

Chapter Four

Hep Cats and Copy Cats:

American Music Challenges the Copyright Tradition

Shirley Dixon was 13 years old in 1976, when she first played the Led Zeppelin song "Whole Lotta Love" for her father. Shirley had borrowed the 1969 album, *Led Zeppelin II*, from a friend because the hit song from it had reminded her of one of her father's compositions.¹ Her father was the legendary blues composer, performer, producer, and bass player Willie Dixon. Young Shirley was well versed in the "property talk" of copyright law. She had been typing her father's lyrics and filling in copyright registration forms since she was eight years old. Shirley applied her keen ear and mind to the Led Zeppelin song, and concluded "Whole Lotta Love" reminded her of her father's writing style. He agreed that "Whole Lotta Love" sounded like his obscure song "You Need Love," which was recorded by Muddy Waters in 1962.²

Willie Dixon filed suit in 1985 against the British rock group. They settled their dispute in 1987. Although this case

never made it as far as a court hearing, examining the tensions between an older blues composer and younger hitmakers illustrates many of the contradictions and tensions of American music copyright.

Music, more than any other form of expression, collapses the gap that separates idea from expression. Is the string of six notes that initiates "Happy Birthday to You" an idea, an expression, or both? If it is an idea, there must be another way to express the same idea. Would playing the same notes at a different tempo constitute a new expression of the same idea? Would playing it in a different key be an exercise in novel expression? Is there an idea behind a particular arrangements of musical notes? Is there an idea behind a tone, texture, timbre, or "feel" of a song? Are these features of a song an ideas in themselves?

If copyright law is charged with protecting a particular arrangement of notes, should it protect the melody, the harmony, the rhythm, or all of the above? How long must that string of notes be to constitute a protectable segment of expression? Should music copyright law be most concerned with the "total look and feel" of a protected work, or particular elements such

as solos, riffs, or choruses? The 12-bar I-IV-V chord pattern runs through most songs within the blues tradition, so that pattern is generally considered unprotectable. It is considered "common property," drawn from the "deep well" of American blues. However, an identifiable one-measure guitar riff -- such as the opening to the Rolling Stones' song (and Microsoft Windows advertisement) "Start me Up" -- could be protectable. At what point between general chord patterns and specific strings of notes does repetition constitute an infringement of a protectable expression? None of the answers to these questions are clear. Creative infringement cases have been interpreted on an almost ad-hoc basis. Maintaining a healthy measure of freedom for "second takers" to build upon an expressive tradition demands other strategies, because the traditional safeguard of the idea-expression dichotomy does not operate the same way in music.

Because these questions yield unsatisfying answers, many disputes among artists get expressed in moral or ethical terms. Led Zeppelin, like many rock groups, did not have an unsullied reputation for granting credit to blues artists. The group had covered and properly credited two other Dixon compositions, "You

Shook Me" and "I Can't Quit You Baby," on its first album in 1968, *Led Zeppelin I*. During the early 1970s, the group had befriended the Dixon family on its visits to Chicago, and had publicly paid homage to American blues pioneers. The group had failed to credit two other songs from *Led Zeppelin II*, "Bring It on Home" and "The Lemon Song," which resembled other Dixon compositions. Unbeknownst to Dixon, his publishing company, Arc music, had negotiated a settlement with Led Zeppelin over those uncredited songs, but had neglected to inform Dixon or pay him the recovered royalties until long after the settlement. By the late 1970s, Led Zeppelin would not eagerly grant either writing credit or royalties to Dixon over "Whole Lotta Love." The proceeds of that settlement helped Dixon start the Blues Heaven Foundation, dedicated to helping aging composers and performers recoup some of the rewards for their work in years before they had a chance to develop sophisticated business and legal acumen. When Dixon passed away in 1992, his legend had grown from brilliant composer and performer to brave business pioneer. Dixon was among the first blues artists to wrest control of rights and royalties from exploitative record and publishing companies.³

The relationship between blues composers and rock artists is complex. There are rarely obvious good guys and bad guys in the stories of disputes over credit, influence and royalties. In 1956, Elvis Presley revolutionized popular music by introducing stripped-down, high-power Southern rhythm and blues to mainstream white audiences around the world. He did so by recording some songs that African-American artists had distributed to lesser acclaim just a few years before, such as Big Mama Thornton's "Hound Dog." While Thornton's version gained legendary status among blues fans in the 1950s, it barely scratched the white pop market. Presley's version, on the other hand, sold two million copies in 1956 and simultaneously topped the pop, country, and rhythm and blues charts. Presley's appeal transcended racial and regional lines and opened up several generations of young people from around the globe to the power of African-American music.⁴ Yet Presley remains a controversial figure to many critics, who consider his work "inauthentic" because he reaped far greater rewards than previous or contemporary black artists whose work was just as exciting. Music journalist Nelson George has called Presley "a damned lazy student" of black culture and a "mediocre interpretive artist."

Chuck D, the leader and lyricist of the rap group Public Enemy, sings "Elvis was a hero to most, but he didn't mean shit to me." Whether in good faith or bad, white performers almost always reaped larger rewards than their black influences and songwriters. As Tricia Rose has argued, whiteness matters in the story of the commodification of black cultural expression. By virtue of their whiteness, many artists participated in styles and subcultures that emerged from the rhythm and blues tradition and "crossed over" what was until only recently a gaping social and economic chasm between black music and white consumers. White rockers went where black artists could not. Even when blacks could cross over, white artists have had better opportunities to capitalize on the publicity and distribution systems. For instance, many "alternative" or "rock" radio stations will occasionally play rap music, but only if it is by white artists such as the Beastie Boys, Limp Bizkit, or Kid Rock..⁵

But the politics and economics of cultural exchange and translation are not simple and unidirectional. Like Elvis, many later blues-rock stars such as Eric Clapton, the Rolling Stones, and Bonnie Raitt helped publicize the work of almost forgotten

blues artists. Others, such as Led Zeppelin and the Beach Boys, have granted credit to composers such as Dixon and Chuck Berry under legal duress. If viewed along a continuum, there is very little difference in the passion or sincerity behind the work of Muddy Waters and Eric Clapton. However, there is an indisputable chasm between the reception of Waters' work in the 1950s and Clapton's hits of the 1970s: Because he is white, Clapton was in a better position to exploit vastly better business conditions and broader consumer markets than Waters was. Clapton emerged at a very different time. Nonetheless, many music fans now know and appreciate the work of Willie Dixon, Muddy Waters, and Robert Johnson because of Elvis Presley, Eric Clapton, Jimmy Page, and others.

The simplistic story of the relationship is frequently couched in terms of younger white performers "stealing" material from aging "authentic" composers such as Willie Dixon, Sonny Boy Williamson, or Son House. But tracing influence through something as organic and dynamic as American music is never simple. Blues-based music is often the product of common and standard chord structures and patterns. Relying on or referring to a particular influence can be as important as any "original"

contribution to a work. A composer might employ a familiar riff within a new composition as a signal that the new song is part of one specific tradition within the vast multifaceted canon of American music. Influence is inspiration, and songs talk to each other through generations. As Willie Dixon wrote: "When you're a writer, you don't have time to listen to everybody else's thing. You get their things mixed up with your ideas and the next thing you know, you're doing something that sounds like somebody else." Because repetition and revision are such central tropes in American music, rewarding and encouraging originality is a troublesome project in the music industry.⁶

In 1948, Muddy Waters released a song for the Chess brothers' Aristocrat label called "Feel Like Goin' Home." It was Waters' first national rhythm and blues hit. "Feel Like Goin' Home" was a revised version of a song Waters had recorded on his front porch in Mississippi for the folklorist Alan Lomax in 1941. After singing that song, which he told Lomax was entitled "Country Blues," Waters told Lomax a story of how he came to write it. "I made that blue up in '38," Waters said. "I made it on about the eighth of October, '38. ... I was fixin' a puncture on a car. I had been mistreated by a girl, it was just running

in my mind to sing that song. ... Well, I just felt blue, and the song fell into my mind and it come to me just like that and I started singing." Then Lomax, who knew of the Robert Johnson recording of a similar tune called "Walking Blues," asked Waters if there were any other blues songs that used the same tune. "There's been some blues played like that," Waters replied. "This song comes from the cotton field and a boy once put a record out -- Robert Johnson. He put it out as named 'Walking Blues.' ... I heard the tune before I heard it on the record. I learned it from Son House. That's a boy who could pick a guitar."⁷

In this brief passage, Waters offers five accounts for the origin of "Country Blues." At first, Waters asserts his own active authorship, saying he "made it" on a specific date under specific conditions. Then Waters expressed the "passive" explanation of authorship as received knowledge -- not unlike Harriet Beecher Stowe's authorship of *Uncle Tom's Cabin* -- that "it come to me just like that." After Lomax raised the question of Johnson's influence, Waters, without shame, misgivings, or trepidation, said that he had heard a version of that song by Johnson, but that his mentor Son House had taught it to him.

Most significantly, Waters declared in the middle of that complex genealogy that "this song comes from the cotton field."

What might seem to some observers a tangle of contradictions might instead be an important complication. Waters had no problem stating, believing, and defending all five accounts of the origin of "Country Blues." To Waters, one explanation does not cancel out the others. Blues logic is neither linear nor Boolean. Blues ideology is not invested in some abstract notion of "progress" and thus does not celebrate the revolutionary for its own sake. The blues compositional ethic is complex and synergistic, relying on simultaneously exploring and extending the common elements of the tradition. Blues artists are rewarded for punctuation within collaboration, distinction within a community, and an ability to touch a body of signs shared among all members of an audience. While Muddy Waters used the metaphor "from the cotton fields," other artists say that inspiration comes to them "from the air." They call their songs "air music." The elements and themes float and flow, ready for any skilled and practiced performer to borrow and put to use. Each performer can revise the common tropes and expand the cultural commons. As blues scholar David Evans explains,

blues composition relies on concepts to which we usually assign the terms tradition, inspiration, and improvisation. But blues singers do not see these as separate and distinct factors. They are one process. Because blues composers do not ask themselves what is particularly traditional about their tradition, they do not feel bound to tradition. Because they do not isolate a process called "improvisation," they feel no compulsion to improvise every time they play a particular song. Blues artists often express "newness" passively, as if they original or improvisatory elements "just came" to them from the air or the cotton fields.⁸

Whether the basis of the song came from the cotton field or not, Johnson recorded it before either House or Waters. But were all of these recordings really of the "same" song? Johnson's 1937 recording of "Walking Blues" and Waters' 1941 "Country Blues" share many qualities. The verse-and-chorus structures of both songs (ABAB) are identical, but that structure is common if not standard for country blues songs. Both songs employ similar guitar solos using a bottleneck slide. And as music scholar John Cowley has demonstrated, they both share a common ancestor in

Son House's "My Black Mama," which House sometimes called "Walking Blues."⁹

Many of the lyrics of Johnson's "Walking Blues" also resemble Waters' "Country Blues." Both songs feature the classic blues line, "I've been mistreated baby, and I don't mind dying." Consider Johnson's first two verses:

I woke up this morning, feeling round for my shoes
Tell everybody I got these walking blues
Woke up this morning, feeling round, oh, for my shoes
But you know about that, I got these old walking blues.

