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“What Is Stolen? What Is Lost? Sharing Information in an Age of Litigation”¹

The snarl of issues surrounding music, copyright, and music scholarship first came into focus for me during the research and writing of my master’s thesis.² Examining the effects of copyright litigation on sample-based hip-hop producers during the 1990s, I tried to tease out how the very act of sampling was advanced by producers as an embodied critique of the law, and how the telltale signs of sample-based productions—the snaps, crackles, and pops of well-worn vinyl, for instance—came to accrue, indeed to epitomize, authenticity among a certain set of practitioners and listeners.

One of my chief examples in this study was DJ Premier, best known for his work with Gang Starr, whose voice as a producer seemed increasingly shaped by his quest to maintain sampling as a primary practice while evading, and audibly taunting, the “sample-sniffers” employed by various publishing houses.³ What was most striking about Premier’s response to the constraints imposed by an increasingly litigious publishing industry was the cleverness and creativity through which he challenged the legal status quo, offering his peers an example of undeterred activism couched in the hardcore stance of underground hip-hop. Whereas Premier’s productions in the late 80s often employed one- or two-measure loops from jazz and funk records, by the late 90s, he was assembling tracks using rather small snippets of sound, still recognizable as sourced from vinyl (and, for some hip-hop aficionados—or crate diggers—still recognizable as having come from particular recordings, especially as signaled by unique timbral characteristics).

In attempting to represent Premier’s practices, I found myself coming up against a host of methodological, if not ethical, problems. How could I demonstrate Premier’s savvy without making known the very sources he had so skillfully masked? Or conversely, how could I produce scholarship which kept certain secrets? I wanted neither to inform on my informants, so to speak, nor to go against the norms of transparency and citation we expect in the studies we read.⁴ In cases where it appeared that unauthorized samples were being used, I refrained from naming the original sources myself, despite sometimes referring to them, if not transcribing them, as examples. I experimented with various sorts of graphical representations, but worried frequently about how to document and explicate “the art of sample-based hip-hop,” as Joe Schloss calls it, without contributing to the

¹ This paper was originally presented at the Society for Ethnomusicology’s 51st annual meeting in Honolulu, Hawaii on November 16, 2006.

² Wayne Marshall, “Producing the Real: Hip-hop Music and Authenticity” (M.A. thesis, University of Wisconsin-Madison, 2002). See also, Wayne Marshall, “Giving up Hip-Hop’s Firstborn: A Quest for the Real after the Death of Sampling,” *Callaloo* 29:3 (Summer 2006): 868-892.

³ Take, for example, the Jane Peterer Music Corporation, which employs people to listen for instances of copyright infringement in commercial recordings, especially hip-hop recordings. See, e.g.: <<http://www.wcax.com/Global/story.asp?S=4677112&nav=4QcS>>.

⁴ Indeed, this paper itself has required that I withhold certain names and data once again.

powerful forces, the evidentiary base, often aligned against it.⁵ Subsequently, as I have considered ways of bringing this research to a wider audience, it is clear that even these transcriptions—never mind actual audio examples—might prove to be a sticking point for various presses and publications. Just as hip-hop acts and labels experienced a chilling effect with regard to sampling in the 1990s, despite bold statements from such producers as Premier, the present publishing environment for music scholars is also often a frigid one, as publishers commonly discourage authors from including transcriptions of music or lyrics in their books and articles.

In our “ownership society” and under the current copyright regime, the publishers in our field—and, in turn, their general counsels—have become overly cautious in their practices.⁶ The cost of mounting a defense, or of recalling a run of books or journals, they say, outweighs the benefits of including an explicit musical example here or there. It is a risk that most presses are unwilling to take. So despite the various dimensions of the fair use defense we might invoke—the educational uses to which we put our research, the degree of critical commentary we provide, the “original” work we put in (e.g., the transformations we make to a piece of music in the act of representing it, reframing it, and analyzing it)—the burden still falls on us as individual scholars to secure countless, and often needless, permissions or simply to do without a crucial example. As a result of such overbearing caution, our publication practices—the most common and enduring ways that we share our research—have grown impoverished, sometimes despairingly so.

