13 The Musician as Thief: Digital Culture and Copyright Law

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Human culture is always derivative, and music perhaps especially so. New art builds on old art. We hear music, process it, reconfigure it, and create something derivative but new—folk melodies become Liszt's Hungarian Rhapsodies; Roy Acuff's "Great Speckled Bird" becomes Hank Williams's "Wild Side of Life"; and Rodgers and Hammerstein's "My Favorite Things" becomes a John Coltrane classic.

Twentieth-century recording technology brought this pervasive culture of reuse to a new level. Artists can now build upon prior recordings themselves, turning the fixed artifact of an earlier artist's performance into raw material for new work. Early sonic collage, in the analog era, was painstaking and labor-intensive. It took John Cage a year to make his four-minute-long Williams Mix.[1] William Burroughs spent untold hours constructing cut-ups with razor blades and tape. And of course, artists' raw materials for these projects were limited to whatever recorded sound was physically at hand.

Digital recording technology revolutionizes and democratizes this recycling process, making complex manipulation of recorded fragments easy and relatively affordable. And the Internet and other digital communications media bring a treasure trove of recorded sound directly to the sonic cannibal—information formerly fixed in discs or tapes now exists, in one critic's words, "as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light, in conditions which one might behold in effect, as glowing pixels or transmitted sounds, but never touch or

claim to 'own' in the old sense of the word."[2] Contemporary music, from the top forty to the most obscure live DJ set, reflects this technological change, taking the music that came before as raw material for reuse and reconfiguration. As David Sanjek has noted, this cultural practice profoundly blurs the line between creators and consumers of culture, turning listening itself into a platform for creative production and performance.[3]

The cultural practice of sampling meshes very poorly with copyright, the body of law which turns creative expression into private property. The first U.S. sampling case held rapper Biz Markie liable for infringing Gilbert O'Sullivan's copyright in the song "Alone Again (Naturally)." Judge Kevin Duffy began his opinion with scripture—"thou shalt not steal"—and ended it with a referral for criminal prosecution.[4] The law has changed very little in intervening years, despite the burgeoning of sample-based music. As a result, much of today's most innovative cultural production takes place in the shadow of the law: many DJs and other artists produce their work in the knowledge that a copyright holder could sue, that distribution of their work could be enjoined by law, and the sampler held liable for substantial monetary damages.

The law doesn't have to work this way. Judge Duffy's "thou shalt not steal" implies a deeply flawed analogy between physical property and the intellectual property protected by copyright law. Property rights over informational works, such as music, don't work the same way as property rights over land or material goods, for reasons eloquently expressed by Thomas Jefferson:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.[5]

The peculiar properties of intellectual goods—that we can all use them at once without diminishing their value, that we consistently build on elements of older intellectual goods to produce new ones—are reflected in U.S. copyright law. The law limits the rights of intellectual property owners, and grants the public rights to share in the intellectual property's value, in ways that would be unthinkable for tangible property like cars or bushels of wheat. Indeed, many argue—based on the First Amendment and the Constitution's Copyright Clause—that expansive copyright protection of the sort assumed by Judge Duffy in the Biz Markie case exceeds Constitutional parameters. This essay will not detail those arguments. (I refer you to sonic appropriationists Negativland if you are interested in the legal niceties of this issue.[6]) But it will lay out a framework for considering the relationship between copyright, culture, and digital technology.

According to the Constitution, copyright law grants limited rights to authors in order to "Promote the Progress of Science and Useful Arts." The point is to create the economic and legal conditions within which science, learning, and culture can flourish. In pursuit of this goal, a copyright holder is generally granted the right to stop other people from selling copies of her work or derivative works based on it.[7] This ensures that she can get paid, that she will have economic incentives to create and distribute culture. As the Supreme Court has explained, the "Promote the Progress" goal is deeply utilitarian:

> [Although] the immediate effect of our copyright law is to secure a fair return for an author's creative labor the ultimate aim is, by this incentive, to stimulate artistic production for the general public good.[8]

"Promot[ing] the Progress" is a goal defined by collective interests, not individual desert. (This utilitarian function of copyright can, in a characteristic Enlightenment-liberal way, be a little harsh. U.S. law has no equivalent to Europe's "moral rights" for a songwriter to control exploitation of her work—she cannot necessarily stop a cruel parody; and if she sells her copyright she retains no power to stop commercial or other uses that she finds distasteful.)

