

PART ONE

Art and Culture: Use Only as Directed

Copyright and trademark law is an important tool in incubating new creativity and building a culture. By giving creators a property right in their works, the law stimulates the development of all sorts of new works. What is not appreciated as much is how overly broad copyright and trademark laws can sabotage creative production. Artists necessarily must draw upon works of the past. They also must be able to modify and transform prior works and collaborate and share with fellow artists.

Since copyrights and trademarks are essentially monopoly rights, the question thus becomes: How far should intellectual property protection extend? What is the proper balance?

As the stories of Part One illustrate, the intended balance of copyright and trademark law has gotten seriously out of whack. The chief proponents of broader, longer, and stricter forms of protection are the various “content industries” that produce music, film, photographs, literature, journalism, and entertainment. They like broad legal protection for their works because it makes those works more valuable. Owning the copyright on, say, a Beatles tune for an extra twenty years could easily be worth a fortune. Broader protection also privileges commodified works over “nonmarket” creativity such as folk traditions, public dialogue, art, scholarship, and the works of online communities.

It is a complicated business drawing the lines of protection properly. But the following stories show that appropriate limits for copyright and trademark protection have been transgressed time and again. Part One explores some of the more memorable examples affecting art and culture.

CHAPTER 1

The Crusade to Lock Up Music

[It] is entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers' song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later.

—A federal court in *Three Boys Music Corp. v. Bolton*,
upholding the subconscious copying doctrine

For millennia, the circulation of music in human societies has been as free as the circulation of air and water; it just comes naturally. Indeed, one of the ways that a society constitutes itself as a society is by freely sharing its words, music, and art. Only in the past century or so has music been placed in a tight envelope of property rights and strictly monitored for unauthorized flows. In the past decade, the proliferation of personal computers, Internet access, and digital technologies has fueled two conflicting forces: the democratization of creativity and the demand for stronger copyright protections.

While the public continues to have nominal fair use rights to copyrighted music, in practice the legal and technological controls over music have grown tighter. At the same time, creators at the fringes of mass culture, especially some hip-hop and remix artists, remain contemptuous of such controls and routinely appropriate whatever sounds they want to create interesting music.

Copyright protection is a critically important tool for artists in earning a livelihood from their creativity. But as many singers, composers, and musicians have discovered, the benefits of copyright law in the contemporary

marketplace tend to accrue to the recording industry, not to the struggling garage band. As alternative distribution and marketing outlets have arisen, the recording industry has sought to ban, delay, or control as many of them as possible. After all, technological innovations that provide faster, cheaper distribution of music are likely to disrupt the industry's fixed investments and entrenched ways of doing business. New technologies allow newcomers to enter the market and compete, sometimes on superior terms. New technologies enable new types of audiences to emerge that may or may not be compatible with existing marketing strategies.

No wonder the recording industry has scrambled to develop new technological locks and broader copyright protections; they strengthen its control of music distribution. If metering devices could turn barroom sing-alongs into a market, the music industry would likely declare this form of unauthorized musical performance to be copyright infringement. Sound improbable? Chapter 1 looks at some disturbingly hilarious attempts to privatize and lock down music, a cultural form that seems to flourish most when it can circulate freely.

ASCAP Stops the Girl Scouts from Singing around the Campfire

You may *think* that it's okay for little campers to sing "Happy Birthday" and "Row, Row, Row" around the campfire for free, without asking for permission. But in fact, you *may* have to pay a license to a licensing society known as ASCAP. ASCAP, the American Society of Composers, Authors and Publishers, is a performance-rights body that licenses copyrighted works for nondramatic public performances. It then distributes royalties collected from those performances and channels them to the appropriate composers, authors, and publishers. The system is intended as a way to assure that creators receive monies for the public performances of their works . . . even some campfire songs.

But what exactly is a "public performance," and should summer camps be charged for license fees for widely sung tunes like "Puff the Magic Dragon," "Edelweiss," and "This Land Is Your Land"? In 1996, ASCAP decided that since hotels, restaurants, funeral homes, and resorts pay for the right to "perform" recorded music, and since many summer camps resemble resorts, why shouldn't they pay too? Under copyright law, a public

performance occurs “where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” Like a summer camp.

After reportedly opening its negotiations with the American Camping Association with an offer of \$1,200 per season per camp, ASCAP eventually settled on an average annual fee of \$257. Most of these camps were “big commercial camps,” an ASCAP spokesperson told a reporter—places equipped with dining and recreational facilities that used music for dances and other social functions. For camps that did not belong to the association, the fees ranged from \$308 to \$1,439 a year.

When ASCAP sent letters to the 288 camps enrolled with the American Camping Association, demanding payment for the “public performances” of copyrighted songs, it failed to check the affiliations of each camp. Unbeknownst to ASCAP, 16 of the 288 camps were run by the Boy Scouts of America or the Girl Scouts.

When Sharon Kosch, the director of the San Francisco Bay Girl Scout Council’s program services, received an ASCAP letter demanding \$591, her first thought was, “You guys have got to be kidding. They can’t sing the songs?” She reconsidered when she found out the potential punishment. “It’s pretty threatening. We were told the penalty can be \$5,000 and six days in jail.”

So the council took a black marker to its “Favorite Songs at Diablo Day Camp” list, trying to determine which songs were copyrighted and which belonged in the public domain. But the council didn’t have the means to check its song list against ASCAP’s 70,000-page list of 4 million songs. And even if it did, another composer licensing body—SESAC, Inc., which owns the copyright to Bob Dylan’s “Blowin’ in the Wind”—had announced it would ask camps for its own set of royalties.

The council couldn’t shoulder the bureaucratic hassles. It was low on cash and couldn’t afford \$10,000 in licensing fees for its twenty chapters. And it could not afford to be sued. So the camp simply stopped singing.

The girls of Diablo Day Camp were reduced to doing “The Macarena” (which was all the rage that summer) in silence, without the music. Non-ASCAP or noncopyrighted songs like “Bow-Legged Chicken” and “Herman the Worm” had to be sung instead of “This Land Is Your Land.”

