

[What follows are excerpts (including one full chapter, Chapter 5) from the forthcoming book, *Creative License: Digital Sampling and the Law* by Kembrew McLeod and Peter DiCola, with Jenny Toomey and Kristin Thomson (Duke University Press).]

INTRODUCTION

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

Digital sampling is a musical technique that incorporates a portion of a previously existing sound recording into new music.¹ As De La Soul’s Pasemaster Mase tells us, sampling is “taking sounds and meshing them together and putting them all in time, to come up with something totally different.” During the 1970s, hip-hop DJs used the turntable as an instrument that could manipulate sounds—transforming the record player from a technology of consumption to one of musical production. And in the 1980s, hip-hop artists built on these turntable techniques by using digital samplers to construct single songs out of dozens of sampled sound sources. “We’d grab a conga sound,” says Mix Master Mike, a member of the Beastie Boys and the DJ crew Invisibl Skratch Piklz. “We grabbed trumpet sounds, violin sounds, drumbeat sounds, and re-manipulated them and created our own music.”

Sampling can be done by using a variety of media and methods, including: cutting up magnetic audiotape on analog equipment; physically manipulating vinyl records on a turntable; and using digital technologies like computers or drum machines. While the term “digital sampling” refers only to the latter method, many people nevertheless use “sampling” more generally as a stand-in for sound collage, in all its forms. Musicologist Joanna Demers writes, “With the rise of disco, hip-hop, and electronic dance music, transformative appropriation has become the most important technique of today’s composers and songwriters.”² That quote embodies the tension between the positive connotation of “transformative” with the more negative connotation (at least in legal circles) of “appropriation.”

Speaking about the emergence of digital sampling technologies in the 1980s, Chuck D observes that there was a “mad dash of creativity”—both in the realm of musical innovation and technological advances. “Technology companies didn’t necessarily have any kind of allegiance to intellectual property owners,” he tells us. When it first emerged in the 1980s, detractors referred to sampling as “groove robbing”³ and argued that it was a form of aural plagiarism, or it was just plain “stealing.”⁴ One entertainment lawyer diplomatically said at the time, “It may be flattering to have the underlying works used for sampling purposes, but it’s still taking.” Another lawyer representing an artist who had been sampled stated that it “is a euphemism in the music industry for what anyone else would call pickpocketing.”⁵ Therefore, it’s no wonder that Dean Garfield, the Vice President of Anti-Piracy at the Motion Picture Association of America (MPAA), notes, “The area where sampling has raised the greatest legal concern most recently is in hip-hop and rap.”

Technology Challenges Previous Conceptions of Creativity

“Sampling is like the color red. It's like saying, ‘Is the color red creative?’ Well, it is when you use it *creatively*. It's not when it's just sitting there.” – Harry Allen

In addition to the “stealing” allegations, some threw around a term that packed an even heavier rhetorical punch: sampling was “uncreative.” For example, Mark Volman, a member of the 1960s rock band The Turtles—who famously sued De La Soul for sampling his group—bluntly said, “Sampling is just a longer term for theft ... Anybody who can honestly say sampling is some sort of creativity has never done anything creative.”⁶ Entertainment lawyer Anthony Berman, who was working in the music industry when sampling emerged, remembers, “The view on the traditional side was that sampling is a very lazy way of making music, of songwriting.” Engineer Bob Power, who recorded A Tribe Called Quest’s first album, recalls that a lot of engineers said at the time that hip-hop simply wasn’t music. “I have to say; honestly, I think that there was an unconscious element of racism,” Powers says. The technical recording community was a white boys club then, and to a great extent, it still is now. “At the time, I think that a lot of the engineers didn’t want to get with what was coming through the door.”⁷

These “traditional” musicians, engineers, and other industry figures thought these young upstarts were essentially cheating and not putting any creativity into their music. Digital Underground’s Shock G—whose MTV hit “The Humpty Dance” heavily sampled George Clinton’s legendary funk group Parliament-Funkadelic—remembers, “As far as sampling is concerned, a lot of musicians and artists from the past generation thought that our generation wasn't doing enough work.” Hip-hop journalist and cultural critic Greg Tate maintains that the sampler is nothing more than a musical tool, just like drums or an electric guitar—tools that can be used creatively or otherwise. For instance, most people can clearly hear Queen and David Bowie’s “Under Pressure” in Vanilla Ice’s “Ice Ice Baby” or Rick James’ “Superfreak” in MC Hammer’s “U Can’t Touch This.” Few would argue that these are particularly imaginative uses of samples. However, these simplified examples do little justice to the complex rhythms, references, and layers of sound that were created by Public Enemy, De La Soul, A Tribe Called Quest, the Jungle Brothers, and the Beastie Boys in the late-1980s, as well as more contemporary acts like RZA, DJ Shadow, the Avalanches, and El-P today.

Most importantly, hip-hop artists radically rewired the way that we understand how music can be made, something that was recognized early on by hip-hop activist, journalist, and Media Assassin Harry Allen. In 1988, he wrote a prescient piece in the *Village Voice* on sampling, titled “Hip-Hop Hi-Tech.” Allen argues that hip-hop is, intrinsically, electronic African-American music—one that speaks to a “particularly modern comfort with, and access to, electronic technology.” He continues, “Hip-hop humanizes technology and makes it tactile. In hip-hop, you make the technology do stuff that it isn’t supposed to do.”⁸

This can only be done with the technical knowledge, something that is echoed in a comment by Wu-Tang Clan production whiz RZA, who says, “In hip-hop, you must master the technology.”⁹ Allen notes that it is fitting that Joseph Sadler—better known as Grandmaster Flash, the pioneering hip-hop DJ—did not attend a traditional music school to learn his craft. Instead, he went to Samuel Gompers Vocational School to become an electronics technician. “I wasn’t interested in the actual making of music,” Grandmaster Flash recalls. “Beats and grooves were cool, but I wasn’t one of those guys who picked up an instrument and instantly knew what

to do. But electronics were different. Electronics drew me in.”¹⁰ These comments about making music echo something Public Enemy’s Hank Shocklee said in 1988, which was quoted in Harry Allen’s *Village Voice* essay: “Who said that musicians are the only ones that can make music?”¹¹

For many traditional musicians at the time, that statement amounted heresy, but this unease about the role of new technologies is nothing new. Sound artist Vicki Bennett observes that the history of music and technology is one full of anxiety and conflict between the old and the new. “Before people were freaking out about sampling, they were freaking about the invention of the synthesizer and how it was going to destroy orchestras,” Bennett says. “And on a similar level, much earlier, the industry was freaking out about mass duplication.” Lloyd Dunn, of the sound collage group the Tape-beatles, also puts reproductive technologies’ disruptive role in a broader historical context. “Ever since photography in the nineteenth century,” he says, “artists have had to face the notion that there are suddenly machines that are able to produce—*reproduce*—nature better than they could.”

Shock G offers the following analogy: “Perhaps it’s a little easier to take a piece of music than it is to learn how to play the guitar or something. *True*, just like it’s probably easier to snap a picture with that camera [looks at camera] than it is to actually *paint* a picture. But what the photographer is to the painter is what the modern DJ and computer musician is to the instrumentalist.” Tom Silverman, the founder and CEO of Tommy Boy Records, recalls that during the 1980s, “A lot of musicians were really pissed off about [sampling]. Bob James is another one who didn’t like to be sampled, *ever*. . . . Maybe that’s a little bit frustrating to see your song interpolated—or parts of your song used and made into bigger hits—and it exposes you to a broader audience than you ever reached.”

There was no shortage of other traditional instrumentalists who were disturbed by sampling. “Knowing how long he took to work on that drumbeat,” says Harry Allen, speaking sympathetically from the perspective of a sampled drummer, “to get that drumbeat to where it was, and you’re just going to go—*bink*—and just take it right off the record? It almost seemed rude.” For instance, the funk artist Mtume attacked sampling for these very reasons during the 1980s. He referred to it as “Memorex music,” invoking the specter of a lazy new generation of artists who simply hit the *record* button. This criticism from Mtume and other older artists prompted the hip-hop group Stetsasonic to pen a reply in the form of their 1988 hit “Talkin’ All that Jazz.”¹²

Heard you on the radio
Talkin' 'bout rap
Sayin' all that crap about how we sample...
You criticize our method of how we make records
You said it wasn't art, so now we're gonna rip you apart ...
A sample is a tactic
A portion of my method, a tool
In fact it's only of importance when I make it a priority
And what we sample is loved by the majority
But you are a minority, in terms of thought
Narrow minded and poorly taught

Daddy-O, Stetsasonic’s MC, further explained his position on sampling when he told an interviewer, “Sampling’s not a lazy man’s way. We learn a lot from sampling; it’s like school for us.”¹³ Mtume and Bob James notwithstanding, not all older artists hated sampling. George Clinton tells us that he felt at the time that sampling as just a new way to make music, and he recalls that many people from earlier generations dismissed his own group as being uncreative. “My mother called us [Parliament-Funkadelic] lazy too,” Clinton says. “She said we vamped. We just got on the groove and we just held it—held a groove for 20 minutes. She said we were lazy. [laughter] ... Kids love it when you hate it.” Clinton continues, discussing his own views on sampling’s creative potential: “There’s some people out there that who ain’t lazy. [Public Enemy’s] Hank Shocklee is not lazy. I mean, he actually did arrangements with the Public Enemy stuff that was twice as hard to make them blend—all of them atonal, and in different keys. They were just bringing on the noise, and they meant it.”

The Art and Culture of Sampling

“A lot of records back in time have a really good sound, like James Brown—the beats have just have such a *fat* sound.” -Miho Hatori, *Cibo Matto*

Despite the shock-of-the-new that sampling delivered, this technique is merely the latest manifestation of a rich musical tradition—one particularly prevalent in jazz, folk, bluegrass, and blues—where artists have borrowed from, referred to, riffed off of, or stolen from (depending on how you see it) artists of the past. Hip-hop historian Jeff Chang, author of *Can’t Stop Won’t Stop*, explains that there is a tradition of quoting and taking inspiration from previous music within African-American music. “I think sampling is in line with that tradition,” he says. “You’ve got new generations of artists quoting older generations of artists, just to show that they’ve got the knowledge, the bona fides, to be a part of the culture.” Coldcut’s Matt Black points out that when people sample James Brown’s iconic grunt, they are “sampling it because it’s ‘James Brown,’ and you’re referring to his whole canon of music and what he means to us people who love that funky music. So, a good appropriated sample has those two qualities. It has a good quality of its own, and it has a strong reference that evokes cultural resonance as well.”

Sampling is also an extension of the “call and response” tradition; it’s a kind of musical dialogue, one that has existed within African-American music for centuries. Invoking this call and response tradition, pioneering hip-hop DJ Grandmaster Flash once described DJ-ing as a dialogic act: “That’s what mixing two songs together felt like,” says Flash. “A question and an answer. One song would ask, the next one would respond.”¹⁴ Jeff Chang argues, “Sampling itself is an embodiment of this active process of engaging with history.” Sampling artists drew on entire histories and biographies connected to those sounds, whether they were referencing a specific figure like James Brown or a funky decade like the 1970s, more generally. “That’s what’s cool about sampling,” says Drew Daniel, one half of the experimental electronic group Matmos. “It transports the listener, if they’re willing, to move in that pathway, back to a specific moment in time. So, it’s sort of like an archive of memories, of real experiences.”

The underground producer Kid 606 explains the appeal of sampling in the following way. “It’s like Legos,” he says. “If someone said, ‘Here’s a bunch of Legos, put them together,’ you

have something to work with—as opposed to, ‘Here’s a bunch of plastic, mold it, and then start building it.’” Echoing this, remix pioneer Steinski says that sampling technologies have allowed virtually anyone to become a musical producer, even those without musical training. “You don’t have to learn how to play guitar,” says Steinski. “You don’t have to know nothing. All you have to do is get a two-track editing program or a four-track editing program for your computer, and you’re right there. You can make the next big record in the world.”

Miho Hatori—one half of the 1990s duo *Cibo Matto*, who used numerous samples in their work—tells us, “We were always buying records, *searching, searching*, and then sometimes we find, ‘Oh, a Silver Apples record!’ And then we find this one very short part, ‘There, *that* bass line!’” This process of searching for sounds is called “crate digging,” and it’s central to sample-based music. She emphasizes, “To find the right one or two seconds of sound—that’s a lot of work.” Trugoy, a member of *De La Soul*, explains the haphazard ways he looks for potential samples: “I could be walking in the mall and I might hear something, or in a store, something being played in the store, and say, ‘Wow that sounds good.’ Or a sound in an elevator, you know, elevator music, ‘That sounds good.’ If it sounds good and feels good, then that’s it. It doesn’t matter if it was something recent or outdated, dusty, obscure, and, you know, weird.”

Harry Allen provides another motivation for why sample-based artists seek out older sounds. “Many aficionados look for that sound, the ‘warmth’ of analog equipment,” he says, “to bring what they call ‘a more human sound’ back. It’s an interesting way of describing technology: *human*.” Lawrence Ferrara, a New York University musicologist and sampling expert, says that hip-hop producers “want to retain the richly analog sound that they really can’t recreate unless they’re going to use some kind of device that we don’t use anymore in studios. So they want that particular sound.” Music historian David Sanjek maintains that sampling artists often are looking for sounds that offer a certain historical resonance. “I think the ways in which samples get chosen are often because there’s a particular sound that people associate with an era,” Sanjek says. “So I think, for example, people will hear the whacking of [Sly & the Family Stone’s] Larry Graham’s slap back bass style. Probably a significant number of people won’t know Larry Graham from a hole in the ground, but they’ll hear that sound and it conjures up an earlier period—the 60s, the 70s.” On a similar note, hip-hop producer and MC Aesop Rock tells us, “That’s what makes it fun. It’s cool to be able to mix different decades together, you know?”

Some critics of sampling believe that if these hip-hop producers were truly creative, they would bring in session musicians to play a guitar riff, or a flute melody, or a drum break. But that is kind of missing the point, because many believe that there is aesthetic value in using a particular sound. “What comes from a dusty old record has a different type of feel to it that allows you to create a sense of agedness,” says Jeff Chang, emphasizing the aesthetic value of sampling. “The main reason I still sample is, *tonally*,” DJ Abilities says. “I want the *sound* of it.” Even if one could exactly recreate a guitar riff, it is a moot point for many hip-hop producers, because they want to access the sonic qualities that can only be found on a particular old record. They are looking for that certain kind of timbre, a certain kind of aura that signifies, for instance, an old guitar sound taken from a 1970s funk-rock record. “There’s something about sound popping on a record,” Mr. Len says. “You can almost smell the smoke in the air and hear, like, the griminess of a great sample on an ashy-ass record.”

Who Gets the Money and the Credit?

“I never got a ‘Thanks,’ I never got a ‘Hello, how ya doing?’ or anything from any of the rap artists.” – Clyde Stubblefield, drummer for James Brown

Many of the artists, record companies, and song publishers who were uneasy about sampling came around once they realized it could produce a new revenue stream. “It turned out that all the traditional people who were so miffed by this way back in the early days,” says entertainment lawyer Anthony Berman, “realized that there was a *huge* amount of money to be made.” Major record companies realized that their catalogs of black music—which had typically been treated by the industry as disposable commodities—were worth quite a bit. However, this doesn’t necessarily mean that the people who played on records that had been sampled received any money. One notable example of this sad situation is Clyde Stubblefield, who played drums on key 1960s James Brown funk recordings like “Cold Sweat,” “Funky Drummer,” and “Say It Loud, I’m Black and I’m Proud,” among others. He cares less about monetary compensation, though he’s careful to point out that it would be nice to be paid. Instead, he is more interested in being recognized within the music world. He tells us, “I’d prefer to get my name on the record saying, ‘This is Clyde playing,’ to get my name out. Money is not the important thing.”