As well as rewarding authors for their work, the law also protects the general public interest in cultural progress by maintaining some public access to old works as raw materials for new ones. All copyrights eventually expire, and the works feed into the public domain where anyone may copy them or prepare derivative works.

In addition, certain reuse rights never belong to the author—they are handed off to the public, and to secondary users, immediately. You are always

free to copy the underlying ideas or facts contained in a work; only the author's individual expression is protected by copyright. And you can copy elements of a work that were not original to the author—like 4/4 time, an a-b-a-b rhyme scheme, or a boy-meets-girl plot. Moreover, under the doctrine of "fair use," certain criticism and parodies can copy a work without infringing the work's copyright. When 2 Live Crew mocked Roy Orbison in a goofy cover version of "Pretty Woman," the U.S. Supreme Court held that the fair use doctrine protected the group from copyright liability.

Fair use is not a great legal tool for DJs or appropriationist artists as defendants, though. For one thing, taking a fair use case to court is hugely expensive. For another, it is rarely clear in advance what a court will consider to be fair use, so the defense can be a serious gamble. The 2 Live Crew case illustrates this legal unpredictability: the group's fair use defense was accepted by a federal trial court, then roundly rejected by the appeals court, before being upheld at the Supreme Court level. And the fair use defense has conspicuously failed some artists. Jeff Koons, whose "Banality Exhibition" included a sculpture based on a copyrighted image from a postcard, argued in court that "his sculpture [was] a satire or parody of society at large,"[9] and that he drew on Dadaist and other influences in critiquing "the mass production of commodities and media images [that] has caused a deterioration in the quality of society." He used the postcard's mass-marketed image of a couple holding puppies, he said, in order to "comment critically both on the incorporated object and the political and economic system that created it."[10] The court rejected this defense, holding Koons liable for copyright infringement and suggesting that, "given Koons' willful and egregious behavior, we think [the copyright holder] may be a good candidate for enhanced statutory damages" of $100,000.[11] No fair use case involving music sampling has ever been decided. When U2 sued Negativland for sampling, Negativland wanted to defend on fair use grounds. But the group's record label, aware of the uncertainty and legal pitfalls of the doctrine, settled the case.[12]

Fair use is a conceptually useful doctrine, though, because the statute establishing the doctrine lays out a detailed balancing test. The test asks both how creative or transformative the second work is and whether it displaces the first product in the market.[13] This lets a court get at questions about creativity and questions about money all at once—and these issues tend to blur in the sampling context. Another legal device that effectively merges financial and artistic concerns is the compulsory license for musical compositions (not

recordings—just compositions). Anyone who wants to record a new version of a copyrighted composition can do it, as long as he pays the songwriter a fee set by the government. So the owner of the copyright in the composition gets paid whenever someone records a cover—but in most circumstances she can't stop the cover artist or set the terms of payment. Compulsory licensing is one possible legal compromise in allocating rights between artists who sample recordings and artists whose work gets sampled.

The legal limits on copyright holders' power, in particular the fair use doctrine, are legal mechanisms allowing us to engage with, respond to, and reuse information; to turn cultural input into cultural output; to be processors of culture rather than passive consumers. These doctrines protect First Amendment values: if copyright did make it illegal to quote someone in order to criticize what they said, it would run headlong into the First Amendment.[14] And the limiting doctrines serve the Copyright Clause's "Promote the Progress" goal by balancing financial rewards to authors against access rights for the public and for secondary authors who build on elements of the older work.

