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A Contrarian View of Copyright: Hip-Hop, Sampling, and Semiotic Democracy

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**A Contrarian View of Copyright:
Hip-hop, Sampling, and Semiotic Democracy**
Forthcoming, 44 CONN. L. REV. --- (2012)

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Abstract

A dominant trend in intellectual property (IP) theory asserts that technologies such as digital copying enable individuals to resist the cultural dominance of the media industry. Under this view, individuals appropriate cultural material and “recode” it by assigning alternative meanings to it. By enabling more people to participate in the making of cultural meanings, recoding supposedly enhances “semiotic democracy.” IP theorists tend to argue that copyright law inhibits recoding, thus stifling semiotic democracy. The use of sampling in hip-hop music is frequently cited as a paradigmatic example of recoding that has been stifled by IP law.

This paper uses history, economics, and critical theory to question these arguments on both the empirical and theoretical levels. Many scholars assert that copyright law turned against recoding in the 1990s by requiring samplers to pay for copyright permission. But the music business—including the hip-hop sector—was already in the practice of paying for copyright permission. Judicial decisions simply codified existing practice, which treated copyright permission as merely one of the many costs of making music. Thus copyright law did not impede musical recoding generally or hip-hop specifically.

While economic markets work well in allocating recoding rights, however, this does not necessarily advance semiotic democracy, because market failures afflict the marketplace of ideas. Recoding embodies contradictory forces that both advance *and* retard semiotic democracy. Law and technology facilitating recoding not only help independent record labels and artists question the cultural meanings advanced by major record companies; they also allow the latter to appropriate from the former. Moreover, recoding not only creates new meanings from existing cultural materials, but also repeats and reinforces those dominant cultural meanings. Indeed, by creating alternative meanings for dominant cultural materials such as popular music, recoding can contribute to their commercial appeal and cultural influence.

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I. INTRODUCTION: “Recoding” and “Semiotic Democracy”

In recent years, intellectual property theorists have advanced the argument that the IP regime should be designed to foster broad popular participation in cultural production. Many adherents of this vision refer to it as "semiotic democracy." Michael Madow, for example, applies the term to refer to an aspirational “society in which all persons are free and able to participate actively, if not equally, in the generation and circulation of meanings and values.”¹ William Fisher writes that individuals in such a society “would be able to participate in the process of making cultural meaning. Instead of being merely passive consumers of images and artifacts produced by others, they would help shape the world of ideas and symbols in which they live.”² According to Fisher, “active engagement of this sort would help both to sustain several of the features of the good life - e.g., meaningful work and self-determination - and to foster cultural diversity.”³

A significant roadblock to semiotic democracy is the fact that a relatively small number of multinational media enterprises dominate the channels of cultural distribution,⁴ such as television, publishing, and recorded music. Many of these same enterprises also hold copyrights in many influential cultural properties. A number of prominent legal scholars argue that legal reform, including reducing the scope of

¹ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (1993).

² William W. Fisher III, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 24, 168, 193 (Stephen R. Munzer ed., 2001).

³ William W. Fisher III, *Property and Contract on the Internet*, 73 CHI-KENT L. REV. 1203, 1217-18 (1998).

⁴ See LAWRENCE LESSIG, THE FUTURE OF IDEAS (hereinafter, LESSIG, THE FUTURE OF IDEAS) at 263.

copyright, can mitigate this concentrated cultural influence enjoyed by the “culture industry.”⁵ Lawrence Lessig has loosely labeled this aspirational reform “free culture.”⁶ According to this view, the public actively participates in culture by appropriating these dominant cultural properties and “recoding” them—that is, by challenging their proffered meanings and assigning new ones.⁷ Digital copying technology and the Internet have made such cultural appropriation and its dissemination as easy as “cut and paste.”⁸

IP law, however, empowers IP “owners” to prevent many forms of appropriation. Most copyright scholars agree that this power is inimical to semiotic democracy, and that reforming IP law⁹ to facilitate cultural recoding will advance semiotic democracy.¹⁰ For example, Rosemary Coombe, perhaps the first to use the term “semiotic democracy” in the context of IP law, argued that excessive intellectual-property protections interfere with a “quintessentially human” quality: “the capacity to make meaning, challenge meaning, and transform meaning.”¹¹ According to Michael Madow, the law should encourage recoding in order to “align itself with cultural pluralism and popular cultural production.”¹² This article will question this emerging orthodoxy. Cultural innovation and participation can reach accommodation with IP law and even benefit from it.

⁵ The term “culture industry” refers to the mass commercial production of arts and entertainment that began in the late nineteenth century. The so-called Frankfurt School of cultural criticism coined the term in the 1930s. See Madow, *supra* note ---, at n. 8.

⁶ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 8 (2004) (hereinafter, LESSIG, *FREE CULTURE*) (arguing for less legal regulation of the “ways ordinary individuals share[] and transform[] their culture.”)

⁷ See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991).

⁸ See LESSIG, *FREE CULTURE*, *supra* note ---, at 105.

⁹ The pioneering legal scholarship on semiotic democracy applied the concept to trademark and the right of publicity, as well as to copyright. See, e.g., Madow, *supra* note ---; Coombe, *supra* note ---.

¹⁰ See Fisher, *supra* notes 2 and 3; SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS* 4-5 (2001); Olufunmilayo Arewa, *From J.C. Bach to Hip Hop*, 84 N.C. L. REV. 547, 630 (2006).

¹¹ Coombe, *supra* note ---, at 1864.

¹² Madow, *supra* note ---, at 240.

Furthermore, the liberalization of appropriation rights may have harmful effects on semiotic democracy as well as beneficial ones.

This article focuses on a form of recoding widely celebrated by IP scholars: the incorporation of copyrighted musical compositions and/or recordings into new musical works through means such as digital sampling. This type of appropriation, which I will refer to generally as “sampling,” is the basis of countless pieces of popular music, and is closely identified with the hip-hop (or rap¹³) genre that has become a dominant force in popular culture worldwide. The hip-hop era has coincided with the digital age, and hip-hop has become closely identified with digital recoding.

As noted above, “free culture” scholars insist that copyright laws that burden recoding are inherently harmful to individual expressive freedom, and that lifting such laws will necessarily increase semiotic democracy. This thinking has influenced two important assertions that “free culture” theorists tend to make about hip-hop and sampling. First, most scholars writing in the area assert that copyright law has been destructive of recoding in hip-hop music and thus of semiotic democracy.¹⁴ Second, most “free culture” scholars further believe that a legal regime that is more permissive of cultural appropriation, such as sampling, will necessarily contribute to greater semiotic democracy.¹⁵ This article will question both these assertions.

With respect to the first assertion, many IP scholars argue that after a long tradition of benignly neglecting recoding, copyright law shifted direction in recent

¹³ The term “rap” more precisely refers to hip-hop music that incorporates spoken, or “rapped,” vocals, but the terms tend to be used interchangeably.

¹⁴ See, e.g., Arewa, *supra* n.---; LESSIG, THE FUTURE OF IDEAS 9; JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 148 (2008); VAIDHYANATHAN, *supra* note ---, at 140-148.

¹⁵ See, e.g., Arewa, *supra* n.---; VAIDHYANATHAN, *supra* note ---, at 132-140.

decades to inhibit appropriation generally and sampling specifically.¹⁶ The historical record refutes this claim, however. Sampling and its predecessor forms of musical recoding developed in the presence of copyright law and reached accommodation with it—even in the absence of judicial decisions. By the time courts explicitly stated that sampling requires copyright clearance two decades ago, they were not imposing new rules on the music industry, but only describing practices that the music business had followed since the earliest days of recorded hip-hop and even before. Legal scholars, perhaps understandably, have overemphasized the influence of law and underestimated the ability of artistic and business communities to adapt to it.

Even if I am correct that existing law has not stifled recoding, that does not fully address the second assertion—that actively facilitating recoding would further semiotic democracy. IP scholars insist that copyright law is destructive of semiotic democracy because they view recoding solely as an autonomous act of individual expression. This position is consistent with liberalism’s analytical focus on the individual actor, as well as its descriptive and normative commitment to individual autonomy and particularly to individual expression. Under this view, the absence of legal constraint is both necessary and sufficient to empower individuals to overcome domination through free and fair competition. Thus formally equal rights to participate in cultural and political dialogue—such as a right to recode—are the necessary and sufficient response to the concentration of cultural influence. For example, although antitrust law has permitted the current concentration of media power that concerns so many IP commentators, Lawrence Lessig has argued that increased expressive opportunities (such as Internet access and the right

¹⁶ See, e.g., JAMES BOYLE, *supra* note ---, at 148; VAIDHYANATHAN, *supra* note ---, at 140-148.

to use copyrighted materials) are sufficient to counteract media concentration and that reform of antitrust policy is unnecessary.¹⁷

But the liberal foundation of “free culture” theory is a historical irony: the concepts of “recoding” and “semiotic democracy” actually originated as *critiques* of liberal pluralism. The originators of these theories argued that recoding has an ambivalent—if not complicit—relationship to structures of domination. They saw the power of cultural establishments, such as the concentrated entertainment industry, as structurally embedded and durable. Under this view, the formally equal opportunity to create alternative meanings is insufficient to correct substantive inequalities in cultural influence. This argument is even more compelling today in view of the increasingly concentrated nature of the culture industry. The version of “semiotic democracy” theory in today’s legal academy fails to address, or even to meaningfully engage, this central insight of the original theory.

The remainder of this Article develops the above arguments as follows. Part II is primarily concerned with my first argument—that IP scholars overstate the destructive effect of copyright law. Part II provides a brief legal history of musical appropriation in hip-hop music. Intellectual-property commentators writing in the “free culture” vein insist that the essence of hip-hop is copying,¹⁸ and that it thus exists in opposition to mainstream culture and norms of intellectual property.¹⁹ But the historical record shows

¹⁷ See LESSIG, *THE FUTURE OF IDEAS*, *supra* note ---, 110. Lessig is of course a pioneer of the insight that technology, as well as law, enables the dominant position of the culture industries. For example, he has identified encryption technology as a threat to creativity. See, e.g., LESSIG, *FREE CULTURE*, *supra* note ---, 150-57. But ultimately his complaint is not with the technology per se, but laws (such as the Digital Millennium Copyright Act) that prevent the circumvention of encryption. *Id.* at 157-61. This position implies that enabling competition between hackers and industry would be sufficient to overcome the anticompetitive effects of encryption.

¹⁸ See LESSIG, *THE FUTURE OF IDEAS*, *supra* note ---, at 9.

¹⁹ See VAIDHYANATHAN, *supra* note ---, at 133.

that long before the hip-hop era, recoding practices in the pop music industry developed in concert with copyright law. Despite the absence of judicial decisions, the industry developed norms of obtaining copyright permission and setting permission fees by contract. When hip-hop came on the scene, the same norms applied; neither artists nor record companies saw it as fundamentally different from prior recoding practices. Hip-hop generally, and sampling techniques specifically, have developed despite, and perhaps even because of, intellectual property law.

Copyright scholars are in general agreement that a 1991 opinion, *Grand Upright Music v. Warner Bros. Records*,²⁰ suddenly and radically changed the legal status of sampling by declaring that sampling required copyright permission. This is a gross misconception. The historical record, including the court records in *Grand Upright* itself, shows that the hip-hop community, from its earliest days, understood and respected the obligation to obtain and pay for permission to sample.

Part III of this Article focuses on my second argument: that recoding has an ambivalent relationship to semiotic democracy. Even assuming copyright law discourages cultural appropriation, that would not necessarily harm semiotic democracy. Increased appropriation can have negative as well as positive effects on the dispersion of semiotic influence. Because it enables the recoding of cultural products, a legal regime that facilitates appropriation can disperse the power to make meanings—what I will refer to as “semiotic power.” But it can also encourage activity that contributes to *concentration* of semiotic power—that is, it can have the very “constraining” effect on cultural dialogue that Coombe deplors.

²⁰ 780 F. Supp. 182 (S.D.N.Y.1991).

Indeed, exercising a “right” to recode may empower dominant culture as well as challenge it. Not all borrowing of cultural products constitutes autonomous meaning-making by individuals. For example, permitting recoding without copyright permission enables individuals to freely appropriate from the powerful culture industries, but it also enables appropriation in the reverse direction. Furthermore, individuals who recode may assign *new* meanings to dominant cultural products, but they cannot easily displace the *existing* meanings. Thus recoding re-disseminates those existing meanings and reaffirms their importance. Those who borrow from the culture industries, even to criticize them, engage in a discourse on terms set by the culture industry.²¹ By selecting from and further repeating the cultural materials preselected by the culture industry, recoding can simultaneously undermine *and* further concentrate the cultural influence of the already dominant culture industry. For example, sampling existing popular music and incorporating it into new hip-hop music is sometimes described as a challenge to dominant musical culture and the music industry,²² but sampling also re-disseminates existing music and extends its cultural influence.

Liberal legal theory tends to have difficulty with this kind of internal contradiction. Indeed, IP scholars tend to see a dualistic, if not Manichaeian, struggle between oppressive intellectual property law on the one hand and autonomous recoding on the other.²³ The tension between domination and autonomy, however, expresses itself

²¹ Cf. Stuart Hall, *Notes on Deconstructing “The Popular,”* in PEOPLE’S HISTORY AND SOCIALIST THEORY 227, 233 (Raphael Samuel, ed. 1981) (“the cultural industries do have the power...by repetition and selection, to impose and implant such definitions of ourselves as fit more easily the descriptions of the dominant or preferred culture.”)

²² See VAIDHYANATHAN, *supra* note ---, at 137 (arguing that sampling can be “a political act—a way of crossing the system”).

²³ Michael Madow, for example, argues that deciding whether to protect the right of publicity “requires us to make a fundamental choice...between centralized, top-down management of popular culture

not solely *between* copyright law and recoding, but also *within* copyright law and *within* recoding.

II. LEGAL DOMINATION?

1. Business Practice and the Limits of Legal Domination

The narrative of a battle between copyright and hip-hop is an overdramatized myth that ignores the actual history of the interaction between law and musical recoding. Art (and the business of art) can reach accommodation with the law and have done so, allowing art to flourish in harmony with the law. Indeed, the tension between legal restrictions and creative energy can be a productive one. After all, copyright law does not constitute a prohibition on cultural appropriation: it merely assigns it a price, just as every aspect of artistic production, from guitars to paintbrushes, has a price. Sampling in hip-hop, like earlier kinds of musical borrowing, did not develop in some mythical golden age in which intellectual property was unregulated. Rather, it (and its many antecedents) developed within a copyright regime fundamentally like today's.

The slow pace of the law means that it tends to lag behind artistic innovation rather than run ahead of it. This tends to limit the law's role to settling disputes over the proceeds from established practices –it simply arrives too late to prevent new methods of making meanings. In the meantime, art and business can develop a balance between new practice and existing law. One influential commentator argues that sampling in hip-hop

on the one hand, and a more decentralized, open, 'democratic' cultural practice on the other." See Madow, *supra* note ---, at 239.

“revealed gaping holes in the premises of how copyright law gets applied to music....”²⁴

But in fact there were no such “gaping holes.” Musical recoding thrived, copyright law notwithstanding, long before the advent of hip-hop. Neither courts nor the music industry found sampling in hip-hop to be significantly different from existing forms of recoding, and thus it caused no legal upheaval.

a. Public Performance and the Birth of Hip-hop

U.S. law has regulated the appropriation of copyrighted music at least since the early twentieth century, but these burdens have not prevented the development of recoding practices in hip-hop or other musical genres. For example, since the Copyright Act of 1909, copyright in a musical composition has included the exclusive right to control “public performance for profit” of the work.²⁵ Nonetheless, the earliest hip-hop music involved disk jockeys (DJs) publicly playing and recoding copyrighted recorded music at for-profit dance parties.²⁶ DJ Kool Herc (Clive Campbell)’s 1973 DJ show has become a “creation myth” of hip-hop. He is credited with inventing the practice of manipulating vinyl records to repeatedly play dancers’ favorite portions of a song.²⁷ Similar turntable manipulation allowed the creation of collage-like mixes made up of portions of multiple records.²⁸ Other DJs created the technique of moving a record

²⁴ VAIDHYANATHAN, *supra* note---, at 133.

²⁵ Copyright Act of 1909, ch. 320, § 1(e), 30 Stat. 1075, 1076 (repealed 1976). This right is currently codified at 17 U.S.C.A. § 106.

²⁶ Furthermore, music was only one part of “hip-hop,” a subculture that also involved dance and graffiti—activities which did not attract the attention of copyright law, probably because they never came to implicate the amount of money involved in commercial recordings.

²⁷ See JEFF CHANG, *CAN’T STOP, WON’T STOP: A HISTORY OF THE HIP-HOP GENERATION* 78-79 (2005).

²⁸ See Tricia Rose, *Rap Music*, in *THE HIP HOP READER* 17, 17 (Tim Strode & Tim Wood, eds., 2008).

under the needle to distort the recording into rhythmic “scratching” sounds.²⁹ The use of records and turntables as musical instruments is sometimes considered its own subgenre of hip-hop, now sometimes referred to as “turntablism.” While the DJ played records, a master of ceremonies (MC) would sometimes use the microphone to encourage dancers; this practice is one of the forerunners of rap.³⁰

Copyright law entitled the owners of recorded compositions to control DJs’ public performances of the records. Yet this rule did not inhibit semiotic democracy as expressed through the grass-roots innovations of DJs.³¹ Copyright law notwithstanding, live hip-hop became a vibrant and influential musical form in the 1970s.³²

b. Reproduction, Derivative Works, and Hip-hop Recordings

The incorporation of copyrighted music into a new recording (through sampling, for example) does not involve public performance, but it implicates different IP rights—the rights of a copyright holder to control reproductions and derivative works. The holder of copyright in a musical composition has enjoyed the exclusive right to “publish, copy and vend the copyrighted work,” as well as “to arrange or adapt it” at least since the Copyright Act of 1909.³³ For at least a century, then, the copyright in a musical composition has included a right to control recordings that recode the composition. The Copyright Act of 1976, the backbone of the current copyright code, reaffirmed the

²⁹ See CHANG, *supra* note ---, at 114.

³⁰ See *id.* at 78; Rose, *supra* note ---, at 20-21.