Lord, I feel like blowing my old lonesome home
Got up this morning now, Bernice was gone
Lord I feel like blowing my old lonesome home
Well I got up this morning, all I had was gone.¹⁰

And here are the first two verses to Waters' version:

Ah, it gets later on in the evening, child. I feel like, like
blowing my home

I woke up this morning to find my, my little baby gone

Later on in the evening man, man, I feel like, like blowing my
home

Well I woke up this morning baby, to find my little baby gone.

Well now, some folks say the worried, worried blues ain't bad

That's the miserablest feeling child I most, most ever had

Some folks tell me man that the worried blues ain't bad

Well that's the miserablest old feeling, honey now, ooh now gal,
I most ever had.¹¹

Both songs deal with the same story. The singer's love has left him, so he feels like "blowing" his home and he doesn't mind dying. A legal claim to authorship over these lyrics would require an argument that one person deserves monopoly control over these very common expressions of an almost universal experience: frustration and resignation over a failed love affair. The "feel" of these two versions is very distinct. Waters, for instance, syncopates his lyric delivery in "Country Blues" much more than Johnson does in "Walking Blues."

Waters recorded versions of this song several more times in his career, each time changing the order of certain stanzas. Each version tells the same story, contains a slide solo, and shares the verse structure. Yet each is a very different song. Waters' 1948 version "I Feel Like Going Home" is electrified, up-tempo and "rocks" more than his acoustic version that Lomax recorded. Waters' voice lack the gravelly growl of the earlier versions. It occasionally almost squeals -- more like Bobby Blue Bland than Robert Johnson or Son House -- yet distinctly Muddy Waters. The 1948 hit version established Waters' "signature" sound, which no artist, black or white, American or British, would ever capture or imitate. For Waters, originality and authenticity were not in the lyrics or chord sequence. They were in his voice, his passion, his presentation, his motion. There was no reason for Waters to seek a legally granted monopoly over his style. Muddy Waters already enjoyed a natural monopoly.

These are more aesthetic and ethical issues than legal ones. What if Robert Johnson -- had he lived -- had filed suit against Muddy Waters over composer's rights for "Walking Blues?" Waters' best defense might have been that the elements of both songs came "from the cotton field," and were thus already part

of the public domain long before Johnson recorded his version. Yet these same issues of style and presentation mark the dispute over Willie Dixon's composition and Muddy Waters' recording of "You Need Love" and Led Zeppelin's "Whole Lotta Love." Dixon and Led Zeppelin never met in a courtroom. The case was settled for undisclosed terms after two years of negotiation. Both songs do share some lyrics, but they both take elements from the deep well of the blues tradition. What's more, the two songs have completely different "feels." They do different work, speak to different conditions, and strike different audiences in different ways. They are very different songs. While Dixon suffered greatly during his career at the hands of unscrupulous and exploitative handlers who manipulated the copyright laws to deny him long-term rewards for his brilliant work. But Dixon did not "own" the blues aesthetic as expressed through "You Need Love" any more than Robert Johnson "owned" the elements of "Walking Blues." If the case had made it to trial, the results would have been impossible to predict. However, in an era and industry that has grown accustomed to "property talk," lawsuits have become frequent tools for resolving disputes over authorship, ownership, and originality.

While ownership is a sloppy and almost undefinable quality in the blues tradition, there is a real and significant claim to originality in blues music. Blues originality is just very different from the standard European model. Originality in the blues is performance-based. Pen and paper never enter the equation unless the song is considered for recording and distribution. In his 1978 ethnographic study Blues from the Delta, folklorist William Ferris argued that blues artists have a notion of authorship and originality that does not rely on the raw materials employed for the composition, but in the style and presentation. Ferris stated that many blues singers simultaneously admit learning a particular song from another artist and claim authorship for it. Some artists even claim authorship of classic folk ballads like "John Henry." Ferris exemplified this point through an interview with blues and gospel singer Sonny Matthews: "I'll hear somebody else sing it and then I'll put my words like I want them in there. ... I just sing it in my voice and put the words in there like I want them. Them my words there. I spaced them words like that on a contention that so many peoples singing alike, till you know that's just about to put a ruination on the gospel singing in

this part. So many peoples is trying to imitate other folks, you know. . . . I will sing their songs, but I will put the words my way." Ferris also quotes Arthur Lee Williams of Birdie, Mississippi, on the process of blues composition: "You sit down and hum to yourself. You try to see if that fits and if that don't work, you hum you something else. And then too you may pick out a verse from some other song and switch it around a little bit." The blues tradition values "originality" without a confining sense of "ownership." In the blues tradition, what is original is the "value-added" aspect of a work, usually delivered through performance.¹²

Creativity and composition ethics within the blues tradition derive from West African antecedents. While the cultures of West Africa are diverse and complicated, some cultural forms helped form a "cultural commons" that exists today across the Atlantic, linking many of those in the West African diaspora to those on the continent through a web of familiar signs and tropes. Anthropologists and musicologists have emphasized the importance of the "circle" as the site of both creativity and community in African cultures. The music, lyrics, and dance that emanate from the circle often reflect

these attributes: rhythmic complexity and syncopation; individual improvisation and stylization; call-and-response; engagement between individuals and the community at large; and commentary in the form of satire, parody, or boastful competition; a sense of group consciousness. The tension between individual improvisation and communal flows produces and celebrates both a balance between individuals and the community and a safe space for individual expression of daring and excellence. Each value depends on the other. The community rewards both individual "stylization" and mastery of a canon. While other traditions around the world employ these dynamics as well, West African aesthetic principles have had a clear and profound effect on American culture through music, dance, prose, poetry, and humor. The "shape" of West African creativity is a circle, not a line.¹³

This has created a cultural value system among West-African-derived traditions that differs from the "progressive" value system that emanates from the European artistic tradition and informs European and American copyright law.¹⁴ This does not mean that American copyright law, as designed and employed through most of American history, conflicts with African

principles of expression. In fact, when a copyright system is loose and balanced, it can amplify the positive elements of West African aesthetic tradition. In principle, copyright law does not prevent artists from taking from the "commons." It supports the idea that new artists build upon the works of others. It rewards improvisation within a tradition. But originally, copyright only regulated the proliferation of physical and complete copies. Now copyright regulates (but does not necessarily forbid) performance, transformative works, slight and oblique reference, and even access. And copyrights used to expire on definite dates, thus constantly enriching the public domain with new material. Now, copyright terms last far beyond most people's life span, and Congress keeps extending them, making copyright protection virtually perpetual. American copyright as it has been corrupted at the turn of the 21st century clearly conflicts with the aesthetic principles of West African music and dance. Yet American copyright regulates West African musical styles more than ever.

Very little American popular music since 1956 has not been influenced by the blues tradition. Therefore a preponderance of the musical products on the American market since 1956 have

emerged from the performance-based blues aesthetic. Simultaneously, the stakes for control of publishing and recording (known as "mechanical") rights have climbed exponentially as the record business assumed a major place in the American economy. And as the companies that control and reproduce the products that carry this creative work have consolidated and grown more powerful, the legal and commercial balance of the copyright system has shifted to heavily favor established works. These shifts have handcuffed newer artists who want to participate in the chain of creativity.

Poisoning the Well

Just before the Beatles broke up, lead guitarist George Harrison was busy composing songs for his first solo album, *All Things Must Pass*. Harrison and his new band, which included keyboard player Billy Preston, were playing a concert in Copenhagen, Denmark, in 1970. During a backstage press conference, Harrison slipped away, grabbed an acoustic guitar, and started playing around with simple chord structures. He eased into a pattern of alternating a minor II chord with a

major V chord. Then he chanted the words "Hallelujah" and "Hare Krishna" over the chords. Soon other members of his band and entourage gathered around him, joining in on the song in four-part harmony. Between choruses of "Hallelujah" and "Hare Krishna" Harrison improvised some verses that included lyrics such as "May Sweet Lord," "Dear, dear Lord," and "I really want to see you; I really want to be with you." Over the next few weeks, Harrison and Preston returned to that jam, composed and recorded the entire text of what became Harrison's first solo hit, "My Sweet Lord."¹⁵

After the song gained wide acclaim and broad distribution, a band called The Belmonts recorded a tongue-in-cheek version of "My Sweet Lord" that appended the chorus lyrics from the 1962 Chiffons tune "He's So Fine," composed by Ronald Mack and produced by Phil Spector, to the Harrison hit. The similarities between "My Sweet Lord" and "He's So Fine" were not lost on Bright Tunes Music Corporation either. Bright Tunes was the publishing company that controlled the rights to "He's So Fine." Bright Tunes filed suit against Harrison and the case went to trial in 1976. In his decision, the district judge closely examined the building blocks of both songs. "He's So Fine"

consists of two "motifs," Judge Richard Owen concluded. The first motif (A) is the array of notes "sol-me-re." The second motif (B) is the phrase "sol-la-do-la-do." Owen granted that standing alone neither of these motifs is novel enough to qualify for protection.

However, what matters is not the building blocks themselves, but their arrangement and order within the greater structure. "He's So Fine" contains the pattern A-A-A-A-B-B-B-B. The pattern of four repetitions of A followed by four repetitions of B is "a highly unique pattern," Owen ruled. Then, examining "My Sweet Lord," Owen stated that the Harrison song used the same motif A four times, and then motif B three times. In place of the fourth repetition of B, Harrison employed a transitional passage (T) of the same length as B. "My Sweet Lord" goes A-A-A-A-B-B-B-T. In both songs, the composers used a slippery "grace note" in the fourth refrain of B (or in the substituted transitional phrase T, in the case of "My Sweet Lord"). In addition, Owen wrote, "the harmonies of both songs are identical." Harrison's expert witnesses asserted that the differences between the songs mattered more than the similarities. They argued that the lyrics, the syllabic

patterns, and syncopations distinguished each song. For instance, the highly meaningful terms "Hallelujah" and "Hare Krishna" in "My Sweet Lord" replace the nonsense word and rhythmic placeholder "dulang" from "He's So Fine."¹⁶

In stark contrast to the complex and nuanced "web of expression" analysis that Judge Learned Hand prescribed for motion picture cases concerning derivative works, federal courts ask two questions to determine whether a song infringes on the copyright for an earlier song. The plaintiff must show that the second composer had access to the first song and that the second song shows "substantial similarity" to the first. Similarity without access, the result of a random coincidence, would not infringe. There are only eight notes in a major scale, after all. Accidents do happen. The need to establish access necessarily protects hits better than obscure songs. On the other hand, hits are more likely to stick in people's minds, more likely to flow through musical communities as influences and inspirations, and more likely to add elements to the musical "well."¹⁷