The balance between the rights of authors and the rights of creative reusers has shifted dramatically over time. Copyright has expanded hugely, particularly in the twentieth century, giving creators ever-greater powers to stop other people from making derivative or secondary uses of their work. The first U.S. Copyright Act, in 1790, only gave authors the right to "print, reprint, publish or vend"—authors had no right to control derivative uses.[15] An 1863 Supreme Court case took a similarly dim view of authorial control over derivative works, holding that Harriet Beecher Stowe could not stop sales of an unauthorized German translation of *Uncle Tom's Cabin*.[16] This holding illustrates a conception, profoundly different from today's, of the reuse rights passed by a copyright holder to her readers. The court explained,

> [when an author] has ... given his thoughts, sentiments, knowledge or discoveries to the world ... his conceptions have become the common property of his readers, who cannot be deprived of the use of them.

This nineteenth-century conception of the "the common property of readers" is strikingly robust—according to this holding, a copyright holder grants such significant reuse rights to cultural consumers that they may legally prepare closely derivative works, even translations.

The law has changed greatly since this holding. Stowe's case would come out the other way if litigated today. This expansion of authors' property rights

is driven in part by sound economics—authors would have a hard time getting paid if pirates could legally sell derivative works which differed only slightly from the original. But the expansion is also driven by intensive lobbying from major copyright holders, a group which currently prominently includes record companies and movie studios.

Historically, flurries of lobbying and changes in the legal balance between authors' and consumers' rights have tracked changes in popular media and communications technologies. The invention of player piano rolls triggered heated copyright battles, as did the development of photography, the VCR, and digital audio tape. Legislation has consistently favored existing commercial interests over interests newly enabled by technology. In 1905, draft legislation largely ignored the interests of the technologically novel piano roll and phonograph producers. By 1909, these industries had a seat at the bargaining table and helped craft legislation that disfavored the then-nascent motion picture studios. In the 1920s, proposed copyright laws neglected the interests of another emerging group, radio broadcasters.[17] And at no time, of course, have the diffuse interests of the public, or the as-yet-unconceived interests of future creators, been strongly represented in the lobbying process.

But given the Constitutional concerns described above, the interests of the public and of creative reusers of culture should be relevant; the law should be tailored to account for both contemporary technology and contemporary culture. At any given time, legal rules defining what the author can do with a work, and what subsequent creators can do with the work, logically build on two sources (aside from lobbyist pressure): (1) The constitutional mandate to promote progress, and (2) lawmakers' empirical assumptions about how to promote progress—how culture gets made.

The legal question posed by the art discussed in this book is, should digital technologies change lawmakers' empirical predictions about cultural production? Does a change in technology produce a change in how we make culture? And, if we are making culture differently now, how should the law respond?

Marshall McLuhan offers one answer: he says that changes in technology do change culture.[18] For example, he argues, in preliterate societies, a story or song existed only in the moment of being performed—there was no separation of text and performance, and plagiarism was inconceivable, because cultural survival depended on repetition. Writing, the technology of fixing information in physical form, changed our relation to culture. Writing reified information as a thing existing separately from the human being. As a fixed

object, the informational work became more easily susceptible to ownership and authorial attribution.[19]

There's clear cause and effect here: a change in technology produces a change in how we use information, and particularly how we think about ownership of information. Another technology, the printing press, is generally credited as the trigger for modern legal copyright protection.

Electronic and eventually digital media introduced another cultural shift. McLuhan identified television as the bringer of post-print culture, disrupting the linearity of previous media. McLuhan's contemporary, Harvard Law Professor Benjamin Kaplan, who dismissed McLuhan as a "professional soothsayer," himself proved almost eerily prescient on this topic.[20] Speaking in 1966, he forecast the rise of networked computers which would allow cheap and instantaneous distribution of text, images, and sound.[21]

This technology, he said, would beget a sea-change in our creative practices and interaction with information, as the "distinction between the author or producer of the stored material and the user of the material [becomes] blurred." In time, he said, such a change will likely "abate feelings of proprietorship and thus modify conceptions of copyright, especially those bearing on plagiarism."[22]

Kaplan's prediction pulls together technology, culture, and copyright law. He suggests, first, that technology will change the way we think about information and produce culture; and, second, that this will bring about a corresponding change in the law.