A fourteen-year-old camper tried to tell the younger Brownies what had happened: “They think copyright means the ‘mean people,’” said

Debby Cwalina. “The people who wrote it have a thing on it. A little *c* with circles around it. There’s an alarm on it. And if you sing it, BOOM!”

As if to play into this stereotype of copyright law, ASCAP’s chief operating officer, John Lo Frumento, told a reporter: “They [camps] buy paper, twine and glue for their crafts—they can pay for the music, too.” And if the little girls sang anyway, he said, ASCAP would “sue them if necessary.”

Not surprisingly, ASCAP’s arrogance did not play well in the press. “Tightwad bean counters in the music industry descended to a new low this summer,” wrote an editorialist for the *San Francisco Chronicle*. “Let ASCAP bullies try to collect their phony royalties. We dare them.”

The press had a field day. The basketball player Shaquille O’Neal offered to pay a camp’s royalties for ten years. BMI, ASCAP’s rival in licensing music, offered to license its three million songs to the Girl Scouts for nothing.

James V. DeLong, writing in the *National Law Journal*, astutely noted that composers do not create their music from scratch; they necessarily “steal” from the cultural commons: “Song writers draw heavily on the efforts of other people, such as those who invented the musical notation used to put songs into marketable form, a rich tradition of folk music written without benefit of copyright, and old works no longer covered. The composers are tapping into a sort of cultural commons without which their efforts would be bootless, and they have no right to appropriate it.”

It was also pointed out that Boy Scouts, Girl Scouts, and other youth camps probably do more than any other force to keep old songs in circulation, introducing them to a new generation year by year. Whatever economic value the songs may have, certainly some significant amount stems from this informal sharing of the works via the commons. But copyright champions systematically ignore the “value added” wealth that derives from the unmeasured sharing of creative works.

A week after the public furor started, a chastened ASCAP said that the entire affair was a “gross misunderstanding” and that it would not be seeking royalties from the Girl Scouts after all. Said a spokesperson: “I guess we could have researched the list [of camps] better than we did, but quite honestly there isn’t a lot of money here.”

For all of its PR backpedaling, ASCAP did not concede any legal ground. The free singing of songs by the Girl Scouts remains an ASCAP-

granted indulgence, not a legal entitlement. But as this episode showed, the public has its own considerable voice in how copyright law will be enforced—if it can express itself. Or as Bob Dylan put it, in a song that he claims belongs to him alone, “The answer, my friend, is blowing in the wind. The answer is blowing in the wind.”

The Blurry Line between Originality and Copying

One of the most persistent difficulties in applying copyright law to music is determining what is original—and therefore deserving of copyright protection—and what is deemed illicit “copying.” Copyright law presumes that the originality of a new work—and thus its “authorship”—can be identified and legally defined as property. But in actual practice, no one creates a new song out of thin air. Virtually every new creation draws in varying degrees upon musical tradition and the larger culture, sometimes in highly specific ways. All creators depend upon a cultural commons for inspiration, imitation, and derivation.

The history of music is a story of originality combining with creative derivation. Sometimes a new work seems familiar because it belongs to a specific musical tradition; sometimes it copies key melodies, notes, refrains, or lyrics. For example, “Good Night Sweetheart” (1931) is based on themes from Schubert’s Symphony in C and Liszt’s preludes. “Love Me Tender,” made famous by Elvis Presley in 1956, is based on “Aura Lee” by George Poulton. “The Lion Sleeps Tonight,” also known as “Wimoweh”—recorded by the Weavers in 1952 and the Tokens in 1961—is based on a traditional African song.

In “copying” their predecessors, musicians are not necessarily ripping off someone else’s work. Often, a prior work is quoted to pay homage, evoke another cultural period, or make fun of it. Mozart, Wagner, Bartók, and Debussy all wrote music that mocked contemporaries whom they disliked. Bartók imitated Dmitry Shostakovich’s Symphony no. 7 with a parody that he described as “trumpets give a Bronx cheer; high strings and woodwinds shriek derision . . . woodwinds trail off in giggles; trombones fart, glissando. The whole wind band combines trills with an umpah bass to introduce . . . violins in varied repetition of the Shostakovich tune.” Taking this impulse a step further, Peter Schickele, better known as

P.D.Q. Bach, has built a career as a musical parodist using Johann Sebastian Bach's oeuvre.

But imitation is not just a matter of making fun. On the record sleeve of an orchestral recording of his *Sinfonia*, Luciano Berio explained that the third section was composed as an homage to Mahler: "It was my intention here neither to destroy Mahler (who is indestructible) nor to play out a private complex about 'post-Romantic music' (I have none) nor yet to spin some enormous musical anecdote (familiar among young pianists). Quotations and references were chosen not only for their real but also for their potential relation to Mahler."

In drawing upon the blues, rock music carries on the same tradition of reinventing and interpreting the art that has come before. Sometimes the imitations are strikingly similar. Led Zeppelin's "Whole Lotta Love" is remarkably close to "You Need Love" by the blues composer Willie Dixon, and the band's "The Lemon Song" is clearly related to Howlin' Wolf's "Killing Floor." (Dixon actually sued Led Zeppelin and later settled.) Scholars such as Siva Vaidhyanathan have identified many clear lines of musical influence, if not outright imitation, that connect Muddy Waters to Eric Clapton, Chuck Berry to the Beach Boys, and Big Mama Thornton to Elvis Presley. While there is little question that all of these artists were distinctive innovators, it is not always possible to identify precisely who, if anyone, is solely responsible for a given innovation and whether it should be protected through an exclusive property right.

Vaidhyanathan illustrates the profound limitations of copyright law by recalling an Alan Lomax interview with the blues artist Muddy Waters. Asked about the origins of his song, "Country Blues," Waters admits in the course of a rambling conversation to at least five identifiable sources: Waters himself "made it" on a certain occasion; the song was received knowledge that "come to me just like that"; the song may have derived from a similar song by Robert Johnson; Waters's mentor Son House taught the song to him; and the song "comes from the cotton field."

