

Sound Unbound

# SOUND UNBOUND

## Sampling Digital Music and Culture

edited by Paul D. Miller aka DJ Spooky that Subliminal Kid

edited by Paul D. Miller aka DJ Spooky that Subliminal Kid

The MIT Press  
Cambridge, Massachusetts  
London, England

2008

vibration of his recitation through playing it on a million radios and televisions at once, to the point where it affected our reality and his.

word is bond.

“these are the words that i manifest”

—guru

we are the manifestation of our thinking patterns. and we think in terms of terms. words. sooner or later we must realize that we are liable for what and how we think and say and thus must alter (altar) our use of language. sentence structures predate pyramids and are as complex. realize, even in asking me to describe the future of language, i am simply playing my part in determining it by helping those who read this to become more aware of the importance of what they say. and that (this) is how the future comes about.

word.

#### Jonathan Lethem

All mankind is of one author, and is one volume; when one man dies, one chapter is not torn out of the book, but translated into a better language; and every chapter must be so translated. . . .

—John Donne

#### Love and Theft

Consider this tale: a cultivated man of middle age looks back on the story of an *amour fou*, one beginning when, traveling abroad, he takes a room as a lodger. The moment he sees the daughter of the house, he is lost. She is a pre-teen, whose charms instantly enslave him. Heedless of her age, he becomes intimate with her. In the end she dies, and the narrator—marked by her forever—remains alone. The name of the girl supplies the title of the story: *Lolita*.

The author of the story I’ve described, Heinz von Lichberg, published his tale of *Lolita* in 1916, forty years before Vladimir Nabokov’s novel. Lichberg later became a prominent journalist in the Nazi era, and his youthful works faded from view. Did Nabokov, who remained in Berlin until 1937, adopt Lichberg’s tale consciously? Or did the earlier tale exist for Nabokov as a

hidden, unacknowledged memory? The history of literature is not without examples of this phenomenon, called cryptomnesia. Another hypothesis is that Nabokov, knowing Lichberg's tale perfectly well, had set himself to that art of quotation that Thomas Mann, himself a master of it, called "higher cribbing." Literature has always been a crucible in which familiar themes are continually recast. Little of what we admire in Nabokov's *Lolita* is to be found in its predecessor; the former is in no way deducible from the latter. Still: did Nabokov consciously borrow and quote?

"When you live outside the law, you have to eliminate dishonesty." The line comes from Don Siegel's 1958 film noir, *The Lineup*, written by Stirling Silliphant. The film still haunts revival houses, likely thanks to Eli Wallach's blazing portrayal of a sociopathic hit man and to Siegel's long, sturdy auteurist career. Yet what were those words worth—to Siegel, or Silliphant, or their audience—in 1958? And again: what was the line worth when Bob Dylan heard it (presumably in some Greenwich Village repertory cinema), cleaned it up a little, and inserted it into "Absolutely Sweet Marie"? What are they worth now, to the culture at large?

Appropriation has always played a key role in Dylan's music. The songwriter has grabbed not only from a panoply of vintage Hollywood films but from Shakespeare and F. Scott Fitzgerald and Junichi Saga's *Confessions of a Yakuza*. He also nabbed the title of Eric Lott's study of minstrelsy for his 2001 album *Love and Theft*. One imagines Dylan liked the general resonance of the title, in which emotional misdemeanors stalk the sweetness of love, as they do so often in Dylan's songs. Lott's title is, of course, itself a riff on Leslie Fiedler's *Love and Death in the American Novel*, which famously identifies the literary motif of the interdependence of a white man and a dark man, like Huck and Jim or Ishmael and Queequeg—a series of nested references to Dylan's own appropriating, minstrelboy self. Dylan's art offers a paradox: while it famously urges us not to look back, it also encodes a knowledge of past sources that might otherwise have little home in contemporary culture, like the Civil War poetry of the Confederate bard Henry Timrod, resuscitated in lyrics on Dylan's newest record, *Modern Times*.

The same might be said of *all* art. I realized this forcefully when one day I went looking for the John Donne passage quoted above. I know the lines, I confess, not from a college course but from the movie version of *84, Charing Cross Road* with Anthony Hopkins and Anne Bancroft. I checked out *84, Charing Cross Road* from the library in the hope of finding the Donne passage,

but it wasn't in the book. It's alluded to in the play that was adapted from the book, but it isn't reprinted. So I rented the movie again, and there was the passage, read in voiceover by Anthony Hopkins but without attribution. Unfortunately, the line was also abridged so that, when I finally turned to the Web, I found myself searching for the line "all mankind is of one volume" instead of "all mankind is of one author, and is one volume."

My Internet search was initially no more successful than my library search. I had thought that summoning books from the vasty deep was a matter of a few keystrokes, but when I visited the website of the Yale library, I found that most of its books don't yet exist as computer text. As a last-ditch effort I searched the seemingly more obscure phrase "every chapter must be so translated." The passage I wanted finally came to me, as it turns out, not as part of a scholarly library collection but simply because someone who loves Donne had posted it on his homepage. The lines I sought were from Meditation 17 in *Devotions upon Emergent Occasions*, which happens to be the most famous thing Donne ever wrote, containing as it does the line "never send to know for whom the bell tolls; it tolls for thee." My search had led me from a movie to a book to a play to a website and back to a book. Then again, those words may be as famous as they are only because Hemingway lifted them for his book title.

Literature has been in a plundered, fragmentary state for a long time. When I was thirteen I purchased an anthology of Beat writing. Immediately, and to my very great excitement, I discovered one William S. Burroughs, author of something called *Naked Lunch*, excerpted there in all its coruscating brilliance. Burroughs was then as radical a literary man as the world had to offer. Nothing, in all my experience of literature since, has ever had as strong an effect on my sense of the sheer possibilities of writing. Later, attempting to understand this impact, I discovered that Burroughs had incorporated snippets of other writers' texts into his work, an action I knew my teachers would have called plagiarism. Some of these borrowings had been lifted from American science fiction of the 1940s and '50s, adding a secondary shock of recognition for me. By then I knew that this "cut-up method," as Burroughs called it, was central to whatever he thought he was doing, and that he quite literally believed it to be akin to magic. When he wrote about his process, the hairs on my neck stood up, so palpable was the excitement. Burroughs was interrogating the universe with scissors and a paste pot, and the least imitative of authors was no plagiarist at all.

## Contamination Anxiety

In 1941, on his front porch, Muddy Waters recorded a song for the folklorist Alan Lomax. After singing the song, which he told Lomax was entitled “Country Blues,” Waters described how he came to write it. “I made it on about the eighth of October ’38,” Waters said. “I was fixin’ a puncture on a car. I had been mistreated by a girl. 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 called “Walkin’ Blues,” asked Waters if there were any other 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 ‘Walkin’ Blues.’ I heard the tune before I heard it on the record. I learned it from Son House.” In nearly one breath, Waters offers five accounts: his own active authorship: he “made it” on a specific date. Then the “passive” explanation: “it come to me just like that.” After Lomax raises the question of influence, Waters, without shame, misgivings, or trepidation, says that he heard a version by Johnson, but that his mentor, Son House, taught it to him. In the middle of that complex genealogy, Waters declares that “this song comes from the cotton field.”

Blues and jazz musicians have long been enabled by a kind of “open source” culture, where preexisting melodic fragments and larger musical frameworks are freely reworked. Technology has only multiplied the possibilities; musicians have gained the power to *duplicate* sounds literally rather than simply approximate them through allusion. In 1970s Jamaica, King Tubby and Lee “Scratch” Perry deconstructed recorded music, using astonishingly primitive predigital hardware, creating what they called “versions.” The recombinant nature of their means of production quickly spread to DJs in New York and London. Today an endless, gloriously impure, and fundamentally social process generates countless hours of music.

Visual, sound, and text collage—which for many centuries were relatively fugitive traditions (a cento here, a folk pastiche there)—became explosively central to a series of movements in the twentieth century: futurism, cubism, Dada, *musique concrète*, situationism, pop art, and appropriationism. In fact, collage, the common denominator in that list, might be called *the* art form of the twentieth century, never mind the twenty-first. But forget, for the moment, chronologies, schools, or even centuries. As examples accumulate—

Igor Stravinsky’s music and Daniel Johnston’s, Francis Bacon’s paintings and Henry Darger’s, the novels of the Oulipo group and of Hannah Crafts (the author who pillaged Dickens’s *Bleak House* to write *The Bondswoman’s Narrative*), as well as cherished texts that become troubling to their admirers after the discovery of their “plagiarized” elements, like Richard Condon’s novels or Martin Luther King Jr.’s sermons—it becomes apparent that appropriation, mimicry, quotation, allusion, and sublimated collaboration consist of a kind of sine qua non of the creative act, cutting across all forms and genres in the realm of cultural production.

In a courtroom scene from *The Simpsons* that has since entered into the television canon, an argument over the ownership of the animated characters Itchy and Scratchy rapidly escalates into an existential debate on the very nature of cartoons. “Animation is built on plagiarism!” declares the show’s hot-tempered cartoon-producer-within-a-cartoon, Roger Meyers Jr. “You take away our right to steal ideas, where are they going to come from?” If nostalgic cartoonists had never borrowed from *Fritz the Cat*, there would be no *Ren & Stimpy Show*; without the Rankin/Bass and Charlie Brown Christmas specials, there would be no *South Park*; and without *The Flintstones*—more or less *The Honeymooners* in cartoon loincloths—*The Simpsons* would cease to exist. If those don’t strike you as essential losses, then consider the remarkable series of “plagiarisms” that links Ovid’s “Pyramus and Thisbe” with Shakespeare’s *Romeo and Juliet* and Leonard Bernstein’s *West Side Story*, or Shakespeare’s description of Cleopatra, copied nearly verbatim from Plutarch’s life of Mark Antony and also later nicked by T. S. Eliot for *The Waste Land*. If these are examples of plagiarism, then we want more plagiarism.

Most artists are brought to their vocation when their own nascent gifts are awakened by the work of a master. That is to say, most artists are converted to art by art itself. Finding one’s voice isn’t just an emptying and purifying oneself of the words of others but an adopting and embracing of filiations, communities, and discourses. Inspiration could be called inhaling the memory of an act never experienced. Invention, it must be humbly admitted, does not consist in creating out of void, but out of chaos. Any artist knows these truths, no matter how deeply he or she submerges that knowing.

What happens when an allusion goes unrecognized? A closer look at *The Waste Land* may help make this point. The body of Eliot’s poem is a vertiginous mélange of quotation, allusion, and “original” writing. When Eliot alludes to Edmund Spenser’s “Prothalamion” with the line “Sweet Thames,

run softly, till I end my song," what of readers to whom the poem, never one of Spenser's most popular, is unfamiliar? (Indeed, the Spenser is now known largely because of Eliot's use of it.) Two responses are possible: grant the line to Eliot, or later discover the source and understand the line as plagiarism. Eliot evidenced no small anxiety about these matters; the notes he so carefully added to *The Waste Land* can be read as a symptom of modernism's contamination anxiety. Taken from this angle, what exactly is postmodernism, except modernism without the anxiety?

