

## “DON'T HAVE TO DJ NO MORE”: SAMPLING AND THE “AUTONOMOUS” CREATOR

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“[T]he street finds its own use for things—uses the manufacturers never imagined.”

—William Gibson<sup>1</sup>

Musical language has an extensive repertoire of punctuation devices but nothing equivalent to literature's “ ” quotation marks. Jazz musicians do not wiggle two fingers of each hand in the air, as lecturers sometimes do, when cross-referencing during their extemporizations, as on most instruments this would present some technical difficulties.

—John Oswald<sup>2</sup>

Get hyped, c'mon we gotta  
Gather around—gotcha  
Mail from the courts and jail  
Claim I stole the beats that I rail  
Look at how I'm livin' like  
And they're gonna check the mike, right? Sike  
Look at how I'm livin' now, lower than low  
What a sucker know  
I found this mineral that I call a beat  
I paid zero  
I packed my load cause it's better than gold  
People don't ask the price but its [sic] sold  
They say I sample but they should  
Sample this my pit bull  
We ain't goin' for this  
They say I stole this  
Can I get a witness?

—Public Enemy, “Can We Get A Witness”<sup>3</sup>

It is a longstanding practice for consumers to customize their commodities, command their use and meaning before they

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<sup>1</sup> MIRRORSHADES: THE CYBERPUNK ANTHOLOGY at xiii (Bruce Sterling ed., 1988).

<sup>2</sup> John Oswald, *Bettered by the Borrower: The Ethics of Musical Debt*, WHOLE EARTH REV., Winter 1987, at 104, 106.

<sup>3</sup> PUBLIC ENEMY, *Caught Can We Get a Witness*, on IT TAKES A NATION OF MILLIONS TO HOLD US BACK (Def Jam/Columbia Records 1988).

are commanded by them. The Puerto Rican poet, Victor Hernandez Cruz, comments on this practice in his prose poem *The Low Writers*, where he describes how the inhabitants of the San Jose barrio inscribe meaning upon their vehicles:

When I am in this room that flies it is as if I invented rubber. Like San Jose Low riders interiors, fluffy sit back, unwind, tattoo on left hand, near the big thumb a cross with four sticks flying, emphasizing its radiance, further up the arm skeletons, fat blue lines, Huichol designs on the copper flesh, the arm of the daddy-o on the automatic stick. A beautiful metal box which many call home. It doesn't matter if the manufacturer was Ford or General Motors, their executives in the suburbs of Detroit watching home movies, vacationing in weird Londons, when 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, the urbanites will see them like butterflies with transmissions.<sup>4</sup>

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, thereby 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. Without doubt, while "[p]assivity is still the dominant demographic," a recording can be "played like an electronic washboard."<sup>5</sup> As Cruz states, the purchase of a commodity is only the first step; it can become the means of declaring your "exaggerations," your "mad paint for the grand scope of humanity."<sup>6</sup>

The range of options available either to the consumer 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. Since one is able to retrieve any compositional

<sup>4</sup> VICTOR HERNÁNDEZ CRUZ, *The Low Writers*, in *BY LINGUAL WHOLES* (1982).

<sup>5</sup> John Oswald, *Plunderphonics: Or, Audio Piracy as a Compositional Prerogative*, 34 *MUSICWORKS* 5, 7 (1986).

<sup>6</sup> Cruz, *supra* note 4.

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 creation. 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 the 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.<sup>7</sup>

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 recorded musical history, and talent for ingenious collage can call themselves a creator of music, is it the case that the process and the product no longer possess the meanings once assigned them? Also, how 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? The question of sampling's propriety remains open, but it is a process whose presence in the recording of music is increasing, not decreasing. It is my purpose, therefore, to address three questions. First, what 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? Second, how 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 altogether? Finally, is sampling the post-modernist 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? And, when considering these questions, we must not

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<sup>7</sup> John Leland, *Singles*, SPIN, Aug. 1988, at 80.

forget 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.<sup>8</sup> It is all too easy to fall prey to a vision of a technological utopia of unfettered creativity while forgetting the workers who construct the chips that drive MIDI synthesizers, or that the dominant culture feels it needs to defend itself against the ideological contestation in some sampled music.

