

# Copyright Remix (It's Tricky): Sampling to Revitalize U.S. Copyright Law

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## Abstract

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Over the past five decades, hip hop has become a widely celebrated genre of music, yet misconceptions still exist surrounding the hip hop community's norm of sampling. This paper explores the origins of hip hop and the concept of sampling that is central to the genre. Sampling can be conceptualized as an eight-pronged framework involving three types of wholesale appropriation, three types related to lyrical quotation, and two types related to the variety of music or beats. Each type is discussed, and some examples are given. Following this overview, the ethics of sampling is explored via the context of the origins of copyright in the United States, which, some consider, to be a sampling of the first copyright law from Great Britain, the Statute of Anne. Historic litigation against hip hop artists is also discussed, as well as how these specific cases changed the attitude of record labels and their willingness to allow their artists to sample from outside the genre. The paper culminates with a discussion on various sampling norms within various communities and how they can be viewed as potential ways to revitalize U. S. copyright law.

Keywords: cultural norms; derivative works; ethics of sampling; fair use; hip hop; licensing; sampling; United States copyright law

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## Introduction: The Roots of Hip Hop

**B**irthing from the passion and poetics of the Bronx during the early 1970s, hip hop emerged in conjunction with the "first graduating class" of affirmative action policies of the 1960s (George, 1998). The genre took shape as an underground urban movement that evolved to become one of the world's most celebrated yet highly misunderstood musical genres. Today, many connote hip hop with shocking lyrics, promotion of lavish lifestyles, and outrageous performances. However, the roots of hip hop humbly began as a movement of pushback against systemic subjugation and a way for the disenfranchised youth of marginalized backgrounds and low-income areas to find their voice (Aldridge & Steward, 2005).

## From House Parties to an Empire

Many associate the creation of hip hop with Clive Campbell, a Jamaican-born DJ better known by his stage name, DJ Kool Herc. The story goes that Clive's sister, Cindy Campbell, was looking to raise money to buy new clothes before the start of the school year. Cindy rented the first-floor recreation room of the 100-floor apartment building that she lived in with her family in the Bronx (New York, USA) and charged admission for a party. Despite the food, drink, and

socializing, the real draw to the party was the entertainment provided by Cindy's brother, Clive, who went by the nickname Herc (short for Hercules as a nod to his impressive height and muscle mass). At the "Back to School Jam" held on August 11, 1973, at 1520 Sedgwick Avenue in the Bronx, Herc kept the crowd moving with his lively and unexpected playlist where he blended various records and experimented with audio technology while his friends shouted out the names of other friends over the music (Batey, 2011). It was at this historic first hip hop event that DJ Herc originated the "break-beat":

[Where he] developed a two-turntable technique that he called "merry go round," which put a copy of the same record on each of the turntables and switched back and fourth (sic) between them to loop the best parts of the record. In essence, Herc invented the break beat, which became the foundation over which MCs would later spin their rhymes and tell their stories. (Anderson, 2010, para 2)

Others may consider the creation of hip hop to be a 'slow born' movement, noting that if you visited house parties or attended neighborhood block parties in the Bronx in the 1970s, you would likely be treated to entertainment that held elements of what we categorize as hip hop today (PQ, 2019). Disc jockeys fished through vinyl record collections stored in milk crates to select songs to play and, rather than allow dead air between tracks, they blended and scratched different records together with the use of two turntables. Meanwhile, emcees (MCs) hyped the crowd with their rhymes and "capped"<sup>1</sup> one another with playful word jousts in attempts to outdo their opponent to gain the favor of the crowd (Neumann, 2000). Whether MCs were boasting of their prowess or "spitting"<sup>2</sup> commentaries on political issues of the day, the rap lyrics they delivered became an integral part of the hip hop music experience along with the concept of sampling<sup>3</sup> from different songs.

While rapping at underground parties was prevalent during the 1970s, it was not until 1979 when the Fatback Band released their song entitled "King Tim III (Personality Jock)" that hip hop began to see wider popularity (Songfacts, 2022). "King Tim III", the first official commercially released rap song, was followed a few months later with the Sugarhill Gang's "Rapper's Delight," which brought even more attention to the genre due to the song's nationwide success (Songfacts, 2022). Sugar Hill Records, the producer of "Rapper's Delight," was founded in 1979 by New Jersey (U.S.)-based R&B singer Sylvia Robinson (Greene et al., 2011). Robinson's sponsorship of "Rapper's Delight" marked another milestone for hip hop with the launch of a record label specializing in hip hop music. Notably, some of the most influential records in hip hop history were released by Sugar Hill Records, creating a solid foundation for the musical genre to grow and evolve.

