

COPYRIGHT CRIMINALS

A FILM PRODUCED BY **BENJAMIN FRANZEN** AND **KEMBREW MCLEOD**



Can you own a sound? As hip-hop rose from the streets of New York to become a multibillion-dollar industry, artists such as Public Enemy and De La Soul began reusing parts of previously recorded music for their songs. But when record company lawyers got involved everything changed. Years before people started downloading and remixing music, hip-hop sampling sparked a debate about copyright, creativity and technological change that still rages today.



WWW.PBS.ORG/INDEPENDENTLENS/COPYRIGHT-CRIMINALS



FROM THE FILMMAKERS

COPYRIGHT CRIMINALS tells the story of music sampling and its inevitable collision with copyright law by self-reflexively integrating the collage aesthetic into the film itself. Collaborating with a variety of artists, musicians, lawyers and commentators, we set out to question the ethics, aesthetics and legalities surrounding digital sampling. For more than thirty years, innovative hip-hop performers and producers have been re-using portions of previously recorded music in new, otherwise original compositions. Two decades before people started downloading and remixing music on their home computers, this creative practice sparked a debate about copyright, creativity and technological change that still rages today. Our film features many of hip-hop music's seminal figures, such as Public Enemy and De La Soul, while also featuring emerging artists like audiovisual remixers Eclectic Method. COPYRIGHT CRIMINALS provides an in-depth look at artists who have been sampled, such as funk legend George Clinton and Clyde Stubblefield, who was James Brown's drummer and is the world's most sampled musician.

There are many ironies involved in making a film about copyright infringement. When telling this story, it is quite easy for us (as filmmakers) to become potential copyright criminals, because we included hundreds of quotations from music and video within this documentary. To document this history, we also had to include content that is impossible to license—such as songs that have been sued out of existence, like Biz Markie's "Alone Again" and Roger & the Goobumps' "Stairway to Gilligan's Island." Additionally, it was financially and logistically impossible to pay for every fragmentary use of sounds and images contained in COPYRIGHT CRIMINALS. And, even if every copyright holder would approve the use, which is unlikely, the total cost of clearing the rights would be an estimated four million dollars—money we clearly don't have.

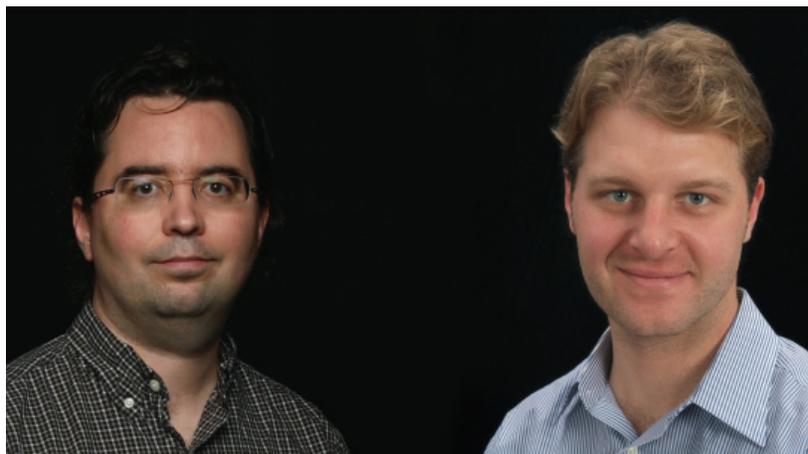
In order to avoid being brought to court, it was important to make sure we worked closely with legal experts and had a firm understanding of the law. The good news is that our documentary budget was able to pay several copyright owners for significant uses of their work; however, it's important to point out that this movie could not be made and distributed without a legal doctrine known as fair use. A landmark event in fair use was the 2005 release of the

Documentary Filmmakers' Statement of Best Practice in Fair Use, which was overseen in part by American University law professor Peter Jaszi (who was our fair use legal consultant). In the time since its release, many broadcasters, distributors and media insurance companies have increasingly been willing to allow documentary filmmakers to quote from songs, movies and music in order to make an argument or illustrate an important point. Nevertheless, the legal risks associated with making a documentary about sampling cannot be avoided. Like in David Cronenberg's thriller Videodrome, the film's subject matter has jumped off the screen and become an everyday consideration (and headache) in our own lives.

With this documentary, we wanted people to better understand how copyright laws affect creativity and free expression. In the past decade, computers, software, and even mobile phones have dramatically shifted the way people interact with mass culture, giving consumers the tools to become producers of their media environments. But as the commentator (and SoleSides Records co-founder) Jeff Chang says in the film, copyright law has created two classes. "You're rich enough to afford the law," he says, "or you're a complete outlaw." We find it sad that at the moment when more people can comment on the barrage of media we experience in daily life, the law has shut down those multimedia possibilities. Our film reflects on these tensions by creating an experience that invites viewers to look, listen and learn.

