

DUKE

Creative LICENSE

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The Law
and Culture of
Digital Sampling

why the interviewees' words provide the backbone of this study. Like a musical collage, this volume mixes together this source material with our own legal, economic, historical, and cultural analysis to create a richer text—a collage of words that both describes and enacts the technique of sampling.

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THE GOLDEN AGE OF SAMPLING

In this chapter we compare and contrast two key moments in hip-hop music's evolution in order to illustrate how the emergence of the contemporary sample licensing system impacted creativity. First, we examine the golden age of hip-hop, when sampling artists were breaking new aesthetic ground on a weekly basis. Following that, we explain how legal and bureaucratic regimes forcefully constrained the creative choices that hip-hop producers could make. The rise and fall of sampling's golden age—roughly between 1987 and 1992—offers evidence that illustrates why we should care about sampling as a fruitful musical technique. As we mentioned in the introduction, recent history can provide us with a lesson about what happens when we don't make carefully considered policy decisions about copyright and creativity.

Paul Miller, a.k.a. DJ Spooky, notes that some of the key albums and artists from the golden age include De La Soul's *3 Feet High and Rising*, Pete Rock & C. L. Smooth's *Mecca and the Soul Brother*, and Public Enemy's *It Takes a Nation of Millions to Hold Us Back*, among others. We can add to that list many other classic albums from the Jungle Brothers, Queen Latifah, MC Lyte, Boogie Down Productions (BDP), and Eric B & Rakim, to name but a few. "These albums had a rich tapestry of sound, a variety of messages," notes the media studies scholar Siva Vaidhyanathan. "They were simultaneously playful and serious, and they really stand as the *Sgt. Pepper's* or *Pet Sounds* of hip-hop." And as the MC and producer Mr. Lif observes, "The difference between hip-hop production in current times and in the 1980s during

the golden era—it just allowed so much more freedom. Like, you didn't think about, 'You couldn't sample this, or you couldn't sample that.'

So, for instance, when BDP released their debut *Criminal Minded* in 1987, they didn't ask AC/DC whether they could sample "Back in Black" on their classic song "Dope Beat." Instead, BDP just did it, despite the fact that the hard rock group has since become known for turning down sample requests (or, for that matter, refusing to allow its music to be sold online). "To this day I don't know why AC/DC didn't sue us for that song," frontman KRS-ONE told the journalist Brian Coleman. "That's all samples. I'm probably incriminating myself, but nothing on *Criminal Minded* is cleared." A few years later, artists like KRS-ONE would no longer be able to fly under the radar like they used to. The golden age was an important moment during the development of hip-hop as a musical art form, and it opened up a range of artistic possibilities that largely weren't censored by legal and economic interests.

SAMPLING'S GOLDEN AGE

Sampling was a very intricate thing for us. We didn't just pick up a record and sample that record because it was funky. It was a collage.

We were creating a collage.—HANK SHOCKLEE

The standout records of the golden age were created at a time when hip-hop was still considered a flash in the pan by the larger music industry. This attitude gave many hip-hop artists the opportunity to make music exactly as they imagined it, without restrictions. This was particularly true of De La Soul, a group that hailed from the African American suburbs of Long Island, a region that also produced Public Enemy. De La Soul consisted of Pasemaster Mase, Trugoy, and Posdnuos—a threesome that was augmented on their first three classic albums by the producer Prince Paul. His former group Stetsasonic was signed to Tommy Boy Records, an important independent hip-hop label that released records by Naughty By Nature, Queen Latifah, and many other popular hip-hop acts. But it was De La Soul that was the jewel in the label's crown in the late 1980s, particularly because they were able to match their experimental approach with platinum sales.

