“This Is a Sampling Sport”: 1
Digital Sampling, Rap Music, and the Law in Cultural Production
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Everyday life invents itself by poaching in countless ways on the property of others.
sh Certeau, 1984:xii

Introduction

Digital audio sampling poses several interesting challenges to existing intellectual property right laws, and by looking at the specific case of rap music, a form that is in many ways based on the opportunities presented by sampling technology, these confrontations are highlighted. 2 This article questions both the philosophical bases and common law decisions surrounding intellectual property through a critique of their understanding of individual authorship and creativity. Ultimately, copyright law is property law, and its foundation in notions of creativity and originality therefore have to be seen within the complex of capitalist social relations. Even so, because much of the discourse surrounding the question of copyright concerns itself with the creative process and the circulation of cultural products, it becomes necessary to address the ways in which sampling technology is able to highlight some of the contradictions in the foundational principles of jurisprudence. Sampling, in general and here in the particular case of rap music, forces us to reconceptualize these bases of copyright doctrine for both technological and cultural reasons—the former because digital reproduction accentuates existing understandings of “copying” and poses its own challenge to the ways in which we have to think about the process of production, the latter because rap highlights how different cultural forms and traditions are founded on different understandings of creativity and originality. Finally, because under capitalism the cultural form is necessarily the commodity form, because “the real creative subject within copyright law...is capital” (Bettig, 1992:150), current intellectual property rights articulate the limits of the cultural raw materials available for musical production as well as defining the formal boundaries of acceptable end-products. Gaines (1991:9) points out that this limitation is “self-correcting” through the “double movement of circulation and restriction.” Copyright is enabling of certain forms of discourse while prohibiting others in the ideological balance of “free expression” and profitability. Therefore, copyright becomes an issue for discussions of so-called free expression. In order to enter the fray, it is necessary to look at existing definitions of copyright within legal discourse.
Copyright and the Structuring of Noise in Legal Discourse

The authority of the sovereign’s law depends on the establishing of unambiguous proper meanings for words. Such absolute meaning requires the possibility of absolute knowledge, of a logos in which meaning and word coalesce as law. The absolute political state is necessarily logocentric because it depends on law, which in turn depends on the univocal meaning of words...a point at which knowledge and language attain an identity that can serve as an absolute authority.

Ryan, 1982:3

Music, the quintessential mass activity, like the crowd, is simultaneously a threat and a necessary source of legitimacy; trying to channel it is a risk that every system of power must run.

Attali, 1985:14

The copyright problems caused by digital audio sampling concern basically those inhering in the sound recording (McGraw, 1989). Copyright protection for music is divided between the underlying composition and the sounds “fixed in a tangible medium.” The latter received protection only in 1971 as an amendment to the 1909 Copyright Act in an effort to control widespread record piracy, and are defined as:

works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audio visual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied. (17 USC, s.101)

Under the 1976 Copyright Act, only those sounds which were “fixed” on or before 15 February 1972 are protected (17 USC, s.102(a)) and protection subsists only in “original works of authorship.” Authorship is the capturing of sound in a tangible medium, not the production of those sounds. Importantly, most musicians or performers as well as engineers and producers contractually deliver the right of authorship to the record company (this is the “circle-p” copyright). The originality required for copyright protection is de minimis and does not have to be novel, ingenuous or aesthetically meritorious (HR Rep. No. 94–1476, 94th Cong., 2d Sess. 1, 51 (1976); Fishman, 1989:205). Originality means nothing more than a designation of origin with a particular author (Burrow-Giles Lithographic Co. v. Sarony, 111 US 53, 57–58 (1884)). As Gaines (1991:63) has stated it, “all works originating from an individual are individual works of authorship.” Hence, in order for a sample to be copyrightable, it must be original. While simple sounds of a snare drum may not be protected,

the “signature sample,” an identifiable sound of an artist taken live or from a recording, which is then dropped into a musical composition, may possess the required degree of personality to warrant copyrightability. (McGraw, 1989:159)
Prevost (1987:8) has stated that “it is difficult to imagine a musical performance that does not have originality sufficient to qualify for copyright.”

After proving copyrightability and the ownership of copyright, the plaintiff must show that there was an actual “recapture of original sounds” (Prevost, 1987:9) and that the taking was more than de minimis, i.e., that it was substantially similar. In the case of sampling, however, the taking is exactly similar (an exact reproduction), so the question becomes one of determining if the taking was significant. This leads back to the protectability of sounds—if a sound is copyrightable, it will probably be substantial enough to be infringed. Thom has rather crassly suggested that the extent of the taking be judged by looking at “the artistic and financial importance of the portion(s) copied or appropriated” (Thom, 1988:324; emphasis added). In any event, “the question turns on whether the similarity relates to a substantial portion of the plaintiff’s work, not whether the material constitutes a substantial portion of the defendant’s work” (McGraw, 1989:164).