While sampling is most often associated with the genre of rap and hip-hop, it has in fact become common in the recording of all forms of music. Sampling is a process with a distinct history, a developed aesthetic, and a set of auteurs who have defined the parameters of its use. Rather than engaging in 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 of technology 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 any audience member a potential musician) to appropriate the products of capital and the recording industry to serve their own devices.

Sampling began as a manual procedure and gained in sophistication and precision with the invention and marketing of inexpensive computer technologies that transferred the work of the DJ to the programmer. 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 Waton and Slim Gaillard), and the aggressive braggadocio of Bo Diddley.<sup>9</sup> However, technique and technology came together in Jamaica when portable sound systems allowed DJs such as Prince Buster, Duke Reid, Sir Coxson, 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 an-

<sup>8</sup> For documentation of the hazards to the environment, their workers, and the economy wrought by the computer manufacturers of Silicon Valley, see DENNIS HAYES, *BEHIND THE SILICON CURTAIN: THE SEDUCTIONS OF WORK IN A LONELY ERA* (1989).

<sup>9</sup> DAVID TOOP, *THE RAP ATTACK: AFRICAN JIVE TO NEW YORK HIP-HOP 83* (1984).

other. They began to chant over the records, scattng 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 recording.<sup>10</sup> 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," whose 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 is treated as Holy Writ."<sup>11</sup> Performers adapted King Tubby's discovery to their own ends, and dub performers such as U Roy, I Roy, Big Youth, Tapper Zukie, Dr. Alimento, 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, Jamaica-born Kool DJ Herc who emigrated in 1967 and purchased a sound system in 1973.<sup>12</sup> He soon, along with such other early key DJs as Theodor, Afrika Bambaataa, and Grandmaster 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 emphasizing 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

<sup>10</sup> DICK HEBDIGE, *CUT 'N' MIX CULTURE, IDENTITY, AND CARIBBEAN MUSIC* 83 (1987).

<sup>11</sup> *Id.* at 14

<sup>12</sup> TOOP, *supra* note 9, at 19; see also B. ADLER, *RAP! - PORTRAITS AND LYRICS OF A GENERATION OF BLACK ROCKERS* 15 (1991).

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.<sup>13</sup>

However, as DJing was a manual technology, its range of effects was as limited as the manual dexterity of a lone individual. That all changed with the MIDI synthesizer, first engineered by the American company Sequential Circuits in 1981 and marketed by Sequential in conjunction with Roland and Yamaha in 1983. The MIDI works by taking an analog audio signal and converting it into a string of computer digits which can be held in random-access memory, retrieved, and introduced into a given recording. The process of recording a sample requires only that one set a level and press a record button. Playback is accomplished by connecting a piano-style keyboard to the sampler; striking a key on the keyboard "triggers" the sample.<sup>14</sup> Anything can be sampled, from a melody to a rhythmic accent, or even a vocal ejaculation. At first, a MIDI synthesizer unit could cost as much as \$20,000, and, therefore, its use was beyond the economic reach of the live DJ. However, as prices fell (the unit nowadays costing as little as \$2,000) the technology not only fell into the hands of a wider range of individuals but also cost far less to maintain and took far less time to master than standard instruments. Thus, it has led us to enter what some have called an Age of Plunder and Orgy of Pastiche, as the MIDI permits the possibility of deconstructing any available recording or any recordable material into a novel construction. It furthermore permits "the increasingly oligopolistic control of musical media [to be] countered by the consumer preference for devices that can, in some sense, increase their control over their own consumption."<sup>15</sup>

The 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 use of computer technology.

First, there are those records which sample known material of sufficient familiarity so that the listener may recognize the quotation and may, in turn, pay more attention to the new material as

<sup>13</sup> Houston A. Baker, Jr., *Hybridity, the Rap Race, and Pedagogy for the 1990s*, in *TECHNOCULTURE* 197, 200 (Constance Penley & Andrew Ross eds., 1991).

<sup>14</sup> J.D. Considine, *Larcenous Art*, *ROLLING STONE*, June 14, 1990, at 107-09.

