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KEMBREW MCLEOD / PETER DICOLA

The Law and Culture of Digital Sampling


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Kembrew McLeod and Peter DiCola

with Jenny Toomey and Kristin Thomson

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INTRODUCTION

In 2008, Girl Talk, the musical project of Gregg Gillis, released an album titled *Feed the Animals* on a small independent American label named Illegal Art. Gillis is a biomedical engineer turned laptop computer remixer who creates music with "samples" of other musicians' work—a technique that incorporates portions of existing sound recordings into a newly collaged composition.[1] Sampling can be done using a variety of media and methods, including cutting up magnetic audiotape on analog equipment, physically manipulating vinyl records on a turntable, and remixing sounds using digital technologies like computers or drum machines, among other techniques. De La Soul's Pasemaster Mase describes sampling as "taking sounds and meshing them together and putting them all in time, to come up with something totally different." The underground producer Kid 606 explains sampling's appeal in the following way: "It's like Legos. If someone said, 'Here's a bunch of Legos, put them together,' you have something to work with—as opposed to, 'Here's a bunch of plastic, mold it, and then start building it.' "[2]

Over the course of Girl Talk's *Feed the Animals*, Gillis pieces together musical fragments from the work of over three hundred recording artists. In doing so he effortlessly joins together (like Lego blocks) music from traditionally isolated genres: metal riffs run alongside love songs from the 1970s and West Coast rap; today's pop gets down with R&B from the 1960s and classic rock. With its hundreds of easily

recognizable musical snippets, the album is part parlor game, part dance party soundtrack, and part love letter to four decades of popular music. After its release *Feed the Animals* received dozens of positive reviews, ranging from the agenda-setting hipster music website Pitchfork to mainstream publications like *Rolling Stone* and the *New York Times*. In the wake of this buzz-making attention, Gillis embarked on a successful world tour, in which he played in increasingly large concert venues and music festivals as he went along. Given all this, *Feed the Animals* could be considered a successful release if not for one problem: Gillis did not get permission to use any of the songs he sampled—which means he and his record label could be sued for tens of millions of dollars in damages.

Gillis is but one of many who makes new music from old songs. As a still-developing musical method, sampling has played an increasingly prominent role in the creation of popular music over the past quarter century, and it has developed in a variety of ways. For instance, Girl Talk uses fairly long samples to create a mash-up of two or three recognizable songs at a time—as opposed to some of the hip-hop songs from the late 1980s that typically combined many more musical fragments at once, often rendering the original sources unrecognizable. Whatever their aesthetic choices, sampling artists all share an important concern: according to the recording industry, it is unlawful to sell or even freely distribute sampled music unless everything is licensed. Therefore, *Feed the Animals* might be illegal under current copyright law.

Most everyone knows that duplicating an entire CD and selling copies to strangers is copyright infringement. Perhaps less well understood is the fact that sampling—copying a few seconds of a single song and integrating it into a new song—can also be infringement, depending on the context. In fact, using those few seconds might infringe *two* different copyrights—one for the musical composition (the notes and lyrics) and one for the recording of that song (the sound stored on a CD). We will explain this aspect of copyright law in more detail in chapter 3, but for now it is useful to think of song as a coin that has two copyrightable sides: the composition and the sound recording. Therefore, because Girl Talk sampled parts of over three hundred songs to make *Feed the Animals*, Gillis may have infringed more than six hundred distinct copyrights. But then again, maybe he didn't. According to most press accounts—and our own correspondences with Gillis and his label—

Girl Talk and Illegal Art believe that *Feed the Animals* is legal under the fair use doctrine. We will discuss this legal doctrine in some detail in chapter 4 and in later chapters, but for now we offer the following brief overview.

Fair use is one of many exceptions and limitations on copyrights in the United States, and it allows individuals to use elements of existing works without permission and yet not violate the law—in certain circumstances. Fair uses include, but are not limited to, "criticism, comment, news reporting, teaching, scholarship, or research."[3] Quoting from a book in the course of reviewing it is a classic example. But fair use can also include "transformative" uses of existing works,[4] a category that might well include some forms of sampling. To determine whether a particular use is fair, courts consider four factors, including whether the use is commercial, whether creative rather than factual elements of the existing copyrighted work were used, how much of the existing work was used, and whether the market for that work has been harmed. Courts evaluate fair use on a case-by-case basis, thereby making the doctrine sensitive to context but also unpredictable to the extent that corporations hesitate to rely on it as a defense to copyright infringement.

As the *New York Times* noted in an article on Gillis, "Because his samples are short, and his music sounds so little like the songs he takes from that it is unlikely to affect their sales, Gillis contends he should be covered under fair use."[5] As of this writing, any dispute remains a mere possibility. Despite the easily recognizable snippets of songs from many high-profile—and some frequently litigious—artists, Girl Talk has yet to be sued for sampling a copyrighted work without a license.