### Surrounded by Signs

The surrealists believed that objects in the world possess a certain but unspecifiable intensity that had been dulled by everyday use and utility. They meant to reanimate this dormant intensity, to bring their minds once again into close contact with the matter that made up their world. André Breton's maxim, "Beautiful as the chance encounter of a sewing machine and an umbrella on an operating table," is an expression of the belief that simply placing objects in an unexpected context reinvigorates their mysterious qualities.

This "crisis" the surrealists identified was being simultaneously diagnosed by others. Martin Heidegger held that the essence of modernity was found in a certain technological orientation he called "enframing." This tendency encourages us to see the objects in our world only in terms of how they can serve us or be used by us. The task he identified was to find ways to resituate ourselves vis-à-vis these "objects," so that we may see them as "things" pulled into relief against the ground of their functionality. Heidegger believed that art had the great potential to reveal the "thingness" of objects.

The surrealists understood that photography and cinema could carry out this reanimating process automatically; the process of framing objects in a lens was often enough to create the charge they sought. Describing the effect, Walter Benjamin drew a comparison between the photographic apparatus and Freud's psychoanalytic methods. Just as Freud's theories "isolated and made analyzable things which had heretofore floated along unnoticed in the broad stream of perception," the photographic apparatus focuses on "hidden details of familiar objects," revealing "entirely new structural formations of the subject."

It's worth noting, then, that early in the history of photography a series of judicial decisions could well have changed the course of that art: courts were

asked whether the photographer, amateur or professional, required permission before he could capture and print an image because the photographer was *stealing* from the person or building whose photograph he shot, pirating something of private and certifiable value. Those early decisions went in favor of the pirates. Just as Walt Disney could take inspiration from Buster Keaton's *Steamboat Bill, Jr.*, the Brothers Grimm, or the existence of real mice, the photographer should be free to capture an image without compensating the source. The world that meets our eye through the lens of a camera was judged to be, with minor exceptions, a sort of public commons, where a cat may look at a king.

Novelists may glance at the stuff of the world too, but we sometimes get called to task for it. For those whose ganglia were formed pre-TV, the mimetic deployment of pop-culture icons seems at best an annoying tic and at worst a dangerous vapidness that compromises fiction's seriousness by dating it out of the Platonic Always where it ought to reside. In a graduate workshop I briefly passed through, a certain gray eminence tried to convince us that a literary story should always eschew "any feature which serves to date it" because "serious fiction must be Timeless." When we protested that, in his own well-known work, characters moved about electrically lit rooms, drove cars, and spoke not Anglo-Saxon but postwar English—and further, that fiction he'd himself ratified as great, such as Dickens, was liberally strewn with innately topical, commercial, and time-bound references—he impatiently emended his proscription to those explicit references that would date a story in the "frivolous Now." When pressed, he said of course he meant the "trendy mass-popular-media" reference. Here, transgenerational discourse broke down.

I was born in 1964; I grew up watching Captain Kangaroo, moon landings, zillions of TV ads, the Banana Splits, *M\*A\*S\*H*, and *The Mary Tyler Moore Show*. I was born with words in my mouth—"Band-Aid," "Q-tip," "Xerox"—object-names as fixed and eternal in my logosphere as "taxicab" and "toothbrush." The world is a home littered with pop-culture products and their emblems. I also came of age swamped by parodies that stood for originals yet mysterious to me—I knew Monkees before Beatles, Belmondo before Bogart, and "remember" the movie *Summer of '42* from a *Mad* magazine satire, though I've still never seen the film itself. I'm not alone in having been born backwards into an incoherent realm of texts, products, and images, the commercial and cultural environment with which we've both

supplemented and blotted out our natural world. I can no more claim it as “mine” than the sidewalks and forests of the world, yet I do dwell in it, and for me to stand a chance as either artist or citizen, I’d probably better be permitted to name it.

Consider Walker Percy’s *The Moviegoer*:

Other people, so I have read, treasure memorable moments in their lives: the time one climbed the Parthenon at sunrise, the summer night one met a lonely girl in Central Park and achieved with her a sweet and natural relationship, as they say in books. I too once met a girl in Central Park, but it is not much to remember. What I remember is the time John Wayne killed three men with a carbine as he was falling to the dusty street in *Stagecoach*, and the time the kitten found Orson Welles in the doorway in *The Third Man*.

Today, when we can eat Tex-Mex with chopsticks while listening to reggae and watching a YouTube rebroadcast of the Berlin Wall’s fall—i.e., when damn near *everything* presents itself as familiar—it’s not a surprise that some of today’s most ambitious art is going about trying to *make the familiar strange*. In so doing, in reimagining what human life might truly be like over there across the chasms of illusion, mediation, demographics, marketing, imago, and appearance, artists are paradoxically trying to restore what’s taken for “real” to three whole dimensions, to reconstruct a univocally round world out of disparate streams of flat sights.

Whatever charge of tastelessness or trademark violation may be attached to the artistic appropriation of the media environment in which we swim, the alternative—to flinch, or tiptoe away into some ivory tower of irrelevance—is far worse. We’re surrounded by signs; our imperative is to ignore none of them.

### Use monopoly

The idea that culture can be property—*intellectual property*—is used to justify everything from attempts to force the Girl Scouts to pay royalties for singing songs around campfires to the infringement suit brought by the estate of Margaret Mitchell against the publishers of Alice Randall’s *The Wind Done Gone*. Corporations like Celera Genomics have filed for patents for human genes, while the Recording Industry Association of America has sued music downloaders for copyright infringement, reaching out-of-court settlements for thousands of dollars with defendants as young as twelve. ASCAP bleeds fees from shop owners who play background music in their stores; students

and scholars are shamed from placing texts facedown on photocopy machines. At the same time, copyright is revered by most established writers and artists as a birthright and bulwark, the source of nurture for their infinitely fragile practices in a rapacious world. Plagiarism and piracy, after all, are the monsters we working artists are taught to dread, as they roam the woods surrounding our tiny preserves of regard and remuneration.

A time is marked not so much by ideas that are argued about as by ideas that are taken for granted. The character of an era hangs upon what needs no defense. In this regard, few of us question the contemporary construction of copyright. It is taken as a law, both in the sense of a universally recognizable moral absolute, like the law against murder, and as naturally inherent in our world, like the law of gravity. In fact, it is neither. Rather, copyright is an ongoing social negotiation, tenuously forged, endlessly revised, and imperfect in its every incarnation.

Thomas Jefferson, for one, considered copyright a necessary evil: he favored providing just enough incentive to create, nothing more, and thereafter allowing ideas to flow freely as nature intended. His conception of copyright was enshrined in the Constitution, which gives Congress the authority to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” This was a balancing act between creators and society as a whole; second comers might do a much better job than the originator with the original idea.

But Jefferson’s vision has not fared well, has in fact been steadily eroded by those who view the culture as a market in which everything of value should be owned by someone or other. The distinctive feature of modern American copyright law is its almost limitless bloating—its expansion in both scope and duration. With no registration requirement, every creative act in a tangible medium is now subject to copyright protection: your email to your child or your child’s finger painting, both are automatically protected. The first Congress to grant copyright gave authors an initial term of fourteen years, which could be renewed for another fourteen if the author still lived. The current term is the life of the author plus seventy years. It’s only a slight exaggeration to say that each time Mickey Mouse is about to fall into the public domain, the mouse’s copyright term is extended.

Even as the law becomes more restrictive, technology is exposing those restrictions as bizarre and arbitrary. When old laws fixed on reproduction as

the compensable (or actionable) unit, it wasn't because there was anything fundamentally invasive of an author's rights in the making of a copy. Rather it was because copies were once easy to find and count, so they made a useful benchmark for deciding when an owner's rights had been invaded. In the contemporary world, though, the act of "copying" is in no meaningful sense equivalent to an infringement—we make a copy every time we accept an emailed text, or send or forward one—and is impossible anymore to regulate or even describe.

At the movies, my entertainment is sometimes lately preceded by a dire trailer, produced by the lobbying group called the Motion Picture Association of America, in which the purchasing of a bootleg copy of a Hollywood film is compared to the theft of a car or a handbag—and, as the bullying supertitles remind us, "You wouldn't steal a handbag!" This conflation forms an incitement to quit thinking. If I were to tell you that pirating DVDs or downloading music is in no way different from loaning a friend a book, my own arguments would be as ethically bankrupt as the MPAA's. The truth lies somewhere in the vast gray area between these two overstated positions. For a car or a handbag, once stolen, no longer is available to its owner, while the appropriation of an article of "intellectual property" leaves the original untouched. As Jefferson wrote, "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."

Yet industries of cultural capital, who profit not from creating but from distributing, see the sale of culture as a zero sum game. The pianoroll publishers fear the record companies, who fear the cassette-tape manufacturers, who fear the online vendors, who fear whoever else is next in line to profit most quickly from the intangible and infinitely reproducible fruits of an artist's labor. It has been the same in every industry and with every technological innovation. Jack Valenti, speaking for the MPAA: "I say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone."

Thinking clearly sometimes requires unbraiding our language. The word "copyright" may eventually seem as dubious in its embedded purposes as "family values," "globalization," and, sure, "intellectual property." Copyright is a "right" in no absolute sense; it is a government-granted monopoly on the use of creative results. So let's try calling it that—not a right but a *monopoly on use*, a "usemonopoly"—and then consider how the rapacious expansion of

monopoly rights has always been counter to the public interest, no matter if it is Andrew Carnegie controlling the price of steel or Walt Disney managing the fate of his mouse. Whether the monopolizing beneficiary is a living artist or some artist's heirs or some corporation's shareholders, the loser is the community, including living artists who might make splendid use of a healthy public domain.

### The Beauty of Second Use

A few years ago someone brought me a strange gift, purchased at MoMA's downtown design store: a copy of my own first novel, *Gun, With Occasional Music*, expertly cut into the contours of a pistol. The object was the work of Robert The, an artist whose specialty is the reincarnation of everyday materials. I regard my first book as an old friend, one who never fails to remind me of the spirit with which I entered into this game of art and commerce—that to be allowed to insert the materials of my imagination onto the shelves of bookstores and into the minds of readers (if only a handful) was a wild privilege. I was paid \$6,000 for three years of writing, but at the time I'd have happily published the results for nothing. Now my old friend had come home in a new form, one I was unlikely to have imagined for it myself. The gun-book wasn't readable, exactly, but I couldn't take offense at that. The fertile spirit of stray connection this appropriated object conveyed back to me—the strange beauty of its second use—was a reward for being a published writer I could never have fathomed in advance. And the world makes room for both my novel and Robert The's gun-book. There's no need to choose between the two.