"They had an aesthetic of taking everything and the kitchen sink and throwing it into the blender," states the hip-hop historian and journal-

ist Jeff Chang. "So, you didn't just have George Clinton, the Meters, and the usual funk stuff you would expect on a record. You'd have French language records. You'd have the Turtles. You'd have Led Zeppelin. You'd have Hall and Oates. You'd have all kinds of crazy things coming out of the mix, and it sounded the way like a lot of people heard pop culture at that moment in time." The title of their first album came from a sample they snatched from Johnny Cash's hit from the 1950s "Five Feet High and Rising," during which Cash sings, "Three feet high and rising, ma." ("Dave's father had that record," says Posdnuos, referring to the group member known back then as Trugoy.)²

"I definitely, *definitely* was taken aback by what De La Soul did," says the hip-hop journalist Raquel Cepeda. "They just went ahead and took whatever moved them." Prince Paul echoes Cepeda when he says, "We went in there to have fun and experiment, and with De La, we could literally do *anything*."³ The creative field was wide open, with no significant legal or administrative fences yet erected. One can also place the Beastie Boys' densely packed sophomore record, released in 1989, into the same experimental category. "Look at the *Paul's Boutique* record," says the current Beastie Boys DJ, Mix Master Mike. "That was sample mastery right there. Those records were just *full* of samples." Although there is no accessible paper trail that confirms what was sampled, or how many samples *Paul's Boutique* contains, somewhere between one hundred and three hundred is a safe guess.⁴

The Dust Brothers' John Simpson, who co-produced *Paul's Boutique*, details the creative processes and the technologies—rudimentary by today's standards—involved in making that record. "The people who worked at the studios thought we were crazy at the time, 'cause they had never seen anybody make songs that way."⁵ Simpson explains that they would build a song starting from one sampled loop of instrumentation that was then layered with other loops and bursts of sound. The Beastie Boys and the Dust Brothers would then painstakingly sync each of the other loops up with the first one, spending hours getting the layers to sound good together. It was a laborious process, Simpson says, explaining that "if you knew which tracks you wanted playing at any given time, you typed the track numbers into this little Commodore computer hooked up to the mixing board. And each time you wanted a new track to come in, you'd have to type it in manually. It was just painful. It took *so* long. And there was so much trial and error."⁶

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

Although those records by De La Soul, the Beastie Boys, and others are justly revered for their sampling techniques, no one took advantage of these technologies more effectively than Public Enemy. When the group released *It Takes a Nation of Millions to Hold Us Back* in 1988, it was as if the work had landed from another planet. The album came frontloaded with sirens, squeals, and squawks that augmented the chaotic backing tracks over which frontman Chuck D laid his politically and poetically radical rhymes. Their next record, *Fear of a Black Planet*, released in 1990, is considered culturally so important that the *New York Times* included it on its list of the twenty-five most significant albums of the last century. Additionally, the Library of Congress included *Fear of a Black Planet* in its 2004 National Recording Registry, along with the news broadcasts of Edward R. Murrow, the music of John Coltrane, and other major works.

In the final pages of this section, we examine Public Enemy’s creative processes during this period in order to glimpse what was possible creatively and to understand what was lost when the golden age came to a close. Public Enemy was, and still is, deeply influential for a wide variety of artists who followed them. Public Enemy’s production team, the Bomb Squad—Hank Shocklee, Keith Shocklee, Eric “Vietnam” Sadler, and Chuck D—took sampling to the level of high art while keeping intact hip-hop’s populist heart. They would graft together dozens of fragmentary samples to create a single song collage. “They really put

sound and noises together and made incredible music,” De La Soul’s Posdnuos says. As a contemporary of Public Enemy who hailed from the same area and drew from a similarly wide sonic palate, he tells us, “Public Enemy reminded me a lot of what we were doing, obviously in a different way. But you can listen to their music and hear something else for the first time.”

The group’s music was both agitprop and pop, mixing politics with the live-wire thrill of the popular music experience. Matt Black of the British electronic duo Coldcut, which emerged around the same time as Public Enemy, remembers the impact of their song “Rebel Without a Pause.” It was one of the many tracks on *It Takes a Nation* that featured repetitious, abrasive bursts of noise, something that simply wasn’t done in popular music at the time. As Black tells us, “That noise—what some people call the ‘kettle noise’—it’s actually a sample of the JB’s ‘The Grunt.’” Public Enemy took that brief saxophone squeal (from a James Brown spin-off group) and transformed it into something utterly different, devoid of its original musical context.