Looking to the burgeoning production of digitally enabled, sample-based culture, I would say that Kaplan's first prediction has clearly come to pass. Looking to the ever-increasing legal constraints on reuse of prior works, however, I would submit that his second prediction, about the law, has not.

David Toop has written eloquently about the cultural shift brought about by sampling technology. With sampling, he says,

> Songs became liquid. They became vehicles for improvisation, or source materials, field recordings almost, that could be reconfigured or remixed to suit the future. In a humiliating way, musicians became technicians, alongside recording engineers, tape ops, editors, and all the other technocratic laboratory assistants cleaning their glasses in the back room. At the front end of the medium was the DJ ... playing music and people as one fluid substance.[23]

Mixmaster Morris put it more succinctly: "We've had sixty, seventy years of making records. That's stage one. Now we sample them."[24]

If this is the way that we make culture now—if, as Chris Cutler suggests, in an age of digital technology "producing is no more than critical consuming"—then perhaps it is time to reconsider how well copyright law's balance of authorial control and public access serves the Constitutional "Promote the Progress" goal.[25] Streamlined compulsory licensing systems and expanded, clarified fair use rights may facilitate contemporary cultural production better than the expansive copyright power currently granted to authors.

Cultural theorists have intelligently theorized the intersection of cultural consumption and cultural production, and provided a framework for thinking about these practices. Dick Hebdige described versioning in Caribbean music as a sort of semiotic democracy: "it implies that no one has the final say. Everybody has a chance to make a contribution. And no one's version is treated as Holy Writ."[26] (Carried by immigrants like Cool DJ Herc, the musical practices which Hebdige describes became part of the early hip-hop culture of the Bronx and an ancestral source of much that is most alive in today's music.) Roland Barthes, too, told us something about the nonpassive consumption of culture when he wrote of "writerly texts," which invite the reader to participate in the production of meaning.[27] Sampling practice may represent more vigorous participation than Barthes envisioned, and suggest that with the right (digital) tools, an intelligent consumer can make any found text "writerly."[28]

Walter Benjamin's works of the 1930s provide especially well-developed theoretical foundations for navigating the relation between technology, semiotic leftovers, and cultural production through consumption. His essay "The Work of Art in the Age of Mechanical Reproduction" suggested that the reproductive technology of film and other media "not only permits ... but virtually causes mass distribution." As a result, he said, "the distinction between author and public is about to lose its basic character."[29]

Benjamin's writing both about technologies for copying art and about mosaic or collage-format artistic production may provide conceptual tools to explain how, through sampling, an artist can create something new and valuable. His own major uncompleted work, the *Arcades Project*, was to have been entirely sample based. Benjamin explained:

> Method of this project: literary montage. I needn't say anything. Merely show. I will purloin no valuables, appropriate no ingenious formulations. But the rags, the refuse—these I will not inventory, but allow, in the only way possible, to come into their own: by making use of them.[30]

In one critic's description, the mosaic model of the *Arcades Project* is a construction of a "history and politics ... which clings tenaciously to the fragment, the miniature, the stray citation, but which impacts these fragments upon each other to politically explosive effect."[31]

Drawing on Benjamin (and oversimplifying, inevitably) we can derive at least two explanations of what is new and creative about sample-based production.[32]

The first point is about collage as a technique: the selection, arrangement, and juxtaposition of the found bits of prior culture is the art. The fragments "impact upon each other to explosive effect"—through the artist's selection and arrangement, she generates novel information. Such collage-based creative production is well established in visual art. In the realm of music, musical sampling artists like Negativland and Canadian plunderphonics creator John Oswald practice analogous techniques with sonic detritus.[33]

The second point derived from Benjamin is that it may be a culturally productive act simply to discover and draw attention to a fragment of text, image, or sound. Part of the mosaic- or collage-creator's art lies in the very process of rescuing the fragment from obscurity and showing it to people. This Benjaminian urge to rescue and re-present culture is conspicuous throughout sample-based genres, and is illustrated in the following description of DJs making organized raids on collective culture—that is, going to record stores. This comes from Jeff Chang, aka DJ Zen, who describes feeling outclassed as a crate-digger by members of the now defunct Solesides collective.