In the first life of creative property, if the creator is lucky, the content is sold. After the commercial life has ended, our tradition supports a second life as well. A newspaper is delivered to a doorstep, and the next day wraps fish or builds an archive. Most books fall out of print after only one year, yet even within that period they can be sold in used bookstores and stored in libraries, quoted in reviews, parodied in magazines, described in conversations, and plundered for costumes for kids to wear on Halloween. The demarcation between various possible uses is beautifully graded and hard to define, the more so as artifacts distill into and repercuss through the realm of culture into which they've been entered, the more so as they engage the receptive minds for whom they were presumably intended.

Active reading is an impertinent raid on the literary preserve. Readers are like nomads, poaching their way across fields they do not own—artists are no more able to control the imaginations of their audiences than the culture industry is able to control second uses of its artifacts. In the children's classic *The Velveteen Rabbit*, the old Skin Horse offers the Rabbit a lecture on the practice of textual poaching. The value of a new toy lies not in its material qualities (not "having things that buzz inside you and a stick-out handle"), the Skin Horse explains, but rather in how the toy is used. "Real isn't how you are made. . . . It's a thing that happens to you. When a child loves you for a long, long time, not just to play with, but REALLY loves you, then you become Real." The Rabbit is fearful, recognizing that consumer goods don't become "real" without being actively reworked: "Does it hurt?" Reassuring him, the Skin Horse says: "It doesn't happen all at once. . . . You become. It takes a long time. . . . Generally, by the time you are Real, most of your hair has been loved off, and your eyes drop out and you get loose in the joints and very shabby." Seen from the perspective of the toymaker, the Velveteen Rabbit's loose joints and missing eyes represent vandalism, signs of misuse and rough treatment; for others, these are marks of its loving use.

Artists and their surrogates who fall into the trap of seeking recompense for every possible second use end up attacking their own best audience members for the crime of exalting and enshrining their work. The Recording Industry Association of America prosecuting their own record-buying public makes as little sense as the novelists who bristle at autographing used copies of their books for collectors. And artists, or their heirs, who fall into the trap of attacking the collagists and satirists and digital samplers of their work are attacking the next generation of creators for the crime of being influenced, for the crime of responding with the same mixture of intoxication, resentment, lust, and glee that characterizes all artistic successors. By doing so they make the world smaller, betraying what seems to me the primary motivation for participating in the world of culture in the first place: to make the world larger.

#### Source Hypocrisy, or Disnial

The Walt Disney Company has drawn an astonishing catalogue from the work of others: *Snow White and the Seven Dwarfs*, *Fantasia*, *Pinocchio*, *Dumbo*, *Bambi*, *Song of the South*, *Cinderella*, *Alice in Wonderland*, *Robin Hood*, *Peter Pan*, *Lady and the Tramp*, *Mulan*, *Sleeping Beauty*, *The Sword in the Stone*, *The Jungle Book*, and, alas, *Treasure Planet*, a legacy of cultural sampling that

Shakespeare, or De La Soul, could get behind. Yet Disney's protectorate of lobbyists has policed the resulting cache of cultural materials as vigilantly as if it were Fort Knox—threatening legal action, for instance, against the artist Dennis Oppenheim for the use of Disney characters in a sculpture, and prohibiting the scholar Holly Crawford from using *any* Disney-related images—including artwork by Lichtenstein, Warhol, Oldenburg, and others—in her monograph *Attached to the Mouse: Disney and Contemporary Art*.

This peculiar and specific act—the enclosure of commonwealth culture for the benefit of a sole or corporate owner—is close kin to what could be called *imperial plagiarism*, the free use of third-world or "primitive" artworks and styles by more privileged (and better-paid) artists. Think of Picasso's *Les Femmes d'Alger*, or some of the albums of Paul Simon or David Byrne: even without violating copyright, those creators have sometimes come in for a certain skepticism when the extent of their outsourcing became evident. And, as when Led Zeppelin found themselves sued for back royalties by the bluesman Willie Dixon, the act can occasionally be an expensive one. *To live outside the law, you must be honest*: perhaps it was this, in part, that spurred David Byrne and Brian Eno to recently launch a "remix" website, where anyone can download easily disassembled versions of two songs from *My Life in the Bush of Ghosts*, an album reliant on vernacular speech sampled from a host of sources. Perhaps it also explains why Bob Dylan has never refused a request for a sample.

Kenneth Koch once said, "I'm a writer who likes to be influenced." It was a charming confession, and a rare one. For so many artists, the act of creativity is intended as a Napoleonic imposition of one's uniqueness upon the universe—*après moi le déluge* of copycats! And for every James Joyce or Woody Guthrie or Martin Luther King Jr. or Walt Disney who gathered a constellation of voices in his work there may seem to be some corporation or literary estate eager to stopper the bottle: cultural debts flow in, but they don't flow out. We might call this tendency "source hypocrisy." Or we could name it after the most pernicious source hypocrites of all time: Disnial.

#### You Can't Steal a Gift

My reader may, understandably, be on the verge of crying "Communist!" A large, diverse society cannot survive without property; a large, diverse, and modern society cannot flourish without some form of intellectual property. But it takes little reflection to grasp that there is ample value that the term



“property” doesn’t capture. And works of art exist simultaneously in two economies, a market economy and a *gift economy*.

The cardinal difference between gift and commodity exchange is that a gift establishes a feeling-bond between two people, whereas the sale of a commodity leaves no necessary connection. I go into a hardware store, pay the man for a hacksaw blade, and walk out. I may never see him again. The disconnect-ness is, in fact, a virtue of the commodity mode. We don’t want to be bothered, and if the clerk always wants to chat about the family, I’ll shop elsewhere. I just want a hacksaw blade. But a gift makes a connection. There are many examples, the candy or cigarette offered to a stranger who shares a seat on the plane, the few words that indicate goodwill between passengers on the late-night bus. These tokens establish the simplest bonds of social life, but the model they offer may be extended to the most complicated of unions—marriage, parenthood, tutorship. If a value is placed on these (often essentially inequal) exchanges, they degenerate into something else.

Yet one of the more difficult things to comprehend is that the gift economies—like those that sustain open source software—coexist so naturally with the market. It is precisely this doubleness in art practices that we must identify, ratify, and enshrine in our lives as participants in culture, either as “producers” or “consumers.” Art that matters to us—which moves the heart, or revives the soul, or delights the senses, or offers courage for living, however we choose to describe the experience—is received as a gift is received. Even if we’ve paid a fee at the door of the museum or concert hall, when we are touched by a work of art something comes to us that has nothing to do with the price. The daily commerce of our lives proceeds at its own constant level, but a gift conveys an uncommodifiable surplus of inspiration.

The way we treat a thing can change its nature, though. Religions often prohibit the sale of sacred objects, the implication being that their sanctity is lost if they are bought and sold. We consider it unacceptable to sell sex, babies, body organs, legal rights, and votes. The idea that something should never be commodified is generally known as *inalienability* or *unalienability*—a concept most famously expressed by Thomas Jefferson in the phrase “endowed by their Creator with certain unalienable Rights...” A work of art seems to be a hardier breed; it can be sold in the market and still emerge a work of art. But if it is true that in the essential commerce of art a gift is carried by the work from the artist to his audience, if I am right to say that where there is no gift there is no art, then it may be possible to destroy a work of art by converting it into a pure commodity. I don’t maintain that art can’t be bought and sold,

but that the gift portion of the work places a constraint upon our merchandising. This is the reason why even a really beautiful, ingenious, powerful ad (of which there are a lot) can never be any kind of real art: an ad has no status as gift; i.e., it’s never really *for* the person it’s directed at.

The power of a gift economy remains difficult for the empiricists of our market culture to understand. In our times, the rhetoric of the market presumes that everything should be and can be appropriately bought, sold, and owned—a tide of alienation lapping daily at the dwindling redoubt of the unalienable. In freemarket theory, an intervention to halt propertization is considered “paternalistic,” because it inhibits the free action of the citizen, now reposed as a “potential entrepreneur.” Of course, in the real world, we know that child-rearing, family life, education, socialization, sexuality, political life, and many other basic human activities require insulation from market forces. In fact, paying for many of these things can ruin them. We may be willing to peek at *Who Wants to Marry a Millionaire* or an eBay auction of the ova of fashion models, but only to reassure ourselves that some things are still beneath our standards of dignity.

What’s remarkable about gift economies is that they can flourish in the most unlikely places—in rundown neighborhoods, on the Internet, in scientific communities, and among members of Alcoholics Anonymous. A classic example is commercial blood systems, which generally produce blood supplies of lower safety, purity, and potency than volunteer systems. A gift economy may be superior when it comes to maintaining a group’s commitment to certain extra-market values.

### The Commons

Another way of understanding the presence of gift economies—which dwell like ghosts in the commercial machine—is in the sense of a *public commons*. A commons, of course, is anything like the streets over which we drive, the skies through which we pilot airplanes, or the public parks or beaches on which we dally. A commons belongs to everyone and no one, and its use is controlled only by common consent. A commons describes resources like the body of ancient music drawn on by composers and folk musicians alike, rather than the commodities, like “Happy Birthday,” for which ASCAP, 114 years after it was written, continues to collect a fee. Einstein’s theory of relativity is a commons. Writings in the public domain are a commons. Gossip about celebrities is a commons. The silence in a movie theater is a transitory

commons, impossibly fragile, treasured by those who crave it, and constructed as a mutual gift by those who comprise it.

The world of art and culture is a vast commons, one salted through with zones of utter commerce yet which remains gloriously immune to any overall commodification. The closest resemblance is to the commons of a *language*: altered by every contributor, expanded by even the most passive user. That a language is a commons doesn't mean that the community owns it; rather it belongs *between* people, possessed by no one, not even by society as a whole.

Nearly any commons, though, can be encroached upon, partitioned, enclosed. The American commons include tangible assets such as public forests and minerals, intangible wealth such as copyrights and patents, critical infrastructures such as the Internet and government research, and cultural resources such as the broadcast airwaves and public spaces. They include resources we've paid for as taxpayers and inherited from previous generations. They're not just an inventory of marketable assets; they're social institutions and cultural traditions that define us as Americans and enliven us as human beings. Some invasions of the commons are sanctioned because we can no longer muster a spirited commitment to the public sector. The abuse goes unnoticed because the theft of the commons is seen in glimpses, not in panorama. We may occasionally see a former wetland paved; we may hear about the breakthrough cancer drug that tax dollars helped develop, the rights to which pharmaceutical companies acquired for a song. The larger movement goes too much unremarked. The notion of a *commons of cultural materials* goes more or less unnamed.

Honoring the commons is not a matter of moral exhortation. It is a practical necessity. We in Western society are going through a period of intensifying belief in private ownership, to the detriment of the public good. We have to remain constantly vigilant to prevent raids by those who would selfishly exploit our common heritage for their private gain. Such raids on our natural resources are not examples of enterprise and initiative. They are attempts to take from all the people just for the benefit of a few.