In the decades that followed, a billion-dollar industry was built. New artists were signed, record labels launched, and a lifestyle of hip hop blossomed. Worldwide, it is estimated that hip hop generates nearly \$10 billion annually with the expansion from just the creation of music to clothing, jewelry, and food and beverage (Watson, 2006).

## A Deep Dive into Sampling

### Lyrical

In its simplest form, sampling can be thought of as using a portion from a previously recorded piece of music in a new recording (Krasilovsky et al., 2003). Sampling encompasses the use of a

rhythm, melody, beat, vocals, or even spoken word. In the world of hip hop, sampling is a much more nuanced concept. Anderson (2011) posits eight ways to imitate an existing work in the context of hip hop with three types relating to wholesale lyrical or musical appropriation, three types related to lyrical quoting, and two types related to musical sampling.

When discussing the first type of wholesale appropriation, Anderson introduces the concept of “biting” where one artist passes the lyrics of another off as their own. This is often done without consent or authorization from the original artist and is considered the most egregious type of imitation which can often ruin the career of the “biter” (Anderson, 2011). The next form of appropriation concerns taking the beats of another artist and is considered the non-lyrical equivalent of biting, called “beat-jacking” (Anderson, 2011). In beat-jacking, an artist will take the beats of an existing song and use it as their own without the consent or authorization of the original DJ or music producer. This is seen as a lack of creativity and the laziness associated with beat-jacking leads some to think the beat-jacker lacks skill. Throughout the hip hop industry, these types of imitation are looked down upon with notable artists Grand Master Caz calling acts such as biting “pure treason” and Slick Rick calling those who bite “backstabbers” (Anderson, 2011).

The final type of appropriation is what Anderson (2011) calls “ghosting”, and this is a somewhat authorized type of biting. In ghosting, the imitating artist will use expressions of another artist with consent. Ghosting, while not favored but not fatal to an artist’s career, is still looked down upon since the hip hop community “has traditionally placed a premium on having the ability to write one’s own lyrics” (Anderson, 2011) In an industry where authenticity is king, ghostwriting in hip hop is not as normalized as is songwriting in other genres of music.

One caveat presented by Anderson (2011) deals with an artist who has created lyrics but feels they would be better suited for another artist. An example of ghostwriting situation which displays intergenerational respect concerns The Notorious B.I.G. and Lil’ Kim. American Rapper Kimberly Denise Jones, better known by her stage names Lil’ Kim and The Queen Bee, became a premier female artist associated with Bad Boy Records. A major pull for her to become a rapper and an introduction to Bad Boy Records was The Notorious B.I.G., also known as Christopher Wallace, Biggie Smalls, or simply Biggie, as a teen. Wallace and Jones continued a deep friendship, with Wallace writing numerous songs for Jones including one of her hits, “Queen Bitch.”

The first three types of imitation listed above fall within the appropriation category and are not applauded within the hip hop community whereas the following types are more welcomed forms of imitation. The first type of quoting deals with an artist who takes the lyrics of another artist when they are battling and remixes the original lyrics to belittle their opponent (Anderson, 2011). In cases such as these, an artist may take the words of others and riff off the lyrics to display lyrical agility, their creativity, or to bite their opponent using their own words against them (Anderson, 2011). An example of this is born from the infamous feud between female rappers Nicki Minaj and Cardi B. In a verse performed by Minaj on David Guetta’s 2014 song “Hey Mama”, the Trinidadian-American rapper starts a verse with the words “Yes I do the cooking; Yes I do the cleaning” (Guetta et al, 2014). Minaj’s rival, Cardi B, turned these lyrics around on her in the 2020 hit WAP, performed with Megan Thee Stallion, in which she raps, “I don’t cook, I don’t clean; But let me tell you, I got this ring (ayy, ayy)” (Almanzar, 2020).

However, the final case of quoting which can bring the most joy to listeners is when an artist takes the lyrics of another artist and uses the lyrics in their own song to show their respect for the original artist which can tie generations of hip hop together. An example of this is the case of Jay-Z who will often mention The Notorious B.I.G. in his songs or even directly quote Biggie to show his utmost respect for the artist and show the public that he carries Biggie wherever he goes.