The legality or accessibility of the music we study doesn't influence—at a basic level—our sense of whether they're worthy of study or not, but inaccessibility *can* serve as a serious deterrent for those of us who are interested in and invested in sharing our research with a wider public. This is not just a problem for the hip-hop scholar or for the scholar of popular music more generally, but for anyone who deals with musical recordings or employs robust (or even not so robust) representations thereof. Not only do entire genres exist—hip-hop, reggae, mashup, jungle, reggaeton—which are, by and large, technically illegal due to their sampling or versioning practices (never mind their performance and circulation), entire catalogues of non-sample based music—the rare, the out-of-print—are in another way effectively locked away, or ‘mothballed’ as Cliff Murphy puts it. Not only does the public sphere suffer as a result, our studies—our explications of music's significance in social and cultural context—suffer as well, consigned to a kind of dustbin, describing music that few will hear and, by separating the sounds we study from our studies themselves, pushing us even further away from one obvious, dialectical resolution of Charles Seeger's famous “musicological juncture” or “linguocentric dilemma”: presenting the two alongside each other, never mind musicking about music itself.⁷

⁵ Joe Schloss, *Making Beats: The Art of Sample-Based Hip-Hop* (Middletown, CT: Wesleyan University Press, 2004).

⁶ During his campaign for tax-cuts and social security “reform” during 2003-4, President George W. Bush often used the phrase “ownership society” to refer to his ideal social-economic model. Although the phrase has been circulating in conservative circles for some time now, and was apparently a pillar of Thatcherism, more recently think-tanks such as the Cato Institute have produced white-papers discussing and promoting the phrase and concept. See, e.g.: <http://www.cato.org/special/ownership_society/boaz.html>.

⁷ See, e.g., Charles Seeger, “Speech, Music and Speech about Music,” in *Studies in Musicology 1935-1975* (Berkeley: University of California Press, 1987), 16-35. With regard to “musicking about music,” I have

We are in a position as scholars to press for the full range of abilities available under the law to comment on the music that we study, but the fact that fair use is a defense rather than a right makes this sort of stance a lot more difficult, a lot less tenable, than it may seem on the face of it. Rather than the burden resting on the copyright holders to prove that one's uses infringe on their rights—rights which, I might remind you, increasingly belong to some party other than the actual composers, performers, or producers responsible for the music in question—the burden instead is on us to show that our uses are fair. The current copyright regime thus requires one to knowingly violate the law, be sued, and mount a defense. But our institutions, our universities and presses (and/or the general counsels that advise and represent them), generally don't want to take such a risky position, and so we find ourselves hunting down permissions for the most inconsequential quotations, abandoning certain examples despite their importance, and—perhaps most alarmingly—altering our practices and constraining our approaches, conflating commonsense procedures with piracy, curtailing innovation and adoption of new technologies, and failing to serve the interests of our society and the wider public. We grow docile as email exchanges sap our souls.

Comparing the lot of the contemporary music scholar with that of a sample-based producer (which today might include hip-hop artists and mashup makers alike), it would seem that despite the laws and effects of copyright constraining both camps, in different ways, it is the musicians who have responded more courageously and more creatively. As scholars attempting, and in some sense required, to publish in certain places, we've a lot less license to push the envelope, to assert our uses as fair; we're told upfront and throughout that the risk is not ours to take. (We're also told in far too many instances that we give up our rights to reproduce and distribute our own research, but that's something of a tangential problem.) Although musicians or producers must also work in fear of cease and desist orders, at least they have the opportunity to take that personal risk. And in a rapidly expanding world of democratized access to the tools of production and distribution, today's musicians appear to have unprecedented opportunities for finding a sustainable niche, a spot on the "long tail" where they are unlikely to pester this or that content company.⁸ The big fish can eat the big fish and the police can chase the pirates. (Bridgeport Music, a large publishing house with strong holdings in well-sampled catalogs, just announced this week a new suit against Jay-Z, one of over 800 it has initiated in the past 5 years.⁹) Such activity, ironically, leaves room for little fish to thrive.

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discussed and proposed some possibilities in various papers, including "Musically-Expressed Ideas about Music," presented in 2006 to the New England Chapter of the Society for Ethnomusicology, available here: <<http://wayneandwax.blogspot.com/2006/04/musically-expressed-ideas-about-music.html>>.

⁸ The "long tail" is a concept usually associated with Chris Anderson, who advanced the idea first in *Wired Magazine* ("The Long Tail," *Wired* 12:10 [October 2004]: <<http://www.wired.com/wired/archive/12.10/tail.html>>) and then later in a book-length exposition, *The Long Tail: Why the Future of Business is Selling Less of More* (New York: Hyperion Books, 2006).

⁹ See, e.g.: <<http://www.entertainmentwise.com/news?id=24685>>.