Stubblefield wasn’t listed as a copyright owner on those James Brown records, which means Stubblefield isn’t legally required to get royalties, or even credit. This is the reason why he hasn’t been paid for the hundreds, probably thousands, of times “Funky Drummer” has been sampled in dance, pop, and hip-hop songs. It’s also the reason why his name isn’t required to appear album liner notes, as he wishes. “I never got a ‘Thanks,’ I never got a ‘Hello, how ya doing?’ or anything from any of the rap artists,” Stubblefield says, shaking his head. “The only one I got a thanks or anything from was Melissa Etheridge.” There are certainly many musicians who retained their copyrights and have been rewarded financially through sample licensing—Curtis Mayfield is a notable exception—however, many more like Stubblefield weren’t so lucky.

Inversely, there are plenty of others who get credit and compensation from sampling, but who had nothing at all to do with the creation of a song. One of the most head-spinning examples of this involves an odd couple: legendary song collector Alan Lomax—whose Depression-era recordings for the Library of Congress documented hundreds of obscure American folk and blues songs—and Jay-Z, one of the biggest selling hip-hop artists of the past two decades. In an unlikely turn of events, these two iconic, but very different, figures became songwriting partners on one of Jay-Z’s best songs, “Takeover,” from his album *The Blueprint*. How exactly did a dead white guy who used to record nineteenth century folk songs end up receiving a songwriting credit on a Jay-Z recording released at the turn of the twenty-first century? And why is it that someone like Clyde Stubblefield is not legally required to be compensated when James Brown is sampled, while Alan Lomax—who didn’t have a hand in writing the songs he recorded—gets credit?

To answer this, we need to chart a genealogy of Jay-Z’s “Takeover,” a case study that highlights the bewildering ways sample licensing operates, and how copyright law deals with art. In *The Blueprint*’s liner notes, “Takeover” is credited to Jay-Z, the lyricist, and Kanye West, the

song’s producer—as well as the following authors: The Doors’ Jim Morrison, John Densmore, Robby Krieger, and Ray Manzarek; KRS-One and Rodney Lemay, aka Showbiz, who produced “Sound of Da Police,” a track sampled in that Jay-Z song; Eric Burdon and Bryan Chandler from The Animals; and, yes, Alan Lomax. Even though there are so many co-authors, this Jay-Z song contains only two samples: The first is The Doors’ “Five to One,” which provides the song’s main sampled riff, and the second is the aforementioned 1993 song “Sound of Da Police.”

We’ll get the less complicated branch of this musical family tree out of the way first. Jay-Z and Kanye West sampled the sound recording of the Doors’ song, “Five to One”—which means that they had to get permission from both the Doors’ sound recording owner, Elektra Records, as well as the four members of the Doors who wrote the song. Because there were no other record labels, songwriters, or publishing companies that control “Five to One,” it’s as simple as that (though, as this book will demonstrate, nothing is actually that simple when it comes to sample licensing). The second sample on “Takeover” is a fleeting six words from KRS-ONE’s “Sound of Da Police”: “Watch out! We run New York.” Even though Jay-Z and Kanye West only sampled a short vocal from “Sound of Da Police”—less than two seconds—they nevertheless had to license all of the other elements contained in the remaining four minutes and seventeen seconds of the song. Those are the rules.

One of the sampled elements from that KRS-ONE track comes from Grand Funk Railroad, an American hard rock band popular in the late-1960s and 1970s. Complicating this genealogy more is the fact that Grand Funk Railroad didn’t even write the song that KRS-ONE sampled. It was a cover of “Inside Looking Out,” which was written by the Animals—or we should say it was *kind of* written by the Animals. “Inside Looking Out” was actually a rewritten version of “Rosie,” an old nineteenth century folk song that was “collected, adapted, and arranged”—and copyrighted—in 1934 by Alan Lomax and his father John. The Animals’ version of this song features a new musical arrangement and additional lyrics by Eric Burdon and Bryan Chandler, the two central musicians in the Animals; Lomax is also listed as a co-author of “Inside Looking Out,” a standard practice in the music industry.

All this still begs the question of *why* Alan Lomax is listed as an author on “Inside Looking Out,” or even “Rosie.” During the Great Depression, many collectors who recorded folk songs for the Library of Congress, including the Lomaxes, often published them under their own names.¹⁵ There’s a long tradition of this sort of practice. For instance, British folk song collector Cecil Sharp attached his name to the copyrights of a number of traditional folk songs he collected. (This includes “The Battle Hymn of the Republic” and the classic folk song “Old King Cole,” a folk song that Oscar Brand sarcastically writes was “old when London Bridge was still a plank and ‘Beowulf’ was the Book of the Month.”¹⁶)

Because KRS-ONE sampled Grand Funk Railroad’s cover of the Animals song, that meant that the Animals’ Eric Burdon and Bryan Chandler—and Alan Lomax—got a songwriting credit on “Sound of Da Police.” This is despite the fact that KRS-ONE only samples a very brief guitar riff, which appears intermittently throughout the song; it neither provides the central hook for the song, nor is it very audible in the mix. Nevertheless, it’s enough for Lomax to become a co-writer on two classic hip-hop tracks. Again, those are the rules, according to today’s copyright clearance system. This case underscores several contradictions—racial, economic, and

musical—at play in sample licensing. The history of the twentieth century American music industry is also a history of the exploitation of African-American artists by whites. It was not uncommon for a black songwriter to have his or her name replaced by a businessperson or musician with more legal and economic resources, but who had no involvement in songwriting. For instance, Elvis Presley reportedly didn't write a single song in his life, but his name appears on the publishing credits of several songs he recorded. Alan Lomax's hip-hop songwriting credits are an uncomfortable reminder of this legacy.

Aside from the fraught racial politics, this case also underscores another dynamic at work: The process of adaptation and transformation that occurred during the evolution of the original song “Rosie” is a great example of how the folk music process works. In the first half of the twentieth century, and before, blues and folk musicians regularly retooled the lyrics, melodies, and songs of previous musicians. However, copyright law halts the process of this kind of music making by preventing elements of a copyrighted song from being legally transformed once more. It essentially freezes the development of melodic themes and lyrics by stamping the name of an author on a “final product.”

This raises another important question for contemporary artists: What happens when an enterprising hip-hop producer comes along in ten years and tries to pay tribute to—or dis—Jay-Z by sampling “Takeover”? Not only will he or she have to get permission from both Jay-Z's song publishing company and record company, Def Jam, but also the many parties who control the copyrights to songs sampled in “Takeover.” If one of those parties says no, or demands an exorbitant fee, this new song will be denied the luxury of a legal existence. As more and more modern music incorporates samples from past songs—including songs that themselves contain samples—life is growing increasingly difficult for sample-based artists.

This licensing imbroglio is already creating headaches for filmmakers, television producers, game designers, and other media makers who want to license sample-based songs for their projects. As the producers of the movie *I Got the Hook-Up* discovered—who licensed an early-1990s hip-hop song that, unbeknownst to them, contained an uncleared sample—it can result in multimillion dollar losses. Because music is the basic building block for all kinds of media texts (film, television, videogames, advertisements, web content, etc.), the labyrinthine sample clearance system is not just a concern for hip-hop artists—an admittedly small subset of creators—but for media makers of all stripes. If, for instance, a director wanted to use Public Enemy's “Fight the Power” in a new movie, he or she would need to secure permission from all the stakeholders who own the copyrighted material sampled in that song—all twenty to thirty of them, a number that adds up to a weighty stack of licenses.

This “license stacking” problem impacts other areas of contemporary life, especially in the realm of drug manufacturing—in which many individual patents need to be licensed. In his book *Gridlock Economy*, economist Michael Heller presents a sobering example of how license stacking has negatively impacted the development of life saving drugs. A drug company executive told him that his researchers “had found a treatment for Alzheimer's disease, but they couldn't bring it to market unless the company bought access to dozens of patents. Any single patent owner could demand a huge payoff; some blocked the whole deal.”¹⁷ The drug is still sitting on the shelf, even though it could have impacted millions of lives and generated millions

more dollars, Heller writes. Digital sampling and drug manufacturing are certainly on two very different planes of social importance, but they are nonetheless impacted by the same kinds of structural pressures.

A Great Balancing Act

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

All music borrows some elements—usually many elements—from earlier music. Musicians do not reinvent the twelve-tone scale used in western music; they borrow it from previous generations. Musicians often use major-seventh chords, play in 4/4 meter, and perform on instruments with unique timbre like the violin and the piano. No musician living today invented those things. Someone (or some group of people) did once invent chords, meter, and musical instruments; it was long ago and, in the time since, millions of people have borrowed those musical ideas and instruments to make their own musical contribution. Not only is it clear, theoretically, that no one owns the rights to such abstract musical ideas, it is also codified in law. As DJ Vadim argues, “You can't own a B flat or a B sharp or a C minor or a C major on a keyboard, on a guitar, or what have you.” But what about an eight-note melody using some of the twelve tones of the scale? Or a specific five-chord progression that includes a major seventh chord? Or a complex rhythm played in a 4/4 meter? Or the unique timbre achieved by the skill a particular flutist, pianist, or violinist?

The controversy starts when musicians sample specific melodies, chord progressions, rhythms, or timbres that were recorded by other musicians—which has led to bigger questions about sampling, copyright, licensing, compensation, and creativity. Regardless of artistic merit, use of a prior work implicates the interests of the original work's creators and copyright holders: the musicians who composed and recorded it, their publisher and record label, or others who have acquired the copyrights. As a society, we want to reward musical creativity and encourage more of it. When composers or recording artists take existing musical ideas—perhaps adding some new elements—and combine all the elements in sufficiently original ways, we offer these new works copyright protection. This is one way we facilitate musicians' efforts (and the efforts of their record labels and publishers) to make money from music. And we don't stop at protecting whole works—we also protect some parts and portions of musical works. But, at the same time, society wants future composers to be able to use some elements from previous music without permission.

Just think how cumbersome it would be to acquire a license for every single note you use in a composition. The fundamental building blocks of music should not belong to anyone in particular. They are the shared musical heritage for all people to enjoy. But sampling a sound recording requires permission, which usually entails a licensing fee, whereas sufficiently faithful cover versions require payment but not permission or a negotiated license. This is because samples and cover songs are treated differently by provisions in U.S. copyright law. The existing rule reflects the balance our society has struck between prior musicians and subsequent musicians who wish to use their work, and not all uses of prior works are treated equally. Of course, this was a balance struck over one hundred years ago in the Copyright Act of 1909,

which forged this rule long before the introduction of digital samplers. Some critics have argued that the law simply hasn't caught up with current creative practices and technological advances.

The innovations of pioneering hip-hop artists dramatically changed the way popular music is created and have forced us to rethink the laws that affect digital art forms. Napster, YouTube, iMovie, and the like have radically altered our relationship to culture and technology—providing consumers with the tools to become producers (or “remixers”) of their media environments. Today, sampling is something that a twelve-year-old can do. “I think because of the way kids are raised now, you have your average kid sits in front of the TV with a remote control and click, click, click, click, click, click,” rapper Mr. Lif says, explaining how remix culture has touched so many aspects of contemporary life. “It’s the same way you’re going to think musically. You’re going to be like, ‘OK, here’s the theme from *Diff’rent Strokes*, here’s Kermit the Frog, here’s a fucking Sally Strothers’ infomercial,’ you know what I mean? It all becomes the same thing, and I think that’s what’s happening with music too.”

Girl Talk, a notorious mash-up artist and laptop DJ, tells us that these sorts of sound collage practices have become extremely common, particularly on the Internet. “On a personal level and on a completely musical level,” he tells us, “people are interacting in others’ lives, and music is becoming a lot more democratic. I think that record labels should really learn how to use this to their advantage rather than trying to stop it.” It is in this sense that we can locate some of the significant roots of today’s intellectual property wars in the economically devastated South Bronx in the 1970s—over a quarter century before music downloading controversies rocked the entertainment industry. The controversies surrounding sampling that emerged later in the 1980s and 1990s were like the canary in a coalmine that anticipated both today’s remix culture and the legal culture that is largely at odds with that culture. By studying sampling, we have the opportunity to focus our critical lenses on the relatively recent past, so that we can learn from it.

The U.S. Constitution asks copyright to perform many balancing acts, brokering a compromise between compensation and access. In recent years we have heard much about the battle between copyright holders and unauthorized downloaders, and the balancing that courts have sought between the legitimate interests of entertainment companies and consumers. The debate over sampling also concerns a balancing act. Sampling implicates the opposing interests of musicians (and their affiliated record labels and publishers) and other musicians (and their affiliates). The question of how the law—and the licensing practices for samples that are shaped by law—should handle sampling involves another search for balance in copyright. Any just determination of who should end up with what rights and what compensation must involve consultation with all the people with first-hand knowledge of the process and with something at stake. In this book, we set out to craft a comprehensive study that maps the field of sampling in all its complexities and contradictions.

A Final Note

Much of the recent research on these issues has simplified the landscape in an effort either to reinforce the existing system or to undermine it. And much of this work lacks a sustained empirical component, something that perpetuates false assumptions and apocryphal stories that could easily be corrected by simply talking to actual stakeholders. “There’s some sort

of rumor that’s gone around for years that you can use one bar or two bars or so much of someone’s song without clearing the rights or getting a license to do so,” says Pat Shanahan, a music industry executive who has been at both ends of the sample licensing clearance system. “I tell them all, ‘I don’t know who started this rumor or where this information came from, but when you use someone else’s copyrighted material, you need a license from them. Clear and simple. There’s no part of it that you can use without their permission.’ So that’s my advice to them.” Other law professors and legal professionals have critiqued the idea that *every* sampled source needs to be licensed. They argue that these stringent requirements are a result of a “clearance culture” that stems more from existing industry practices than the dictates of copyright law itself.

To write this book, we discussed these issues with over one hundred stakeholders—drawing on commentary, expert opinion, and raw, opinionated passion from a diverse assembly of interviewees. We talked to musicians who sample, musicians who have been sampled, and musicians who have been on both sides of this issue during their careers. We also talked to music lawyers, industry executives, sample clearance professionals, public-interest group representatives, law professors, musicologists, music historians, and journalists. Direct quotes from these interviews are regularly woven into our analysis, because we feel it is important that these people provide their own points of view in their own words. However, we did not take everything they said as gospel, because we found that more than a few of these insiders frequently recited apocryphal stories that previous academics and journalists are guilty of propagating.

While we weren’t able to find any real consensus among our interviewees about how to properly fix the sample clearance system—something this book doesn’t claim to attempt—we did find there was a near-universal opinion that the system is inefficient. Of course, there were varying opinions about *how* inefficient it was, and what those consequences are. However, it is clear that the sample licensing system and collage-based forms of creativity are in some tension, and we have attempted to understand the nuances of this conflict. Our interviews have greatly enhanced our understanding of this subject, which is a central reason why their words provide the backbone of this study. Like a good song made from samples, *Creative License: Digital Sampling, Culture, and the Law* synthesizes the source material to create a compelling whole—a collage of words that both describes and *enacts* the book’s subject matter.