<sup>15</sup> Simon Frith, *Art Versus Technology: The Strange Case of Popular Music*, 8 *MED., CULTURE & SOC'Y* 263, 275 (1986).

a consequence of that familiarity. Examples of the practice include Run DMC's "Walk This Way," which incorporates Aerosmith's original recording; Hammer's "U Can't Touch This," which is built around a repeating riff from Rick James' "Super Freak"; and Vanilla Ice's "Play That Funky Music," which incorporates as its bridge that line as sung in the song of the same name by Wild Cherry. In addition, there is the quoting of material not immediately recognizable to the listener, but whose sampling is so frequent and widespread that it attains a measure of familiarity 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 1971 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, Michel'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."<sup>16</sup>

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. However, other artists crowd their work with an intentional and at times oppressive amount of sound, sampled and otherwise. They act as what Simon Reynolds has called "chaos theoreticians," for their work reflects the chaos of society by metronomically replicating the din and collisions of a traumatized civilization.<sup>17</sup> Principal amongst these artists is Public Enemy, whose three albums to date—"Yo! Bum Rush the Show," "It Takes A Nation of Millions To Hold Us Back," and "Fear Of A Black Planet"—pile up layers of ingenious wordplay, ideological agitation, and some of the densest mixing imaginable to "Bring The Noise" to a resistant public. Their records, like Radio Raheem's boom box in Spike Lee's "Do The Right Thing" (itself playing Public Enemy's "Fight the Power"), are meant to be aurally agitating. Of equal interest is the work of the British producer/mixer and director of

<sup>16</sup> Harry Weinger, *The Ghost in the Machine is a Drummer*, ROLLING STONE, June 14, 1990, at 105.

<sup>17</sup> SIMON REYNOLDS, *BLISSED OUT: THE RAPTURES OF ROCK* 160 (1990).

the On-U Sound record label, Adrian Sherwood. In addition to found sound and polemical quotations from various sources, Sherwood's releases (over forty in all) incorporate and sample materials and performances from the realms of rock, reggae, dub, punk, and hip-hop. In his work with the performer Gary Clail and the ensemble Tackhead (which includes the rhythm section, Keith LeBlanc and Doug Wimbush, that propelled the recordings of one of the pioneering rap labels, Sugarhill Records), Sherwood aims for what has been called "sonic terrorism."<sup>18</sup> However, not all these samplers, who maximize their use of appropriated materials, aim to antagonize their listeners. A number of them playfully and wittily utilize the technology to more peaceful ends, including De La Soul, A Tribe Called Quest, and Digital Underground. They make it clear that one is able to maintain street credibility without losing a sense of humor. Like the technology it employs, sampling can be adaptable.

Finally, in a process dubbed "quilt-pop" by critic Chuck Eddy, recordings can be constructed wholecloth from samples to create a new aesthetic.<sup>19</sup> The landmark recording that laid the groundwork for this form was the 1980 "Adventures Of Grandmaster Flash On The Wheels Of Steel" on which the DJ joined together elements of Chic's "Good Times," Queen's "Another One Bites The Dust," Blondie's "Rapture," and three raps, Sugarhill Gang's "8th Wonder," Furious Five's "Birthday Party," and Spoonie Gee's "Monster Jam." The result was a recording about "taking sound to the very edge of chaos and pulling it back from the brink at the very last millisecond. On this record Flash is playing chicken with a stylus."<sup>20</sup> The 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. These would include S'Express, M/A/R/R/S, Cold Cut, and the Jams, whose album "The History Of the Jams a.k.a. The Timelords" sarcastically details on its sleeve all the legal and journalistic brouhaha left in their wake.<sup>21</sup> Certainly one of the most exciting and pro-

<sup>18</sup> MC, *Chaos Theory: Tackhead*, I-D MAGAZINE, Oct. 1990, at 73-74.

<sup>19</sup> Chuck Eddy, *Quilt-Pop: Reap What You Sew*, VILLAGE VOICE, Oct. 24, 1988, at 86.

<sup>20</sup> Hebdige, *supra* note 10, at 142.

<sup>21</sup> A striking illustration of how rich and complex mixing can be is the transcription of M/A/R/R/S's re-mix of Erick B. & Rakim's "Paid in Full - Seven Minutes of Madness." See MARK COSTELLO & DAVID FOSTER WALLACE, SIGNIFYING RAPPERS: RAP AND RACE IN THE URBAN PRESENT (1990).



lific 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 propulsion for another sort of posttrap noise: raw, reckless, risky jams as exhilarating as they are brutal."<sup>22</sup>