The controversies surrounding copyright are very complex, and the position COPYRIGHT CRIMINALS takes is not as simple as good or bad. Musicians such as Clyde Stubblefield and George Clinton help represent the point of view of those who have been sampled, while artists like Public Enemy and Eclectic Method bring an outlaw perspective to the sport of sampling. We have learned to respect artists on both sides of the debate, and hope to inspire viewers to be active participants in the struggle over how to fix the outdated laws that regulate remix culture.

Benjamin Franzen and Kembrew McLeod



THE FILM

Is it acceptable to take the work of others and make that part of your own creation? Can you copyright a sound? *COPYRIGHT CRIMINALS* examines these questions and others raised by hip-hop artists' use of sampled music. Through interviews with producers and DJs, musicologists and legal experts, the film lays out the issues involved in sampling and describes how lawsuits have changed the way hip-hop music is produced.

Hip-hop began as street entertainment and musical expression among African Americans and Latinos in poverty-stricken areas of the Bronx in the 1970s. It became not just a genre of music but a cultural movement, encompassing dancing, graffiti art and slang. At street parties, hip-hop DJs found ways to emphasize and extend the drum breaks in popular music, and then began incorporating those breaks in their own musical creations. One example is Clyde Stubblefield's "Funky Drummer," recorded with James Brown, which has been the most sampled of those breaks. Throughout the film, numerous clips of hip-hop music illustrate the use of sampling.

Sampling became the hallmark of hip-hop music, with some recordings using dozens of samples. As long as hip-hop was perceived as an urban underground phenomenon, sampling went unchallenged. But, as the popularity of the music grew during the 1980s and early 1990s and hip-hop began making money, others in the music industry took notice. Traditional artists, whose music was being sampled, felt they should be paid for the use of their music and their record labels filed lawsuits for infringement of copyright.

Two cases in particular, both brought in the early 1990s, had sobering effects on the practice of sampling: the Biz Markie case, in which

singer-songwriter Gilbert O'Sullivan sued for the use of a phrase from his popular song, "Alone Again, Naturally," and the \$1.7 million lawsuit against De La Soul for unauthorized sampling of the Turtles' music.

Legal actions against hip-hop producers have made them more cautious and has given rise to a new industry of sample licensing, since permissions must be obtained for every piece of sampled music on a new recording. Some musicians have found ways to skirt the law by altering their samples electronically, and some samplers are going underground.

Legal victories have settled the claims of some record labels, while others have ended in defeat; however, questions about sampling remain. Is it art? Is it improvisation on an existing theme or outright theft of artistry? Does it really use technology in an original and creative way?

Sampling lawsuits have also brought to light the need for copyright law to adjust to new technologies for recording and distribution of creative works. What the film makes clear is that the development of new digital recording technology has democratized the process of creating music. Anyone can produce a mashup and send it out on the Internet. Popular music today is part of a vibrant remix culture that threatens the traditional structure of the music business. As record producer Tom Silverman says at the end of the film, "Society moves forward... It evolves through taking old things and changing them." Musicians and recording artists, using digital technologies, are following their own rule book. Clearly, copyright law needs to catch up in order to protect artists' rights while allowing musical creativity to grow and flourish.



INDIVIDUALS FEATURED IN COPYRIGHT CRIMINALS

Hip-hop artists, producers and performers

Matt Black – Coldcut
 George Clinton – Funkadelic
 Chuck D – Public Enemy
 De La Soul
 DJ Abilities & MC Eyedea
 DJ Qbert – Invisibl Skratch Piklz
 El P – hip-hop producer
 Sage Francis – MC/Producer
 Bobbito Garcia – Rock Steady Crew
 Miho Hatori – Cibo Matto
 Mark Hosler - Negativland
 Paul Miller, aka DJ Spooky
 Mix Master Mike – Beastie Boys
 Mr. Len – producer/DJ
 Pete Rock – hip-hop pioneer
 Prefuse 73 – sampler/producer
 MC Schmidt & Drew Daniel - Matmos
 Hank Shocklee – Public Enemy
 Shock G – Digital Underground
 Clyde Stubblefield – drummer for James Brown
 Jonny Wilson & Ian Edgar – Eclectic Method

Legal and Musical experts

Anthony Berman – Entertainment Law
 Joanna Demers - musicologist
 Ken Freundlich - attorney
 Jeff Chang – Sole Sides Records
 Mia Garlick – Creative Commons
 Lawrence Lessig – Stanford professor and lawyer
 Greg Tate – music historian
 Siva Vaidhyanathan – media professor
 Sand Williams – poet/musician
 Tom Silverman – CEO, Tommy Boy

BACKGROUND INFORMATION

Terminology

Hip-hop is a musical genre that typically consists of a rhythmic vocal style called rap. Rap music and hip-hop music are often used synonymously.