CHAPTER 1 - YOUR FAIR REWARD IS MY CREATIVE ROADBLOCK: THE ISSUES PRESENTED BY SAMPLE LICENSING

Digital sampling provides a case study to examine the larger issue of the law’s effect on creativity. More specifically, the controversy over sampling in music speaks to the ability of artists and citizens to use pre-existing works of art. As we discussed in the introduction, all music uses elements from previous music. This is broadly true of all creativity: prior creative works are an input for subsequent creative works. Writers, composers, artists, and inventors all make use of ideas and particular applications of those ideas that others created before them. For example, to write this book we have made use of the English language, employed various words coined by others over the centuries, displayed the influence of the work of other scholars, and wrestled with ideas that others put on the table. Whether you call such uses “borrowing” or

“appropriation” depends on your point of view about intellectual property law. That is, it depends on what works—and, most importantly for our purposes, what parts of those works—you believe a creator should own.

Ownership of pre-existing songs does not necessarily prevent new music from incorporating elements of those older songs. Although copyright owners do have the right to simply deny permission, not all of them refuse to deal. Instead, what ownership really means in many instances is the right to negotiate a license at a price that the owner finds acceptable. Thus, copyright protection for samples—for small fragments of a song—often boils down to the difference between getting no compensation when a subsequent artist samples your song and getting some amount of compensation that you bargained for. Thus, as this chapter explains, a central legal issue with respect to sampling is whether we as a society want to encourage licensing negotiations between samplers and samplees.

A successful licensing transaction means that the owners of pre-existing songs receive compensation; the creators of new, sample-based works get to make their art; and both parties reached a voluntary agreement. Simple economic theory can take us that far. And, described in that abstract way, licensing sounds pretty good. In fact, in the final chapters of this book we advocate finding ways to promote more and more efficient licensing, among other policy recommendations.

But as everyone (including economists) knows, the real world is much messier than economic theory. So this book also examines whether sample licensing really works in the real world. How easy is it to find the owner of the pre-existing work? How long does it take to reach an agreement? Does licensing always occur when it would be socially beneficial to allow the creation of a new work that incorporates other, pre-existing works? In short, how does the sample clearance system really operate? Answering those questions must inform a discussion of whether, how, and when we want copyright law to insist that musicians obtain a license to sample from pre-existing works.

Licensing as Both a Reward Mechanism and a Constraint on Creativity

“By discouraging copying, [copyright law] discourages the historically very important form of creativity that consists of taking existing work and improving it.” — William Landes and Richard Posner¹⁸

Copyright law has many beneficial attributes from an economic perspective. By protecting creators from competition from those who would sell exact (or substantially similar) copies of their work, copyright siphons financial rewards from the public to creators in the form of higher prices. For example, when Merge Records released the album *Neon Bible* by the Arcade Fire, federal law prohibited any other company from selling copies of that album. This allowed Merge to set its own price, influenced by how much money Arcade Fire fans were willing to pay for CDs or downloads of the album as well as fans’ interest in competing bands’ albums and, more indirectly, other forms of entertainment that fans could substitute for listening to recorded music. If the price Merge set had to take copycat record companies into account, which offered identical or close copies of *Neon Bible*, then that price would be much lower.

Enhanced financial rewards allow creators to recoup the money and time they spent creating. In this way, copyright is thought to provide incentives to create.

More subtly, copyright law also serves the function of organizing investment in creativity. Giving someone a copyright gives them greater incentive to take care of the value of that work. To continue with the Arcade Fire example, the band invested a huge amount of time and money for music equipment and their unique recording space (a former church in Farnham, Quebec).¹⁹ Moreover, both Merge Records and the band itself spent time and money to promote the album. Those efforts brought *Neon Bible* to a wider audience. The more listeners who learn about the album, choose to purchase it, and enjoy it, the more social benefits come from the Arcade Fire's work. With a copyright, Merge and the Arcade Fire can invest in high-quality recording and extensive promotional effort knowing that they will reap the rewards.

Copyright law's benefits, however, come with costs, as many commentators before us have noted.²⁰ Many commentators have focused on the cost to consumers at large. The other side of the enhanced-rewards coin is that consumers have to pay more for albums like *Neon Bible* than they would if copycat record labels could enter the market. A host of copycats would offer lower prices to steal sales from Merge and from each other. But higher prices do more than take money from the pockets of devoted fans. They also mean that some people who would have bought the album at a lower price decide not to buy it. Their lost enjoyment is another cost of having copyright law. Thus, copyright presents a tradeoff between providing incentives for creators and granting access to the public.

Among the general public, creators need access to pre-existing creative works to use them, or at least parts of them, as building blocks. Copyright law can make prior works by yesterday's musicians impossible, difficult, or expensive to use for today's musicians. In economic terms, as William Landes and Richard Posner have put it, copyright increases the "cost of expression" for musicians and other creators.²¹ Copyright protection converts what would be a free input into a costly input. This may be a desirable thing for copyright law to do, but either way it has important consequences for creativity.

Some of the costs of licensing copyrighted works are the same as they would be for any economic input. When a bakery makes bread, it has to pay for the flour and eggs. But the total increase in the cost of expression that results from other musicians' copyrights has some components that do not resemble the costs involved in a simple transaction for the baker's flour. You cannot go to a store and buy sample licenses off the shelf. Nor is it easy to set up a relationship with a regular supplier of sample licenses, at least not in the way that bakeries contract with foodservice companies to deliver staples on a daily basis. To use a bit of economic jargon, the "transaction costs" of licensing pre-existing copyrighted works are probably higher than the transaction costs of a bakery's purchase of the ingredients for bread.

Here is composite of what we have learned from our interviewees about the costs of licensing. (We will provide the details in [Chapter 5](#).) Suppose you are a musician who has just created a new song. Writing and recording the song took skill, effort, time, and money. But before releasing your song commercially you must worry about whether you have infringed someone else's copyright—and that will cost you more time and money. First, you must

determine whether someone else owns something you used: a melody, a bass line, a sound clip. Next, you must determine who that person is, and whether she has sold or transferred her rights to someone else. Then, if you are able to track the current copyright owner down, you must negotiate with him, which takes time and money. As this whole process transpires, you are missing opportunities to sell copies of your new song. Finally, if you are able to successfully negotiate a license, you have to pay the licensing fee itself. And that fee can be steep.

As a result of copyright law's grant of protection for fragments of sound recordings in many (though not necessarily all) instances, digital sampling is a relatively costly form of borrowing from prior musicians. By contrast, other ways of taking elements from other artists' songs are cheap or free. For example, recording a cover version of another songwriter's composition costs pennies per copy and does not require permission.²² Using a single note or quoting a short phrase from a pre-existing composition is also free.²³ Displaying the influence of another musician is free, as long as your song is not substantially similar, in a legal sense, to another musician's song. Copyright law thus discriminates among different methods of musical borrowing or appropriation, making some methods—like sampling—more expensive than others. That increased cost may be justified in order to compensate creators, provide incentives, and encourage investment. But before we can evaluate the wisdom of copyright protection for samples, which we focus on in **Chapter 6**, we must investigate its impact on musical production.

Increasing the cost of doing something will usually lead people to do less of it. For instance, musicians who sample might choose, in the face of licensing costs, to merely quote a short phrase from a prior work by re-recording that short phrase. It might lead them to abandon particular projects entirely. Others musicians might expend effort to disguise what they have taken from other works. Whichever way would-be samplers respond, copyright law has shaped their choices, whether in the foreground or the background. Musicians experience the higher costs of expression resulting from copyright law as a constraint on what they are free to do.

<SNIP>

CHAPTER 3: THE COMPETING INTERESTS IN SAMPLE LICENSING

The rich history of musical collage, of which digital sampling is a part, speaks to the value and predominance of musical borrowing or appropriation. But, as we suggested in the Introduction, sampling has resulted in a great deal of legal controversy. While samplers' creative endeavors should be understood as an art form, that does not answer the legal question of whether samples must be licensed. Several categories of people in the music industry have a claim to some of the proceeds from sales of sample-based music. In this chapter, we explain the competing interests that are implicated by the musical practice of sampling. And we detail, based on our interview findings, how complex the arguments among these competing interests can become. Before we can explore that complexity, however, we have to bring copyright law back into the picture. For copyright law shapes the initial bargaining positions of each competing interest group and reflects the balance society has struck, whether consciously or implicitly.

Music Copyright Basics

Music copyrights come in two basic kinds: **musical compositions** and **sound recordings**.²⁴ The distinction between the two breaks down like this:

- a musical composition copyright applies to the notes, chords, melodies, and other underlying structures of a piece of music, while
- a sound recording copyright applies to the particular performance of the singers and instrumentalists captured on vinyl, tape, hard disk, or other format.

The two kinds of music copyrights can coexist simultaneously in the same piece of music, and often do. Thus, every piece of music that is created involves two potential copyrights. In the United States, musical compositions have been eligible for copyright protection since 1831, but sound recordings have only received federal copyright protection since 1972 (some states, like California, had laws protecting them before 1972). Historically, creators of musical compositions have contracted with **publishers** to promote their work, whereas creators of sound recordings typically contract with **record labels**.

For lack of a better alternative, we will use the more colloquial term “song” as an umbrella term to refer to both the musical composition and the sound recording at once. That is, we use the word song to represent the unified whole as experienced by listeners to a piece of music.²⁵ We treat the legal terms “musical composition” and “sound recording” as technical legal terms. These terms act as an overlay that categorizes two types of musical contributions to what listeners hear. This terminology allows us to write simpler sentences like “artist X sampled artist Y’s song” before delving into the details of who owns the musical composition in Y’s song and who owns the sound recording of Y’s performance of that song.

The distinction between musical compositions and sound recordings dates back to the days even before Tin Pan Alley, but that era of songwriting helps explain what’s going on. When George Gershwin and Ira Gershwin wrote and published “Someone to Watch Over Me” in 1926, they received a musical composition copyright. They would receive royalties from sales of sheet music and phonograph recordings of the song. But when Ella Fitzgerald recorded “Someone to Watch Over Me” in 1959, she did not receive any copyright at all. Her compensation for her performance on the recording and subsequent record sales would be based on her recording contract, without the involvement of federal law. If she had recorded the song after February 15th, 1972, however, she or her record label would have received a sound recording copyright, while the Gershwins retained their musical composition copyright just as before. (The specific rights that come with a sound recording copyright differ from those that come with musical composition copyrights, but we need not trouble over that just yet.)

Each song can give rise to both a musical composition copyright and a sound recording copyright at the same time. For example, Prince wrote the composition for “Nothing Compares 2 U,” which Sinéad O’Connor recorded in 1990 on her album *I Do Not Want What I Haven’t Got*. Prince received the musical composition copyright for this song, but O’Connor received a sound recording copyright for her rendition. The two types of copyrights can also go to the same person, as when artists write and record their own songs—for example, Prince’s recorded performance of “Little Red Corvette.”

Copyright holders get certain exclusive rights with respect to a work: reproduction, distribution, public performance, public display, and creation of derivative works.²⁶ These rights are subject to various limitations and exceptions. To name a few broad and important examples of these limitations, copyrights are limited in time, limited to expression rather than ideas, limited to substantial takings, and subject to users' rights of fair use.

Sample Licensing

“I'm totally for sampling. I think it's just like any other art form. ... But I feel both ways about it. There has to be some structure [for compensation].” – Richard McGuire, Liquid Liquid

Sampling means that the sound recording itself is being used, usually taken from a vinyl or compact-disc copy of the recording. But the underlying notes, chords, melody, rhythm, etc., of the song are also an inseparable part of the sample. Thus, sampling implicates *both* copyrights in the song being sampled. Sampling will sometimes infringe both the musical composition copyright and the sound recording copyright in the song being sampled.

Why only “sometimes”? Not every sample necessarily infringes a copyright, for three basic reasons. First, some of copyright's limitations and exceptions (such as the doctrine of fair use) mean that certain samples of copyrighted works are lawful even without the copyright owner's permission. Second, other limitations and exceptions to copyright (such as the time limit on each copyright) mean that copyrighted works can enter the public domain, becoming free for anyone to sample or use in other ways as they wish. Third, copyright owners can voluntarily specify that certain unauthorized uses of their works are permissible, or even donate their works to the public domain.

If a sample does violate one or both copyrights in a song, then the sampler must obtain permission or a license. (We discuss the lawsuits that have determined exactly what kinds of samples infringe musical composition copyrights, sound recording copyrights, or both, in **Chapter 4**.) Thus, the two types of music copyrights mean that the law provides for two kinds of musicians to make money. When a song is sold (for instance, on a compact disc) or licensed (for instance, to be played on the soundtrack of a television show), there are two distinct copyrights whose owner(s)²⁷ may have a right to receive compensation.

Of course, as Danny Rubin points out, “Most of the time the copyrights aren't owned by the artists.” Copyrights are like other kinds of property in that they can be sold or licensed to others. Because copyrights are transferable, the musical composition and the sound recording can be owned by different people, even people who have no relationship with each other. Recording artists often relinquish ownership of their copyrights to record labels when they sign a record contract. Songwriters often license or sell their copyrights to publishers. The two types of music copyrights remain distinct. But they may pass down to different owners. Copyright owners may even split each copyright into parts; for example, co-writers of a song often do so.

Who Gets the Money?

“My question is, well, ‘Who is it actually benefiting?’ Is it benefiting the original artists that have made the song in the first place or is it benefiting somebody who just happened to be a holder of certain contracts?” – Hank Shocklee

Partly because of the two kinds of music copyrights and partly because copyrights can be divided and sold, following the money through the music industry has always been a complicated task. For instance, who gets paid with the \$16.98 you shell out for a new CD? People are often astonished to hear that the musicians typically only end up with roughly 10 percent of the retail price.²⁸ But retailers, publishers, record labels, managers, lawyers, and producers have to get paid, too. So how does the money flow, and to whom, when one artist licenses a sample of another artist’s music?

The answers to these questions depend on the details of both music-industry contracts and copyright law’s specific provisions. Music-industry contracts can be complex and far from straightforward, as evidenced by the giant stack of papers the band Wilco’s record label had them sign, depicted in the film *I Am Trying to Break Your Heart*. (The band—perhaps unwisely—started reading, gave up, shrugged, and signed.) Moreover, music copyright is among the most convoluted areas in copyright law because of compromises Congress has brokered among music and technology companies over the last century. Some compromises specify the actual number of pennies a songwriter is entitled to receive for each recording sold with their song on it. Other compromises, more relevant to sampling, determine which uses of music require permission, such as a remix, and which uses of music do not, such as a cover version.

The terms of musicians’ contracts reflect a mixture of industry customs, idiosyncratic negotiations, and the relative bargaining power of composers and recording artists on the one hand and publishers and record labels on the other. The provisions of music copyright reflect the answers Congress has come up with to difficult questions about fairness, creativity, and the workings of the music business. Some decisions, as applied to sampling, may seem reasonable, while others may seem out of whack.

In this section, we run down all the different parties that might receive the revenue from a sample license. We explain some of the relevant copyright provisions along the way. In this way, we can begin to understand how the current system for licensing music samples fits in the larger context of music copyright.

1. Recording Artists

As we mentioned earlier, recording artists sign contracts with record labels to sell their sound recording copyrights. These record-label contracts have provisions in them determining how much money from sample licenses goes to the record label and how much goes to the recording artists. One common arrangement would involve the recording artist receiving 50 percent of the revenue from licensing the sound recording copyright for sampling, subtracting some possible deductions.²⁹

But would a recording artist really receive that much money? Or is the story more complicated? As attorney Anthony Berman says, “It’s a very interesting question who gets the money from sampling. It’s all about the money, right? Sadly, a lot of time, it’s not artists who get the money.” From a purely legal standpoint, a recording artist who is sampled might not receive revenue because the sample may not copy enough to infringe their copyright³⁰ or may be fair use,³¹ so that the law would require no license.