Finally, sampling has been utilized in the ever proliferating domain of "mixes." As new dance forms or performance styles come into fashion, mixers—many of whom began, and on occasion still act as club DJs—are hired to produce alternate versions of a given recording in that style. Now it is uncommon to find a 12-inch release that does not include any number of versions, including the dance, dub, acid, house, and new jack swing mixes in addition to the ubiquitous bonus beats. (One wonders which amongst the various versions would be considered the Ur-Mix?). Mixers such as Arthur Baker, Trevor Horn, Rick Rubin, and Jellybean Benitez (in whose footsteps younger mixers such as Scott Blackwell, "Little" Louis Vega, and Freddie Bastone hope to follow) have found that their careers as DJs opened the path to full-time producing.<sup>23</sup> 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."<sup>24</sup>

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, that an exhausted culture can only trot out endless re-treads."<sup>25</sup> He and other critics would like us to believe that if, as Marvin Gaye and Tammi Terrell sang, "Ain't Nothin' Like The Real Thing," then sampling is a mere reflection of the real thing.

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 of materials. Samplers engage in the practice for a number of reasons, only one of which (and any honest sam-

<sup>22</sup> Vince Aletti, *The Single Life: Can We Party?*, VILLAGE VOICE, Jan. 10, 1989, at 67.

<sup>23</sup> Rusty Cutchin, *The Sons of Jellybean*, WORKING MUSICIAN, Aug. 1989, at 81-82, 84, 86, 116.

<sup>24</sup> Andrew Goodwin, *Sample and Hold: Pop Music in the Digital Age of Reproduction*, 30 CRITICAL Q. 34, 47 (1988).

<sup>25</sup> Jon Pareles, *In Pop, Whose Song Is It, Anyway?*, N.Y. TIMES, Aug. 27, 1989, (Arts & Leisure), at 1.

pler will admit to it) is their lack of instrumental expertise. Part of it is surely their 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. But, even more important is the belief that sampling is not so much ransacking the past as reanimating it. 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."<sup>26</sup> No better illustration of hip-hop's sense of its own geneology exists than the persistent inclusion of lists of inspirations of the genre as well as those current practitioners who are hardcore and those who deserve to be dissed. Self-serving as the posture may seem to some, 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) or taken out of print. As Stetsasonic argue in "Talkin' All That Jazz," "James Brown was old/Till Eric & Rak came out with 'I Got Soul'/Rap brings back old R&B."<sup>27</sup> Sampling, one could also argue, only benefits the conglomerates, as much of the CD market has been dedicated to just that archival material. However, one final reason individuals sample, as I was told by Prince Paul, former member of Stetsasonic and producer of De La Soul, is that the advances in recording technology have not necessarily improved the sound of recording, and he, therefore, often samples older records because, despite the resources available to him in the contemporary studio, he cannot recreate that original sound. Therefore, rather than denigrate the practice of sampling as Jon Pareles does, calling it "appropriationist art," we might instead examine what it allows artists to accomplish.<sup>28</sup>

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 recording 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. To assume that studio-produced recording is "natural," while the sampling of re-

<sup>26</sup> Greg Tate, *Diary of a Bug*, VILLAGE VOICE, Nov. 22, 1988, at 73.

<sup>27</sup> STETSASONIC, *Talkin' All That Jazz*, on IN FULL GEAR (Tommy Boy Records 1988).

<sup>28</sup> Pareles, *supra* note 25, at 1.

corded material is "artificial," is splitting hairs. Producers and artists who belittle sampling see nothing wrong in availing themselves of the same technological resources—which range from digital delay to string and drum machines, emulators, and synthesizers—when it will save them the cost of hiring a live string section. As Evan Eisenberg has written, "The word 'record' is misleading. Only live recordings record an event; studio recordings, which are the great majority, record nothing. Pieced together from bits of actual events, they construct an ideal event. They are like the composite photograph of a minotaur."<sup>29</sup>

And yet, if one may not photograph a minotaur, one can market a recording and sample it too; but 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 distribution 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.<sup>30</sup> 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 its rhythmic components. And if rap and hip-hop are, like all Afro-American music, rhythmic in nature—as Max Roach states, "The thing that frightened people about hip-hop was that they heard people enjoying rhythm for rhythm's sake"—can a rhythm be protected under the statutes as they now stand?<sup>31</sup> Charles Aaron focuses on the legal peculiarity of sampling's status when he writes:

An experienced lawyer would advise any sampler to ask himself the following questions before seeking a license or selling a composition: Is the sample melodically essential to both the original and new work? Is it readily recognizable in its new context? Is it crucial to the financial success of both the original and the new work? But questions based on melodies or "hooks" or "key phrases" often don't apply to hip-hop, which is a *rhythmic* construct of patched-together drum beats and bass fragments, animated by snatches of melodic figures.<sup>32</sup>

<sup>29</sup> EVAN EISENBERG, *THE RECORDING ANGEL: THE EXPERIENCE OF MUSIC FROM ARISTOTLE TO ZAPPA* 109 (1987).