³¹ The extent to which copyright holders actually asserted this right is unclear. So-called “performing-rights agencies” such as ASCAP and BMI typically collect public-performance royalties from performance venues on behalf of copyright holders. Collecting performance rights royalties from smaller venues has long been notoriously difficult, as it involves painstaking fieldwork and resistant venue owners. See John Bowe, *The Music-Copyright Enforcers*, NY TIMES MAGAZINE, Aug. 6, 2010, at 38.

³² See CHANG, *supra* note ---, 151, 168-70 (describing the influence of hip-hop on New York’s art and punk cultures)

³³ Act of Mar. 4, 1909, ch. 320, §§1(a) & 1(b), 35 Stat. 1175 (repealed 1976).

copyright owner’s exclusive right to “adapt” under the rubric of the exclusive right “to prepare derivative works based upon the copyrighted work.”³⁴

A recording of a composition implicates both the copyright in the composition and a separate copyright in the recording itself. Sound recordings first became copyrightable in 1972, around the time of the advent of hip-hop.³⁵ The rights associated with copyright in a sound recording differ somewhat from those associated with copyright in a composition, however. Under the 1976 Act, the owner of copyright in a sound recording has exclusive rights over reproduction and derivative works, but these rights extend only to use of the actual sounds captured on the recording.³⁶ Thus an unauthorized recording of a similar-sounding new performance does not infringe upon the copyright in a sound recording (though it might infringe the copyright in the underlying composition). As we shall see, hip-hop records have both used sound-alike performances and taken the actual sounds from recordings (through the recording of DJ performances, tape manipulations, and digital sampling). Despite their technical and legal differences, these are all appropriations that potentially infringe upon copyrights. Thus, for convenience, I will refer to all these methods of borrowing as “sampling.”

As with recoding in public performances, then, copyright law puts burdens on recorded musical recordings. Yet the law did not prevent the rise of such recordings. For

³⁴ 17 U.S.C.A. § 106. A derivative work is “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of... modifications which, as a whole, represent an original work of author ship, is a ‘derivative work.’” 17 U.S.C.A. § 101.

³⁵ See David Dante Troutt, *I Own, Therefore I Am*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 373, 375 (2010) (citing Act of Oct. 15, 1971, Pub. L. No. 92-140, [85 Stat. 391](#) (codified as amended at [17 U.S.C. §§ 1, 5, 19, 20, 26, 101](#) (2006))). The copyright in a sound recording, however, did not, and still does not, confer any right to control public performance of the recording. See *id.* at 423 (citing 17 U.S.C.A. § 114(a)). Thus, unlike the owners of compositions (typically music-publishing companies), the owners of sound-recording copyrights (typically record labels) have no right to control DJ performances.

³⁶ 17 U.S.C.A. § 114(b).

example, long before the hip-hop era, Chuck Berry's publisher threatened to sue the Beach Boys for copying the melody of his 1958 composition "Sweet Little Sixteen" in their 1963 song "Surfin' USA." This resulted in an out-of-court settlement (and writing credit for Berry).³⁷

Technological appropriations from sound recordings—and legal responses thereto—also predate hip-hop. Beginning with the 1956 hit "The Flying Saucer," Bill Buchanan and Dickie Goodman produced a long series of novelty comedy records that included dialogue assembled from snippets of pop hits. They were sued by multiple music publishers who alleged infringement of the copyrights in the underlying compositions. The parties reached an out-of-court settlement that entitled the publishers to royalties.³⁸ Goodman continued to make these collage-like records for decades; indeed, he had a Top Ten hit in during the formative years of hip-hop with his 1975 solo record, "Mr. Jaws."³⁹ The influential hip-hop producer Steinski (Steve Stein) cites Buchanan and Goodman as a direct influence on the sampling techniques of hip-hop.⁴⁰

The long history of copyright owners' control of reproduction and derivative works did not discourage the development of recordings based on appropriation. Rather, it simply led to a business practice of paying for permission to recode copyrighted compositions, just as an artist would pay other contributors to a recording, such as studio musicians or recording engineers. Whether this was a doctrinally correct interpretation of

³⁷ See PHILIP LAMBERT, *INSIDE THE MUSIC OF BRIAN WILSON* 11, 64 (2007); *see also* <http://www.arcmusic.com/searchresults.aspx?track=81367> (showing composition credited to Berry).

³⁸ See Chuck Miller, *Dickie Goodman: We've Spotted the Shark Again*, available at Chuck Miller Creative Writing Service website, <http://www.chuckthewriter.com/goodman.html> (originally published in *GOLDMINE* magazine (1997)). They were separately sued by record labels for "unfair competition," on the ground that their recordings used the services of performers who were under exclusive contract to the record labels. *See Modern Joins in Luniverse Suit; Quick Action Skedded*, *BILLBOARD*, Nov. 17, 1956, at 16, 30. At the time (prior to 1972), the record labels had no IP rights in the sound recordings.

³⁹ *See* JOEL WHITBURN, *THE BILLBOARD BOOK OF TOP 40 HITS* 260 (2004).

⁴⁰ JOSEPH SCHLOSS, *MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP* 19-20 (2004).

copyright law is open to debate. As many commentators argue today, musical appropriations that involve significant recoding may fall under the “fair use” exception to copyright protection, a doctrine that dates at least back to 1869.⁴¹ But right or wrong as a doctrinal matter, copyright holders’ insistence on payment did not prevent the use of recoding in pop records. The later development of sampling in recorded hip-hop is, as Steinski recognizes, merely a continuation of an established artistic practice. Both turntablism and rap music made the transition from live performance to records, and the existing business practice of paying for permission to appropriate was, quietly and unremarkably, extended to hip-hop records. Indeed, the practice dates to the very first commercially successful hip-hop record—yet it did not prevent hip-hop from becoming a dominant artistic and commercial force in popular music.

In 1979, Sugarhill Records released “Rapper’s Delight” by the Sugarhill Gang, the first hip-hop single to become a national hit. It featured rappers backed by studio musicians recreating the distinctive instrumental portion of “Good Times,” a contemporaneous hit song by the group Chic.⁴² (I will refer to this sub-category of songs—rap vocals backed by previously copyrighted tunes—as “hybrids.”) Soon after the release of “Rapper’s Delight,” the composers of “Good Times,” Nile Rodgers and Bernard Edwards, threatened to sue Sugarhill for infringing upon their copyrighted composition.⁴³ The parties reached an out-of-court settlement,⁴⁴ and Rodgers and Edwards are now included as co-writers of “Rapper’s Delight”⁴⁵ (and, presumably,

⁴¹ See *Lawrence v. Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869). Fair use is now codified at 17 U.S.C.A. § 107.

⁴² See Steven Daly, *The History: Hip Hop Happens*, VANITY FAIR, November 2005, 263.

⁴³ See Daly, *supra* note ---.

⁴⁴ See *id.*

⁴⁵ *Id.*

receive a share of the considerable profits from the song). The story of “Rapper’s Delight” shows that copyright holders successfully asserted a right to control sampling from the very dawn of recorded hip-hop. The settlement was consistent with established practices in the music business, and it did not inhibit the birth of recorded hip-hop or its subsequent development.

Shortly after “Rapper’s Delight,” Sugarhill Records released the first commercial recording of turntablism, “The Adventures of Grandmaster Flash on the Wheels of Steel.” The song featured the celebrated DJ Grandmaster Flash manipulating a number of easily recognizable recent hit records (including, once again, “Good Times”) Like Buchanan and Goodman’s records, “The Adventures of Grandmaster Flash” likely implicated the copyrights of multiple composers—as well as the relatively new copyrights in sound recordings. But the existence of copyright law and recent experience with litigious composers did not prevent the release of the record.

c. Evidence of Business Practice: The Misunderstood Case of *Grand Upright*⁴⁶

Obtaining sample clearance appears to have been standard practice in the recording industry. Legal commentators’ reaction to *Grand Upright Music v. Warner Brothers Records*,⁴⁷ a 1991 federal district court case, is emblematic of their tendency to overstate copyright’s inhibiting influence on recoding. *Grand Upright* enjoined the sale of a hip-hop album that used an unauthorized sample from a pop single. One

⁴⁶ 780 F. Supp. 182 (1991).

⁴⁷ *Id.*

commentator argued that the decision “stole the soul” of hip-hop,⁴⁸ and many others agree.⁴⁹ IP commentators suggest that the case gave copyright owners new rights against samplers and thus suddenly imposed new, burdensome licensing costs on recoding. This is manifestly incorrect. The preceding discussion shows that samplers paid for copyright permission since the beginning of recorded hip-hop.⁵⁰ By the time of *Grand Upright*, sample clearance was a firmly established artistic and business norm.

Double Dee and Steinski’s 1983 song, “Lesson 1-The Payoff Mix,” was made by splicing together analog tapes of scores of copyrighted sources.⁵¹ It has become an important influence on hip-hop production, but according to Steinski, it was never released commercially due to concerns about the cost of clearances.⁵² This indicates an understanding among the earliest hip-hop samplers that they were obliged to pay for copyright permission. Although concerns about the law prevented commercial release of that particular work, “Lesson 1” was nonetheless made and, moreover achieved cultural importance. “Lesson 1” became highly influential on later hip-hop and paved the way for Steinski to become a successful hip-hop producer and recording artist.⁵³

MC Hammer, who used the tune from Rick James’s “Super Freak” in his immense 1990 hit “U Can’t Touch This,” acknowledged an obligation to pay James for copyright permission: “I didn’t need a lawyer to tell me that . . . I’m borrowing enough

⁴⁸ VAIDHYANATHAN, *supra* note ---, at 144 (citing *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991)).

⁴⁹ See, e.g., BOYLE, *supra* note ---, at 148; Arewa, *supra* note ---, at 585 n. 175, MACLEOD, FREEDOM OF EXPRESSION, *supra* note ---, at 106.

⁵⁰ Similarly, a widely-cited student note recently argued that copyright law endangers jazz music today because it requires musicians to pay for permission to record jazz versions of existing compositions. See Note, *Jazz Has Got Copyright Law and That Ain’t Good* 118 HARV. L. REV. 1940, 1944 (2005). Copyright law, however, has imposed this cost since the earliest days of jazz.

⁵¹ National Public Radio, *Steinski Gives a Sampling History Lesson*, available at <http://www.npr.org/templates/story/story.php?storyId=93844583>.

⁵² *Id.*

⁵³ *Id.*

of his song that he deserves to be compensated.”⁵⁴ The 1991 rap single “Pop Goes the Weasel,” by 3rd Bass, reflects a similar view of copyright: the song uses samples itself, but the lyrics mock a rapper who fails to give credit for samples and gets sued.⁵⁵ This is an apparent reference to Vanilla Ice,⁵⁶ who was accused of using an unauthorized sample in his 1990 hit, “Ice Ice Baby.” Notably, Vanilla Ice did not assert the argument, fashionable today, that he should be legally entitled to sample without permission. Rather, he insisted that the passage in his song was slightly different—for which he was widely ridiculed.⁵⁷ By 1991, he had entered into a settlement that reportedly cost him \$4 million.⁵⁸

According to a student author who interviewed music lawyers and record-company executives shortly before the *Grand Upright* decision, “Prudent music lawyers advise their artists to keep track of samples included in their music and then seek out the copyright holders to bargain for the right to use the sample. After determining the cost of a prospective license, a record executive or producer weighs that cost against the potential success of the new work embodying the sample.”⁵⁹ There is considerable support for this view, including the facts of the widely misunderstood *Grand Upright* case itself. Extensive and uncontroverted testimony in the case indicates that before the

⁵⁴ Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 726 (1992) (hereinafter *New Spin*) (quoting Peter Castro, *Chatter*, PEOPLE WEEKLY, July 30, 1990, at 86).

⁵⁵ *Pop Goes the Weasel*, on 3RD BASS, DERELICTS OF DIALECT (Def Jam/Columbia 1991).

⁵⁶ The music video accompanying “Pop Goes the Weasel” portrays the members of 3rd Bass beating up an actor dressed as Vanilla Ice.

⁵⁷ Michael J. Mooney, *For us, Rob Van Winkle will always be Vanilla Ice*, MIAMI NEW TIMES, November 26, 2009 (“He defended his beat in an infamous video clip – ‘Theirs goes ding-ding-ding dada ding-ding, and mine goes ding-ding-ding dada ding-ding dink.’”).

⁵⁸ *Id.*

⁵⁹ *New Spin*, *supra* note ---, at 727-8 (internal footnotes omitted); *but see* BOYLE, *supra* note ---, at 148 (asserting that seeking sample clearance was rare prior to *Grand Upright*).

case was decided, it was established and understood practice for hip-hop artists to request and pay for copyright permission for samples.

Grand Upright involved the song “Alone Again,” by the rapper Biz Markie. The instrumental element of the song is constructed from a sample from “Alone Again (Naturally),” a 1972 pop record written and performed by Raymond “Gilbert” O’Sullivan. O’Sullivan was the principal shareholder of the plaintiff corporation, Grand Upright Music, Limited, which claimed ownership of copyrights in the sound recording and the composition. The opening eight bars of the O’Sullivan recording, or “about 30 seconds,” are sampled and looped (i.e., repeated) to form the instrumental basis for the entire length of the song.⁶⁰ In addition, Biz Markie sings a version of the title phrase.⁶¹ The song appeared on Biz Markie’s album *I Need a Haircut*, produced by an independent record label, Cold Chillin’, released by Warner Brothers Records and distributed by Warner’s subsidiary WEA.⁶² Markie, Cold Chillin’, Warner, and WEA were all named defendants.

The *Grand Upright* court states that the defendants “admit” to unlicensed use of the sound recording and the composition.⁶³ The court reasoned that the only remaining issue was whether Grand Upright owned the copyrights.⁶⁴ Based on this cursory

⁶⁰ See Hearing Transcript, Nov. 25, 1991 at 13 (testimony of Raymond “Gilbert” O’Sullivan), *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (No. 91 Civ. 7648 (KTD)) (hereinafter, “Nov. 25 Hearing”). The court records in *Grand Upright* are stored at the National Archives Records Center, Lee’s Summit, Missouri, Accession/transfer no. 021-93-0007, Box no. 182, Location no. B4207072. A copy is on file with the author.

⁶¹ The song can be heard online in various places, including the UCLA and Columbia Law School Copyright Infringement Project website, http://cip.law.ucla.edu/cases/case_grandwarner.html (last visited January 28, 2011).

⁶² See Deposition of Leonard Fichtelberg, President of Cold Chillin’ Records, at 6-7, *Grand Upright* (hereinafter “Fichtelberg Deposition”) (explaining the relationship between Cold Chillin’ and Warner Brothers); Deposition of George Rossi, Executive VP of Marketing, WEA, Nov. 22, 1991 at 5, *Grand Upright* (explaining WEA’s relationship to Warner Brothers).

⁶³ *Id.*

⁶⁴ *Id.*

discussion of infringement, the case is widely misinterpreted as holding, without explanation, that unauthorized sampling categorically constitutes copyright infringement.⁶⁵ In fact, the case made no such holding, conclusory or otherwise. Commentators have uniformly overlooked the fact (not readily apparent from the opinion alone) that the case did not even present the legal question of whether Biz Markie’s sample, or sampling generally, constituted infringement.

The record of the case shows that the defendants did not merely “admit” to having sampled without permission; they conceded that unauthorized sampling is *illegal*. The defendants—a rapper, an independent hip-hop label, and a multinational major label—unequivocally agreed that the sample at issue required copyright clearance, and that they had used the sample in question without permission. The lawyer representing all the defendants⁶⁶ stated in court, “We acknowledge that we do not have the right to do it [*i.e.*, to use the sample without clearance][;] we acknowledge that at some point we are going to have to pay the copyright proprietor.”⁶⁷ The *Grand Upright* court did not “hold” that the unauthorized sample (or any unauthorized sample) was infringing; that was accepted by all parties for purposes of the case. (In any event, the opinion merely granted a preliminary injunction,⁶⁸ and thus did not purport to be a final disposition on the merits of any issue.)⁶⁹

⁶⁵ See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 401 F. 3d 647, 650 n.14 (2004) (order granting panel rehearing); Arewa, *supra* note --- at 580 (“The court did not analyze why the sample was infringement under applicable copyright law standards.”); BOYLE, *supra* note ---, at 148 (2008); MACLEOD, *supra* note ---, at 78-79.

⁶⁶ See 780 F. Supp. at 183.

⁶⁷ Hearing Transcript, Nov. 26, 1991, at 148, *Grand Upright* (hereinafter, “Nov. 26 Hearing”).

⁶⁸ See 780 F. Supp. at 183.

⁶⁹ Shortly after the reported opinion granted the preliminary injunction, the parties (presumably having reached a settlement) agreed to dismiss the case with prejudice. See Stipulation and Order of Dismissal [sic] with Prejudice, dated Dec. 24, 1991 (filed Jan. 6, 1992), *Grand Upright*.

The defense's primary argument had been that Grand Upright had failed to prove it was the copyright owner of either O'Sullivan's composition or the sound recording of it.⁷⁰ The defendants' other line of argument was that even if Grand Upright owned the copyrights, their release of the album prior to obtaining clearance constituted good faith conduct and thus an injunction would be an excessive remedy. They claimed that they were in discussions with the Grand Upright at the time of release, and that it was common industry practice to release music during clearance negotiations and finalize terms later.⁷¹ The president of Cold Chillin' Records, as well as a copyright administrator and a music-publishing executive with no involvement in the dispute, testified to this practice.⁷² The administrator further stated she had never refused a request for clearance.⁷³ Notably, neither of the defendants' two arguments asserted a right to sample without permission; indeed, the latter theory acknowledged an infringement, and claimed only that it was a minor and non-willful violation.

⁷⁰ See Defendants' Post-Hearing Memorandum on Plaintiff's Application for Preliminary Injunction (hereinafter, "Post-Hearing Memorandum") at 3-13 (composition); 14-15 (sound recording), *Grand Upright*. Although the Sixth Circuit has criticized *Grand Upright* for failing to distinguish between the composition copyright and the sound recording copyright, see *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 650 n.14 (2004) (order granting panel rehearing), this is another unfounded criticism. *Grand Upright* clearly states that it involves *both* the copyright to the "song" *and* to "the master recording thereof." 780 F. Supp. at 182. In any event, the distinction was unimportant, because the case involved a preliminary injunction application by the owner of both copyrights.