Unrecouped Artists

A more common reason that artists do not receive any money when their sound recording is licensed for sampling is because of record label recoupment.³² If an artist is in the red and another artist licenses a sample of their work, then that payment is applied to their label debt. This may move them closer to being in the black and recouped—but they will not receive a check until they are fully recouped. Royalties from sample licenses are generally applied against recoupable amounts by the record label. It is not uncommon for recording artists to never recoup,³³ meaning that aside from the rise and the fall of the calculations on their negative balance sheet they receive no money at all from any licensed samples of their music.

The reverse is also true, in terms of who pays for the cost of licensing samples on an artist’s record. Bill Stafford explains, “If the artist is in an unrecouped position, which on average, about 85 to 90 percent of them are, the label has just a further deficit for that artist. So they just go a little further in the red. If the artist is recouped though, it comes directly out of their artist royalties.” Another possibility is that licensing costs will come out of a recording artist’s advance.

Supporting Musicians Who Are Not Copyright Holders

Another group of recording artists get paid differently. Some members of a group may not be the “featured artist” of the sound recording or a co-author of the musical composition.³⁴ Similarly, some musicians who play on a recording might be session musicians, who also do not typically count as featured artists or co-authors. Clyde Stubblefield was the drummer in James Brown’s band in the late 1960s and played on many famous recordings. He was paid a salary for his employment in the band, but James Brown was the featured artist as well as the copyright holder for those musical compositions.

2. Producers

According to music lawyer Donald Passman, many producers’ contracts allow them to receive royalties when a sound recording is licensed for other uses.³⁵ Their royalties come out of the recording artists’ contractual share of the royalties. But some producers’ contracts allow them to get paid from “record one”—even before the recording artist has recouped.³⁶ This follows the logic that a producer is not benefiting from many of the advance costs (like tour support and video budgets) that might keep an artist’s album unrecouped. Since the producer is not benefiting from these expenses, he or she should not be penalized by them. Perhaps this is a reasonable arrangement. But it leads to the irony that a producer who has points on a record that is sampled often has a better chance of receiving check for that sample license than the recording artist does.

3. Record Labels

Because most major-label record contracts involve recording artists transferring their sound recording copyrights to the record label, the record labels ultimately control licenses for sampling. (A license for sampling is a type of “master use license,” in record-industry jargon.) Bill Stafford told us that “there is a real market incentive for labels to license, both so that their own clearances come through from other labels, as well as to make the income.” The twin incentives of reciprocity and revenue got the license revenue flowing by the 1990s, after it became clear that sampling often involved copyright infringement in the eyes of the law. Don Joyce of Negativland says, “There’s a whole industry built up around licensing now, getting clearance rights. Every label has offices that do that, and it has become a big income stream.”

In the drama swirling around music sampling and hip-hop, many of the interviewees have identified record labels and music publishers as the culprits. This has been the experience of El-P, who is both an artist and an independent record company owner. When talking about the problems he faces as an artist and businessman, he saves his wrath for what he sees as the faceless entities that are fundamentally greedy. “It’s usually not the people who created the music,” says El-P. “It’s not. It’s usually someone else who owns the music, who swallowed the shit up, you know, who bought them and a million other groups in some merger, ya know.” On this note, Michael Hausman adds, “I personally feel that a lot of the problems with sampling and copyright come up because you don’t have artists talking to each other. You might have artists talking to publishers, or artists’ representatives talking to publishers or their representatives.”

In the next section, we discuss more of the details about the sample clearance system. The point for now is that record labels get much of the money from sample licensing. But this revenue source also has its costs. The sample clearance system “added another layer of bureaucracy to the creative process of making collage-based music,” says Anthony Berman, raising another issue we will return to later.

4. Composers and Songwriters

Musicians with the second kind of copyright in a musical work—the musical composition copyright—are more likely to actually receive revenue than recording artists. Songwriters typically receive 50 to 75 percent of the revenue generated by their musical compositions,³⁷ which includes revenue from sample licenses.

Not every sample of a song infringes the musical composition copyright, of course. For instance, one court held that sampling a three-note pattern did not constitute infringement.³⁸ But many samples that borrow larger chunks of a composition do infringe a musical composition copyright. When a sample would infringe an artist’s musical composition copyright, and when the sampling artist pays for a license of that copyright, the resulting revenue can be meaningful for a songwriter. Anthony Berman says that it “certainly created a big jump in the revenue streams of copyright holders.”

So, for musicians who perform and record songs that they themselves compose, there are two potential revenue streams. This can benefit artists greatly, especially in terms of their career arc. Sample licenses can generate income after a musician has passed the peak of his or her commercial success—or even after a musician has died. Dina LaPolt, who represents the estate of Tupac Shakur, says, “So, if they sample Tupac, there’s a master use royalty that gets paid and there’s also a music publishing royalty that gets paid. And on top of it we create, because it’s a derivative work, it increases our catalogue on an artist that’s otherwise deceased.” LaPolt continues, “So, when I started with the Tupac estate, if we had say 200 songs, maybe now we have 290 songs on an artist who’s been dead for ten years.”

The licensing of samples, then, has two sides. While it has created complications and expenses for the *sampling* artist, the sample clearance system has also generated meaningful revenue for some *sampled* artists. Successful artists who had excellent legal representation at the right time and who own the rights to their work are in an especially good position to exploit the revenue streams from sample licenses. Music lawyer Whitney Broussard tell us that “this is much more likely to be true for modern contracts than older ones.”

5. Publishers

As we explained earlier, songwriters usually sell or license their copyrights to a publisher. (Some songwriters form their own publishing companies.) Publishers administer musical composition copyrights, overseeing the licensing of songs and some of the revenue that flows in. Whenever a song or a sample of a song is recorded and sold, the publisher receives a royalty and usually splits it with the songwriter.

But not every songwriter signs the same contract or retains the same rights with respect to their musical composition copyrights. Music attorney Shoshana Zisk explains one unfortunate scenario. “I don’t believe that George Clinton received any money, at least in the publishing,” she says. “The publisher came out and said well, ‘I haven’t paid you anything and I’m never gonna pay you anything ’cause you don’t own your copyrights.’ . . . So George never got paid in the publishing, but I think [he did get paid] for the master. . . . He’s currently auditing both record companies that had put out most of his hits for not paying him properly. So I’m not certain if he really saw a whole increase in money based on the sampling.”

6. Copyright Aggregators

Copyrights are, in some ways, commodities like other kinds of property. As we mentioned earlier, they can be sold, licensed, and split up. Sometimes publishers split up the rights to a song, selling off rights to portions of the revenue generated by a musical composition, or perhaps even the whole thing. Publishers can also go out of business, meaning that other entities will take over the administration of the bankrupt publisher’s copyrights. Songwriters can sell, assign, or split their portion of the royalties (recall that this is usually 50 percent) as well.

Entities that take over copyrights from the original songwriter, publisher, recording artist, or record label and accumulate them are copyright aggregators or, to use a more derogatory term, “sample trolls.”³⁹ In the *Bridgeport* case, for example, the plaintiffs were not the original

copyright owners. Although it was George Clinton’s song whose sound recording was allegedly infringed by the N.W.A. song on the Dimension Films movie soundtrack, he had not retained the copyright and was not the plaintiff. This experience and others led Clinton to advocate the following:

When you sample, make sure that [you know] who’s getting the money. That way you can make sure that the person that wrote it or performed it gets it, you know, when you sample each other’s music, but otherwise somebody else will get it. And that’s the great tragedy of the whole thing. We haven’t gotten hardly any of money from that—you know, from the sampling. And this guy [the owner of Bridgeport Music, Inc.] is like over \$100 million. You know what I’m saying?

Clinton advocates a greater understanding among artists about who the parties to the sample-license transaction actually are. We will return to the theme of the relationship between sampler and samplee later. Our point here is to show that copyright aggregators can make answering the “who gets the money?” question even more complicated.

7. Lawyers

We have surveyed all the different music-industry players who receive the revenue from sample licenses. But to generate such revenue, someone has to negotiate the sample licenses. And this is where the lawyers come in. Chuck D says, “At the end of the day, lawyers never lose money; they gain from both sides going back and forth.” Lawyers, record-label legal departments, and sample clearance houses, which also facilitate sample licenses, do not receive revenue directly from the licenses. But they do get paid for their services in effecting the transaction. These transaction costs represent part of the cost of having a sample clearance system in the first place. Every time a sample license generates revenue, it also generates transaction costs along the way, which often go to pay the fees of lawyers and sample-clearance professionals. As Chuck D’s quote suggests, the money required to pay lawyers (some with key relationships) can help determine who acquires a license and who does not.

The money from sample licenses can take a number of paths. Each sample involves a combination of many of the seven groups that we have described. Sometimes the transactions can become quite complex, as when musicians sample works that themselves contain samples. (A prime example would be the case of folk song collector Alan Lomax’s estate getting royalties from a Jay-Z sample, as we described [in the Introduction](#).) Having examined who gets the money from such transactions, in the next section we begin to explore more of the details of these sample-licensing transactions.

<SNIP>

CHAPTER 5. THE SAMPLE CLEARANCE SYSTEM: HOW IT WORKS (AND DOESN’T WORK)

Copyright law and judicial opinions interpreting it only matter directly for the parties to particular cases. For others, law matters mainly as foundation or a background, upon which

negotiations over licenses take place. The music industry's business practices are what matters most to the negotiations between samplers and samplees (or their representatives). Thus, our interviews for this book focused heavily on the details of the sample clearance system. We sought to understand the mechanics of obtaining sample licenses. In those details, we learned how sample clearance works. We also discovered that the current system does benefit some musicians (and their record labels, publishers, and so on) to a great degree. But the sample clearance system also has several important flaws.

The Business of Clearing Samples

“I mean, as the music itself changed, the use of the sample became increasingly prevalent. It became something that just was cleared as a regular course.” – Andrew Bart

During the 1990s, as a generation of sampling artists matured in their careers and as digital technology made both sampling and policing sampling easier, the modern sample clearance system developed. This converted sampling—at least, most major-label sampling—from an underground relationship between musicians and the records they sampled to an above-ground relationship between licensees and licensors. Revenue began to flow through the sample clearance system, to the benefit of at least some parties. As Matt Black of the electronic duo Coldcut says, “I’m glad that a legal framework has developed . . . because it means that actually people can release records with samples in now. They can actually be released and everyone can benefit from it.”

Shoshana Zisk explains one of the most fundamental facts of this new business of licensing samples as follows: “All sample clearances are handled on a case-by-case basis and they all have to be negotiated.” Each sample clearance is therefore unique. The sampling song and artist, and the sampled song and its copyright holders, will have their own special circumstances depending on the situation and the particular use. And this is where lawyers and sample clearance houses come in. Sometimes record labels have their own in-house expertise; as Dina LaPolt explains, “You have the major labels—like specifically J Records and Arista—they have in-house sample clearance people in their company, which is amazing.” But other labels outsource some of the tasks involved in licensing samples to the specialized sample clearance houses.

Sample clearance houses offer expertise in handling the licenses that generate the sometimes-complicated revenue flow we described in the previous section. Sample clearance professional Danny Rubin says, “I would say maybe between three sample clearance houses we probably do about 90 percent of the sample clearances for the major record companies. As for smaller labels, sometimes they’ll do it in-house or use agencies that we’ve never heard of or use their attorneys or something like that.” With that amount of business at the major-label level, the sample clearance houses are able to develop relationships with many sampled artists and the associated copyright holders for their works. They also offer a less expensive solution to the problem of all the transaction costs that can pile up while trying to track down multiple copyright holders. Dina LaPolt says, “I have several sample clearance people that I use frequently. . . . Where they might charge a flat fee to clear a use, some of them charge an hourly rate that might be 50 bucks an hour, which is nothing compared to what a lawyer would charge.”

Danny Rubin described for us the sample-clearance-house perspective on the process of licensing a sample. He says that what his firm would do for a sampling client is to track down the owners of the copyrights to a particular song. “With a sample, you need clearance on two copyrights—the owner of the master recording and the owner of the musical composition or publishing,” Rubin says. “And what we do is we do research and track down the owners, and then we contact them on your behalf and then negotiate a rate, which could be a royalty or it could be a one-time payment. And we take care of all the formal contracts and get the samples cleared for you. That would be the process.”

Researching and tracking down the owners can be a time-consuming part of clearing a sample. This is especially so with samples of older records, where the original record label may no longer exist as an active imprint and may have been sold to a copyright aggregator like Bridgeport Music one or more times. But negotiating a rate can be even more difficult. Sample clearance houses have developed relationships with musicians and their representatives, potentially facilitating negotiations that would be difficult or impossible otherwise. The direct fees for licensing a sample are generally borne by the recording artist and the songwriter, not their record label or publisher. But, partly because of the potential liability for copyright infringement involved, the record label or publisher will often bear the transaction costs of licensing negotiations or sample clearance.

Opening Negotiations

Reaching a deal for a license can start in two ways: the sampler seeks a license voluntarily or the samplee tracks down the sampler. How negotiations start can, of course, affect the ultimate outcome. In the early days of sampling and even into the 1990s, many musicians did not seek licenses for their samples. Paul Miller, aka DJ Spooky, explains the perspective he took early in his career. “My first couple albums were meant to be provocation, so I never really felt that it was going to be above the threshold, so to speak, of getting in touch and doing all that.” He continues, “So that was when I was much younger and I felt like, ‘Okay, well, I’m just kind of want to throw this out there as a message in a bottle about sampling.’ It’s a mistake many young producers and artists make, but it’s also where you find some of the richest material.”

The likelihood of sampling musicians seeking clearance for the samples they use increases as their career progresses and as their sales increase. Tim Love’s description of his experience outlines these changing incentives over the course of his career. “My first album is completely un-cleared ’cause at the time I didn’t really know anything about it. We never got called. I mean we only sold a few thousand copies and, you know, never got on the charts or anything like that. So we were always under the radar.” Love says that as he learned more about the industry it became clear that not clearing samples was limiting his opportunities. He discovered that sample clearance is necessary for having his music licensed for television, films, and advertisements—or even getting his music licensed to larger record companies.

Jeff Chang, who co-founded Soulsides—an important independent label that operated during the 1990s—tells a story about a samplee’s lawyer tracking down a sampler. The story nicely illustrates many of the complexities of sampling in the modern marketplace. Chang says:

I had a friend who had put out a record that used a sample and suddenly it got picked up for a TV commercial. So, now it's running on TV coast to coast and around the world in all of these big sporting events. The original artists who recorded the song were very, very obscure. They had been sort of lost through the sands of time. They were a small group from a distant area that made a couple of underground records and never really broke big. But they're listening to the TV out of the back of their ear one day, and they hear their song coming on. They get mad, and they find a lawyer. The lawyer steps to my friend, the artist, and says, "That's our sample. Let's negotiate on this." The owner of the sample in this particular instance has my friend over a barrel because the song has gotten so big they think there's a lot of money being generated out of this. So, my friend the artist had to figure out a way to fairly compensate the artist because he wants to. It's a recognition of the debt they owe to the artist. It's not like people that are sampling are all heartless thieves. [My friend] says, "I want to be able to give them some money," but at the same time, the people that are making the claim upon my friend are asking for ridiculous amounts. They're asking for 200 percent of the composition. They're asking for all these back royalties that have supposedly been paid to my friend, the artist. At some point my friend had to say, "Look, if you do this, you're going to run me out of business. I'm just going to have to stop licensing this record to be used in commercials or in shows or that kind of thing. We'll pay you what's fair, but you can't run me out of business on this. I'm going to have to declare bankruptcy on this." The other side said, "Okay, we understand," because they don't want to see that line of money dry up. They don't want to kill the golden goose. So, they came to some sort of an agreement, and now they've got an agreement that allows everybody to be able to be properly compensated.