<sup>30</sup> See generally Copyright Act of 1976, Pub. L. No. 94-553, at 101, 90 Stat. 2541 (1976).

<sup>31</sup> Tate, *supra* note 26, at 73.

<sup>32</sup> Charles Aaron, *Gettin' Paid. Is Sampling Higher Education, or Grand Theft Audio?*, VILLAGE VOICE ROCK & ROLL QUARTERLY, Fall 1989, at 22, 23.

What then is the legal status of a sampler and his use of digital technology for the appropriation of other artists' material? Is it merely, as J. C. Thom asserts, "[N]othing but old fashioned piracy dressed in sleek new technology"?<sup>33</sup> Clearly, any number of performers and writers have felt themselves to be abused, and therefore, pressed their cases in the courts. The most publicized of cases have been the Turtles' \$1.7 million suit against De La Soul for using part of "You Showed Me" in the rappers' "Transmitting Live From Mars" and Jimmy Castor's suit against the Beastie Boys for using drum beats and the words "Yo Leroy" from his hit recording "The Return of Leroy (Part I)." Both suits were settled despite the heated publicity, yet not all negotiations have been acrimonious. Hammer split his publishing royalties 50-50 with Rick James for the use of the passage from "Super Freak," and 2 Live Crew worked out an arrangement for a payment of 5.5 cents per sale with Bruce Springstein for material incorporated in "Banned in the USA."<sup>34</sup>

Despite the variety of settlements, the legal status of a sample involves three key issues: the nature of the appropriation, the amount in bars or length in number of seconds, and the intention of use, either to compliment 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,<sup>35</sup> as a sample is always the transfer of an element of a recording to another recording. The 1971 Act, itself enacted in response to the marketing of audio cassettes and the recording industry's panic over home taping,<sup>36</sup> supplemented the 1907 Copyright Act<sup>37</sup> which did not legislate protection of recordings. Its writers felt they were not tangible entities, as is a piece of sheet music or a score, and they received no protection until the 1971 Act. However, due to a mistake, the Act protects only those recordings made subsequent to 1972, any earlier recording being protected by individual state statutes.<sup>38</sup>

The 1971 Act protects the work of the writer, the artists, and all performers, engineers, and manufacturers involved in a recording. Under the Copyright Act, authors control how their

<sup>33</sup> J.C. Thom, Comment, *Digital Sampling: Old-Fashioned Piracy Dressed Up in Sleek New Technology*, 8 LOY. ENT. L.J. 297, 336 (1988).

<sup>34</sup> Jeffrey Resner, *Sampling Amok?*, ROLLING STONE, June 14, 1990, at 105.

<sup>35</sup> Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

<sup>36</sup> See H.R. No. 92-487, 92d Cong., 1st Sess. 2 (1971).

<sup>37</sup> The Copyright Act of 1907, ch. 320, 35 Stat. 1075 (codified as amended at 17 U.S.C. §§ 1-215 (1909)).

<sup>38</sup> See Thom, *supra* note 33, at 308.

work is used, and any individual who wishes to appropriate the piece in some fashion must apply for a mechanical license through the Harry Fox Agency, sole agent in charge of such transactions, at the rate of 5.25 cents per composition per record sold or one cent per minute, whichever is larger. The 1971 Act extends the protection from the writer to include the other prior mentioned individuals involved in the recording of that piece of material. It asserts a recording to be as much a "work" as a documented composition, thereby updating the 1907 law.<sup>39</sup> Although the recording industry customarily pays each of the "authors" of a recording, thereby allowing the record label to be the sole possessor of copyright, the Act nonetheless names performers, engineers, and manufacturers as co-authors. In the Senate Committee hearings drafting the 1971 Act, the following statement was made:

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work . . . . [T]he bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.<sup>40</sup>

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 permits. As is often the case with copyright legislation, the law must catch up with advancing technology. 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. Proving this can be difficult if the original work has been so mechanically altered as to be unrecognizable. The defendant can try, in turn, to apply the "fair use"

<sup>39</sup> *Id.* at 306-07.