What may seem like a confusing set of contradictory statements is, in the blues tradition, a unified field. Tradition, inspiration, and improvisation are all wrapped up together, making it impossible to tease out with absolute certainty what is "original" in a given piece of music, let alone assign clear property rights to it. As Vaidhyanathan points out, "Blues originality is just very different from the standard European model. Original-

ity in the blues is performance-based. Pen and paper never enter the equation unless the song is considered for recording and distribution. . . . The blues tradition values ‘originality’ without a confining sense of ‘ownership.’ In the blues tradition, what is original is the ‘value-added’ aspect of a work, usually delivered through performance.”

If it is easier to discern the creative borrowings that occur in rhythm and blues or folk music than in, say, pop music, that is because these types of music have historically invited imitation and derivation as part of their tradition. By contrast, pop music, as an artifact of the mass marketplace (Tin Pan Alley, vaudeville, the Broadway musical), has grown up with a tradition of strict copyright protection. Outright, explicit imitation is therefore more rare, if not illegal, in pop music, than in the “open” traditions like folk.

Interestingly, one artist who straddles these two musical worlds, and who therefore embodies their contradictions, is Bob Dylan. Dylan is one of the most original contemporary composers yet one of the most inveterate “borrowers” of other people’s work. But does Dylan “steal”?

The issue came to the fore in 2003 when a Dylan fan discovered that some lyrics on Dylan’s 2001 album *Love and Theft* were almost verbatim lines from a 1991 novel, *Confessions of a Yakuza*, by Japanese novelist Dr. Junichi Saga. (Dylan would neither confirm nor deny to the *New York Times* having read the book.) While copyright attorneys might be shocked at such “plagiarism,” folk music fans (and Bob Dylan fans in particular) know that the essence of such music is appropriation and collage. “Allusions and memories, fragments of dialogue and nuggets of tradition have always been part of Mr. Dylan’s songs, all stitched together like crazy quilts,” wrote the *New York Times* music critic Jon Pareles about the incident. “His lyrics are like magpies’ nests, full of shiny fragments from parts unknown.”

It was pointed out that the melody of Dylan’s first big hit, “Blowin’ in the Wind,” was based on an antislavery spiritual, “No More Auction Block.” Woody Guthrie’s tunes drew heavily on songs recorded by the Carter Family. The difference between Dylan and Guthrie is that Dylan is quite proprietary about his songs, to the extent of testifying before Congress on behalf of a twenty-year copyright term extension. Guthrie, as we saw earlier, was only too proud to have his works become so integrated into the culture that his authorship is forgotten.

In the 1960s the folksinger Pete Seeger introduced a little-known innovation that sought to bridge the “community ownership” of a song with the individual “authorship” claimed by a subsequent songwriter or performer. The song at issue was “We Shall Overcome.” Seeger had first heard it in 1947 when Zilphia Horton, a white woman who was one of the founders of the Highlander Research and Education Center, had taught it to him. She in turn had learned the song the year before from African American women on strike against the American Tobacco Company in Charleston, South Carolina. To keep their spirits up on the picket line, the women had adapted an old gospel tune, “I’ll Overcome” or “I’ll Be All Right”; one of the strikers, Lucille Simmons, sang the song movingly as “*We* Will Overcome” in a very slow meter.

Seeger loved the song, but changed the words to “*We Shall Overcome*” (“I think I liked a more open sound,” he said) and added some new verses, “We’ll walk hand in hand” and “The whole wide world around.” In 1952, Seeger taught the song to a California singer, Frank Hamilton, who then introduced the song to Guy Carawan, who in 1959 brought the song back to the Highlander Center and its young civil rights activists. After Carawan taught it to the founding convention of the Student Nonviolent Coordinating Committee in Raleigh, North Carolina, “*We Shall Overcome*” quickly spread throughout the South despite the absence of a recording of it.

As Seeger recalls in his autobiography, *Where Have All the Flowers Gone*, “In the early ’60s, our publishers said to us, ‘If you don’t copyright this now, some Hollywood types will have a version out next year like ‘Come on Baby, We shall overcome tonight.’ So Guy [Carawan], Frank [Hamilton] and I signed a ‘songwriter’s contract.’ At that time we didn’t know Lucille Simmons’ name.” To acknowledge their debt to gospel congregations, the Food and Tobacco Workers Union, and others who had “created” the song, Seeger and his friends created the We Shall Overcome Fund under the auspices of the Highlander Center. The fund receives the royalties from the song and makes annual grants “to further African American music in the South.”

The fund is just one case in which Seeger has earmarked a portion of his royalties for the musical communities that originated a song. The idea, he said, is to buck the common industry practice of ignoring the collective origins of music. Or as Joseph Shabalala of South Africa’s Ladysmith

Black Mambazo has reportedly said, “When the word ‘traditional’ is used, the money stays in New York.”

Should artists be able to strictly control how their works may circulate and who may use them? Copyright law provides a compulsory license that lets anyone do a “cover” version of an artist’s song for a fixed fee, which is why so many versions of “White Christmas” and “I Shot the Sheriff” are floating around. But if artists want to sample portions of a song or change it significantly, permission is needed from the copyright holder. As we will see below, this means that only wealthy recording artists can afford to pay the licensing fees to sample works that have come before. The struggling newcomer cannot afford to make a new song using samples of Aerosmith’s “Dream On” as Eminem did in “Sing for the Moment.”

One must remember that “theft” is a slippery term. Dr. Saga was delighted to learn that Dylan had used lyrics from his novel, and was surely doubly thrilled when *Confessions of a Yakuza* subsequently rose to number 117 on Amazon.com’s best-seller list and number 8 among biographies and memoirs. It is, in fact, a recurrent pattern for a new work to provoke interest and sales in a prior work on which it is based in some way. When Paul Simon wrote songs that imitated the style of Ladysmith Black Mambazo—prompting some purists to charge that Simon had ripped off their music for personal gain—sales of Ladysmith Black Mambazo’s music soared.

For artists whose work is reused by another artist, derivative works can be gifts as much as thefts. For the culture at large, new creations generally enrich it.

The problem is that copyright law has trouble recognizing imitation as anything but theft. Happily, some progress is being made. Certain forms of imitation such as parody are starting to gain greater legal protection. For years, comedians, disc jockeys, and even *Mad* magazine were being successfully sued for musical parodies, sometimes of the most innocent variety (see chapter 4). Finally, in 1994, the U.S. Supreme Court for the first time gave broad protection to parody as a legitimate form of fair use.