For samplers trying to assess the likelihood of being pursued by samplees over uncleared samples, it matters how the samples are used and whether the copyright holders are likely to identify any samples. Since the technological tools for identifying samples have improved and policing efforts have stepped up, DJ Spooky says, "I really am very cautious these days about recognizability, because, you know, the fact these days a lot of record labels have whole departments with people just sitting there listening to records all day."

The Structure and Terms of Sample Licenses

Licenses to sample take different forms. In a seminal article on digital sampling, music lawyer Whitney Broussard has summarized the different types: "There are five basic classes of deals that are used to grant consent for the use of a sample: gratis; buyouts; royalties; co-ownership; and an assignment of the copyright."⁴⁰ Sound recording licenses usually involve a buyout (i.e. a lump-sum payment) or, if the sampling work has large expected commercial potential, a royalty.⁴¹ Buyouts today range from \$500 to \$5,000, but in special cases can cost as much as \$50,000 (or even \$100,000 in some very special cases). Royalties range from \$0.01 per record to as much as \$0.15 per record. The electronic artist Scanner relates some examples of buyouts versus gratis licenses. "When I've been sampled, I've been sampled on a couple of

people’s records, they’ve come to me and said, ‘We gave Stevie Wonder \$500, we gave Nirvana \$1000. What do you want?’ ” Scanner continues, “What does one say in these situations? You know, for one of them, I said, I’d like my name on the record. I’d like it to say sampled from this Scanner record. They said, no, we won’t do that, we’d rather just pay you the \$500 so we don’t have to put this credit on there—which is quite an interesting situation.” Because royalties impose the need for continued administrative and transaction costs, buyouts are the most common arrangement when the licensing revenue is small. Copyright holders will also sometimes offer licenses for no charge, or merely in return for attribution, as Scanner’s quote illustrates.

Musical composition licenses typically involve a royalty or co-ownership of the new work’s musical composition copyright. Either arrangement results in a percentage of the proceeds going to the sampled songwriter and publisher. In the case of a royalty, the percentage ranges from 10 to 50 percent; with a co-ownership deal, the range is 25 to 50 percent. The exact percentage depends on various factors including, for example, how much of the composition is sampled, whether the sample includes the whole melody or just an incidental snippet, how the sample is used in the new work, and who the sampling artist is.⁴² More rarely, the sampled songwriter and publisher will demand full assignment of the sampling work’s copyright.⁴³

As Shoshana Zisk relates, “When I was working in copyright at Motown, you’d get one song and there’d be 14 people that you had to get permission from. And each one of them is like, ‘I own 6.2 per cent, I own 8.9 percent.’ There’s a pie-graph of a song and everyone has a slice.” For instance, Ma\$e, a protégé of Diddy back when he was called Puff Daddy, included a song on his second album that listed *nine* people on the songwriting credits—six of whom never set foot in the studio when Ma\$e recorded the song “Stay Out of My Way.” The Ma\$e sampled Madonna’s 1990 song “Justify My Love” (written by Madonna, Lenny Kravitz and I. Chavez), which in turn sampled Public Enemy’s 1988 song “Security of the First World” (written by J. Bolexy, Chuck D and Eric Sadler). The Madonna song had not credited Public Enemy in the liner notes of the album on which “Justify My Love” appears, in part because Public Enemy did not pursue the matter, and also because this type of crediting—and, for that matter, this type of co-authorship—was uncommon in 1990. However, by the time the Ma\$e album was released nine years later, the authorship was split across nine people, including the members of Public Enemy.

In practice, many factors influence the buyout fee or the royalty rate in a sample license.⁴⁴ These factors apply to both sound recordings and musical compositions. To some extent, the list reflects similar factors that would be considered in a copyright infringement lawsuit. In this way, parties negotiate sample licensing contracts in the shadow of the law. But other factors come from music industry practices and the demands of the sample licensors. We can split the list of factors into two.

First, some factors that influence the licensing fee (whether a buyout or royalty rate) pertain to the song that is sampled and characteristics of the samplee:

- Quantitative portion of the recording or composition used
- Qualitative importance of the portion used

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- Whether the sample comes from the chorus or melody or from the background
- Whether the sample comes from the vocal or instrumental portion
- Recognizability of the portion sampled
- Whether the samplee had a major label or distributor
- Popularity of the sampled recording or composition
- Level of the samplee's commercial success and fame

Second, other factors pertain to the new song seeking to use the sample and the characteristics of the sampler:

- Number of times the sample is repeated
- Quantitative portion that the sample represents with respect to the new song
- Qualitative prominence and importance of the sample in the new song
- Perceived aesthetic qualities of the new song, such as genre or quality
- Whether the new song is of a violent or pornographic nature
- Level of commercial potential for the new song
- Whether the sampler has a major label or distributor
- Level of the sampler's commercial success, fame, and ability to pay

In addition to these substantive factors, the process that those samplers seeking licenses adopt can influence the eventual licensing fee or whether a license is achieved. For instance, it matters whether the sampler or his representatives contact the copyright holders of the sampled song in advance of the sampling work being released. Buyouts, royalties, and co-ownership percentages are generally lower when the sampler's side initiates licensing discussions before release.⁴⁵ DJ Spooky told us that he prefers to clear samples “[at] the very beginning . . . I'd much rather just get it sorted out in advance.” Clearing samples earlier not only reduces the licensing fees, but also minimizes the chance for holdups or extra hassle in getting the sampling work released. As Kanye West manager Hip-Hop says, “You really take care of samples beforehand. If it's after, you're gonna be paying more. You know, like if they hear the record in the market before you reach them, they'll come and get you.”

Musicians' understandings of sample licenses—and assessments of their fairness—do reflect a distinction between sampling a large part of a song versus sampling a small amount. Matt Black told us, “You can't just take big slices of someone else's work. If so, you should pay. However, if you sample one snare drum off a Rolling Stones record and add 99 percent of the song yourself, you shouldn't pay the Rolling Stones 100 percent of the royalties.”⁴⁶ Mr. Len states, “Some artists will feel, you know, ‘I made your record, you know, So I want all of it. I want 100 percent publishing. Or ‘I want a 90/10 split on your royalties or your sales,’ you know? So it really all depends.” Pete Rock echoes this: “Sometimes people want, you know, 70 percent of their song, you know. And what can you say to that?”

Navigating the System

A lesson emerges from the institutions, processes, and terms involved in sample licensing: detailed knowledge of the system can be a must. This is especially true when dealing with a samplee who recorded or published within the major-label system. Sample clearance often

requires an understanding of copyright law; familiarity with record contracts, publishing contracts, and sample-licensing agreements; knowledge of the institutions and relationships with particular individuals within those institutions (as we explain in a later section of this chapter); and—perhaps most importantly—common sense about how to conduct licensing negotiations. Without these skills, musicians who sample face a hurdle to creativity—or at least to marketing and distributing the fruits of creativity. Similarly, without these skills, musicians whose songs are sampled face a hurdle of collecting any licensing revenue.

Employing an experienced music manager or music lawyer is often the price of surmounting these hurdles. Some musicians grumble about the role of lawyers in sample clearance, **as we saw in Chapter 3**, perhaps shifting their resentment for copyright holders pursuing their interests on the lawyers those musicians or companies employ. It can seem frustrating that licensing negotiations only rarely involve musician-to-musician talks. Instead, lawyers and other intermediaries like sample clearance houses are often involved. Even if a sampler is an independent musician without any business relationships, the copyrights in the samplee’s song are likely to be owned or managed by a record label and a publisher. In that event, negotiations are more likely to succeed if the sampler can benefit from the advice of a manager or attorney. Samplees who discovered their songs have been sampled without their permission can also benefit from representation, even if they operate independently from the major-label world. Recall Jeff Chang’s story about the obscure group that sought to collect licensing revenue from his friend’s band. Although the obscure group’s lawyers overreached at first (a strategy that could have originated with their clients rather than them), they eventually negotiated a deal that benefited all parties.

Navigating the sample clearance system calls for several kinds of legal and business experience that most musicians lack, especially at the beginning of their careers. It is not that musicians do not have the aptitude for understanding sample clearance—spreading knowledge of the system is one reason we wrote this book. Musicians can and do learn how sample clearance works, eventually. But a number of interviewees describe learning those lessons the hard way. This state of affairs may seem out of step with larger trends in the music industry, such as the decline of the major labels in terms of sales revenue and the advent of direct online sales by musicians who forgo signing with a label. But in a hypothetical world without record labels (which isn’t here yet and might never come to pass), songs that are sampled would still have copyright owners, and music managers and music lawyers would still have a role in licensing.

The Benefits of Licensing

We have laid out the basic structure of sample licenses, and provided ranges of the fees and royalties that sampling artists must pay for clearances. These fees, along with the transaction costs, can serve as a deterrent to making sample-based music, but bringing sampling into a licensing framework can also work to the benefit of sampled and sampling artists, and lead to interesting artistic opportunities. Despite some initial reluctance, most record companies—which often own the copyright to the sound recording, or “the master”—have realized they are sitting on potential treasure troves. Rather than suing remixers, they are increasingly commissioning works, giving some sampling artists access to record company vaults. “I’m now in the position of reconstructing other people’s back catalogs,” says British sound artist Scanner. “At the present

moment in time, I'm reconstructing the back catalog of Warner Classics, a classical music label that releases Vivaldi, Mozart, Erik Satie, all kinds of artists, and I'm reconstructing it. I've got complete freedom to sample what I like from their back catalog to make a new record." Scanner has also had the opportunity to take the work of American noise rock pioneers The Swans—roughly twenty-five albums—and remix it into one album. Scanner says, "For me, it's quite extraordinary to be making these works, which would generally be deemed bootlegs, but with full approval of the labels and the artists."

Similarly, back in 1993 the classic jazz label Blue Note commissioned the album *Hand on the Torch* by US3, a group of British producers led by Geoff Wilkinson. Like Deee-lite's hit "Groove Is In the Heart"—which was built around a sample from a Herbie Hancock song—"Cantaloop" drew from Hancock's "Cantaloop Island." US3's *Hand on the Torch* became the Blue Note label's first platinum selling album, sales that were fueled by the success of the hit single "Cantaloop (Flip Fantasia)." The song originally began as an unauthorized bootleg, but Blue Note chose not to sue, and instead realized that there was money to be made there. "I worked on that one also," says entertainment lawyer Whitney Broussard, who was employed by Capitol Records, the jazz label's parent company. "Capitol was in a unique position to do that because it controlled those masters and it also time had contracts with those artists that didn't generally require them getting permission from the original artists."

Not only can this kind of archive-mining collaboration be good for the companies that control the sound recordings, it can be good for the artists themselves—both dead and alive. Tupac's estate has licensed several of the late rapper's copyrighted songs, something that has helped bring in a significant amount of revenue after his death (he earned more money in royalties in the afterlife than in his time here on Earth). "Let me give you a great real-life example," says Dina LaPolt, citing Jay-Z's "Me and My Girlfriend," a 2003 hit he did with Beyonce. LaPolt, who oversees the estate's legal affairs, says that it was one of the biggest selling singles that year, receiving a great amount of radio play and winning several awards. "We own 37 1/2 percent of that song," says LaPolt. "That was great for us—it was great money. Not only was that great, when Jay-Z won his award, we won awards too because we are a songwriter. So when he won his BMI awards and all these other things, and we won those awards, too. When he was making public performance monies because his song was on the radio 24/7, we were making public performance monies, too. It was great."

The potential benefits from licensing, then, are relatively easy to see. Each side in the transaction can reap financial gains, awards, and publicity. Royalty and co-ownership agreement can align the interests of samplers and samplees. And licenses can allow artists who sample to proceed without the uncertainty of potential copyright infringement litigation.

The Trouble With Clearing Samples

Sample licenses cost a lot, in part because each sample typically requires two licenses: one for the sound recording, or master, and one for the musical composition. (In the case of Jay-Z's "Hard Knock Life," a third license—a performance rights license—was required to legally release the song, because the sample came from a theatrical production, *Annie*.) But the two (or more) sides are not necessarily equally expensive, as El-P explains. "The master side is the one

that you almost always get hit hard for,” he says, “because that’s the side that’s controlled by the record label. And anyone who’s really litigious or gives a fuck about sample clearance—usually that’s a major label.” We asked interviewees about how sample clearance has changed over the past two decades. Danny Rubin believes that sampling has become more expensive, and Pat Shanahan agrees, saying, “I’ve noticed there is very little sampling going on anymore because it has now become so exorbitantly expensive to do so.”

“It’s tough to do,” says De La Soul’s Trugoy. “It gets expensive.” He says that a lot of people assume that sampling artists have plenty of money to pay out for the samples they want to use, but he argues that, “We don’t make as much money as people may think.” Trugoy says that his group definitely wants to be able to make a living off their music, but he acknowledges that this can be hard in light of “what we have to give up—financially—just to make these creative records.” Flat fee “advances” make sample licensing expensive, but royalty payments also cut into the ongoing profits for record labels, song publishers, and musicians. Andrew Bart explained it this way: “The cost of [licensing] is so high when you pay off all of the owners of the different samples that there’s probably very little left for the compiler to receive his profit once all of the money is split among the various sample owners. So I would think that at some level, there’s going to be an economic limit to how much you want to use a sample. Because it cuts in to the profitability of the song.”

“With every project I’ve done over the years,” Shanahan says, “the publishers and labels want more and more money. It has literally knocked the smaller artists out of the game altogether. Only the ones who are very, very well off can afford to sample anymore.” Because many sample licenses require an advance—instead of, or even in addition to, a royalty payment—larger organizations with more cash on hand have a greater ability to pay for such licenses. As Shoshana Zisk relates, “I remember when I was working at Polygram, which is now Universal, seeing some of the sample clearance spreadsheets coming across my desk and sometimes people were paying up to maybe \$25,000 per sample.” She continues, “I think if somebody was putting out an indie record and they received a quote yes, you can sample this, but it’s going to cost you \$25,000, they would probably just go into another line of work.” Tom Silverman voiced a similar concern: “I would like to see a level playing field where the smallest guy working in his home studio in the Bronx, or anywhere in the world, could come up with something without censoring himself because he’s afraid of being sued.”

These comments underscore the difficulties created by the modern sample clearance system. The difficulties created by this system break down into four categories: expense, relationships, bureaucracy, and timing. They all impact how sampling artists—and their record labels—can legally release their music, and in the following section we will systematically examine the four ways that people have problems when trying to clear samples.