⁷¹ See Nov. 26 Hearing, *supra* note ---, at 76-77. Late in the proceedings, the defendants also asserted that their use of the sample was "*de minimis*." Post-Hearing Memorandum at 20. This was *not* an assertion of a "*de minimis* defense" to infringement, however. (That doctrine is discussed *infra* at p. ---.) Defendants' argument was merely that an injunction requiring recall of the album would be disproportionate to the small scale of the offense. *Id.* Indeed, by this point in the proceedings, the defendants conceded that it *would* be appropriate to impose money damages. *Id.*

⁷² See Fichtelberg Deposition, *supra* note ---, at 33, 39, 41; Nov. 26 Hearing at 126, 134 (testimony of Fredrick Silber, Vice President of Business Affairs, EMI Music Publishing; testimony of Jane Peterer).

⁷³ See Nov. 26 Hearing, *supra* note ---, at 135 (testimony of Jane Peterer). The other copyright administrator said he had refused permission "on a few occasions, generally when we feel a song is so obscene or...politically incorrect that we don't want our song to be associated with them [sic]." *Id.* at 129 (testimony of Fredrick Silber, Vice President of Business Affairs, EMI Music Publishing).

Despite the evidence that the industry generally tolerated releases during negotiations, other evidence suggested that at the time the album was released, the defendants knew that Grand Upright would not grant permission.⁷⁴ Thus the judge dismissed the “good faith” argument in a hearing, stating, “if a guy starts negotiations and they are not fruitful and he goes ahead and does it anyway, then that might be taken to be some evidence of willfulness.”⁷⁵ In this context, it is clear why the opinion stated that the “only issue” in the case was whether Grand Upright owned the copyrights.⁷⁶ Since the defendants had conceded using the sample without permission, and the judge had rejected their justification for doing so, ownership was indeed the sole remaining issue. Satisfied that Grand Upright had proven ownership,⁷⁷ the court granted a preliminary injunction against further sale of the album.⁷⁸

Leading commentators have unfairly criticized the *Grand Upright* opinion for failing to consider a fair use defense.⁷⁹ But since the defendants conceded that unauthorized sampling constitutes infringement, they never raised, even implicitly, the fair use defense. It would have been unnecessary, if not improper, for the court to consider such a defense on its own motion. Furthermore, the opinion merely addressed an application for a preliminary injunction; the defense could have been raised and considered later had the case progressed to trial.

⁷⁴ See Nov. 25 Hearing, *supra* note, --- at 19-23 (testimony of Raymond “Gilbert” O’Sullivan) (describing O’Sullivan’s protectiveness of “Alone Again (Naturally)” and his distaste for Biz Markie’s song); Nov. 26 Hearing at 26 (testimony of Raymond “Gilbert” O’Sullivan) (stating there was “[n]o way” Grand Upright would have granted sample clearance for the Biz Markie record).

⁷⁵ Nov. 26 Hearing, at 77.

⁷⁶ 780 F. Supp. at 183.

⁷⁷ See *id.* 184.

⁷⁸ See *id.* at 185.

⁷⁹ See, e.g., Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 896 n. 126 (1997); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 300 n. 313 (1998).

The defendants’ concessions with respect to sample clearance requirements appear to reflect industry practice of the time. A vice president of EMI Music Publishing, testifying as an expert on sample clearance, stated that he was the *de facto* head of sample clearance for EMI (a major record label).⁸⁰ In less than three years with the company, he had been involved in “approximately 100, 120” instances in which EMI’s material was sampled and “settled about 15 or 20” cases in which EMI artists had been accused of sampling without permission.⁸¹

Biz Markie, Cold Chillin’ and Warner Brothers all appreciated the risk of copyright liability in releasing a sample-heavy record, and allocated that risk by contract. With respect to any copyright infringement, Cold Chillin’ was obligated to indemnify Warner Brothers and the artist was obligated to indemnify Cold Chillin’.⁸² Biz Markie, in deposition testimony, stated that he had an obligation—which he fulfilled—to give completed tapes of his work to his lawyer, whose “job” was to then obtain clearances for the samples used in the tapes.⁸³

Biz Markie’s lawyers assumed from the outset that copyright permission would be required. After the album was recorded, but before it was released, the lawyers sent a tape of “Alone Again” to Grand Upright’s representative and requested permission to

⁸⁰ See Nov. 26 Hearing, *supra* note ---, at 125 (testimony of Fredrick Silber, Vice President of Business Affairs, EMI Music Publishing).

⁸¹ See *id.* at 125 (testimony of Fredrick Silber, Vice President of Business Affairs, EMI Music Publishing).

⁸² See Fichtelberg Deposition, *supra* note---, at 35. Biz Markie’s lawyers suggested that Cold Chillin’ had a cavalier attitude about sample clearance because of this indemnification arrangement. See 780 F. Supp. at 185 (quoting August 16 letter to Cold Chillin’).

⁸³ See Deposition of Marcel Hall (a/k/a Biz Markie), Nov. 20, 1991, at 48, *Grand Upright* (hereinafter, “Biz Markie Deposition”) (“I just knew that when I was done with my album, I make tapes and I give it [sic] to my lawyer and he clears them. That’s all I know.”), 51.

release the song as part of the album.⁸⁴ Before permission was obtained, however, Cold Chillin’ Records delivered the master recording of *I Need a Haircut* to Warner Brothers and Warner Brothers released it.⁸⁵ But the premature release does not mean Cold Chillin’ thought sample clearance was unnecessary; it had scrupulously observed clearance requirements with respect to other samples on the same album. For example, when Biz Markie’s lawyer had difficulty obtaining permission to use a sample in another song, Cold Chillin’s president had tried to help.⁸⁶ When the request was denied, Cold Chillin’ dropped the offending song from the album, even though this required creating a costly new master recording of the entire album.⁸⁷

The court’s opinion has been criticized—ridiculed, even—for opening with the Biblical proscription “Thou shalt not steal.”⁸⁸ One commentator argues that this evidences “a disdainful, if not contemptuous, view by judges for the type of musical borrowing involved in hip hop as a genre.”⁸⁹ But these commentators take the sentence out of context. The sentence is not about sampling generally; it is about an admittedly unauthorized instance sampling in a case where the defendants themselves conceded that copyright permission was required. Indeed, Biz Markie himself seemed to agree with this characterization. When asked in deposition if he understood the meaning of copyright infringement, he replied, “That means something was copyrighted already and

⁸⁴ 780 F. Supp. at --. See also 105 Harv. L. Rev. 726, 744 (1992) (citing telephone interview with Robert Cinque, lawyer for the *Grand Upright* defendants (Dec. 18, 1991)).

⁸⁵ See Fichtelberg Deposition, *supra* note ---, at 36-37, 42-43.

⁸⁶ See *id.* at 29-31, 60.

⁸⁷ See *id.*

⁸⁸ 780 F. Supp. at 183. The many critics who have singled out this passage include Arewa, *supra* note --, at 581; Peter K. Yu, *The Copyright Divide*, 25 Cardozo L. Rev. 331, 410 (2003); Justin Hughes, *Size Matters (Or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, n.15 (2005); and K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 382 n.202 (1999).

⁸⁹ Arewa, *supra* note --, at 581.

I stole it.”⁹⁰ Nothing in his deposition suggests a belief in a right to unauthorized sampling; as noted above, he understood the clearance requirement and argued only that the failure to get clearance was his lawyer’s fault.

Grand Upright, then, did not announce a change in legal doctrine; nor did it require any change in business or artistic practice in the recording industry. By the time of *Grand Upright*, the industry appears to have reached a consensus interpretation of samplers’ obligations under the Copyright Act and was successfully implementing that interpretation. While it is possible that the judicial stamp of approval may have added legitimacy to the practice of sample clearance, the practice needed no such affirmation. For all practical purposes, this practice was already the “law,” despite the lack of specific pronouncements on sampling by courts or Congress. This “law” did not prevent the artistic or commercial development of sampling; indeed, it coexisted with some of the most artistically and commercially successful examples of sample-based hip-hop.

2. “Slice-and-dice:” More Samples, More Problems?

a. Clearance Requirements and Multiple Samples

Biz Markie’s 1991 “Alone Again” was a rap-plus-pop-tune hybrid along the lines of 1979’s “Rapper’s Delight.” Since the early days of hip-hop, however, many artists and producers had used sampling in more ambitious and transformative ways.⁹¹ By the late 1980s, digital technology enabled producers to take the mix-and-match aesthetic of

⁹⁰ Biz Markie Deposition, *supra* note ---, at 6-7.

⁹¹ See *supra* at --- (discussing the work of Grandmaster Flash and Steinski).

turntablism to new extremes. Thus many artistically and commercially important albums of the late 1980s and early 1990s used brief samples, transformed by digital processing and combined in large numbers to create dense, layered pieces very different from their musical sources. For convenience, I will (inelegantly and imprecisely) refer to more complex combinations of samples as the “slice-and-dice” approach.⁹² The number of samples used increased the number of copyrights involved and, presumably, the complexity of obtaining permission. Many commentators argue that the requirement of obtaining sample clearances for samples (supposedly created by *Grand Upright*) made the cost of producing slice-and-dice music prohibitive.⁹³

Although this argument may sound plausible in theory, it is an ahistorical one. Complex combinations of multiple sources were common in early hip-hop DJing and, as noted above, had already been commercially recorded by Grandmaster Flash by 1981. Furthermore, as argued above, sample clearance was already an established practice, and slice-and-dice practitioners appear to have observed it just as other hip-hop artists did.

For example, in 1989, the Beastie Boys and their producers, the Dust Brothers, released the critically praised, sample-heavy album *Paul’s Boutique*. They sought and obtained clearances for the many samples used in the album—at a cost said to have been between \$200,000 and \$250,000.⁹⁴ The year 1989 saw another landmark example of hip-hop sampling: De La Soul’s commercially and critically successful album, *3 Feet High and Rising*. Like *Grand Upright*, it also spawned a copyright dispute that is incorrectly

⁹² James Boyle uses the term “wall of sound” to refer to this style. See BOYLE, *supra* note ---, at 148.

⁹³ See *id.*; CHRISTOPHER R. WEINGARTEN, IT TAKES A NATION OF MILLIONS TO HOLD US BACK 41-42 (2010).

⁹⁴ BRIAN COLEMAN, CHECK THE TECHNIQUE: LINER NOTES FOR THE HIP-HOP JUNKIE (2007) .

blamed for helping to establish a clearance requirement for sampling.⁹⁵ In fact, like *Paul's Boutique*, the *3 Feet High and Rising* story actually shows that the clearance practices outlined in the *Grand Upright* testimony were an accepted part of slice-and-dice production as early as 1989. One song on *3 Feet High and Rising* used an unauthorized sample from “You Showed Me,” a 1969 record by the Turtles. When two members of the Turtles threatened to sue Tommy Boy Records for releasing the album⁹⁶ the label agreed to a settlement.⁹⁷ De La Soul and Prince Paul, the album’s producer, never asserted a right to sample without permission. Indeed, they believed copyright clearance to be legally and ethically required. Band member Mase believes the Turtles “rightfully” sued: “That’s fine. That was cool.”⁹⁸ As in *Grand Upright*, copyright responsibility appears to have been understood and allocated by contract: the group and its producer maintain that Tommy Boy was contractually obligated to obtain clearances for the album (a claim that Tommy Boy apparently does not dispute).⁹⁹

Despite the established practice of seeking clearances, Tommy Boy apparently chose to take the risk of being sued in the future instead of bearing the upfront cost of licensing. Although commentators have decried the idea that the Turtles should be paid for a “sliver” of a song,¹⁰⁰ that criticism fails to consider the fact that the “sliver”—no less than the services of a backup musician, composer, or engineer—was one of the

⁹⁵ See VAIDHYANATHAN, *supra* note---, at 141.

⁹⁶ The suit was apparently based on sound recording rights, as the plaintiffs did not write the song.

⁹⁷ See Robert Hilburn, *Alive and Rapping*, L.A. TIMES, June 30, 1991.

⁹⁸ *Dave and Mase from De La Soul discuss their music*, FRESH AIR, September 1, 2005 (radio program, transcript available on LEXIS); see also Patrick O’Neil, *The Madminute with Posnudos* [sic], MX (Melbourne, Australia) 4 (May 13, 2003) (quoting Posnudos, a member of De La Soul); Angus Batey, *Last Chance to Comprehend*, hiphop.com, April 7, 2009, available at <http://www.hiphop.com/features/60-de-la-soul-3-feet-feature-part-two> (last visited October 8, 2010); (quoting Dave, another band member).

⁹⁹ See FRESH AIR, *supra* note --- (“we turned in all sample information [to Tommy Boy] and what we sampled and what we needed cleared. And unfortunately, the record label just didn’t take its time...”); see also Batey, *supra* note –.

¹⁰⁰ See VAIDHYANATHAN, *supra* note---, at 141.

economic inputs that made up an immensely successful commercial product. In 1989, 3 *Feet High and Rising* reached number one on the Billboard R&B album chart and number 24 on the Billboard Hot 200 chart. According to Prince Paul, “even after the law suit [against Tommy Boy] I got a nice royalty cheque [from Tommy Boy].”¹⁰¹

Members of Public Enemy have expressed less enthusiasm about the practice of obtaining clearances. But they appear nonetheless to have been complying with industry practice even before *Grand Upright*. This did not prevent them from pioneering slice-and-dice digital sampling in the late 1980s and early 1990s. Chuck D of Public Enemy has stated that “by the late 1980s” copyright holders were granting permission to use samples “for around \$1500,” and prices rose dramatically thereafter.¹⁰² The existence of known prices obviously suggests that paying for permission was a common practice. Chuck D’s complaint about high prices seems to suggest that Public Enemy was in the habit of paying for permission, despite recording a rap suggesting otherwise.¹⁰³ Chuck D’s expressed resistance to sample clearance must also be considered in light of the fact that he himself brought two infringement suits (one against a fellow rapper) alleging unauthorized sampling of his voice.¹⁰⁴

¹⁰¹ Angus Batey, *Last Chance to Comprehend* (interview with De La Soul and others), hiphop.com, April 7, 2009, available at <http://www.hiphop.com/features/60-de-la-soul-3-feet-feature-part-two> (last visited October 8, 2010).

¹⁰² Quoted in WEINGARTEN, *supra* note ---, at 41.

¹⁰³ In a 1988 Public Enemy song, Chuck D raps that “the courts” have accused Public Enemy of stealing because of its sampling, for which he “paid zero.” See *Caught-Can We Get a Witness? on PUBLIC ENEMY, IT TAKES A NATION OF MILLIONS TO HOLD US BACK* (DefJam/Columbia Records 1988) (quoted in VAIDHYANATHAN, *supra* note ---, at 144-45). But all this seems to be poetic license. There does not appear to have been a court disposition, or even a lawsuit filed, with respect to any Public Enemy sample.

Hank Shocklee, a producer of Public Enemy’s albums, has claimed he “never really cleared the samples” on the group’s earlier albums. But he says the cost of clearances started “catching up to us” by 1990. Quoted in MCLEOD, *FREEDOM OF EXPRESSION* at 78.

¹⁰⁴ See Randy Reiss, *Public Enemy’s Chuck D Settles B.I.G. Copyright Suit*, vh1.com, Nov. 17, 1998, available at http://www.vh1.com/news/articles/504067/11171998/chuck_d.html (last visited Jan. 29, 2011).

Grand Upright did not spell the end of sampling generally or slice-and-dice specifically, despite some commentators' unfounded insistence that hip-hop went into decline in response to *Grand Upright*.¹⁰⁵ Even Biz Markie continued to use samples on his next album, prudently entitled *All Samples Cleared!* Many knowledgeable observers of the music believe it reached an artistic peak the early 1990s: for example, one recent scholarly study asserts that “for sheer volume of classic hip-hop it is difficult to surpass 1993-94.”¹⁰⁶

Even assuming prices were rising, sampling remained a common method of hip-hop production throughout the 1990s and remains so today. During the 1990s, sampling techniques continued to develop. Slice-and-dice never entirely went away, although it underwent some permutations. Indeed, in 1996, Beck's hip-hop influenced album, *Odelay*, introduced slice-and-dice to a broad mainstream audience.¹⁰⁷ The album was produced by the Dust Brothers, who also produced *Paul's Boutique*, and the album has a similar sound made up of dense, layered samples. Many slice-and-dice artists began to use samples that were of obscure origin and cut and processed them even more radically. DJ Shadow is a hip-hop artist credited with inspiring this trend, sometimes described as subgenre called “trip-hop.”

If clearance fees indeed increased at the end of the 1980s, it was likely due to changed market conditions: artistic fashion, popular taste, and technological advances had combined to increase the value of copyrighted recordings and compositions. If indeed copyright holders charged higher rates for copyright clearance, that was

¹⁰⁵ See BOYLE *supra* note ---, at 148, VAIDHYANATHAN *supra* note ---, at 143.

¹⁰⁶ See THE ANTHOLOGY OF RAP 330 (Adam Bradley and Andrew DuBois, eds. 2010).

¹⁰⁷ The album won two Grammy awards. See http://www2.grammy.com/grammy_awards/winners/.

presumably possible only because sample-based music was generating greater revenues. The argument that copyright holders raised clearance prices so high as to prevent the use of samples defies economic logic. Indeed, the emergence of sample clearance as a revenue stream may have made it *easier* to obtain sample clearance by giving record companies incentive to pay attention to clearance requests rather than simply ignoring them. Many record companies, including Universal Music and BMG Music, now provide easily accessible online forms for would-be samplers to request copyright clearance.¹⁰⁸

b. *Bridgeport v. Dimension Films*:¹⁰⁹ Another Misunderstood Decision

Ironically, while pioneering slice-and-dice groups like Public Enemy, The Beastie Boys, and De La Soul seem to have assumed they were obligated to pay clearances for their samples, unauthorized slice-and-dice might have been legally defensible. Chuck D of Public Enemy seems to have believed in the late 1980s that he was obligated to obtain clearances (whether or not he did) even for “unrecognizable” samples.¹¹⁰ But many of the brief, unrecognizable samples in “slice-and-dice” productions arguably did not require copyright permission. In doctrinal terms, they arguably involved only *de minimis* copying and lacked “substantial similarity” to their source material.¹¹¹ Indeed, several

¹⁰⁸ See RICHARD STIM, GETTING PERMISSION: HOW TO LICENSE & CLEAR COPYRIGHTED MATERIALS ONLINE AND OFF 180 (3d ed. 2007).