It is an open question whether Girl Talk should have obtained licenses, whether Gillis's fair use defense would hold up in court, or some combination of these outcomes—depending on the particular sample at issue. Sampling prompts many other questions, the answers to which depend in part on samplers' position (or lack thereof) in the mainstream music industry. As a matter of law, must these musicians get licenses for everything they sample? As a matter of policy, should they have to? What procedures do sampling artists use to secure licenses on musical compositions and sound recordings? What business, legal, and aesthetic factors affect whether it's possible to obtain licenses? Perhaps the most interesting question is *why* it is so difficult

to obtain licenses, or "clearance," for many of the samples contained in sample-based records. In this book we explore the answers to these questions by providing historical, legal, and cultural contexts that we hope will promote an informed debate over sampling, as well as a better understanding of it.

THE ART OF SAMPLING

> A lot of people look at hip-hop sampling as doing what be-boppers did—taking standards of the day and putting a new melody on top of it.—GREG TATE

Like any musical technique, sampling can be used well or used poorly. Most people can clearly hear the bass line to Queen and David Bowie's "Under Pressure" in Vanilla Ice's "Ice Ice Baby" or much of Rick James's "Superfreak" in MC Hammer's "U Can't Touch This." Critics of sampling often cite such songs (which borrow lengthy hooks or choruses) to dismiss sampling as an illegitimate creative method. Surely, few would argue that these are particularly imaginative uses of musical samples—though this approach has certainly resulted in fun, sometimes-classic party records, as well as mega-selling hits. These simplified examples, however, do little justice to the complex rhythms, references, and layers of sound that sample-based music can achieve. In the late 1980s, recording artists like De La Soul, A Tribe Called Quest, the Jungle Brothers, Public Enemy, and the Beastie Boys constructed single songs from multiple brief, often unrecognizable musical quotations. More contemporary artists like RZA, DJ Shadow, the Avalanches, and El-P today employ a similarly dense style of sampling.

During the 1970s, hip-hop DJs used the turntable as an instrument that could manipulate sound, and thus transformed the record player from a technology of consumption to one of musical production. And in the 1980s, hip-hop producers built on these turntable techniques by using digital samplers to distill dozens of sampled sound sources into a single new track. "We'd grab a conga sound. We grabbed trumpet sounds, violin sounds, drumbeat sounds, and remanipulated them and created our own music," says Mix Master Mike, a member of the Beastie Boys and the DJ crew Invisibl Skratch Piklz. Sampling has had

a leveling effect on music making by allowing virtually anyone to make music, even those without formal training. "You don't have to learn how to play guitar," says Steinski, a pioneering remix artist. "You don't have to know nothing. All you have to do is get a sound editing program for your computer, and you're right there. You can make the next big record in the world."

The innovations of pioneering hip-hop artists dramatically changed the way popular music is created and have forced us to rethink what counts as creativity in a digital world. As Gillis, in discussing the ways that music fans, amateur music makers, and professionals are using digital technologies to remix and share music, tells us, "People are interacting in others' lives, and music is becoming a lot more democratic." Similarly, iMovie, YouTube, and the like have altered our relationship with technology and cultural production by providing consumers with the tools to become producers (or "remixers") of and distributors in their media environments. Today, a thirteen-year-old can make music with samples, and plenty do. "I think because of the way kids are raised now, your average kid sits in front of the TV with a remote control and *click*, *click*, *click*, *click*, *click*, *click*," the rapper Mr. Lif says in explaining how remix culture has touched so many aspects of contemporary life. "It's the same way you're going to think musically. You're going to be like, 'OK, here's the theme from *Diff'rent Strokes*, here's Kermit the Frog, here's a Sally Struthers infomercial,' you know what I mean? It all becomes the same thing, and I think that's what's happening with music too."

The clashes over sampling that emerged in the late 1980s anticipated both today's remix culture and the legal culture that is largely at odds with it. Therefore, it's not much of a stretch to say that the hip-hop DJs of the 1970s helped plant the seeds of some key debates that are currently raging over intellectual property. This is one reason why our work in this volume primarily focuses on hip-hop. We start in chapter 1 by describing the so-called golden age of sampling, a term that refers to a moment in time in the late 1980s and early 1990s when artists had more freedom to create sample-based music. The legal and administrative bureaucracies of the music industry had not yet turned their attention to hip-hop, which was considered a passing fad. This vacuum allowed many hip-hop artists to make music the way they wished,

without a proverbial (or literal) attorney looking over their shoulders. And the music they made was groundbreaking.

In chapter 1 we use the golden age as a case study that clearly demonstrates what can go wrong if we don't properly understand how copyright law can act as a de facto cultural policy. By this we mean that the law encourages some forms of creativity and discourages others—a subtler form of what happens in communist societies, with their official decrees concerning state-sanctioned art. Actually, the existence of a cultural policy is not a bad thing, as long as the members of a society have a chance to shape it. The situation we face today, in the context of sampling, is one where we let private institutions impose constraints on the production of art, with little or no input from actual creators. We should also point out that copyright was conceived as a kind of cultural policy from the very beginning, given that the U.S. Constitution charged Congress to make laws to "promote the progress of science and useful arts."[6]

The framers of the Constitution never understood intellectual property as equivalent to physical property, and instead viewed it as a limited right designed to encourage and sustain the production of cultural and scientific works. Built into this design was a balance between the needs of individual creators, users, and (more generally) society. But by the early 1990s, in the realm of musical sampling, courts and music industry professionals allowed copyright owners' perspective to trump all other understandings of copyright law. That's when the trouble started. We wrote this book with the idea that the relatively recent past can offer us lessons on how to not repeat the same mistakes in the near future.

