How did the Depression-era folk-song collector Alan Lomax end up with a songwriting credit on Jay-Z’s song “Takeover”? Why doesn’t Clyde Stubblefield, the primary drummer on James Brown recordings from the late 1960s such as “Funky Drummer” and “Cold Sweat,” get paid for other musicians’ frequent use of the beats he performed on those songs? The music industry’s approach to digital sampling—the act of incorporating snippets of existing recordings into new ones—holds the answers. Exploring the complexities and contradictions in how samples are licensed, Kembrew McLeod and Peter DiCola interviewed more than 100 musicians, managers, lawyers, industry professionals, journalists, and scholars. Based on those interviews, Creative License puts digital sampling into historical, cultural, and legal context. It describes hip-hop during its sample-heavy golden age in the 1980s and early 1990s, the lawsuits that shaped U.S. copyright law on sampling, and the labyrinthine licensing process that musicians must now navigate. The authors argue that the current system for licensing samples is inefficient and limits creativity. For instance, by estimating the present-day licensing fees for the Beastie Boys’ Paul’s Boutique (1989) and Public Enemy’s Fear of a Black Planet (1990), two albums from hip-hop’s golden age, the authors show that neither album could be released commercially today. Observing that the same dynamics that create problems for remixers now reverberate throughout all culture industries, the authors conclude by examining ideas for reform.

Kembrew McLeod is Associate Professor of Communication Studies at the University of Iowa. He is the author of Freedom of Expression®: Resistance and Repression in the Age of Intellectual Property and Owning Culture: Authorship, Ownership, and Intellectual Property Law, and co-creator of the documentary film Copyright Criminals. Peter DiCola is Assistant Professor at Northwestern University School of Law. He is a board member and former Research Director of the Future of Music Coalition. Jenny Toomey is Program Officer for Media and Cultural Policy at the Ford Foundation. Kristin Thomson is Education Director at the Future of Music Coalition.
Interview Topics

CREATIVE LICENSE
The Law and Culture of Digital Sampling
by Kembrew McLeod and Peter DiCola

Publication date: March 31, 2011

Co-authors Kembrew McLeod and Peter DiCola are available to answer these and other questions:

- What’s the history of sampling? How has musical appropriation been a part of musical history, and what helped lead to the emergence of hip hop?

- How do artists who sample potentially break the law, and how might they not be infringing on someone’s copyright when they engage in this practice?

- What were some of the key legal decisions that occurred in the 1990s and 2000s, and how did they change the course of hip hop and popular music?

- How does one license a sample? What is the process like? Who do you need permission from, and how much does it cost?

- Some readers coming to the topic of sampling might have heard of the "7 second rule" or a "7 beats rule." How does the research in Creative License address these myths?

- In the book, you go to great lengths to estimate how much it would cost to clear the samples on two legendary hip hop records: Public Enemy’s It Takes a Nation of Millions and Beastie Boys’ Paul’s Boutique. What did you find out about those sample-heavy releases?

- What do some of the artists you talked to think about sampling in the current licensing system and the state of music today? Are there records equivalent to Paul’s Boutique being made today?

- We’re in an age where record labels are going through their archives and re-releasing deluxe box sets, or re-mastered versions of classic albums. Why haven’t we seen re-releases of many of the classic hip-hop albums and how does this relate to copyright law and licensing?

- The book also includes some well-thought out strategies for addressing the challenges that sampling presents, each with their own pros and cons. What do you hope Creative License does for the way we think about sampling and creativity?
• As technologies like computers and the Internet make it easier and easier for all of us to copy and paste words, music, and images, are we all in danger of violating copyright law? Are we doing so already without knowing?

• How does this conversation about sampling inform wider conversations about the future of creativity, commerce, and free expression?

• What is the value of interviewing a wide range of people in the music industry—musicians who sample, musicians who have been sampled, attorneys, publishers, label owners, copyright experts—about the issues that surround sampling?