¹⁰⁹ 410 F. 3d 792 (2005).

¹¹⁰ See MCLEOD, *supra* note ---, at 68.

¹¹¹ “[A] plaintiff must first show his work was copied by proving access and substantial similarity between the works.” *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir 1991). For a contemporaneous case suggesting the *de minimis* exception, see *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir 1988). The rule was made clearer in subsequent cases, most notably *Ringgold v. Black Entertainment TV*, 126 F.3d 70 (2d Cir 1997) and *Sandoval v. New Line Cinema*, 147 F.3d 215 (2d Cir., 1998) (fleeting, unrecognizable glimpses of copyrighted photos in a movie were *de minimis* and not actionable copyright violations.)

later cases have applied this doctrine to find that brief samples did not infringe upon copyrights in the underlying composition.¹¹² Most notably, in the 2002 *Newton v. Diamond* case,¹¹³ a federal district court held that a three-note sample in a Beastie Boys record was *de minimis* and thus did not infringe upon the copyright in the composition.

Slice-and-dice samples may also fall under the “fair use” exception to copyright infringement for similar reasons. One of the factors supporting a fair use exception is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹¹⁴ Furthermore, as the Supreme Court held in *Campbell*, a use that “adds something new, with a further purpose or different character, altering the [source] with new expression, meaning, or message” has a “transformative” character that weighs in favor of a fair use determination.¹¹⁵ Neither the *de minimis* nor transformation characterizations seems applicable to the song at issue in *Grand Upright*, which used a significant and recognizable portion of its source material.¹¹⁶ It was, then, unclear after *Grand Upright* whether copyright doctrine required clearance for slice-and-dice sampling.

The status of slice-and-dice remains unclear even today, over two decades after it first appeared in hip-hop. *Bridgeport v. Dimension Films*,¹¹⁷ the circuit decision most closely on point, was not decided until 2005. In that case, the Sixth Circuit rejected the

¹¹² See *Staggs v. West*, 2009 U.S. Dist. LEXIS 72275 (D. Md. 2009) (dismissing a claim that a sample in a hip-hop song violated the copyright in a composition because “an ordinary listener -- the Court in this case -- would quickly determine that the melodies of the songs are not similar.”); *Jean v. Bug Music, Inc.*, 2002 U.S. Dist. LEXIS 3176 (S.D.N.Y. 2002) (holding that a sample was *de minimis* and did not infringe the copyright in the composition because “[o]nly three words and notes in the [two songs] are identical. Overall the songs are different in sound and they convey different moods.”).

¹¹³ 204 F.Supp.2d 1244, 1246, 1258 (C.D. Cal. 2002).

¹¹⁴ See 17 U.S.C. § 107(3).

¹¹⁵ *Campbell v. Acuff-Rose Music*, 510 U.S.569, 579 (2004); *Castle Rock Entertainment v. Carol Publishing Group*, 150 F.3d 132, 143 n.9 (2d Cir. 1998).

¹¹⁶ See *supra* at --- (describing the song).

¹¹⁷ 410 F. 3d 792 (2005).

de minimis defense with respect to a sample used in “100 Miles and Runnin’” (“100 Miles”), a song by the rap group NWA. The song contained a brief sample of a keening, siren-like electric guitar passage from a record by the group Funkadelic. Although some commentators argue that *Bridgeport* placed a burden on “innovative music,”¹¹⁸ “100 Miles” was eleven years old by the time the lawsuit was filed, and 15 years old by the time the court handed down its decision.¹¹⁹ “100 Miles” was recorded in 1990, and reflected the slice-and-dice style of that era. One commentator notes that the same Funkadelic song had previously been sampled by Public Enemy, and that “100 Miles” imitated the style Hank Shocklee used to produce Public Enemy records.¹²⁰ The lawsuit in *Bridgeport* was not against NWA or its record company, but against No Limit Films, a company that used “100 Miles,” and hence the Funkadelic sample, in a 1998 movie.¹²¹

As noted above, cases such as *Newton v. Diamond* had by this time recognized the *de minimis* defense to claims of infringement of composition copyrights. *Bridgeport*, however, involved only the copyright in a sound recording,¹²² and the court held that the *de minimis* doctrine is unavailable in that context. The court pointed to sections 106 and 114(b) of the Copyright Act, which give the owner of the sound recording copyright the exclusive right to make derivative works “in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” *Bridgeport* interpreted this to mean the owner of the sound recording copyright had the

¹¹⁸ Tim Wu, “Jay-Z Versus the Sample Troll,” SLATE, www.slate.com/id/2153961 (Nov. 16, 2006).

¹¹⁹ See 410 F. 3d at 795 (stating that the action commenced in 2001).

¹²⁰ See WEINGARTEN *supra* note ---, at 70-71.

¹²¹ See 410 F. 3d at 793.

¹²² The court found that the plaintiff, Bridgeport Music, did not own the rights to sample the composition; they had been retained by the previous owner of the composition. See 401 F. 3d at 796.

exclusive right to prepare *all* such works, without limitations such as the substantial similarity requirement or *de minimis* exceptions.

Some commentators decry *Bridgeport* for prohibiting the slice-and-dice approach.¹²³ But, like the condemnation of *Grand Upright*, this is a misreading of the holding. First of all, no form of sampling is prohibited as long as clearance is obtained. Second and moreover, the case simply does *not* hold that clearance is required for slice-and-dice generally, or even for “100 Miles” specifically. Although the opinion glibly states at one point, “Get a license or do not sample,”¹²⁴ in fact the holding is limited to rejecting the substantial similarity requirement and the related *de minimis* defense in the sound recording context. The court did not even hold “100 Miles” to be an infringing use. Rather, it reversed the lower court’s finding of noninfringement (which had been based on the *de minimis* defense) and remanded the case for a new trial. Indeed, the *Bridgeport* court specifically stated that the court on remand could consider a fair use defense (which was not reached below), “express[ed] no opinion on its applicability to these facts.”¹²⁵

Even to the extent that it rejects the *de minimis* defense in the context of sound-recording infringement, the import of *Bridgeport* is overstated. *Bridgeport* is the decision of only one circuit, and not one that is especially influential with respect to copyright law. Moreover, it turns on a questionable interpretation of the Copyright Act. The *Bridgeport* rule expands sound-recording copyrights in a direction denied to other copyrights.¹²⁶ As

¹²³ See BOYLE, *supra* note--- at 148.

¹²⁴ 410 F. 3d at 801.

¹²⁵ 410 F. 3d at 805. In an analogous case, the Second Circuit held that a visual artist was protected by fair use with respect to his painting that incorporated a recognizable scanned portion of a copyrighted photograph. See *Blanch v. Koons*, 467 F. 3d 244.

¹²⁶ The statutory language and the legislative history, however, strongly suggest that the purpose of Section 114 is to make the scope of sound recording copyrights *narrower* than those of other copyrights.

noted above, several cases have applied the *de minimis* doctrine to find noninfringement with respect to compositions. In addition, at least one federal district court has explicitly rejected *Bridgeport* and applied the *de minimis* doctrine to find that a one-second sample did not infringe upon a sound recording copyright.¹²⁷

The impact of *Bridgeport* may be overstated for another reason. Right or wrong, *Bridgeport* appears, like *Grand Upright* before it, to have been consistent with existing industry practices—practices under which sampling flourished. As argued above, it was well-established practice in the music industry by the late 1980s to seek copyright permission both lengthy recognizable samples and for briefer, slice-and-dice samples. In fact, NWA itself reportedly sought and obtained sample clearance when it originally recorded “100 Miles” in 1990.¹²⁸

Indeed, *Bridgeport*’s differing treatment of *de minimis* borrowings from compositions and those from sound recordings seems to reflect earlier practice by the Beastie Boys. The aforementioned *Newton v. Diamond*¹²⁹ case involved the 1992 Beastie Boys song, “Pass the Mic.” The song included a sample of a brief flute passage from a recording of a jazz composition entitled *Choir*.¹³⁰ When the Beastie Boys were sued by the composer, who owned the copyright in the *composition*, the court found that the sample was *de minimis* and thus noninfringing.¹³¹ But while the Beastie Boys used the composition without permission, they *had* sought and obtained clearance to use the *sound*

See Leslie Kurtz, *Digital Actors and Copyright*, SANTA CLARA COMPUTER & HIGH TECH. L.J. 783, 794-795 n.80 (2005).

¹²⁷ See *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325 (S.D. Fla. 2009).

In a pre-*Bridgeport* case, the Southern District of New York stressed the importance of substantial similarity analysis in deciding whether sampling constituted infringement. *Williams v. Broadus* 2001 U.S. Dist. LEXIS 12894 (S.D.N.Y. 2001).

¹²⁸ See WEINGARTEN *supra* note ---, at 70.

¹²⁹ 204 F. Supp. 2d 1244 (C.D. Cal. 2002).

¹³⁰ See *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002).

¹³¹ See *id.*

recording.¹³² It is possible that, some thirteen years before *Bridgeport*, the Beastie Boys (or more likely the lawyers for their record label, Capitol/EMI) understood that a *de minimis* defense might excuse the unauthorized use of a composition, but might not apply in the sound-recording context.

Capitol/EMI may have sought sound-recording clearance for another reason: the same major record companies that release records containing samples also own huge back catalogs of recordings that might be sampled. Thus they have economic incentive to support a rigid practice of sample clearance. As noted above, however, *Bridgeport* explicitly acknowledges the possibility of a fair use defense to the sampling of sound recordings. Thus the decision may actually open the door to legal treatment of slice-and-dice that is *more permissive* than the music industry's prevailing interpretation. Indeed, *Bridgeport*'s acknowledgement of the fair-use defense may explain the recent invocation of that doctrine by the musician Girl Talk, who has openly refused to pay clearance fees for even the most obvious samples.¹³³

c. Law and Cost Do Not Necessarily Determine Cultural Practice

The potential cost of sample-based music has been known since the very first successful hip-hop record. Legal scholars' insistence that law is determinative of cultural participation is an example of thinking like a lawyer, not like an artist. Some practices are unaffected by the law, and factors other than law shape cultural practice.

¹³² See *id.* at 1246.

¹³³ See Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, NY TIMES, Aug 6, 2008.

The law has little impact on some kinds of sampling. Chuck D has complained that he had to obtain clearance even when samples were “unrecognizable.”¹³⁴ One commentator asserts that *Bridgeport* spells the end of slice-and-dice sampling.¹³⁵ Similarly, one law-student commentator has argued that if other courts follow *Bridgeport*, “the way DJ Shadow and others make music may change forever.”¹³⁶ It is theoretically possible that prices could rise high enough to make clearance prohibitively expensive when multiple samples are used. But these responses fail to appreciate an age-old legal principle: it’s only illegal if you get caught. If samples of copyrighted material are sufficiently brief, obscure, and/or altered, the copyright holder can simply never know the material was used. For such samples, *de minimis*, fair use and indeed all copyright laws are irrelevant in practical terms. DJ Shadow clearly understood this: he released several singles in the early 1990s¹³⁷ without obtaining sample clearance.¹³⁸ He did not seek any clearances until the release of his first album in 1996, and even then he only sought them for a small number of recognizable samples “...there's probably 1,000 samples on [the album] and I think we cleared 10 or so.”¹³⁹

Even when the law does impose costs on sampling, artists may be willing to pay those costs for the sake of innovation. There is considerable irony in the “free culture” argument that strong copyright laws discourage sampling by increasing its cost. It is in

¹³⁴ MCLEOD, FREEDOM OF EXPRESSION, *supra* note ---, at 68.

¹³⁵ See BOYLE, *supra* note--- at 148.

¹³⁶ John Schietinger, *Note and Comment: Bridgeport v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Sampling*, 55 DEPAUL L. REV. 209, 209 (2005).

¹³⁷ See DJ Shadow discography, <http://www.djshadow.com/discography>.

¹³⁸ See *DJ Shadow: The Message is Clear* (undated interview) available at <http://www.solesides.com/winblad/shadowtechno.html>. (last visited September 30, 2010).

¹³⁹ *Id.* He sought clearance for “things that I based an entire song on, just because I knew it'd be recognizable to whoever did it.” *Id.* Based on this comment, it is unclear whether his sample-clearance practices were based solely on liability concerns, or whether they also reflect the ethical norms expressed by De La Soul and MC Hammer .

effect the same argument behind the traditional economic *defense* of strong copyright laws: that protecting profitability is necessary to incentivize creativity. The history of sampling, however, suggests otherwise. Profit potential may inspire imitation *after* an artistic innovation is made, but profit does not necessarily provide the incentive for such innovation. As noted above, Steinski did not release his pioneering “Lesson 1” commercially due to concerns about clearance costs. Nonetheless, “Lesson 1” was widely played in clubs and on radio, and Steinski became a successful and highly influential record producer.¹⁴⁰ According to Steinski, “the legality of this doesn't really make any difference to me.... I mean, I'm gonna make the records no matter what.”¹⁴¹ Even if we agree that the law should offer incentives to recoding, the law need only guarantee appropriators a chance at a reasonable reward—not *all* the proceeds from the derivative work. The indirect rewards have been sufficient to incentivize Steinski.

The more recent story of the *Grey Album* is similar. In 2004, Danger Mouse (Brian Burton) mixed the vocals from rapper Jay-Z’s 2003 *Black Album* with new instrumental tracks sampled from the Beatles’ self-titled 1968 album, commonly known as *The White Album*.¹⁴² When the resultant *Grey Album* appeared for sale online, the EMI record label threatened to sue Burton and the retailers for infringing upon the Beatles recording.¹⁴³ Burton argued that it had been released without his permission, and had been intended as a noncommercial “art project.”¹⁴⁴ He became something of a *cause célèbre* among anti-copyright activists, even though he expressly denied any intent to

¹⁴⁰ See WNYC Soundcheck, *Steinski Gives a Sampling History Lesson*, on National Public Radio website, <http://www.npr.org/templates/story/story.php?storyId=93844583> (undated)(last visited Jan. 28, 2011).

¹⁴¹ *Id.*

¹⁴² See MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD 133 (2008)

¹⁴³ *See id.*

¹⁴⁴ *See id.*

challenge copyright laws, and readily cooperated with EMI in stopping online sales.¹⁴⁵

The *Grey Album* was unprofitable, but as “Lesson 1” did for Steinski, it established Burton as a significant musician and producer, and inspired legions of imitators in the so-called “mashup” genre of similarly hybridized songs.

Some commentators assert that less has sampling occurred in the post-*Grand Upright* era.¹⁴⁶ Such a claim is difficult to support without an exhaustive, longitudinal study of records. But even assuming such a change occurred, it may have had other causes. One likely reason is a change in artists’ preferred styles and methods. Many commentators complain that the classic slice-and-dice albums by Public Enemy, De La Soul, and the Beastie Boys could not be made today due to the cost of obtaining clearances,¹⁴⁷ but even if true, the complaint is an odd one. Those important albums *were* made, over two decades ago, and there is no reason why artists would want to make the same (or similar) albums again.¹⁴⁸ On their next album after *Paul’s Boutique*, the Beastie Boys used far less sampling and played their own instruments. Band member Mike Diamond made a good argument for artistic change and the irrelevance of law: “I don’t know if I’d say that *Paul’s Boutique* took the sampling thing as far as it could be taken, but we came close. So we definitely didn’t want to jump right back into that same direction.”¹⁴⁹

¹⁴⁵ *Id.*

¹⁴⁶ *See, e.g.,* BOYLE at 148, VAIDHYANATHAN at 143 (“Rap music since 1991 has been marked by a severe decrease in the amount of sampling.”).

¹⁴⁷ *See, e.g.,* MACLEOD, FREEDOM OF EXPRESSION, *supra* note ---, at 78-82; WEINGARTEN, *supra* note ---, at 41.

¹⁴⁸ *See infra* at --- (arguing that musical forms should not be subject to “static reification”).

¹⁴⁹ BRIAN COLEMAN, CHECK THE TECHNIQUE: LINER NOTES FOR THE HIP-HOP JUNKIE (2007). Admittedly, however, others believe the cost of clearances for *Paul’s Boutique* contributed to the use of instruments on *Check Your Head*. *See id.*

Just as artists may have decided to move on, the record industry seems to have recognized the greater sales potential of simpler hip-hop records with recognizable tunes instead of multiple samples. Two songs released in 1990: “U Can’t Touch This,” by M.C. Hammer, and “Ice Ice Baby” by Vanilla Ice, became two of the biggest hip-hop singles of all time. Each of these songs was, like “Rapper’s Delight,” a relatively simple combination of a rap and the hook from a famous pop hit.

Legal disputes over sampling are not entirely determinative of creative innovation or the distribution of semiotic power. Rather, they are disputes among members of the media industry over the distribution of the proceeds from an existing, profitable method of joint production. The music industry arrived at a method of distributing these proceeds by contract, allowing innovation to proceed. This is not to say formal law is irrelevant: the contracting was clearly based on the legal entitlements set out in the Copyright Acts of 1909 and 1976. The legal norm of negotiated sample clearance did not prevent the development of hip-hop—to the contrary, it can be seen as an important part of the development of hip-hop as an art form and an industry. History shows, then, that commentators have greatly exaggerated copyright law’s stifling effect on recoding in popular music. Lawyers and legal academics are (unsurprisingly) likely to overestimate the ability of law to constrain productive and creative behavior. Copyright owners’ statutory entitlements are thus often portrayed as insuperable barriers to sampling. The economic analysis of law, however, teaches that legal entitlements can be reallocated by bargaining, at least where transaction costs are sufficiently low.¹⁵⁰ That is, even if the right to sample belongs to a copyright holder, a would-be sampler should be able to

¹⁵⁰ See, e.g., Ian Ayres and Eric Talley, *Distinguishing between Consensual and Nonconsensual Advantages of Liability Rules*, 105 YALE L.J. 235 (1995).

obtain permission, as long as the costs of information, negotiation, and the like are not prohibitive.