> There's nothing worse to them than the kind of guy who won't bid his rent and food money for a Tanzanian Funk 45 or the impossible-to-get Invaders LP. The kind of person who doesn't scour thin phonebooks from foothill counties and find teeny used record stores owned by unwashed proprietors who look like trolls. The kind of person who doesn't know where and when all the record conventions within 1000 miles are going down, and what hour before dawn to show up in a miner's light helmet and a backpack.[34]

This is serious pursuit of cultural fragments—on par with the great-granddaddy of all crate diggers, Grandmaster Flash, who claims to have performed with "something like 45" crates of records behind him.[35] The critical and commercial success of these artists suggests that their compulsion to collect, to reconfigure, to re-present prior recorded sound is finding a receptive audience. To listeners, crate-digging is a highly legitimate foundation for significant and innovative cultural production.

McLuhan gives us a conceptual framework for explaining how technology affects cultural production; Benjamin and others give us analytical tools for describing how production based on copying can be creative and important. A glance at the top forty or visit to a record store gives us evidence of how widespread sampling practice is. All of this evidence strongly supports Benjamin Kaplan's claim that technology will change the way we make culture and disrupt the neat division between cultural producers and consumers.

But the DJs and artists who make culture this way still legally expose themselves to civil and even criminal liability. That brings us to Kaplan's second prediction: that copyright law will adapt to this new mode of production. This prediction has not come to pass. Indeed, so far, copyright law has reacted only to the increased piracy threat posed by digital technology, and not to the technology's creative potential.

Very few music sampling cases have gone to court. Those that have—such as the Biz Markie case—have come out so poorly for the sampler that few musicians would now choose to defend sampling before a judge. So instead of a body of carefully reasoned and Constitutionally constrained case law, we are left with compelling precedent of a different sort: the legendary out-of-court settlements—De La Soul versus the Turtles, Vanilla Ice versus Queen and David Bowie, the Beastie Boys versus everyone.

The law, by creating a background regime of absolute entitlements for copyright holders, creates a very bad bargaining situation for the well-meaning DJ who actually tries to comply with the law and clear her samples. And it creates an impossible situation for acts like John Oswald or Negativland, who (1) sample lots of artists who are very hard to track down, making transaction costs of licensing impossibly high; (2) tend to irritate the artists they sample, making refusal of permission quite likely; and (3) aren't making much money.

It has been my contention that digital technology allows us to interact with information and make culture in a new way. Copyright law should respond to this cultural shift if it is to serve its Constitutional "Promote the Progress" goal and the First Amendment's free expression goal. It's not that we've stopped making music the old way—people still sing and always will, people still play acoustic guitars and Hammond organs, and those people should be able to sell their work and make a living. And it's not that all sampling should be free—very few people would argue that Puffy Combs should not have had to pay for his "Every Breath You Take" sample. But some sampling is so clearly original and expressive, and so harmless to sales of the original work, that it should be free—either on fair use grounds or pure First Amendment grounds. And creative reuse of copyrighted material could be enabled, and legal chilling effects on new musical voices alleviated, through a streamlined compulsory licensing system for sampling. The law should move in this direction in order to adapt to technology and the way culture gets made today, in order to serve the collective cultural progress goal that copyright is designed to facilitate.

But the law is in fact moving in the opposite direction. I will close with a brief overview of recent legal responses to digital technology and digital culture. Major copyright holders have successfully argued to Congress that digital technology and the Internet vastly increase the threat of piracy, making greater protection necessary. They are partly right—a technology which enables free and instantaneous transmission of millions of copies is a very real threat to copyright holders. But the situation is more complicated than that. The same technology also lowers copying and distribution costs for legal sales, which can decrease costs for the copyright holder and help her turn a profit on her work. And on the Internet, the same technology that facilitates piracy also facilitates detection and prosecution of piracy. Moreover, individuals' noncommercial copying and sharing of copyrighted music—which is now labeled piracy by the record industry, particularly if carried out online—has traditionally been far outside the province of copyright law and enforcement. It's not that digital and Internet piracy is not a legitimate threat—but the furor surrounding it is, in the words of copyright professor Jessica Litman, "about 50 percent hype."[36]

The legislative response, however, has been quite real. In the Sonny Bono Copyright Term Extension Act, Congress extended the term of copyright to life plus 70 years, or 95 years for corporate works. (The original copyright term, in 1790, was 14 years extendible to 28 years.) This extension enraged online publishers and others whose business it was to bring public domain works—often works long out of print and unavailable to consumers—into print or online distribution.