#### Undiscovered Public Knowledge

Artists and intellectuals disheartened by the prospects for originality can take heart from a phenomenon identified about twenty years ago by Don Swanson,

a library scientist at the University of Chicago. He called it "undiscovered public knowledge." Swanson showed that standing problems in medical research may be significantly addressed, perhaps even solved, simply by systematically surveying the scientific literature. Left to its own devices, research tends to become more specialized and abstracted from the real-world problems that motivated it and to which it remains relevant. This suggests that such a problem may be tackled effectively not by commissioning more research but by assuming that most or all of the solution can already be found in various scientific journals, waiting to be assembled by someone willing to read across specialties. Swanson himself did this in the case of Raynaud's syndrome, a disease that causes the fingers of young women to become numb. His finding is especially striking—perhaps even scandalous—because it happened in the ever-expanding biomedical sciences.

Undiscovered public knowledge emboldens us to question the extreme claims to originality made in press releases and publishers' notices: is an intellectual or creative offering truly novel, or have we just forgotten a worthy precursor? Does solving certain scientific problems really require massive additional funding, or could a computerized search engine, creatively deployed, do the same job more quickly and cheaply? Lastly, does our appetite for creative vitality require the violence and exasperation of another avant-garde, with its wearisome killing-the-father imperatives, or might we be better off ratifying *the ecstasy of influence*—and deepening our willingness to understand the commonality and timelessness of the methods and motifs available to artists?

#### Give All

A few years ago, the Film Society of Lincoln Center announced a retrospective of the works of Dariush Mehrjui, then a fresh enthusiasm of mine. Mehrjui is one of Iran's finest filmmakers, and the only one whose subject was personal relationships among the upper-middle-class intelligentsia. Needless to say, opportunities to view his films were—and remain—rare indeed. I headed uptown for one, an adaptation of J. D. Salinger's *Franny and Zooey*, titled *Pari*, only to discover at the door of the Walter Reade Theater that the screening had been canceled: its announcement had brought threat of a lawsuit down on the Film Society. True, these were Salinger's rights under the law. Yet why would he care that some obscure Iranian filmmaker had paid him

homage with a meditation on his heroine? Would it have damaged his book or robbed him of some crucial remuneration had the screening been permitted? The fertile spirit of stray connection—one stretching across what is presently seen as the direst of international breaches—had in this case been snuffed out. The cold, undead hand of one of my childhood literary heroes had reached out from its New Hampshire redoubt to arrest my present-day curiosity.

A few assertions, then: Any text that has infiltrated the common mind to the extent of *Gone With the Wind* or *Lolita* or *Ulysses* inexorably joins the language of culture. A map-turned-to-landscape, it has moved to a place beyond enclosure or control. The authors and their heirs should consider the subsequent parodies, refractions, quotations, and revisions an honor, or at least the price of a rare success.

A corporation that has imposed an inescapable notion—Mickey Mouse, Band-Aid—on the cultural language should pay a similar price.

The primary objective of copyright is not to reward the labor of authors but “to promote the Progress of Science and useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate.

Contemporary copyright, trademark, and patent law is corrupted. The case for perpetual copyright is a denial of the essential gift-aspect of the creative act. Arguments in its favor are as un-American as those for the repeal of the estate tax.

Art is sourced. Apprentices graze in the field of culture.

Digital sampling is an art method like any other, neutral in itself.

Allusion is a step toward making the modern world possible for art.

Despite hand-wringing at each technological turn—radio, the Internet—the future will be much like the past. Artists will sell some things, but also give some things away. Change may be troubling for those who crave less ambiguity, but the life of an artist has never been filled with certainty.

The dream of a perfect systematic remuneration is nonsense. I pay rent with the price my words bring when published in glossy magazines and at the same moment offer them for almost nothing to impoverished literary quarterlies, or speak them for free into the air in a radio interview. So what are they worth? What would they be worth if some future Dylan worked them into a song? Should I care to make such a thing impossible?

Any text is woven entirely with citations, references, echoes, cultural languages, which cut across it through and through in a vast stereophony. The citations that go to make up a text are anonymous, untraceable, and yet *already read*; they are quotations without inverted commas. The kernel, the soul—let’s go further and say the substance, the bulk, the actual and valuable material of all human utterances—is plagiarism. For substantially all ideas are second-hand, consciously or unconsciously drawn from a million outside sources, and daily used by the garnerer with a pride and satisfaction born of the superstition that he originated them; there is not a rag of originality about them anywhere except the little discoloration they get from his mental and moral caliber and temperament, and which is revealed in characteristics of phrasing. Old and new make the warp and woof of every moment. There is no thread that is not a twist of these two strands. By necessity, by proclivity, and by delight, we all quote. Neurological study has lately shown that memory, imagination, and consciousness itself is stitched, quilted, pastiched. If we cut-and-paste our selves, might we not forgive it of our artworks?

Artists and writers—and our advocates, our guilds and agents—too often subscribe to implicit claims of originality that do injury to these truths. And we too often, as hucksters and bean-counters in the tiny enterprises of our selves, act to spite the gift portion of our privileged roles. People live differently who treat a portion of their wealth as a gift. If we devalue and obscure the gift-economy function of our art practices, we turn our works into nothing more than advertisements for themselves. We may console ourselves that our lust for subsidiary rights in virtual perpetuity comprises some heroic counter to rapacious corporate interests. But the truth is that with artists pulling on one side and corporations pulling on the other, the loser is the collective public imagination from which we were nourished in the first place, and whose existence as the ultimate repository of our offerings makes the work worth doing in the first place.

As a novelist, I’m a cork on the ocean of story, a leaf on a windy day. Pretty soon I’ll be blown away. For the moment I’m grateful to be making a living, and so must ask that for a limited time (in the Thomas Jefferson sense) you please respect my small, treasured usemonopolies. Don’t pirate my editions; do plunder my visions. The name of the game is Give All. You, reader, are welcome to my stories. They were never mine in the first place, but I gave them to you. If you have the inclination to pick them up, take them with my blessings.

## KEY: I IS ANOTHER

This skeleton key to the preceding essay names the source of every line I stole, warped, and cobbled together as I “wrote” (except, alas, those sources I forgot along the way). First uses of a given author or speaker are highlighted in bold-face. Nearly every sentence I culled I also revised, at least slightly—for necessities of space, in order to produce a more consistent tone, or simply because I felt like it.

## Title

The phrase “the ecstasy of influence,” which embeds a rebuking play on **Harold Bloom**’s “anxiety of influence,” is lifted from spoken remarks by Professor **Richard Dienst** of Rutgers.

## Love and Theft

“... a cultivated man of middle age ...” to “... hidden, unacknowledged memory?” These lines, with some adjustments for tone, belong to the **anonymous editor or assistant** who wrote the dust-flap copy of **Michael Maar**’s *The Two Lolitas*. Of course, in my own experience, dust-flap copy is often a collaboration between author and editor. Perhaps this was also true for Maar. “The history of literature ...” to “... borrow and quote?” comes from Maar’s book itself.

“Appropriation has always ...” to “... Ishmael and Queequeg...” This paragraph makes a hash of remarks from an interview with **Eric Lott**, conducted by **David McNair** and **Jayson Whitehead**, and incorporates both interviewers’ and interviewee’s observations. (The text-interview form can be seen as a commonly accepted form of multivocal writing. Most interviewers prime their subjects with remarks of their own—leading the witness, so to speak—and gently refine their subjects’ statements in the final printed transcript.)

“I realized this ...” to “... for a long time.” The anecdote is cribbed, with an elision to avoid appropriating a dead grandmother, from **Jonathan Rosen**’s *The Talmud and the Internet*. I’ve never seen 84, *Charing Cross Road*, nor searched the Web for a Donne quote. For me it was through Rosen to Donne, Hemingway, website, et al. I avoid spiritual matters in my own writing, and so I experienced a peculiar discomfort hijacking Rosen’s gently searching tone.

“When I was thirteen ...” to “... no plagiarist at all.” This is from **William Gibson**’s “God’s Little Toys,” in *Wired* magazine. My own first encounter with William Burroughs, also at age thirteen, was less epiphanic. Having grown up with a painter father who, during family visits to galleries or museums, approvingly noted collage and appropriation techniques in the visual arts (Picasso, Claes Oldenburg, Stuart Davis), I was gratified, but not surprised, to learn that literature could encompass the same methods.

## Contamination Anxiety

“In 1941, on his front porch ...” to “... ‘this song comes from the cotton field.’” **Siva Vaidhyanathan**, *Copyrights and Copywrongs*.

“... enabled by a kind ... freely reworked.” **Kembrew McLeod**, *Freedom of Expression*. In *Owning Culture*, McLeod notes that, as he was writing, he happened to be listening to a lot of old country music, and in my casual listening I noticed that six country songs shared *exactly* the same vocal melody, including Hank Thompson’s “Wild Side of Life,” the Carter Family’s “I’m Thinking Tonight of My Blue Eyes,” Roy Acuff’s “Great Speckled Bird,” Kitty Wells’s “It Wasn’t God Who Made Honky Tonk Angels,” Reno & Smiley’s “I’m Using My Bible for a Roadmap,” and Townes Van Zandt’s “Heavenly Houseboat Blues.” ... In his extensively researched book, *Country: The Twisted Roots of Rock ’n’ Roll*, Nick Tosches documents that the melody these songs share is “ancient and British.” There were no recorded lawsuits stemming from these appropriations. ...

“... musicians have gained ... through allusion.” **Joanna Demers**, *Steal This Music*.

“In 1970s Jamaica ...” to “... hours of music.” Gibson.

“Visual, sound, and text collage ...” to “... realm of cultural production.” This plunders, rewrites, and amplifies paragraphs from McLeod’s *Owning Culture*, except for the line about collage being the art form of the twentieth and twenty-first centuries, which I heard filmmaker **Craig Baldwin** say, in defense of sampling, in the trailer for a forthcoming documentary, *Copyright Criminals*.

“In a courtroom scene ...” to “... would cease to exist.” **Dave Itzkoff**, *New York Times*.

“... the remarkable series of ‘plagiarisms’ ...” to “... we want more plagiarism.” **Richard Posner**, combined from The Becker-Posner Blog and *The Atlantic Monthly*.

"Most artists are brought ..." to "... by art itself." These words, and many more to follow, come from **Lewis Hyde's** *The Gift*. Above any other book I've here plagiarized, I commend *The Gift* to your attention.

"Finding one's voice ... filiations, communities, and discourses." Semanticist **George L. Dillon**, quoted in **Rebecca Moore Howard's** "The New Abolitionism Comes to Plagiarism."

"Inspiration could be ... act never experienced." **Ned Rorem**, found on several "great quotations" sites on the Internet.

"Invention, it must be humbly admitted ... out of chaos." **Mary Shelley**, from her introduction to *Frankenstein*.