The rap group 2 Live Crew had appropriated the music and title of Roy Orbison’s famous song “Oh, Pretty Woman.” At critical points in the song, “pretty woman” became “big hairy woman,” “bald headed woman,” and “two timin’ woman.” Hilarious, but legal? The district court thought

so, but the Sixth Circuit had ruled that the song was “presumptively . . . unfair” because its use was primarily commercial.

A unanimous Supreme Court struck down this presumption, legitimizing a much greater cultural space for commercial parodies than ever before. The Copyright Act of 1976 had enumerated four factors that should guide the courts in deciding if the use of a copyrighted work constitutes “fair use,” a legal use of a work by someone other than the copyright owner.* In this case, the Supreme Court held that none of the four fair use factors are controlling in determining whether a parody is fair use. The ruling also recognized that appropriation, even of an entire work, may be necessary for a parody, and thus protectable under the fair use doctrine. For this reason alone, wrote one legal commentator, *Campbell v. Acuff-Rose Music, Inc.* “could very well go down in jurisprudential history as the case that shepherded copyright law’s entry into the post-modern era.”

While the *Acuff-Rose Music* ruling is a welcome development, it represents only a small recognition that creativity is an ongoing cultural conversation, and that any such conversation requires copying. Literal-minded courts are still likely to regard send-ups that are *too* sly and sophisticated

* The Copyright Act of 1976 stipulates four guidelines in Section 107 for determining whether a use of a copyrighted work shall be considered a “fair use”: (1) *the purpose and character of the use* (“transformative” noncommercial uses, such as research, scholarship, criticism, and news reporting, enjoy greater protection than commercial uses); (2) *the nature of the copyrighted work* (greater leeway is given to excerpting from factual works than from creative works such as novels); (3) *the amount and substantiality of the portion used in relation to the whole* (shorter excerpts are more defensible than longer ones); and (4) *the effect of the use on the potential market for the copyrighted work* (the second work should not compete in the marketplace with the original).

While these guidelines provide some help to the courts in determining what shall be considered fair use, the House Judiciary Committee in its report on the 1976 Copyright Act acknowledged, “Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.” In 2002, Professor David Nimmer offered a devastating empirical critique of the incoherent adjudication of the fair use doctrine, concluding that “the four statutory factors to reach fair use decisions often seems naught but a fairy tale.”

as theft. Unfortunately, as currently constituted, copyright law just cannot sufficiently recognize that sharing and collaboration are a natural, vital part of any artistic tradition.

How Illegal Rap Sampling Revived the Music Business

It is hard to imagine a more powerful threat to the basic premises of copyright law than rap music and its signature technique, sampling. Sampling in some form or another is nothing new, of course. Composers and performers have always taken melodies or rhythms or styles of their favorite songs and built something new around them. But in the 1980s, two diametrically opposed forces began to collide with each other: more record companies began to invoke copyright law to control smaller and finer “units” of the works (distinctive guitar riffs, melodies, and vocals) even as new technologies were giving artists (and the mass public) new powers to make music using *verbatim* samples of those sounds.

Over the past twenty years, digital sampling has enabled entirely new genres of musical collage—hip-hop, DJing, mash-ups—which in turn has made the line between originality and copying very blurry indeed. If dozens of samples can be taken and remixed into a new song altogether, who is its “author”?

Clearly, large-scale digital sampling involves “taking someone else’s work” and is generally regarded as a flagrant copyright infringement. But just as clearly the new art forms, rapping and DJing, are acts of considerable creativity in their own right. Moreover, they mimic the very borrowing and creative transformation that has always characterized artistic work. What is interesting about rap music is how this underground, “pre-market” musical genre arose over the course of the 1980s and 1990s and became a cultural juggernaut that transformed pop music, entertainment, and fashion. Its ascendance had nothing to do with the copyright “incentives” that are presumed to be necessary for artists to create. Rather, rap emerged and flourished as a fresh and vital genre precisely because it ignored intellectual property norms. Rap was born in a cultural commons, not a market.

Rap sampling is the product of a very different creative ecology than the copyright-based environment responsible for pop music. The pop aesthetic

is based on traditional copyright notions of authorship and originality. A pop star presents herself as the sole creator of an original work, and makes only token gestures to acknowledge creative debts to earlier artists and traditions. By contrast, the African American musical traditions—jazz, blues, rap—are deeply rooted in communal sharing and collaboration. A big part of the music is invoking the signature riffs and styles of great masters to communicate one's musical and cultural identity.

“Exclusive ownership of creative materials runs counter to the ethical codes of African-American musical culture,” writes Joanna Demers, an assistant professor of music history and literature at the University of Southern California. “Emphasizing the continuity of life rather than the differences between generations, African metaphysics did not conceive of originality as creation from nothingness, since everything had already been created. Rather, originality is to be found in the novel combination of multiple elements from both the present and the past, an idea very similar to the Western definition of craftsmanship.”

Demers cites an observation by Christian Béthune that African American culture has always been based on the borrowing and creative reassembly of previous works: “Cut from his roots, the black man on American soil is left only with fragments and debris stemming from heterogeneous worlds: disparate memories of African heritage, hymns and canticles from the Christian tradition, sailors' music learned on the docks, etc. The sole means of reconstructing an original expression consisted in drawing from this inheritance, even if this meant refurbishing these scattered bits using one's own sensibility.”

Thus, while performers in the blues, funk, or soul music traditions may contribute something fresh and distinctive, they also like to invoke the musical motifs of predecessors. No one regards this as piracy or imitation. Rather, it is a way to declare one's identity and pay homage to a respected cultural tradition. The impulse to assert a community affiliation—or comment upon another performer—is at the root of sampling in hip-hop, asserts Demers, whose doctoral dissertation is entitled “Sampling as Lineage in Hip-Hop.”