And with the Digital Millennium Copyright Act (DMCA), Congress gave copyright holders legal protection that potentially eviscerates consumers' fair use rights. The DMCA established both civil and criminal liability for anyone who breaks through encryption or other "digital fences" surrounding a copyrighted work.[37] The law also criminalizes distribution of programming tools

for breaking such encryption. Under the DMCA, it doesn't matter if the defendant actually infringed copyright—if she bypassed the encryption, she broke the law. If the encryption wraps up both a public domain work and a copyrighted one—like a Shakespeare play with a new introduction—and the hacker only copies from Shakespeare, she is still liable under the DMCA. She is also liable if she hacks the encryption in order to make fair use of the material—a film teacher could violate the DMCA by making a montage of clips from movies on encrypted, copy-protected DVDs.

The DMCA has come under heavy attack from computer programmers who work on encryption, because it can prevent them from developing and sharing their work—a restriction which, in addition to being inconvenient, arguably violates both the First Amendment rights of code writers and the "Promote the Progress" goal of copyright. (The DMCA got a lot of bad press when the Recording Industry Association of America threatened to sue Princeton Computer Science Professor Ed Felten for presenting his research on digital music encryption at a scientific conference. Although the RIAA backed off of that case, it reserves the right to sue Felten's graduate student assistants for publishing their encryption research, should they attempt to do so.) But the DMCA is also potentially significant for cultural producers of the sort discussed in this article. By banning decryption tools, it may make reuse of digital format recordings much more difficult as a practical matter. And by banning decryption, it raises the number of laws a DJ may break, and the amount of legal liability she may face, every time she uses an uncleared sample.

The DMCA is just one of several legal shifts that may effectively expand protection so far as to seriously undermine legal reuses (such as fair use) and currently illegal but interesting reuses (such as those carried out by innumerable DJs and artists). Another emerging body of law permits copyright owners to legally bind consumers to the terms of "click-wrap" licenses on digital media.[38] By clicking "yes" and using the copyrighted work, the user legally agrees to comply with small print which may prohibit fair use and even, in some cases, purport to prohibit public criticism of the copyrighted work. Yet another law—as yet unenacted, but working its way through Congress—would compel manufacturers to make computers and other devices comply with technical measures for protecting copyright.

These legal changes respond to one aspect of digital technology, the cheap and easy piracy which it enables. But in so doing, they impede new modes of cultural production enabled by those same technologies. Legal rights to turn cultural consumption into cultural production are eroding at the very moment that such production is becoming possible for large numbers of artists. In legally foreclosing this entire realm of digital culture, copyright law disserves its "Promote the Progress" goal under the Constitution.[39]

Notes

1. Chris Cutler, "Plunderphonics," *Musicworks* 59 (1994), 14.

2. John Perry Barlow, "Selling Wine without Bottles: The Economy of Mind on the Global Net" (1993), available at http://www.eff.org//Publications/John_Perry_Barlow/HTML/idea_economy_article.html.

3. David Sanjek, "'Don't Have to DJ No More': Sampling and the 'Autonomous' Creator," *10 Cardozo Arts & Entertainment Law Journal* 607 (1992).

4. *Grand Upright Music Ltd. v. Warner Brothers Records*, 780 F.Supp. 182 (1992), available at http://detritus.net/rhizome/legal/bizmarkie.txt.

5. Letter from Thomas Jefferson to Isaac McPherson, August 13, 1813, quoted in *The Complete Jefferson*, ed. Saul K. Padover (Duell, Sloan and Pearce 1943), 1011, 1015.