In chapter 2 we move from the particular to the general by widening the frame to discuss the broader history of musical collage across time and genres. Despite the shock of the new that digital sampling delivered, this technique is merely the latest manifestation of a rich musical tradition previously found in jazz, folk, bluegrass, and blues. Over the past century, however, the expansion of copyright law, the rise of the music industry, and the introduction of new sound recording technologies have served to make matters more complicated.

CONFLICTS OVER SAMPLING

You can't just have a record made up of other people's records and not pay them for it.—KEN FREUNDLICH, music attorney

The musicologist Joanna Demers notes that "with the rise of disco, hip-hop, and electronic dance music, transformative appropriation has become the most important technique of today's composers and songwriters."[7] This statement encapsulates two key facts about sampling: it is commercially important and musicians in a wide variety of genres engage in it. There is also a fascinating tension embodied in the phrase that Demers chooses to describe this method. Much of the legal, cultural, and economic difficulty accompanying the proliferation of sampling stems from the tug of war between the positive connotation of the adjective "transformative" and the more negative connotation (at least in legal circles) of the noun "appropriation." One's attitude toward sampling depends on one's aesthetic, ethical, and perhaps legal point of view. As we discovered in our research for this book, it can also depend on one's position in the relationship between the artist who samples and those who are sampled.

In chapter 3 we examine several categories of positions within the music industry—positions created by copyright law and music-business practice—and the variety of perspectives individuals can have, even within each category, on disputes over sampling. We also relate a series of rich narratives in chapter 3 that describe particular instances of sampling and illustrate the competing interests at stake: publishing companies, record labels, remixers, artists who are sampled, sample licensing experts, and so on. This chapter underscores the diversity and the complexity of opinions about sampling, for there is no single monolithic position that exists on either side of the equation.

Conflicts about sampling have their roots in the fundamental relationship between musicians past and present. Musicians do not reinvent the twelve-tone scale used in Western music but rather borrow it from previous generations. Instrumentalists often use major-seventh chords, play in 4/4 meter, and perform on instruments with unique timbre like the violin and the piano. No musician living today invented those things. Someone (or some group of people) did once invent chords, meter, and musical instruments, but that was long ago. In the time

since, millions of people have used those musical ideas, instruments, and traditions to make their own musical contribution. Music is not unique in this regard; all creativity occurs in this way. Writers, composers, artists, and inventors all make use of ideas—and particular applications of those ideas—that others created before them.[8] For example, to write this book we have made use of the English language, employed various words (and arrangements of words) coined by others over the centuries, displayed the influence of other scholars' research, and wrestled with ideas that our interviewees put on the table—often quoting them while doing so.

To keep the chain of creativity going, copyright law prevents anyone from owning the rights to certain abstract musical ideas.[9] As DJ Vadim points out, "You can't own a B-flat or a B-sharp or a C minor or a C major on a keyboard, on a guitar, or what have you." But the boundary between ideas too abstract to be owned and particular expressions of ideas that one can copyright can still be disputed. Difficult examples from music abound. What about a distinct eight-note melody using some of the twelve tones of the scale? Or a specific five-chord progression that includes a major seventh chord? Or a complex rhythm played in a 6/8 meter? Or the unique timbre achieved by the skill of a particular flutist, pianist, or violinist? Because mining the past for inspiration is so commonplace, and takes so many different forms, all musicians have a strong interest in the ability to use existing music as source material.

Controversies start when musicians use specific melodies, chord progressions, rhythms, or timbres found in existing music—and sampling is a major example of this kind of boundary dispute in copyright law. In chapter 4 we discuss the most prominent of the judicial decisions that have determined how copyright law applies to specific disputes over sampling. These decisions provide an important explanation of how and why the industry developed a system to handle sampling that generally requires licensing and thus encourages copyright holders to demand payment for most uses of the works they own, even the shortest and most unrecognizable samples. For better or worse, licensing is now standard practice in the music business today.

WHY PROTECT SAMPLES WITH COPYRIGHT LAW?

To lift someone else's riff and then call it your own—
that's stealing—unless it's a quotation, in which case you'd still
owe a percentage, in my opinion.—DAVID BYRNE

So why protect samples with copyright law? From the downstream creator's perspective, it may seem odd or even retrograde to put a roadblock in the way of new music. But recognizing ownership of existing music does not necessarily prevent musicians from incorporating elements of older works. Although copyright owners do have the right to simply deny permission, not all of them use that right. Instead, what ownership really means in many instances is the right to negotiate a license at a price that the owner finds acceptable. Thus, copyright protection for samples often boils down to the difference between getting no compensation when a subsequent artist samples your composition or recording and getting some amount of compensation that you bargained for. To us, a successful licensing transaction means that the owners of existing compositions and recordings receive compensation, when it is deserved; the creators of new, sample-based works get to make their art; and both parties have reached an agreement.