“It was just so avant-garde and exciting, and heavy,” Black says. Chuck D tells us that part of the intention behind transforming the sounds was to disguise them, but that wasn’t the primary purpose; mostly they wanted to make something fresh. “We wanted to create a new sound out of the assemblage of sounds that made us have our own identity.” Chuck D says, “Especially in our first five years, we knew that we were making records that will stand the test of time. When we made *It Takes a Nation of Millions to Hold Us Back* we were shooting to make *What’s Going On* by Marvin Gaye and when we made *Fear of a Black Planet* I was shooting for *Sgt. Pepper’s*.”

Behind the boards was Hank Shocklee (widely credited as the architect of Public Enemy’s aesthetic), who served as the director of Public Enemy’s production unit, the Bomb Squad. “Hank is the Phil Spector of hip-hop,” says Chuck D, referring to the producer from the 1960s who perfected a sonic approach known as “the wall of sound.”⁷ In Public Enemy’s hands, sampling was now a tremendously complex choreography of sound that reconfigured smaller musical fragments in ways that sounded completely new. “My vision of this group,” says Hank Shocklee, “was to have a production assembly line where each person had their own particular specialty.” Jeff Chang explains that the members of the Bomb Squad had worked out an elaborate method that involved

the group members bringing into the studio different types of sounds. “They’re figuring out how to *jam with the samples*,” says Chang, “and to create these layers of sound. I don’t think it’s been matched since then.” The Bomb Squad’s success hinged on the fact that each member brought a different approach to making music, crafting sounds, and working with technology. “I’m coming from a DJ’s perspective,” says Hank Shocklee. “Eric [Sadler] is coming from a musician’s perspective. So together, you know, we started working out different ideas.”

Public Enemy’s distinctive sound grew out of the push and pull between Eric Sadler, who often advocated for a more traditional, structured approach to songwriting, and Hank Shocklee—who “wanted to destroy music,” as Chuck D put it. “When you’re talking about the kind of sampling that Public Enemy did,” Hank Shocklee says, “we had to comb through thousands of records to come up with maybe five good pieces. And as we started putting together those pieces, the sound got a lot more dense.” In some cases, the drum track alone was built from a dozen individually sampled and sliced beats. The members of Public Enemy treated audio—from singles, LPs, talk radio, and other sources—as a kind of found footage that could be spliced together to create their aural assemblages.

“We thought sampling was just a way of arranging sounds,” says Chuck D. He explains that Public Enemy wanted “to blend sound. Just as visual artists take yellow and blue and come up with green, we wanted to be able to do that with sound.” Hank Shocklee adds, “We would use every technique, no different than in film—with different lighting effects, or film speeds, or whatever. Well, we did the same thing with audio.” Even though the group was working with equipment that was rudimentary by today’s standards, they made the most of the existing technologies, often inventing techniques and workarounds that electronics manufacturers never imagined.

“Don’t Believe the Hype” on *It Takes a Nation* is another notable example of the Bomb Squad’s aural experiments. It was, according to Hank Shocklee, “one of the strangest ways we made a record. We were looking for blends in particular records; so I might be on one turntable, Keith on another, and Chuck on another turntable at the same time.” As Chuck D elaborates further: “We would go through a session of just playing records, and beats, and getting snatches, and what Hank would

do is record that whole session. You know, 95 percent of the time it sounded like *mess*. But there was 5 percent of magic that would happen. That’s how records like ‘Don’t Believe the Hype’ were made. You would listen to sixty minutes of this mess on a tape, and then out of that you would be like, ‘Whoa! What happened right here?’”

They used the same approach when constructing Public Enemy’s next album, *Fear of a Black Planet*. “It’s completely an album of found sounds,” Chuck D says. “It was probably the most elaborate smorgasbord of sound that we did.” He describes how he spent at least one hundred hours listening to various tapes, records, and other sound sources in search of samples for the album. As the group’s lyricist, Chuck D needed to fit the snatches of sampled songs, radio snippets, and everything else into his lyrics so that his rhymes and those sounds would weave together to create a theme for the album. “There were hundreds of sampled voices on that album,” Chuck D explains. Pointing to the album’s opening track, “Contract on a World Love Jam,” he says the song holds “about forty-five to fifty voices” that interlock and underscore the album’s message with a forceful sonic collage.⁸