Beatboxing is a form of vocal percussion in which a performer produces drum beats, rhythm, and musical sounds using his/her mouth, lips, tongue and voice.

Breaking, b-boying, b-girling or breakdancing is a street dance style characterized by complicated and rapid acrobatic moves, including flips, head spins and handstands. Because it uses various parts of the body for support and balance, breaking requires a high degree of physical strength and skill.

Mashup is a musical genre, a video or a digital media file that contains material from more than one source to create one musical, video or digital work.

Rapping, also referred to as MCing or emceeing, is a vocal style in which the performer speaks rhythmically and in rhyme, generally to a beat.

Sampling is the use of a segment or segments from the musical recordings of others as part of one's own recording.

Turntablism is the art of manipulating sounds and creating music using phonograph records and a DJ mixer. The word turntablist is used to distinguish between a DJ who just plays records, and one who performs by touching and moving the records, stylus and mixer to manipulate sound.

Hip-Hop and the Beginnings of Sampling

The roots of hip-hop go back hundreds of years to the griots of West Africa, itinerant poets and singers whose style is similar to that of rappers. Hip-hop is both a musical genre and a cultural movement, characterized by MCing (or rapping), DJing, graffiti, breaking, beatboxing, hip-hop fashion and slang. Hip-hop developed in the Bronx in the early 1970s after a period of major demographic shifts. Highway construction had led to the decline of former white ethnic neighborhoods, which were replaced by low-income housing projects whose tenants were largely African Americans and Latinos. Block parties became a popular form of entertainment, with dance music furnished by DJs. At these parties DJs began isolating the most danceable parts of hit songs—the percussion breaks. One of those DJs was the Jamaican-born Clive Campbell, known as DJ Kool Herc, who is considered the godfather of hip-hop. To emphasize and prolong the break, Herc began using a two-turntable set-up, which allowed him to use two copies of the same recording and switch back and forth, repeating the break sections. With advances in digital technology, hip-hop producers in the early 1980s started using sampled breaks and other musical segments in their recordings, rather than live studio bands which had been the norm. As the technology developed further and became widely available, the use of sampling continued as the popularity of hip-hop soared.



Copyright Overview

Copyright is a form of protection provided by U.S. law to authors of original literary, dramatic, artistic, musical and other intellectual works. The founding fathers recognized that everyone would benefit by encouraging the creation and dissemination of creative and intellectual works into our culture and society, and they included this clause in the U.S. Constitution, Article 1, Section 8: "The Congress shall have Power To...promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries..."

Copyright ownership and protection is available for an author/creator if three requirements are met:

1. Fixation—the work exists in a medium from which the author's expression can be read, seen or heard, either directly or by the aid of a machine;
2. Originality—the work owes its origin and independent creation to an author;
3. Minimal creativity—the work is the product of at least a minimal level of creativity.

The primary purpose of copyright law is not so much to protect the interests of the authors/creators, but rather to promote the progress of "science and the useful arts," that is, knowledge. To accomplish this purpose, copyright ownership encourages authors/creators in their efforts by granting them a temporary monopoly, or ownership of exclusive rights for a specified length of time. The first U.S. copyright law (1790) set the term of exclusive right to 14 years—with the right to renew for 14 more. In recent times, as technology made it easier, faster and cheaper to reproduce original works, the idea of limited copyright was transformed into long-term ownership, giving rise to the concept of "intellectual property." The idea of copyright as a protection of property is a significant departure from what the writers of the Constitution intended, and indeed, is viewed by many in our information age as a kind of imprisonment of information.

What is fair use?

The Copyright Act of 1976 generally gives the copyright owner the exclusive right to say who can use his works and how they can be used. An author's or creator's right to his work is somewhat limited when it conflicts with an overriding public interest, such as encouraging new creative and intellectual works, or the necessity for some members of the public to make a single copy of a work for nonprofit, educational purposes. One of the limitations on this right is the doctrine of fair use. According to the Center for Social Media at American University, "Fair use is the right, in some circumstances, to quote copyrighted material without asking permission or paying for it. Fair use enables the creation of new culture, and keeps current copyright holders from being private censors." (http://www.centerforsocialmedia.org/resources/fair_use)

Samplers who have been sued for copyright infringement have used the fair use doctrine as a defense, with uneven results. Fair use is a gray area of copyright law and a tricky one to navigate. While guidelines have been established for determining fair use in education and some other areas, they do not necessarily apply to all situations.