## Musical

The last two types of imitation relate to the use of the beats from a published song in a new song, also known as sampling. Whereas some view sampling as a lazy way to take the beats of others and reuse them in a new song, others like Webber (2007) point out the immense creativity it takes to take an existing piece of music, rework and recontextualize the music, and create a new piece of musical expression. There are two ways to sample music. The first way involves taking the music of others whereas the second form of sampling deals with self-sampling where an artist will repurpose their previously released songs.

In the 1970s, during the early years of hip hop, sampling was a more physical activity due to the analog technology of the time. DJs would play two records on separate turntables blending elements from different songs to create a new musical experience. Slowly, technology became available to artists allowing them to mix songs via the computer with a milestone advance being the 1970s Fairlight Computer Musical Instrument. While pulling portions of songs and reusing these portions in new songs was not the focus of the instrument at creation, artists were now able to digitize real sounds and manipulate the tone and pitch for reuse (George, 1998). Within a decade, the first real technology was created whose main purpose was sampling. In 1981, E-mu Systems launched their E-mu Emulator which was a series of digital sampling synthesizers that utilized floppy disc storage allowing artists to store, manipulate, playback, and use any sound (George, 1998). Over decades to follow, technology has grown considerably, but at its core, sampling retains the goals of building upon the creativity of artists of the past to create a new expression of music.

## The Ethics of Sampling

Many from outside the hip hop community hold sampling as an act infringing upon copyright and a way for artists to save time by just clipping samples from the work of others. This is because digital sampling affords artists the capacity to reproduce exactly, note-for-note, original musical recordings. As pointed out above, sampling is a much more nuanced and skillful act than just cutting and pasting. Sampling is not only seen as an acceptable form of imitation in the hip hop community, but also a way to tie the past to the present. As Anderson (2011) explains, there are norms in the hip hop community that artists abide by to make their samples more acceptable within the community.

One norm is seeking consent from the original artist or their record label to use the sample. If a lyric sample is sought, consent is needed from the singer as well as the writer whereas if a music sample is employed, consent is sought from the composer. Another norm is if the source is made identifiable, there will be more likelihood of the sample passing as “sound” versus an artist trying to pass off the work of others as their own. Finally, another norm within the hip hop community relates to the finished work - if, for example, the work incorporating the sampled piece of music was enhancing both the new and existing work, there would be a higher likelihood of acceptance.

While some may see sampling as a lazy way to save time or money, the art of sampling is a much more creative process resulting in densely layered collages where, at times, the original work is hardly recognizable to the untrained ear (McLeod, 2010). Ethically, the proper use of sampling is seen as a fair and just way to create new music.

### A Brief Introduction to Copyright

Copyright can be thought of as an invisible bundle of rights that copyright holders possess. With music, the five exclusive rights owners possess include the right to reproduce their work, the right to create a derivative work from their original work, the right to distribute their original work, the right to perform their work, and the right to publicly display their work. Notice in previous sentences I chose the word “copyright owner” rather than an artist and that is because an artist may choose to transfer their ownership and copyright of their work to someone else. To do so, an artist would need to create and sign a document transferring their rights<sup>4</sup> and record this in a copyright office (Krasilovsky et al., 2003). If someone were wishing to obtain the copyright of a song to perhaps perform or sample from, they would need to gain multiple clearances including the rights from both the composer as well as the performer, but an interesting loophole in U.S. Copyright law states that if someone were to cover a song - word for word and note for note - obtaining copyright clearance would not be required (Webber, 2007).

An interesting way to envision U.S. copyright law is by thinking of it as a sample of a law created in Great Britain. The Statute of Anne, also known as the Copyright Act of 1710, was an act passed by the Parliament of Great Britain aimed to reduce the monopoly publishers possessed and eliminate perpetual copyright (Webber, 2007). Simply put, prior to the act, publishers, not authors, owned the copyright to manuscripts and decided where and in what quantity items were published without ever having to gain consent from authors. After the act was passed, authors were required to deposit a copy of their book and then retained exclusive rights over their book regarding copying and printing. According to copyright authors such as Deazley (2006), the Statute of Anne was the first statute in the world to provide copyright to authors.

In the U.S., copyright law can trace its inspiration to the Statute of Anne. The first U.S. federal copyright law came into effect in 1790 and encourages learning by granting authors exclusive rights over the printing, reprinting, publishing, and vending of their maps, charts, and books.