Creative License: The Law and Culture of Digital Sampling
By Kembrew McLeod and Peter DiCola
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An interview with *Creative License* co-authors Kembrew McLeod and Peter DiCola
Conducted by book contributor Kristin Thomson, October 12, 2010

**Kristin:** What got each of you interested in this topic of sampling, enough that you wanted to write a book about it?

**Kembrew:** I grew up listening to hip-hop music, and back then I never really thought about sampling as a legal issue. It was just an aesthetic issue; I thought about it more as art. But around 1990 or so when the lawsuits started flying – first with De La Soul and a year later with Biz Markie – I started paying attention to the legal implications. This subject is actually the whole reason I went to graduate school to become a professor and a researcher. So *Creative License* for me, personally, is the culmination of probably 10 years of listening pleasure, and about 20 years of research.

**Peter:** It’s a really different story for me because I came at it from the academic side and got interested in the creative aspect later. For me what’s interesting about sampling is that it’s a certain kind of musical practice that runs afoul of copyright law. Because of this, it becomes a really interesting test case of how the expansion of copyright law has affected creativity.

**Kristin:** Why was it important to write *Creative License*, and what was your research process?

**Kembrew:** One of the reasons that a book like *Creative License* needed to be written is to correct some facts. One thing that I’ve noticed in scholarly works about sampling is that a lot of previous researchers didn’t actually talk to artists who sample, artists who have been sampled, and the stakeholders who have first-hand knowledge of how sample clearance worked. And because of this, a lot of inaccurate information made its way into a lot of early research, and a lot of misinformation got perpetuated. So I felt it was really important to talk to stakeholders, to learn what they know based on their experiences.

**Peter:** What’s great about using interviews in economic research in this way is that they provide a really rich source of detailed knowledge about a specific area. There’s a lot of scholarship that talks about the broad sweep of copyright law and how its expansion affects creativity. But only by focusing on one sector of the industry – and one method of making music– can you really learn about whether the law is causing problems or not. As we did the research, it became clear that there were certain ways in which copyright law – and the business practices that have evolved under the shadow of copyright law – have affected people and creativity.

**Kristin:** Some folks who come to this topic of sampling might have some preconceived notions about what it is, and even the “rules” around it. There’s one that I’ve heard through the years, the “seven second rule” or the “seven beat rule.” In other words, there’s a notion that a person is allowed to sample another person’s work as long as it’s less than seven seconds or seven beats. What did you find out about this assumption?

**Kembrew:** First of all, it’s important to say that it’s not true; there is no seven second or seven beats rule, but a lot of people believe it exists. It became obvious to us is that there are a lot of misunderstandings and a lot of urban legends surrounding rights clearance. And, I discovered is that even the people who should know better and who do have this first-hand experience ended up repeating a lot of myths.
By talking to stakeholders, we also discovered just how much information you need to navigate this system. One of the things that we realized was that when people don’t have direct exposure to sample-clearance systems, they end up just repeating what they hear from their friends and others.

**Peter:** I agree. I think one of the big themes that came out of the interviews is this issue of familiarity with how the rights clearance system works. Knowledge and expertise become a kind of threshold. They become a barrier to entry for new musicians, and for musicians on independent labels. As you read about the details of the rights-clearance process in the book, it becomes clear that you need a lawyer to navigate this stuff. On top of that, you learn that even with a savvy lawyer, that lawyer needs to have specific relationships with the major label system and the large publishers in order to get certain kinds of deals done. Insider social and business relationships can become really important.

“**What the book details is what happens when folk wisdom hits a buzz saw.**”

What the book details is what happens when folk wisdom hits a buzz saw. As a sampler, you think that five seconds or seven seconds is okay, and then you learn that there’s this whole complicated apparatus that doesn’t have any kind of bright-line rules that benefit the ordinary users or practitioners.

**Kristin:** As you conducted the interviews and did the research, what most surprised you about the topic, either as expressed by the folks that you interviewed or through the research around the economic and legal framework?

**Kembrew:** I wouldn’t necessarily use the word “surprise,” but one thing that I did notice, which I wasn’t expecting, was the number of hip-hop artists who sample who were very upfront about the fact that they understand that the original artists want to get paid or that they want to control the context in which that song got sampled, re-worked. There was a great amount of empathy on the part of the artists who sample for the people who don’t necessarily like sampling.