Four factors are used by judges in determining fair use:

1. The purpose and character of the use of copyrighted material;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion taken and
4. The effect of the use upon the potential market

Judges have a great deal of discretion in how they apply these factors and may adapt them differently in different cases. Contrary to widespread belief, there is no specific number of words, lines or notes that may be used without permission. At present, fair use is an area of legal uncertainty and must be determined on a case by case basis. In cases where fair use is in question, legal experts advise getting a license or written permission. And when in doubt, consult a copyright attorney.

For more information, see:

http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview

Copyright ownership and fees

In the music business, it is all too common for performers to enter contracts in which ownership of the copyright to musical numbers is assigned to the record company or the performer's manager. Thus, musical groups are sometimes in the position of having to pay a fee for the right to sample their own music.

Sampling fees can be quite exorbitant and are charged on a per-word or per-second basis. There are two types of fees:

- Mechanical royalty fee – for use of a segment of a recording and paid to the record company
- Publishing royalty fee – paid to the songwriter

Sampling requires payment of both of these fees.

Creative Commons

Creative Commons is a nonprofit organization that seeks to counter what it regards as an increasingly dominant permission culture, that is, one in which copyright restrictions are pervasive. It seeks to increase the public domain by making more creative works available for others to build upon legally, and it does this through a licensing process.

A creator who publishes a work with Creative Commons retains the copyright to the work but can choose the degree to which his work may be used by others. Creative Commons licenses offer a range of options, such as whether the work can be used for commercial or noncommercial purposes, and whether it can be used as the basis for derivative works. A work marked with a Creative Commons license symbol tells others what rights they have with respect to using that work. Stanford law professor Lawrence Lessig, who appears in COPYRIGHT CRIMINALS, is a founding board member of Creative Commons.



THINKING MORE DEEPLY

1. In your opinion, is sampling a form of copyright infringement? Explain your position.
2. Do you agree that, as was stated in the film, hip-hop's sampling is no different from other artistic work (e.g. Andy Warhol's paintings of soup cans or a photographer's taking scenes and reconstructing them)? Why or why not?
3. What kinds of changes are needed in our copyright law to accommodate recent changes in technology and current popular musical culture?
4. Does repurposing a piece of music always have a detrimental effect on the way the original recording is perceived? Does it always cut into the profits of the owner of the original recording? Why or why not?
5. Some people, such as Lawrence Lessig (a founder of Creative Commons), say that current technology enables more creativity; others feel that new technology allows musical artists to take the easy route and just patch together pieces of music created by someone else.

Where do you stand on this issue? Where do you think the filmmakers stand?

6. The film quotes Igor Stravinsky, who once said, "A good composer does not imitate; he steals." Was Stravinsky condoning plagiarism and copyright infringement? What did he mean?
7. Do legal actions against sampling limit the exposure of artists whose work is sampled or do these actions protect the artists' interests? Explain why you feel that way.
8. In the current remix culture, when anyone can create something using digital technology, how is authorship being redefined? Is the composer who writes an original piece of music any more of an author than the person who takes that original composition and combines it with other pieces of music to create a new composition?
9. In your estimation, what type of copyright/permissions arrangement would be fair to both owners of copyright and creators of derivative works?



SUGGESTIONS FOR ACTION

Together with other audience members, brainstorm actions that you might take as an individual and that people might do as a group. Here are some ideas to get you started:

1. Organize a hip-hop festival featuring local musicians, dancers, rappers and DJs. Include performances and demonstrations as well as information sessions and workshops where participants can learn about the origins of hip-hop and try their hand at writing rap lyrics.
2. Do some sampling of your own, but not the kind done by hip-hop recording artists. Listen to recordings of various hip-hop performers, such as Melle Mel and Grandmaster Flash (whose work is considered the beginning of “serious” hip-hop); LL Cool J (a mainstream performer); Public Enemy and De La Soul (both associated with the “golden age” of hip-hop); Ice T and Dr. Dre (West Coast gansta rappers); and Tupac Shakur (one of the biggest-selling rappers of the 1990s).
3. Help your community learn about intellectual property issues. Work with a local law school or law firm to arrange a panel discussion on copyright and fair use. Consider expanding the discussion beyond the field of music to include writing, photography and other arts.
4. Post your comments about the film, hip-hop, sampling or other topics related to COPYRIGHT CRIMINALS on the film’s blog at www.copyrightcrimnals.com.
5. Hold a remix contest for local teens like the national one held for COPYRIGHT CRIMINALS. (See <http://ccmixter.org/copyrightcrimnals> for details.) This could be done with an after-school program or community organization that works with teens. Start with a screening of the film and a discussion of hip-hop music and sampling, and then ask a panel of teen judges to rate the final remixes.
6. For either teens or for a broader audience, hold a screening of the film and then have participants create and perform a rap about copyright, sampling or a social/political issue of their choice, instead of holding a formal discussion. Challenge performers to work with others to improvise a rhythmic beat to back up their rap.