With these foundational points of law in mind, the three extant U.S. court decisions on sampling and copyright provide another segue into legal doctrine. The first case to be decided on the subject of sampling and copyright was Acuff-Rose Music Inc. v. Campbell (754 F.Supp. 1150 (MD Tenn. 1991)) in which the holders of the copyright of Roy Orbison’s “Oh, Pretty Woman” enjoined Luther Campbell of the rap group 2 Live Crew for their use in a sample in the song “Pretty Woman” from the album As Clean As They Wanna Be. Acuff-Rose Music denied 2 Live Crew’s management the license request to parody the Orbison song and sued Luther Campbell and 2 Live Crew’s record company, Luke Skywalker Records, after the release of “Pretty Woman” for copyright infringement and two tort claims of interference with business relations and prospective business advantage (under Tennessee state law), in spite of the fact that the album acknowledged Orbison and Dees (the co-writer) and Acuff-Rose as holding rights to the song. The defendants argued that their use of “Oh, Pretty Woman” was a parody and was therefore protected as fair use under 17 USC, s.107 of the Copyright Act (754 F.Supp. at 1152). While the tort claims are less important for this article’s purposes, the claim of fair use as a defense in sampling cases is an important one. The statutory law of copyright in s.107 suggests that the courts consider four factors in determining a fair use defense:

The purpose and character of the use, including whether such a use is of a commercial nature or is for non-profit educational purposes;

The nature of the copyrighted work;

The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

The effect of the use upon the potential market for or value of the copyrighted work.

The courts have indicated that these factors are minimally required but are not exclusive in determining fair use (see Harper & Row Publishers, Inc. v. Nation Enterprises, 471 US 539, 560).

In deciding the Acuff-Rose case, the court considered each of these points in turn. First, Congress listed parody as one of the purposes of fair use which might be granted and common law has traditionally allowed this. Because 2 Live Crew’s record was sold
for profit, this is an important point. However, a finding of parody is not a presumptive finding of fair use; therefore, the other factors have to be weighed as well (745 F.Supp. at 1115, quoting Fisher v. Dees, 794, F.2d 432, 435 (9th Cir. 1986)). The second factor in fair use determines whether the copyrighted work (not the subsequent work) is “creative, imaginative, and original, ...and whether it represented a substantial investment of time and labor made in anticipation of financial return” (quoting MCA, Inc. v. Wilson, 677 F.2d 180, 182). The original can be (must be?) for profit, the derivative work cannot. The court in Acuff-Rose decided that “since ‘Oh, Pretty Woman’ is a published work, with creative roots, this factor weighs in favor of the plaintiff” (754 F. Supp. at 1156). In other words, it is impossible to infringe on a work which is not original itself. Third, the courts addressed the question of the substantiality and amount of quotation. While the 2 Live Crew song was a substantial use, the court maintained that “the question about substantial similarity cannot be divorced from the purpose for which the defendant’s work will be used” (754 F.Supp. at 1156). Because the defendant’s work was a parody, the court maintained that a greater use was allowed. In Elsmere Music v. National Broadcasting Co. (623 F.2d 252 (1980)) the court held that “a parody frequently needs to be more than a fleeting evocation of the original in order to make its humorous point” (at 253). The courts maintained in Acuff-Rose that 2 Live Crew’s parody did not invoke too much of the original. Lastly, the court held that the defendant’s work would not have a detrimental effect on the market of the original, perceptively noting that “the intended audience for the two songs is entirely different” (754 F. Supp at 1158).

The decision in Acuff-Rose was appealed to the Sixth Circuit Court of Appeals and was reversed and remanded because it held that “Pretty Woman” was not a fair use (972 F.2d 1429 (6th Cir. 1992)). Even if “Pretty Woman” is a parody (which the Circuit Court had difficulty granting), its purpose as a for-profit song (i.e. its commodity status) outweighed its character as parodic (972 F.2d at 1437). The Appellate Court also held that “Oh, Pretty Woman” was a copyrightable work, but reversed the District Court’s decision that the amount of the taking was not an infringement. Here, the Circuit Court’s opinion becomes convoluted as they argue that “near verbatim taking of the music and meter of a copyrightable work without the creation of a parody is excessive taking” (at 1438) even though they admit that “we will assume...that 2 Live Crew’s song is a parody” (at 1435). The court then held, following Sony Corp. of America v. Universal City Studios, Inc (464 US 417, 451), that it is not necessary to show any certain future harm and that a commercial use is presumptively unfair (972 F.2d at 1438). However, as Judge Nelson states in his dissenting opinion, the “Betamax” case cited above involved a copying which did not involve any “alteration of the copied material” (972 F.2d at 1443). A commercial use which transforms the original is different from one which does not. Overall, the result of this appeal has been that sampling has not been afforded a fair use defense on the grounds of parody (keeping in mind that each instance would still have to be decided on a case-by-case basis). Luther Campbell has had a writ of certiorari granted by the Supreme Court to finally decide whether or not 2 Live Crew’s parody was a fair use under s. 107 (123 L.Ed.2d 264), and the outcome of this case will be significant for future sampling parody claims.

