–1485, 1487, 1489–1490, 1537–1538
Substantial Similarity Test and The Ordinary Observer in Copyright Infringement Cases, 1034
Sugar Hill Gang, 79, 90, 94, 133, 140, 1529–1531
Sugar Hill Records, 90, 133–135, 139, 286, 914, 1530–1531
Summary Judgment, 53, 929, 954, 997, 1261–1262, 1285, 1324, 1326, 1364, 1392, 1395, 1419, 1428–1430, 1455, 1470, 1489, 1493, 1496, 1499, 1512–1513, 1587, 1622–1623
Sun Rises in the East, The (Jeru the Damaja), 152
SUPER KOOL 223, 63
Supreme Court, 53, 852, 992, 999, 1005, 1008, 1024, 1043–1045, 1049–1051, 1055, 1057, 1069, 1095, 1100, 1163, 1166, 1169, 1243, 1258, 1260–1262, 1268, 1275, 1295, 1297–1298, 1303, 1307, 1319, 1337, 1354, 1357–1358,

1360–1381, 1383, 1385, 1387, 1389, 1393, 1415, 1425, 1480, 1491, 1506–1507, 1622, 1628, 1647
Swing Time, 490, 493, 583–585, 588, 614–616, 622, 680–681
Swung Time, 584, 614–615, 620, 626, 695
Syncopation, 131, 168, 215, 229–230, 237, 287, 427–428, 435, 442, 444, 458, 460, 462, 472, 494–495, 503, 516, 519, 523, 527, 538, 548, 559, 585, 608–609, 680, 695
Synthetic-Sounds-Based Beatmaking, 281, 284

T

T La Rock, 80–81, 143, 652
T-Pain, 823, 1470–1471, 1481, 1483, 1489
Tags, 62–63, 65
TAKI 183, 62
TBB, 71
TCF, 65
TDK, 71
TDS, 65
Terry Noel, 100
Terry, Todd, 909, 915
Texture, 206, 208–210, 216–217, 236, 311, 316–317, 388, 392, 394, 404, 417–418, 430, 506, 611–612, 651, 727–728, 731
Texture in The Hip Hop/Rap Music Tradition, 236
Theft of Black Intellectual Capacity, 1080, 1083, 1085, 1087
Theft of Black People's Fruits of Creative Labor, 1088–1090
Theft of the Black Body, 1080–1082
Thomas, Joe, 589
Three Compositional Styles of Beatmaking, The 279
Three Critical Observations from the Fair Use Opinions Involving Music, 1352
Three Primary Elements of Music Theory, The: Harmony, Melody, and Rhythm, 208
Throw Up, 65
Timbre, 206, 216–219, 233, 243, 247, 284, 344, 393, 498, 506, 511, 522, 582, 611–612, 617, 623, 733, 736–737, 747, 1342
Time Signature, 214–215, 307, 429, 488–489, 498, 522, 527, 579
Timing correct, 231, 424–428, 491–492, 508, 604–605, 610, 647, 650, 656
TMT, 65
Tonal Progression in Hip Hop/Rap Music, 235
Tonality, 223, 235, 255, 587, 617, 732–733
Tony Furse, 346
Toop, David, 90, 109, 121, 906
TOPCAT 126, 64
Total Concept and Feel, 628–629, 1026, 1028–1030, 1033, 1473–1475, 1478, 1480–1484
Towards a Healthy, Consistent Perception of Fair Use, 1270
Tracklib, 1314, 1557–1558, 1572, 1589–1598, 1600–1610, 1612–1613, 1615–1621, 1623–1625
TRACY 168, 64
Tracy Chapman, 1261, 1622
Transfiguration of African and European Music Styles, 474
Transformation, 86, 238, 252, 332, 336, 391–392, 399, 401, 560, 699, 750–754, 848, 866, 870, 880, 902, 924–925, 932, 941, 944, 1038–1039, 1075, 1084, 1118, 1121, 1127, 1154–1155, 1158, 1161, 1163, 1173, 1177, 1187, 1235, 1241, 1248, 1260–1261, 1271–1272, 1293–1294, 1300, 1303, 1311, 1318–1319, 1321, 1323–1326, 1328, 1331, 1334, 1337, 1339, 1344, 1351–1352, 1356, 1366–1368, 1371, 1383, 1404, 1418, 1461–1462, 1493–1495, 1510–1511, 1519, 1522, 1524–1526, 1532, 1546, 1561, 1599, 1602, 1635, 1649–1650, 1688
Transformation, Reconceptualization, and Recontextualization, 86, 401, 750, 752
Transformative Element (Sub-Factor of the First Factor of Fair Use), 53, 857, 1100, 1295–1296, 1317–1319, 1328, 1332–1333, 1335, 1340, 1354, 1361–1362, 1647
Transformative Use, 19, 848, 954, 1100, 1273–1275, 1281, 1296, 1301–1302, 1317, 1319–1325, 1329–1330, 1335–1339, 1360, 1363, 1366, 1369, 1411, 1460–1463, 1517–1520, 1524
Transformative Use Expanded, 1319
Transformative Use is Not Limited to Parody, 1337
Transformative Works, 1260, 1295, 1331, 1366–1367, 1369
Trap Music, 11, 32, 151, 159–160, 163, 169, 171, 179, 355, 431, 435, 504, 523–524, 554, 580, 636, 662, 708–709, 714, 810, 869, 1553–1554, 1614
Trap Rhythmic Feel, 518, 523–524, 580–581, 628, 708
Trap-Based/Performance-Experimental Period, Trap & Drill Period, 173