<sup>40</sup> H.R. REP. No. 487, 92d Cong., 1st Sess. (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1570.

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 minimus* as not to damage the original recording, make light of its substance, or affect its marketability. Aside from these qualitative 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.*<sup>41</sup> settlement that indicated that borrowings 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.*<sup>42</sup> settlement that indicated that the appropriation of any more than four bars can indicate piracy. However, these presumed precedents were complicated by the 1974 case, *United States v. Taxe*,<sup>43</sup> that involved a defendant who pirated tapes of hit records produced and distributed by major record 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. One commentator summarized the holding of the case as stating that "even though the right to reproduce is limited to the recapture of original sounds, that right can be infringed by an unauthorized re-recording which, despite changes in the sounds duplicated, results in a work of substantial similarity."<sup>44</sup> The significance of the *Taxe* decision can be found in the court's instructions to the jury which seemed to foreshadow the type of problem that would crop up repeatedly with the advent of digital technology. Thus the court instructed the jury that "[a]n infringement which recaptures the actual sounds by re-recording remains an infringement even if the re-recorder makes changes in the speed or tone of the original or adds other sounds or deletes certain frequencies, unless the final product is no longer recognizable as the same performance."<sup>45</sup>

Clearly, the law has begun to reflect the possibilities open to creators through digital technology, but it has not yet fully re-

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<sup>41</sup> 224 F. 646, 647 (S.D.N.Y. 1915).

<sup>42</sup> 105 F. Supp. 393, 397 (S.D.N.Y. 1952).

<sup>43</sup> 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd, vacated, and remanded in part*, 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

<sup>44</sup> Thom, *supra* note 33, at 327.

<sup>45</sup> *Id.* at 328 (quoting *Taxe*, 380 F. Supp at 1017).

solved 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. Another alternative is for the record companies to establish an industry-wide rate structure for licensing of and royalty payments for samples, but that could lead to complaints of price fixing. The likely resolution is outlined in the proposals of Steven R. Gordon and Charles J. Sanders.<sup>46</sup> 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. Samplers realize that in the litigious environment of the United States, there is nothing to be gained and much money potentially to be lost by being a renegade. Surely some obscure materials will be sampled and 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.

However, all too often the process has become embroiled in

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<sup>46</sup> "Practical Guidelines of Phonorecord Sampling Etiquette and Ethics"

1. Samplers should apply for mechanical and master licenses for any sample whose source is in any way recognizable by an informed listener as it appears on the new recording.

2. Copyright owners of both the sampled underlying musical composition and the master sound recording should give due consideration to licensing requests made by samplers, and if no philosophical or practical bar to such licensing is harbored by the petitioned licensor, license the use at a fair and reasonable rate.

3. Samplers should respect the rights of copyright owners both to receive fair compensation for sampling uses, or to deny the use if the owner so sees fit. In instances in which the material being sampled may not be copyrightable, but the final sampling use represents a recognizable taking of the style of the particular artist who created the sound which was sampled, similar consideration should be extended to such artist.

4. Sampling license applications should be made by samplers in writing "without prejudice," and potential licensors should accept the "without prejudice" nature of the request in all cases, in order to encourage the licensing process on the whole.

5. Mutual respect for the artistic integrity of both the sampler's work and the work being sampled should characterize all negotiations and discussions between the parties.

- Edward P. Murphy, president and CEO of The National Music Publishers' Association, Inc. and The Harry Fox Agency, Inc., in New York, reports that the Fox Agency is always willing to pass along licensing requests from samplers to the Agency's publisher principals, and to issue such licenses for use of the underlying song being sampled on instructions from the publisher, in a timely manner.
- Joel Schoenfeld, general counsel to the Record Industry Association of America in Washington, D.C. states that RIAA staff are available to help samplers seeking licenses to get in contract with the master licensing departments of its record company members in order to speed the licensing request process.

Steven R. Gordon & Charles T. Sanders, *The Rap on Sampling: Theft, Innovation, or What*, in ENTERTAINMENT, PUBLISHING, AND THE ARTS HANDBOOK 211 (1988).