Such voluntary, mutually beneficial deals are the core of what is socially desirable, according to economic theory. And, described in that abstract way, licensing might sound pretty good. Recognizing ownership and control over samples allows society—in theory, anyway—to tap into the benefits that copyright law is supposed to have in general. Lawyers and economists over the past two centuries have justified copyright law with arguments along these lines. By protecting creators from competition from those who would sell exact (or substantially similar) copies of their work, copyright siphons financial rewards from the public to creators in the form of higher prices.

For example, when Merge Records released the album *Neon Bible* by the Arcade Fire, federal law prohibited any other company from selling exact copies of that album. This allowed Merge to set its own price, which was influenced by factors such as how much money fans of the Arcade Fire were willing to pay for CDs or downloads of the album;

the interest of fans in competing bands' albums; and, more indirectly, other forms of entertainment besides listening to the Arcade Fire. If the price Merge set had to take copycat record companies into account, which offered identical copies of *Neon Bible* (or close substitutes), then that price would be much lower. Enhanced financial rewards allow musicians to anticipate the opportunity to recoup, and possibly surpass, the money and time they spend creating. In this way, copyright provides incentives to create. Some economists go even further by arguing that copyrights also maximize the value of works even after they are created.[10]

But as everyone knows, including economists, the real world is much messier than economic theory. The economic analysis of law, for instance, has focused on the idea of "transaction costs," meaning the money, time, and other resources that parties must expend to reach a deal, such as a licensing agreement. The idea of friction in physics can be a helpful metaphor for transaction costs: we operate a large economic machine, but some energy gets lost as the gears grind against each other. The work of the Nobel Prize–winning economist Ronald Coase has in many ways launched the study of transaction costs. Although lots of interesting theoretical work builds on his ideas, the problem is a dearth of empirical work that studies the factual details of real-world transactions. Coase has implored economists to work with lawyers, sociologists, and those in other disciplines "to understand why transaction costs are what they actually are."[11]

This book is in part inspired by Coase's charge. In chapter 5 we attempt to document the tangled reality of sample licensing. In our interview research, which we describe in more detail below, we asked questions like the following: How easy is it to find the owner of the preexisting work? How long does it take to reach an agreement? Does licensing always occur when it would be socially beneficial to allow the creation of a new work that incorporates existing works? How do these concerns impact the aesthetic decisions that artists who sample make? In sum, how well does the sample clearance system really function? The answers to those questions should shape our view about whether, how, and when we want copyright law to insist that musicians obtain a license to sample. If licensing were straightforward and smooth, we might be confident that protecting samples with copyright will generate the desired benefits. But if—as happens to be the case—the pro-

cess of sample licensing is fraught with difficulties, we should question whether the system that copyright law and the music industry have generated for clearing samples is a desirable one.

COPYRIGHT AS A CONSTRAINT ON CREATIVITY

> By discouraging copying, [copyright law] discourages the historically very important form of creativity that consists of taking existing work and improving it.—WILLIAM LANDES and RICHARD POSNER, *The Economic Structure of Intellectual Property Law*

Copyright law's benefits come with costs—economic and otherwise—as many commentators before us have noted.[12] Some of the costs fall on consumers, such as those who have to pay more for albums like *Neon Bible* than they would if copycat record labels could legally enter the market. A host of copycats would offer lower prices to poach sales from Merge and from each other. Higher prices also lead some people who would have bought the album at a lower price to decide not to buy it. The lost enjoyment of those whom higher prices discouraged from buying the album is another cost of having copyright law. Our specific focus in this book is on those who want to draw on previous songs and use (at least parts of) these creative works as building blocks—and the costs that come with that effort. In economic terms, as William Landes and Richard Posner have put it, copyright increases the "cost of expression."[13] Copyright protection converts what would otherwise be a free input into a costly input. This insistence on compensation may be a desirable thing for copyright law to do, but it nevertheless has important consequences for creativity.

Copyright presents a tradeoff between providing incentives for creators and granting access to both the public and other creators. Some of the costs of licensing copyrighted music are the same as they would be for any economic input—for instance, when a bakery makes bread it has to pay for the flour and yeast. But the full cost of expression that results from other musicians' copyrights includes costs that differ from those involved in a simple transaction for the baker's ingredients. You cannot go to a store and buy sample licenses off the shelf. Nor is it easy to set up a relationship with a regular supplier of sample licenses, at least not

in the way that bakeries contract with foodservice companies to deliver staples on a regular basis.

The transaction costs of licensing existing copyrighted works are almost certainly higher than the transaction costs of a bakery's purchase of the ingredients for bread. For example, to clear all the samples on *Feed the Animals*, Gregg Gillis first would have to figure out which samples require licenses under copyright law.[14] More practically, he would need to figure out which samples the music industry expects him to clear as a matter of business custom. For each of the samples requiring a license, he would determine who owns each copyright (a huge problem on its own), and then gain permission from the owners of both the sound recording copyright *and* the composition copyright.[15] Each discrete, private negotiation—and there would have to be at least six hundred in this case—takes time and money paid to intermediaries. The costs of engaging in these licensing transactions pile up. Some copyright owners might simply deny permission, thereby forcing Gillis to rearrange or even abandon the songs, which could have both financial and artistic costs.