George Harrison went to the well once too often. He was raised in the blues tradition, as embodied by the English

working class in the 1950s and 1960s. He and his pals spent their youth memorizing riffs from Chuck Berry, Muddy Waters, and Buddy Holly records. American rhythm and blues were irresistible sources of powerful stories and emotions, and influenced everything Harrison and his peers did. Both Harrison and Preston testified vehemently that neither one of them considered "He's So Fine" an inspiration for "My Sweet Lord." The Chiffons' song never entered their minds, they said. But "He's So Fine" topped the pop music chart in the United States for five weeks in the summer of 1963. It reached the number 12 spot in England during that same time -- a summer when the top song on the British pop charts belonged to the Beatles. Both Preston in the United States and Harrison in England had ample access to the Chiffons' recording. They both knew of the song, but neither consciously appealed to it as a source for "My Sweet Lord." Judge Owen agreed: "Seeking the wellsprings of musical composition -- why a composer chooses the succession of notes and the harmonies he does -- whether it be George Harrison or Richard Wagner is a fascinating inquiry. It is apparent from the extensive colloquy between the Court and Harrison covering forty pages in the transcript that neither Harrison nor Preston were conscious of

the fact that they were utilizing the 'He's So Fine' theme. However, they in fact were, for it is perfectly obvious to the listener that in musical terms, the two songs are virtually identical except for one phrase." Then, precipitously employing the passive voice, Owen leapt to a conclusion that poisoned the well for subsequent artists:

What happened? I conclude that the composer, in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success. Did Harrison deliberately use the music of "He's So Fine?" I do not believe he did so deliberately. Nevertheless, it is clear that "My Sweet Lord" is the very same song as "He's So Fine" with different words, and Harrison had

access to "He's So Fine." This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.¹⁸

Under this standard, which makes "subconscious" influence illicit, something an artist must struggle to avoid, Muddy Waters would have had great difficulty keeping up with who had recorded and marketed particular arrangements that were considered common property in the Mississippi Delta, music that came "from the cotton field," or from the well of tradition. The standard used in the Harrison case puts a heavy burden on those who snatch a groove out of the air and insert it as one part of a complex creative process.

Over the next 12 years, emboldened by the Harrison suit, composers and publishing companies that retained rights to classic American songs considered pursuing legal action against more recent songwriters. In 1981, the company that owned the rights to the 1928 Gus Kahn and Walter Donaldson standard "Makin' Whoopee" filed suit against Yoko Ono, collaborator and spouse of former Beatle John Lennon, for her song "I'm Your Angel" on the 1981 album *Double Fantasy*. Jazz pianist Keith

Jarrett pursued action against Steely Dan songwriters Donald Fagen and Walter Becker for jazz-tinged cuts from their album *Gauche*. Actions such as these did nothing to promote originality and new music. In fact, the publicity about such suits probably retarded creativity by generating an aura of fear and trepidation.¹⁹

Then, in 1988, another artist who "went to the well" of the American rhythm and blues tradition won a major case that was strikingly similar to the Harrison ordeal. Only this time, the songwriter in question, John Fogerty, had written both the original song and the later one. Fogerty was accused of copying from himself. Fogerty had been the leader, driving force behind, and chief songwriter of the successful 1960s country-blues-rock band Creedence Clearwater Revival. Like many young and naive songwriters, including Willie Dixon, Fogerty had signed a contract earlier in his career that granted all rights to his songs to a publishing company, Jondora, which was owned by Fantasy Records. After Fogerty split with his band and Fantasy in the early 1970s, he refused to play hits from his old catalogue because he resented the performance royalties flowing to Fantasy and its president, Saul Zaentz. Those years of

bitterness pushed Fogerty out of the rock spotlight. His refusal to play his old songs disconnected Fogerty from his fans. Then, in 1985, Fogerty released his "comeback" album, *Centerfield*. The album yielded a number of hits that generated airplay and sales, including "Rock and Roll Girls" -- which shares a chord pattern and beat with classics such as Ritchie Valens' "La Bamba" and the Isley Brothers' "Twist and Shout" -- and the title cut "Centerfield," which quotes a line from Chuck Berry's song "Brown-Eyed Handsome Man," signifying that the album was just the latest link in the rhythm and blues chain. However, two of the songs on the album seemed to be direct attacks on Fogerty's nemesis, Fantasy president Zaentz. "Mr. Greed, why you gotta own everything that you see? Mr. Greed, why you put a chain on everybody livin' free?," Fogerty sang on the song "Mr. Greed." And the final song on the album was called "Zanz Kan't Danz." The refrain includes the line "... but he'll steal your money."²⁰

Zaentz filed suit. But he had found a stronger claim than defamation or libel on which to attack Fogerty. Zaentz argued that the opening song on *Centerfield*, "The Old Man Down the Road," contains a bass line, rhythm and guitar bridge that is similar to the 1970 Creedence Clearwater Revival hit "Run

Through the Jungle." While Fogerty had written "Run Through the Jungle," Zaentz still owned the rights to it. During the jury trial in San Francisco, both sides called a series of musicologists to discuss influence and originality in music. Then Fogerty took the stand with his guitar in hand. Over a day and a half, Fogerty played for the jury such songs as "Proud Mary," "Down on the Corner," and "Fortunate Son" to explain his creative process. Most importantly, Fogerty played tapes of old Howlin' Wolf and Bo Diddley songs, then picked up his guitar and played a Bo Diddley song called "Bring it to Jerome," which contains riffs and rhythms similar to both "Run Through the Jungle" and "The Old Man Down the Road." The jury found for Fogerty after two hours of deliberation.²¹

The Harrison and Fogerty cases show that the case law concerning the reuse of tropes and elements from older songs into newer ones makes little or no space for performance-based models of originality -- contributions of style or delivery. Judges such as Owen in the Harrison case have tried to employ the structuralist reading method that Judge Learned Hand developed (although Owen's opinion seems to owe something to Freud as well). But these cases have not yielded anything close

to a simple or clear standard for determining whether one song in the blues tradition infringes on another. The ruling in the Harrison case seemed to bend in favor of older composers, putting the burden of clearing influences on newer songwriters. Yet the judgment in the Fogerty case seemed to grant "Creedence" to the notion that songwriters should be allowed to draw from the blues tradition well.

The Harrison and Fogerty cases are concerned with how songwriters might trample on the composition rights -- that is, the actual notes and structure -- of an older song. But there are two other major rights in the "bundle" of rights that make up musical copyright: performance rights and mechanical rights. Performance rights concern public concerts, radio play, jukebox play, and other media exhibitions. Performance rights are usually licensed -- and royalties collected -- through consortiums such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Incorporated (BMI). Mechanical rights are the rights to reproduce particular recordings of the song or album. Before the 1980s, infringement suits that dealt with mechanical rights generally concerned large scale pirating of records and tapes. Suits over

composition rights dealt with the re-use of melody, harmony, or lyrics.

However, digital technology and the rise of urban hip-hop culture complicated that dichotomy. Rap does not use melody and harmony in the same ways that other forms of music do. In fact, rap artists often "sample" bits of others' melody and harmony, and use those "samples" as part of a rhythm track, completely transforming and recycling those pieces of music. Rap is revolutionary because it did not emerge directly from the American blues tradition. It is an example of and expression of "Afro diasporic" black culture, derived in form and function from Caribbean music more than from American rhythm and blues.²² However, in the United States, rap artists used whatever building blocks they found in their environment to construct an American rap tradition. So instead of playing similar riffs or melodies from other artists on their own instruments, early rap composers weaved samples from familiar songs into a new montage of sound. By the early 1990s copyright cases concerning mechanical rights intersected with the unstable principles of composition rights.²³

Over the raunchy, driving Jimmy Page guitar chords of the Led Zeppelin song "Kashmir," Philadelphia rapper Schoolly D bellows the words "Way way down in the jungle deep ..." -- signature lines to the African-American folk poem "Signifying Monkey." In the traditional poem, the trickster monkey uses his wits and his command of diction to outsmart a more powerful adversary. The "Signifying Monkey" has appeared in various forms in blues recordings, folktale ethnographies, the poetry of Larry Neal, and in the blacksploitation film *Dolomite*. Only this time, the trickster tale turns up as the lyrics to the song "Signifying Rapper" on Schoolly D's 1988 album *Smoke Some Kill*. Jimmy Page did not join D in the recording studio. Nor did Page or Led Zeppelin garner any credit on the label of *Smoke Some Kill*. But the contribution -- and the message -- is unmistakable. Schoolly D is "signifying" on Led Zeppelin, a more powerful cultural force than he was. Among the raw materials available to creative black youth in the deindustrialized Reagan-era cities were piles of warped vinyl, scraps of sounds. Pretensions to "authenticity" seemed silly. "Credit," in all its

various meanings, was not forthcoming to black youth or black culture. Why should they give it when they weren't receiving it? Led Zeppelin did not "credit" the blues masters as often as they could have, so why should Schoolly D do anything but reciprocate? Yet by rapping an updated and unexpurgated version of an African-American folktale, Schoolly D was proclaiming his connection to something that was once "real," by constructing something a musical work that felt nothing like "real" music. Repeating and reusing the guitar riff from "Kashmir" was a transgressive and disrespectful act -- a "dis" of Led Zeppelin and the culture that produced, rewarded, and honored Led Zeppelin.²⁴

Schoolly D released "Signifying Rapper" a decade after rap first attracted the attention of young people and music executives around the world. The first rap record to attract radio play and widespread sales, the Sugarhill Gang's "Rapper's Delight" (1979), rode the thumping instrumental track from Chic's "Good Times," a disco hit that also served as the backing track for many free-form rap songs of the 1970s. From the late 1970s through the early 1990s, most rap songs adhered to and improved on the formula popularized by "Rapper's Delight,"

spoken rhymes punctuating a background montage constructed from unauthorized pieces of previously recorded music. The expansion of the market for rap music was phenomenal. In 1987, rap records represented 11.6 percent of all the music sales in the United States. By 1990, rap was 18.3 percent of the music business.²⁵

Rap's rise from an urban hobby to a major industry rocked the status quo of not only the music industry, but the legal world as well. Since the late 1970s, rap artists have pushed the boundaries of free expression with sexually explicit lyrics and descriptions of violence by and against law enforcers. They have raised questions about society's power structures from the ghettos to the Gallerias. In many cases, legal and societal traditions had no way to deal with these fresh and strong sentiments that drove through America in an open jeep, powered by a heavy beat.

That's what happened when an entrenched and exciting hip-hop tradition, sampling, energized by digital technology, encroached upon one of the most ambiguous areas of the American legal tradition: American copyright law. Complicating the clash, the concept of copyright has been deeply entrenched in western literary tradition for centuries, but does not play the same

role in African, Caribbean or African American oral traditions. It's far too simple and inaccurate to declare that copyrighting has been a white thing; sampling, borrowing or quoting has been a black thing. The turmoil that rap has created in copyright law is more complex than just a clash of stereotypically opposed cultures. It's not just a case of mistrust and misunderstanding. Rap -- for a moment -- revealed gaping flaws in the premises of how copyright law gets applied to music and shown the law to be inadequate for emerging communication technologies, techniques, and aesthetics.