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 Laboratories 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 he wished all records came with footnotes or bibliographies of who they quoted.<sup>47</sup> Oswald saw his work as being in the avant-garde tradition that treated all forms of sound, recorded and 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 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.<sup>48</sup>

Despite Oswald's straightforwardness about his practices, he had the gate rather rudely slammed behind him. In 1987 he 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."<sup>49</sup> Further-

<sup>47</sup> Mark Hosler, *Plunderphonics*, MONDO 2000, Summer 1990, at 102, 103-04.

<sup>48</sup> Gerry Belanger, *Plunderphonics—Who Owns the Music?*, OPTION, Jul./Aug. 1990, at 16 (citing John Oswald's guest editorial, *Neither a Borrower nor a Sampler Prosecute*, *Keyboard*, Mar. 1988).

<sup>49</sup> JOHN OSWALD, *PLUNDERPHONICS* (Mystery Laboratories 1987).



more, it includes a circled S, the computer term for programs that can be reproduced indefinitely by anyone with access to them. Unfortunately, the Canadian legislation against duplication and piracy is staggering, and when Bruce Robertson, president of the Canadian Recording Industry Association (CRIA) was presented with the CD, he responded by stating, "My immediate and deep reaction was not to the music, but to the gross distortion of Michael Jackson's image. . . . It was the combination of the music being played around with that only added insult to injury."<sup>50</sup> Yet, in the end, the injured party was not Jackson, but Oswald, for Robertson threatened to prosecute him to the full extent of the Canadian law despite the CD's disclaimer, its being not for sale, and general lack of publicity (until the prosecution that is) outside the avant-garde music community. 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, which one can only obtain through copies being made of the original CD. What Jackson and others gained from the action is vague, but what is lost is the work of a thoughtful artist who may well be extending the potential uses of recorded sound.

Oswald's fate brings us to the question of how sampling has transformed our notions of composition and authenticity. Some have designated sampling, with its emphasis upon appropriation, replication, and simulation, as the Postmodernist artistic form par excellence. Others less rhapsodically remind us that our emphasis upon the autonomous creator might well be a romantic artifact, and technology has so pervaded the creative process that the rhetoric of co-option lacks substance. True, sampling disrupts our long-cherished notions of the autonomous creator, but the technology that permits it allows consumers to appropriate not only the technology of mass culture but also the ideology that surrounds it for their own purposes. Sampling reminds us that our notions of mimesis have an aural component, for when we distinguish between "real" and sampled sound, it forces us to reconsider notions we have lazily allowed to abide in a virtual pre-technological avoidance of what sound means.

Furthermore, the fury sampling has given rise to in some people must be connected to the demonization of much popular

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<sup>50</sup> Belanger, *supra* note 47, at 18.

music, particularly the rap and hip-hop genres. When *Newsweek* denigrates the "attitude" of much contemporary Afro-American music as a debasement of civilized standards, we must not only recognize that a diverse and complex community is being painted with too broad a brush but also wonder how much of its work the dominant society has sampled?<sup>51</sup>

Finally, sampling 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 pastiche might serve? Too often the discussion of sampling has led to either exaggerated cultural pessimism or a facile polemical overenthusiasm. While too many voices bemoan the process of pop eating itself, might it be better to turn to the work and recognize that we have only begun to discover the potential sampling holds for the disposition of sound rather than focus on whose music is this anyway?

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<sup>51</sup> The questionable analysis of rap and hip-hop music was included in two articles, Jerry Adler et al., *The Rap Attitude*, NEWSWEEK, Mar. 19, 1990, at 56-59, and David Gates, *Decoding Rap Music*, NEWSWEEK, Mar. 19, 1990, at 60-63. The best judgment of these two pieces is contained in the January 1991 issue of *The Source. The Magazine of HipHop Music, Culture & Politics*, the principal journal on that scene, where it states:

DON'T BELIEVE THE TYPE: The good news is that Tone-Loc was on the cover. The bad news is everything else inside. *Newsweek's* March 19 issue fronted as a fair representation of our art form and our culture but really was a one-sided, vicious attack which ignored the positive value of rap and portrayed rappers and rap fans as threatening to mainstream culture. With this story, *Newsweek* confirmed that much of the media has *no clue* about what rap music really is.

*The 1990 Hip-hop Year in Pictures*, THE SOURCE, Jan. 1991, at 48.