Regarding Public Enemy’s musical complexity, the DJ and producer Mr. Len points to a particular track, “Night of the Living Base Heads,” from *It Takes a Nation*. As Mr. Len says, “If you really listen to that song, it changes so many times.” Kyambo “Hip Hop” Joshua—who started out in the music industry working for Jay-Z’s Roc-a-Fella Records in the mid-1990s, and who now co-manages Kanye West’s career—echoes Mr. Len. “It was common to have multiple samples in a song, like on Public Enemy or N.W.A. albums,” Hip Hop says. “If you was to go into those records, you could look at one record and you’ll see five or six samples for every song. There was more changeups and drums was changing on different parts, and samples was changing.”

“I’m a big Public Enemy fan,” Girl Talk tells us. “Even on the subconscious level I think it really affected me—just understanding sampling as an instrument and understanding the way people make their music like that.” And MC Eyedea adds, “One of the reasons why we don’t like most modern hip-hop is because we can listen to [Public Enemy records], and their arrangements are so much more complex than *anything* today.” During hip-hop’s golden age, artists had a small window of opportunity to run wild with the newly emerging sampling technolo-

gies before the record labels and lawyers started paying attention. “It was definitely a time when sampling artists could get away with murder and we just—we *did*,” says Coldcut’s Matt Black.

On Public Enemy’s *It Takes a Nation of Millions to Hold Us Back*, Chuck D raps about white supremacy, capitalism, the music industry, and—in the case of “Caught, Can I Get a Witness?”—digital sampling: “Caught, now in court ‘cause I stole a beat / This is a sampling sport / Mail from the courts and jail claims I stole the beats that I rail . . . I found this mineral I call a beat / I paid zero.” Our interviewees told us that no one bothered to clear the many fragmentary samples contained in Public Enemy’s classic song “Fight the Power,” which was featured in Spike Lee’s *Do the Right Thing* (even though that film was released by a large movie studio and the soundtrack album was on a major label). As Chuck D explains, “It wasn’t necessary to clear those albums, *Fear of a Black Planet* and *It Takes a Nation*, because copyright law didn’t affect us yet. They hadn’t even realized what samplers did.” The music producer El-P waxes nostalgic: “It was just this magical window of time.”

THE END OF THE GOLDEN AGE

Once the money came in and said, “Yo, you can’t keep doing this,” all the momentum just kind of dropped out. It was like the bottom fell out the bucket. And those cats were saying, “Man, that’s our style. Now you’re telling me that our style’s too expensive?”—MR. LEN

Of course, not everyone stitched together their samples like Public Enemy did. There were plenty of songs from the golden age that merely looped the hook of an earlier song, and it was this type of sampling that began provoking legal action. For example, the influential old-school rapper T La Rock (and one-time EPMD label mate) points to the “I Shot the Sheriff” sample—which provides the backbone of EPMD’s “Strictly Business.” Referring to the sampled performance by Eric Clapton, T La Rock says, “I don’t care who you are, you *know* where that loop is from. And there’s a few songs like that in their records.” Those reservations aside, he is still a fan of EPMD, and he acknowledges that even a simple loop can work its magic if used the right way. Nevertheless, this kind of sampling made T La Rock uncomfortable back then, when few hip-hop artists had concerns about copyright.

“There were some producers who really had no originality,” T La Rock says. “It’s as if they took the whole song. They sampled so much out of that record that there was no real production there. That’s the problem I had with a lot of the producers that sampled. They didn’t try to contact the person and say, ‘Hey, you know, I want to make some type of publishing deal or something like that.’ And for years and years and years, this went on and on under the radar, you know?” In EPMD’s case it wasn’t far enough below the radar, because many of the original artists tracked them down and demanded payment. “We never cleared any samples on the first album,” EPMD’s Erick Sermon chuckles. “People would just come after us after they knew we had sampled them. Eric Clapton wanted ten thousand dollars, Roger Troutman wanted five thousand. They didn’t even sue us back then—we just paid them and that was that.”