While it cannot be *assumed* that transaction-cost barriers can be overcome by bargaining in a given context,¹⁵¹ history suggests that they were with respect to sampling. In Calabresi and Melamed’s famous formulation,¹⁵² copyright law allocates sampling rights under a “property rule”—under which a would-be user must bargain with the owner—as distinct from a “liability rule”—under which a user may use without permission as long as the user pays damages. Copyright law is a “property” regime because statutory damages under the Copyright Act are not limited to the owner’s actual damages;¹⁵³ furthermore, the code allows for injunctive relief¹⁵⁴ (as seen in *Grand Upright*) as well as the disgorgement of profits.¹⁵⁵ Calabresi and Melamed argued that because liability rules facilitate the transfer of entitlements, they are preferable when transaction costs are high.

Some commentators have argued in favor of compulsory licensing of copyrighted works in order to facilitate licensing.¹⁵⁶ Such an approach would be a “liability” regime in that it would allow users to “take and pay” without obtaining permission. The history of sampling described above, however, suggests that a “property” approach to sampling rights has thus far been appropriate because transaction costs have been sufficiently low. The music industry, faced with a property regime that potentially slowed the transfer of

¹⁵¹ R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 174-178 (1988).

¹⁵² See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹⁵³ See 17 U.S.C.A. § 504(c); Pamela Samuelson and Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 438, 441-443 (2009)(providing examples).

¹⁵⁴ See 17 U.S.C.A. § 502(a).

¹⁵⁵ See 17 U.S.C.A. § 504(b).

¹⁵⁶ William Fisher has made perhaps the most fully developed compulsory-licensing proposal. See FISHER, *supra* note ---, at 199ff.

sampling rights, responded by reducing transaction costs. Sample clearance was just another example of transferring copyright entitlements, with which the music industry had long been familiar, and had learned to accommodate. If parties disagreed over whether sample clearance was necessary (that is, over who owned the entitlement to sample), it might have increased the transaction costs of each negotiation. But the evidence discussed above strongly indicates that there was consensus that sampling rights belonged to copyright holders. (This follows from the fact that samplers are themselves artists and record labels with an interest in protecting their own intellectual property.) Transaction costs are likely to have fallen further as sampling became more common and the industry established business practices for seeking and granting clearance, such as dedicated employees and indemnification clauses,¹⁵⁷ and, more recently, online clearance processing.¹⁵⁸ Indeed, the evidence in *Grand Upright* suggests that obtaining clearance was normally as simple as a few letters and phone calls that need not even hold up the release of a record.

¹⁵⁷ See the industry practices described in the *Grand Upright* testimony, *supra*.

¹⁵⁸ See STIM, *supra* note ---, at 180.

PART III. CULTURAL AUTONOMY?

1. Recoding's Ambivalent Relationship to Semiotic Democracy

As a historical matter, then, copyright law has not prevented the development of sampling. Many commentators argue that this is not enough, however; the law should affirmatively *facilitate* recoding in order to further semiotic democracy. For example, as noted above, many commentators argue for a compulsory licensing, either at centrally-determined rates or at no charge. By limiting a copyright owner's control over derivative works and allowing users to simply "take and pay," a compulsory licensing regime would likely lower users' costs. But it would externalize and subsidize users' costs; it would not necessarily lower costs overall. A compulsory licensing regime would constitute a subsidy of users at public expense--i.e., the considerable expense of administering such a regime.¹⁵⁹ Indeed, the huge costs of creating and administering a comprehensive compulsory licensing system could even *increase* the total costs of copyright licensing.

Whether the law should subsidize or otherwise facilitate recoding depends on whether recoding is good for society. Even assuming recoding advances semiotic democracy, subsidizing *any* method of cultural production can do so. The cost of sample clearance and other kinds of copyright permission is not significantly different from other costs of cultural participation and expression, such as education, computers and Internet connectivity, paint and canvas, or musical instruments. It is hardly clear why, in a world of limited resources, copyright permission should be subsidized while support for these other creative inputs remains limited.

¹⁵⁹ See FISHER, *supra* note ---, 223, 246.

The question of, course is whether sampling and other kinds of recoding have special social value, such as furthering semiotic democracy. Addressing this question underscores the great irony of “free culture” theory. On the one hand, as argued above in Part II, copyright law is far friendlier to recoding than these theorists tend to believe. On the other hand, as will be argued in this Part, recoding itself has potential negative effects on semiotic democracy. The current academic discourse tends to consider only recoding’s potential positive effects on cultural participation. The central insight of the original theories of semiotic democracy and recoding, however, was the existence of a tension between recoding’s positive *and* negative effects on cultural participation. Today’s legal academics need not agree with those previous cultural critics; it is of course appropriate to challenge and “recode” earlier concepts. But the “recoding of recoding” in contemporary intellectual property law has not seriously engaged the original arguments: rather, it has largely ignored them.

The term “semiotic democracy” and its underlying theory were formulated by the pioneers of “Cultural Studies,” a neo-Marxist academic movement in the United Kingdom.¹⁶⁰ Liberalism understands the dangers of an overbearing state, but tends to have excessive faith in the ability of formally equal competition to allocate wealth and other forms of power fairly and efficiently. Conversely, Cultural Studies and other Marxist-influenced theorists underestimate the risks of state control, but their critique of liberal capitalism offers insight into the limitations of allocating power via “market competition.”¹⁶¹

¹⁶⁰ See, e.g., JOHN FISKE, TELEVISION CULTURE 236-39 (1987); Hall, *supra* note --.

¹⁶¹ William Fisher’s proposal to remake copyright law is a bit of a hybrid: he seeks to realize a combination of liberal participatory values and material goals (such as supplying affordable cultural

In the 1930s and 1940s, German-American academics of the so-called “Frankfurt School” argued that the “culture industry” manipulates the public into buying and enjoying mass-produced cultural products. Theodor Adorno, for example, argued that the music industry manufactures popular music from simple, standardized patterns and conditions the public to expect and respond favorably to such patterns.¹⁶² In the 1970s and 1980s, Cultural Studies theorists modified this overly patronizing view. They agreed that the public’s consumption and enjoyment of commercial mass culture is not fully autonomous, but argued that it is not *entirely* manipulated either. The culture industries attempt to impose their view of reality on the public, but meet with a mixture of success and resistance. Dick Hebdige, for example, argued that youth subcultures in postwar Britain (such as mods, rockers, and punks) appropriated “mundane” consumer commodities—“a safety pin, a pointed shoe, a motor cycle”—and imbued them with alternative “meanings which express, in code, a form of resistance to the order which guarantees their continued subordination.”¹⁶³

This idea of redefinition—what has come to be called “recoding”—became a central part of cultural studies theory. According to Stuart Hall, the dean of Cultural Studies, members of the public are not merely “cultural dopes,” but are able to recognize the way their lives are “reorganised, reconstructed, and reshaped” by the way the media depicts them.¹⁶⁴ Building on this notion, John Fiske coined the related term “semiotic democracy” to describe television.¹⁶⁵ Fiske asserted that television viewers question the

products and increasing economic production) through an ambitious plan of state action. WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 202-03 (2004).

¹⁶² See Theodor Adorno, *On Popular Music*, in THEODOR ADORNO, *STUDIES IN PHILOSOPHY AND SOCIAL SCIENCE* 17, 27 (1941).

¹⁶³ DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* 2, 18 (1979).

¹⁶⁴ See Hall, *supra* note---, at 232-233.

¹⁶⁵ JOHN FISKE, *TELEVISION CULTURE* 236-39 (1987).

intended meaning of television programming, assign their own alternative meanings to it, and thus derive their own kind of pleasure from it.¹⁶⁶

Cultural Studies theorists maintained, however, that the autonomy of the media audience “is only relative, and never total.”¹⁶⁷ The culture industries constantly attempt, with limited success, to push meanings onto the public, and individuals constantly push back, with limited success, by recoding.¹⁶⁸ Cultural appropriation, then, involves *both* autonomy *and* domination. In the U.S. legal academy, however, “semiotic democracy” and “recoding” are used to connote purely autonomous cultural participation—something Cultural Studies theorists deemed impossible. Liberal legal theorists have, then, “recoded” the term “semiotic democracy”...as well as the term “recoding” itself.

Art and architecture critic Hal Foster expanded on Cultural Studies theory in the 1980s and coined the term “recoding.”¹⁶⁹ Foster noted that his most of his contemporaries in the art world saw cultural appropriation as “a parodic collage of the privileged signs of gender, class and race” that exposes and resists “the false nature of these stereotypes.”¹⁷⁰ “Free culture” theorists tend to adhere to his vision, and even attribute it to Foster.¹⁷¹ Foster, however, did *not* espouse this view; he believed these subversive aspirations were doomed to fail. Questioning cultural meanings does *not* challenge the cultural status quo, he argued, because liberal capitalism does not depend on a set of fixed cultural meanings. To the contrary, it depends on the appearance of variety and consumer choice: “in our system of commodities, fashions, styles, art

¹⁶⁶ *Id.* at 19.

¹⁶⁷ FISKE, *supra*, n. --, at 310.

¹⁶⁸ Hall, *supra* note ---, at 233 (emphasis added).

¹⁶⁹ HAL FOSTER, RECODINGS: ART, SPECTACLE, CULTURAL POLITICS 170 (1985);

¹⁷⁰ FOSTER, *supra* note ---, at 170.

¹⁷¹ See Keith Aoki, *Adrift in the Intertext*, 68 CHI.-KENT L. REV. 805, 810 n.33 (1993) (quoting the preceding passage from Foster with approval); Coombe, *supra* note ---, at 1864 (citing FOSTER, *supra* note---, as general support for her view that recoding advances semiotic democracy).

works...it is difference that we consume.” Thus, “[t]o expose its false nature, to manipulate its differences hardly constitutes resistance, as is commonly believed: *it simply means you are a good player, a good consumer.*”¹⁷² Capitalism welcomes recoding, incorporates it, and co-opts it: such has been the fate of nearly every youth subculture based on recoding, from rock ‘n’ roll to punk to hip-hop.¹⁷³

Recoding has both positive and negative effects on semiotic democracy. These potential conflicting effects are abstract and beyond empirical measurement; thus it is impossible to reach a meaningful cost-benefit calculation of the “net effect.”¹⁷⁴ Rather, we must be candid about the potential positive and negative effects of law and consider the *kinds* of potential benefits we categorically value—and the kinds of harms we are willing to tolerate. “Free culture” proponents implicitly accept formally equal expression and participation rights as a more important value than correcting power disparities *per se*. This is hardly unusual—it is, after all, the heart of liberalism. But it is in considerable tension with their professed concern for the actual distribution of cultural influence in society.

2. Subsidizing Recoding, Discouraging Innovation

a. The Static Reification Fallacy

¹⁷² *Id.* at 171.

¹⁷³ Cf. Dick Hebdige, *The Meaning of Mod*, in RESISTANCE THROUGH RITUALS (1979).

¹⁷⁴ Cf. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 539-44 (1990) (arguing that a utilitarian evaluation of copyright law is conceptually and empirically impossible to perform).

Copyright critics are fond of pointing out that imitation and borrowing are used in many types of cultural production; many of them further assert that hip hop is particularly dependent on borrowing,¹⁷⁵ and more specifically, on borrowing that conflicts with copyright law.¹⁷⁶ Thus, they argue, copyright law threatens semiotic democracy in that it would discourage new voices—many of them African-American—from participating in making cultural meanings.

Commentators on any subject tend to essentialize and reify the subject in order to make it more amenable to analysis.¹⁷⁷ But any art form, indeed any complex phenomenon, is multifaceted at any one point in time, as well as dynamic across time. Stuart Hall criticized the idea that any cultural form has a “fixed and unchanging meaning or value.”¹⁷⁸ Similarly, jazz historian Ted Gioia has bemoaned the tendency of jazz historians and critics to employ oversimplified “static models of jazz.”¹⁷⁹ Hip-hop has been subjected to the same kind of essentialization. For example, one of the leading intellectual-property commentators argues that both jazz and hip-hop consist primarily of copying existing works and grafting new elements onto them.¹⁸⁰ One prominent commentator argues that digital sampling is the “soul” of hip-hop.¹⁸¹ Another argues that “the question of whether and how sampling should be permitted is in some measure an inquiry about how and to what extent hip hop can and should continue to exist as a

¹⁷⁵ See, e.g., LESSIG, *THE FUTURE OF IDEAS* at 9.

¹⁷⁶ VAIDHYANATHAN, *supra* note ---, at 133 (“...copyright has been deeply entrenched in the Western literary tradition for centuries, but does not play the same role in African, Caribbean, or African American oral traditions.”)

¹⁷⁷ See Thomas W. Joo, *Contracts, Property, and the Role of Metaphor in Corporation Law*, 35 UC Davis L. Rev. (2002). I admit to oversimplification in reifying “free culture” scholarship, but the basic gist of the scholars quoted here is remarkably consistent.

¹⁷⁸ Hall, *supra* note ---, at 237.

¹⁷⁹ *THE FUTURE OF JAZZ* 192,196 (Yuval Taylor, ed., 2002), *quoted in* JOHN GENNARI, *BLOWIN’ HOT AND COOL: JAZZ AND ITS CRITICS* 4 (2006).

¹⁸⁰ LESSIG, *THE FUTURE OF IDEAS* at 9; *cf. Jazz Has Got Copyright*, *supra* note ---, at 1944 (incorrectly asserting that jazz consists primarily of reinterpretations of pop and Broadway “standards”).

¹⁸¹ See VAIDHYANATHAN, *supra* note ---.

musical form.”¹⁸² Rosemary Coombe argued that intellectual property law can stifle certain kinds of creative and critical practices “[b]y objectifying and reifying cultural forms -- freezing the connotations of signs and symbols.”¹⁸³ Ironically, the argument that copyright threatens hip-hop is based on a similar “freezing” of music. In fact, many commentators and artists define hip-hop music by its eclecticism—that is, by its very lack of essential elements.¹⁸⁴

IP commentators tend to portray sampling as an insurgent and beleaguered form of underground art that is essential to hip-hop. The characterization, if it was ever accurate, has been rendered inaccurate over time. Sampling is a venerable, ubiquitous and profitable method of musical production that is neither necessary to nor specific to hip-hop music.¹⁸⁵ As noted in Part II of this article, sampling in hip-hop has clear, direct antecedents in earlier pop-music practices. Indeed, many commentators seem to assume that sampling is inherently innovative even as they point out that appropriation is as old as music itself.¹⁸⁶ Not all sampling appears in hip-hop and not all hip-hop performances or recordings, currently or in the early days of the genre, use digital samples or other manipulations of copyrighted recordings.

Despite the historical influence of the DJ, hip-hop also has other kinds of musical predecessors, such as the work of spoken-word artists of the late 1960s and early 1970s,

¹⁸² Arewa, *supra* note ---, at 630.

¹⁸³ Coombe, *supra* note ---, at 1866.

¹⁸⁴ “No boundaries, no genre barriers... That’s to me what Hip-hop is about.” *DJ Shadow; The Message is Clear*, *supra* note ---.

¹⁸⁵ Jeff Chang’s magisterial history of hip-hop culture, a winner of the American Book Award, barely mentions sampling, and does not mention the legal issues surrounding it at all. See CHANG, *supra* note ---. In addition, a recent major scholarly work on the art of hip-hop, published by Yale University Press, focuses entirely on rap lyrics. See THE ANTHOLOGY OF RAP, *supra* note---.

¹⁸⁶ See Arewa at 609; JAMES BOYLE, JENNIFER JENKINS AND KEITH AOKI, THEFT! A HISTORY OF MUSIC (forthcoming).

such as Gil-Scott Heron and the Last Poets.¹⁸⁷ Musicologists trace the deeper roots of rap back to the oral traditions of West Africa and the rural American South.¹⁸⁸

Furthermore, as in any art form, methods and styles vary among practitioners, and are debated among them as well. From the beginnings of hip-hop music and continuing to the present, the use of copyrighted recordings has been only one of many technological tools for producing the instrumental aspects of hip-hop music. By analogy, jazz music often uses saxophones and trumpets, but no particular instrument is considered “essential” technology for the making of jazz.

Since the earliest days of hip-hop, many significant works contained no potentially infringing samples. For example, two of the most influential early hip-hop singles, 1982’s “The Message” by Grandmaster Flash and the Furious Five and “Looking for the Perfect Beat” by Afrika Bambaataa and Soulsonic Force, consisted of raps accompanied by original music played on synthesizers, keyboards, and drum machines.¹⁸⁹ Some hip-hop songs consist of rap or other vocals with no instrumental accompaniment. The influential 1980s band Stetsasonic and, more recently, Grammy-award winning artists OutKast, the Roots, and the Beastie Boys are among the many important hip-hop groups to play their own compositions on their own instruments.

Many critics of copyright correctly argue that composition often includes appropriation, and that the line between infringement and “original” composition is a

¹⁸⁷ See Alec Wilkinson, *New York is Killing Me*, THE NEW YORKER, Aug. 8, 2010, at 26, 30.

¹⁸⁸ See generally Cheryl L. Keyes, *The Roots and Stylistic Foundations of the Rap Music Tradition*, in THE HIP HOP READER 3, 4-8, 10-11 (Tim Strode & Tim Wood, eds., 2008).

¹⁸⁹ See Dorian Lynskey, *The Greatest Songs Ever!* The Message, BLENDER, November 2004. <http://www.blender.com/guide/articles.aspx?id=1095>; Richard Buskin, “Afrika Bambaataa and the Soulsonic Force: ‘Planet Rock,’” SOUND ON SOUND (2008), available at http://www.soundonsound.com/sos/nov08/articles/classictracks_1108.htm.

blurry one.¹⁹⁰ But this blurriness is hardly unusual—law is full of flexible, context-specific “standards.” Moreover, this particular imperfect distinction has necessarily existed as long as copyright in music has existed, and it has not crushed semiotic democracy or musical innovation. As the leading copyright treatise points out, “almost all works are derivative works in that in some degree they are derived from pre-existing works....[H]owever,...[a] work is not derivative [in the legal sense] unless it has *substantially* copied from a prior work.”¹⁹¹ Indeed, the prevalence of copying in popular culture does not prove that copyright law threatens pop culture; it proves just the opposite.¹⁹²

b. From Innovation to Cliché

Commentators’ insistence that sampling remains “innovative,” “transgressive,” or essential to hip-hop is based on a static view of artists’ preferred methods and their meaning within an art form. A dynamic view appreciates that the meaning of sampling could transform over time. The mere act of “recoding” pop culture is no longer by itself an important or novel artistic statement. Biz Markie’s use of a rap over a recognizable pop melody in 1991 was basically the same concept “Rapper’s Delight” used in 1979. Danger Mouse’s *Grey Album* was, in both technique and sound, reminiscent of earlier hip-hop records, such as those by Grandmaster Flash and Steinski. Indeed, the album’s

¹⁹⁰ See, e.g. Arewa, *supra* note ---, at ---.