For those negotiations that succeeded, Girl Talk would have to pay the licensing fees (on top of the transaction fees associated with hiring sample clearance experts who have the industry connections that can make a deal possible). Once in a while a sample might come for free, but prices can escalate quickly to tens or even hundreds of thousands of dollars, especially for samples of well-known songs, which are exactly the types of tunes Gillis sampled. And any instances in *Feed the Animals* where Gillis sampled a source that itself contains multiple samples—like Public Enemy's "Bring the Noise"—would compound all these expenses. For instance, he would not only need permission from Public Enemy's song publisher and record company, but also those who hold the rights to the songs that are sampled within "Bring the Noise" (including a notoriously litigious publishing company named Bridgeport Music). Even if Gillis diligently secured the sound recording and composition publishing rights for all the identifiable samples used in "Bring the Noise"—but had not cleared the rights for an obscure sample that had previously gone undetected—he could be sued. Ignorance of a copyright infringement is not an adequate defense.

Similar problems are already creating headaches for filmmakers, television producers, game designers, and other media makers who want

to license sample-based music for their projects. As the producers of the movie *I Got the Hook-Up* discovered—when they included a hip-hop song from the early 1990s that, unbeknownst to them, contained an uncleared sample—licensing failures can cause multimillion dollar losses. (The *Bridgeport Music v. Dimension Films* suit was brought forward, and won, by Bridgeport.) Because music is a basic building block for all kinds of media texts, the labyrinthine sample clearance system is a concern for media makers of all stripes. This system often demands that one obtain a towering stack of licenses—often referred to as "license stacking" or "royalty stacking"—a problem that also arises with types of intellectual property other than music.

In his book *The Gridlock Economy*, the law professor Michael Heller presents a sobering example of how the need to license patented genes and other pharmaceutical "inventions" has hindered the development of life-saving drugs. A drug company executive told Heller that his researchers "had found a treatment for Alzheimer's disease, but they couldn't bring it to market unless the company bought access to dozens of patents. Any single patent owner could demand a huge payoff; some blocked the whole deal."[16] The drug is still sitting on the shelf, even though it could have benefited millions of people and generated millions more dollars, Heller writes. We recognize that digital sampling and drug manufacturing are on two very different planes of social importance, but the legal and bureaucratic pressures of licensing cause analogous problems in both areas. Exacerbating the gridlock phenomenon is the increased duration of copyright law. Copyrights in the United States now last for the life of the author plus seventy years or, for works with corporate authors, ninety-five years after publication or one hundred and twenty years after creation, whichever is shorter. Longer copyright terms mean a taller stack of licenses to negotiate.

In the context of these legal and bureaucratic constraints, in chapter 6 we describe the impact of the sample clearance system on creativity. Musicians can respond in many ways to the burdens of licensing. For example, a musician might choose to quote a short phrase from an existing song by rerecording that short phrase rather than sampling the existing recording directly. Another musician might abandon particular projects entirely. Others might go to huge lengths to disguise what they have taken from other musicians, and many more might decide to distribute it through more "underground" distribution net-

works. Regardless of how would-be samplers respond to the costs of licensing, copyright law and traditional music industry practices have shaped their choices, whether in the foreground or the background. Put another way, artists who sample pay some price—either in terms of creative constraints, limited distribution options, exorbitant licensing fees, or all of the above.

In chapter 6 we also attempt to measure the impact of the changes and adjustments musicians make in response to the sample clearance system. To get at that question, we ask whether commercial record labels could release albums from the golden age of sampling (described in chapter 1) under the modern licensing system. Others have asked and answered this question before, but never in a sustained empirical manner. In looking at two sample-heavy albums released in 1989 and 1990—the Beastie Boys' *Paul's Boutique* and Public Enemy's *Fear of a Black Planet*—we estimate that they probably would *not* be released today without taking a significant loss on each copy sold. (And this is assuming that all the samples contained on those albums could be cleared successfully, which is highly doubtful.) These fiscal and legal realities deter the creation of collaged compositions containing multiple samples, thereby stunting the development of an art form in its relatively early stages.

A BALANCING ACT

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.—The U.S. SUPREME COURT in *Twentieth Century Music Corp. v. Aiken*

As a society we want to reward musical creativity and encourage more of it. When composers or recording artists take existing musical ideas—perhaps adding some new elements—and combine all of the elements in sufficiently original ways, we offer their creations copyright protection. This is one way we facilitate the efforts of musicians, their record labels, and publishers to make money from music. And we don't stop at

protecting whole creations—we also protect certain portions of them. At the same time, we want future composers to be able to use some elements from previous music without permission. Thus, copyright must perform a balancing act by brokering a compromise between compensation and access.