Treacherous Three, The 78–79
Trena Steward Et Al. V. Kanye West et al., 1453
Tresóna Multimedia v. Burbank High School Vocal Music Ass'n, 1351, 1356
Tricia Rose, 116, 223
Triggering, 291–292, 299, 367–368, 445, 750
Triple Threat of Boom Bap, 516
True Meanings of the Concepts of Originality and Authorship, 1095
True Master, 317, 325, 372, 547, 593–596, 600–603, 608, 610, 629–630, 640, 648, 686, 702
Truth About Competition, 1210
TufAmerica Inc. v. WB Music Corp. et al, 1046–1053
Two Basic Forms of Drum Programming: Breakbeat Blend and Hit-Stab Drum Programming, 428
Two Poles of Originality, 1122–1123
Two Theories of Copyright: Natural Right and Economic Incentive, 998

U

UA, 65
Uncle Jamm's Army, 118, 139
Understanding Drum Syncopation, 435
Unification of the Four (Original) Elements of Hip Hop Culture, The, 60
United States Constitution, 974, 1007, 1251, 1654, 1657
United States v. Am. Soc'y of Composers, Authors and Publishers, 599 F. Supp. 2d 415, 1350, 1355

V

Value of Art in Society, The, 988
Value of Sampling, The, 844, 881
Vanilla Ice, 1530, 1532–1533
Versioning, 5, 74, 87, 339–340, 342, 372, 474, 531, 542, 709, 744, 820, 849, 906, 1161, 1244, 1247–1248
Virtual Sampling, 1247
VMG Salsoul LLC v. Madonna Louise Ciccone et al., 1487, 1493
Vogel, Peter, 346
Validity of E-Digging, The, 377

W

WAP (of Brooklyn), 63
Weight of Each of the Four Factors of Fair Use, The, 1316
West Coast Beats, 140
West Coast Sound, 140, 157, 159, 163–164, 180, 183
Westbound Records, 1392, 1395
Western (European) and African Perspectives of History, Time, and Repetition and Their, 201
Western Classical Ideology is Completely Invested in the Notion of Linear Progression, 223
Western Classical Music, 165, 188, 191, 193, 195–200, 202, 210, 212, 219, 221–223, 228, 234, 250, 252, 256–258, 269, 277, 300, 397, 466, 469, 558, 731, 819, 827–828, 831–832, 836, 863–864
Western Music Theory, 193, 195–196, 205, 235, 254, 259, 886, 1189
What is Copyright Infringement and How Is It Determined?, 1020
What the Creation of the Public Domain Reveals About Borrowing in Music, 1150
When is Fair Use in Your Favor?, 1271
Who is Western classical music actually meant for?, 222
Why Composers Were Slow to Embrace Copyright At First, 979
Why Sample-Based Beatmakers Sample, 333
Why the Composers' Fight for Copyright Is Instructive for Sample-Based Beatmakers, 995
William Warburton, 970
Williams, Alonzo, 139
Williams, Guy "Rahiem", 78
Wood, Chet, 347
Word...Life (O.C.), 152
Writers' Corners, 64, 357
Wu-Tang Clan, 21, 152, 159, 363, 553, 583, 591, 641, 645, 667, 677, 686, 799, 802, 806, 813