If I may continue with this metaphor for a stretch, one such lagoon where the little fish thrive offers refuge at the moment to a world of music and music-driven discourse so wild and vibrant that it can make our great musicological pool party look more like a salmon farm. A set of practices that more closely resembles our own (as opposed to, say, outright music-making), what I will generally refer to here as the music blogosphere—sometimes called the mp3 blogosphere, but certainly broader than that—appears to have the distinct advantage, an advantage at once visible and audible, of providing a space for music and music-related musings relatively unencumbered by risk-averse middlemen.

Since the turn of the millennium, blogs (or weblogs) have exploded in popularity as self-publishing software such as Blogger, WordPress, and MovableType enable people to share their thoughts, writings, and other media online. As of the revision of this article in January 2007, Technorati, a company that monitors blogs, was actively tracking over 63 million blogs and cited the number of new blogs created daily at 175,000.¹⁰ Moreover, mainstream media outlets, such as the *New York Times*, have adopted the format and now offer a number of regular blogs on various subjects. Although found in a range of forms, from fairly formal articles to short posts containing little more than an outgoing link (or URL), blogs most frequently resemble the personal, chronological style of a journal or diary. The advent of blogs has, in the age of the “long tail,” facilitated the formation of communities of affinity, who find each other via web-searches for particular subjects or through trusted sources and bloggers who tend to offer a “blog-roll” (or provide a list of favorite blogs they read) on their own sites. One such community—or better, set of communities—is what we might call the music or audio blogosphere or, after the file type most frequently shared in such forums, the mp3 blogosphere.

Ranging in form from multimedia rich, deeply contextualized close readings of songs and genre genealogies (essentially an online music criticism, with varying degrees of rigor and reflexivity) to relatively thinly-described (if not starkly naked) sharing of audio files (not all of which, mind you, regulated by copyright or spoken for by the RIAA), the networked expressions of the music blogosphere—and increasingly the world of “user generated content” more generally (though I am rather suspicious of that phrase) and of the so-called “semantic web” (i.e., Web 2.0, 2.5, 3.0, etc.)—offer a striking contrast to the ways we bind ourselves like the books we seem to have so little faith in, doubting their abilities to stand as self-evident justifications for the quotation and reproduction of the subjects and objects we study.¹¹

In the *bogosphere* (to keep the flow going, as well as note some pitfalls of the place), people are pushing limits because they can, and these activities are themselves no doubt working to reshape commonplace notions of fair use, if through nothing else than their sheer ubiquity. For the music blogosphere constitutes in some sense a massive act of civil disobedience, one that will have untold consequences. The vibrant and varied discussions ongoing online call our attention to what is lost when we find ourselves forgoing the open sharing of information in our litigious age.

¹⁰ See: <<http://technorati.com/about>>.

¹¹ See also, message boards (e.g., <<http://gybo-v3.co.uk>>), MySpace, YouTube, artist sites, etc.

One participant in and observer of the music blogosphere gave voice to this atmosphere of excitement, its paradoxes and possibilities when he wrote, consistent with the water metaphors I've been drip-dropping here:

Despite [the RIAA] using - successfully! - all the legal tools at their disposal, shutting down Napster, Grokster et al, and suing a bunch of 12 year olds or whatever, **WE ARE SWIMMING IN AN OCEAN OF FREE MUSIC**, and the ocean is getting bigger and deeper all the time.

And sharing music, like sharing information, is capital-G Good - as we come to know a wider and weirder variety of people, the more we realize how similar people are. The closer I look at you, the more I see myself, and the more I listen, the more I hear my own voice - ¹²

Although surely not all downloaders share this blogger's enthusiasm for the kind of cultural critique that emerges from a world of networked, shared music, such ebullience nevertheless stands in marked contrast with the frustrated, downtrodden tone of music scholars who feel their hands to be tied, wishing for a reasonable, lawful solution to the problem of finding the music they study to be effectively un-shareable. Take for example, the following sentiment in an email correspondence I received recently from a colleague who, like DJ Premier's sample sources, shall remain anonymous:

I guess what ultimately bothers me so much is that if I'm doing all this research on a music that's forever trapped in a vault somewhere, why even bother? I can see that a dissertation parlays into a job someday, but to me that's not what drives me to do the research. I think it's important music and I want others to hear it and understand it in its cultural context.