Before the Acuff-Rose Circuit Court decision, a second case was handed down by the U.S. District Court in New York. In Grand Upright Music v. Warner Bros Records (780 F.Supp. 182 (SDNY 1991)), the court held that Biz Markie’s sample of three words and
portions of music from Gilbert O’Sullivan’s “Alone Again (Naturally)” was an
infringement of copyright. The case does not present the legal problems that arose in
Acuff-Rose because quite simply the clearance was not obtained for the use of the
samples and there was no formal fair use defense, and Warner Brothers was ordered to
discontinue the sale of the Biz Markie recording. However, the defense’s claim that
“because others in the ‘rap music’ business are also engaged in illegal activity” they
should be excused, although dismissed as “totally specious” by the judge, is an
interesting comment on widespread musical practice. Perhaps buoyed by the preliminary
success of 2 Live Crew at the District Court level, this line of argument suggests that the
counsel may have been hoping for an even wider interpretation of originality for
sampling. The ruling in favour of the plaintiffs, however, had wide effect and was
reported extensively in the popular press (New York Times, 8 January 1992: C13, 21
April 1992: C13, for example). 5

The most recent sampling case to be decided is Boyd Jarvis v. A&M Records et al.
(1993 US Dist. LEXIS 10062, filed 27 April 1993; 827 F.Supp. 282). In this case, Robert
Clivilles and David Cole used samples of Boyd Jarvis’s song “The Music’s Got Me” in
their “Get Dumb! (Free Your Body).” Interestingly in this case, the court considered the
specific issue of the digital audio sampling of uncopyrightable portions of an original.
The court points out that “the simple fact of copying is not enough to prove an improper
appropriation” (note 2 in text). Because in the case of sampling there is not a question
that copying took place, the courts have to determine whether the sample is an unlawful
one. Infringement is decided if “the value of a[n original] work may be substantially
diminished even when only a part of it is copied, if the part that is copied is of great
qualitative importance to the work as a whole” (Werlin v. Reader’s Digest Association,
528 F.Supp. 451, 463 (SDNY 1981)) and, as in Grand Upright, if the defendants
appropriated elements that are “original.” While the court held that non-copyrightable
elements of a song should be factored out in determining the extent of appropriation, it
ruled that the series of “oohs” and “moves” and the phrase “free your body” were in fact
copyrightable expressions. The court concluded that the fact this was a sampling case in
which direct appropriation took place “says more than what can be captured in abstract
legal analysis.” The court ultimately agreed with the judge in Grand Upright when it
found here that “there can be no more brazen stealing of music than digital sampling.”

This sentiment is the same as that expressed in the vast majority of legal literature on
the subject of audio sampling. The subject first emerged for legal scholars with the
“problems” of mastermix recordings in which DJs would spin different records together
over borrowed beat tracks (Prevost, 1987). Since then, more than a dozen law review
articles have appeared addressing the challenges of sampling to copyright doctrine—even
Before the courts supplied a case on which to comment. While McGraw’s (1989) study
presents a fairly even-handed investigation of the relevant portion of the Copyright Act,
most others have been less sympathetic to samplers. 6 A number of the articles worry
about the future place of “live” musicians and the general impact of sampling on
presumably more “authentic” musical creators. Wells (1989:705) is characteristic in his
quip that “ultimately, digital samplers are thieves” (see also McGiverin, 1987; Thom,
1988; Newton, 1989; Moglovkin, 1990; Small, 1991). The other primary concerns of
legal theorists has been the economics of sampling. Authors have drawn attention to the
ways in which sampling is seen as a threat to the livelihood of record companies, and this
is seen as a motivation to prosecute samplers (Giannini, 1990; Houle, 1992). Characteristic of this view is Fishman who argues that while the courts have successfully balanced free speech interests against those of profitability in the past, sampling upsets that balance and is therefore “a substantial economic threat” to musicians and the industry (Fishman, 1989:223). The other concern is that sampling upsets the balance of copyright doctrine itself: “the law can ill afford to linger during the exponential growth of the legal complexities that encompass this technology” (Moglovkin, 1990:174). Finally, Houle (1992:902) has expressed the underlying belief of these authors when he states that only through prosecuting samplers “will the true creativity be spawned and true genius discovered.”

What this article maintains is that legal doctrine, through its assigning of copyrights to corporate subjects and its definition of originality as origin in the individual author, is a contradictory discourse—one that allows for its own contradiction even as it seeks to secure unambiguous meanings. Even though, after Bleistein v. Donaldson Lithographing Co., authorship can now be assigned to corporate entities instead of artists, and even though originality has come to mean origination (here, the “fixing” of sound), copyright is still influenced by the ideological construct of the “author” as a singular “origin” of artistic works (Jaszi, 1991). As the three extant cases show, these contradictions have been consistently resolved in the interests of copyright holders. The significance of copyrights to further accumulation by record companies is being supported at the expense of more dialogic forms of cultural production. The technological practice of sampling and the specific case of rap music highlight these issues.

Looking for Benjamin’s Orchid: Technology, Authenticity and Authorship in Popular Music

That is to say, in the studio the mechanical equipment has penetrated so deeply into reality that its pure aspect freed from the foreign substance of equipment is the result of a special procedure.... The equipment-free aspect of reality here has become the height of artifice; the sight of immediate reality has become an orchid in the land of technology.