The tension in the law is not between the urban lower class and corporate über-class. It's not between black artists and white record executives. It's not always a result of conflicts between white songwriters and the black composers who sample them. It is in fact a struggle between the established entities in the music business and those trying to get established. It is a conflict between old and new. As the market for rap and the industry that supports it grew and matured through the 1980s and 1990s, the law shifted considerably in favor of established artists and companies, and against emerging ones. So by the late 1990s, rap artists without the support of a major record company

and its lawyers, without a large pool of money to pay license fees for samples, had a choice: either don't sample or don't market new music. Copyright law is designed to forbid the unauthorized copying or performance of another's work.

Authorization means licensing. Licensing means fees. Violations bring lawsuits. Lawsuits bring settlements. But the practice of digital sampling, having been granted access to the airwaves and record stores less than two decades ago, is relatively new to the music business and its lawyers. For the longest time, no one seemed to be able to agree on a fair price for licensing samples. No one seemed to know the best way to structure the fees. No one seemed to know exactly how existing statutes and case law would apply to alleged violations of musical copyrights. And before 1991, no one had pursued a sampling case through to a judicial ruling.²⁶

Yet entertainment lawyers, alarmed over these and other issues, reacted with varying degrees of anger and concern. Juan Carlos Thom, a Los Angeles lawyer, musician, playwright and actor, wrote in 1988: "Digital sampling is a pirate's dream come true and a nightmare for all the artists, musicians, engineers and record manufacturers. Federal courts must update their view

of piracy and interpretation of the (Copyright) Act to meet the sophistication of digital technology. Sounds are not ideas, but expressions, and therefore copyrighted works. ... Unchecked digital sampling will present the incongruous result of a copyrighted work which is both protected by copyright but is also part of the public domain. By any standard, digital sampling is nothing but old fashioned piracy dressed in sleek new technology."²⁷

As it emerged on the American music scene in the late 1970s, hip-hop music was composed of two layers of creative raw material. On the top was the vocalization, the rap itself. The rhymes were -- and still are -- in heavy dialect, urban African American, Caribbean, or Spanish, and were originally improvised. Many of the vocal habits of rappers are easily traced to the African American tradition of "toasting," or "playing the dozens," and ultimately to the African oral tradition of "signifying."²⁸

Rappers would, and still do, focus much of their efforts on boasting of their own abilities in arenas as diverse as sex, sports, money, knowledge or rhyming ability. Sometimes raps served to show disrespect for people in authority, or even other

rappers. As rap journalist and historian David Toop writes rap verbal styles owe much to the African-American word game known as "signifyin'" or "the dozens."²⁹ In addition, rap styles of the last 20 years bear significant resemblance and owe a heavy debt to scat singers like Cab Calloway, rhythm & blues performers like Otis Redding and rock precursors like Bo Diddley. A more direct debt should be paid to James Brown, Isaac Hayes, George Clinton, and Muhammad Ali.³⁰

Underlying the rap vocal tracks is the bed of music. Because the art was originally performed and perfected by disc jockeys, the rhythms and melodies of the tunes were essentially lifted from records that were popular dance themes at the time. So while the oral traditions of dissing and signifying can be easily linked, the vinyl traditions are of more obscure lineage.³¹ Early DJs scratched and sampled whatever records they had, and listened specifically for funky breaks, or at least funny combinations. They fused a mish-mashed mosaic of samples that would confound anybody trying to assemble a simple ethnic genealogy for the birth and growth of rap.³²

What developed in Rap in the 1970s and 1980s has been compared to what happened to jazz in the 1940s and 1950s, when

Dizzy Gillespie and Charlie Parker took it higher by cutting up and improvising on top of stale standards like "I Got Rhythm" and "How High The Moon."³³ If we could trace the tradition of borrowing other people's music, making it one's own, and improvising on top of it, back through African-American musical history to Africa, a simple thesis would emerge: The rap on sampling would be that American laws don't deal with African traditions. The history, as we have seen with blues music, is not that simple. In Africa, music and poetry is not simply considered community property. Some cultural anthropologists have claimed that authorship and composition hold little or no value in African societies, but this is an oversimplified and ethnocentric notion.³⁴

Instead, it is easier, and perhaps more accurate, to trace this tradition back along two lines: one through mid-century American rhythm and blues and jazz, and the other through more recent immigrant influences from the Caribbean islands. Caribbean Islanders, somewhat freer of the special social constraints that American blacks felt, had the ability to build and control their own music industry. They also had the benefit of choosing the best of American, British, and African

influences to blend into their music. And in Jamaica, more so than most cultures, the concept of music as community property is important to the development of commercially viable art forms.³⁵ Dick Hebdige, a music scholar who specializes in how Caribbean music has affected world music in general, claims that "versioning," the repeated borrowing and recycling of a popular standard, is the key to not only reggae, but all African-American and Caribbean music. Hebdige writes that often as soon as a reggae record is released, hundreds of different versions of the same rhythm or melody will be released in the subsequent weeks. Every new version will slightly modify the original tune.³⁶

In the mid-1970s, Ska and reggae producers invented a new way to version. They began fading instrumental tracks in and out, playing bass off of vocals, slowed down the rhythm and threw in echoes. They dubbed this process "dubbing." It involved different raw materials, but the same production process, as sampling.³⁷ Hebdige writes that while the studio environment spawned dubbing, the dance hall scene incubated the vocal precursor to American rap: the DJ talk-over.³⁸

There is a recent and clear link between New York Hip-Hop in the 1970s and Jamaican "versioning" in the 1960s. His name is Kool Herc.³⁹ Kool Herc came to the Bronx from Jamaica in 1967. On his native island, he had heard "talk-over" DJs and knew the scat-singing techniques of some of the Ska and reggae artists who had churned out international hits during the 1960s.⁴⁰ Hebdige explains how Kool Herc imported almost all the necessary precursors to modern rap music: By 1973 Herc owned the loudest and most powerful sound system in his neighborhood. But when he would dee-jay at house parties Herc found that the New York African-American crowd would not dance to reggae or other Caribbean beats. So Herc began talking over the Latin-tinged funk that held broad, multi-ethnic appeal in the Bronx. Gradually, he developed a popular and recognizable style. Herc began buying records for the instrumental breaks rather than for the whole track.⁴¹ Herc became one of the first -- if not the first -- to discover that he could sample the hearts out of a pile of vinyl and give a room full of people plenty to taste.⁴²

Before too long, other New York DJs picked up on the popularity of Herc's style. The first changes they made were to incorporate classic rhythm and blues riffs and breaks, adding

the thrill of recognition to the groove, "scratching" a records to create a new rhythm track, and rapping in an American dialect full of street slang.⁴³ To complement the linkage of American sampling with Caribbean versioning, there have been suggestions that the vocal styles of American rap may have thicker Caribbean roots than previously thought. Music critic Daisann McLane argues that rap's strongest and most obvious musical and ideological links are not to Africa, but to the West Indies, and the Afro-Caribbean styles of calypso and reggae. Calypso lyrical style, for instance, overflows with double-entendres, verbal duels and playful boasts. These themes are common in American rap lyrics.⁴⁴

In American popular music, versioning or borrowing is not unheard of, although it has traditionally been white artists versioning the work of black artists. The Beach Boys lifted riffs from Chuck Berry that dominated their songs to the same extent that Van Halen's "Jamie's Crying" guitar riff stands alone as the backing track to Tone Loc's "Wild Thing."⁴⁵ The traditional New Orleans rhythm and blues song, "Stagger Lee" (which in its original form is called "Stack-o-Lee"), is one American song that has been versioned so many times that it has

served as almost a signature song for New Orleans music. Stagger was a bad man, into gambling, drinking and fighting. His tales of gluttony and bad luck have taken on almost as many plots as voices. It can still be heard covered in live music clubs large and small all over the United States.⁴⁶

Sampling, as opposed to simply imitating, became a big issue in American music after digital technology became cheap and easily available and its products became immensely popular.⁴⁷ Digital sampling is a process by which sounds are converted into binary units readable by a computer. A digital converter measures the tone and intensity of a sound and assigns it a corresponding voltage. The digital code is then stored in a computer memory bank, or a tape or disc, and can be retrieved and manipulated electronically.⁴⁸

But why do rap artists sample in the first place? What meanings are they imparting? Some songs grab bits and pieces of different pop culture signposts, while others, such as Tone Loc's "Wild Thing" or Hammer's "U Can't Touch This," which lays upon a backing track made up almost entirely of Rick James' "Super Freak" instrumentals, hardly stand alone as songs, but are truly "versions" of someone else's hits.⁴⁹ Sometimes, as with

Schoolly D's sampling of Led Zeppelin's "Kashmir" for his song "Signifying Rapper," it can be a political act -- a way of crossing the system, challenging expectations, or confronting the status quo. Oftentimes, the choice of the sample is an expression of appreciation, debt or influence. Other times it's just a matter of having some fun or searching for the right ambient sound, tone, or feel. Certainly Rick James' funky hits of the late 1970s and early 1980s influenced not only artists of the 1990s, but their audiences. Sampling is a way an artist declares, "Hey, I dug this, too." It helps form a direct connection with listeners, the same way a movie maker might throw in a Motown hit in a soundtrack. By the early 1990s, at least 180 recordings by more than 120 artists contain samples by some of funk godfather George Clinton's P-Funk school, which included 1970s bands Funkadelic, Parliament, and various other bands headed by Clinton or his bassist, Bootsy Collins.⁵⁰ It's tough to say whether a new song that relies almost completely on some older hit riffs can achieve financial success on its own merits. Two of the best-selling rap hits are entirely dependent on massively danceable older songs, and are, sadly, lyrically limited. They are Hammer's "U Can't Touch This" and Vanilla

Ice's 1990 single "Ice Ice Baby," which was a stiff and meaningless rap over the backing track to the 1982 David Bowie-Queen hit "Under Pressure."⁵¹ *Village Voice* music critic Greg Tate explained the aesthetic value of sampling: "Music belongs to the people, and sampling isn't a copycat act but a form of reanimation. Sampling in hip-hop is the digitized version of hip-hop DJing, an archival project and an art form unto itself. Hip-hop is ancestor worship."⁵²

Sampling helps forge a "discursive community" among music fans. Rap music first made that connection white audiences -- and thus expanded the discursive community exponentially -- in 1986, when Run DMC released its version of the 1977 Aerosmith song, "Walk This Way."⁵³ Within the African-American discursive community, rap songs serve, in historian George Lipsitz' words, as "repositories of social memory." Lipsitz particularly credits the matrix of cultural signs highlighted by sampling and realistic lyrics that document the struggles of inner-city life. Sampling can be transgressive or appreciative, humorous or serious. It gives a song another level of meaning, another plane of communication among the artist, previous artists, and the audience.⁵⁴

Digital sampling also had a powerful democratizing effect on American popular music. All a young composer needed was a thick stack of vinyl albums, a \$2,000 sampler, a microphone, and a tape deck, and she could make fresh and powerful music. She could make people dance, laugh, and sing along. She might, under the right conditions, be able to make money from the practice. As critic John Leland wrote in Spin: "The digital sampling device has changed not only the sound of pop music, but also the mythology. It has done what punk rock threatened to do: made everybody into a potential musician, bridged the gap between performer and audience."⁵⁵