**Peter:** I think the thing that surprised me most is that when you talk to the people who were getting sampled – the samplees – they often emphasized control rather than money. Some were most upset about not getting credit. The reason they would deny permission for samples would often be more along the lines of, ‘I don’t agree with the sampler’s politics,’ or ‘I don’t like the message it sends to children in this new song,’ or just, ‘I want to have control over my work.’ It wasn’t so much, ‘This new song sampled me, someone made money, and I didn’t get paid.’ Of course part of what creators and copyright owners want is money, perhaps a large part. But it was interesting to me that it was such a complicated mindset, with aspects of artistic control being so central.

**Kristin:** The book concludes with well-thought-out strategies for addressing the sampling problem. What do you each hope that this book does for the discourse about sampling and creativity?

**Peter:** To my knowledge we’re the only source that actually looks at a really broad portfolio of reforms and talks about which ones might complement each other. So my hope is that the book will help people realize that there are multiple fronts to push along. Some of them are private and involve private businesses just offering more innovative licensing. But there are also really
important things that the courts could do, or that Congress could do, to open up some breathing room for sampling and get the gears of licensing turning more easily. In the twenty years since it became clear that sampling could be copyright infringement, there hasn’t been much progress in terms of the problems we document. So I’m hoping that advocating a set of multiple policy reforms will be a better recipe for progress than just resting things on one pet solution.

**Kembrew:** One of the reasons I wanted to co-write this book is because all of the information and knowledge about sampling and the legal issues that relate to it have been dispersed across a wide range of books, articles, and published interviews. One of the things that *Creative License* does is it gathers all of this disparate information into one place. There’s a fairly sweeping cultural history of musical appropriation in Chapter Two, covering everything from jazz and reggae to hip-hop and disco, as well as avant-garde sound collage. This is juxtaposed with chapters that cover the legal and economic underpinnings and key court cases. Then we finish the book with a review of the different policy and legal solutions, all of that knowledge and those resources are dispersed across the Web and across law journals.

**Kristin:** There’s one thing that I notice as a reader of the book is that we all assume that sampling is the purview of hip-hop artists in the studio, but maybe you can both reflect on how it’s becoming ingrained or embedded in our culture right now. Thanks to technology, we’re all becoming remixers, aren’t we?

**Kembrew:** Exactly. The issue of sampling doesn’t just simply affect hip-hop artists or just audio remix artists. One of the things that the book makes clear is that you can see sampling as kind of a microcosm of the new entertainment culture. Just think about how music is used as the basic audio building block for commercials, video games, movies, television shows, and on and on. The people who license their songs for those uses are implicated into this legal system. They themselves can end up getting sued if they license a song that contains an uncleared sample. So in other words, we’re facing this massive licensing logjam that’s only going to get worse in the coming years and decades. That’s because more and more of the culture that gets produced contains references to previous musical or visual texts. That’s why it’s an important issue for everyone.

**Peter:** Right, and this gets back to copyright’s expansion over recent decades. One of the ways copyright has expanded is that copyrights last longer than they used to. But a more subtle way that copyright has expanded is that smaller and smaller pieces of larger works are now protected. Neither the public nor its legislators have had when I would consider a meaningful debate about whether 1.9 seconds of a sound recording should be subject to copyright. It is only becoming more prevalent for ordinary people to use small snippets of existing copyrighted works. It should interest everyone that the law and the music business arrive at a more sensible solution.

*Creative License: The Law and Culture of Digital Sampling*
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CREATIVE LICENSE
The Law and Culture of Digital Sampling
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Includes interviews with:

George Clinton
Clyde Stubblefield
Hank Shocklee
Chuck D
Harry Allen
Pasemaster Mase & Posdunos, De La Soul
Mix Master Mike
Kid 606
El-P
Mark Hosler & Don Joyce, Negativland
Lloyd Dunn, the Tape-Beatles
Eyedeas & Abilities
Raquel Cepeda
Mr. Len
Tim Love
Prefuse 73
Shock G, Digital Underground
Drew Daniel & M.C. Schmidt, Matmos
Sage Francis
Mr. Dibbs
Saul Williams
Miho Hatori, Cibo Matto
Matt Black of Coldcut
Paul Miller aka DJ Spooky
Scanner
DJ Vadim
Bobbito Garcia
Twick, graffiti artist
Eothan Alapatt, Stones Throw Records
Mark Kates, formerly of Grand Royal
Andrew Bart
Greg Tate
Jeff Chang
Joe Schloss
Whitney Broussard, music lawyer
Dina LaPolt, music lawyer (clients include Tupac Shakur’s estate)
Walter McDonough, music lawyer
Shoshana Zisk, music lawyer
Ken Freundlich, music lawyer
Anthony Berman, music lawyer
Michael Hausman, music manager (Suzanne Vega, Aimee Mann)
Danny Rubin, sample clearance expert
Pat Shanahan, sample clearance expert
Bill Stafford, publisher-side clearance expert
Tom Silverman, Tommy Boy
Dean Garfield, MPAA
David Sanjek, music historian, BMI
Lawrence Ferrara, musicologist at NYU and sampling expert witness
Siva Vaidhyanathan, University of Virginia School of Law
Peter Jaszi, American University School of Law
William Terry Fisher, Harvard University
Jane Ginsburg, Columbia University School of Law
Lawrence Lessig, Stanford University
Mia Garlick, Creative Commons

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The current debate over intellectual property rights has resulted in a broad but often superficial understanding of the issue among the general public. With the goal of replacing anecdotal with empirical evidence, McLeod (communication studies, Univ. of Iowa; *Freedom of Expression: Resistance and Repression in the Age of Intellectual Property*) and DiCola (law, Northwestern Univ.) questioned dozens of artists, music executives, lawyers, and copyright experts about their experiences with and opinions about the complicated and expensive system of licensing music samples. Beginning with a short history of sampling and the evolution of its legal standing, the authors examine the challenges faced by samplers, the sampled, and the recording industry as a whole. Interviews, economic data, and examples from case law clearly identify trouble spots in the current system and their harmful effects on all parties. Several proposals for reform and their possible results are also explored.

**Verdict** A methodical yet accessible exploration that addresses concerns from several perspectives and invites spirited discussion. Essential for students of intellectual property law, aspiring recording artists or producers, and hip-hop history buffs.—Neil Derksen, Gwinnett Cty. P.L., Lawrenceville, GA

Copyright laws inhibit creation of new media

By Benjamin Franzen and Kembrew McLeod

7:38 p.m. Wednesday, December 15, 2010

The arrival, finally, of Beatles songs on iTunes might appear to signal that art and technology have at last been fully united in a happy 21st-century marriage. And yet, the relationship between music and copyright law is anything but harmonious.

What would sound sweeter? A copyright system that allows musicians to create with the full range of today’s digital technology legally — while also ensuring that copyright holders get paid for using their works.

Let’s dial the clock back a bit. In 1998, Congress passed the Sonny Bono Copyright Extension Act, which granted creators and their heirs unreasonably long control of their work before it passes into the public domain. For pieces published prior to 1978, owners keep the copyright for 98 years; work created since then belongs to owners for the life of the creator, plus 70 years. This is significantly longer than the 28 years of control established by the Founding Fathers.

Say a woman records a song today at age 25, and she lives to be 80. After death, her kids — and grandkids, and great-grandkids — take control for another seven decades. You wouldn’t be free to incorporate that recording into a song of your own until the year 2135, by which time you’d be dead, too.

Of course, you can pay to license that song. But copyright terms that extend so far beyond a creator’s natural life upset market forces. That is, there is no urgency for owners to exploit their rights while they still hold them. As a result, the fees they set are often exorbitant.

So if work is prohibitively expensive to license, and it won’t enter the public domain during our lifetimes, then it’s effectively barred from being woven into the cultural conversation. Our common well of ideas, the ingredients we use and transform to create anew, shrinks. We wind up stymieing our own evolution.

We learned firsthand the frustrations modern creators face when we made “Copyright Criminals,” a documentary about “sampling” in music.

For a while, sampling — or using a piece of sound from an existing recording within a new work — was a key to some of the most exciting music America had to offer. In the 1980s,
groups like De La Soul and Public Enemy were making rich aural tapestries in which a single song might use 20 samples, each just a second long. Public Enemy’s “Fear of A Black Planet” (1990) is such a cultural benchmark that the Library of Congress included the album in its National Recordings Registry alongside work by Gershwin, Coltrane and Hank Williams.

Today, those records couldn’t get made. Court victories by copyright holders drove licensing fees through the roof and put an end to audio envelope-pushing.