Expense

“I say there’s two types of samples: the really fucking expensive type, and the really *really* fucking expensive type.” – Dina LaPolt

Mark Kates is a former label executive—including a stint as president of the Beastie Boys' Grand Royal Records—and is a DJ himself. He tells us, “You generally start at paying \$5,000 to even have a conversation. They won't even really consider it for less than that.” But the ultimate price for the sample license can go much higher. Tommy Boy Records CEO Tom Silverman says, “I've seen samples that cost \$50,000, easily. If I go to somebody and I want to sample a Marvin Gaye lick, I might have to pay Gaye's estate, like Eric Sermon did, \$100,000 for one sample. An advance!” Danny Rubin's description provides a useful review of the more common price ranges for both master-use licenses and publishing licenses. He tells us that in today's market an advance will usually cost—depending on how long the sample is, and who the original artist is—somewhere between \$5,000 to \$15,000 (though there are always the outliers, like Silverman's example of the \$100,000 Marvin Gaye sample).

“The royalty is usually going to fall anywhere from a penny per unit, and it could be as high as 12 or 15 cents per unit,” Rubin says. “Then you have a cost on the publishing side. Similarly, they're going to ask for an advance. Usually on the publishing side, the advance will be a little lower, probably average somewhere around \$4,000 or \$5,000, and you'll have to assign a percentage of your new copyright to the publishing company of the song that you sampled.” These high amounts can be quite imposing, even for a major-label recording artist, but even smaller figures can be daunting. If the fees are appropriate—in the sense of being reasonable, being economically efficient, or both—then this result might be acceptable. Not all undertakings are worth the cost. But in a relatively small market⁴⁷ like the market for samples, prices might go awry.

Many of the musicians we interviewed expressed dismay at some of the prices they had been quoted. Pasemaster Mase of De La Soul said, “If you're sampling anything from Slick Rick and Doug E. Fresh's ‘The Show’ and ‘La Di Da Di’—that was like a six grand, six thousand dollars figure to start with, just to even sample the words, ‘Hit it!’ ” El-P related a caricature of a licensing negotiation: “ ‘Hey, can we use this bass line? [laughs] *Please?*’ And they're like, ‘Yeah, sure, give me all your publishing revenues and give me ten thousand dollars.’ You can be completely blindsided by some gigantic, outrageous price.” For instance, when De La Soul made the mistake of trying to sample Paul McCartney, they grew frustrated and ultimately gave up and dropped the sample from the record. “We reached out to his people,” group member Trugoy says. “He loved the song, was with it, but was like, ‘You can use it, but I need all the publishing. All of it.’ It was just crazy.”

Two of the effects we outlined earlier have come to fruition: fewer musicians working within mainstream distribution systems engage in sampling, and the musicians who do sample have had to abandon the traditional commercial-recording model. Even though sample licenses typically count as recording costs that artists are required to recoup before they receive any royalties, record labels must provide the money up front. So the size of the label can determine whether the expense of clearing samples is too great to undertake. Pat Shanahan told us that artists on most independent labels can't afford to sample. “There's no way they can afford to. So what they do, I don't know. I don't know if they remove their samples. I assume that's what they do ... because it has literally become unaffordable unless they have a major, major budget to work with.” But Eothan Alapatt told us that his small label, Stones Throw, bears the expense,

saying, “It’s painful for a small company with very tight cash flow to pay out for samples, but we *do* do it.”

When it is very important to sampling artists, sometimes they will reluctantly pay a price because they feel like they have no other choice but to pay. De La Soul’s Trugoy relates the following story about a sample from their third album. “It was *Buhloone Mindstate*, we had recorded a song we wanted, it sounded great, and was the intro to the album,” he says. “We found out that they wanted like maybe fifteen grand and a crazy amount of percentage of the song. And we were like ‘Nah, we can’t do this, this is ridiculous, this isn’t even worth it.’ We went back and found new music for the intro, but it kind of totally spoiled the feel of the album. So we actually went back and paid the amount shared the splits the way they wanted it.” Music manager Michael Hausman told us, “You can get some pretty outrageous quotes, and that hasn’t helped creativity very much. There has to be some kind of reasonable price.”

Here’s where the complexity of the competing interests between samplers and samplees (and their record labels and publishers) becomes significant. Samplees want as high a price as they can get, but if individual samplees demand overly high prices, they can price themselves out of the market for samples. El-P provides a musician’s perspective. “So if there was a give and take, publishers could make money, and we could actually pay for it without feeling like we’re getting ripped off. But they’re too fuckin’ greedy, so they’re gonna force us all to not sample anymore.” Entertainment lawyer Anthony Berman describes one of the major ways in which the prices for individual samples have created obstacles for any new musical work that wants to use two or more samples: “Sometimes, if you sample three records, you might get all three copyright holders demanding to own 100 percent of your new sampled composition. Three times 100 percent is 300 percent, but you only have 100 percent to give.”

In our interviews, we heard about many manifestations of this fundamental problem. Music lawyer Whitney Broussard told us, “Your publishing can get really out of hand because it is quite likely, or certainly not uncommon, that you might have licensors on the publishing side asking for the full song, you know, 100 percent of the publishing. And then you might have other samples on the same track, so you might even have to give out more than 100 percent of a song in order to get it licensed.” For instance, Jeff Chang offers a vivid example of what a well-known artist did when he encountered this scenario (we won’t reveal the identity of this artist, because there would be obvious legal consequences for this person). This artist had previously released a classic sample-based record on an independent label, but when this person was working with a major label, “he was shocked to hear back from [the label’s] lawyers that he needed to turn in a sample sheet, a sample clearance sheet.” There was no room in the budget to clear all of the samples, especially because some of the songs contained upwards of forty to fifty samples from different songs and sound sources. “So he took a very interesting approach,” Chang says. “He kind of looked at it from the point of view of, ‘Okay, well, if somebody’s gonna get my money for this, who deserves to get it the most?’ You know? [Laughter] And he went in and kind of selectively gave [the label] a list of samples that they should go ahead and get cleared.”

As Michael Hausman’s earlier quote about outrageous fees suggested, a more reasonable or more flexible pricing system might benefit everyone. Think of this as the opposite of Adam Smith’s “invisible hand” (a contrary case that Smith was well aware of, by the way). Economists

call some such situations “collective action problems.” If everyone gobbles up too much real estate, an area can become overcrowded. Each individual might lack incentive to give up their valuable real estate, but the resulting congestion reduces the value of everyone’s land. The pricing of sample licenses is a kind of collective action problem. Individual licensors—for example, the copyright holders of musical compositions—are demanding a certain price based on their own individual self-interest. But by acting this way, the licensors are forcing sampling musicians to endure negative profits in order to license any new works that use two or more prior works. The sampling musicians either decline to make or release the work, or they adopt an underground business model. In either case, the licensors as a group make no revenue. Their individual self-interest has carried them to a collectively undesirable result.

Relationships

“I think that in some instances, people would be more willing to license to a major than an independent simply because there's a possibility that they would sell more records, given the distribution.” – Walter McDonough

Previous or continuing business relationships can grease the wheels of obtaining a license for a sample. In discussing the popularity of mash-ups and the new class of creators, entertainment attorney Dina LaPolt said that if “one of my clients mashed up something that I thought was brilliant, I would do whatever it takes to get it cleared.” Even though LaPolt would do whatever it would take to get a mash-up or a sample that she liked cleared, most of those independent creators do not have access to the financial capital or cultural capital needed to pull it off. Bill Stafford told us that licensing, for independent artists (i.e. those without a label at all), is “very, very difficult. Without someone there to help them along, it's the bottom of the pile.”

There is a certain level of knowledge of and familiarity with both copyright law and the music industry that many musicians would lack without representation or without affiliating with a label and publisher. Dina LaPolt illustrated the value of having expert representation with strong business relationships. She says, “So, if one of the quotes came in and my client co-wrote that song, then I'll call the music publishers of that sample and I'll try to get it down. ... I'll say, ‘Hey, I know you quoted 60 percent. Can you come down?’ And you get it down as low as possible so your songwriter gets to keep more of the copyright.” Business relationships represent not only the connections between parties to a licensing negotiation, but also stored knowledge about customary licensing practices, such as what type of royalty to ask for and which offers might be negotiable.

Pat Shanahan elaborated on the difficulty of seeking sample licenses on your own as an independent musician: “Basically if they try to do it themselves, they usually become quite frustrated because everyone's very busy at these companies, unless you know people and have relationships.” In prospective sample-licensing negotiations, musicians need to have representatives with strong business networks. For instance, when Big Daddy Kane tried to sample “I’ll Take You There” by the classic gospel-soul group the Staple Singers, he ran into problems clearing the sample. “We wrote the rhymes and made the track,” Kane says, “but apparently Prince owned the rights to all the Staple singers songs and wasn’t tryin’ to let no rappers use them.” This was when Big Daddy Kane was still signed to an independent label, and

so his song, also titled “I’ll Take You There,” went unreleased. Things turned around when Kane and Prince became labelmates. “When I signed with Warner Bros., that was the same label Prince was on, so then Prince was cool about it.”⁴⁸

Relationships can be a way to reduce transaction costs such as figuring out which people you need to license from and how to contact them. It also matters which sort of record label and publisher a musician affiliates with. Major labels have more resources and have strong, continuing business relationships with each other. Deee-lite’s Lady Miss Kier told us, “The good thing about being on a major label is they [Warner] had a great legal department that made sure we had to clear all samples, which we wouldn’t have known anything about.” Danny Rubin explains the importance of a label or publisher’s size. “It’s a business about making money, and if an artist is going to come out and sell 250 copies of a record from the trunk of his car, and only going to be able to pay the publisher or a record company an advance of \$100, it’s really not in the company’s best interests to spend time working out a license for that. In the long run, the costs of the transaction are going to outweigh the benefit or the profits or the revenue from the transaction.”

“Oh, everything’s about relationships,” says Dina LaPolt. “If I like you, I’ll help you. If I don’t like you, it’s going to be difficult and expensive. That’s just the way of the world.” In this way, we see how transaction costs reinforce the importance of relationships. The complicated nature of sample licensing makes it practically necessary for musicians to employ lawyers experienced with sample clearance. Affiliating with a major label, with the larger potential sales that comes with, makes sample clearance more feasible. In sum, sampling musicians seeking licenses will find advantages in developing relationships with music lawyers, major labels, and large publishers—partly so that the musicians can enjoy the business relationships possessed by the lawyers, labels, and publishers.

Bureaucracy

“I think increasingly, because this stuff is difficult, expensive, and time-consuming, people that are talented enough are trying to avoid dealing with it.” – Mark Kates

Transaction costs are all the ancillary costs that accompany the primary action. For instance, when you need groceries, the time and energy spent driving to the store and getting cash from an ATM might be your transaction costs. Sample clearance involves many transaction costs, some of them typical in the course of music-industry business, some of them idiosyncratic to the sampling context. As we have emphasized, collage-based works that use multiple samples in each song face particular problems. The licensing fees themselves are a large expense. But the transaction costs of negotiating two types of licenses (sound recording and musical composition) for each of many samples are also a considerable cost. “It’s a lot of accounting work,” Tom Silverman says, speaking of the early De La Soul albums his company Tommy Boy released. “You have to pay out on 60 different people on one album. It’s quite a nightmare actually.”

So, following this chain of logic, the transaction costs increase as the number of copyright holders implicated by the samples used increases. Each copyright may be split or may have downstream owners. And these owners might be difficult to identify or find—or even to

know they exist. The pricing of samples is not transparent; there is no menu. It takes time, effort, and money to learn or even get a sense of how much a given sample will cost, or if it is even clearable. For instance, Mark Kates told us about trying to clear a sample on Beck's biggest album, *Odelay*, before it was released. The song "Jackass," which was one of the album's hits, contained a sample from "It's All Over Now, Baby Blue," a Bob Dylan song performed by Them, whose lead singer was Van Morrison. Not only did they have to acquire a song publishing license from Bob Dylan's publishing company, they had to get permission to use Them's sound recording. "It was a really, really difficult sample to clear on that record," says Kates. "I mean, we literally were dealing with like the upper echelon of the Irish music business, and it finally got done, but it wasn't easy."

Clearing samples requires hiring a music lawyer or a sample clearance professional. Many musicians, especially those new to the music industry, might not have a sense of these prices as they compose and record. Because copyrights can be split, more transactions are necessary when there are more copyright holders, and each copyright can have multiple owners. The transaction costs are known as search costs; in this case, would-be licensees (the samplers) are searching for the set of proper licensors (the samplees). "In some cases, it's not even the original artist," observes Eothen Alapatt of Stone's Throw Records. "It's three other different people that represent their publishing or had the publishing on that record thirty years ago, and they give you a quote that you can't deal with. We've had to pull tracks off of records because of that." Alapatt provides specific example of the difficulties generated from copyrights changing hands over the years:

If we're talking about, for instance, Ethiopian records—even if you went and found the division of Universal Records that supposedly purchased the Phillips Ethiopia catalog, the chances of Phillips Ethiopia having contracts that survived the regime changes in Ethiopia or any proof that they own the music is so far-fetched. You might get to a person at the company who would just take the blanket stance that they own it—regardless of whether it was proven or not—because they were Phillips Ethiopia, bought by Polygram, bought by blah blah blah, bought by Universal. And they could actually stop you from putting the record out even though they don't have proof that they actually own the material. ... If I found that an artist of ours used a track that was released on Phillips Ethiopia released in 1974, I would say there's no way in hell we're gonna try to clear this sample. We're just gonna put this out.

Smaller labels or musicians would have a hard time bearing the search costs of tracing the ownership of copyrights in such a situation as Alapatt describes. As he suggests, they would also have trouble disputing a major label's claim of ownership, lacking the legal resources to match up with a global conglomerate to challenge the validity of their claimed copyrights. "The question is, who do you contact? You have to find the writers on the record," says Hank Shocklee. "Then when you go and look and find the writers of the record, you try to find the publishing company that was associated with those writers. Well, when this thing starts getting transferred and people start signing their rights over to the next third party and the fourth party and fifth parties and things of that nature, well, we're not privy to that information." Speaking to

Shocklee’s frustrations, Kyambo “Hip Hop” Joshua bemoans the current, confusing state of the sample clearance system.

Kembrew: Do you think the licensing system is efficient or inefficient?

Hip Hop: I didn’t even know it was a *system*.

Kembrew: There’s no system? It’s just free-for-all, is that what you mean?

Hip Hop: Yeah.

Interestingly, there was *literally* no system back in 1981 when David Byrne and Brian Eno released *My Life in the Bush of Ghosts*. Byrne explains: “Yes, there were no sample clearance agencies to help clear stuff back then. We delayed the record release by about a year (it was more or less finished BEFORE Remain In Light came out) to try and contact as many of the sources as possible. Lots of detective work. We knew that if we didn’t, it might not reflect well on us later. Luckily no one could quite figure out what we were doing -- and it certainly didn’t seem like a project that would generate oodles of cash for us -- so pretty much everyone said OK when we finally found them.”

Byrne continues, “The big exception was the original vocal on The Jezebel Spirit was the late radio evangelist Katherine Kuhlman. She’s pretty well known in certain circles, so apparently on her death bed Oral Roberts, another radio evangelist, had her sign over the rights to her recorded programs. Or so we heard. He absolutely refused to grant us the right to use her voice—so we reworked the track with the radio exorcist— which worked out maybe even better.”

Another type of transaction cost is known as the hold-up problem. Suppose that a certain track includes five samples, and that all licenses for four of the samples have been negotiated. What if one of the copyright holders for the last sample cannot be found? What if they decide to “hold you up” for a higher buyout or royalty, perhaps knowing that they are the last necessary licensor? The costs involved in breaking such an impasse are also a form of transaction costs. And some copyright holders may refuse to sell a license to sampling musicians at all. As Danny Rubin related to us, “There are some publishers ... that will not even accept submissions for samples. They’ll just flatly say, ‘We do not clear any samples. Please let your client know that this is flatly denied and not to sample any of our material again.’ ” In this situation, if other licenses for a track have already been negotiated, the transaction costs spent to that point—not to mention the effort in creating that particular mix of the track—have been wasted.