"What happens ..." to "... contamination anxiety." **Kevin J. H. Dettmar**, from "The Illusion of Modernist Allusion and the Politics of Postmodern Plagiarism."

#### Surrounded by Signs

"The surrealists believed ..." to the Walter Benjamin quote. From **Christian Keathley's** *Cinephilia and History, or the Wind in the Trees*, a book that treats fannish fetishism as the secret at the heart of film scholarship. Keathley notes, for instance, Joseph Cornell's surrealist-influenced 1936 film *Rose Hobart*, which simply records "the way in which Cornell himself watched the 1931 Hollywood potboiler *East of Borneo*, fascinated and distracted as he was by its B-grade star"—the star, of course, being Rose Hobart herself. This, I suppose, makes Cornell a sort of father to computer-enabled fan-creator reworkings of Hollywood product, like the version of George Lucas's *The Phantom Menace* from which the noxious Jar Jar Binks character was purged; both incorporate a viewer's subjective preferences into a revision of a filmmaker's work.

"... early in the history of photography" to "... without compensating the source." From *Free Culture*, by **Lawrence Lessig**, the greatest of public advocates for copyright reform, and the best source if you want to get radicalized in a hurry.

"For those whose ganglia ..." to "... discourse broke down." From **David Foster Wallace's** essay "E Unibus Pluram," reprinted in *A Supposedly Fun Thing I'll Never Do Again*. I have no idea who Wallace's "gray eminence" is or was. I inserted the example of Dickens into the paragraph; he strikes me as overlooked in the lineage of authors of "brand-name" fiction.

"I was born ... *Mary Tyler Moore Show*." These are the reminiscences of **Mark Hosler** from *Negativland*, a collaging musical collective that was sued by U2's record label for their appropriation of "I Still Haven't Found What I'm Looking For." Although I had to adjust the birth date, Hosler's cultural menu fits me like a glove.

"The world is a home ... popculture products ..." McLeod.

"Today, when we can eat ..." to "... flat sights." Wallace.

"You're surrounded by signs. Ignore none of them." This phrase, which I unfortunately rendered somewhat leaden with the word "imperative," comes from **Steve Erickson's** novel *Our Ecstatic Days*.

#### Usemonopoly

"... everything from attempts ..." to "defendants as young as twelve." **Robert Boynton**, *The New York Times Magazine*, "The Tyranny of Copyright?"

"A time is marked ..." to "... what needs no defense." Lessig, this time from *The Future of Ideas*.

"Thomas Jefferson, for one," to "... respective writings and discoveries." Boynton.

"... second comers might do a much better job than the originator. ..." I found this phrase in Lessig, who is quoting Vaidhyanathan, who himself is characterizing a judgment written by **Learned Hand**.

"But Jefferson's vision ... owned by someone or other." Boynton.

"The distinctive feature ..." to "... term is extended." Lessig, again from *The Future of Ideas*.

"When old laws ..." to "... had been invaded." **Jessica Litman**, *Digital Copyright*.

"I say to you ... woman home alone." I found the Valenti quote in McLeod. Now fill in the blank: Jack Valenti is to the public domain as \_\_\_\_\_ is to \_\_\_\_\_.

#### The Beauty of Second Use

"In the first ..." to "... builds an archive." Lessig.

"Most books ... only one year. ..." Lessig.

"Active reading is ..." to "... do not own. ..." This is a mashup of **Henry Jenkins**, from his *Textual Poachers: Television Fans and Participatory Culture*, and **Michel de Certeau**, whom Jenkins quotes.

"In the children's classic ..." to "... its loving use." Jenkins. (Incidentally, have the holders of the copyright to *The Velveteen Rabbit* had a close look at *Toy Story*? There could be a lawsuit there.)

### Source Hypocrisy, or Disnial

"The Walt Disney Company ... alas, *Treasure Planet*..." Lessig.

"Imperial Plagiarism" is the title of an essay by **Marilyn Randall**.

"... spurred David Byrne ... *My Life in the Bush of Ghosts*..." **Chris Dahlen**, *Pitchfork*—though in truth by the time I'd finished, his words were so utterly dissolved within my own that had I been an ordinary cutting-and-pasting journalist it never would have occurred to me to give Dahlen a citation. The effort of preserving another's distinctive phrases as I worked on this essay was sometimes beyond my capacities; this form of plagiarism was oddly hard work.

"Kenneth Koch ..." to "... déluge of copycats!" **Emily Nussbaum**, *The New York Times Book Review*.

### You Can't Steal a Gift

"You can't steal a gift." **Dizzy Gillespie**, defending another player who'd been accused of poaching Charlie Parker's style: "You can't steal a gift. Bird gave the world his music, and if you can hear it you can have it."

"A large, diverse society ... intellectual property." Lessig.

"And works of art ..." to "... marriage, parenthood, mentorship." Hyde.

"Yet one ... so naturally with the market." **David Bollier**, *Silent Theft*.

"Art that matters ..." to "... bought and sold." Hyde.

"We consider it unacceptable ..." to "... certain unalienable rights..."

Bollier, paraphrasing **Margaret Jane Radin's** *Contested Commodities*.

"A work of art ..." to "... constraint upon our merchandising." Hyde.

"This is the reason ... person it's directed at." Wallace.

"The power of a gift ..." to "... certain extra-market values." Bollier, and also the sociologist **Warren O. Hagstrom**, whom Bollier is paraphrasing.

### The Commons

"Einstein's theory ..." to "... public domain are a commons." Lessig.

"That a language is a commons ... society as a whole." **Michael Newton**, in the *London Review of Books*, reviewing a book called *Echolalias: On the Forget-*

*ting of Language* by **Daniel Heller-Roazen**. The paraphrases of book reviewers are another covert form of collaborative culture; as an avid reader of reviews, I know much about books I've never read. To quote **Yann Martel** on how he came to be accused of imperial plagiarism in his Booker-winning novel *Life of Pi*:

Ten or so years ago, I read a review by John Updike in the *New York Times Review of Books* [sic]. It was of a novel by a Brazilian writer I'd never heard of, Moacyr Scliar. I forget the title, and John Updike did worse: he clearly thought the book as a whole was forgettable. His review—one of those that makes you suspicious by being mostly descriptive ... oozed indifference. But one thing about it struck me: the premise.... Oh, the wondrous things I could do with this premise.

Unfortunately, no one was ever able to locate the Updike review in question.

"The American commons ..." to "... for a song." Bollier.

"Honoring the commons ..." to "... practical necessity." Bollier.

"We in Western ... public good." **John Sulston**, Nobel Prize-winner and co-mapper of the human genome.

"We have to remain ..." to "... benefit of a few." **Harry S Truman**, at the opening of the Everglades National Park. Although it may seem the height of presumption to rip off a president—I found claiming Truman's stolid advocacy as my own embarrassing in the extreme—I didn't rewrite him at all. As the poet **Marianne Moore** said, "if a thing had been said in the *best* way, how can you say it better?" Moore confessed her penchant for incorporating lines from others' work, explaining, "I have not yet been able to outgrow this hybrid method of composition...."

### Undiscovered Public Knowledge

"... intellectuals disheartened" to "... quickly and cheaply?" **Steve Fuller**, *The Intellectual*. There's something of Borges in Fuller's insight here; the notion of a storehouse of knowledge waiting passively to be assembled by future users is suggestive of both "The Library of Babel" and "Kafka and His Precursors."

### Give All

"... one of Iran's finest ..." to "... meditation on his heroine." **Amy Taubin**, *Village Voice*, although it was me who had made the discovery at the Walter Reade Theater and who had the fresh enthusiasm for Iranian cinema.

"The primary objective ..." to "... unfair nor unfortunate." **Sandra Day O'Connor**, 1991.

"Allusion is a step ... possible for art." **T. S. Eliot**, in his review of Joyce's *Ulysses*.

"... the future will be much like the past" to "... give some things away." Open-source film archivist **Rick Prelinger**, quoted in McLeod.

"Change may be troubling ... with certainty." McLeod.

"... woven entirely ..." to "... without inverted commas." **Roland Barthes**.

"The kernel, the soul ..." to "... characteristics of phrasing." **Mark Twain**, from a consoling letter to Helen Keller, who had suffered distressing accusations of plagiarism(!). In fact, her work was a composite of received phrases; under her particular circumstances, Keller's writing could be understood as a kind of allegory of the "constructed" nature of artistic perception. I found the Twain quote in the aforementioned *Copyrights and Copywrongs*, by Siva Vaidhyanathan.

"Old and new ..." to "... we all quote." **Ralph Waldo Emerson**. These guys all sound alike!

"People live differently ... wealth as a gift." Hyde.

"... I'm a cork ... blown away." This is adapted from the Beach Boys' song, "'Til I Die," written by **Brian Wilson**. My own first adventure with song-lyric permissions came when I tried to have a character in my second novel quote the lyrics, "There's a world where I can go and tell my secrets to/In my room/In my room." After learning the likely expense, at my editor's suggestion I replaced those with "You take the high road/I'll take the low road/I'll be in Scotland before you," a lyric in the public domain. This capitulation always bugged me, and in the subsequent British publication of the same book I restored the Brian Wilson lyric, without permission. *Ocean of Story* is the title of a collection of **Christina Stead's** short fiction.

**Saul Bellow**, writing to a friend who'd taken offense at Bellow's fictional use of certain personal facts, said: "The name of the game is Give All. You are welcome to my facts. I gave them to you. If you have the strength to pick them up, take them with my blessings." I couldn't bring myself to retain Bellow's "strength," which seemed presumptuous in my new context, though it is surely the more elegant phrase. On the other hand, I was pleased to invite the suggestion that the gifts in question may actually be light and easily lifted.

## KEY TO THE KEY

The notion of a collage text is, of course, not original to me. **Walter Benjamin's** incomplete *Arcades Project* seemingly would have featured extensive interlaced quotations. Other precedents include **Graham Rawle's** novel, *Diary of an Amateur Photographer*, its text harvested from photography magazines, and **Eduardo Paolozzi's** collage-novel *Kex*, cobbled from crime novels and newspaper clippings. Closer to home, my efforts owe a great deal to the recent essays of **David Shields**, in which diverse quotes are made to closely intertwine and reverberate, and to conversations with **Sean Howe** and **Pamela Jackson**. Last year **David Edelstein**, in *New York* magazine, satirized the Kavya Viswanathan plagiarism case by creating an almost completely plagiarized column denouncing her actions. Edelstein intended to demonstrate, through ironic example, how bricolage such as his own was ipso facto facile and unworthy. While Viswanathan's version of "creative copying" was a pitiable one, I differ with Edelstein's conclusions.

The phrase *Je est un autre*, with its deliberately awkward syntax, belongs to **Arthur Rimbaud**. It has been translated both as "I is another" and "I is someone else," as in this excerpt from Rimbaud's letters:

For I is someone else. If brass wakes up a bugle, it is not his fault. That is obvious to me: I witness the unfolding of my thought: I watch it, I listen to it: I make a stroke of the bow: the symphony makes movement into the depths, or comes in one leap upon the stage.