In this first round of copyright law, musical compositions were not included. Music was not covered until the Copyright Act of 1831 and previously, musical compositions were registered under copyright law as “books” (Patry, 2000). It was not until the addition of Section 101 of the U.S. Copyright Act of 1972 when “sound recording” was added to the umbrella of copyright protection. Before 1972, no U.S. copyright law made it illegal to duplicate master recordings (Webber, 2007). Originally, all sounds created prior to the act were in the public domain but the U.S. Copyright Office has since brought all pre-1972 sound recordings under copyright protection under state law until February 15, 2067, (United States Copyright Office, 2011) Despite sampling being ethically permissible within the hip hop community, the constraints of the law hold sampling as an infringement of copyright law.

### Copyright and the Hip Hop Community

Bringing forth actions of infringement is not always an easy task. There are no set structures within which to compare songs against; there is no pre-established number of words or set

number of seconds of sampling which would be considered copyright infringement. In some cases, courts rule against imitators using the “one-drop rule” where, if even the tiniest fragment of work by another is included in the new song, the entire work is considered legally tainted no matter how much the existing piece had been transformed or recontextualized (McLeod, 2010).

Since sampling is such an integral part of hip hop and has been acted upon innumerable times, one would assume that obtaining the copyright would include a simple set of steps, but it can be cumbersome. Firstly, artists or record labels are not required to grant copyright clearance, meaning some requests are ignored or disregarded. Secondly, as mentioned above, there can be more than one license to obtain when reusing musical compositions which means there are more steps to clear copyright - one for the musical composition and one for the sound recording. Finally, since there is no scale of pay required with copyright requests, artists and record labels can arbitrarily charge fees to allow for copyright release and this sometimes exorbitant fee can serve as a barrier to imitators (Claflin, 2020).

Despite sampling being central to hip hop, newer record labels are less likely to want to pursue an artist wanting to sample from an existing recording for a few reasons. First, as mentioned in the paragraph above, the fees associated with obtaining the clearance to use the sample can be exorbitant. The second is a complex catch-22 of the industry. In many cases, to obtain copyright clearance, an artist must present the copyright holder with a submission featuring the sampled piece of music before the license is issued. However, this act is a copyright violation when creating the piece for submission, resulting in a sticky zone (Webber, 2007).

### Historic Litigation

Throughout the 1970s and 1980s, not many cases were brought against artists sampling the works of others. While infractions may have occurred, it was not until 1991 that the first major case was brought against an artist. In the case of *Grand Upright Music Ltd. v. Warner Bros. Music*, the Southern District of New York decided that Biz Markie, birth name Marcel Theo Hall, violated copyright when he sampled three words from Raymond “Gilbert” O’Sullivan’s song “Alone Again (Naturally)” on his song entitled “Alone Again”. The judge ruled that the defendant knowingly violated the plaintiff’s rights with “callous disregard for the law” and forwarded the case to a U.S. attorney for possible criminal prosecution (Weiler et al., 2015). Many felt this case struck fear in the hearts of record companies after realizing their artists may have been infringing on the copyright of artists each time sampling occurred whether it was deemed permissible within the hip hop genre or not.

This case was followed by the landmark decision in the *Jarvis v. A & M Records* case. In this case from 1993, The Crew sampled Boyd H. Jarvis’s song “The Music Got Me” in their song titled “Get Dumb (Free Your Body)”. In this instance, the court ruled that there was no case of infringement since the songs would not sound similar to a lay listener and the term “fragment literal similarity” was used (Anderson, 2011).

The following year, another monumental case concerning copyright was brought to court. In the case of *Campbell v. Acuff*, 2 Live Crew parodied Roy Orbison’s song “Oh, Pretty Woman” in their own song entitled “Pretty Woman”. The court ruled in favor of the defendants stating fair use covered the new lyrics the group created to the tune of Orbison’s song thus establishing the case of fair use if new lyrics accompany established music (Sewell, 2014).

These early cases shaped the way the record industry began to approach sampling. Moving away from a handshake style agreement commonly practiced in the hip hop community, the law stepped in to rule that whether it was an agreed upon norm or not, the community norm would not stand up in court.

The early 2000s gave birth to another issue regarding copyright infringement with the rise of “sample trolls”. One of the most well-known “sample troll” companies is a music publishing company called Bridgeport Music who launched nearly 500 cases of copyright infringement against hundreds of artists after they bought the music catalog of notable funk artists George Clinton and Funkadelic. Clinton has argued that his copyright was never purchased but rather stolen by Bridgeport Music. Bridgeport used their newly acquired copyrights to search for songs featuring samples of items within their catalog and pursued legal action to retroactively seek payment (Sewell, 2014).