Clearly, sampling as an American expression was raised in the Bronx, but was probably born in the Caribbean. Its aesthetic appeal is deeply embedded in African American and Afro-Caribbean culture, if not for most of this half-century, then certainly over the last 25 years. More significantly, for a while in the late 1980s, it looked like transgressive sampling was not going to go away. It made too much money and was too important to the meaning and message of rap. During the first decade of rap, the legal questions surrounding sampling grew more troublesome for both artists and labels as rap became more popular and the

economic stakes rose. Sampling seemed to undermine the very definitions of "work," "author" and "original" -- terms on which copyright law rests. Consider a song with a backing musical track filled with bits and pieces of other works, others' applications of skill, labor, and judgment. There's a Keith Richards guitar riff here and there. We hear Bootsy Collins' thumb-picked and hand-slapped bass filling in the bottom. The rhythm is kept constant through an electronic drum machine. We hear the occasional moan of a Staple Singer or a shout of James Brown. The new work may exist as an individual work per se. The new, composite, mosaic work is assembled from these samples through an independent application of skill, labor and judgment. Is each of these samples a copyright infringement? If the artist asks for permission to sample the Keith Richards riff -- which might be an expression Chuck Berry's or Hounddog Taylor's idea -- does she admit that permission should have been sought for the bass line? How about the moans and shouts, which could easily be considered "signature sounds" and thus marketable qualities? If the artist, the assembler of the mosaic, had hired studio musicians to imitate these distinctive sounds, instead of splicing digital grafts onto a new tape, would she be lifting

unprotected "ideas," instead of tangible products of actual skill, labor and judgment? If a person recorded an entire song based upon the music to "The Boogie-Woogie Bugle Boy of Company B," and a court found the use of the score to be outside the domain of fair use, then the defendant would be expected to pay the appropriate penalty for violating the letter and spirit of the copyright law. But what if the defendant only used the notes and words of the "Boogie-Woogie" portion of the refrain, and repeated them throughout a song that had other creative elements in it? Has the right to the original "work" been infringed? Courts have varied in their rulings of how much one may take before a "work" has been violated. Legal scholars agree there is no clear guideline, and the text of the law simply does not deal with the issue.⁵⁶ After examining this confusion, David Sanjek, director of the Broadcast Music Inc. archives, concluded that the rise of digital sampling had removed whatever claim musicians had to "an aura of autonomy and authenticity." Sanjek wrote: "If anyone with an available library of recordings, a grasp of recorded material history, and talent for ingenious collage can call themselves a creator of music, is it the case

that the process and the product no longer possess the meaning once assigned to them?"⁵⁷

In many sectors of the law, we would expect courts to clarify issues like these. Ideally, federal courts would slowly sift through the competing arguments and seek a balance that would ensure freedom for the emerging artists while protecting the risks and investments of established ones. But from 1978 through 1991, the courts were silent on most of these issues.

The Illin' Effect: How Copyright Bum-Rushed Rap

All was not well for the creative process before courts weighed in on sampling issues. Anarchy was not paradise. Artists also suffered because of the confusion the practice caused in the record business. Record companies were understandably risk averse. Because sampling raised so many questions, labels pushed their more successful acts to get permission for samples before releasing a record. The problem was that no one knew what to charge for a three-second sample. As a 1992 note in the *Harvard Law Review* stated: "Consequently, the music industry has responded with an ad-hoc, negotiated licensing approach to

valuing music samples."⁵⁸ As industry leaders and lawyers, and older songwriters, grew more aware of the prevalence and potential monetary gain from challenging sampling, artists became more concerned with the potential costs of sampling. This certainly retarded the creative process. Artists chose to sample less well-known works, works published or produced by their own companies and labels, or works with a lower licensing price. When the Beastie Boys wanted to sample the Beatles' song, "I'm Down," Michael Jackson informed them that he owns the rights to the song and denied them permission to use it. The Beastie Boys eventually opted against using that song.⁵⁹

Until 1991, no one in the rap or licensing businesses knew what the guidelines for digital sampling were. This means that on any given day, an artist may have been ripped off by an over-priced licensing fee, or a publishing company may have gotten burned by charging too little for a sample that helped produce a top hit.⁶⁰ That's why several legal scholars in the late 1980s and early 1990s tried to formulate licensing systems based on the use, length and type of sample. Still, the industry was waiting for a court to weigh in so there could be some predictability and stability in the system.⁶¹

Several sampling cases were settled out of court before December of 1991, postponing the inevitable guidance a judicial decision would bring. Nonetheless, the publicity surrounding these cases made older artists hungry to cash in on the potential sampling licensing market. A song that had ceased bringing in royalties decades ago could suddenly yield a big check. In 1991 Mark Volman and Howard Kaylan of the 1960s pop group The Turtles sued the rap trio De La Soul for using a 12-second piece of the Turtles' song "You Showed Me" in the 1989 rap track "Transmitting Live From Mars." Volman and Kaylan sued for \$2.5 million, but reached an out-of-court settlement for \$1.7 million. De La Soul paid \$141,666.67 per second to The Turtles for a sliver of a long-forgotten song.⁶²

Then in December 1991 a federal judge issued a terse 1,600-word ruling that all but shut down the practice of unauthorized sampling in rap music. In August of 1991, Warner Brothers Records distributed an album released by a small record label called Cold Chillin' Records. The artist was a young New Jersey rapper named Biz Markie. The album was called *I Need a Haircut*. There was nothing particular unique or special about the album. It was pretty sub-standard fare for rap albums from the late-

1980s and early 1990s. The rhymes were simple. The subject matter was juvenile. The production was pedestrian. The choice of samples was neither funny nor insightful. *I Need a Haircut* might have been a trivial footnote in rap history but for the second-last cut on the album: "Alone Again." For that song, Biz Markie took the first eight bars of the number one single of 1972, Gilbert O'Sullivan's "Alone Again (Naturally)." Markie used only about 20 seconds of piano chords from the original song, which he looped continually to construct the musical background of the song. O'Sullivan's song was a sappy ballad about romantic loss. Markie's song was about how the rapper received no respect as a performer back when he played in combos with old friends, but since he became a solo performer his career has been satisfying. Markie's use of O'Sullivan's sample did not directly parody it, but it was essential to setting the minor-chord mood of Markie's tale of determination and self-sufficiency.⁶³

So while Biz Markie's song did not "cut on" O'Sullivan's song, nor did it revise O'Sullivan's song in a way that would replace it in the marketplace -- or even generate confusion for record buyers, O'Sullivan pursued the case with righteous

indignation. O'Sullivan's attorney, Jody Pope, stated after the case ended that O'Sullivan would not allow his song to be used in a humorous context, and would license it to be used only in its complete, original form. Even through Markie had requested permission to use it, O'Sullivan failed to grant permission because the use did not maintain either the integrity or original meaning of the song. Markie's attorneys launched two strategies for defense, neither particularly effective. The weaker was that O'Sullivan himself was not the copyright holder, and thus could not seek relief from the court. The fact that Markie's lawyers had mailed a tape of the song to O'Sullivan asking for permission (they received no reply) persuaded the judge that it was clear to everyone that O'Sullivan was the holder of the original copyright. The other defense was that everybody in the music industry was doing it. This did not score points either with the judge or others in the music industry. Biz Markie's lawyers did not claim that sampling in this context was fair use. They could have argued that only a small section of O'Sullivan's song contributed to a vastly different composition that did not compete with the original song in the market place. This fair use defense probably would not have

swayed the judge either. But they didn't even attempt to mount one.⁶⁴

O'Sullivan requested an injunction against further sale of the song and album. U.S. District Judge Kevin Thomas Duffy gladly granted O'Sullivan his wish. Duffy wrote in terms loaded with hints of moral rights, natural rights, and property talk:

"Thou shalt not steal" has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.

... From all of the evidence produced in the hearing, it is clear that the defendants knew that they were violating the plaintiff's rights as well as the rights of others. Their only aim was to sell thousands upon thousands of records. This

callous disregard for the law and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures.⁶⁵

Duffy concluded by referring the case to a U.S. district attorney to consider criminal prosecution. What Duffy did not write is as important as what he did write. Duffy's ruling did not articulate any nuanced standard by which a song could be sampled, manipulated, or revised without permission. It left no "wiggle room" for fair use. It did not consider whether the new use affected the market of the original song in any way. It did not try to clarify how long a sample must be to qualify as an infringement. The fact that the sample in question was a mere 20 seconds did not bode well for fair use. Duffy's brevity clarified these issues by ignoring them: "how much?" and "for what purpose?" need not even be asked after Duffy's ruling. It was safe to assume that any sample of any duration used for any purpose must be cleared. Soon after Duffy's ruling, Markie's attorneys realized they would not have much of a chance to win the case before Duffy. They settled. The record company agreed to remove the offending song from subsequent printings of the

album, and O'Sullivan received monetary compensation. Reaction to Duffy's ruling was also extreme. One of O'Sullivan's lawyers declared an end to sampling: "Sampling is a euphemism that was developed by the music industry to mask what is obviously thievery. This represents the first judicial pronouncement that this practice is in fact theft." Mark Volman of The Turtles 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." On the other side, Dan Chamas, an executive with the rap label Def American Records warned that Duffy's ruling would "kill hip-hop music and culture." While Chamas' fears were exaggerated, they were not unfounded. The case did not kill the music. It just changed it broadly and deeply. Rap music since 1991 has been marked by a severe decrease in the amount of sampling. Many groups record background music, and then filter it during production so it sounds like it has been sampled. Other groups -- the well-established -- pay for and extensively credit all the sources of their samples. Many established songwriters -- including Led Zeppelin -- refuse any requests for samples. Others deny sampling requests if the new song tackles controversial subject matter like sex, drugs, or

violence. What sampling did occur in the late 1990s was non-transgressive, non-threatening, and too often clumsy and obvious. The signifying rapper had lost his voice. The 1991 ruling removed from rap music a whole level of communication and meaning that once played a part in the audience's reception to it. The Biz Markie case "stole the soul" from rap music.⁶⁶

The death of tricky, playful, transgressive sampling occurred because courts and the industry misapplied stale, blunt, ethnocentric, and simplistic standards to fresh new methods of expression. The trend could have gone the other way. Courts and the music industry could have allowed for limited use of unauthorized samples if they had considered taking several tenets of fair use and free speech seriously -- especially the question of whether the newer work detracts from the market of the original. In fact, as has been shown repeatedly, sampling often revives a market for an all-but-forgotten song or artist. The best example is the revival of Aerosmith since Run DMC's version of "Walk This Way" reminded young listeners of the power of the original song. Aerosmith, almost forgotten after a string of hits in the 1970s, collaborated on that project. But even an unauthorized use of the original song would have revived

interest in Aerosmith, one of the most successful bands of both the 1970s and the 1990s.