Sampling represents a profound threat to the copyright tradition because it threatens to eliminate the “authorship” of a piece of music. Yet without free, unrestricted access to other people's music, it is safe to say that rap would never have developed in the first place. Chuck D and Hank Shocklee, two early rap pioneers, told *Stay Free!* magazine that hip-

hop music would never have gotten off the ground in the 1980s if today's copyright regime for sampling had been in place. "It wouldn't be impossible," conceded Shocklee, but, he insisted, "it would be very, very costly." Shocklee estimated that a single sample could cost half the revenues that an album might earn.

If most pop musicians are highly proprietary about the music that they "own," the early hip-hop artists considered every sound in the culture as fair game for their creativity. The first hip-hop samplers developed a technique of "scratching," the manual rotation of a vinyl record back and forth to produce unique sounds from individual grooves. The essence of the music was a real-time performance pastiche using someone's else's recorded music.

Scratching and sampling thus shifted the locus of "originality" from the composer to the rapper and DJ, whose creativity consisted of the selection and arrangement of samples. Said another way, sampling put composers, rappers, DJs, and record producers on a more or less equal footing—as appropriators of other people's music. In rap music, originality was more about an artist's live performance and improvisation, not the notes as written on sheet music.

With the proliferation of sound synthesizers and, later, inexpensive digital audio and computer technologies, the musical palette for hip-hop sampling exploded. Musical creativity became democratized. It became possible for anyone to draw upon hundreds of snippets of sound, modify them in novel ways, and assemble a sonic collage that might just attract an audience. In these dynamics, rap might be considered a musical analog to open source software: a creative milieu that is open to anyone and receptive to merit no matter its source.

For *New York Times* music critic Neil Strauss, writing in 1997, sampling was a refreshing musical development: "Only when plundering and originality come together to create something new does sampling become reminiscent of pop's pre-rock days, when new and vital music came out of the intersection between a good song, a good interpreter and perhaps a good arranger. The same cliché that applies to any remake applies to sampled songs: in a valid, worthwhile version, an artist makes the song his or her own. Examples range from John Coltrane playing 'My Favorite Things' to Frank Sinatra singing 'I've Got You Under My Skin.'"

What began as an underground ghetto art form in the 1970s had by the early 1990s become a \$1 billion market. Naturally, as certain songs

became hits, questions about who “owned” a given snippet of music became the subject of legal wrangling. After all, a hit rap song was now worth some serious money.

The bigger stars generally tried to pay licenses for samples, largely to placate their record labels, but many other rap artists, perhaps most, did not bother, especially if the sample was short and not a major, recurring component of the song.

Inevitably, major copyright disputes over sampled sounds arose. One notable lawsuit was waged by Tuff City Records of New York City against Sony Music, distributor of Def Jam Records, in 1992. The dispute involved the sampling of a drum track. An attorney for a sample clearinghouse told a reporter, “Everyone takes beats from other songs, adds things over them, amplifies them, does anything they have to do to make their own track. If Tuff City wins, it could mean you’d have to clear everything on a record.”

Tuff City lost the case because it could not prove it held copyrights for either the recordings or the compositions. In addition, the court found that the sampled drumbeats were significantly changed and recontextualized from the original sources. The ruling, *Tuff 'n' Rumble Management v. Profile Records*, proved influential because it recognized that music sampling can be done without permission under certain circumstances if the use is a “transformative appropriation.”

Another such case involved the jazz flutist James Newton Jr., who was appalled to discover in 1998 that six years earlier the Beastie Boys had sampled six seconds of his song “Choir” for their hit “Pass the Mic,” which in turn was later used on the MTV show *Beavis and Butt-Head*. It turned out that Newton’s record company had given permission to use the recorded sample, but Newton, as the composer of the piece, had not given his permission. A court eventually ruled that the sample was a “recording,” and not a “composition.” It held that the three-note sequence that the Beastie Boys had sampled—a C, a D-flat, and a C, with a background C segregated from the entire piece—was such “a small and unoriginal portion of music” that it cannot be protected by copyright. Curiously, this ruling appears to contradict the precedents of previous fully litigated sampling cases, in which virtually any sound—screams, drum beats, odd sounds—counted as an original “composition.”

As the market value of rap songs grew, the uncertainty over how to license samples became a more urgent problem, as Vaidhyanathan recounts in his book *Copyrights and Copywrongs*, “Because sampling raised so many

questions, labels pushed their more successful acts to get permission for samples before releasing a record. The problem was that no one knew what to charge for a three-second sample.”

What emerged was an ad hoc system of negotiated licenses for samples. An influential force was a 1991 federal court ruling that forced rapper Biz Markie to pay Gilbert O’Sullivan for taking the first eight bars of his 1972 single “Alone Again (Naturally).” The judge bluntly declared that Biz Markie’s sampling was theft: “‘Thou shalt not steal’ has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed.” The ruling made no provisions for fair use of prior works. Understandably, Biz Markie’s lawyers quickly settled.

Once the courts had weighed in on the sampling issue, their rulings began to change the very nature of rap music. “Rap music since 1991 has been marked by a severe decrease in the amount of sampling,” writes Vaidhyanathan. “Many groups record background music and then filter it during production so it sounds as if it has been sampled. . . . The 1991 ruling removed from rap music a whole level of communication and meaning that once played a part in the audience’s reception to it. The Biz Markie case ‘stole the soul’ from rap music.”

As sampling licenses became the legal norm, creative freedom became a privilege that only the richest, most established artists could afford. It also meant that certain types of works would never get produced at all. Public Enemy produced a track, “Psycho of Greed,” that was originally recorded for the group’s album *Revolverution*. The track never made it onto the album, however, because it sampled the Beatles song “Tomorrow Never Knows,” whose owner, Capitol Records, was asking more for the sample than Public Enemy was willing to pay.

An art form that had been open to anyone, especially impoverished inner-city African Americans, was becoming a proprietary genre whose participation required serious money for licensing fees. Once the proper-tization of music had worked its way down to four-second sound bites, hip-hop had moved far beyond its communal urban roots and become another branch of the music business. By September 2004, the Sixth Circuit Court of Appeals held that even single notes and chords could not be sampled, even if the original sound was unidentifiable. The court sniffed, “Get a license or do not sample. We do not see this as stifling creativity in any way.” So much for fair use.