The controversy over sampling in music is part of a larger set of debates about how legal and bureaucratic institutions regulate new technological innovations and their creative uses. For instance, in a narrow 1984 decision the Supreme Court effectively legalized the videocassette recorder (VCR).[17] But a decade later Congress mandated that digital audio tape (DAT) devices be outfitted with anticopying controls.[18] Courts and Congress have thus played a large role in the success and failure of these respective technologies and the companies that invested in them. The VCR achieved a near-universal adoption rate in households, while the DAT was essentially extinct by the mid-1990s. On the other side of these disputes over new technologies, the owners of copyrighted content will reap rewards or suffer losses depending on the decisions that courts and Congress make.[19]

The advent of digital technology has made the musical technique of sampling even more prevalent, thus contributing to the continuing stream of sampling-related controversies. Although sampling presents issues about creativity distinct from those presented by the VCR, technological advances have put analogous pressure on copyright law to strike a new balance between the parties that sampling affects. Sampling implicates the interests of the copyright owners (including the original songwriter, his or her publisher, the recording artist, his or her record label, and anyone else who owns a copyright interest in a sampled song); the artists who have sampled; and the listening public. The current rules for separating copyright-protected elements from unprotected elements determine whether an instance of sampling requires a license (and usually payment). Thus, the rules governing sampling reflect the balance our society has struck between earlier musicians and subsequent musicians who wish to use existing music as source material.

Copyright law draws the line between the copyright-protected elements of music and freely available elements differently depending on the kind of musical borrowing. Using a single note or quoting a brief phrase from an existing composition is free if you don't take too

much.[20] Employing the style or displaying the influence of another musician (say, writing a folk ballad inspired by Woody Guthrie) is not an infringement as long as the song is not substantially similar—in a legal sense—to another musician's song. Copyright law also contains a compulsory license for cover versions—a compromise between songwriters and subsequent recording artists and their labels. Congress struck this particular balance over one hundred years ago in the Copyright Act of 1909. Recording a cover version of another songwriter's composition costs pennies per copy and does not require permission, which means that performers are free to reinterpret a song in whatever style they wish as long as they don't significantly alter the lyrics.[21] (For instance, changing a pronoun from he to she is fine, but changing the words of a chorus is probably not.)

But not all creative uses of previous work are treated equally. Some types of musical borrowing have few legal restrictions, but other forms have many. The creative freedoms associated with brief quotation, mimicry of style, and cover versions often don't apply for those who wish to sample fragments of sound recordings. This makes digital sampling a relatively costly form of borrowing, and in this sense copyright law discriminates against sampling as compared to other kinds of borrowing. It might have justification for doing so, but copyright law as applied to sampling constrains the forms that expression can take. It also constrains the ultimate content of that message—something that causes concerns rooted in the First Amendment and in free-speech values more generally.[22]

With this in mind, in chapter 7 we examine several proposals for reform. Some proposals require government action; others rely on private institutions and actors. Throughout the chapter, we seek a set of complementary solutions that are practical, uphold the value of compensating musicians who are sampled where appropriate, and reduce the extent to which sample-licensing burdens creativity. Ultimately, the process of deciding who should end up with what rights and what compensation ought to involve consultation with all parties that have something at stake—which is what we attempted when choosing our interviewees. Finally, in the conclusion we propose a thought experiment that isn't as pragmatic but suggests a way to move outside the constraining boxes of copyright's conventional wisdom that limit our options.

ABOUT THE RESEARCH FOR THIS BOOK

In our research for this volume we discussed sampling and sample licensing with over one hundred prominent stakeholders—a diverse assembly of interviewees who provided us with everything from informed commentary to raw, opinionated passion. We talked to musicians who sample, musicians who have been sampled, and musicians who have been on both sides of this issue during their careers. We also talked to music lawyers, industry executives, sample clearance professionals, public-interest group representatives, law professors, musicologists, music historians, and music journalists. Direct quotes from these interviews are regularly woven into our analysis because we feel it is important to report our interviewees' points of view in their own words.

In doing so, we set out to craft a comprehensive study that maps the field of sampling in all its complexities and contradictions. A great deal of the recent discussion about these issues has simplified the landscape in an effort either to defend the status quo or to undermine the existing sample license clearance system. Also, much of this work lacks a sustained empirical component, which is something that perpetuates false assumptions and oversimplifications that could be corrected by simply asking a participant in the sample clearance system. We did not, however, take everything our interviewees said as gospel, because we found that more than a few of these insiders frequently recited apocryphal stories that earlier academics and journalists have been guilty of propagating. We hope this book will help end this recursive cycle.

Although we weren't able to find a true consensus among our interviewees about how to properly fix the sample clearance system, we did find there is a near-universal opinion that the system is broken. Of course, opinions vary about the degree to which the system is inefficient as well as the resulting creative consequences of this inefficiency. It is clear, however, that the sample licensing system and collage-based forms of creativity are in conflict. We have attempted to understand the nuances of that conflict, and our interviews have greatly enhanced our understanding of this subject. This is one of the central reasons

why the interviewees' words provide the backbone of this study. Like a musical collage, this volume mixes together this source material with our own legal, economic, historical, and cultural analysis to create a richer text—a collage of words that both describes and enacts the technique of sampling.