¹⁹¹ NIMMER ON COPYRIGHT §3.01 (2010).

¹⁹² Cf. See Justin Hughes, “*Recoding*” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 947 (1999) (hereinafter Hughes, *Recoding* (pointing out that much recoding in pop music is perfectly permissible under IP law)).

central gimmick—raps set to tracks constructed from Beatles samples—was heard fifteen years earlier on the Beastie Boys’ aforementioned *Paul’s Boutique* album.¹⁹³

Many hip-hop artists deride sampling. Beans (Robert Stewart), a founding member of influential and innovative hip-hop group Anti-Pop Consortium, has said, “I’m not into sampling much. If you’re trying to bring about tomorrow, don’t take sh-t from yesterday.”¹⁹⁴ Similarly, Dan “The Automator” Nakamura, an influential producer and DJ, argued over a decade ago, “There’s no new R&B music out there today, because it’s all stolen from the past.”¹⁹⁵ Imani Coppola had a hip-hop influenced pop hit in 1997 with “Legend of a Cowgirl,” which was built around a sample from a 1966 pop song. Just a year later, she said, “I am a hypocrite...But I hate sampling...It’s gonna be the joke of music history.”¹⁹⁶

As one critic observes, “[i]n pop, every wave of innovation...inevitably heralds a host of new clichés and conventions.”¹⁹⁷ Sampling is now a dominant method of economic production by the dominant culture industries. Whatever its novelty in the 1970s, the appropriation of copyrighted music (like all elements of hip-hop sound and style) has long appeared in all genres of pop music, on television, and in advertising.

c. The Artistic Benefits of Restrictions

¹⁹³ The song, “The Sounds of Science,” was built in part from the Beatles’ “The End” and “Sgt. Pepper’s Lonely Hearts Club Band (Reprise).”

¹⁹⁴ Quoted in Ethan Brown, *Genre Bender*, WIRED, March 2003, at 61.

¹⁹⁵ Christensen, *supra* note ---.

¹⁹⁶ Thor Christensen, *Rampant recycling makes many wonder whether pop’s creativity has crashed*, DALLAS MORNING NEWS (Knight Ridder/Tribune News Service), April 15, 1998.

¹⁹⁷ SIMON REYNOLDS, RIP IT UP AND START AGAIN: POSTPUNK 1978-1984 at 270 (2005). Reynolds argues that punk, like hip-hop, was a genre that quickly mutated from anything-goes iconoclasm to a formulaic sound. Reynolds argues that Black Flag’s 1981 album, *Damaged*, “was such a definitive hardcore statement that it served simultaneously to codify the genre [of “hardcore” punk] and render it nearly obsolete. *Id.* at 456.

Technical limits have historically presented obstacles for artists to overcome, resulting in innovations. For example, Public Enemy’s producer Hank Shocklee prefers older digital samplers to today’s computers because the older machines required creative use of limited digital memory.¹⁹⁸ As technology frees art from technical and physical constraints, man-made constraints may help inspire artists to make new kinds of meanings through new techniques. Restrictive rules, even somewhat arbitrary ones, can provide this kind of beneficial constraint.¹⁹⁹ For example, the “Hays Code,” the self-censorship rules the U.S. motion-picture adopted in the 1920s, are sometimes caricatured as stifling and prudish.²⁰⁰ But film scholars have come to believe the Code helped “facilitate the insertion of potentially controversial representations into motion pictures.”²⁰¹ Rather than eliminating controversial content, it led filmmakers to express such content through creative, stylized shorthand rather than literal, graphic images.²⁰²

Cost can be a type of beneficial restriction. Subsidizing any activity can lead to inefficient overutilization of that activity. Subsidizing sampling may encourage its overuse and reduce incentives to develop other potential methods of cultural production. Part II above argued that law is not determinative of cultural practices. But let us assume “free culture” theorists are correct that the cost of sample clearance discouraged sampling. If so, it may have contributed to semiotic democracy by inspiring alternatives

¹⁹⁸ See Ben Detrick, *The Dirty Heartbeat of the Golden Age*, VILLAGE VOICE (Nov. 6, 2007), <http://www.villagevoice.com/2007-11-06/music/the-dirty-heartbeat-of-the-golden-age/2/> (webpage gives article date as Dec 31, 1969, but this is obviously incorrect. See <http://www.villagevoice.com/content/result/author:155449/>).

¹⁹⁹ See generally JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000).

²⁰⁰ Norman Rosenberg, *Looking for Law in All the Old Traces: The Movies of Classical Hollywood, the Law, and the Case(s) of Film Noir*, 48 UCLA L. REV. 1443, 1456 (2001).

²⁰¹ *Id.*

²⁰² A familiar example is the use of a fade-to-black following a couple’s embrace in order to imply sexual relations. See *id.*

to the dominant hip-hop approach. According to one hip-hop producer, legal impediments to sampling simply mean “producers have to ‘step up to the game’ and become more creative without using samples.”²⁰³ The Beastie Boys, for example, played their own instruments after *Paul’s Boutique*. Clearance costs may have also inspired new approaches to sampling, such as DJ Shadow’s use of obscure or unrecognizable samples. Beck’s *Odelay* and the Beastie Boys’ *Check Your Head* also included samples of their own instrumental playing.²⁰⁴ M.I.A.’s 2007 hit song, “Paper Planes,” featured a distinctive chorus built on the sampled sounds of gunshots and a ringing cash register.²⁰⁵ Turntablist DJ Q-bert has stated that copyright law is “a challenge for us because you really have to flip the sound.... That’s also what makes it more beautiful as well. It makes you want to change that sound because if you just *use* it then it’s theirs and that’s stealing.”²⁰⁶

3. Subsidizing the Powerful: Markets and the Limits of Formal Equality

Facilitating recoding through compulsory licensing might give the semiotically weak the freedom to express themselves, but would be unlikely to increase their influence relative to the semiotic establishment—and it could even decrease it. Lowering the cost of recoding could retard semiotic democracy in that it would subsidize not only the semiotically weak and resource-poor, but also the most culturally influential members of

²⁰³ Susan Butler, *Court Ruling Could Chill Sample Use*, BILLBOARD, September 18, 2004.

²⁰⁴ See COLEMAN, *supra* note ---.

²⁰⁵ M.I.A., *Paper Planes*, on KALA (XL Records/Interscope Records, 2007).

²⁰⁶ Quoted in KEMBREW MACLEOD, *OWNING CULTURE* 95 (2001).

society.²⁰⁷ Given the greater resources and distribution networks of established media corporations, their recordings are likely to have more cultural influence than those of less powerful speakers.

The use of sampling in hip-hop plays an important role in the discourse about recoding and semiotic democracy because hip-hop is often viewed as the paradigm of a “minority” discourse, in terms of race, class, politics, and artistic values.²⁰⁸ As a “minority” discourse, it is simultaneously essentialized as inherently oppositional to “mainstream” law and culture. But hip-hop is not a pure cultural underdog. Like much American pop culture, it has deep African-American roots, and much hip-hop music has nominally oppositional content. But much of it—and certainly most of that which attracts the attention of the law—is also a commercial product sold by multinational corporations.²⁰⁹ It can be, in hip-hop parlance, both the player and the played—often simultaneously. As music critic Robert Christgau wrote as early as 1986, “to fuss about the exploitation of hip hop is quite often to take sides against the hip hoppers themselves.”²¹⁰

As one scholar has argued, academic commentary tends to focus on “general societal (i.e., social, political, and economic) conditions that made hip-hop an attractive proposition for inner-city youth”²¹¹ and has failed to consider the influence of technology and artists’ “specific aesthetic goals.”²¹² Thus commentators (including many IP-law

²⁰⁷ See Madow, *supra* note ---, at 240 (citing JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* (1991)).

²⁰⁸ See SCHLOSS, *supra* note ---, at 17; Greene, *supra* note --- at 383 (referring to rap music as “one of today’s primary Black art forms”).

²⁰⁹ Cf. CHANG at 447 (“At the turn of the century, the hip-hop generation was now at the center of a global capitalist process generating billions of dollars in revenues.”).

²¹⁰ Quoted in *id.* at 407.

²¹¹ SCHLOSS, *supra* note ---, at 17.

²¹² *Id.*

commentators) often assume that turntables and samplers spread semiotic democracy because they are affordable and do not require musical training.²¹³ This socioeconomic determinism implicitly denies hip-hop the status of “art” and denies its practitioners the status of “artists.” Furthermore, it perpetuates stereotypes of African-Americans as poor and uneducated.

In fact, many pioneering hip-hop artists came from educated, middle and upper-middle class backgrounds.²¹⁴ In addition, the belief that sampling first emerged as a cheaper and easier alternative to traditional music-making is more myth than fact. Hip-hop DJing may have originated in the housing projects of the Bronx, but the turntables, mixers, amplifiers and record collections of hip-hop DJs were *not* affordable, everyday items: they were the specialized (and expensive) tools of professional entertainers.²¹⁵ Digital sampling was introduced into popular music by established, professional music producers and not by a grassroots artistic movement.²¹⁶ Digital sampling equipment, like any other cutting-edge technology, was extremely expensive and difficult to use when it first appeared. The pioneering Fairlight sampling synthesizers originally cost between

²¹³ *See, e.g.*, LESSIG, THE FUTURE OF IDEAS 270 n.10; FISHER, *supra* note ---, at 30.

²¹⁴ Run DMC, LL Cool J and Russell Simmons, co-founder of the influential Def Jam label, are from middle-class neighborhoods in Queens, New York. CHANG at 231. The members of Public Enemy, De La Soul, and Rick Rubin, co-founder of Def Jam, are from prosperous parts of Long Island; some of the members of Public Enemy met as college students. *Id.* Note also that important hip-hop pioneers such as the Beastie Boys, Rick Rubin and Steve Stein were not black.

²¹⁵ *See* CHANG at 68-69 (describing the extensive equipment used by Kool Herc and his father, Keith Campbell, the sound engineer for a rhythm-and-blues band). *See also* LLOYD BRADLEY, BASS CULTURE 36-37; 141-142 (2004) (arguing that the importance of amplification technology to Jamaican DJs influenced hip-hop through Jamaican immigrants like the Campbells).

²¹⁶ Digital sampling appears to have been introduced into commercially recorded pop music in 1983 when the British record producer Trevor Horn produced the song “Beat Box” for The Art of Noise. Horn was formerly a member of the 1970s rock groups the Buggles and Yes. *See* SIMON REYNOLDS, RIP IT UP AND START AGAIN. “Beat Box,” which was built around a sampled and looped drum break, influenced hip-hop when it became a favorite of break dancers. *Id.* The first use of digital sampling in a rap record appears to have been Marley Marl’s production of MC Shan’s “The Bridge” in 1986. *See* CHANG, *supra* note ---, at 256.

\$50,000 and \$100,000.²¹⁷ Even today, a professional-quality digital sampler and the computer equipment required to manipulate samples can cost thousands of dollars. Sampling may have expanded the toolbox of music professionals, but it did not necessarily make musicianship more broadly accessible. The suggestion that music-making was closed to the poor or untrained until the advent of digital technology is an odd one—whether garage rockers or “folk” musicians, untrained musicians have always made compelling music with inexpensive or homemade instruments.

Whatever its benefits in terms of efficient production, reducing the cost of appropriation could have negative distributional effects in terms of both wealth and semiotic influence, as it would subsidize wealthy and powerful artists and record labels as well as the less influential. Rosemary Coombe argued that recoding requires protection because it implicates the “quintessentially human...capacity to make meaning, challenge meaning, and transform meaning.”²¹⁸ But when a multinational corporation recodes the work of a relatively powerless individual, recoding can pose a threat to human self-realization.²¹⁹

Although hip-hop music and sampling also continue to exist in independent, less commercial forms, commercially successful music is more likely to appear as the subject of litigation or legislative reform because it implicates large amounts of money. Commercially successful recordings embody a contradiction in that they offer artists a platform for semiotic influence, but ultimately increase the semiotic influence (and wealth) of record companies (which, in the case of the most successful recordings, tend to

²¹⁷ See Fairlight Instruments website, <http://www.fairlightinstruments.com/history.html> (last visited January 29, 2011). See also CHANG at 256 (describing early Fairlights as “prohibitively expensive”).

²¹⁸ Coombe, *supra* note ---, at 1864.

²¹⁹ *Id.*

be multinationals). The pioneering DJ Afrika Bambaataa claims to have turned away inquiries from record labels for some time before eventually becoming a recording artist, because he feared recordings would reduce attendance at his successful live shows—that is, that they would transfer wealth from him to a record label.²²⁰ Subsidizing recoding can exacerbate this regressive redistribution of wealth. As the Sixth Circuit noted in *Bridgeport*, samples are valuable to music producers because they offer a way to obtain the sound of a musician without employing any musicians.²²¹ In this way, sampling shares much in common with automated production methods in other industries.

“Rapper’s Delight” embodies the contradictions of commercially successful hip-hop records. On the one hand, it was the debut of a group of unknown performers, released by a small, black-owned, independent record label, and gave hip-hop music its first worldwide exposure. On the other hand, it can be blamed for transforming a participatory underground cultural movement into a watered-down and passively consumed commercial product. Even in its day, the record was derided by many hip-hop artists and fans as a weak commercial imitation of hip-hop culture.²²² At the time, live hip-hop was well established in the Bronx and in the downtown Manhattan art scene. Many hip-hoppers thought the very idea of recordings absurd, however, because hip-hop was not a type of music so much as an interactive live experience.²²³ The owner of Sugarhill Records, Sylvia Robinson, assembled the Sugarhill Gang for the express purpose of capitalizing on the genre. Robinson “was not exactly attuned to the Bronx-

²²⁰ See Steven Daly, *Hip-Hop Happens*, VANITY FAIR 263, November 2005.

²²¹ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801-02 & n.14 (6th Cir. 2005).

²²² See CHANG, , *supra* note ---, at 129-35; Daly, *supra* note ---.

²²³ See *id.* at 130 (quoting Chuck D), 132 (quoting filmmaker Charlie Ahearn).

centered hip-hop subculture.... ‘I didn't know no Bronx people,’ Sylvia admits.’²²⁴

Thus she manufactured a group, one of whose members was Hank Jackson, a pizza parlor employee who, unbeknownst to Robinson, happened to manage an established (but unrecorded) hip-hop group called the Cold Crush Brothers.²²⁵ Jackson plagiarized some of the lyrics on “Rapper’s Delight” from raps written by Grandmaster Caz, one of the Cold Crush Brothers.²²⁶

Similar contradictions arise from the fact that sampling in hip-hop often involves established musicians and multinational record labels appropriating the work of less popular and powerful artists.²²⁷ Funkadelic, the group whose work was sampled by NWA in *Bridgeport v. Dimension Films*,²²⁸ enjoyed far less commercial success than either NWA or Dimension Films, the studio that used the NWA song in a film.²²⁹ In *Newton v. Diamond*,²³⁰ the Beastie Boys used a sample without the permission of composer James Newton. While Newton is an established and respected musician, his cultural influence cannot compare to that of a major pop group like the Beastie Boys and their multinational record label. Given the tendency to essentialize hip-hop as an African-American form, it also bears mentioning that the Beastie Boys are white and James Newton is African American. The work of drummer Clyde Stubblefield (particularly on the James Brown song, “Funky Drummer”) is sampled ubiquitously in hip-hop and other

²²⁴ See Daly, *supra* note ---.

²²⁵ *Id.*

²²⁶ See *id.*

²²⁷ Similarly, some major rock stars and record labels plagiarized from relatively obscure blues artists, who sued and obtained favorable settlements. See, e.g., Dave Lewis, *The Complete Guide to the Music of Led Zeppelin* (1994); Michael Goldberg, “Willie Dixon Sues Led Zeppelin over ‘Whole Lotta Love’,” *Rolling Stone* (March 14, 1985), p. 12. Although some commentators argue that blues music is communally authored and antithetical to IP ownership, see VAIDHYANATHAN, *supra* note ---, at 117-126, these blues artists asserted their IP rights to claim authorship and fight back against economic exploitation.

²²⁸ 410 F. 3d 792 (2005).

²²⁹ The film, “I Got the Hookup,” cost an estimated \$3.5 million to make and grossed over \$10 million at the box office. See <http://www.imdb.com/title/tt0131436/business>.

²³⁰ 204 F.Supp.2d 1244 (C.D. Cal. 2002).

popular music, yet he does not receive royalties.²³¹ Similarly, the “Amen Break,” a drum passage from an obscure funk record has been heavily sampled in hip-hop and in “drum and bass” dance music.²³² Neither the original artists nor their record label appear to have received any royalties from that lucrative sample.²³³

The potential harm of compulsory licensing goes beyond regressive economic redistribution. It can also subsidize efforts of the semiotically influential to seize control over and subvert semiotic projects of the less powerful. At the time of *Grand Upright*, Biz Markie’s work was distributed by Warner Brothers, while Gilbert O’Sullivan had not had a hit record in years. O’Sullivan testified that he did not want Biz Markie to use “Alone Again (Naturally)” because Biz Markie has a reputation as a comic performer.²³⁴ Despite a deceptively pretty pop melody, the O’Sullivan song’s lyrics are grim, written from the point of view of a man contemplating suicide.²³⁵ O’Sullivan stated that he is extremely protective of the song’s serious content, and has refused to license it for any humorous uses, or even for karaoke.²³⁶

Chuck D, the Public Enemy rapper who has complained about having to pay for sample clearances,²³⁷ has himself filed two copyright-infringement suits on the recoding of his work. His voice was sampled in a St. Ides malt liquor commercial and in a rap

²³¹ See, e.g., Rob Thomas, *Is Sampling an Art Form or “Incredibly Lazy” Theft?* CAPITAL TIMES (Madison, WI), Jan, 28, 2010, at 15.

²³² See Nathan Harrison, *Can I Get an Amen?* (sound recording from audio installation, dated 2004) available on Nate Harrison website at http://nkhstudio.com/pages/popup_amen.html (last visited Feb. 2, 2011).

²³³ *Id.*

²³⁴ Hearing Transcript, *Grand Upright Music v. Warner Bros. Records*, November 25, 1991, at 20.