Some commentators have argued that the rise of sampling licenses caused a decline in the verve, inventiveness, and social bite of rap music. Others argue that any music placed in modern commerce simply must abide by traditional copyright norms and that the market helped amplify rap's cultural influence. There is a certain irony, nonetheless, that a musical genre based on illegal, unfettered appropriation became a global force that arguably saved the ailing music industry.

The music historian Demers writes: "Those rappers in the 1980s who sought a musical 'free-for-all,' in which sounds could be sampled with impunity, were probably veering towards what would have been the first postmodern state of copyright law, a world in which no conditions are set on originality and authorship, and thus where all songs, regardless of their constituent material, are equally original." That vision turned out to be a short-lived creative experiment, and perhaps an unsustainable one. Yet it also suggested that the wellsprings of creative renewal do not necessarily have anything to do with copyright law.

The Sequel to Sampling: Mash-ups

Rap sampling may have evolved into an art form requiring a fat bank account and rights-clearance bureaucracy. Yet the urge to create music is a powerful force in its own right. In the past several years, another genre of openly recombinative music—the bootleg remix, or mash-up—has also soared out of the musical underground and thumbed its nose at copyright law.

Like rap, the bootleg craze had its origins with DJs in clubs, mostly in Britain and Europe. Once again, the genre grew out of creative improvisation and performance. But this time, the resulting songs were embedded in MP3 computer files and shared via the Internet. Making a bootleg remix is fairly easy. All a teenager has to do is download a software program like Acid, blend samples from two or more wildly different songs, and then send the crazy remix out to the wider world via peer-to-peer file-sharing programs. The best remixes can quickly circulate the planet like a global virus; indeed, that is how the trend spread from Europe to the United States.

One appeal of bootleg remixes is the unexpected sounds that can emerge from familiar pop music. Who would think that Christina Aguilera's "Genie in a Bottle" could be mixed with the Strokes' "Hard to Explain," or that a Hall and Oates song could be mashed with Daft Punk?

The mash-up verges on becoming a new genre unto itself by bringing together the legendary and the obscure, and the virtuoso and the tacky. Remixes often discover unexpected depth, emotion, and styles in old, familiar songs.

“The more disparate the genre-blending is, the better,” writes Roberta Cruger in *Salon.com*. “The best mash-ups blend punk with funk or Top 40 with heavy metal, boosting the tension between slick and raw. Part of the fun is identifying the source of two familiar sounds now made strange—and then giggling over how perfect Whitney sounds singing with Kraftwerk.”

Certain recording artists like Eminem and Missy Elliott are especially popular on the mash-up scene because their music can be easily mixed with a wide variety of other artists and styles. Critic Robert Wilonsky writes, “These are amazing songs not because they merely fuse the previously incompatible, but because they render the familiar absolutely, brilliantly brand-new—and they do so without losing the integrity of the two parties suffering through this shotgun marriage.” Others have pointed out that mash-ups are actually a way to “dis” one genre of music by contrasting it unfavorably with another, as when Celine Dion is mixed with Sigur Ros or Beyoncé with Nirvana. The pop hit usually comes off as trite when paired with a punk, rap, or hardcore song.

Like early rap songs, bootleg remixes are outright appropriations of other artists’ work. But they also reinvigorate lots of old, often forgotten music. In some ways, this is a dimension of the creative process, the reinvention of the old, that copyright law makes little provision for. Clearing permissions can be exceedingly difficult; fair uses are highly limited; and copyrighted songs often do not enter the public domain for more than a century.

It is a thrill, therefore, when a familiar contemporary song is reversioned in an unexpected way. A much-cited precursor to contemporary mash-ups is the 1980s collaboration between Run-DMC and Aerosmith that resulted in a rap version of “Walk This Way.” The stunt showed how divergent musical traditions could produce a popular song while drawing fresh attention to an old rock band.

While that was a consensual collaboration, bootleg remixes are, of course, wholly illegal. This is surely one reason they are so popular. They have a whiff of cultural transgression. But like Trekkies who write illicit fan fiction, remix artists have little compunction about using fragments of

mass culture for their own ends; their moral license to revamp fragments of pop culture stems from their emotional rapport with them.

In any case, obtaining legal clearances for every sample in a mash-up is next to impossible. A Belgian DJ act known as 2ManyDJs demonstrated this when they set out to produce a commercial CD of bootleg remixes. This required them to obtain copyright permissions for each of dozens of samples that they had mashed together for an album of songs. The album took two weeks to produce; the permissions clearances—involving letters, faxes, and e-mails to dozens of record labels around the world—took nearly a year, and one-third of the respondents refused to grant permission. The crowning irony was that many of the rejections came from the biggest names in the business—the Beastie Boys, Beck, Missy Elliott, Chemical Brothers—whose early careers were built on sampling other people's works. (Of course, it is quite likely that it was really the record labels, and not necessarily the artists themselves, who rejected these requests.)

One band that has become famous for its inventive remixes is Negativland, a Concord, California, band that since 1980 has specialized in music “collages” using borrowed songs from every imaginable source, especially pop music and television shows. With the anarchic zeal of the Dadaists, Negativland's five male members have produced such albums as *Plunderphonics* and *Escape from Noise*. One of the band's most famous music collages, a spoof of U2's “I Still Haven't Found What I'm Looking For,” triggered a three-year legal battle (see page 214).

Remixes have become so popular that established artists and their labels seem to be sending mixed messages to rappers who do remixes. A number of rappers, including Jay-Z and Eminem, now release a cappella raps on their singles, in effect inviting others to remix their songs. Glenn Otis Brown, the executive director of the Creative Commons, a group that provides alternative licenses for creative works, calls this “a great example of our two-tiered copyright system. Labels are saying, ‘If you do [a remix] on the underground scene, it's OK. But if it's so compelling that people trade it all over the Internet, then we're going to sue you.’”

But can such two-tier treatment survive? Mash-ups may be unstoppable. They are migrating to the mainstream with remarkable speed and popularity. An early sign of this was the illegal remix known as *The Grey Album* made by Brian Burton, a rapper who goes by the name Danger

Mouse, by remixing Jay-Z's *Black Album* with the Beatles' *White Album*. Released on file-sharing networks in early 2004, *The Grey Album* became an immediate, critically acclaimed hit. *Rolling Stone* called it "an ingenious hip-hop record that sounds oddly ahead of its time," and the *Boston Globe* called it "the most creatively captivating" album of the year.