Benjamin, 1968:233

Walter Benjamin early on argued that the technological reproduction of artistic works has an impact on them. His argument is that through the process of mechanical reproduction, the artifact loses its “aura” and “detaches the reproduced object from the domain of tradition.” Instead of a single art object, there now exists “a plurality of copies” (Benjamin, 1968:221). One effect of this is that the copy can then be used in different ways than the original could have been, “and in permitting the reproduction to meet the beholder or listener in his own particular situation, it reactivates the object reproduced” (Benjamin, 1968:221). This “shattering of tradition” takes the object of art and moves it from both the realm of cult-inspired awe and artistic authenticity to a new social function:

for the first time in world history, mechanical reproduction emancipates the work of art from its parasitical dependence on ritual. To an ever
greater degree the work of art produced becomes the work of art designed for reproducibility.... But the instant the criterion of authenticity ceases to be applicable to artistic production, the total function of art is reversed. Instead of being based on ritual, it begins to be based on another practice—politics. (Benjamin, 1968:224)

The work of art is now seen as having lost an aura of authenticity and as having gained a foundation in relations of power. However, the structures of intellectual property rights are founded on notions of the work of art that has its aura intact. Statute and common law definitions of originality and authenticity still presume that the aura of the author remains intact after the processes of technological mediation. In order to understand Benjamin’s point about artifice and reality in technologized art, it becomes necessary to look at the practices of musical production.

As Steve Jones has pointed out, the different technical apparatuses like sampling that are available and are used in the making of popular music are an important part of that process and need to be part of an understanding of musical production:

The effects those [sonic and compositional] limitations [of equipment used for the fixation of sound] have on the composition and realization...of music play a critical role in the production of popular music. Therefore, it is at the level of composition and realization that one should begin to analyze the relationship of technology and popular music, for it is at that level that popular music is formed. (Jones, 1993:7)

However, the relationship between technology and music is not altogether obvious: for one thing, the precise moment of realization becomes less clear (Frith, 1987a: 65). Clearly, no recorded music is simply the recording of a live event—even “live” recordings are the product of mixing and post-production work. The very uncertainty of the precise musical moment is a product of the ideological mystification of the production process that conceals the constructedness of musical sound. As Doane explains in the context of recorded sound in film,

the rhetoric of sound is the result of a technique whose ideological aim is to conceal the tremendous amount of work necessary to convey an effect of spontaneity and naturalness. What is repressed in this operation is the sound which would signal the existence of the apparatus. (Doane, 1980:55)

The arrival of the apparatus in the form of sampling is a reminder that there is more to a recording than simply the virtuosity of the performers.²

There is a need to reconceptualize the musical process to include an understanding that technological knowledge, not just knowledge of particular instruments, is now an integral part of the process of popular music production (Jones, 1993). The sounds that we think of as original or authentic are themselves the product of the production process. As Tankel (1990) has shown, the process of remixing is a recoding of the musical text and
engineers are as much a part of the recorded sound as musicians. One engineer put it this way:

I don’t know if you’ve ever tried to make a sample, but making one is a real pain in the ass. Everybody thinks, oh, sample, oh, I just play a note and that’s it. It’s a lot harder than that, because of the vagaries of the machine once you get it in and once you get it out. (Jones, 1993:108)

This engineer goes on to explain the different procedures for refining the sample in order to put it into a usable form and points out “it’s just not as easy as it sounds” (Jones, 1993:109; emphasis added). Durant (1990) points out that sampling has created a new technological literacy that is necessary for modern musical production. Indeed, Porcello (1991) notes that engineers are unemployable if they do not know how to sample effectively.

The production of music is not something that is tainted by the effects of technology; rather, music is constituted by technology through and through. As Frith explains,

The “industrialization of music” can’t be understood as something that happens to music but describes a process in which music itself is made—a process, that is, which fuses (and confuses) capital, technical, and musical arguments. (Frith, 1987b: 54)

All of popular music is the product of technology, and it becomes important to look at those “relations [which] exist between different technical and practical elements at play in any changing context of musical production” (Durant, 1990:180). By looking at the process of production, we see that technologized music is the product of not just auteur-musicians but of the work of musicians and engineers alike. We cannot go back to some pre-industrial form of music. The “demand for authenticity in popular music is a false request, because such a demand is made with the assumption that music exists in some pure form” (Jones, 1993:208). The practices of making music cannot be usefully detached from the conditions of their existence; therefore, in the age of digital reproduction, the search for a singular musical moment is a search in vain. Gaines points out that,

while sound recording is certainly mechanical or electronic “copying “it produces neither a “copy” of the acoustic event nor a “copy” of the notational system in which the underlying composition has been encoded. It is more likely a “sample” of an acoustic event stored in another form such as paper roll, magnetic tape, pressed vinyl, or compact disc. (Gaines, 1991:131)

As with Benjamin’s orchid, popular music is now so imbricated with technology that its “reality” can no longer be assigned to a pre-industrial authenticity but is instead constituted by its technical processes.