²³⁵ The lyrics include such lines as “God in his mercy, who if he really does exist/why did he desert me in my hour of need?” The song ends by describing the deaths of the narrator’s parents.

²³⁶ See Hearing Transcript, *Grand Upright Music v. Warner Bros. Records*, November 25, 1991, at 20.

²³⁷ See *supra* at ---.

song by the Notorious B.I.G. that allegedly glorified drug dealing.²³⁸ At the time of the suit in the late 1990s, Public Enemy’s commercial and cultural influence had significantly declined, while B.I.G., although recently deceased, was a major rap star. Chuck D complained that the uses were both infringing and defamatory because they associated his voice with inner-city scourges that he has specifically criticized in his music.²³⁹ In particular, the song about drug dealing sampled a song that Chuck D claimed was actually “about empowering young black persons through peaceful, non-violent and non-drug using means.”²⁴⁰

Rock music provides a related example. While campaigning for re-election in 1984, Ronald Reagan claimed to admire Bruce Springsteen’s music for its “message of hope.”²⁴¹ That appeared to be a reference to Springsteen’s song, “Born in the USA.”²⁴² The song is often misinterpreted as a patriotic, or even jingoistic anthem, although its lyrics are actually about the indignities suffered by a Vietnam veteran in a declining and unsympathetic America.²⁴³ In response to Reagan’s comments, Springsteen questioned whether the President had actually listened to his music.²⁴⁴ Nonetheless, Reagan’s campaign reportedly asked Springsteen to provide an endorsement; Springsteen declined.²⁴⁵ The campaign also reportedly asked the same of Michael Jackson, who also declined, citing conflicts with his religious beliefs as a Jehovah’s Witness.²⁴⁶ Under a compulsory licensing regime, Reagan could have used “Born in the U.S.A.” or a Michael Jackson

²³⁸ See Reiss, *supra* note ---.

²³⁹ See *id.*

²⁴⁰ *Id.*

²⁴¹ Francis X. Clines, *President Heaps Praise on Voters in the Northeast*, NY TIMES, Sept. 20, 1984.

²⁴² Jim Miller, *Pop and Jazz*, NEWSWEEK, December 17, 1984 at 93.

²⁴³ *Id.*

²⁴⁴ See *Reagan's New Hero*, THE NATIONAL JOURNAL, September 29, 1984 vol. 16 at 1807.

²⁴⁵ *Rock Stars Reject GOP's Overtures*, ADWEEK, October 29, 1984.

²⁴⁶ *Id.*

song without permission. The minority political and religious views of these artists could have been replaced by associations with Reagan and Reaganism. The hypothetical compulsory licensing scenario becomes even more disturbing if we imagine a president who perceived the dark theme of Springsteen's song as politically threatening, and appropriated it specifically in order to "recode" it as a "message of hope."

Compulsory licensing for uses such as those cited here could obviously facilitate expression.²⁴⁷ Because it would empower the culturally influential, however, it would not necessarily increase semiotic democracy. I do not mean here to assert an artist's "moral right" to control her message. Individual listeners are, and should be, free to reinterpret "Born in the U.S.A." in any number of ways, including as a "message of hope." Indeed, many, if not most, listeners seem to have done so, and have succeeded in changing the cultural meaning of the song.²⁴⁸ Similarly, they could choose to hear the plaintive "Alone Again (Naturally)" as a wistful rumination on loneliness. These could be seen as examples of resisting and remaking messages produced by the media industry.

But subsidizing recoding by major record labels, incumbent politicians, and similarly influential parties would help those powerful interests reinterpret, and even "drown out" a less powerful artist's attempt to make meaning.²⁴⁹ Formally equal

²⁴⁷ See, e.g., Kurt Opsahl, *Henley v. Devore: Second-Class Citizenship for Satire?* <http://www.eff.org/deeplinks/2010/06/henley-v-devore-second-class-citizenship-satire>.

²⁴⁸ Radio personality Glenn Beck, for example, did not discover the song's intended meaning until 2010, when he denounced the song on the air. Jason Linkins, *Glenn Beck Finally Get Around to Denouncing Bruce Springsteen*, HUFFINGTON POST, March 12, 2010, available at http://www.huffingtonpost.com/2010/03/12/glenn-beck-finally-gets-a_n_497360.html.

²⁴⁹ See Madow, *supra* note ---, at 240 (citing JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* (1991)).

Woods v. Universal City Studios, 920 F. Supp. 62 (1996), is another example of this process. In that case an architecture theorist successfully sued a movie studio for a film set that closely copied his copyrighted drawing. "Free culture" advocates have ridiculed the decision as an example of copyright excess and a threat to semiotic democracy, see LESSIG, *THE FUTURE OF IDEAS* at 4; VAIDHYANATHAN, *supra* note ---, at 115, although the plaintiff was a relatively obscure academic and the defendant was a major movie studio that had admittedly copied his work.

opportunity to engage in recoding is unlikely to result in the equalization of semiotic influence. As Stuart Hall argued, dominant cultural institutions may lack the power to brainwash the public, but they influence cultural meanings by selecting and repeating the representations that the public sees.²⁵⁰ The metaphor of alternative meanings competing in a “marketplace of ideas” is inapposite.²⁵¹ Concentration of market share and resources create a situation ripe for market failure, as well as anticompetitive behavior. The contestation of meanings would hardly be a fair competition, or even a meaningful dialogue.

Consider, for example, the *Grey Album*. Even if IP law had protected Danger Mouse against EMI’s pressure to withdraw the album, he never stood a serious chance of contesting the cultural meaning of the Beatles’ “White Album” or Jay Z’s “Black Album.” The Beatles and Jay-Z enjoy the promotional resources, brand recognition, and distributional reach of multinational record companies, which gives them visibility in physical retail outlets, online stores, and traditional media such as radio and television that most independent releases lack.

New, “free” markets are no solution to concentration in existing markets. Many students of cyberspace believe that because the Internet facilitates low-cost worldwide distribution, content providers now compete on equal footing.²⁵² But traditional distribution and marketing channels, such as radio, concerts, television, movies, and the

²⁵⁰ See Hall, *supra* note ---, at 232- 233 (dominant cultural institutions “have the power ... by repetition and selection, to impose and implant such definitions of ourselves as fit more easily the descriptions of the dominant or preferred culture.”).

²⁵¹ Cf. Jerome A. Barron, Access to the Press - A New First Amendment Right, 80 Harv. L. Rev. 1641, 1641 (1967) (“if ever there were a self-operating marketplace of ideas, it has long ceased to exist. The mass media’s development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum.”).

²⁵² See LESSIG, THE FUTURE OF IDEAS at 119. Thanks to the Internet, Lessig argues, “the success of any particular kind of content is more convincingly a function of the desire for that content.” *Id.*

distribution of CDs in physical stores, remain important,²⁵³ and all of them are dominated by a relatively few multinational corporations. These sectors have high barriers to entry and immense concentration. Following several rounds of consolidation, sales of recorded music are dominated by four multinational corporations, Sony/BMG, Universal, Warner, and EMI.²⁵⁴ CC Media Holdings, through its Clear Channel Radio subsidiary, owns over 150 U.S. radio stations, 140 radio stations in Australia and New Zealand, and Premiere Radio, the largest radio network in the U.S.²⁵⁵ Online music service Pandora reaches about 13 to 20 million listeners per month—but traditional radio reaches about 100 times as many.²⁵⁶ Live performance, perhaps the most profitable aspect of the music industry, is now dominated by a single corporation, thanks to the 2009 merger of Live Nation, the world's largest concert promoter and venue operator, and Ticketmaster, which dominates both artist-management and ticket sales.²⁵⁷

Formal equality can do little to reduce the concentration of cultural power unless this real-space oligopoly is addressed, whether by antitrust law,²⁵⁸ technological innovations, or structural changes.²⁵⁹ The Internet is no panacea, because powerful members of the culture industry can import their greater resources and other real-space

²⁵³ See John Pareles, *Songs From the Heart Of a Marketing Plan*, N.Y. TIMES, December 28, 2008.

²⁵⁴ Eric Pfanner, *For New Revenue, Sony and Other Labels Reach Far Beyond The Music Business*, NY TIMES July 5, 2010 at B5. The constant threat of corporate takeover may also limit companies' willingness to take risks with new music or the development of new artists. Mike Wiser, *Frequently Asked Questions*, PBS Frontline Website, <http://www.pbs.org/wgbh/pages/frontline/shows/music/inside/faqs.html>; see also Andre Schiffrin, *When We Devoured Books*, in CONSUMING DESIRES 111 (Roger Rosenblatt, ed., 1999) (asserting a similar effect due to consolidation in the book-publishing industry).

²⁵⁵ See Clear Channel website, <http://www.clearchannel.com/>.

²⁵⁶ See Antony Bruno, *Pandora: Thinking Outside the Box*, BILLBOARD, July 17, 2010.

²⁵⁷ See Ray Waddell, *Building the Perfect Beast*, BILLBOARD, February 6, 2010.

²⁵⁸ Lessig, however, rejects a direct, antitrust-based response to media concentration. LESSIG, THE FUTURE OF IDEAS, *supra note* ---, at 110, 118.

²⁵⁹ TV, radio, and the like may eventually become outmoded, reducing the media oligopoly's advantages, though this is unlikely in the foreseeable future. Moreover, by that time, media companies may have successfully leveraged their current advantages into dominant positions in cyberspace.

advantages into cyberspace. Public Enemy encountered this reality after it abandoned its record-label contract in the 1990s and began selling its music directly over the Internet. According to Chuck D, the group has had to seek new methods of generating revenue because “we recognized the majors and corporate gluttons would slowly pour into the digital territory and try to dominate with analog tactics.”²⁶⁰ Although many theorists portray formally equal, free access as an inherent aspect of the Internet, access to the Internet is in fact subject to private gatekeepers such as commercial Internet service providers (ISPs), search engines, and others.²⁶¹ As in real space, money buys superior access, and thus equality on the Internet seems dependent on regulation. A federal appeals court recently ruled, however, that the FCC lacks jurisdiction to require ISPs to observe “net neutrality,”²⁶² and Congress has so far been unable to pass legislation on the matter.

Of course, copyright protection can in theory impede some semiotically disempowered persons’ attempts to exercise semiotic power. In the examples above, however, it did not. These anecdotes do not prove that copyright protection is (or is not) good for semiotic democracy. But they do show that it can have both positive and negative effects such that its net effect is unknown—and probably unknowable. There is a fundamental tension between offering *formally* equal opportunity of (or subsidy of) expression and *actually* broadening the range of people who engage in meaningful semiotic participation. I take no position on whether strong, formally equal opportunity

²⁶⁰ Gail Mitchell, *Public Enemy: Q&A with Chuck D*, BILLBOARD, March 20, 2010.

²⁶¹ See, e.g., Christopher Yoo, *Free Speech and the Myth of the Internet as an Unmediated Experience*, 78 GEO. WASH. L. REV. 697 (2010).

²⁶² See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). “Net neutrality means simply that all like Internet content must be treated alike and move at the same speed over the network.” Lawrence Lessig & Robert W. McChesney, *No Tolls on the Internet*, WASH. POST, June 8, 2006, at A23.

to speak should take categorical precedence over broadening actual participation. But it is critical to recognize that these are different policy concerns—indeed, different conceptions of “democracy.”

4. Recoding as Both Resistance *and* Capitulation

As the preceding discussion shows, a formally equal regime that is permissive of recoding can end up subsidizing the semiotically powerful as well as the weak, so its net effect on semiotic democracy is unclear. One response to this problem might be an asymmetrical regime that subsidizes appropriation by the semiotically disempowered from the semiotically powerful, but not vice versa. The important work of Madhavi Sunder and Anupam Chander suggests such an approach: for example, they are advocates of “fan fiction,” amateur works that recode characters and scenarios from television and movies,²⁶³ but criticize the appropriation of indigenous cultural knowledge by multinational corporations.²⁶⁴ An asymmetrical approach might allow independent musicians to sample from major-label recordings but not vice versa.

While asymmetrical access to intellectual property may address issues of wealth distribution, however, it would not necessarily advance semiotic democracy, and might even retard it. In his seminal work on the right of publicity, Michael Madow argued that the law must choose between strict protection of celebrity images and other intellectual property, which will “strengthen the already potent grip of the culture industries over the

²⁶³ See Anupam Chander and Madhavi Sunder, *Everyone’s a Superhero*, 95 CALIF. L. REV. 597 (2007).

²⁶⁴ See Anupam Chander and Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004).

In a forthcoming article, Sunder suggests that the existing IP regime exhibits an unfair reverse asymmetry: Hollywood studios seek legal action against intellectual-property “piracy” in Asia, yet Hollywood appropriates from Asian film and television with impunity. See Madhavi Sunder, *Bollywood/Hollywood* (forthcoming).

production and circulation of meaning,” and a more permissive approach, which will “facilitate popular participation, including participation by subordinate and marginalized groups, in the processes by which meaning is made and communicated.”²⁶⁵ The reality is probably considerably more complicated, however. Subsidizing the semiotically weak in their use of the cultural commodities of the semiotically powerful may transfer *wealth* from the strong to the weak, at least in the short term. Regardless of its immediate economic effects, however, such borrowing may contribute to the *semiotic* dominance of the strong. Recoding can express resistance and thereby create new meanings, but at the very same time, the act of appropriating dominant cultural properties (even in order to critique them) acknowledges their cultural authority and can even further it.

The argument that recoding, even critical recoding, can contribute to media domination does not depend on the Frankfurt School thesis that the media audience is entirely manipulated. Individuals often make choices that are rational in isolation, but which generate negative externalities that cumulate into socially negative results. Classic examples of this dynamic are traffic jams, pollution, and bank runs, in which individuals’ rational, self-interested choices combine to the ultimate detriment of nearly all the individuals involved.²⁶⁶ Similarly, even assuming that individuals freely choose to engage in isolated acts of recoding, the prevalence of recoding in the culture can result in reinforcing dominant cultural institutions.

Many commentators who believe the law should facilitate recoding argue that it is a form of “collaborative” authorship.²⁶⁷ By its very terms, this argument acknowledges

²⁶⁵ Madow, *supra* note ---at 141-42.

²⁶⁶ See, e.g., Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes*, 75 IND. L. J. 1231, 1243-45 (2000).

²⁶⁷ Aoki, *supra* note ---, at 814.

that both the recoder *and* the author of the source material participate in the creation of the new work. Intellectual property theorists in the legal academy uniformly see this glass as half full, but it is also half empty. Even the most active engagements with texts, such as the production of innovative derivative works, involve at least *some* ceding of the meaning-making function to the author of the source work. By definition, a recoder creates some new elements, but also chooses not to create others. Pioneering hip-hop DJs like Afrika Bambaataa, for example, were recognized for their eclectic combinations of unusual and obscure records.²⁶⁸ But even the most creative DJ or sampler cedes some of the meaning-making function to the creators of the records he plays or samples. The active, meaning-making aspect of recoding is often overstated. As Foster said of “postmodern” appropriation in the visual arts some 25 years ago, “Many artists borrow promiscuously from both historical and modern art. But these references rarely engage the source—let alone the present—deeply.”²⁶⁹

Appropriation for the purpose of engaging and critique the source presents a special justification for compulsory licensing, since a property rule could retard semiotic democracy by stifling dissent. Existing doctrine accounts for this to some extent: the Supreme Court has held that parody of the original militates in favor of a fair use defense.²⁷⁰ More recent decisions, however, seem to expand fair use significantly beyond recordings that engage and challenge their source material. For example, a recent district court decision found fair use in a rap song that “highlights the contrast between the two worldviews [of the source and of the rapper] and expresses the rapper's belief in the

²⁶⁸ See Daly, *supra* note ---.

²⁶⁹ FOSTER, *supra* note ---, at 16. Cf. Hughes, *supra* note ---, at 946-47 (“it is important to understand better what constitutes recoding because it is possible that there actually is little recoding going on”).

²⁷⁰ See *Campbell v. Acuff-Rose Music*, 510 U.S.569, 579 (2004).

realism of his own perspective.”²⁷¹ The song in question adapted the song “What a Wonderful World” by altering the lyrics to celebrate marijuana use.²⁷² Even more recently, the Second Circuit has stated that fair use protection may extend to works that “satirize life.”²⁷³

When recoding does challenge and critique its source, it may empower the recoder on one level, but it can simultaneously *disempower* her on another level. John Fiske argued that television’s semiotic plasticity gives the disempowered the “pleasure” of engaging in resistance to power through recoding,²⁷⁴ but acknowledged that “[t]he resistive readings and pleasures of television do not translate directly into oppositional politics or social action.”²⁷⁵ Indeed, the pleasure of recoding can, like bread and circuses, mask the pain of subordination and diminish the incentive for material change. For example, using sampling to deconstruct and critique a pop record may express frustration with the record industry, but this pleasurable activity is a poor substitute for material reform of semiotic democracy, such as reducing the overconcentration of the industry.

²⁷¹ *Abilene Music, Inc. v. Sony Music Ent., Inc.*, 320 F. Supp. 2d 84, 89-92 (2003); *see also* *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009)(following *Abilene*).

Unfortunately, fair use remains a loosely defined, equitable balancing doctrine, and establishing it in court is costly. When the musical group Negativland and its record label, SST, were sued for sampling a U2 song, . Negativland insisted that its sample constituted fair use. SST and Negativland, however could not pay the costs of defending against a lawsuit. *See* NEGATIVLAND, *supra* note ---, at 21, 24 (reprinting Negativland press release dated November 10, 1991). Blanket protection for recoding seems an excessive response to the cost of copyright litigation, however; after all, that cost is endemic to our legal system and not particular to copyright. As in other areas of law, the cost of litigation is addressed in limited part by *pro bono* organizations, such as the Electronic Frontier Foundation, the Stanford Law School Center for Internet and Society, and cyberlaw clinics at law schools.

²⁷² *Id.*

²⁷³ *See* *Blanch v. Koons*, 467 F. 3d 244, 255 (2d Cir. 2006) (holding that “the broad principles of *Campbell* are not limited to cases involving parody”); *see also* *EMI Records Limited v Premise Media Corp. L.P.*, 2008 NY Slip Op 33157U (Sup. Ct. N.Y. 2008)(unpublished opinion)(citing *Blanch* and finding fair use in the use of John Lennon’s song “Imagine” to criticize anti-religious sentiment generally).