If the old fools had not found only the false significance of the Ego, we should not now be having to sweep away these millions of skeletons which, since an infinite time, have been piling up the fruits of their one-eyed intellects, proclaiming themselves to be the authors!

Combining these theories and ideas recently led to my collaboration with American artist Mike Kelley for our work *Esprits de Paris* (2002–2003) shown as part of the Sonic Process show at the Pompidou Centre in Paris. Wishing to explore the ground built through these explorations into these unintelligible signals, we recorded some of the most haunted places in Paris, as well as locations loaded with an electrical presence—everywhere from author Isidore Ducasse's (Lautréamont) apartment in Montmartre where he died in 1870; the grave of Charles Cros, inventor of the phonograph and alien contactee, in Montparnasse cemetery; to recordings inside l'Église de la Sainte-Trinité Church, where composer Olivier Messiaen famously played the organ.

The theory is that somehow certain places may become impregnated by some subtle physical emanation, by the thoughts and emotions of those living and dying within them. An analogy can be found in the display of a physical medium, which seems to become surcharged with a psychic energy, from which phenomena doubtless radiate during the course of a seance. Recording using a thermal camera that allows one to tune into a particular temperature on the film and also a series of acoustic recordings in each of the locations, sometimes with the microphone itself connected but switched off, allowed us to explore a form of "audio mirage" that can emerge from prolonged listening to an identical recording, where you almost begin to hear things not actually recorded on the original tape or disc. Somewhere beneath the surface we were able finally to reveal acoustic data and information, voices formed from the distortions in digital recording. In even the most subtle passages one could hear the most dramatic parts, the hidden shifts in detail and language we were searching out. A space would thus be orchestrated in which the audience could experience the essence of these voices from beyond, a densely orchestrated hiss of information. We listened to the spaces to hear the detail, the silences offering up a narrative unknown.

All of my works have explored the hidden resonances and meanings within the memory and in particular the subtle traces that people and their actions leave behind. The "ghosts" within sound and memory point to where I am currently propelling myself. Capturing these moments, storing them and redirecting them back into the public stream enables one to construct an archaeology of loss, pathos, and missed connections, assembling a momentary forgotten past in our digital future. It is a form of found futurism.

*With thanks to Mike Kelley for historical detail*

## The Musician as Thief: Digital Culture and Copyright Law

13

Daphne Keller

Human culture is always derivative, and music perhaps especially so. New art builds on old art. We hear music, process it, reconfigure it, and create something derivative but new—folk melodies become Liszt's Hungarian Rhapsodies; Roy Acuff's "Great Speckled Bird" becomes Hank Williams's "Wild Side of Life"; and Rodgers and Hammerstein's "My Favorite Things" becomes a John Coltrane classic.

Twentieth-century recording technology brought this pervasive culture of reuse to a new level. Artists can now build upon prior recordings themselves, turning the fixed artifact of an earlier artist's performance into raw material for new work. Early sonic collage, in the analog era, was painstaking and labor-intensive. It took John Cage a year to make his four-minute-long Williams Mix.<sup>1</sup> William Burroughs spent untold hours constructing cut-ups with razor blades and tape. And of course, artists' raw materials for these projects were limited to whatever recorded sound was physically at hand.

Digital recording technology revolutionizes and democratizes this recycling process, making complex manipulation of recorded fragments easy and relatively affordable. And the Internet and other digital communications media bring a treasure trove of recorded sound directly to the sonic cannibal—information formerly fixed in discs or tapes now exists, in one critic's words, "as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light, in conditions which one might behold in effect, as glowing pixels or transmitted sounds, but never touch or



claim to 'own' in the old sense of the word."<sup>2</sup> Contemporary music, from the top forty to the most obscure live DJ set, reflects this technological change, taking the music that came before as raw material for reuse and reconfiguration. As David Sanjek has noted, this cultural practice profoundly blurs the line between creators and consumers of culture, turning listening itself into a platform for creative production and performance.<sup>3</sup>

The cultural practice of sampling meshes very poorly with copyright, the body of law which turns creative expression into private property. The first U.S. sampling case held rapper Biz Markie liable for infringing Gilbert O'Sullivan's copyright in the song "Alone Again (Naturally)." Judge Kevin Duffy began his opinion with scripture—"thou shalt not steal"—and ended it with a referral for criminal prosecution.<sup>4</sup> The law has changed very little in intervening years, despite the burgeoning of sample-based music. As a result, much of today's most innovative cultural production takes place in the shadow of the law: many DJs and other artists produce their work in the knowledge that a copyright holder could sue, that distribution of their work could be enjoined by law, and the sampler held liable for substantial monetary damages.

The law doesn't have to work this way. Judge Duffy's "thou shalt not steal" implies a deeply flawed analogy between physical property and the intellectual property protected by copyright law. Property rights over informational works, such as music, don't work the same way as property rights over land or material goods, for reasons eloquently expressed by Thomas Jefferson:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.<sup>5</sup>

The peculiar properties of intellectual goods—that we can all use them at once without diminishing their value, that we consistently build on elements

of older intellectual goods to produce new ones—are reflected in U.S. copyright law. The law limits the rights of intellectual property owners, and grants the public rights to share in the intellectual property's value, in ways that would be unthinkable for tangible property like cars or bushels of wheat. Indeed, many argue—based on the First Amendment and the Constitution's Copyright Clause—that expansive copyright protection of the sort assumed by Judge Duffy in the Biz Markie case exceeds Constitutional parameters. This essay will not detail those arguments. (I refer you to sonic appropriationists Negativland if you are interested in the legal niceties of this issue.<sup>6</sup>) But it will lay out a framework for considering the relationship between copyright, culture, and digital technology.

According to the Constitution, copyright law grants limited rights to authors in order to "Promote the Progress of Science and Useful Arts." The point is to create the economic and legal conditions within which science, learning, and culture can flourish. In pursuit of this goal, a copyright holder is generally granted the right to stop other people from selling copies of her work or derivative works based on it.<sup>7</sup> This ensures that she can get paid, that she will have economic incentives to create and distribute culture. As the Supreme Court has explained, the "Promote the Progress" goal is deeply utilitarian:

[Although] the immediate effect of our copyright law is to secure a fair return for an author's creative labor the ultimate aim is, by this incentive, to stimulate artistic production for the general public good.<sup>8</sup>

"Promot[ing] the Progress" is a goal defined by collective interests, not individual desert. (This utilitarian function of copyright can, in a characteristic Enlightenment-liberal way, be a little harsh. U.S. law has no equivalent to Europe's "moral rights" for a songwriter to control exploitation of her work—she cannot necessarily stop a cruel parody; and if she sells her copyright she retains no power to stop commercial or other uses that she finds distasteful.)

As well as rewarding authors for their work, the law also protects the general public interest in cultural progress by maintaining some public access to old works as raw materials for new ones. All copyrights eventually expire, and the works feed into the public domain where anyone may copy them or prepare derivative works.

In addition, certain reuse rights never belong to the author—they are handed off to the public, and to secondary users, immediately. You are always

free to copy the underlying ideas or facts contained in a work; only the author's individual expression is protected by copyright. And you can copy elements of a work that were not original to the author—like 4/4 time, an a-b-a-b rhyme scheme, or a boy-meets-girl plot. Moreover, under the doctrine of “fair use,” certain criticism and parodies can copy a work without infringing the work's copyright. When 2 Live Crew mocked Roy Orbison in a goofy cover version of “Pretty Woman,” the U.S. Supreme Court held that the fair use doctrine protected the group from copyright liability.

Fair use is not a great legal tool for DJs or appropriationist artists as defendants, though. For one thing, taking a fair use case to court is hugely expensive. For another, it is rarely clear in advance what a court will consider to be fair use, so the defense can be a serious gamble. The 2 Live Crew case illustrates this legal unpredictability: the group's fair use defense was accepted by a federal trial court, then roundly rejected by the appeals court, before being upheld at the Supreme Court level. And the fair use defense has conspicuously failed some artists. Jeff Koons, whose “Banality Exhibition” included a sculpture based on a copyrighted image from a postcard, argued in court that “his sculpture [was] a satire or parody of society at large,”<sup>9</sup> and that he drew on Dadaist and other influences in critiquing “the mass production of commodities and media images [that] has caused a deterioration in the quality of society.” He used the postcard's mass-marketed image of a couple holding puppies, he said, in order to “comment critically both on the incorporated object and the political and economic system that created it.”<sup>10</sup> The court rejected this defense, holding Koons liable for copyright infringement and suggesting that, “given Koons' willful and egregious behavior, we think [the copyright holder] may be a good candidate for enhanced statutory damages” of \$100,000.<sup>11</sup> No fair use case involving music sampling has ever been decided. When U2 sued Negativland for sampling, Negativland wanted to defend on fair use grounds. But the group's record label, aware of the uncertainty and legal pitfalls of the doctrine, settled the case.<sup>12</sup>

Fair use is a conceptually useful doctrine, though, because the statute establishing the doctrine lays out a detailed balancing test. The test asks both how creative or transformative the second work is and whether it displaces the first product in the market.<sup>13</sup> This lets a court get at questions about creativity and questions about money all at once—and these issues tend to blur in the sampling context. Another legal device that effectively merges financial and artistic concerns is the compulsory license for musical compositions (not

recordings—just compositions). Anyone who wants to record a new version of a copyrighted composition can do it, as long as he pays the songwriter a fee set by the government. So the owner of the copyright in the composition gets paid whenever someone records a cover—but in most circumstances she can't stop the cover artist or set the terms of payment. Compulsory licensing is one possible legal compromise in allocating rights between artists who sample recordings and artists whose work gets sampled.

The legal limits on copyright holders' power, in particular the fair use doctrine, are legal mechanisms allowing us to engage with, respond to, and reuse information; to turn cultural input into cultural output; to be processors of culture rather than passive consumers. These doctrines protect First Amendment values: if copyright did make it illegal to quote someone in order to criticize what they said, it would run headlong into the First Amendment.<sup>14</sup> And the limiting doctrines serve the Copyright Clause's “Promote the Progress” goal by balancing financial rewards to authors against access rights for the public and for secondary authors who build on elements of the older work.

The balance between the rights of authors and the rights of creative reusers has shifted dramatically over time. Copyright has expanded hugely, particularly in the twentieth century, giving creators ever-greater powers to stop other people from making derivative or secondary uses of their work. The first U.S. Copyright Act, in 1790, only gave authors the right to “print, reprint, publish or vend”—authors had no right to control derivative uses.<sup>15</sup> An 1863 Supreme Court case took a similarly dim view of authorial control over derivative works, holding that Harriet Beecher Stowe could not stop sales of an unauthorized German translation of *Uncle Tom's Cabin*.<sup>16</sup> This holding illustrates a conception, profoundly different from today's, of the reuse rights passed by a copyright holder to her readers. The court explained,

[when an author] has . . . given his thoughts, sentiments, knowledge or discoveries to the world . . . his conceptions have become the common property of his readers, who cannot be deprived of the use of them.