With the commercial success of a number of hip-hop albums in the late 1980s, the music industry had begun to see the genre as not just an inner-city fad but as a solid source of sales revenue. With commercial validity also came increased scrutiny over samples. During the early 1990s—after a wave of lawsuits we will address in chapter 4—the legal landscape radically changed. This shifted the ground beneath the feet of hip-hop artists. “By 1994, when we made *Muse Sick-N-Hour Mess Age*,” says Chuck D, “it had become so difficult to the point where it was impossible to do any of the type of records we did in the late 1980s, because every second of sound had to be cleared.” Another thing that occurred by the early 1990s was that the cost of clearing samples—and the legal risks of *not* clearing samples—had significantly increased. As Harry Allen, a hip-hop journalist who has long been affiliated with Public Enemy, observes, “Records like *It Takes a Nation of Millions* and *3 Feet High and Rising*, we would have to sell them for, I don’t know, \$159 each just to pay all the royalties from publishers making claims for 100 percent on your compositions.” Allen’s hypothetical \$159 CD refers to the cumulative costs associated with tracking down the owners and obtaining the proper licenses to clear the one hundred to two hundred samples on each of those early Public Enemy albums.

Many of the musicians, lawyers, and record company executives we interviewed have made similar claims regarding the costs of licensing numerous samples in a single composition. Danny Rubin, who runs a firm that clears samples for artists and record labels, tells us

that today it is impractical to license songs with two or more samples. Given this, no wonder that the Beastie Boys never attempted to follow up on *Paul's Boutique's* densely layered collages. On the Beastie Boys' album from 1992, *Check Your Head*, they used drastically fewer samples, and traditional instruments comprised most of that album's instrumental bed. "The way I always heard it," says Money Mark, who played keyboards on *Check Your Head* and later albums, "was that their accountant told them that they couldn't make any money with all those samples, so they tried a different route."¹⁰ Mario Caldato Jr., who worked as a recording engineer on *Paul's Boutique*, estimates that 95 percent of the sounds on that record came from sampled sources, and that "they spent over \$250,000 for sample clearances."¹¹

As Posdnuos of De La Soul remembers, "I think *Stakes Is High* [1996] was the first album we recorded where we actually sat down in the beginning of the album, and the record company went through a list, 'Well, George Clinton is in litigation with Westbound [Records], so don't mess with his stuff right now.' Or, you know, 'Serge Gainsbourg, you sampled him for the second album, but his estate—he died, and his family's trying to get control of his estate—don't mess with him.' Or, 'George Harrison don't like rap, don't mess with him.' We actually had a list of people *not to touch*." And De La Soul's Trugoy complains, "You kind of have to do the work before you even do the creative end of things. That's what's kind of messed up about sampling, in some cases. You know, when you create a song and you think, 'All right, this is hot, this is it, right here.' And then you hand the work in to the lawyers to go clear. And either the numbers are just so crazy that you don't want to pay that kind of money, or some people just clearly say outright, 'No, you know, you're *not* using my stuff.' It kind of spoils the creative process."

By the 1990s, high costs, difficulties negotiating licenses, and outright refusals made it effectively impossible for certain kinds of music to be made legally, especially albums containing hundreds of fragments of sound within one album. Reflecting on the current state of the art of sampling, Kyambo "Hip Hop" Joshua says, "Now it's like, 'I like that beat. I'm just gonna use this one Isley Brothers sample, and that's it.' . . . It ain't that complex no more." And Mr. Len adds, "Nowadays, because of people getting into trouble with samples, or having to pay a lot for more than one sample, it's forced a lot of people now to rework their

styles. To me, it took a lot away from where the music could have gone." Given the cumulative effect of multiple expensive samples and administrative hassles, one can see why the sample-laden albums like Public Enemy's *It Takes a Nation*, De La Soul's *3 Feet High and Rising*, or the Beastie Boys' *Paul's Boutique* (all released in 1988 or 1989) couldn't be made today—or at least couldn't be distributed through legitimate channels.