Frith and Durant’s understanding above of the connection between popular music and technology (i.e. that music is part of a productive process that necessarily involves the
engagement of the productive apparatus) forces us to interrogate the role of the author or musician in the productive process itself. Traditional aesthetics and copyright philosophy depend on a strong notion of authorship and are situated within humanist ideologies of the creative artiste. However, after the industrialization of art, as described by Benjamin for cinema, the role of the producer has changed. As Lyotard has argued,

that the mechanical and the industrial should appear as substitutes for hand and craft was not in itself a disaster—except if one believes that art is in its essence the expression of an individuality of genius assisted by an elite craftsmanship. (Lyotard, 1984:74)

That is, the end of the dominance of the aura of a work of art is only a problem insofar as this end further discredits the myth of the individual creator. In the case of sampling technology in musical production, the abolition of the aura signals the insertion of different subjects into the creative process, namely those of DJs, engineers and producers.

Foucault (1977) provides some interesting comments on the social function of the author. He points out that the role of the name of an author is not simply that of the proper name, which distinguishes between different subjects; rather the name of an author serves to distinguish between different texts, separating them and marking them distinct from others. Moreover, not all texts (e.g., bureaucratic forms, receipts, now the post-it note) necessarily require (or are granted) authorship. For Foucault, the question becomes one of understanding not only which texts are designated as authored, but also analyzing the conditions for authorial discourse. Thus Foucault says that “the function of an author is to characterize the existence, circulation, and operation of certain discourses within society” (Foucault, 1977:124). The designation of authorship for a text signifies for that text a certain social significance that the anonymous text does not possess. The author then becomes a function of social discourses.

According to Foucault, there are four characteristics of the “author-function” in discourse. One is that it is not universal or constant, that is, certain forms of discourse do not always require authorship for validity (e.g., the use of authorship in scientific discourse over time has generally changed to one of anonymity). Second, the attribution of authorship is not automatic or “spontaneous” simply by connecting individuals and discourses. Instead, it is a result of a “complex operation whose purpose is to construct the rational entity we call an author” (Foucault, 1977:127). The characteristics that we localize as belonging to an author of a particular type are for Foucault projections onto that individual of our interaction with the text. Thus the qualities that we would characterize as constituting the author of a musical piece are those that we choose to locate in the individual to whom authorship is attributed. Combined with the first characteristic, it is important to remember that these characteristics are not transhistorical or culturally universal but rather are transformed over time. The next characteristic of the author-function concerns the presence of the author in the text. In discourses that do not have authorship, the use of personal pronouns points directly towards the writer; however, in authored texts, the reference to “I” is never exact and therefore signals a generality of the text which the reader encounters. Thus the author-function in an authored text does not refer to an actual individual but to a subject position that remains open to the reader.
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Most importantly for purposes of understanding authorship and copyright, however, is the characteristic of authored discourse that Foucault (1977:130) says "is tied to the legal and institutional systems that circumscribe, determine, and articulate the realm of discourses." Authored texts are always a form of property— they are "objects of appropriation" (Foucault, 1977:124). Foucault notes that this author-function has been linked to transgression, first by assigning authorship to discourses that were to be punished—misappropriation. He goes on to say that it was a gesture charged with risks long before it became a possession caught in a circuit of property values. But it was at the moment when a system of ownership and strict copyright rules were established...that the transgressive properties always intrinsic to the act of writing became the forceful imperative of writing. (Foucault, 1977:125)

Now writing, in general, again becomes a dangerous activity through conferring "the benefits of property" (Foucault, 1977:125). What this analysis of authorship provides for a current understanding of copyright law is in its approach to the category of author as historically situated and constructed. Moreover, it is the granting of copyright to authors that situates them in the dynamics of power. From Benjamin we see that the work in the age of reproduction is no longer authentic, but it is firmly situated in politics. This politics is the politics of authorship, and from Foucault we see that not every discourse stands equal before the law.

Sampled recordings are not granted an author-function the way that supposedly individually created recordings are. Given that the myth of the pre-technological musician is abolished in the age of electronic reproduction, the specific practices of sampling become transgressive.\(^{51}\) Porcello notes also the problems of authorship and copyright when he states that after Foucault, it is hard to imagine how any particular instance of interaction with a text does not itself create a new text (thus satisfying the conditions of the older aesthetic anyway), which is why the author is a spurious category for Foucault, and why the sampler's physical and functioning fusing of documentary and reproductive capabilities—which serves to throw the authorial producer of sound into a binary electronic limbo—has so thoroughly frustrated a legal model of copyright which is based on assumptions that one can clearly separate producers from consumers and texts from their readings. (Porcello, 1991:77)

The DJ's interaction with the prerecorded sound of another unsettles the idea of the audio text as sealed and final to be consumed in preordained ways. The text is now part of the aural collage (Korn, 1992) as it becomes temporarily fixed to other samples in the record.
Transgression on the Turntable: Rap and Intertextuality

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 sold
They say that I sample, but they should
Sample this, my pit bull
We ain’t goin’ for this
They said that I stole this
Can I get a witness?
Public Enemy, “Caught, Can We Get A Witness?”