Beyond fair use, courts and the record industry could have considered actually employing the idea-expression dichotomy in a new way. Music copyright has traditionally protected melody, sometimes harmony, almost never rhythm. Rhythm has been considered either too common or too unimportant to warrant protection.⁶⁷ But what actually happens when a rap producer injects a sample into a new medium is this: an expression of melody becomes a building block of rhythm. The claim that samples cease transmitting their original meanings-- cease operating as expressions once they are taken out of context -- is best expressed by Chuck D of Public Enemy, who sang:

Mail from the courts and jail
Claim I stole the beats that I rail
Look at how I'm living like
And they're gonna check the mike, right? Sike
Look how I'm livin' now, lower than low
What a sucker know
I found this mineral that I call a beat

I paid zero
I packed my load 'cause it's better than gold
People don't ask the price but it's sold
They say I sample but they should
Sample this, my pit bull
We ain't goin' for this
They say I stole this
Can I get a witness?⁶⁸

For Chuck D, a sample is a "mineral." It is raw material for a new composition. Sampling is a transformation: using an expression as an idea; using what was once melody as a beat -- an element of rhythm. Sampling is not theft. It's recycling. If we define an expression by what it does, instead of what it did, it no longer counts as an expression (or that particular expression) in the new context. The expression does not do the same work in its new role. Context matters to meaning. An old expression is no longer same expression, and not even the same idea, if the context changes radically.

There could be room for unauthorized sampling within American copyright law. It could and should be considered fair

use. Digital samples are more often than not small portions of songs. These portions are being used in completely different ways in the new songs. Because they are not working in the same way as in the original song, they are inherently different from their sources. But most importantly, samples add value. They are pieces of language that generate new meanings in their new contexts. The new meanings are clear and distinct from their original meanings. A new song that samples an old song does not replace the old song in the marketplace. Often, it does the opposite. Despite all the panic digital sampling generated among legal experts in the late 1980s, sampling does not threaten the foundation of the law. In fact, if copyright law is to conform to its Constitutional charge, the "promote the progress of science and useful arts," it should allow transgressive and satirical sampling without having to clear permission from original copyright owners. A looser system -- and a broader definition of fair use -- would encourage creativity. A tightly regulated system does nothing but squeeze new coins out of old music and intimidate emerging artists.

As Funny as They Wanna Be

There is social value in allowing transformative uses of copyrighted music without permission. The U.S. Supreme Court in 1994 articulated this principle in a landmark case that involved rap music. But it was not a case about sampling per se. It was the case that made America safe for parody.

Despite its brief tenure on the music charts, no group in the history of rap has been as controversial as the 2 Live Crew. A Broward County sheriff prosecuted a record-store owner for selling the group's 1990 album *As Nasty as They Want to Be*, which relied on sexist and explicit lyrics and a complex montage of digital samples. Scholars and musicologists lined up both for and against the group and its leader, Luther Campbell. Within a year, Campbell had recast himself from nasty rapper and talented producer to a hero for the First Amendment. But it was 2 Live Crew's "nice" version of the album, *As Clean as They Want to Be* that brought the group to the U.S. Supreme Court. It contained a cut entitled "Pretty Woman" that relied heavily on the melody and guitar riff of Roy Orbison's 1964 hit "Oh, Pretty Woman." Orbison's publishing company, Acuff-Rose Music Inc., had denied 2 Live Crew permission to parody the song. Campbell decided to

do it anyway, and relied on a fair use defense when the lawsuit came. The U.S. District Court granted a summary judgement in favor of 2 Live Crew, ruling that the new song was a parody of the original and that it was fair use of the material. But the Sixth Circuit Court of Appeals reversed that decision, arguing that 2 Live Crew took too much from the original and that it did no for blatantly commercial purposes. The U.S. Supreme Court ruled unanimously that the appeals court had not balanced all the factors that play into fair use. The Supreme Court reversed the appeals court and ruled in favor of Campbell and 2 Live Crew.⁶⁹

Besides failing to understand the playfulness of parodying a canonical white pop song in a black rap context, the Sixth Circuit Court of Appeals showed that it's not always clear that a silly song that sounds like an old song is parodic. For a work to qualify as a parody, it must make some critical statement about the first work. It's not good enough to be just funny. The critical statement must be directed at the source text itself. If second work does not clearly target the original work, the second work more likely operates as satire, not parody. For example, a the Second Circuit Court of Appeals ruled in 1981

that a song from the off-Broadway erotic musical *Let My People Come* called "Cunnilingus Champion of Company C" was not a parody of the song "Boogie Woogie Bugle Boy of Company B." The court ruled that the infringing song did not make sufficient fun of the original, but instead satirized sexual mores in general. The court argued the show's writers could have made the same satirical point by either revising a song in the public domain or writing an original song. There was no need to revise the "Bugle Boy" song.⁷⁰

Courts have had a difficult time carving out the fair-use exemption for parody. One of the first significant parody cases, *Loew's Inc. v. Columbia Broadcasting System*, had a stifling effect on parody. The plaintiff stopped comedian Jack Benny from televising a parody of the motion picture "Gaslight" in 1956. The court ruled that the parody could not be a form of criticism because of the defendant's strong profit motive.⁷¹ Slowly, throughout the 1960s and 1970s, courts began recognizing that parody had cultural value. In 1964 *Mad Magazine* published parodic versions of the lyrics to some songs written by Irving Berlin. The Second Circuit rose above the decision that had stopped Jack Benny and held that *Mad* was not liable for

infringement. The court stated that "we believe that parody and satire are deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism."⁷² By the late 1970s, televised parody was a staple of American comedy. In 1978, the NBC show *Saturday Night Live* ran a parody of the pro-New York jingle "I Love New York." It was called "I Love Sodom." The district court found that "I Love Sodom" neither competed with nor harmed the value of "I Love New York."⁷³ Music parodies had also grown in popularity during the 1970s and 1980s with the popularity of Weird Al Yankovich and others. In 1985, disc jockey Rick Dees produced a 29-second parody of the Johnny Mathis song called, "When Sunny Gets Blue" called, "When Sunny Sniffs Glue." The Ninth Circuit Court of Appeals ruled that the parody would not compete in the market with the original. Plus, the court concluded that a parody necessarily takes a large portion -- perhaps even the heart -- of the original, or else fails in its effort. Most significantly, the court ruled that "copyright law is not designed to stifle critics."⁷⁴

Rick Dees' success at defending his parody made 2 Live Crew's eventual success a little more likely. Relying on recent

precedents such as the Dees case, Justice David Souter criticized the Sixth Circuit for basing its judgment on a presumption that, since the parody was produced for commercial sale, it could not be fair use. The Sixth Circuit had decided on the same faulty basis on which the Jack Benny case had been decided. Souter also concluded that a parody is unlikely to directly compete in the market with an original work because it serves a different function -- criticism. Souter wrote, "Suffice it to say now that parody has an obvious claim to transformative value, as Acuff-Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. ... Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing." Souter concluded that 2 Live Crew did target Orbison's song, not just society at large. But Souter also warned that this case should not be read as an open license to revise others' works for merely satirical purposes, and that each case should be considered individually. "The fact that

parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. ... Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law."⁷⁵

While Souter was careful not to send too strong a message to potential parodists, his ruling set down some pretty firm principles upon which future cases might be decided. Significantly, Souter declared from the highest perch that parody has social value, and that courts must take such fair use claims seriously. But the U.S. Supreme Court has not considered a case concerning the possible fair use considerations of transgressive or parodic sampling in rap music. Based on the principles Souter outlined, it's not likely that the court would smile upon unauthorized digital sampling that indirectly commented on the culture at large -- that is -- most sampling. But sampling that directly comments upon its source, positively or negatively, might have a chance for consideration. Fundamentally, courts, Congress, and the public should consider how creativity happens in America. Ethnocentric notions of creativity and a maldistribution of political power toward

established artists and media companies have already served to stifled expression -- the exact opposite of the declared purpose of copyright law.⁷⁶

¹ Led Zeppelin, "Whole Lotta Love," on *Led Zeppelin II* (New York: Atlantic Records, 1969). In the 1994 digitally remastered release of *Led Zeppelin II*, Willie Dixon receives co-songwriting credit for "Whole Lotta Love" after Jimmy Page, Robert Plant, John Paul Jones, and John Bonham.

² Willie Dixon, "You Need Love," on various artists, *Blues Masters, Volume 6* (New York: Rhino Records, 1993). The Dixon composition was originally released as a Muddy Waters recording by Chess Records in 1962. See Steve Hochman, "Willie Dixon's Daughter Makes Sure Legacy Lives On," in *The Los Angeles Times*, Oct. 8, 1994. p. F10. Also see Greg Kot, "Willie Dixon's Heavenly Legacy: Blues Heaven Foundation Aims to Smooth the Road for Other Blues Artists," in *Chicago Tribune*, Dec. 17, 1993. p. 5.

³ Willie Dixon and Don Snowden, *I Am the Blues: The Willie Dixon Story* (New York: Da Capo Press, 1989). p. 223. Information on

the Blues Heaven Foundation can be found on the World Wide Web at <http://www.island.net/~blues/heaven.html>. The troubling relationship between blues composers and their record and publishing companies is much clearer. More often than not, it was blatantly exploitative. For an account of the relationship between Chicago rhythm and blues labels and their exploited artists, see Mike Rowe, *Chicago Breakdown* (New York: Da Capo Press, 1979). Also see Robert Pruter, *Chicago Soul* (Urbana: University of Illinois Press, 1991). For a study of the cultural and social meaning of blues in Chicago, see Charles Keil, *Urban Blues* (Chicago: University of Chicago Press, 1966). For the most penetrating study of the blues aesthetic in American culture, see Albert Murray, *Stomping the Blues* (New York: McGraw Hill, 1976).

⁴ David Halberstam, *The Fifties* (New York: Villard Books, 1993). p. 478.

⁵ Nelson George, *The Death of Rhythm and Blues* (New York: Pantheon, 1988) pp. 62-64. Public Enemy, "Fight the Power," from *Fear of a Black Planet* (New York: Def Jam Records, 1990). Tricia Rose, *Black Noise: Rap Music and Black Culture in Contemporary*

America (Hanover, NH: Wesleyan University Press, 1994) pp. 4-8.

The observation about "alternative" playlists is my own, drawn from hundreds of hours of frustrating radio listening.

⁶ Dixon and Snowden, p. 224. The essential books about Delta blues include Robert Palmer, *Deep Blues* (New York: Penguin Books, 1982) and William Ferris, *Blues from the Delta* (New York: Da Capo, 1978).

⁷ Muddy Waters, interview with Alan Lomax in Stovall, Mississippi, August 1941, on *Muddy Waters: The Complete Plantation Recordings* (Universal City, CA: MCA Records, 1993). Thanks to Gena Dagel Caponi for insisting that I listen to this interview.

⁸ David Evans, *Big Road Blues: Tradition and Creativity in the Folk Blues* (Berkeley: University of California Press, 1982) pp. 113-115. Thanks to David Sanjek for suggesting this book, and thanks to a reader for New York University Press for insisting that I explore the blues ethic and how it evades the Boolean logical traps.

⁹ John Cowley, "Really the 'Walking Blues': Son House, Muddy Waters, Robert Johnson and the Development of a Traditional

Blues," in Richard Middleton and David Horn, eds., *Popular Music 1: Folk or Popular? Distinctions, Influences, Continuities* (Cambridge: Cambridge University Press, 1981). pp. 57-72. Also see Palmer, pp. 4-7. Palmer refers to the various verses from "Country Blues" as "the common property of all blues singers."