With the golden age of sampling long gone, the music industry's conventional wisdom recommends clearing even the most fragmentary uses. For example, on Jay-Z's song "Takeover" (from his album *The Blueprint* from 2001), the rapper felt compelled to get permission to use a single word in his lyrics. Hip Hop—one of the managers of Kanye West, who produced the music for "Takeover"—told us that Jay-Z's record label got clearance from David Bowie not because West sampled a sound recording but because of the way Jay-Z uttered a single word. In the song, he raps, "I know you missin' all the FAAAAAAAME!"—imitating the phrasing from Bowie's 1975 hit "Fame"—"Nigga, you LAAAAAAAME!" Significantly, this didn't provide the hook of "Takeover"; Jay-Z just said it once in passing in the middle of a verse. It's the kind of referential vocal phrasing that occurs all the time in music. Copyright law actually permits such "sound-alike" recordings. But in the risk-averse world of the major labels, the rules are different:

HIP HOP: Like when he said, "Fame," that was an interpolation of a David Bowie record. Jay didn't sample that record, but he said it just like David said it, in the same context.

KEMBREW: Are you saying that you have to get permission if you end up sounding like David Bowie when you just say the word "fame"?

HIP HOP: Yeah, if you *sound* like him. . . . If you say a hook like somebody else said it, or you say a phrase like somebody else said it. Sometimes it can be a short saying, and [the copyright owners] will be like, "Okay, whatever." Like Jay might start a record off singing a little bit of Biggie verse, and depending on how long that verse is determines whether the person who owns it wants to come in and say, "Hey, we want a percentage of that," or, "Don't worry about it."

Many artists, scholars, and critics have argued that the growth of twentieth-century jazz music would have been similarly stunted if the jazz musicians of the time—who regularly riffed on others' songs—had

to obtain permission or a license from music publishers for the use of every sonic fragment they improvised upon. Others disagree that the sample clearance system has had any negative impact on creativity. One of these dissenters is Dean Garfield, vice president of anti-piracy at the Motion Picture Association of America (MPAA), who formerly worked for the Recording Industry Association of America (RIAA). He doesn't believe that the requirement to clear samples hindered anyone's music. "If one person doesn't clear a snippet, you could just use another snippet from someone else who would clear it," says Garfield in denying Chuck D's assertion that the sample clearance system changed the way Public Enemy made music. "I think Chuck D may say that today because he finds it convenient to say that. But it's not true."

SAMPLING CONTROVERSIES HEAT UP IN THE NEW MILLENNIUM

The other person who was being sampled, their attorneys got up and said, "Well, hey, where's my piece?" That's when all the lawsuits started happening.—SHOSHANA ZISK

The copyright conflicts that began swirling around sampling in the 1980s certainly haven't gone away. Indeed, the disputes have only intensified and expanded in recent years. And it is probable that they will continue, because every major label likely owns and distributes numerous ticking time bombs waiting to be ignited by a copyright infringement lawsuit. A quarter century of nonstop sampling undoubtedly has produced a very large number of uncleared samples that are embedded in hundreds of albums released by major labels. Even though some of them have been discovered, many of our interviewees believe that a huge number have gone undetected—for the time being, at least. Lawsuits can arise long after a sample-based album was made.

The potential for sampling lawsuits increased after the *Bridgeport Music v. Dimension Films* case of 2005, a case we mentioned in the introduction that centered around an N.W.A. song from 1991 titled "100 Miles and Runnin'." This gangsta rap song was used in the film *I Got the Hook-Up*. The song sampled two seconds and used three notes from a guitar solo taken from the Funkadelic song "Get Off Your Ass and Jam." The sample was looped by N.W.A. and repeated intermit-

tently throughout the song, where it was placed fairly low in the mix to provide a texture rather than a central hook. A federal appellate court concluded that N.W.A.'s use was an infringement of the law and infamously declared, "Get a license or do not sample." The floodgates opened after *Bridgeport* with several high-profile lawsuits targeting classic hip-hop albums such as Notorious B.I.G.'s *Ready to Die* and Run-DMC's *Raising Hell*. Both of these albums, important contributions to hip-hop culture, were removed from record store shelves and from online vendors after copyright infringement suits were filed.