When EMI Records, who holds the Beatles' rights, sent cease-and-desist letters to dozens of Web sites that offered downloads of *The Grey Album*, a protest was mounted on February 24, 2004—"Grey Tuesday"—when more than two hundred Web sites offered free—and illegal—downloads of the album. More than one million downloads were made, or more song tracks than represented by sales of the best-selling album at the time, Norah Jones's *Feels Like Home*.

The point of the protest, said organizers, was to show how the current legal environment gives the five major record labels a stranglehold over the types of musical creativity that can develop and be sold. "EMI isn't looking for compensation, they're trying to ban a work of art," said Rebecca Laurie of Downhill Battle, a music industry watchdog group that organized the protest. Nicholas Reville, cofounder of Downhill Battle, said, "Remixes and pastiche are a defining aesthetic of our era. How will artists continue to work if corporations can outlaw what they do? Artists, writers, and musicians have always borrowed and built upon each other's work. Now they have to answer to corporate legal teams."

If nothing else, mash-ups testify to the strong, spontaneous surges of creativity that naturally occur among artists and ordinary people even in the absence of intellectual property rights. The real challenge ahead is in finding better ways to honor such open creativity, which in the past has given us jazz, blues, and rap, while allowing artists to enjoy reasonable market rewards from their works.

Copyright Colonizes the Subconscious Mind

In declaring that "originality" is the preeminent trait of a creative work, copyright law often runs up against an embarrassing reality: sometimes great works are brilliant derivations. "In art," wrote George Bernard Shaw, "the highest success is to be the last of your race, not the first. Anybody, almost, can make a beginning; the difficulty is to make an end—to do what cannot be bettered." Without knowingly copying a predecessor,

many artists nonetheless end up making remarkably similar versions of prior works. Great art can at once be an original and yet a copy.

Copyright law skirts past this paradox by invoking a Freudian sleight of hand, the doctrine of “subconscious copying.” Although the doctrine has been around for more than seventy-five years, it was rarely applied until a federal court ruled that former Beatle George Harrison’s 1969 song “My Sweet Lord” unlawfully copied the Ronald Mack song made famous in 1963 by the Chiffons, “He’s So Fine.”

The subconscious copying doctrine had its origins in 1924 when Judge Learned Hand was confronted by the credible claim of composer Jerome Kern that he had independently composed a song, “Kalua,” that featured a passage known as an “ostinato” that was virtually identical to one that occurred in an earlier song, “Dardanella,” by Fred Fisher. An ostinato was described to the court as a “constantly repeated figure, which produces the effect of a rolling underphrase for the melody, something like the beat of a drum or tom-tom, except that it has a very simple melodic character of its own.” While the sequence of notes used in Kern’s ostinato was traced to several classical works, the specific notes had apparently never been used in an ostinato before “Dardanella.”

The conundrum facing the court was how Jerome Kern could both create something independently and yet copy it as well. Carl Jung famously theorized the existence of a “collective unconscious” that humans in all cultures draw upon to create strikingly similar myths and motifs. In theory, copyright law recognizes independent creation as an absolute defense against copyright infringement. But in practice, few judges or juries want to believe that the similarities occur innocently. There may be a deep psychic commons in human societies that at times, mysteriously, generates nearly identical creative works. Philosophically, copyright law does not want to hear about it. As Judge Hand declared:

Everything registers somewhere in our memories, and no one can tell what may evoke it. On the whole, my belief is that, in composing the accompaniment to the refrain of Kalua, Mr. Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before. I cannot really see how else to account for a similarity, which amounts to identity. So to hold I need to reject his testimony that he was unaware of such a borrowing.

By invoking “subconscious copying”—the unwitting use of prior artistic works in new ones—the courts ingeniously found a way to punish the infringer without questioning his integrity. The courts could also uphold the fiction of immaculate originality in copyrighted works, and insist that originality trumps its eternal twin, creative imitation and transformation.

The subconscious copying doctrine lay dormant for nearly fifty years after Judge Hand’s 1924 ruling partly because it was tethered to several stringent factual premises. A defendant had to have been exposed to the plaintiff’s song. The two works had to be “substantially similar.” And the period of time between an artist’s exposure to the first work and the creation of the second (or in the law’s formulation, “the degree of temporal remoteness”) had to be short.

But with the George Harrison case, in 1983, these prerequisites for finding “subconscious copying” were relaxed. At trial, Harrison admitted that “He’s So Fine” and “My Sweet Lord” did sound “strikingly similar.” Even though Harrison had composed his song six years after first hearing the Chiffons’ song, the appeals court held that copyright infringement had occurred.

The subconscious copying doctrine was stretched a few cubits further in a dispute between the Isley Brothers and crooner Michael Bolton and co-composer Andrew Goldmark. In 1990, Bolton and Goldmark composed “Love Is a Wonderful Thing,” which Bolton recorded the next year. The song ended up as No. 49 in *Billboard’s* pop chart for 1991.

At the time, Bolton wondered aloud whether the song had already been written, asking Goldmark whether they were simply composing Marvin Gaye’s “Some Kind of Wonderful.” Bolton had good reason to suspect that he may have been treading on familiar ground: there were 129 songs called “Love Is a Wonderful Thing” registered with the U.S. Copyright Office at the time of the trial; 85 of them had been registered before 1964, when the Isley Brothers wrote and recorded a song with that title. (Titles of songs cannot be copyrighted.)

A jury hearing the case of *Three Boys Music Corp. v. Michael Bolton* ended up finding a “substantial similarity” between the two songs. The reasons cited were that both songs shared the same title hook phrase, a shifted cadence, instrumental figures, a verse/chorus relationship, and a fade ending. The court ruled that Bolton and Goldmark were guilty of copyright infringement even though the evidence of their exposure to

the Isley Brothers' song was circumstantial. The court found that "it is entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later."