¹⁰ Robert Johnson, "Walking Blues," on *Robert Johnson: The Complete Recordings* (Los Angeles: Columbia Records, 1990).

¹¹ Waters, "Country Blues," on *Muddy Waters: The Complete Plantation Recordings*. The 1948 version, "Feel Like Goin' Home" was copyrighted by Arc Music in 1964, with words and music credited to McKinley Morganfield, which was Muddy Waters' real name. Arc Music, the publishing company affiliated with Chess Records in Chicago, published most of Waters' and Dixon's compositions as works made for hire, giving flat fees but limited royalties to the composers. Arc was owned by Benny Goodman's brothers, Gene and Harry Goodman. See Dixon and Snowden.

¹² Ferris, pp. 57-59.

¹³ Gena Dagel Caponi, ed., *Signifyin(g), Sanctifyin', and Slam Dunking: A Reader in African American Expressive Culture*

(Amherst: University of Massachusetts Press, 1999) pp. 8-15. The introduction to this book is the single most eloquent distillation on the influence of African aesthetics on American culture. For the African influence on American dance, see Brenda Dixon Gottschild, *Digging the Africanist Presence in American Performance: Dance and Other Contexts* (Westport: Greenwood Press, 1996). For the transnational consciousness that informs the African Diaspora, see Paul Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (Cambridge: Harvard University Press, 1993). For Africanisms and their presence in American music, see Gerhard Kubik, *Africa and the Blues* (Jackson: University of Mississippi Press, 1999). Also see Steven Tracy, ed., *Write Me a Few of Your Lines: A Blues Reader* (Amherst: University of Massachusetts Press, 1999). For an analysis of improvisation, see Albert Murray, "Improvisation and the Creative Process," in Robert O'Meally, ed. *The Jazz Cadence of American Culture* (New York: Columbia University Press, 1998), pp. 111-113. For Africanisms in American language, see Geneva Smitherman, *Talkin' and Testifyin': The Language of Black America* (Detroit: Wayne State University Press, 1977).

¹⁴ Christopher Small, *Music of the Common Tongue: Survival and Celebration in African American Music* (Hanover: Wesleyan University Press, 1987) pp.289-312. Also see Robert Farris Thompson, *Flash of the Spirit: African and Afro-American Art and Philosophy* (New York: Vintage, 1983).

¹⁵ George Harrison, "My Sweet Lord," from *All Things Must Pass* (London: Apple Records, 1970). The account of Harrison's composition process is from *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177. U.S. District Court Southern District of New York, Aug. 31, 1976.

¹⁶ *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*

¹⁷ Sidney Shemel and M. William Krasilovsky, *This Business of Music*, fifth edition (New York: Billboard Publications, Inc., 1985) pp. 265-266.

¹⁸ *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*

¹⁹ Robert Palmer, "Today's Songs, Really Yesterday's," in *The New York Times*, July 8, 1981. p. C21.

²⁰ John Fogerty, *Centerfield* (Burbank: Warner Brothers Records, 1985). See George Varga, "A Good Moon Rising: Legal Troubles Behind Him, Fogerty Takes Back His Own," in *The San Diego Union-*

Tribune, August 13, 1998. p. E4. Also see Hank Bordowitz, *Bad Moon Rising: The Unauthorized History of Creedence Clearwater Revival* (New York: Shirmer Books, 1998) pp. 202-206.

²¹ *Fantasy Inc. v. Fogerty*, 664 F. Supp. 1345. Northern District of California, 1987. Also see *Fantasy Inc. v. Fogerty*, 984 F. 2d 1524. U.S. Ninth Circuit Court of Appeals, 1993. Also see Katherine Bishop, "A Victory for the Creative Process," in *The New York Times*, November 11, 1988. p. B5.

²² Rose, pp. 21-26.

²³ See Shemel and Krasilovsky, *This Business of Music*. For the history of the development of this "bundle" of rights, especially the rise of ASCAP and BMI, see Russell Sanjek (updated by David Sanjek), *Pennies from Heaven: The American Popular Music Business in the Twentieth Century* (New York: Da Capo Press, 1996).

²⁴ Schoolly D, "Signifying Rapper" from *Smoke Some Kill* (Philadelphia: Zomba Recording Corp., 1988). For an example of the "Signifying Monkey" tale, see Langston Hughes and Arna Bontemps, eds., *Book of Negro Folklore* (New York: Dodd, Mead, 1958). pp. 365-366. Also see Roger Abrahams, ed., *Afro-American*

Folktales: Stories from Black Traditions in the New World (New York: Pantheon, 1985) pp. 101-105. For the transgressive and political potential of "signifying" during African-American slavery, see Abrahams, *Singing the Master: The Emergence of African American Culture in the Plantation South* (New York: Pantheon, 1992). For an account of the urban 20th century uses of both the practice of "signifying" and the "Signifying Monkey" tale, see Abrahams, *Deep Down in the Jungle: Negro Narrative Folklore from the Streets of Philadelphia* (Chicago: Aldine Publishing, 1970). Also see John W. Roberts, *From Trickster to Badman: The Black Folk Hero in Slavery and Freedom* (Philadelphia: University of Pennsylvania Press, 1989). For a theory of the transgressive and unifying functions of tricksters, signifying, and the "Signifying Monkey" in forging an African-American literary tradition published the same year as Schoolly D's "Signifying Rapper," see Henry Louis Gates, *The Signifying Monkey: A Theory of African-American Literary Criticism* (New York: Oxford University Press, 1988). For an introduction to the Afro-Caribbean roots of the Signifying

Monkey, see Robert Farris Thompson, *Flash of the Spirit: African and Afro-American Art and Philosophy* (New York: Vintage, 1983).

²⁵ Theresa Moore and Torri Minton, "Music of Rage," in *San Francisco Chronicle*, May 18, 1992. p. 1.

²⁶Until late 1991, there were no sampling cases brought to trial, although many had been filed and settled out of court, according to James P. Allen Jr., "Look What They've Done to my Song, Ma -- Digital Sampling in the '90s: A Legal Challenge for the Music Industry," in the *Entertainment & Sports Law Review*, Vol. 9, No 1. p. 181.

²⁷Juan Carlos Thom, note in the *Loyola Entertainment Law Journal*, Vol. 8 No. 2, 1988. p. 336.

²⁸David Toop, *Rap Attack 2: African Rap to Global Hip Hop* (London: Serpent's Tail, 1991). pp. 29-34. This is an updated version of his original book, *Rap Attack*. It includes more on the rise of Def Jam and its artists, and on the rise and controversy of Los Angeles and Miami-based rappers.

²⁹Toop, p.32. Toop also writes, "No matter how far it penetrates into the twilight maze of Japanese video games and cool European electronics, its roots are still the deepest in all contemporary

Afro-American music." p.19.

³⁰Toop cites Otis Redding's "Tramp" as an early dissing influence on rap pioneer Afrika Bambaataa. Toop, p. 115. Many rappers pay their debt by quoting from these masters of soul and funk. Digital Underground even named an album in honor of George Clinton's P-Funk, *Sons of the P*.

³¹Mark Costello and David Foster Wallace, *Signifying Rappers: Rap and Race in the Urban Present* (New York: Ecco Press, 1990). p 25. Also see Toop, p.17. Many of the backing tracks to early rap hits were lifted from 1970s disco records such as Chic's "Good Times," or classic James Brown and Funkadelic riffs. It was not unusual to hear some stranger stuff, such as television theme show choruses or Kraftwerk spinning in the background. Strangely, one of the most often used and cited backing tracks was "Apache," by The Incredible Bongo Band. It was written and performed by a British instrumental group, The Shadows, and became a hit in 1960. The Ventures covered it, as did the Jamaican group, The Incredible Bongo Band. Eventually, the Sugarhill Gang recorded an entire song called "Apache." See Toop, p.114.

³²Toop, p. 66. Bambaataa was hardly alone in this practice. One of his "old school" contemporaries who tried to make a mid-80s comeback, Kool Moe Dee, laid down a repetitive track of Paul Simon's "Fifty Ways to Leave Your Lover." Stevie Gabb's snare drum roll would introduce Dee's ominous baritone voice warning that he has "fifty ways ... to get ya."

³³For a full exploration on the improvisational history of basketball, see Nelson George, *Elevating the Game: Black Men and Basketball* (New York: HarperCollins, 1992). Also see Gena Dagel Caponi, ed., *Signifyin(g), Sanctifyin', and Slam Dunking: A Reader in African American Expressive Culture* (Amherst: University of Massachusetts Press, 1999) For the Be-Bop/Hip-Hop connection, see Toop, p.18.

³⁴Ruth Finnegan, *Oral Literature in Africa* (London: Oxford University Press, 1970). p. 9. Oral traditions that sprout written traditions handle questions of authorship and originality in a complicated manner. While the British romantic tradition runs from influence, the American oral-written tradition revels in it, and uses it with wit and style. This aesthetic is mostly closely studied and clearly explained in the

African American oral and literary traditions. In *The Signifying Monkey*, Gates identifies how the anxiety of influence affected opinions of African and African American expression. Gates notes that David Hume and Thomas Jefferson both accused blacks of being merely imitative rather than creative. Orally-based literatures are likely to be heavily informed by immediate audience response, and the valorized story teller must react to what has been told before, and to what is going on around him. The story teller has an important role, one of demystified authorship. Yet there is no over-riding concern for originality as a substantive function, merely a stylistic one. Zora Neale Hurston took it upon herself to demystify the Anglo-Saxon author, and she expressed ideas similar to those Mark Twain wrote to Helen Keller: "It is obvious that to get back to original sources is much too difficult for any group to claim very much as a certainty. What we really mean by originality is the modification of ideas. The most ardent admirer of the great Shakespeare cannot claim first source even for him. It is in his treatment of the borrowed material." See Hurston, "Characteristics of Negro Expression," in Robert O'Meally, *The*

Jazz Cadence of American Culture (New York: Columbia University Press, 1999). p. 304. In *The Signifying Monkey*, Gates outlines tropes that determine the "blackness" of black texts. These tropes recognize the aesthetic of oral transmission and show up clearly in the written antecedents. Gates calls these tropes tropological revision, the speakerly text and the talking texts. Gates is clear about his motive to define the blackness in texts textually, instead of biologically, and therefore opens his model to texts written by whites. For Gates and others who study African, African-American and American art, music and literature, repetition and revision are fundamental to the forms. As Gates writes, "Whatever is black about black American literature is to found in this identifiable black Signifyin(g) difference." In other words, Gates' goal is to trace a history of distinct and conscious influence -- what he calls "tropological revision" throughout a literary tradition. Gates defines tropological revision as "the manner in which a specific trope is repeated, with differences, between two or more texts." It is important to realize that Gates' questions can and should apply to texts and traditions that few would easily call "black"

or "African." So it is revealing to subject Twain and his work, as it arises out of the American and African-American oral traditions, to Gates' analysis. Gates' work is about much more than African-American literature. It explores how the vestiges of oral traditions survive and thrive in written literature. In cultures that are primarily oral, and within modes of expression that remain oral but operate within post-oral or literate cultures, originality is a matter of style, not substance. According to Walter J. Ong, 20th-century scholarship of oral literature has shown that repetition and revision are essential to the cognitive processes that enable communication and the transmission of meaning. Without a recognizable vocabulary of repeated expressions, an audience cannot follow a story, and a storyteller cannot organize the narrative. Orally transmitted stories must be formulaic, and thus "less original," if we define originality substantively, as we do for linear, written narratives. While written cultures reward its "originators" for "making it new," oral cultures reward stylistic daring, performative excellence, improvisation and audience participation. Doing the "same thing" better is better than

doing a "new thing" the same way. See Walter J. Ong, *Orality and Literacy: The Technologizing of the Word* (London: Routledge, 1982).