The Notorious B.I.G. case centered around a sample of "Singing in the Morning," a song by a funk band from the 1970s named the Ohio Players, which Biggie and the producer Sean "Puffy" Combs (a.k.a. Puff Daddy, P. Diddy, or Diddy) sampled for the title track of *Ready to Die*. They were found liable for infringing the copyright of both the sound recording, which was owned by Westbound Records, and the underlying composition, which was owned by Bridgeport. After the injunction, *Ready to Die* could no longer be sold lawfully, and the trial court also awarded over \$4 million combined to Westbound and Bridgeport. The plaintiffs and defendants could not reach a licensing agreement in the wake of the lawsuit, and thus the only way *Ready to Die* could return to the legitimate marketplace was to remove the offending sample and completely remaster the album, an expensive proposition. While the new version of "Ready to Die" still features Biggie's smooth vocal flow—which is part of the album's appeal—a side-by-side comparison demonstrates that the reworked version loses something aesthetically.

One of the more unexpected sample-related lawsuits in recent years—perhaps reflective of the post-*Bridgeport* landscape—was the lawsuit brought by the Knack in 2006. The Knack alleged that Run-DMC sampled the guitar riff from their hit from 1979, "My Sharona," without permission in the rap group's track from 1986 titled "It's Tricky." The lawsuit was unanticipated because even though "It's Tricky" was a Top 40 radio and MTV hit, the guitar sample had gone undetected by the band for twenty years. If one pays close attention to the two songs, one can hear the similarity; however, a lot of rap and rock fans surely missed this Knack sample because it was detached from its original context. The reworked Knack riff embedded in the Run-DMC song is so minimal and generic that it could come from almost any new wave song from that era. There was nothing particularly unique about it.

Another interesting twist in the Knack versus Run-DMC lawsuit story was that the primary hook that runs through “It’s Tricky” actually derives from a different song from the same era: Toni Basil’s “Mickey.” According to the recollection of DMC, one of the group’s two MCs, they got the idea for “It’s Tricky” from a rhyming routine done by the old-school rap group the Cold Crush Brothers, in which “they’d use a melody from another record and put their names and words in there.” Explaining how Run-DMC’s song was based on Basil’s “Mickey,” DMC states, “I just changed the chorus around and we just talked about how this rap business can be tricky to a brother.”¹² If you are familiar with both songs, compare “Hey Mickey, you’re so fine / You’re so fine you blow my mind, hey Mickey!” with “It’s tricky to rock a rhyme / To rock a rhyme that’s right on time, it’s tricky!” Same cadence, rhyme scheme, and nearly identical sing-along hook. It is somewhat ironic that the song that Run-DMC borrows much more from was *not* the one that caused them legal hassles, in part because of the way the law treats distinct forms of musical borrowing quite differently.

The Knack versus Run-DMC lawsuit and others like it have implications for any major or independent record label that has ever put out a sample-based album, as well as movie and television studios, other content providers, and music distributors (both online and off). For instance, when the Knack sued Run-DMC it also sued iTunes—Apple’s online music store—as well as Amazon, Napster, Yahoo, and others that sold either CD or MP3 copies of the song. The lawsuit alleged that these distributors were also liable for copyright infringement, despite the improbability that any of these companies was aware of the sample or knowingly conspired to distribute an infringing product.

This kind of legal “gotcha” game has turned into a bankable business strategy. Kyambo “Hip Hop” Joshua tells us about a friend of his who represents a widely sampled music catalogue. This person makes a nice living extracting money from downstream users and distributors who have not secured licenses for samples of the copyrighted music he controls. Hip Hop says that his friend is strategic about the way he goes about licensing his copyrights. “What I mean by that is he’ll do a license with someone who wants to release a record, and he limits to album-only rights, which means you can only release the record,” Hip Hop says. “Then a song from that album gets licensed in a commercial or a movie and—lo and behold—now he can go to the movie company

or the advertising company and require them to license it, even though that movie company had no idea what was going on, and they assumed everything was okay.”

Hip Hop reminds us that one doesn’t need to know about a potential infringement in order to be liable for it. This was the situation in *Bridgeport* when the production company Dimension Films included N.W.A.’s “100 Miles and Runnin’” in its movie *I Got the Hook-Up*. Even though producers and executives at the movie company likely had no idea that N.W.A. had embedded an unauthorized sample in its song, Dimension was still liable for copyright infringement because it had not obtained permission for its indirect use of the sample in its film.