### Musings on Paradigm Shift

At the time of the first codification of U.S. copyright law, society had just acquired the printing press. It was not until the piano player caused musical works to be added to copyright protection; but now, with computers and technology, we reproduce, adapt, and share information differently and many argue this is a valid reason to reexamine copyright law (Anderson, 2011). The various uses of sampling in the hip hop context prove to be a much-nuanced art requiring copyright attention that is equally as refined and much less a blanket statement like we have today.

One way to potentially revise U.S. copyright law is by looking toward Polish law which never uses the term “sampling” but rather uses the term “derivative works” created on a basis of imitation. Rather than cause artists or record labels to pay exorbitant fees to secure copyright release, the author of the derivative work is only required to gain the consent of the original creator and mention the creator in their work (Rychlicki & Zielinski, 2009). Treating sampling and copyright as a gentleman’s agreement rather than an opportunity to make money brings the community back to the original days of hip hop where artists sought the consent of one another and, as Anderson argues, so long as the work is recognizable, the imitating artist is not guilty of biting or beat-jacking (Anderson, 2011).

Another potential revision to current US copyright law would relate to requiring original creators or copyright holders to allow sampling to occur. As mentioned earlier, there are instances where the sampling artist seeks copyright clearance but does not receive an answer. A compulsory licensing system would mitigate this time loss and heartbreak by imitators if, once a copyright owner allows the license of their work to be used, the copyright owner is compelled to allow future imitators to use their work (Webber, 2007). This would erase some of the incongruity and headaches related to sampling and create a more structured system.

Finally, “fair use” is a term thrown around a lot when discussing sampling. Fair use is a doctrine that allows “unlicensed use of copyright-protected works in certain circumstances” (U.S. Copyright Office, 2021). Under Section 107 of the Copyright Act, the purpose and nature of the use, the nature of the copyrighted work, the amount used, and the effect upon the potential market for the copyrighted work is evaluated whether use can circumvent copyright under the Fair Use clause (U.S. Copyright Office, 2021). While Fair Use is typically used in cases where items are used for educational purposes, when the created work is not commercial, or when the

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amount used is so tiny that it falls within the de minimus zone, there are a few cases that back up the Fair Use clause for sampling.

One major argument relates to visual arts. Often artists are allowed to use existing art and reuse the art in their new piece without licensing if they are creating a collage. An example of this relates to the *Blanch v. Koons* copyright infringement case in which Andrea Blanch, owner of the copyright in *Silk Sandals* by Gucci, claimed Jeff Koon's use of the image was copyright infringement (U.S. Copyright Office, n.d.). Koons used the image taken by Blanch in a collage that the court held to be transformative because the defendant used the original image as a "raw material" and therefore was protected by fair use. If we reimagine sampling as a musical collage, the same would hold. You would take another artist's "raw material" and layer it within the new work creating an audio collage.

### Conclusion

Whether you are on the copyright or copyleft side of the sampling argument, one thing is sure; it is high time we rethink copyright law in the U.S. With laws created in the 1770s that benefit major record labels or copyright owners versus the original creators, copyright law has become big business. While still necessary to protect creators and incentivize new works, copyright should not be a static law, but rather something that we can change to reflect the current trends and ways it is used. A paradigm shift in the way we envision and interact with copyright law to allow for more flexibility in use and payment would benefit creators and "eliminate biting while leaving space for creative quoting and sampling" (Anderson, 2011).

### Endnotes

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<sup>1</sup> "Capping" is a form of word battle, where the speaker is putting someone else down.

<sup>2</sup> Spitting is a term in the hip hop community that represents the act of rapping. Also known as spittin'.

<sup>3</sup> "Sampling" is the reuse of a portion of one artist's song as part of the composition of another artist's song.

<sup>4</sup> In many cases, if you write the song, create the recording on your own, pay for your studio fees, etc., you will own the recording. If there are multiple people who contributed to creating the song or the musical accompaniment, multiple people may hold copyright to the recording. Often, artists will sign the rights to the masters of their songs to record labels for a set number of years per contract agreement. In return, the label will pay artists an advance. If an artist owns their masters, they can transfer ownership to another party.

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