This has an obvious impact on a hip-hop epicenter like Georgia. Our local heroes — OutKast, Cee Lo Green — are some of the most important creators in music today. But who else loses out?

Lots of folks. The rigid copyright system that stifles the music industry envelops all our culture industries. If a song can’t get clearance for release by a record company, it won’t be used in film. You’re not going to hear it on TV, in commercials or in a ringtone.

Consumers aren’t immune. Today, media consumers are media producers. People can film, sound track, edit and distribute media around the globe, right from their phones.

We need to find a way for this 21st-century “remix culture” and our 20th-century copyright laws to jibe — not so that 16-year-olds can snatch whatever media they want. Rather, we need a reasonable system that compensates rights holders, but also allows modern creators to transform culture.

It’s no easy feat, although there is hope at the grassroots level.

American University’s Center for Social Media has helped develop “best practices” statements for specific communities: documentary filmmakers, media literacy teachers, online video makers and others. These statements carry significant weight in courts that determine whether a work infringes another’s copyright or is protected by the fair use allowance for criticism, commentary and other transformative uses.

Ultimately, Congress will have to tackle the issue. If that seems unlikely now, it’s only going to get harder later.

With each passing week, copyright law grows more disconnected with the way people use media. “Using” media today is more than just buying a song from iTunes. It’s manipulating media of all kinds, dissecting it, transforming it. When we secure a way to do that so everyone profits, our community grows and our culture progresses.

Benjamin Franzen, a filmmaker, owns Changing Images in Atlanta. Kembrew McLeod is an associate professor of communication studies at the University of Iowa.

Their documentary, “Copyright Criminals,” aired on PBS’ “Independent Lens” this month.

Find this article at:
http://www.ajc.com/opinion/copyright-laws-inhibit-creation-778505.html
Wired Campus

Hip-Hop and Copyright Law in the Classroom

January 5, 2011, 3:01 pm

By Ben Wieder

Kembrew McLeod’s youthful interest in 1980s hip-hop became a life-long scholarly pursuit when some of the groups he’d listened to as a teenager were sued in the early 1990s for using samples of previously recorded music.

“The issue—how the law affects sampling—is the entire reason I’m a professor,” says Mr. McLeod, an associate professor of communication studies at the University of Iowa.

It’s the subject of his second documentary film, Copyright Criminals, co-directed by Ben Franzen, which ran last year as part of PBS’s Independent Lens series and will be released on DVD in March. It is also available at Hulu.com.

As part of its Community Classroom program, PBS has released a curriculum centered on excerpts from the film that accompanies teaching materials for the classroom.

The materials are designed to apply to a wide variety of subjects, Mr. McLeod says, and could be used for discussions of plagiarism or the ethics of illegally downloading music and movies, although the film shies away from that issue.

Steve Jones, a professor of communication at the University of Illinois at Chicago, screened an early version of the film for an introductory communications class several years ago and has used excerpts several times since. “It gets them thinking about the interplay of art and commerce,” he says.

The film traces the rise of sample-driven hip-hop in the late 1970s and early 1980s through interviews with members of seminal groups like Public Enemy and De La Soul. Musicians like George Clinton, whose material was sampled in hip-hop music, weigh in, too, along with lawyers, scholars, and record executives.
Students respond more to the movie than they would to lectures on the same topic, says Mr. Jones. “I don’t think they see anyone who’s a professor as having authority on hip-hop and rap.”

The movie both emerged from and contributed to Mr. McLeod’s academic work. It shares its title with a chapter in his 2007 book, *Freedom of Expression: Resistance and Repression in the Age of Intellectual Property*, and he used interviews from the movie for his forthcoming book, *Creative License: The Law and Culture of Digital Sampling*, written with Peter DiCola, an assistant professor of law at Northwestern University.

The movie’s subject informed its own creation, as copyright law affected how much of the subject material Mr. McLeod and Mr. Franzen could use. Mr. McLeod applied the doctrine of fair use, which allows for the use of short excerpts of material in criticism or scholarly work.

“If it wasn’t for the very same thing that allows me to teach media classes, fair use,” he says, “the film wouldn’t exist.”

This entry was posted in *Campus Piracy*, *Legal Troubles*, *Teaching*, *Video*. Bookmark the [permalink](#).