As we ask ourselves what's at stake—that is, what is lost—by maintaining the publishing / property status quo, we would do well to ask from the perspective of the music blogger, what's at risk in bucking such conventions? (For this presents us with an illuminating contrast.) As it turns out, relatively little is at risk for the music blogger—the occasional legal threat or suddenly deleted files notwithstanding. This is in part because content companies are, in general, a lot more interested in curtailing large-scale piracy than free speech, and because bloggers have not exactly been less than savvy when it comes to setting certain rules for themselves and their communities, rules which often echo certain prongs of the fair use defense.¹³ Indeed, certain music bloggers advance quite particular notions of what a music blog, or audioblog, should do to maintain its own existence and

¹² See <<http://chiasm.blog-city.com/invincinet.htm>>.

¹³ See, e.g., Tofu Hut's disclaimer: "All MP3's are up for a limited time and are for sampling purposes only. Music posted here is posted out of love, not with the intention for profit or to violate copyright. If you are the creator (or copyright owner) of a song, excerpt, essay, graphic or photo posted on this blog, please contact me if you want to comment on the selection or wish to have it removed. Please don't download all tracks at once; don't direct link to a track and don't listen to the track until you have fully downloaded to your computer. I save bandwidth, you get music - everyone's happy. Delete all tracks after 24 hours" (<<http://tofuhut.blogspot.com>>).

autonomy: “What you WON'T find in here are file directories without commentary or sites offering a full album that is currently in print,” reads the sidebar of Tofu Hut, an mp3-sharing site, “Audioblogging is NOT about piracy; it's about selectively sharing sounds.”¹⁴

Most importantly, though, it is because music bloggers are more free to engage in personal risk-assessment that makes them different from music scholars who may want just as much to lend their audience an ear. As individuals who nonetheless, like our publications, are often tied to large institutions, we're not always in a position to do this sort of rule-setting for ourselves. Universities are big targets, so we are forced to adhere to letter of the law. Even worse, because of “chilling effects,” we fail to take into account the potential strength of the defense available to us.¹⁵ We proceed in a risk averse manner, but to lose that basic defense, to let it lapse into disuse, would be a great loss for the Society for Ethnomusicology and for society more broadly.

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Theoretically, we should have legal protection to do this very sort of thing—to quote or play musical passages and comment on them without needing to secure permission from any rights holders. The spirit of the fair use protection is that academics and critics play an important role in society, one that should be incentivized right alongside the incentive that copyright is supposed to provide for creators. But the setup of fair use as a defense leads general counsels of universities and presses to take a conservative approach in order to avoid having to mount a costly defense. We're not allowed to assert fair use because our lawyers won't let us get sued in the first place. A prevailing atmosphere of caution hence exerts tacit force on our practice as scholars, essentially handicapping us in an exciting age for multimedia publishing. Somehow we need to exert pressure back to discover where the actual boundary lies.

Perhaps in my polemical stance I paint too gloomy a picture. I would like to hope so, that what I describe here is more a moment of crisis, of transition. But given that we think of ourselves as occupying a privileged, or at least important, place in the public conversation about music, I can't resist pointing out the irony of all this. Music bloggers generally aren't even claiming fair use; flying under the radar, they don't need it. Whereas music scholars, who do need the fair use defense, aren't able to claim it. I don't mean to set up a false dichotomy here, either, for clearly the activities of the music blogosphere—self-publishing, bold assertions of fair use, forms of civil disobedience—appear increasingly to comprise an integral part of our musicological toolkit. This is certainly true for students, many of whom have embraced blogging as an ethnographic procedure, an experiment not so much in keeping a journal as sharing it, inviting “real-time” feedback from colleagues and collaborators. The steadily increasing and interlinked number of blogs by students and scholars alike seem to hold, at least for this participant-observer, no little promise for the future of the field.¹⁶

¹⁴ See <<http://tofuhut.blogspot.com/2005/05/even-when-you-dont-find-music-here-you.html>>.

¹⁵ For more on “chilling effects,” see <<http://www.chillingeffects.org>>.

¹⁶ Full disclosure: I write my own blog at <<http://wayneandwax.com>>.

If ethnomusicologists are to participate in the exciting public exchange around music today, and hence to advance further our theories and methods, we either must engage outside of traditional channels or press more strongly for progressive stances from our publishers. I suspect that such changes in the latter sphere may only come, however, as a result of promising, and indeed competitive, endeavors in non-traditional realms. And though that would take at least another paper—or a series of blog posts—to outline fully, I hope some of the examples I’ve invoked today, from sample-based producers to conscientious music bloggers, might offer suggestive models for a less restrained and more vibrant set of publishing practices. In an age of “chilling effects,” a more creative and critical response to the constraints we face could lead to some well needed climate change.

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