This nineteenth-century conception of the “the common property of readers” is strikingly robust—according to this holding, a copyright holder grants such significant reuse rights to cultural consumers that they may legally prepare closely derivative works, even translations.

The law has changed greatly since this holding. Stowe's case would come out the other way if litigated today. This expansion of authors' property rights

is driven in part by sound economics—authors would have a hard time getting paid if pirates could legally sell derivative works which differed only slightly from the original. But the expansion is also driven by intensive lobbying from major copyright holders, a group which currently prominently includes record companies and movie studios.

Historically, flurries of lobbying and changes in the legal balance between authors' and consumers' rights have tracked changes in popular media and communications technologies. The invention of player piano rolls triggered heated copyright battles, as did the development of photography, the VCR, and digital audio tape. Legislation has consistently favored existing commercial interests over interests newly enabled by technology. In 1905, draft legislation largely ignored the interests of the technologically novel piano roll and phonograph producers. By 1909, these industries had a seat at the bargaining table and helped craft legislation that disfavored the then-nascent motion picture studios. In the 1920s, proposed copyright laws neglected the interests of another emerging group, radio broadcasters.<sup>17</sup> And at no time, of course, have the diffuse interests of the public, or the as-yet-unconceived interests of future creators, been strongly represented in the lobbying process.

But given the Constitutional concerns described above, the interests of the public and of creative reusers of culture should be relevant; the law should be tailored to account for both contemporary technology and contemporary culture. At any given time, legal rules defining what the author can do with a work, and what subsequent creators can do with the work, logically build on two sources (aside from lobbyist pressure): (1) The constitutional mandate to promote progress, and (2) lawmakers' empirical assumptions about how to promote progress—how culture gets made.

The legal question posed by the art discussed in this book is, should digital technologies change lawmakers' empirical predictions about cultural production? Does a change in technology produce a change in how we make culture? And, if we are making culture differently now, how should the law respond?

Marshall McLuhan offers one answer: he says that changes in technology do change culture.<sup>18</sup> For example, he argues, in preliterate societies, a story or song existed only in the moment of being performed—there was no separation of text and performance, and plagiarism was inconceivable, because cultural survival depended on repetition. Writing, the technology of fixing information in physical form, changed our relation to culture. Writing reified information as a thing existing separately from the human being. As a fixed

object, the informational work became more easily susceptible to ownership and authorial attribution.<sup>19</sup>

There's clear cause and effect here: a change in technology produces a change in how we use information, and particularly how we think about ownership of information. Another technology, the printing press, is generally credited as the trigger for modern legal copyright protection.

Electronic and eventually digital media introduced another cultural shift. McLuhan identified television as the bringer of post-print culture, disrupting the linearity of previous media. McLuhan's contemporary, Harvard Law Professor Benjamin Kaplan, who dismissed McLuhan as a "professional soothsayer," himself proved almost eerily prescient on this topic.<sup>20</sup> Speaking in 1966, he forecast the rise of networked computers which would allow cheap and instantaneous distribution of text, images, and sound.<sup>21</sup>

This technology, he said, would beget a sea-change in our creative practices and interaction with information, as the "distinction between the author or producer of the stored material and the user of the material [becomes] blurred." In time, he said, such a change will likely "abate feelings of proprietorship and thus modify conceptions of copyright, especially those bearing on plagiarism."<sup>22</sup>

Kaplan's prediction pulls together technology, culture, and copyright law. He suggests, first, that technology will change the way we think about information and produce culture; and, second, that this will bring about a corresponding change in the law.

Looking to the burgeoning production of digitally enabled, sample-based culture, I would say that Kaplan's first prediction has clearly come to pass. Looking to the ever-increasing legal constraints on reuse of prior works, however, I would submit that his second prediction, about the law, has not.

David Toop has written eloquently about the cultural shift brought about by sampling technology. With sampling, he says,

Songs became liquid. They became vehicles for improvisation, or source materials, field recordings almost, that could be reconfigured or remixed to suit the future. In a humiliating way, musicians became technicians, alongside recording engineers, tape ops, editors, and all the other technocratic laboratory assistants cleaning their glasses in the back room. At the front end of the medium was the DJ ... playing music and people as one fluid substance.<sup>23</sup>

Mixmaster Morris put it more succinctly: "We've had sixty, seventy years of making records. That's stage one. Now we sample them."<sup>24</sup>

If this is the way that we make culture now—if, as Chris Cutler suggests, in an age of digital technology “producing is no more than critical consuming”—then perhaps it is time to reconsider how well copyright law’s balance of authorial control and public access serves the Constitutional “Promote the Progress” goal.<sup>25</sup> Streamlined compulsory licensing systems and expanded, clarified fair use rights may facilitate contemporary cultural production better than the expansive copyright power currently granted to authors.

Cultural theorists have intelligently theorized the intersection of cultural consumption and cultural production, and provided a framework for thinking about these practices. Dick Hebdige described versioning in Caribbean music as a sort of semiotic democracy: “it implies that no one has the final say. Everybody has a chance to make a contribution. And no one’s version is treated as Holy Writ.”<sup>26</sup> (Carried by immigrants like Cool DJ Herc, the musical practices which Hebdige describes became part of the early hip-hop culture of the Bronx and an ancestral source of much that is most alive in today’s music.) Roland Barthes, too, told us something about the nonpassive consumption of culture when he wrote of “writerly texts,” which invite the reader to participate in the production of meaning.<sup>27</sup> Sampling practice may represent more vigorous participation than Barthes envisioned, and suggest that with the right (digital) tools, an intelligent consumer can make any found text “writerly.”<sup>28</sup>

Walter Benjamin’s works of the 1930s provide especially well-developed theoretical foundations for navigating the relation between technology, semiotic leftovers, and cultural production through consumption. His essay “The Work of Art in the Age of Mechanical Reproduction” suggested that the reproductive technology of film and other media “not only permits ... but virtually causes mass distribution.” As a result, he said, “the distinction between author and public is about to lose its basic character.”<sup>29</sup>

Benjamin’s writing both about technologies for copying art and about mosaic or collage-format artistic production may provide conceptual tools to explain how, through sampling, an artist can create something new and valuable. His own major uncompleted work, the *Arcades Project*, was to have been entirely sample based. Benjamin explained:

Method of this project: literary montage. I needn’t say anything. Merely show. I will purloin no valuables, appropriate no ingenious formulations. But the rags, the refuse—these I will not inventory, but allow, in the only way possible, to come into their own: by making use of them.<sup>30</sup>

In one critic’s description, the mosaic model of the *Arcades Project* is a construction of a “history and politics ... which clings tenaciously to the fragment, the miniature, the stray citation, but which impacts these fragments upon each other to politically explosive effect.”<sup>31</sup>

Drawing on Benjamin (and oversimplifying, inevitably) we can derive at least two explanations of what is new and creative about sample-based production.<sup>32</sup>

The first point is about collage as a technique: the selection, arrangement, and juxtaposition of the found bits of prior culture is the art. The fragments “impact upon each other to explosive effect”—through the artist’s selection and arrangement, she generates novel information. Such collage-based creative production is well established in visual art. In the realm of music, musical sampling artists like Negativland and Canadian plunderphonics creator John Oswald practice analogous techniques with sonic detritus.<sup>33</sup>

The second point derived from Benjamin is that it may be a culturally productive act simply to discover and draw attention to a fragment of text, image, or sound. Part of the mosaic- or collage-creator’s art lies in the very process of rescuing the fragment from obscurity and showing it to people. This Benjaminian urge to rescue and re-present culture is conspicuous throughout sample-based genres, and is illustrated in the following description of DJs making organized raids on collective culture—that is, going to record stores. This comes from Jeff Chang, aka DJ Zen, who describes feeling outclassed as a crate-digger by members of the now defunct Solesides collective.

There’s nothing worse to them than the kind of guy who won’t bid his rent and food money for a Tanzanian Funk 45 or the impossible-to-get Invaders LP. The kind of person who doesn’t scour thin phonebooks from foothill counties and find teeny used record stores owned by unwashed proprietors who look like trolls. The kind of person who doesn’t know where and when all the record conventions within 1000 miles are going down, and what hour before dawn to show up in a miner’s light helmet and a backpack.<sup>34</sup>

This is serious pursuit of cultural fragments—on par with the great-granddaddy of all crate diggers, Grandmaster Flash, who claims to have performed with “something like 45” crates of records behind him.<sup>35</sup> The critical and commercial success of these artists suggests that their compulsion to collect, to reconfigure, to re-present prior recorded sound is finding a receptive audience. To listeners, crate-digging is a highly legitimate foundation for significant and innovative cultural production.

McLuhan gives us a conceptual framework for explaining how technology affects cultural production; Benjamin and others give us analytical tools for describing how production based on copying can be creative and important. A glance at the top forty or visit to a record store gives us evidence of how widespread sampling practice is. All of this evidence strongly supports Benjamin Kaplan's claim that technology will change the way we make culture and disrupt the neat division between cultural producers and consumers.

But the DJs and artists who make culture this way still legally expose themselves to civil and even criminal liability. That brings us to Kaplan's second prediction: that copyright law will adapt to this new mode of production. This prediction has not come to pass. Indeed, so far, copyright law has reacted only to the increased piracy threat posed by digital technology, and not to the technology's creative potential.

Very few music sampling cases have gone to court. Those that have—such as the Biz Markie case—have come out so poorly for the sampler that few musicians would now choose to defend sampling before a judge. So instead of a body of carefully reasoned and Constitutionally constrained case law, we are left with compelling precedent of a different sort: the legendary out-of-court settlements—De La Soul versus the Turtles, Vanilla Ice versus Queen and David Bowie, the Beastie Boys versus everyone.

The law, by creating a background regime of absolute entitlements for copyright holders, creates a very bad bargaining situation for the well-meaning DJ who actually tries to comply with the law and clear her samples. And it creates an impossible situation for acts like John Oswald or Negativland, who (1) sample lots of artists who are very hard to track down, making transaction costs of licensing impossibly high; (2) tend to irritate the artists they sample, making refusal of permission quite likely; and (3) aren't making much money.

It has been my contention that digital technology allows us to interact with information and make culture in a new way. Copyright law should respond to this cultural shift if it is to serve its Constitutional "Promote the Progress" goal and the First Amendment's free expression goal. It's not that we've stopped making music the old way—people still sing and always will, people still play acoustic guitars and Hammond organs, and those people should be able to sell their work and make a living. And it's not that all sampling should be free—very few people would argue that Puffy Combs should not have had to pay for his "Every Breath You Take" sample. But some sampling is so

clearly original and expressive, and so harmless to sales of the original work, that it should be free—either on fair use grounds or pure First Amendment grounds. And creative reuse of copyrighted material could be enabled, and legal chilling effects on new musical voices alleviated, through a streamlined compulsory licensing system for sampling. The law should move in this direction in order to adapt to technology and the way culture gets made today, in order to serve the collective cultural progress goal that copyright is designed to facilitate.