The loosening standards for applying the subconscious copying doctrine are troubling for creative freedom. As one legal commentator put it:

No longer is the doctrine reserved for instances where access [to a prior work] is certain, similarity is substantial and temporal remoteness is low. . . . In light of [the Isley Brothers/Michael Bolton case], it seems that the mere spark of questionably substantial similarity between two works may spawn a flame of inference that a defendant copied a song he might have heard two decades before, and that flame may carry the day. . . . One might ask whether a work created independently of one's consciousness is really "copying."

And so copyright law extends property rights into the vast psychic and cultural commons known as the subconscious. In the wake of the Michael Bolton case, artists are understandably wary about the mere possibility of a subconscious copying lawsuit. Rather than risk huge legal fees and the personal anguish and publicity of such a suit, artists and their labels are more likely to just decline to release a song.

Now that old films, music, visual images, advertising, and ephemera are being resurrected and made available to contemporary consumers on all sorts of media, including the Internet, one can only imagine the train wreck of competing copyright claims that may be justified in the future by the subconscious copying doctrine. One trembles to contemplate the effects on creativity.

Copyrighting "Genetic Tunes"

As biotechnology has learned to unlock the secrets of the human genome and animal cloning, it has raised new questions about who shall own and control the information contained in DNA. While the courts have allowed the patenting of some genetic information, the idea of owning genes or species has been tremendously controversial. Should a private

company be able to limit scientists from investigating specific types of cancer cells even if that inhibits the development of new treatments? What are the ethical—or competitive—implications of allowing anyone to own certain animal breeds or clones?

Entrepreneur Andre Crump came up with an ingenious end-run around all these patenting questions: *copyright* your DNA.

Normally, of course, DNA is not copyrightable because it is naturally occurring. It is not an “original work of authorship” as copyright law requires. But what if the long strings of molecules of DNA—the nucleotides comprised of adenine, guanine, thymine, and cytosine, and represented by the letters *A*, *G*, *T*, and *C*—could be converted into a musical tune? That tune would be unique and could itself be construed as an original work of authorship and, as such, be entitled to copyright protection.

In recent years, converting DNA into music has become something of a fad. According to *Wired News*, John Dunn, the founder of Algorithmic Arts, and his biologist wife, Mary Anne Clark, have “sonified” the DNA of vampire bats, slime molds, and sea urchins using the company’s Bank-step software. They even released an album in 2001 called *Life Music*, featuring such “songs” as “Triose Phosphate Isomerase,” “Beta-globin,” “Alcohol Dehydrogenase,” and “Collagen.” The “tunes” have been described as having a New Age feel; one online catalog referred to it as “ambient music.”

More recently, scientists at Ramon y Cajal Hospital in Madrid were fascinated with the possible links between music and genes, and so decided to translate DNA code into music by assigning the DNA units *A*, *G*, *T* and *C* to musical notes, and then turning DNA sequences into sheet music. It turns out that a yeast gene known as SLT2 has a triplet of nitrogen bases that appears several times in succession. In musical terms, this yields an “ostinato” whose sound is “a very sad part [of the DNA song], but a beautiful one,” according to its “discoverer,” Sanchez Sousa. Ten of the DNA tunes have been released as a CD, *Genoma Music*. (One wonders who should be considered the author of these “original works.”)

But back to Andre Crump. His great insight was to see how the DNA-into-music software could offer an easy way to obtain property rights, via copyright law, for DNA sequences. Not only would an elusive realm of life be redefined as property, the legal protection would last for the lifetime of the “author” plus seventy years (or ninety-five years for corporate owners). In 2001, Crump founded the DNA Copyright Institute to offer



Is DNA an “original work of authorship”? Creative Time commissioned six artists to design paper coffee cups to spark public conversations about genetic research. This one (front and back are shown here) is by Larry Miller.

to identify the unique DNA Profile of a person or animal, and then copyright it. The cost: \$1,500.

The idea is to establish a legal basis for asserting ownership of the DNA against any future infringers. “Clients can establish copyright protection guaranteeing legal recourse so that their personal DNA pattern cannot be duplicated in printed, electronic, photographic or biological form,” the company claims. Crump warned that the copyrighting may not necessarily prevent someone from being cloned, but at least it would offer a legal remedy.

If that sounds far-fetched, Crump tried to entice would-be customers with dire futuristic scenarios of unauthorized cloning: “Imagine the biggest Tom Cruise fans around the world, fighting over the chance to procure his drinking glass for the possible DNA samples, or attempting to shake his hand so they can casually scratch a bit of epidermis in a DNA collection sortie. Imagine the sale and resale of not only this DNA, but embryos and other mish-mash made from this DNA in both legal and illegal labs.”

Crump told ABC News: “Who’s the most likely people to be cloned against their will? It’s going to be the celebrities. It’s going to be the superstar athletes, the superstar models, movie stars, television stars, musicians, singers.” By having a copyrighted DNA Profile, celebrities could supposedly protect themselves against the unauthorized use of their likeness, in a quite literal sense. The DNA Copyright Institute also considers the breeders of orchids, cats, dogs, horses, and livestock to be its prime customers.

If the DNA Copyright Institute is one of the most enterprising ventures to commandeer copyright law to protect DNA, it is not the only one. Steven Miller, a high school biology teacher in Oakland, California, has devised what he calls the “poor person’s DNA copyright.” Here’s how it works: Miller takes a photograph of each of his students while the student is licking a postage stamp. Each stamp is then put on an envelope containing the photograph of the student, and mailed to the student. The unopened letters, once received, constitute a kind of common-law copyright, argues Miller, because they represent a fixed expression of original authorship—the DNA of the person (the saliva residue on the stamp), a photograph of the individual, and a dated postmark.

It is too early to know if the courts will in fact recognize these fanciful extensions of copyright law. But why not? Since the first copyright law was enacted in 1790, granting protection to “maps, charts and books,” Congress has expanded copyright law to cover etchings, sheet music, piano rolls, artistic lamp bases, sculpture, software code, architectural drawings, the Yellow Pages of a telephone book (but not the white pages), boat hull designs, and virtually any other creative act that can be reduced to a fixed, tangible medium. If a dash of creativity can now be combined with DNA to produce an original, tangible work of authorship, it is hard to discern any principled reason in legal history for withholding copyrights for DNA.