1

THE GOLDEN AGE OF SAMPLING

In this chapter we compare and contrast two key moments in hip-hop music's evolution in order to illustrate how the emergence of the contemporary sample licensing system impacted creativity. First, we examine the golden age of hip-hop, when sampling artists were breaking new aesthetic ground on a weekly basis. Following that, we explain how legal and bureaucratic regimes forcefully constrained the creative choices that hip-hop producers could make. The rise and fall of sampling's golden age—roughly between 1987 and 1992—offers evidence that illustrates why we should care about sampling as a fruitful musical technique. As we mentioned in the introduction, recent history can provide us with a lesson about what happens when we don't make carefully considered policy decisions about copyright and creativity.

Paul Miller, a.k.a. DJ Spooky, notes that some of the key albums and artists from the golden age include De La Soul's *3 Feet High and Rising*, Pete Rock & C. L. Smooth's *Mecca and the Soul Brother*, and Public Enemy's *It Takes a Nation of Millions to Hold Us Back*, among others. We can add to that list many other classic albums from the Jungle Brothers, Queen Latifah, MC Lyte, Boogie Down Productions (BDP), and Eric B & Rakim, to name but a few. "These albums had a rich tapestry of sound, a variety of messages," notes the media studies scholar Siva Vaidhyanathan. "They were simultaneously playful and serious, and they really stand as the *Sgt. Pepper's* or *Pet Sounds* of hip-hop." And as the MC and producer Mr. Lif observes, "The difference between hip-hop production in current times and in the 1980s during

the golden era—it just allowed so much more freedom. Like, you didn't think about, 'You couldn't sample this, or you couldn't sample that.'"

So, for instance, when BDP released their debut *Criminal Minded* in 1987, they didn't ask AC/DC whether they could sample "Back in Black" on their classic song "Dope Beat." Instead, BDP just did it, despite the fact that the hard rock group has since become known for turning down sample requests (or, for that matter, refusing to allow its music to be sold online). "To this day I don't know why AC/DC didn't sue us for that song," frontman KRS-ONE told the journalist Brian Coleman. "That's all samples. I'm probably incriminating myself, but nothing on *Criminal Minded* is cleared."[1] A few years later, artists like KRS-ONE would no longer be able to fly under the radar like they used to. The golden age was an important moment during the development of hip-hop as a musical art form, and it opened up a range of artistic possibilities that largely weren't censored by legal and economic interests.

SAMPLING'S GOLDEN AGE

> Sampling was a very intricate thing for us. We didn't just pick up a record and sample that record because it was funky. It was a collage. We were creating a collage.—HANK SHOCKLEE

The standout records of the golden age were created at a time when hip-hop was still considered a flash in the pan by the larger music industry. This attitude gave many hip-hop artists the opportunity to make music exactly as they imagined it, without restrictions. This was particularly true of De La Soul, a group that hailed from the African American suburbs of Long Island, a region that also produced Public Enemy. De La Soul consisted of Pasemaster Mase, Trugoy, and Posdnuos—a threesome that was augmented on their first three classic albums by the producer Prince Paul. His former group Stetsasonic was signed to Tommy Boy Records, an important independent hip-hop label that released records by Naughty By Nature, Queen Latifah, and many other popular hip-hop acts. But it was De La Soul that was the jewel in the label's crown in the late 1980s, particularly because they were able to match their experimental approach with platinum sales.

"They had an aesthetic of taking everything and the kitchen sink and throwing it into the blender," states the hip-hop historian and journal-

ist Jeff Chang. "So, you didn't just have George Clinton, the Meters, and the usual funk stuff you would expect on a record. You'd have French language records. You'd have the Turtles. You'd have Led Zeppelin. You'd have Hall and Oates. You'd have all kinds of crazy things coming out of the mix, and it sounded the way like a lot of people heard pop culture at that moment in time." The title of their first album came from a sample they snatched from Johnny Cash's hit from the 1950s "Five Feet High and Rising," during which Cash sings, "Three feet high and rising, ma." ("Dave's father had that record," says Posdnuos, referring to the group member known back then as Trugoy.)[2]

"I definitely, *definitely* was taken aback by what De La Soul did," says the hip-hop journalist Raquel Cepeda. "They just went ahead and took whatever moved them." Prince Paul echoes Cepeda when he says, "We went in there to have fun and experiment, and with De La, we could literally do *anything*."[3] The creative field was wide open, with no significant legal or administrative fences yet erected. One can also place the Beastie Boys' densely packed sophomore record, released in 1989, into the same experimental category. "Look at the *Paul's Boutique* record," says the current Beastie Boys DJ, Mix Master Mike. "That was sample mastery right there. Those records were just *full* of samples." Although there is no accessible paper trail that confirms what was sampled, or how many samples *Paul's Boutique* contains, somewhere between one hundred and three hundred is a safe guess.[4]