But the law is in fact moving in the opposite direction. I will close with a brief overview of recent legal responses to digital technology and digital culture. Major copyright holders have successfully argued to Congress that digital technology and the Internet vastly increase the threat of piracy, making greater protection necessary. They are partly right—a technology which enables free and instantaneous transmission of millions of copies is a very real threat to copyright holders. But the situation is more complicated than that. The same technology also lowers copying and distribution costs for legal sales, which can decrease costs for the copyright holder and help her turn a profit on her work. And on the Internet, the same technology that facilitates piracy also facilitates detection and prosecution of piracy. Moreover, individuals' noncommercial copying and sharing of copyrighted music—which is now labeled piracy by the record industry, particularly if carried out online—has traditionally been far outside the province of copyright law and enforcement. It's not that digital and Internet piracy is not a legitimate threat—but the furor surrounding it is, in the words of copyright professor Jessica Litman, "about 50 percent hype."<sup>36</sup>

The legislative response, however, has been quite real. In the Sonny Bono Copyright Term Extension Act, Congress extended the term of copyright to life plus 70 years, or 95 years for corporate works. (The original copyright term, in 1790, was 14 years extendible to 28 years.) This extension enraged online publishers and others whose business it was to bring public domain works—often works long out of print and unavailable to consumers—into print or online distribution.

And with the Digital Millennium Copyright Act (DMCA), Congress gave copyright holders legal protection that potentially eviscerates consumers' fair use rights. The DMCA established both civil and criminal liability for anyone who breaks through encryption or other "digital fences" surrounding a copyrighted work.<sup>37</sup> The law also criminalizes distribution of programming tools

for breaking such encryption. Under the DMCA, it doesn't matter if the defendant actually infringed copyright—if she bypassed the encryption, she broke the law. If the encryption wraps up both a public domain work and a copyrighted one—like a Shakespeare play with a new introduction—and the hacker only copies from Shakespeare, she is still liable under the DMCA. She is also liable if she hacks the encryption in order to make fair use of the material—a film teacher could violate the DMCA by making a montage of clips from movies on encrypted, copy-protected DVDs.

The DMCA has come under heavy attack from computer programmers who work on encryption, because it can prevent them from developing and sharing their work—a restriction which, in addition to being inconvenient, arguably violates both the First Amendment rights of code writers and the “Promote the Progress” goal of copyright. (The DMCA got a lot of bad press when the Recording Industry Association of America threatened to sue Princeton Computer Science Professor Ed Felten for presenting his research on digital music encryption at a scientific conference. Although the RIAA backed off of that case, it reserves the right to sue Felten's graduate student assistants for publishing their encryption research, should they attempt to do so.) But the DMCA is also potentially significant for cultural producers of the sort discussed in this article. By banning decryption tools, it may make reuse of digital format recordings much more difficult as a practical matter. And by banning decryption, it raises the number of laws a DJ may break, and the amount of legal liability she may face, every time she uses an uncleared sample.

The DMCA is just one of several legal shifts that may effectively expand protection so far as to seriously undermine legal reuses (such as fair use) and currently illegal but interesting reuses (such as those carried out by innumerable DJs and artists). Another emerging body of law permits copyright owners to legally bind consumers to the terms of “click-wrap” licenses on digital media.<sup>38</sup> By clicking “yes” and using the copyrighted work, the user legally agrees to comply with small print which may prohibit fair use and even, in some cases, purport to prohibit public criticism of the copyrighted work. Yet another law—as yet unenacted, but working its way through Congress—would compel manufacturers to make computers and other devices comply with technical measures for protecting copyright.

These legal changes respond to one aspect of digital technology, the cheap and easy piracy which it enables. But in so doing, they impede new modes of

cultural production enabled by those same technologies. Legal rights to turn cultural consumption into cultural production are eroding at the very moment that such production is becoming possible for large numbers of artists. In legally foreclosing this entire realm of digital culture, copyright law deserves its “Promote the Progress” goal under the Constitution.<sup>39</sup>

## Notes

1. Chris Cutler, “Plunderphonics,” *Musicworks* 59 (1994), 14.
2. John Perry Barlow, “Selling Wine without Bottles: The Economy of Mind on the Global Net” (1993), available at [http://www.eff.org/Publications/John\\_Perry\\_Barlow/HTML/idea\\_economy\\_article.html](http://www.eff.org/Publications/John_Perry_Barlow/HTML/idea_economy_article.html).
3. David Sanjek, “‘Don’t Have to DJ No More’: Sampling and the ‘Autonomous’ Creator,” *10 Cardozo Arts & Entertainment Law Journal* 607 (1992).
4. *Grand Upright Music Ltd. v. Warner Brothers Records*, 780 F.Supp. 182 (1992), available at <http://detritus.net/rhizome/legal/bizmarkie.txt>.
5. Letter from Thomas Jefferson to Isaac McPherson, August 13, 1813, quoted in *The Complete Jefferson*, ed. Saul K. Padover (Duell, Sloan and Pearce 1943), 1011, 1015.
6. See [www.negativeand.com](http://www.negativeand.com).
7. Copyright in music is complicated because there are separate copyrights over the underlying composition, on the one hand, and any individual sound recording, on the other. The law is complexly tailored to allow these two sets of rights to coexist. Generally speaking, however, a copyright owner's rights are defined as follows by Section 106 of the Copyright Act (see <http://www.copyright.gov/title17/92chap1.html>):

Subject to sections 107 through 121 [which create a number of exceptions], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

8. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975).

9. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992).

10. *Ibid.*

11. 17 U.S.C. §504 (1992).

12. See Negativland, *Fair Use: The Story of the Letter U and the Numeral 2* (Seeland-Negativland, 1995).

13. 17 U.S.C. §107 provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

14. The Supreme Court, frustratingly, has never clarified the relationship between the fair use doctrine and the First Amendment. Its clearest statement on this point so far is this: "In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use [as defendants in the case asked the court to do]." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

15. See discussion in Jessica Litman's excellent book, *Digital Copyright*, (Prometheus Books, 2001), at p. 22.

16. *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853).

17. Litman, *Digital Copyright*, 46.

18. Marshall McLuhan, *The Gutenberg Galaxy* (University of Toronto Press, 1962); Marshall McLuhan and Quentin Fiore, *The Medium Is the Massage* (Random House, 1967).

19. See Doug Brent, "Oral Knowledge, Typographic Knowledge, Electronic Knowledge: Speculations on the History of Ownership," available at <http://www.virtualschool.edu/mon/Economics/BrentHistoryOfOwnership.html>, discussing Walter Ong, *Orality and Literacy: The Technologizing of the Word* (Routledge, 1982), in turn drawing heavily on McLuhan's work (but adding considerably more anthropological data).

20. Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press, 1967), 118.

21. Kaplan described "full-scale 'on-line' operations with computers . . . linked or integrated systems or networks of computers capable of storing faithful simulacra of the entire treasure of the accumulated knowledge and artistic production of past ages. . . . The systems will have prodigious capacity for manipulating the store in useful ways, for selecting portions [including sound and graphics files] of it upon call and transmitting them any distance. . . ." *Ibid.*, 119. He suggested that the medium could be the death-knell of copyright as we know it, as "the ingenuity which devises the systems will no doubt be capable of welding-in bookkeeping apparatus" to bill on a per-access basis. *Ibid.*, 121.

22. *Ibid.*, 117.

23. David Toop, *Ocean of Sound* (Serpent's Tail, 1995), 43.

24. *Ibid.*, 52.

25. Cutler, "Plunderphonics," 14.

26. Dick Hebdige, *Cut 'n' Mix: Culture, Identity, and Caribbean Music* (Methuen, 1987), 14.

27. Roland Barthes, *S/Z* (Hill and Wang, 1970).

28. Of course, with the right attitude an artist may not need any tools at all. Consider, e.g., Marcel Duchamp's transformation of a urinal into a "writerly text" in creating his *Fountain* sculpture.

29. Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction," in *Illuminations* (Schocken, 1969), 217, 244, 232.

30. Walter Benjamin, *The Arcades Project*, trans. Howard Eiland and Kevin McLaughlin (Harvard University Press, 1999), N1a, 8.

31. Terry Eagleton, *Ideology of the Aesthetic* (Blackwell, 1990), 338.
32. For Benjamin, these two points go together: as Terry Eagleton puts it, Benjamin's model "revolutioniz[es] the relation between parts and whole"; the idea's "constituents light each other up in all their contradictoriness" in a way that "safeguards particularity but fissures identity." Ibid.
33. See [http://www.negativland.com/changing\\_copyright.html/](http://www.negativland.com/changing_copyright.html/).
34. Liner notes from *Solesides Greatest Bumps* (various artists, Quannum Projects, 2001).
35. David Toop, *The Rap Attack: African Jive to New York Hip-Hop* (Pluto Press, 1984), 62, 73.
36. Litman, *Digital Copyright*, 25.
37. 17 U.S.C. §1201.
38. The Uniform Computer Information Transactions Act, enacted in some states, makes click-wrap licenses enforceable. Many courts have held them enforceable under existing contract law.
39. A version of this essay was first delivered at Duke Law School's "Music and Theft" conference in May of 2002.

*My friend Benjamin, and I, on the way...*

Beth Coleman and Howard Goldkrand

We would see them show up, these weird distended figures tautly held by their ears. They brought a phalanx of miniature units through which energy was dispersed in sound waves. Overdeveloped ears, they heard with their whole bodies, swaying to the subsonic bass, their slender frames bowed slightly toward the source. Their figures made a gathering of "U"s and "S"s. With multiple sources in attendance, the scene would become some obtuse ballet mechanic, all units moving in an encrypted cross-pattern. As the signals cross and merge new algorithms would form, hanging in the air, then disperse in the birth of a new one. It dawned on us that sound began to creep away from the deserted construction site where we had gathered. Volume instead of growing became inverted in the pink noise cancellation pattern they danced. There was a legend for the pattern, we'd heard, but no one had yet to be able to read it. Secret agents of the crowd, they would show up at the train tracks, in the street, by monuments on holidays and bend the sound of the throng. Their machines ate the urban ambient of metal-in-motion.

Pink noise rests somewhere on the spectrum between white and black. White noise gives you the intensity of a burn. The vanilla factor is a recognized experience among the noise terrorists. The sound is grown in a self-regenerative lattice that mirrors cellular reproduction. One thing fractures and its breaking creates a synthesis. The synthesis makes a mutation, and so on. Like the wailing of an explosion, it crumbles apart in the ear like glass turned back to sand. The sonic build comes from the acceleration of the process, i.e. sound breaks