²⁷⁴ *See* FISKE, *supra* note ---, at 19.

²⁷⁵ *Id.* at 326. Fiske did believe, however, that resistive readings could *indirectly* contribute to political change by fostering ideological diversity. *Id.*

Cultural products are not empty vessels that can be filled with any preferred meaning. Any source has a range of possible meanings—but not an *infinite* range.²⁷⁶ Just as irony is often lost on its audience, a critical recoding may be mistaken for an endorsement or homage. The audience may even “re-recode” it to restore the source’s conventional meaning. As noted above, Bruce Springsteen tried to give the phrase “Born in the USA” a layered and ironic meaning; many of his listeners insisted on hearing it in a more conventional sense, despite the actual lyrics of the song

Similarly, recoding cultural products such as copyrighted commercial music faces intractable meanings. One of those meanings is the very centrality of the media as a topic of concern. The very act of manipulating and commenting on the media, even to criticize it, acts out and furthers its cultural importance.²⁷⁷ Insisting that we *need* corporate-created cultural commodities to express ourselves not only concedes that those commodities dominate our culture, but also, and moreover, further contributes to that domination. This turns John Fiske’s vision of semiotic democracy on its head: while Fiske saw television as liberating because it *lacked* cultural authority, today’s advocates of “free culture”

²⁷⁶ As Stuart Hall argued, the members of the culture industry “do have the power constantly to rework and reshape what they represent, and by repetition and selection, to impose and implant such definitions of ourselves as fit more easily the descriptions of the dominant or preferred culture.” See Hall, *supra* note ---, at 232- 233.

Cf. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 at 106 (arguing that a legal theory in any given historical context carries “legal and intellectual baggage” that constrains its range of possible meanings).

²⁷⁷ Negativland, *see supra* note ---, which satirizes the media through the manipulation of samples, has been accused of falling into this trap. When Negativland and its label, SST, were sued for unauthorized sampling, the label and the group had an acrimonious falling out. Greg Ginn, the head of SST, argued that Negativland failed to appreciate the real material impact of the suit and failed to cooperate with SST’s lawyers. Ginn accused them of treating the incident like another media-based “joke” and called Negativland “victims of the media cocoon that they frequently lampoon. I suggest Negativland take a year or two off from their ... media obsessions...to see how the other side lives.” See NEGATIVLAND, FAIR USE: THE STORY OF THE LETTER U AND THE NUMERAL 2, at 50-52 (1995) (reprinting SST press release dated Feb. 3, 1992).

argue that cultural appropriation borrowing is necessary precisely *because of* commercial pop culture's cultural authority.²⁷⁸

Recoding popular music can also perpetuate pop music's inherently commercial, consumerist message; recoding pop music into new pop music doubles the effect. Regardless of the artist's intended meaning, the commercial nature of pop music inherently encourages the audience: consume more, because consumption will make you happy.²⁷⁹ As Fredric Jameson put it, "the commodity is its own ideology: the practices of consumption and consumerism, on that view, themselves are enough to reproduce and legitimate the system, no matter what 'ideology' you happen to be committed to."²⁸⁰ As Hal Foster argued, even devising alternative meanings for commodities simply furthers consumerism, because consumers value the appearance of choice and difference;²⁸¹ recoding the Beatles as hip-hop music, for example, only broadens their considerable commercial appeal (and thus their cultural influence). Hip-hop artist KRS-One has said, "Rap music is something we do, but hip-hop is something you live."²⁸² For most people, however, both rap and hip-hop (and rock, jazz and classical music) are primarily things they buy.

The means, like the content, of sampling can also implicate both autonomy and domination. Like commercial pop hits, the very technology of digital sampling consists

²⁷⁸ When asked by a copyright owner's lawyer why he did not create original characters and scenarios, one fan fiction author replied that "an original work would not have the kind of community fan fiction automatically creates between reader and writer." Quoted in Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L.J.* 651, 654 (1997).

²⁷⁹ Cf. BEN WATSON, *LIVING THROUGH POP* 86 (arguing that positive record reviews "are in effect calls to earn money: to *work harder*.")

²⁸⁰ Fredric Jameson, *Architecture and the Critique of Ideology*, in *THE IDEOLOGIES OF THEORY; ESSAYS, 1971-1986* v. 2: *SYNTAX OF HISTORY* 54 (1988). Jameson attributes the phrase "the commodity is its own ideology" to Theodor Adorno. *Id.*

²⁸¹ FOSTER, *supra* note --, at 171.

²⁸² KRS-One, *Hip-Hop Knowledge*, on *THE SNEAK ATTACK* (Koch Records 2001).

of commodities sold by corporations. Moreover, sampling is not just a method of individual expression through recoding, but also the method by which much commercial pop music is produced. Digital sampling became a relatively affordable and user-friendly “democratic” technology only *after* it transformed from a tool for innovative (and elite) cultural practice into a common method of producing commercial music. A similar analysis may apply to technology more generally: the forces that make technological advances affordable and accessible are the same forces that transform them from subversive innovations into commonplace commodities.

I do not mean to suggest that recoding is necessarily less creative than reiterative. I mean only to emphasize that it can *both* create new meanings *and* promulgate the ideas of the culture industries—and thus simultaneously advance and retard semiotic democracy. Intellectual-property theorists posit hip-hop and particularly its use of sampling as an ideal example of an oppositional practice: one that is free and genuine, in contrast to conformist, manufactured commercial culture. As Stuart Hall argues, however, “there is *no* whole, authentic, autonomous ‘popular culture’ which lies outside the field of force of the relations of cultural power and domination. . . . The danger arises because we tend to think of cultural forms as whole and coherent: either wholly corrupt or wholly authentic.”²⁸³ Cultural practice is internally conflicted; it embodies a constant “dialectic of cultural struggle” between domination by the culture industries and resistance by the mass audience.²⁸⁴

²⁸³ Hall, *supra* note ---, at 232-33.

²⁸⁴ *See id.* at 233.

“Free culture” commentators take an extreme opposite view, and consider commercial music, television, movies, and the like to be “our culture.”²⁸⁵ In some very important senses they are “ours.” We as audience members make some contribution to making their meanings. Furthermore, for better or worse, they provide many (if not most) of the shared aesthetic experiences and ideas that help constitute us as individuals and communities. But they are also commodities like fast food, sneakers, or appliances, produced by multinational corporations and marketed to us primarily to generate corporate profits. It is true that we use copyrighted material, such as musical recordings, books, and TV to realize and define ourselves.²⁸⁶ However, that argument only tells us why intellectual property has a significant influence; it does not begin to address whether that influence is a good thing. Nor does it explain why our consumption of intellectual property should be subsidized when so many other things with comparable influence are not, such as homes, clothing or automobiles.

Lawrence Lessig maintains that the “free” in “free culture” is more like “free speech” than “free beer.”²⁸⁷ But although reducing IP protections would facilitate expression in some ways, it would do so in large part by reducing the prices of commodities like music and movies. Free culture is like free beer in this sense. Giving away some beer for free transfers wealth to drinkers in the short run, but in the long run it may increase the demand for beer, to the benefit of sellers and at the expense of drinkers and of society as a whole. Similarly, free culture involves subsidizing commodities for the short-term benefit of individuals as consumers, but it may act in the longer term as a

²⁸⁵ LESSIG, THE FUTURE OF IDEAS 9 (quoting with approval the Apple advertising slogan, “Rip. Mix. Burn. After all, it’s your music.”)

²⁸⁶ See Aoki, *supra* note – at 805.

²⁸⁷ LESSIG, FREE CULTURE *supra* note ---, at *xiv*. (citing Richard Stallman, *Free Software, Free Societies* 57 (Joshua Gay, ed., 2002).

transfer of both cultural power and wealth to sellers at the expense of the audience and of society generally. Thus a legal regime that limits consumption through prices may in fact be salutary.²⁸⁸

Because media culture is a product we consume rather than make (at least not entirely), it is not entirely “our” culture. The problem is not an aesthetic one: many commercial cultural products are of excellent artistic quality (and much “independently” produced culture is not). Rather, the problem is one of political power: even as we participate in creating meaning on some level, we simultaneously delegate some of the meaning-making function to professionals—that is, we choose to buy (or appropriate) meaning rather than make it.

Recoding not only fails to completely reject the dominant discourse, but can also serve to *reinforce* the dominance of the culture industry’s discourse by adopting and further disseminating it. Indeed, it can even serve to help market it.

Some free-culture advocates profess concern about the semiotic dominance of the culture industry, and yet they laud recoding for increasing the industry’s revenues and cultural influence.²⁸⁹ One commentator defends sampling on the ground that it can “revive the market for an all-but-forgotten song or artist.”²⁹⁰ Similarly, some copyright commentators defend unauthorized filesharing of copyrighted music on the ground that

²⁸⁸ *But see* Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010) (criticizing IP law on the ground that it raises prices and thus restricts consumption of certain goods).

²⁸⁹ Similarly, many free-culture advocates believe “fan fiction” furthers semiotic democracy. *See, e.g.,* Coombe, *supra* note ---, at 1877; Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, (1997); Chander and Sunder, *Everyone’s a Superhero*, *supra* note---. They do not consider that fan fiction may ill-serve SD by “keep[ing] its consumers excited about the official shows, receptive to other merchandise, and loyal to their beloved characters.” Tushnet, *supra*, at 669. Paramount Pictures takes a permissive stance toward “Star Trek” fan fiction for these very reasons. *Id.*

²⁹⁰ VAIDHYANATHAN 144.

illegal downloads expose listeners to new music and thus have a positive marketing effect.²⁹¹

As noted above, “Rapper’s Delight,” released in 1979, is rapped almost entirely over a note-for-note imitation of Chic’s “Good Times,” one of that year’s most popular songs. “Rapper’s Delight” gave increased exposure to an already dominant cultural trope in pop music at the time. It further cemented the “Good Times” melody in the public consciousness. Imani Coppola (who once had a sample-based hit song) argues that record companies encourage sampling in order to squeeze new forms of revenue out of songs with proven market power. “It’s just a money-making scheme for record companies who are like, ‘If they loved it once before, they’re gonna love it again.’”²⁹²

While *The Grey Album* recoded Jay-Z and Beatles albums, it simultaneously testified to their cultural importance and gave them additional exposure. It also made the older music of the Beatles relevant and appealing to younger audiences. Similarly, the mashup music of Girl Talk (ironically, one of the few sample-based musicians to expressly invoke fair-use doctrine) derives its appeal precisely from the familiarity of well-known songs. Gillis himself has said, “I always wanted to use recognizable elements and play with people’s emotional, nostalgic connections with these songs.”²⁹³ By deriving its appeal from the appeal of these existing songs, his work exploits, confirms, and perpetuates their cultural influence.

Certain mashups, including *The Grey Album*, present the tension between autonomy and domination even more starkly in that they not only give exposure to established music, but directly act out the promotional strategy of the culture industry.

²⁹¹ See, e.g., LESSIG, FREE CULTURE 68-71.

²⁹² Christensen, *supra* note ---.

²⁹³ Dorian Lynskey, *A little bit of this, a little bit of that*, THE GUARDIAN, Oct. 24, 2008.

While the sampling of the Beatles' music was unauthorized, Jay-Z himself freely provided the vocal tracks. When he released *The Black Album* in 2003, Jay-Z (and his record company) also released *The Black Album: Acappella* (sic) a vocal-only version of the album, and invited anyone to "remix the sh-t out of it."²⁹⁴ Releasing a *cappella* versions and other remix-ready recordings has become a popular promotional tool, because "the labels making these records want to make it as easy as possible for deejays to remix their songs. (Remixes lead to more plays on the dance floor, which could lead to more popularity and more sales.)"²⁹⁵ *The Grey Album* (and other remixes that use authorized recordings) are sometimes portrayed as subversive of established artists and record companies, but in fact they are much more conflicted.

The EMI record label had objected to *The Grey Album*, but it soon followed Jay-Z and took the recoding-as-marketing concept to its logical extreme. Purchasers of Lily Allen's 2008 EMI album, "It's Me, It's You" received online access to MP3 versions of the album's component tracks. EMI invited fans to remix the tracks and submit them via a website. EMI claimed exclusive intellectual property rights in any remixes submitted, and expressly reserved the right to release them commercially without compensation to the remixer.²⁹⁶ That is, as part of the album purchase, consumers were purchasing the opportunity to provide EMI with free labor to create products that EMI could then sell back to the consumer. It is difficult to claim to have engaged in "subversion" when the target has not only consented to, but initiated the engagement in order to further its business at your expense. Indeed, these uses of remixing are very literal examples of Hal

²⁹⁴ See MCLEOD, FREEDOM OF EXPRESSION, *supra* note --, at 153.

²⁹⁵ Eric Gwinn, *A little of this, a sample of that--mashups are do-it-yourself*, CHICAGO TRIBUNE October 13, 2005.

²⁹⁶ See *Lily Remix: Terms and Conditions*, on EMI's Lily Allen website, <http://www.lilyallenmusic.com/lily/remix/terms> (last visited Oct. 14, 2010).

Foster’s admonishment that “to manipulate . . . differences hardly constitutes resistance, as is commonly believed: it simply means you are a good player, a good consumer.”²⁹⁷

Of course, not every form of activity has to advance semiotic democracy. In moderation, the pleasures of watching television, writing fan fiction, or remixing a hit pop song may outweigh their marginal negative social effects. But in this way they are merely guilty pleasures, more like eating junk food, drinking beer, or driving a big car, and less like meaningful expressive or political activity worthy of special legal concern. Academic commentators protest too much when they insist that practically every use of cultural content—even passive consumption²⁹⁸—constitutes a meaningful exercise in cultural *participation*.

As the foregoing discussion demonstrates, the debate over who controls the products of the culture industry is a distraction from a deeper question—to what extent do such products control *us*? One commentator has argued that copyright’s prohibitions on unauthorized derivative works violate the First Amendment because they restrict “freedom of imagination.”²⁹⁹ But one’s imagination might also be shackled by dependence on commercial tropes—and intellectual property law might actually break those bonds. Indeed, one might ask whether semiotic democracy is better served by encouraging the public to critique popular culture or by encouraging them to ignore it and fashion alternatives to it. A logical, if politically unrealistic, approach to this problem would be to fund arts education through a tax on media consumption, in much the same

²⁹⁷ FOSTER, *supra* note ---, at 171.

²⁹⁸ Many commentators argue that even relatively passive uses, such as the unauthorized filesharing of copyrighted music, constitute cultural participation that deserves protection from copyright infringement actions. See LESSIG, *FREE CULTURE* at 66-74; MACLEOD, *FREEDOM OF EXPRESSION*, *supra* note ---, at 278-303; VAIDHYANATHAN 179-82.

²⁹⁹ Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 *YALE L. J.* 1, 4 (2002).

way some public-health programs are funded through taxes on cigarettes.³⁰⁰

³⁰⁰ *See, e.g.*, Cal. Rev. and Tax. Code § 30461.6 (2011).

IV. CONCLUSION: Law, Markets, and Liberalism

The new “free culture” orthodoxy in copyright theory places too much faith in the power of the law, both to restrict and to empower. This may have something to do with the foundational metaphor of “intellectual *property*”: copyright and the like are seen as “property” law—a system of entitlements imposed upon individuals, either by “nature” or by the state. Conversely, in the theory of corporate and business law, business entities and related legal rights are commonly described under the rubric of “contracts”—rights created by the consent of the parties. Thus, the influence of law and other rules tends to be overstated in the IP context and understated in the business-law context, while the influence of private solutions (“contract,” if you will) tends to be understated in IP scholarship and overstated in business law scholarship.

IP scholars overstate copyright doctrine’s ability to restrict artistic and business practice. Academic commentary on *Grand Upright* and other law related to sampling assumes that individuals cannot bargain around legal entitlements, or make decisions about cultural participation on grounds other than immediate legal and financial cost. But the history of sampling suggests both these assumptions are untrue. Sample clearance requirements did not spell the end of musical recoding; indeed, sampling evolved under such requirements. Hip-hop artists and labels acknowledged the cost of appropriation—and worked out payment practices—long before any courts ordered them to do so. Furthermore, there is no reason to assume that the cost of licensing was, or is, the

determinative factor in hip-hop's recoding practices. Artistic and commercial factors were undoubtedly also at work.

IP scholars also tend to overstate the ability of copyright reform to equalize the distribution of semiotic power in society. They follow the liberal assumption that power imbalances can be corrected by market forces as long as legal background rules are formally equal. If the law puts everyone on formally equal footing, "private" forces (such as the concentrated media industry) are by definition unable to restrict individual freedom, because "market" outcomes are inherently just ones. Thus formally equal opportunities to participate in culture (such as by recoding) are sufficient to advance semiotic democracy. This model downplays the possibility that existing disparities in cultural influence and financial resources curtail the ability of the disempowered to take advantages of formally equal opportunities, and that formal equality in a context of substantive inequality can even increase opportunities for the powerful to exploit the disempowered. Furthermore, even if the disempowered exercise a legal entitlement to recode, that exercise can simultaneously embody both resistance and capitulation to the dominance of commercial culture.

An intellectual property regime that encourages cultural appropriation can have both positive and negative effects on semiotic democracy-- whether it is formally equal or it asymmetrically empowers the semiotically weak to appropriate. The effects are so subtle and speculative that it is probably futile to attempt to calculate the *net* effect of an appropriation-rights regime. Thus my point is not that the argument for recoding on semiotic democracy grounds is wrong, but that it cannot really be proven to be right or wrong.

Intellectual property theorists overstate individual autonomy with respect to acts of cultural appropriation, but understate the autonomy of the individual in the face of intellectual property law. This apparent inconsistency may be reconciled in light of liberal-individualist belief that the state poses a special threat to liberty, and that non-state actors have only limited ability to do so.³⁰¹ So although they identify the concentrated culture industry as a threat to semiotic democracy, they believe this imbalance is the product of legal doctrine (i.e., copyright law) repressing the individual. Thus they believe it can be corrected by formally equal legal entitlements and free markets. Despite its appropriation of radical terminology, the “free culture” project is in fact a fundamentally liberal one.

³⁰¹ See Amitai Etzioni, *General Law in Civil Society, Good Society, and the Prescriptive State* 75 *Chi.-Kent L. Rev.* 355, 356 (2000).