As a result of transaction costs, including search costs and hold-up costs, many musicians express frustration at the bureaucracy involved in the sample clearance system. During our interview, Hank Shocklee went on to point out another kind of transaction cost that is inherent in the modern sample clearance system. He understands that one should get a license, but he has several misgivings about the process involved, including tracking down and verifying who the

actual owner of a copyright is. He also points out that, for example, “If I’m sampling let’s say forty seconds of a song and that becomes my entire song, well, do I pay the same amount if I sampled one second of it? ... Who determines these prices? Who determines the rates and all that stuff?”

Sample clearance houses can reduce the monetary portion of the costs and the cost of tracking down the relevant copyright holders. Danny Rubin explains that the “other fee that you're gonna have to pay is either a lawyer or a sample clearance agency to clear the songs, which is how I make my money, and we do it based on a per clearance flat fee. For me, it's usually \$500 per clearance.” However, other people we interviewed felt that, even given the existence of the sample clearance houses, transaction costs remained a problem. Music lawyer Whitney Broussard, who has a great deal of experience with sample clearance, said, “I think that when you're dealing with rights holders trying to get a sample cleared it's really not a priority for them. ... In publisher's cases, they're trying to issue mechanical licenses and get sync[hronization] uses and things that are sort of the normal bread and butter of a company.” Broussard continues:

They’re dealing with a million other issues and they sort of have to get to it. So I think that's a structural problem and that’s very problematic. And the other side of that, or sort of the corollary to that, comes when you look at a fairly typical rap album with say fourteen, fifteen, sixteen songs on it, or sometimes maybe considerably more, and maybe two or three samples on each song. Now you have a problem—that’s like forty-five sample clearances that you need to get done. Or even twenty is an unmanageable number, very difficult to manage. So now you're faced with just the sheer magnitude of the friction in the system just slows the whole process down to almost a crawl.

But not everyone involved in the system agrees that the system is broken. “Those people that are actually doing the deals and being in the industry don't have time to sit around and talk for nine hours about how we can streamline and do all this stuff, because we're all doing it,” Dina LaPolt told us. “I don't have a problem with it and I don't think a lot of my colleagues have a problem with it. It always seems to be the people that are the least successful or not even in my music industry who are the ones that have a problem with how the music industry goes.” Regardless of one’s opinion about the efficiency of the system, the upshot is that commercial success has become a threshold for being able to clear samples. Without commercial success, it is quite difficult to have the necessary up-front financing, business relationships, and ability to bear potentially high transaction costs.

Timing

“This process can take anywhere from 2 to 20 weeks. I mean it's very, very long.” – Bill Stafford

One issue related to timing is whether the samples are cleared as soon as each track is complete or at least before the record’s release, or whether it is licensed after the record is released. When a samplee—or, more likely, their record label or publisher—detects that they

have been sampled without a license, they may demand larger buyouts and greater royalty rates. After the record has been released, the samplee may have some notion of the sampling record's success, and thus the sampler's ability to pay. There may also be acrimony involved in the negotiation, and the samplee can threaten an infringement lawsuit. Because of the possible penalties for not clearing samples beforehand—in terms of higher prices or, worse, a lawsuit—most labels seek to have all samples cleared as soon as possible. Eothen Alapatt said of his label, “We've actually become more proactive in the last couple of years at talking with our artists before the music is finished or because the record is turned in, and finding out what they've used so we can kind of assess what we're gonna have to pay and how budget might be affected as a result.”

In this way, beginning the sample clearance process earlier in a record's production cycle helps reduce the risk of penalties and also assists with financial planning for the label. Danny Rubin explained, “Usually there's a deadline that the record company has to get all samples cleared by a certain date, and usually that date is only a few months away. So I would say if I haven't found something within a few weeks or a month it's usually too late.” Such frustration can extend beyond the level of mere annoyance, as the following example from Michael Hausman indicates: “I did have this one issue with Imago with Aimee [Mann] where the issue of samples became a [problem]—it delayed the record. ... And you know, the idea that you might have to go back and un-record things, erase things or change arrangements. I mean, I think those are real costs not only in studio time but also in the momentum of a project.” Pat Shanahan says that some companies are very good at responding fairly quickly with quotes, and other companies are very bad. It can take months to hear from them, he says, though he points out that lot of times it is not their fault. It depends on whether or not the request is high on the company's list of priorities.

Chris Lighty, a hip-hop management company executive, states, “It's very hard to find these [copyright owners] and very expensive legally. You can spend between \$5,000 and \$10,000 just trying to obtain a license and still come up dry.”⁴⁹ In reference to Lighty's comments about “coming up dry,” he discusses a case in which a production team assumed that the licensing of a sample was imminent, so they completed and mastered the album only to find that the license was rejected. The production team had to reenter the studio to remaster the album, deleting the song with the unauthorized sample in the process because, Lighty states, “We decided it was expensive to remaster, but not as expensive as getting sued.”⁵⁰

Rapper/producer Kanye West — whose innovative production work on Jay-Z's records has been heard by millions — learned this licensing lesson when making his 2004 solo disc, *College Dropout*. He's on a label, Jay-Z's Roc-A-Fella Records, that can afford the ridiculously high prices companies charge, but West still had problems. When Kanye wanted to include a sample of one sung line taken from Lauryn Hill's 2002 *MTV Unplugged* album, he encountered multiple obstacles. “The problem was, it had to get cleared through MTV and also through Sony,” West told *Entertainment Weekly*, referring to the network that originally broadcast Hill's performance and the record company that owns her master tapes. “The sample was going to end up costing like around \$150,000.” This is an extremely large amount of money, especially when it is added to the cost of recording, promotion, music videos and the like.

Even though Kanye and his record company were willing to pay for this very brief fragment of sound, the bureaucratic wheels turned so slowly that it would have significantly delayed the release of his long-anticipated debut. Not only did they have to get permission from Lauryn Hill's record label, the label had to get permission from Hill herself. Kanye's manager Hip Hop remembers, "She was like, 'I like it, but don't use my voice.'" He explains that she felt that because she wasn't making any records at the time, she didn't want her voice to be used on a new record that would likely be popular—and it did become a hit. As a solution, West employed the services of r&b songstress Syleena Johnson, who sang Hill's part, legally bypassing the need to negotiate a mechanical license for the *MTV Unplugged* album.⁵¹ What impact did that decision have on the aesthetics of the song? Did doing a "replay" rather than using the original sound recording make it better or worse? Hip Hop says, "They're both similar, but I think I like the newer one better because he was able to do more with the vocals."

This is one instance in which some of those involved in making the record liked the replayed, non-sampled version created because the rights couldn't be cleared in time for the record release. This wasn't the case on the Beastie Boys' *Check Your Head* album, in which the opening track, "Jimmy James," contained a Jimi Hendrix sample. The album version of that song "isn't the one we had originally wanted to put on there," group member MCA said, explaining that the sample clearance was refused by whoever was controlling the Hendrix estate at the time. In order to release the album on schedule, the Beasties had to replace the Hendrix samples with instrumentation the group played. "I like the original version best," says MCA, "that's the way the song was supposed to be heard."⁵²

Whitney Broussard agreed that the implications of a delayed record-release date can be far-reaching for artists, saying that delay can "drastically affect an artist's career. If tensions flare up, a label can cool on an artist. ... And if you miss one Tuesday [release date], you can't necessarily go to the next." Broussard also noted that a delayed record release can affect the financial reporting for the label. "It can skew the earnings for a record ... so that they fall over two quarters instead of one." To satisfy investors, the major record labels want to show as much earnings as soon as possible. For big-name artists, delays from sample clearance can affect their apparent financial performance. Smaller labels face problems that are perhaps more grave from such timing issues, as they have a smaller roster of artists and a much smaller number of releases per year to spread out financially. Eothen Alapatt explains:

Sometimes you're in the position where you have the record in production, and you have to halt production of it because you can't find the answer that you need. As much as we believe in this creatively, we all have to stay in business, so we can't take risks. ... If you have a record that's done, and let's just say it was done a month ago in July. That means a record company would be putting it into production and it would be set to release in September or October, probably late September. Well, if you're an independent, you don't have the luxury of pushing it back to November because you can't afford the retail programs necessary to market the record between October and December. It's exorbitant. It's the way the music industry works, because the retailer is trying to sell shelf space to major labels. So you have to start in the end of the January when the cycle begins anew for independent companies; we can start affording to buy shelf space. So you

might be with an artist who has a hot single on the radio, or, nowadays, a hot single on the Internet, and you want to get that record into production immediately, but you can't clear a sample. Well, you could lose four months at the drop of a hat, as well as a lot of money.

The details of the record business and its seasonal cycles of promotion make it especially costly to miss a record release date, magnifying the overall cost of any inefficiencies in the sample clearance system. Because the sample clearance bureaucracy takes time to navigate in general, sample-heavy records can translate into financial difficulties for labels. Even the tiniest inefficiencies can have large effects. For instance, if one samplee from a key track on a sampling artist's record is especially difficult to reach by phone, the costs can multiply—with a sort of butterfly effect—into a damaged career for the artist and missed Wall Street expectations for their label.

Trying to Make (Business) Sense of Mash-Ups

“You put a *cappella* vocals out there and you become 50-50 partners with somebody else who might have come up with an incredible piece of work. It is like a universal network of studios where technology allows people to have studios in bedrooms, instead of big expensive studios.” – Chuck D

“I think the record industry is a lot cooler about mash-ups at the moment,” Scanner says, “because things are so bad for them. The major companies are already scared. How do they sell their product?” In response, some record companies are appropriating the appropriations—as apposed to tracking down the anonymous creators and trying to sue them. We have seen the rise of what Freelance Hellraiser calls a “Lawyer’s Mix,” in which two songs are legitimately licensed and then mashed up by a third party record company. For instance, the Sugarbabes got a number one U.K. hit when they sang the vocals from Adina Howard’s “Freak Like Me” over an instrumental by 1980s electro-pop artist Gary Numan—with approval from all the rights owners. In a somewhat humorous turn of events, the mash-up artist Freelance Hellraiser bitterly wrote on his website that this is being done “without giving credit to the people who came up with the original idea.”

In Freelance Hellraiser’s case, his popular Aguilera/Strokes mash-up was released two years later as a legitimate single, but Freelance Hellraiser wasn’t paid. It’s an interesting thing for him to complain about—the idea that someone is ripping off his own unauthorized appropriations, but it nevertheless underscores some troubling labor politics at work. Scanner observes, “What could be better than getting a kid who does it for free in their bedroom? They don’t have to pay anything.” In mash-up collage, the author is somewhat absent from the new work of art, and is a kind of meta-author, or a curator. What sort of protection or compensation should he or she have, if any? Scanner continues, “Instead of saying to this kid at some point, ‘We know who you are we’re taking you to court.’ They say, ‘Actually, we want to release this as a record.’ The kid’s very happy, because he or she gets their product out on the street, and probably paid next to nothing for it.” He also points out that the old pop star who was sampled gets a another hit, and the sound recording and song publishing copyright owners rake in the money.

Speaking about mash-ups, Dean Garfield—Vice President and Director of Legal Affairs for the Motion Picture Association of America (MPAA), formerly of the Recording Industry Association of America (RIAA)—believes that “the market” will sort out the issue of mash-ups. “Not long after the *Grey Album*,” Garfield tells us, “Universal Records put out a mash-up collaboration of their own, and not long after that Jay-Z did his collaboration with Linkin Park, which was also quite popular.” Discussing the impact of the *Grey Album*, Dina LaPolt says that “everybody flipped out, heads spun three degrees south, changed everything. Now mash-ups are huge. People are saying, ‘Let’s make this work.’” But how? Dean Garfield emphasizes that music companies and motion picture studios are interested in selling music and entertaining people, and so they will go where the market leads them. “So if people like mash-ups,” Garfield says, “they’ll produce them.” This may or may not be true. Even though many people liked the Danger Mouse’s collage, the market certainly did not magically readjust EMI’s policy regarding its ban on Beatles samples. Instead, the *Grey Album* was downloaded millions of times, and no one was compensated, and EMI ended up sending out hundreds of cease and desist letters to individuals and Web sites that hosted the album.

The album was downloaded and heard by millions, and yet no money was earned or exchanged. If it was so popular and critically acclaimed, why couldn’t a powerful record label make it work? Whitney Broussard answers by saying that major labels are not in business for the sake of art. “They’re in it to make money,” he says. “And so anything that they can’t really make money on, they’re not gonna work with.” Broussard is sure that a record company would have released the *Grey Album* if it were feasible, but the Beatles’ public stance against being sampled was a clear deterrent that prevented the album to be released legitimately. Siva Vaidhyanathan observes, “Another one of the absurdities of the music industry is nobody made a dime for one of the year’s most successful albums. . . . And it didn’t have to be that way. If we had a more rational system to deal with samples, more people could make money from this phenomenon.” He then waxes philosophical: “But at least we got to dance to it, and that was good.”

The Grey Album by the Numbers: Hypothetical Sales of a Licensed Version.⁵³

Original Production Run of CDs:	3,000
Number of Copies Downloaded on “Grey Tuesday” (Feb. 24, 2004):	100,000

Danger Mouse’s Sales Record

Sales of Gorillaz’ <i>Demon Days</i> (2005):	2,000,000+ (#6)
Sales of DANGERDOOM’s <i>The Mouse and the Mask</i> (2005)	< 500,000 (#41)
Sales of Gnarls Barkley’s <i>St. Elsewhere</i> (2006)	1,000,000+ (#4)

Related Sales Records for Comparison

Sales of The Beatles’ <i>The Beatles</i> (aka <i>The White Album</i> , 1968)	19,000,000+
Estimated Bootleg Distribution of Prince’s <i>The Black Album</i> (1987)	500,000
Sales of Jay-Z’s <i>The Black Album</i> (2003)	3,000,000+

Hypothetical Sales

Suppose 1,000,000 people would have bought a licensed version of *The Grey Album*. The artist’s share of the sales revenue would have been approximately \$1,990,000, (see the distribution-of-CD-revenue figures cited below, at the beginning of Section E). Thus, for every million copies sold, the Beatles and Jay-Z could have each made \$950,000 per million sold, leaving \$90,000 per million sold for Danger Mouse. As it happened, the album generated almost no revenue whatsoever.

Further complicating these market-based solutions, we believe it is unlikely that an amateur mash-up maker will have the sufficient resources and contacts to secure licenses that will allow them to release their collaged composition legitimately. It is also unclear whether or not the market will sort out another problem that discussed in earlier in this chapter: royalty splits. Any “economically rational” steward of, for instance, the copyrights to Nirvana’s “Smells Like Teen Spirit” and Destiny’s Child’s “Bootilicious” will likely demand 100% of the royalties, just as they would for a typical cover version. But mash-ups are, for obvious reasons, quite different, and the end result of this “rational” and “responsible” business behavior is a situation where at least 200% is required, but only 100% can be given away.