The Foucauldian analysis of authorship reveals the intertextuality of the text, i.e., the connections between texts that are (arbitrarily) separated from one another by the name of the author. As Gaines (1991:77) has stated, “the very concept of authorship overrides the generic and conventional indebtedness that would mark words as the product not so much of individuals as of societies.” The text is historically suited within aesthetic traditions which contextualize cultural production. Rap music can be seen as part of a tradition of Black culture that Gates (1988) has drawn attention to as being double-voiced and which he calls “Signifyin(g).” Signifyin(g) is the practice of formal revision and intertextual relation between texts and refers to “the manner in which texts seem concerned to address their antecedents. Repetition, with a signal difference, is fundamental to the nature of Signifyin(g)” (Gates, 1988:51). Meaning is created in the tradition of Signifyin(g) through the formal revision of patterns of representation, i.e., through the inflection of previous texts in new texts. Further, Gates states that

Signifyin(g), in other words, is the figurative difference between the literal and the metaphorical, between surface and latent meaning.... Signifyin(g) presupposes an “encoded” intention to say one thing but to mean quite another. (Gates, 1988:82)

That is to say, meaning operates at several levels and does not lend itself to surface-level decodings. Signifyin(g) is a form of Black discourse, one that significantly relies on the intertextual referencing of previous texts in its making of meaning.12 Rap’s “double-voiced discourse” (Stephens, 1991) is premised on the practices of intertextuality such that the rap song (through both aural and verbal cues) contains within it the inflected “voice” of its antecedent “other” (Bakhtin, 1981; Volo_inov, 1973).13

The case of rap also highlights the ways in which notions of authorship and originality do not necessarily apply across forms and cultural traditions—not because of any inherent worth or quality of different musics, but because different musical practices defy the universals of legal discourse. Frith (1987a: 63) points out that “copyright law defines music in terms of nineteenth-century Western conventions and is not well suited to the
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protection of Afro-American musicians’ improvisational art.” The formal practices of Signifyin(g) in rap music defy traditional definitions of authorship because they are ultimately premised on referencing the other and by explicitly relying on previous utterances.

The specific case of rap music challenges both the accepted understandings of musical practice and the dominant definitions of pop form, both of which are situated within capitalist social relations. Gaines’s analysis presents the development of technological means for capturing sound—for giving sound its materiality—as one way in which sound has been able to become copyrightable, hence its status as a “protected property-appendage” (Gaines, 1991:119). Sampling is a way of appropriating this property, of subverting the proprietary status of sound and allows for a new kind of poaching on the aural commons. Toop notes that scratching and sampling have “led to creative pillage on a grand scale and [have] caused a crisis for pre-computer-age concepts of artistic property” (Frith, 1986:276). By selecting recorded sounds and reusing them in new recordings, rap music offers its critique of the ownership of sound. Porcello (1991:82) argues that “rap musicians have come to use the sampler in an oppositional manner which contests capitalist notions of public and private property by employing previously tabooed modes of citation.” It is rap’s very flaunting of its intertextuality that poses the challenge to copyright law. Porcello continues:

Rap musicians may be engaging in opposition at the level of praxis, but there is an ideological war occurring over the sign as well. The connotative meanings behind each term may be read as attempts to define appropriate sampling practice, at a discursive level, within both industry structures and pop aesthetics. (Porcello, 1991:84, n.5)

As the DJ samples, there is a simultaneous critique of the ownership of sound and “Rockist”14 aesthetics that remain tied to the romantic ideals of the individual performer. Rap forces an expansion of these definitions of musicality. Its meaning-making practices that rely on intertextual referencing via the sample demonstrate the different ways in which the struggle over originality is waged in divergent musical traditions. Because rap music and the practice of sampling change the notion of origin (the basis of copyright) to one of origins, it becomes transgressive in the Foucauldian sense and an infringement of copyright law in the eyes of the courts.

Intellectual Property Is Theft: Copyright and “Free Speech”

In society, however, the producer’s relation to the project, once the latter is finished, is an external one, and its return to the subject depends on his [sic] relations to other individuals. He does not come into possession of it directly. Nor is its immediate appropriation his purpose when he produces in society. Distribution steps between the producers and the products, hence between production and consumption, to determine in accordance with social laws what the producer’s share will be in the world of products.
Copyright is a political and economic not a moral matter.

Frith, 1987a: 73

As Marx states here, the relationship between a musician and her or his musical product is not a natural one but is determined by social relations. The first step towards a critical understanding of copyright is to acknowledge that “copyright law is not a statement of ethical principle but a device to sustain a market in ideas” (Frith, 1988:123). As Bettig (1992) has shown, the development of copyright philosophy has been more to secure the rights of capital in the sphere of cultural production. In the decisions that have come down on digital audio sampling, the courts have ruled consistently in favor of the owners of intellectual property, thereby reinscribing the relation of exteriority between producers and capital and securing the rights of the corporate legal subject over the concerns of cultural expression. Bettig (1992:152) comments that “intellectual property rights continue to be utilized to gain or maintain market advantages by an increasingly oligopolistic and multinational culture industry.” It is this development that has concerned many observers.