SAMPLING AS A HARBINGER OF FUTURE CONTROVERSIES

A wide range of critical commentary, mostly awful but some brilliant, has exploded on the Internet, as more have come to master the remix capabilities of digital technologies. . . . The potential of this technology is extraordinary. Its artistic potential is obvious; its political potential is just beginning to be glimpsed. . . . Yet this form of speech—remix using images and sounds from our culture—is presumptively illegal under the law as it stands.—LAWRENCE LESSIG,
“Free(ing) Culture for Remix”

Beyond the ticking time bomb that film studios, television companies, music retailers, and other distributors face as a result of unlicensed samples lies another set of licensing quandaries. These complex scenarios result from two now-familiar technological developments. The first, personal computers with widely available and even preinstalled software, allows people to edit music and video in ways that were impossible or prohibitively expensive in previous decades. The second, Internet connectivity (especially the advent of broadband), allows people to distribute widely the fruits of their creative production at an extremely low cost. Together, these technological advances make it easy to access a copyrighted work; combine it with other copyrighted works, which may themselves incorporate still other copyrighted works; add one’s own sounds or images; and distribute the recombined product across the world in seconds, making thousands of copies in the process.

This sequence of events—once the domain of entertainment industry professionals alone—is now an everyday occurrence that can be accomplished by amateurs. But can modern copyright law and current licensing practices handle so-called user-generated content? Digital sampling has a lot in common with YouTube's plethora of videos that often remix existing material. Both trends reflect the plummeting cost of sophisticated recording and editing software. As the hip-hop journalist Jeff Chang explains:

Sampling is the kind of technology that's really shifted the way that people consume and produce culture. It used to be the kind of thing where a record company would have a record to produce, and they'd put all kinds of money behind it, and they'd send it down to you, the consumer, and you were supposed to passively accept it and buy it and enjoy it and dance to it—*Saturday Night Fever*, or whatever. Instead, these days what you have is people that are listeners and fans of the music being able to do their own remixes with technology, to do their own mash-ups, to do their own versions and to redo this type of stuff and to put that out into the world. So, the consumers have become producers, and this has taken a lot of power away from the record companies.

Understandably, the owners of copyrighted material are interested in asserting whatever legitimate rights they have regarding how their works are used. We know that copyright law protects the music industry from copycat record companies that sell exact or substantially similar copies of the original work. But can copyright law protect the music industry from competition that comes from its own customers, that is, the general public?

Copyright law, whether through Congress or the courts, has already reacted to the power of contemporary personal computers and network technology on multiple fronts, most prominently in the area of file sharing. The act of downloading and uploading copyrighted files is understood to violate the law.¹³ Under certain conditions, the makers of file-sharing software will be liable for contributory infringement based on the illegal activity of their users.¹⁴ Perhaps this approach has struck an acceptable balance and allowed a legitimate market for downloaded music to develop on iTunes, Wal-Mart, Rhapsody, eMusic, Amazon, and other sites. Or perhaps the law has unnecessarily stifled the music-spelunking delight of services like the original Napster and

merely pushed underground whatever forms of file-sharing software are currently in existence.

Whatever one's conclusion about the correct policy, the dispute over file sharing forced the law to react to technological change and grapple with the complex issues involved in it. Lawsuits have also forced the courts to respond to sampling, which presents quite distinct legal issues from file sharing. But, with some exceptions, courts have not addressed sampling in a thorough or farsighted way. Instead, courts helped bring the golden age of sampling to an end, often without attention to the consequences for creativity. Anyone intrigued by the potential for remix culture to change entertainment, or even to change our public discourse, has an interest in seeing both public and private institutions address digital sampling in a more productive and realistic manner.

Battles over how copyright should respond to technological change, cultural trends, and new musical practices cannot be settled in an abstract way based on extreme points of view on either side. Only by studying the history of sampling and working toward a compromise among all competing interests can we find a path toward a sensible copyright policy that can govern remix culture. An engagement with particular practices in the real world will allow us to find the right balance between copyright and the public domain, between licensing and unfettered use, and between compensation and access. In this spirit, chapter 2 places digital sampling in its proper context within the larger history of sound collage in its many diverse forms.