For additional outreach ideas, visit www.communitycinema.org. For local information, check the website for your local PBS station.

RESOURCES

<http://www.copyrightcrimnals.com> – The COPYRIGHT CRIMINALS website contains background information, a list of artists featured in the film, a blog and “Beat Pirates,” an article about the history of sampling by Rob Sheffield.

Hip-Hop

<http://www.daveyd.com> – This website of hip-hop historian, journalist, deejay, media and community activist Davey D contains a comprehensive history of hip-hop along with news, articles and other information with a political twist.

http://en.wikipedia.org/wiki/Hip_hop_music and http://en.wikipedia.org/wiki/Hip_hop – There is some overlap in these two sites, but together they provide a good overview of hip-hop culture and history, as well as descriptions of the various styles of hip-hop music.

<http://www.hiphopcongress.com> – Hip Hop Congress is a nonprofit corporation representing the merger of artists and students, music and community. Its mission is to use hip-hop culture to inspire young people to get involved in social action, civic service and cultural creativity.

<http://www.hiphopcaucus.org> – The Hip Hop Caucus works towards ending urban poverty for the next generation by organizing young people in urban communities to be active in elections, policymaking and service projects. Priority issues are Urban Poverty, Urban Planning, Climate Change, Healthcare, Public Education and Criminal Justice.

<http://www.hiphopdx.com> – DX provides the latest in hip hop news, rumors, album reviews, interviews, editorials, unreleased audio, rap music videos and mixtapes, along with a lifestyle section, movie and video game reviews, a daily Boondocks comic strip and much more, updated daily.

Copyright, Legal Issues & Policy

<http://www.copyright.gov> – The U.S. Copyright Office website contains basic copyright information, updates on copyright legislation and directions for registering and licensing a creative work.

<http://www.lib.byu.edu/departs/copyright/tutorial/intro/page1.htm> – This tutorial from Brigham Young University explains copyright and fair use in simple, clear language. It links to a chart showing the length of copyright and the public domain status of works based on year of creation.

<http://www.rbs2.com/copyrm.pdf> – This online document by a Massachusetts copyright attorney explains music copyright law.



<http://www.pdinfo.com/fairuse.php> – Public Domain Information is a reference site to help identify public domain songs and music, including royalty-free music recordings you can license, and public domain sheet music reprints.

<http://www.royaltyfreemusic.com> – This site maintains a library of royalty-free music that can be used for production or education up to a certain monthly or yearly limit with one subscription fee. The site also contains information on fair use and public domain music.

<http://creativecommons.org> - Creative Commons is a nonprofit corporation dedicated to making it easier for people to share and build upon the work of others, consistent with the rules of copyright. They provide free licenses and other legal tools that allow the creator to decide what conditions they wish to apply to their work.

<http://www.law.duke.edu/cspd> – The Center for the Study of the Public Domain focuses on areas not protected by exclusive intellectual property rights. Its mission is to promote research and scholarship on the contributions of the public domain to speech, culture, science and innovation, to promote debate about the balance needed in our intellectual property system and to translate academic research into public policy solutions.

<http://futureofmusic.org> – The Future of Music Coalition is a national nonprofit organization that works in three program areas—education, research and advocacy—to ensure a diverse musical culture where artists flourish, are compensated fairly for their work and where fans can find the music they want.

<http://www.riaa.com> – The Recording Industry Association of America represents the interests of record companies; its website contains industry news, information on music piracy for students and parents and the latest news on court cases and other topics of interest to the music industry.

COPYRIGHT CRIMINALS WILL AIR NATIONALLY ON THE EMMY AWARD-WINNING PBS SERIES *INDEPENDENT LENS* IN JANUARY 2010. CHECK LOCAL LISTINGS.

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ITVS COMMUNITY is the national community engagement program of the Independent Television Service. ITVS COMMUNITY works to leverage the unique and timely content of the Emmy Award-winning PBS series *Independent Lens* to build stronger connections among leading organizations, local communities and public television stations around key social issues and create more opportunities for civic engagement and positive social change. To find out more about ITVS COMMUNITY, visit www.communitycinema.org.