A far more daunting prospect—one that might give an entertainment lawyer a stroke—would be trying to clear Girl Talk’s 2006 album *Night Ripper*, which sampled at least 150 songs

(his 2008 follow up, *Feed the Animals*, doubled that number). On these albums, Gregg Gillis demonstrates an uncanny ability to overlay music from traditionally isolated genres: metal riffs run alongside '70s love songs and West Coast rap; today's pop gets down with '60s R&B and classic rock. With its hundreds of easily recognizable samples, the album is part parlor game, part love letter to three decades of popular music. If Girl Talk had simply recorded an album of covers—faithful reproductions of complete songs—then there would have been no problem, as long as he paid royalties to the original composers. No permission necessary. But under current copyright law, copyright owners maintain the right to say "yes" or "no" to derivative uses of their work. In other words, samples.

So, to properly clear and license all the samples on *Feed the Animals*, Girl Talk would have had to first figure out who owns each copyright (already a huge problem on its own), and then gained permission from both the sound recording copyright owner and the composer/publisher for each work he sampled. If you're keeping track, that's about 600 green lights and zero stop signs. Furthermore, in most of the world, the artist maintains the "moral right" to say yes/no, even if s/he doesn't own the copyrights. US copyright law doesn't recognize moral rights, but an artists' contract often includes a provision that allows her/him to maintain approval rights over types of uses. While these contract provisions benefit artists by enabling them to retain some control over new uses of their work, for the artist that wants to clear a sample, this means that there's potentially another structural barrier in the creative process: even if the copyright owner (record label) says yes, the artist may have a provision that allows her/him to veto the use.

Assuming Girl Talk could a) figure out who owns the copyrights, and b) get all the permissions necessary, the problem doesn't end there. It's not even as simple as "just" acquiring and paying for 150 or 300 licenses for *Night Ripper* and *Feed the Animals*, respectively, because some of the songs Girl Talk samples already contained multiple samples. For instance, one of the songs used on *Night Ripper*—the Pharcyde's 1992 hip-hop hit, "Passing Me By"—was composed from samples of "Summer in the City" by Quincy Jones, "Are You Experienced?" by Jimi Hendrix, and four other songs from lesser known artists. Another song sampled on *Night Ripper*—P.M. Dawn's "Set Adrift on Memory Bliss"—not only contains a well known sample from Spandau Ballet's "True," which provides the song's hook, but also a horn and drum sample from the Soul Searchers' "Ashley's Roachclip" and another drum sample from Bob James' "Take Me to Mardi Gras."

One last example, this time from *Feed the Animals*. Girl Talk used a two second clip from Deee-lite's "Groove Is in the Heart," which itself samples Vernon Burch's "Get Up" and the bass line from Herbie Hancock's "Bring Down the Birds." "Groove Is in the Heart" also features two spoken word samples, one from a belly dancing instructional record by Bel-Sha-Zaar with Tommy Genapopoluis and the Grecian Knights—which provides the "We're going to dance and have some fun!" intro to the song—and a one-second speaking-in-tongues-like vocal outburst from Sweet Pussy Pauline's "Hateful Head Helen." On *Feed the Animals*, Girl Talk only samples the "one, two, three, bluhlbluhlbluhlbluhl" part of "Groove Is in the Heart." Two seconds. But as was mentioned earlier in the book, if you count those songs-within-songs—which the current licensing system requires you to do—the already-absurd number of licenses Girl Talk has to acquire would double, at the very least.

What makes this maddening for a sample-based artist who wants to go legit is the fact that each stakeholder has veto power—and can also make any sort of monetary demands it pleases. Even if Girl Talk tried to get permission to release his records, it would be virtually impossible to clear the many copyrighted song fragments embedded in his records. “It’s just not reasonable to go that route,” Girl Talk says. “If we went through the clearance process, it’d probably take our entire lifetime to try to clear the album.” Entertainment lawyer Whitney Broussard agrees. “I think that most major record companies would just throw up their hands and say, ‘We’re not going to do it,’ because it’s just too much work,” Broussard says. “Each license can be a few thousand dollars, just in transaction costs—plus a few thousand dollars in license fees. And when you add that up over 150 samples, if you license everything, most companies probably wouldn’t do it. As major labels, they understand that they’re relatively big targets. They don’t want to release things that haven’t been cleared.”

Assessing the Efficiency of the System

We have provided a catalogue of the sample clearance system’s flaws. At the same time, we have acknowledged that the system does sometimes reach what appear to be reasonable solutions, to the benefit of both samplers and samplees. It is difficult to get a sense of the relative frequency of good and bad outcomes. We lack a data set that tracks a random sample of musicians who might wish to sample and follows their path towards either sampling without permission, obtaining a license, or having permission denied. It is hard to imagine undertaking the expense to collect such a data set properly. But the absence of measurement makes the performance of the music industry’s process for licensing samples hard to evaluate. It also thwarts any systematic, quantitative assessment of changes to that system or landmark decisions in copyright law like the *Bridgeport* case. Yet we need to grasp of how the sample clearance system operates as collage of various forms becomes more inexpensive and thus more pervasive in our culture.

In the absence of quantitative measures, we attempted to collect rich qualitative data by conducting our interviews. The collective experience of our interviewees can raise issues and suggest ways in which the sample clearance system performs poorly. To review, the problems we heard about include: arguably excessive licensing fees; difficulties in clearing songs that contain multiple samples (which are exacerbated by the high-fees issue); multiple and significant transaction costs; outright refusals to license; barriers to licensing for independent musicians who lack business relationships with record labels, publishers, or sample clearance houses; and the failure (from both samplers and samplees) to develop an approach to licensing mash-ups. Many of these criticisms are debatable, in terms of both their validity and their importance. For instance, those who believe samplees should control the contexts in which fragments of their work appear may favor a system that allows for denials of permission to sample. To take another example, some mash-ups have been licensed, suggesting that the problem might not be so dire. Yet other criticisms have undeniable salience—such as the multiple-sample problem, which we address in more detail next in [Chapter 6](#).

Because of the wide range of perspectives on the sample clearance system’s performance, evaluating the overall efficiency of the system entails many considerations. Some

of the competing interest groups might benefit from certain changes, but others might lose out. Changes to copyright law might have complex or unintended consequences. Different licensing practices could be more expensive for the industry to use. And the transition to new practices could have its own costs. Even with these caveats, however, feasible alternatives to the current sample clearance system may exist that would remedy some of the inefficiencies we have described so far. Chapters 7 and 8 attempt to identify such policies.

¹ MARK KATZ, CAPTURING SOUND: HOW TECHNOLOGY HAS CHANGED MUSIC 138 (2004).

² JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 9 (2006).

³ Henken, J. (1988, October 16). Sounding off by the numbers: making music the MIDI way. *Los Angeles Times*, Calendar, p. 66.

⁴ Goldberg, D. & Bernstein, R. J. (1993, January 15). Reflections on sampling. *New York Law Journal*, 3.

⁵ Soocher, S. (1989, February, 13). License to sample. *National Law Journal*, 1-5; Harrington, R. (1991, December 25). The groove robbers' judgment: Order on 'sampling' songs may be rap landmark. *Washington Post*, p. D1.

⁶ Hochman, S. (1991, December 18). Judge raps practice of 'sampling.' *Los Angeles Times*, p. F1.

⁷ Taylor, Shawn. (2007). *People's instinctive travels and the paths of rhythm*. New York: Continuum, p. 102.

⁸ Allen, Harry. (2000). "Hip-Hop Hi-Tech," pp. 91-5 in *Step Into a World: A Global Anthology of the New Black Literature*. New York: Wiley & Sons, p. 91.

⁹ RZA, with Chris Norris. (2005). *The Wu-Tang Manual*. New York: Riverhead, p. 193.

¹⁰ Grandmaster Flash, with David Ritz. (2008). *The Adventures of Grandmaster Flash: My Life, My Beats*. New York: Broadway Books, p. 25.

¹¹ Allen, Harry. (2000). "Hip-Hop Hi-Tech," pp. 91-5 in *Step Into a World: A Global Anthology of the New Black Literature*. New York: Wiley & Sons, p. 95.

¹² George, N. (1998). *Hip-hop America*. New York: Viking, p. 89.

¹³ Rose, T. (1994). *Black noise: Hip-hop music and Black culture in contemporary America*. Hanover: Wesleyan University Press.

¹⁴ Grandmaster Flash, with David Ritz. (2008). *The Adventures of Grandmaster Flash: My Life, My Beats*. New York: Broadway Books, p. 80.

¹⁵ Brand, O. (1962). *The ballad mongers: Rise of the modern folk song*. New York: Funk & Wagnalls.

¹⁶ Boyes, G. (1993). *The imagined village: Culture, ideology and the English folk revival*. New York: Manchester University Press, p. 224.

¹⁷ Heller, Michael. (2008). *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*. New York: Basic Books, p. xiii.

¹⁸ William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Belknap Press, 2003), 58.

¹⁹ Darcy Frey, "One Very, Very Indie Band," *New York Times*, Section 6; Column 3; Magazine; Pg. 31 (March 4, 2007).

²⁰ See, for example, Arnold Plant, “The Economic Aspects of Copyright in Books,” *Economica*, 1 (2): 167-195 (May 1934); and Stephen Breyer, “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs” *Harvard Law Review* 84 (2): 281–355 (1970).

²¹ Landes & Posner, at 52-53.

²² 17 U.S.C. § 115(a)(2).

²³ See, for example, *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2003).

²⁴ Sometimes the musical composition copyright is known as the © (“circle-c”) copyright while the sound recording copyright is known as the (P) (“circle-p”) copyright.

²⁵ Thus, in our parlance, one can write the composition for a song (as in the common term “songwriter”) but one can also record a song. We recognize that the term “song” is a poor fit for most pieces in the classical genre, but we need a word separate from copyright’s legal terminology.

²⁶ 17 U.S.C. § 106 (2000). Sound recording copyright holders have only a limited performance right (it applies only to some digital audio transmissions) and have no display right. *Id.*

²⁷ In pop music, many times the owner of the sound recording copyright and the musical composition copyright can be one and the same, when an artist records renditions of their own songs or compositions. But the two types of copyrights such artists own remain distinct. They can still, for instance, license the sound recording copyright to a record label and license the musical composition copyright to a publisher.

²⁸ See <http://www.cnn.com/interactive/entertainment/0101/cd.price/frameset.exclude.html> and http://www.ascap.com/jam/read_about/mm_cd.html.

²⁹ See, for example, Lee & Thompson Music Guide, Chapter II (Recording Contracts), § 3.10, at http://www.leeandthompson.com/MusicGuide/Chapter2_Part3_3.html (last visited January 18, 2007). Passman, pp. 401-402, discusses synchronization licenses for film, which fall under the same broad category of master-recording licenses that do not involve sales of the artist’s own recordings by the record label.

³⁰ In some sampling cases, it appears that tiny enough samples could be deemed “de minimis” by a court, and thus not constitute infringement. But in *Bridgeport*, the 6th Circuit held that any amount taken from a sound recording constituted infringement.

³¹ We discuss the possibility of sampling as fair use in the final section.

³² In a standard recording contract, recording artists’ royalties from record sales and from other uses are recouped against advances, recording costs, video production costs, and other costs. If a recording artist has not yet earned enough royalties to pay the record label back for these recoupable expenditures, we say that they are not recouped. Until the recording artist is recouped, any royalties they earn act as a credit in a sort of negative-balance account with the record label. This “account” is cumulative across albums and sometimes across contracts (a phenomenon called “cross-collateralization,” meaning that if one album by a recording artist fails commercially, they may never see positive income beyond their advances. See Passman, pp. 100-104.

³³ Cary Sherman of the Recording Industry Association of America has stated, “Record companies try to make a profit and they know that 90 percent of their artists will not succeed. They pay vast amounts on advances, promotional and marketing costs for these artists and rely on the handful of artists who succeed to recover their losses and make a profit.” Eric de

Fontenay, “Should Artists Pay for Labels’ Mistakes?,” *Musicdish.com* (Sept. 6., 2001), at <http://www.musicdish.com/mag/?id=4452> (last visited Mar. 2, 2007).

³⁴ Exactly who counts as a “featured artist” depends on contractual agreements between the record label and the named recording artist and contractual (or sometimes informal) agreements between the named recording artist and the session musicians.

³⁵ “In situations where the artist gets a percentage of the [record] company’s net receipts ... where the artist gets 50% of the fee paid ... the producer gets a pro-rata share of the artist’s earnings, based on the ratio that the producer’s royalty bears to the [artist’s] all-in rate.” Passman, p. 137. “All-in rate” simply refers to the fact that the producer’s share is taken out of the artist’s royalties.

³⁶ Passman, pp. 133-135.

³⁷ Music lawyer Whitney Broussard explains that “75% [is] more common in modern contracts, 50% more common in older contracts.” Sheet music is handled differently. See Passman, p. 260.

³⁸ See the discussion of the *Newton* case, Part C.

³⁹ See Tim Wu, “Jay-Z Versus the Sample Troll,” *Slate.com*, Nov. 16, 2006, available at <http://www.slate.com/id/2153961/> (last visited Oct. 12, 2008).

⁴⁰ Whitney Broussard, “Current and Suggested Business Practices for the Licensing of Digital Samples,” *Loyola Entertainment Law Journal* (1990?), p. 16(?).

⁴¹ Donald Passman notes that record labels often want an advance on their royalty payments. Passman, p. 307-08.

⁴² See Broussard, pp. 14-17(?); see also Passman, p. 308.

⁴³ See Broussard, p. 17(?).

⁴⁴ This paragraph and the list that follow are drawn heavily from Broussard (1990).

⁴⁵ See Broussard, p. 15(?).

⁴⁶ “The Verve were forced to pay 100 per cent of their royalties from 'Bittersweet Symphony' to Rolling Stones' lawyer Allan Klein. Now their million-selling album, *Urban Hymns*, could be removed from sale because former Stones manager Andrew Loog Oldham feels he is entitled to a share of the profits, too.” Sam Taylor, “Top Ten Lawsuits,” *The Observer* (Jan. 31, 1999), at p. 14.

⁴⁷ We consider the market for samples to be “small” in the sense that a typical musical work is only likely to be licensed for sampling once or twice per year, if at all. In such an infrequent market, prices are unlikely to become public and an efficient meeting of supply and demand might be less likely. This argument depends on the uniqueness of each sampled work—each musical work is different and, as many interviewees told us, each sample is different. On the other hand, most licensing fees have a common structure and fall within a standard range of buyout levels or royalty percentages. In that case, one might aggregate all samples into a single market, which would not be “small.”

⁴⁸ Coleman, Brian. (2007). *Check the Technique: Liner Notes for Hip-Hop Junkies*. New York, Villard Books, p. 42.

⁴⁹ Russell, D. (1992, January 4). Judge clips Biz Markie on sampling issue. *Billboard*, 1.

⁵⁰ Russell, D. (1992, January 4). Judge clips Biz Markie on sampling issue. *Billboard*, 1.

⁵¹ Drumming, N. *Entertainment Weekly*, p. 78.

⁵² Coleman, Brian. (2007). *Check the Technique: Liner Notes for Hip-Hop Junkies*. New York, Villard Books, p. 27.

⁵³ See “The Grey Album,” Wikipedia, at http://en.wikipedia.org/wiki/The_Grey_Album (last visited Mar. 2, 2007); “Danger Mouse,” Wikipedia, at http://en.wikipedia.org/wiki/Danger_Mouse (last visited Mar. 2, 2007); and Recording Industry Association of America (RIAA), “Gold & Platinum: Searchable Database,” RIAA.com, at <http://www.riaa.com/gp/database/default.asp> (last visited Mar. 2, 2007).