6. See www.negativland.com.

7. Copyright in music is complicated because there are separate copyrights over the underlying composition, on the one hand, and any individual sound recording, on the other. The law is complexly tailored to allow these two sets of rights to coexist. Generally speaking, however, a copyright owner's rights are defined as follows by Section 106 of the Copyright Act (see http://www.copyright.gov/title17/92chap1.html):

Subject to sections 107 through 121 [which create a number of exceptions], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

8. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975).

9. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992).

10. Ibid.

11. 17 U.S.C. §504 (1992).

12. See Negativland, *Fair Use: The Story of the Letter U and the Numeral 2* (Seeland-Negativland, 1995).

13. 17 U.S.C. §107 provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

14. The Supreme Court, frustratingly, has never clarified the relationship between the fair use doctrine and the First Amendment. Its clearest statement on this point so far is this: "In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use [as defendants in the case asked the court to do]." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

15. See discussion in Jessica Litman's excellent book, *Digital Copyright*, (Prometheus Books, 2001), at p. 22.

16. *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853).

17. Litman, *Digital Copyright*, 46.

18. Marshall McLuhan, *The Gutenberg Galaxy* (University of Toronto Press, 1962); Marshall McLuhan and Quentin Fiore, *The Medium Is the Massage* (Random House, 1967).

19. See Doug Brent, "Oral Knowledge, Typographic Knowledge, Electronic Knowledge: Speculations on the History of Ownership," available at http://www.virtualschool.edu/mon/Economics/BrentHistoryOfOwnership.html, discussing Walter Ong, *Orality and Literacy: The Technologizing of the Word* (Routledge, 1982), in turn drawing heavily on McLuhan's work (but adding considerably more anthropological data).

20. Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press, 1967), 118.

21. Kaplan described "full-scale 'on-line' operations with computers ... linked or integrated systems or networks of computers capable of storing faithful simulacra of the entire treasure of the accumulated knowledge and artistic production of past ages.... The systems will have prodigious capacity for manipulating the store in useful ways, for selecting portions [including sound and graphics files] of it upon call and transmitting them any distance...." Ibid., 119. He suggested that the medium could be the death-knell of copyright as we know it, as "the ingenuity which devises the systems will no doubt be capable of welding-in bookkeeping apparatus" to bill on a per-access basis. Ibid., 121.

22. Ibid., 117.

23. David Toop, *Ocean of Sound* (Serpent's Tail, 1995), 43.

24. Ibid., 52.

25. Cutler, "Plunderphonics," 14.

26. Dick Hebdige, *Cut 'n' Mix: Culture, Identity, and Caribbean Music* (Methuen, 1987), 14.

27. Roland Barthes, *S/Z* (Hill and Wang, 1970).

28. Of course, with the right attitude an artist may not need any tools at all. Consider, e.g., Marcel Duchamp's transformation of a urinal into a "writerly text" in creating his *Fountain* sculpture.

29. Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction," in *Illuminations* (Schocken, 1969), 217, 244, 232.

30. Walter Benjamin, *The Arcades Project*, trans. Howard Eiland and Kevin McLaughlin (Harvard University Press, 1999), N1a, 8.

31. Terry Eagleton, *Ideology of the Aesthetic* (Blackwell, 1990), 338.

32. For Benjamin, these two points go together: as Terry Eagleton puts it, Benjamin's model "revolutioniz[es] the relation between parts and whole"; the idea's "constituents light each other up in all their contradictoriness" in a way that "safeguards particularity but fissures identity." Ibid.

33. See http://www.negativland.com/changing_copyright.html/.

34. Liner notes from *Solesides Greatest Bumps* (various artists, Quannum Projects, 2001).

35. David Toop, *The Rap Attack: African Jive to New York Hip-Hop* (Pluto Press, 1984), 62, 73.

36. Litman, *Digital Copyright*, 25.

37. 17 U.S.C. §1201.

38. The Uniform Computer Information Transactions Act, enacted in some states, makes click-wrap licenses enforceable. Many courts have held them enforceable under existing contract law.

39. A version of this essay was first delivered at Duke Law School's "Music and Theft" conference in May of 2002.