The Dust Brothers' John Simpson, who co-produced *Paul's Boutique*, details the creative processes and the technologies—rudimentary by today's standards—involved in making that record. "The people who worked at the studios thought we were crazy at the time, 'cause they had never seen anybody make songs that way."[5] Simpson explains that they would build a song starting from one sampled loop of instrumentation that was then layered with other loops and bursts of sound. The Beastie Boys and the Dust Brothers would then painstakingly sync each of the other loops up with the first one, spending hours getting the layers to sound good together. It was a laborious process, Simpson says, explaining that "if you knew which tracks you wanted playing at any given time, you typed the track numbers into this little Commodore computer hooked up to the mixing board. And each time you wanted a new track to come in, you'd have to type it in manually. It was just painful. It took *so* long. And there was so much trial and error."[6]

Not only was it time consuming to put the parts together, the search for musical materials was also laborious. As Miho Hatori—one half of the now-defunct duo Cibo Matto, who used numerous samples in their work—tells us, "We were always buying records, *searching, searching,* and then sometimes we find, 'Oh, a Silver Apples record!' And then we find this one very short part, 'There, *that* bass line!' " This process of searching for sounds is called "crate digging," and it is central to sample-based music. "To find the right one or two seconds of sound," Hatori says, "that's a lot of work." Trugoy of De La Soul explains the haphazard ways he looks for potential samples as follows: "I could be walking in the mall and I might hear something, or in a store, something being played in the store, and say, 'Wow that sounds good.' Or a sound in an elevator, you know, elevator music, 'That sounds good.' If it sounds good and feels good, then that's it. It doesn't matter if it was something recent or outdated, dusty, obscure, and, you know, weird."

Although those records by De La Soul, the Beastie Boys, and others are justly revered for their sampling techniques, no one took advantage of these technologies more effectively than Public Enemy. When the group released *It Takes a Nation of Millions to Hold Us Back* in 1988, it was as if the work had landed from another planet. The album came frontloaded with sirens, squeals, and squawks that augmented the chaotic backing tracks over which frontman Chuck D laid his politically and poetically radical rhymes. Their next record, *Fear of a Black Planet*, released in 1990, is considered culturally so important that the *New York Times* included it on its list of the twenty-five most significant albums of the last century. Additionally, the Library of Congress included *Fear of a Black Planet* in its 2004 National Recording Registry, along with the news broadcasts of Edward R. Murrow, the music of John Coltrane, and other major works.

In the final pages of this section, we examine Public Enemy's creative processes during this period in order to glimpse what was possible creatively and to understand what was lost when the golden age came to a close. Public Enemy was, and still is, deeply influential for a wide variety of artists who followed them. Public Enemy's production team, the Bomb Squad—Hank Shocklee, Keith Shocklee, Eric "Vietnam" Sadler, and Chuck D—took sampling to the level of high art while keeping intact hip-hop's populist heart. They would graft together dozens of fragmentary samples to create a single song collage. "They really put

sound and noises together and made incredible music," De La Soul's Posdnuos says. As a contemporary of Public Enemy who hailed from the same area and drew from a similarly wide sonic palate, he tells us, "Public Enemy reminded me a lot of what we were doing, obviously in a different way. But you can listen to their music and hear something else for the first time."

The group's music was both agitprop and pop, mixing politics with the live-wire thrill of the popular music experience. Matt Black of the British electronic duo Coldcut, which emerged around the same time as Public Enemy, remembers the impact of their song "Rebel Without a Pause." It was one of the many tracks on *It Takes a Nation* that featured repetitious, abrasive bursts of noise, something that simply wasn't done in popular music at the time. As Black tells us, "That noise—what some people call the 'kettle noise'—it's actually a sample of the JB's 'The Grunt.'" Public Enemy took that brief saxophone squeal (from a James Brown spin-off group) and transformed it into something utterly different, devoid of its original musical context.

"It was just so avant-garde and exciting, and heavy," Black says. Chuck D tells us that part of the intention behind transforming the sounds was to disguise them, but that wasn't the primary purpose; mostly they wanted to make something fresh. "We wanted to create a new sound out of the assemblage of sounds that made us have our own identity." Chuck D says, "Especially in our first five years, we knew that we were making records that will stand the test of time. When we made *It Takes a Nation of Millions to Hold Us Back* we were shooting to make *What's Going On* by Marvin Gaye and when we made *Fear of a Black Planet* I was shooting for *Sgt. Pepper's*."

Behind the boards was Hank Shocklee (widely credited as the architect of Public Enemy's aesthetic), who served as the director of Public Enemy's production unit, the Bomb Squad. "Hank is the Phil Spector of hip-hop," says Chuck D, referring to the producer from the 1960s who perfected a sonic approach known as "the wall of sound."[7] In Public Enemy's hands, sampling was now a tremendously complex choreography of sound that reconfigured smaller musical fragments in ways that sounded completely new. "My vision of this group," says Hank Shocklee, "was to have a production assembly line where each person had their own particular specialty." Jeff Chang explains that the members of the Bomb Squad had worked out an elaborate method that involved