Rosemary Coombe has shown how the organization of intellectual property law (and its interpretation in the courts) is a limiting force on the free expression of ideas. She echoes Frith when she points out that copyright and intellectual property in general functions solely to secure the market values of cultural artefacts. Ultimately, however, this function limits the possible forms of expression. While certain signs retain cultural meanings even after (or in spite of the fact that) they are owned as intellectual property, the law prevents the free circulation of those signs. Coombe charges that

by objectifying and reifying cultural forms—freezing the connotations of signs and symbols and fencing off fields of cultural meaning with “no trespassing” signs—intellectual property laws may enable certain forms of political practice and constrain others. (Coombe, 1991:1866)

This brings us back to Gaines’s point about the double movement of circulation and restriction in the law. While allowing certain forms of cultural expression to exist, others are restricted. As Coombe’s study of trademark shows, the determination of this process is not innocent:

the more powerful the corporate actor in our commercial culture, the more successfully it may immunize itself against oppositional (or ironic or simply mocking) cultural strategies to “recode” those signifiers that most evocatively embody its presence in postmodernity. (Coombe, 1991:1874)

In other words, capital is able to control the patterns of signification that are most suited to its needs. While it is easy at this point to lapse into an instrumentalist or reductive argument about base and superstructure, even a careful analysis reveals that the political and economic structures are in place which facilitate the interests of capital. Durant gloomily suggests that if the issues of copyright are not resolved favorably, then the
production knowledges involved in sampling will be “largely cut off from the possibility of responding to developments in musical culture expressed in the form of quotation or imitation” (Durant, 1990:195). This appears to be true.

However, an analysis of sampling also draws our attention to other issues of critical importance. Digital technology is:

disrupting the implicit equation of artists’ “ownership” of their creative work and companies’ ownership of the resulting commodities—the latter is being defended by reference to the former. (Frith, 1986:276)

As I have shown in this article, sampling technology challenges the concept of the singular artist as the only embodied voice in the text. The ways in which copyright law understands the creative process and its assigning of property on that basis is confronted by the intertextual artifact. Jaszi points to this as a central contradiction in copyright doctrine when he states that

the overall incoherence of the law’s account of “authorship” may be best understood as reflecting a continuing struggle between the economic forces that (at least in the abstract) would be best served by the further depersonalization of creative endeavor and the ideological persistence of an increasingly inefficient version of individualism. (Jaszi, 1991:501–2)

It is not altogether clear that the interests of the record companies would not be served by the widespread use of samplers, given their status as commodities whose profits are generated for these corporations (McGiverin, 1987:1730); the struggle over appropriate sampling practices in rap and other dance-based forms is currently seeking to resolve this contradiction in the dance halls over the court rooms.

Gaines points out that sometimes the very ways in which capital seeks to realize its accumulation may actually speed up the “production of a common culture, a culture which can be inflected oppositionally” (Gaines, 1991:228). As the culture industries seek the widest possible circulation of their products, the meanings of those products then gain such a purchase that they become part of the public domain: “what the proprietors of popular signs will always come up against is the predictable and desired result of their own popularity—imitation, appropriation, re-articulation” (Gaines, 1991:232). The litigation surrounding sampling has been an effort to prevent just this. Record companies, as owners of the copyrights to the recorded sounds, have tried to take back what have become widely popular tracks from the DJs and engineers who are using them in new mixes.

Collins and Skover (1993) present a “cultural” analysis of free expression that they call “pissing in the snow.” They suggest that actual speech practices (not idealized ones from legal theory) assume a Carnivalesque quality in that they tend not to abide by existing rules or laws. In the Carnival of popular culture, speech is directed more by the demands of listeners than by a fear of infringement:

The “anarchistic” quality of the Carnival is fundamentally at war with the notion of a government of laws. The very character of the Carnival is to
push all boundaries, including the fixed lines of law. (Collins and Skover, 1993:802)

The other thing that this article has tried to show, however, is that the Carnival is also often at odds with the very medium of its circulation—the market. This article has advocated (at least implicitly) the freedom of unauthorized sampling, much in the spirit of the Carnival that respects no boundaries. What it has also shown is that “what cannot be tolerated by the gatekeepers of the Carnival, however, is dissent which poses a clear and present danger to the amusement culture and its economy” (Collins and Skover, 1993:802).

Notes

2. I would like to thank Priyadarshini Jaikumar-Mahey and Joseph Foley for their comments on an earlier version of this paper.
3. The ownership of the copyright of a sound recording grants three rights:

   to reproduce the copyrighted work in copies or phonorecords (the right to duplicate the sound recording in a fixed form that directly or indirectly recaptures the actual sounds fixed in the recording);

   to prepare derivative works based on the copyrighted work (the right to create a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality); and

   to distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending. (17 USC ss. 106 and 114)

This excludes the right to control public performance that is attached to the copyright of the underlying composition (and hence why it is ASCAP and BMI which are involved in litigation in public performance cases, not the record companies; see Morgan, 1980).

4. As Frith (1987a: 64) points out, “originality, in short, can be difficult to define in a business in which similarity (the hit formula) is at a premium.” That is, record companies do not have an interest in a record being so “original” that it does not attract a wide audience! The avant-garde, while “original” by romantic definitions, has not always proved commercially viable.