³⁵Dick Hebdige, *Cut 'N' Mix: Culture, Identity and Caribbean Music* (London: Comedia, 1987).

³⁶Hebdige, p.12.

³⁷Hebdige, p. 83.

³⁸Hebdige, p.84.

³⁹ Hebdige, p. 137.

⁴⁰ Hebdige, p. 137.

⁴¹Hebdige, p. 137.

⁴²Toop, p. 60.

⁴³Hebdige, p. 138.

⁴⁴Daisann McLane, *The New York Times*, Aug. 23, 1992. p.22.

⁴⁵The Beach Boys' breakthrough hit, "Surfin' USA," released in March 1963, relied almost entirely on Chuck Berry's "Sweet Little Sixteen," and its lyrical concept was not unlike that song or Chubby Checker's "Twistin' USA." After Arc music, Berry's publisher, sued Capitol Records, the labeled settled out of court and gave Berry an undisclosed monetary award and

writer's credit on the label. The artistic significance of this event is that "Surfin' USA" established and popularized the Beach Boys' harmonies, vocal styles and production techniques that would set a high mark of creativity with the *Pet Sounds* album. For a full history of this breakthrough song, see Steven Gaines, *Heroes and Villains: The True Story of the Beach Boys* (New York: New American Library, 1986). pp. 100-101.

⁴⁶Famous recorded versions include a 1958 single hit for Lloyd Price, a 1963 cut by the Isley Brothers, several by Dr. John, and a brief Cockney version by The Clash on *London Calling*.

⁴⁷Roland and Yamaha began marketing digital samplers in the United States in 1983, at a cost of up to \$20,000. These days, they cost as little as \$2,000. See David Sanjek, " 'Don't Have to DJ No More': Sampling and the 'Autonomous' Creator," in the *Arts and Entertainment Law Journal*. New York: Cardozo Law School, Vol. 10, No. 2, 1992. p 612.

⁴⁸Allen, p.181.

⁴⁹Hammer freely admits his dependence on other artists for his danceable beats. He is paid for his dancing and rapping, one of which is impressive. Hammer was quoted in *People Weekly* magazine

saying, "Right after I did the song, I said, 'Hey, I gotta pay Rick for this.' I didn't need a lawyer to tell me that." See Peter Castro, "Chatter", *People Weekly*, July 30, 1990. p.86. Hammer frequently bases his most catchy jams on popular hits, and some of them are not old enough to be called classic. His hit "Pray" was laid down over riffs from Prince's 1984 hit "When Doves Cry," from the album *Purple Rain*.

⁵⁰Whitney C. Broussard, "Current and Suggested Business Practices for the Licensing of Digital Samples," in *Loyola Entertainment Law Journal*, Vol. II, 1991. p. 479.

⁵¹"Ice Ice Baby" was certified platinum on Oct. 9, 1990, when its sales exceeded one million. After the success was certified, the original artists, record company and publisher all sought compensation for the use of the sample. The matter was settled out of court for an undisclosed amount. See *Harvard Law Review*, Vol. 105, 1992. p. 728.

⁵²Greg Tate, "Diary of a Bug," *Village Voice*, Nov. 22, 1988. p. 73.

⁵³Run DMC, "Walk This Way," from *Raising Hell* (New York: Profile Records, 1986). This was the first rap hit to get extensive play

on MTV and more "mainstream" rock radio. It had a profound effect on those of us who grew up during the 1980s in suburban America. When we heard that three Adidas-clad men from Hollis, Queens, were down with mid-'70s rock like Aerosmith, it showed us that rap might just have something to say to us, or at least some fun to offer us. For an explanation of how "discursive communities" create meaning, see Stanley Fish, *Is There a Text In This Class?* (Cambridge: Harvard University Press, 1980).

⁵⁴ George Lipsitz, "The Hip Hop Hearings: Censorship, Social Memory and Intergenerational Tensions among African Americans," in Joe Austin and Michael Nevin Willard, eds., *Generations of Youth: Youth Cultures and History in Twentieth-Century America*. (New York: New York University Press, 1998). p. 405.

⁵⁵John Leland, "Singles," *Spin*, August 1988. p. 80. Urban hip-hop is not the only subculture assaulting the foundations of creative ownership. Cyberpunk theory frequently pushes the notion of the end of proprietary information. Cybermusician Lisa Sirois of the Boston band DDT says: "We're no longer playing instruments, we're programming. We sequence music on a computer, store it on a hard disc, and then record it onto digital audio

tape. Then, when we perform, we supplement it with live drums and keyboards. We're live and on tape. We play on an electronic stage." See Nathan Cobb, "Terminal Chic: Cyberpunk Subculture Swimming Closer to the Surface," in the *Boston Globe*, Nov. 24, 1992.

⁵⁶The 1915 case *Boosey v. Empire Music Co.* indicated that lifting six notes or more may be a violation. The 1952 case, *Northern Music Corp. v. King Record Distribution Co.*, indicated that as little as four bars of music may be a violation of a work. But *United States v. Taxe* in 1974 complicated any such formulas. The defendant recorded hit songs and electronically altered their speed and pitch. Strange noises were added throughout. The court was not persuaded that the defendants works were simply "derivative," and ruled that the very recapturing of another's sound is a violation. For an explanation, see Allen, p. 190.

⁵⁷Sanjek, p.609.

⁵⁸Note, "A New Spin on Music Sampling: A Case for Fair Play," in *Harvard Law Review*, Jan. 1992. p. 726.

⁵⁹Allen, p. 102.

⁶⁰Note, p. 729.

⁶¹Broussard, p. 502.

⁶² Richard Harrington, "The Groove Robbers' Judgement," in *The Washington Post*, December 25, 1991. p. D1.

⁶³ Biz Markie, "Alone Again," from *I Need a Haircut* (New York: Cold Chillin' Records, 1991). Since the lawsuit, this original version of the album has been very hard to find. Printings after 1991 do not contain "Alone Again." Warner Bros. ordered all record stores to return copies of the album after the settlement. I searched used record stores for five years to get a copy so I could hear the song in question. Fortunately, in the fall of 1998, I discovered that Wesleyan University student Kabir Sen owns a copy of the original pressing. He lent it to me so I could complete this section.

⁶⁴ Harrington, "The Groove Robbers' Judgement." Also see Susan Upton Douglass and Craig S. Mende, "Hey, They're Playing My Song!: Litigating Music Copyrights" in *New York Law Journal*, July 14, 1997. p. S1.

⁶⁵ *Grand Upright Music Ltd. v. Warner Bros. Records*, 91 Civ. 7648 (KTD), United States District Court for the Southern District of New York, 780 F. Supp. 182; 1991

⁶⁶ Chuck Philips, "Songwriter wins Large Settlement in Rap Suit" in Los Angeles Times, January 1, 1992. p. F1. Also see David Goldberg and Robert J. Bernstein, "Reflections on Sampling" in *New York Law Journal*, January 15, 1993. p. 3.

⁶⁷ Douglass and Mende, p. S1.

⁶⁸Public Enemy, "Caught -- Can We Get a Witness?," on *It Takes a Nation of Million to Hold Us Back*. New York: Def Jam/Columbia Records, 1988.

⁶⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). See Mel Marquis, "Fair Use and the First Amendment: Parody and Its Protections," in *Seton Hall Constitutional Law Journal*, 1997.

⁷⁰ *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981). In the ruling for the case *Fisher v. Dees* (794 F.2d 432; 1986), the court wrote, "In *MCA, Inc. v. Wilson*, the court held the doctrine of fair use inapplicable in the case of a song called 'Cunnilingus Champion of Company C,' which closely tracked the music and meter of the 40's standard, 'Boogie Woogie Bugle Boy of Company B.' The composers of 'Champion,' which was created for performance in the off-Broadway musical *Let My People Come*, admitted that the song was not originally conceived as a parody

of 'Bugle Boy.' Rather, they had copied the original because it was 'immediately identifiable as something happy and joyous and it brought back a certain period in our history when we felt that way.' 677 F.2d at 184 (quoting uncited trial record). Central to the court's holding was the determination that 'Champion' was not a parody of 'Bugle Boy'; in copying 'Bugle Boy' almost verbatim, the composers' purpose was simply to reap the advantages of a well-known tune and short-cut the rigors of composing original music." Also see *MGM v. Showcase Atlanta Cooperative Productions*, 479 F. Supp. 351, 357 (1981). Also see *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group*, 886 F.2d 490, 493 (2d Cir. 1989); For the solidification of parody protection, see *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986); Also see Anastasia P. Winslow, "Rapping On a Revolving Door: An Economic Analysis of Parody and *Campbell v. Acuff-Rose Music, Inc.*," *Southern California Law Review*, 1996.

⁷¹*Benny v. Leow's Inc.* 239 F.2d 532 (9th Cir. 1956)

⁷²*Berlin v. EC Publications, Inc.* 329 F. 2d 541 (2d Cir.) 1964.

⁷³*Elsmere Music, Inc. v. National Broadcasting Co.* 482 F. Supp. 741 (S.D.N.Y), add'd, 623 F.2d 252 (2d Cir.1980).

⁷⁴*Fisher v. Dees*, 794 F.2d 432(9th Cir 1986).

⁷⁵*Campbell v. Acuff Rose*.

⁷⁶Souter's ruling, however, came a couple of years too late for two other parodists who were denied relief by federal courts.

For the painful saga that the avant-gard music group Negativeland had to endure when Island Records filed suit again the group and its label for a sampled parody of the Irish rock group U2, see Negativeland, *Fair Use: The Story of the Letter U and the Number 2* (Concord, California: Seeland, 1995). Just as painful, artist Jeff Koons designed a sculpture that parodied a photograph postcard of a rural American couple holding a litter of puppies. Art Rogers, the photographer of the original, sued Koons and won. *Rodgers v. Koons*, 960 F.2d 301 (2d Cir. 1992). See Vilis Inde, *Art in the Courtroom* (Westport: Praeger, 1998). Also see Rosemary Coombe, *The Cultural Life of Intellectual Property: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998). The culture industries and their lawyers still seem to resist the idea that parody is fair use.

See Alex Kuczynski, "Parody of Talk Magazine Upsets Disney," *The New York Times*, July 19, 1999, p. C10.