Z

Zomba Enters., Inc. v. Panorama Records, Inc., 1350, 1354
Zulu Kings, 67, 71

Acknowledgements

Amir Ali Said, Salam Alaikum wa Rahmatullahi wa Barakatahu, my son, my best friend, Alhumdulilah ! Thank you for keeping me on point, thank you for always me pushing to do my best. We'll talk later, Insha'Allah.

My crew: Steve, Eion, Rone, Boog. Love, I got the package. Soon come. Steve (Stax)— Either you the big brother I never had, or I'm the big brother you never had. Either way, we family. Thank you for taking me in. Eion (E)— To believe in somebody is a powerful source. To act on that belief is a rare jewel that can't be replaced. Thank you for believing in me and thank you for being my brother. Mike Rone (Rone)— One of the realest things you ever did was let me come to your crib and see how you make beats. It was about the beats, it was the friendship and love that you showed me. Thank you for being my brother. Brian (Boog)— Before I moved to Paris, I slipped back into New York for a couple of weeks. We ran into each other in Red Hook, and as happy as I was, it fucked me up. I knew I was leaving and didn't know when or if I'd be back. I think you knew it, too. That day was real because it reminded me that you my brother. Thank you for day 1, for having my back when I wasn't there to speak. Mariella, you held us down, Alhumdulillah! Now you good.

DJ Premier— Preem, thank you for keeping it real. Ready for that DJ Premier vs. Sa'id album when you are! Marley Marl— Marley, every beatmaker (producer) owes you a great debt! Thank you for granting me the most extensive interview you've ever done. Buckwild— Yo, Buck! Appreciate you, man, you came through each time. True Master— True! Thank you walking me through everything, thank you for shedding so much light, and thank you for introducing me to Ghost. DJ Toomp— Toomp, I cannot thank you enough for changing your schedule so that we could talk, and thank for the incredible stories that you shared. D.R. Period— D.R., Yo ! you one of the realest there ever was — music aside! Thank you for sharing your insight with me. 9th Wonder— 9th, thank you for your candor and depth.

Amanda, your eye is impeccable, thank you!

Geraldine, tu imagines le canal, ensuite ce jour dans le 9ème, je te dois toujours, merci ! Danni !! Encore, merci mon pote, tu m'as donné un lien crucial. Sibel, hardcore what you had to go through. Enjoy the sunlight. Sylvie, eh ben, merci pour les pains aux raisins — c'est incroyable tout ce que tu as fait, tu merites tout le bonheur qui va t'arriver. Christophe, grace à toi j'ai appris beaucoup de choses, merci ! Hafidah, merci beaucoup — la famille est importante, maintenant tu peux leur montrer. Karima, je pense que maintenant tu comprends tout. Alhamdoulillah ! Tu étais là pour moi sans hesitation. Merci !

Finally, I would also like to extend my respect and gratitude to Eileen Southern and to every unknown architect and pioneer who played a role in hip hop's foundation. Thank you.

About The Author



Amir Said (aka "Sa'id") is a writer, publisher, beatmaker/rapper, and father from Brooklyn, NY (now making his home in Paris). In addition to writing, making beats, and managing the BeatTips Network of music education websites, Said also runs Superchamp Books, an independent publishing company. Equally adept at translating the beatmaking themes and sounds of every beatmaking period since 1973, Said has been able to help scores of different beatmakers (producers) develop their overall production level and music-business understanding. While he's committed to the advancement of hip hop studies worldwide, he's also dedicated to raising public awareness about copyright law.