5. Indeed, the success of Grand Upright Music spurred on other suits to recover from unauthorized samples. In a significant case, Aaron Fuchs of Tuff City Records tried to sue Sony and Def Jam Records for the unauthorized use of drum beats from a song by the Honeydrippeters. This case, although it was settled out of court, is significant because most drum beat samples are not cleared. Should this decision have come down in favour of Fuchs, rap music would have become prohibitively expensive because it would have required the clearance of all samples used, no matter how small (see Billboard, 11 January 1992:71, 23 May 1992:4, 30 May 1992:8,6 June 1992:6).
6. For a sympathetic reading of sampling and copyright, see Marcus (1991) who suggests a licensing scheme to alleviate the problem; Hempel (1992) who argues that being sampled does not necessarily deprive the original author the rights of copyright; Korn (1992) who advocates a fair use defense for samples as parodies of pre-existing texts; and Brown (1992) who suggests amending the Copyright Act to allow for short samples.

7. Jaszi (1991:459) argues that:

Legal scholars' failure to theorize copyright relates to their tendency to mythologize "authorship" leading them to fail (or refuse) to recognize the foundational concept for what it is—a culturally, politically, economically, and socially constructed category rather than a real or natural one.

8. Some critics of sampling maintain that the sampler is still invisible. Small (1991:108) claims that "the practice of digital sampling is not common knowledge to the untutored public at this time" and therefore is guilty of unfair competition by confusion of origin. On the other hand, Goodwin (1990:263) maintains that pop fans "have grown used to connecting machines and funkiness" suggesting that their presence is recognized by audience members. Ultimately, listeners' perceptions remain an empirical question, but the theoretical point that sampling practice challenges traditional understandings of the productive process still obtains.

9. It is important to remember the distinction between the "threat" of "piracy" of recordings and the practice of sampling. As Jones (1993:117) points out, "even though it appears that sampling allows artists to reclaim or recontextualize sound, it must be remembered that sampling is a production method and not a means of distribution" and is therefore distinct from the challenge of "piracy" to corporate profits. Sampling's recording is quite distinct from the practices of illegal record pressing (the problem which brought the 1971 amendment to the 1909 Copyright Act) and home-taping—the industry's menace in the 1980s. This point is missed sorely by Thom (1988) who confuses the two in making points of law.

10. Andrew Goodwin's (1990:259) assertion that digital reproduction allows a "mass production of the aura" in which "everyone may purchase an 'original'" seems to me to miss the point. Benjamin's argument is that the performer's presence is lost in technological mediation; even under conditions where the studio performance is reproduced "exactly" using digital technology (disregarding contentions about the "warmth" of analogue recordings), the performer is still absent. It may be that the affect of popular music no longer relies exclusively on the presence of the author, as in the ways in which DJ-based musical cultures upset the meaning of "live" performances.

11. It is important to remember that copyright needs an "author-function" but not necessarily an "author." Gaines points this out when she states that:

we should not be surprised that Anglo-American intellectual property law is formally unaccommodating to the human subject bearing natural rights, because copyright doctrine is nothing more or less than a right to prohibit copying by others. Actual authors, in other words, are irrelevant to the operation of a copyright system. (Gaines, 1991:64)

It is the record companies as rights-holders who are enjoining samplers, not necessarily individual author-subjects. This is one of the fundamental contradictions in legal theory: its reliance on the myth of the original, individual
author coupled with the abandonment of the author-subject for the corporate rights-holding-subject.

12. Importantly, Gates does not maintain that the tradition of Signifyin(g) is metaphysically connected to conditions of race, nor is it part of an essential nature outside of history. Instead, "blackness" for Gates (1988:121) means "the specific uses of literary language that are shared, repeated, critiqued, and revised."

13. For a descriptive presentation of the ways in which reggae DJs are also part of a multi-voiced Black discourse, see Hebdige (1987). A more analytical presentation of the position of reggae within Black diasporic culture is provided by Gilroy (1987).

14. Most criticism of popular music remains firmly tied to the aesthetics and affects of rock music—a form which is facilitated by copyright doctrine through its reliance on virtuosity and artistry, especially in the excesses of 1970s progressive rock and its aftermath. The implications of this are that different forms are judged by rock’s presumed universal standards to be “less creative” as a new high culture/low culture divide is instituted between the more “serious” rock and pop (or other dance-based forms).

Bradby (1993:156) has recently pointed out how rock’s ideology of virtuosity has not applied equally to men and women performers and has not allowed “women’s performances to be ‘authentic’ in the ways that men’s are.” Moreover, she argues that modernist ideologies of the creative process “are kept alive especially by the ‘expert’ writing of the male rock press and among male groups and producers” (Bradby, 1993:164). In this way, the discourse of authorship and originality can be seen as gendered.

15. Coombe points out that legal theory does not address the problem of how meanings are fixed and dialogue is prevented. Legal theorists she says,

fail to examine the differential power that social agents have to make their meanings mean something and the material factors that constrain signification and its circulation in the late twentieth-century. Legal theory perhaps defines itself as theory by its loathing to address specific processes of hegemonic struggle or the political economies of communication in a late capitalist era. (Coombe, 1991:1860)

16. See also Helfand (1992) who points to the convergence in court interpretations of the logics of copyright, trademark, and Lanham Act s. 43 (a) which, “led by a small handful of major character owners” (Helfand, 1992:627), has had the effect of preventing fictional characters from falling into the public domain and therefore “unavailable for new expressive uses” (Helfand, 1992:654).

References


