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Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!

Neela Kartha

COMMENT

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NEELA KARTHA

I. INTRODUCTION

"Thou Shalt Not Steal"[1]

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"Blacks Create and then move on. Whites document and then recycle. In the history of popular music these truths are self-evident."[2]

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For the law to operate colorblindly is a travesty of justice. In a country whose history and wealth is built on the subjugation of people of color,[3] there may never be an appropriate time for colorblindness in the analysis and application of the law. It amounts to neglect—like a mother to a child, and inevitably, perpetuated racism in a white-dominated, obdurate society. The nineties have seen retrogression in the area of civil rights.[4] Much of this retrogression is driven by a colorblind approach to the law, the least of which is exemplified by limited, yet stifling jurisprudence associ-

1. Exodus 20:15, The Seventh Commandment, as well as the opening line in the seminal case on digital sampling. This was extreme and a clear punitive statement illustrating the court's bias against Rap Artist Biz Markie's use of digital sampling and the then 10 year-old sampling dilemma.

2. NELSON GEORGE, THE DEATH OF RHYTHM AND BLUES 108 (1988).

3. The Indigenous American is extinct. The African-American has been subject to centuries of slavery; the Chinese-Americans built our railroads and were then subject to Chinese Exclusion Acts; Mexican-Americans are used as migrant workers and then denied basic rights, etc.

4. Derrick Bell, et. al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1037-8 (1990).

ated with digital sampling and copyright law. The racial problems of this country have been exacerbated by denial manifested in the belief that there is no racism, and that discrimination on the basis of color—no matter what the context—is racism. This Article will show how it is impossible to legislate and adjudicate any area of law without considering its broad, yet relevant social context. Copyright law has yet to recognize the contributions of Black people to musical works in America, or the ways in which the law has inhibited or disempowered Black artists. On the contrary, courts and legislators have viewed copyright law "colorblindly" with respect to digital sampling, which has effectively contravened the public policy interests that copyright law seeks to protect.

Part II will expose the influence of Africans and African music, which has consistently been at the forefront of musical innovation, through an overview of the history of American music by genre. A focus on digital sampling will reveal a pattern in history of exploiting Black musicians and music. Part III examines the policy behind copyright law, and the law that has not satisfied but instead contravenes these policy interests. It will also revisit the digital sampling analysis taking the history and social context that Black music exists in, into account. Part IV implores legislators and judges to consider the ramifications of the decisions they make and how it perpetuates the long accepted theory of Black America that the law is not meant to protect equally, however explicitly it may state otherwise.

II. BACKGROUND

From ragtime to rap, American history shows that Black musicians have significantly and distinctly contributed to every different type of mainstream music which exists in the twentieth century.[5] Africans in America influenced forms of classical music even in the nineteenth century.

A. The History of Recorded American Music and Its African Influence

When Dvorak visited America in 1893, he was exposed to Negro spirituals which were reflected in his Symphony No. 9.[6] Choral Conductor Tippett's "A Child of Our Time" is based on the

5. *See generally* DONALD J. GROUT & CLAUDE PALISEA, A HISTORY OF WESTERN MUSIC (5th ed. 1996).

6. *Id.* at 587.

Negro Spiritual "Nobody Knows the Trouble I've Seen."[7] Moreover, the twentieth century has been consistently and profoundly affected by Africans in America. The "Golden Age" lasted from World War I through the mid-1920s, with a pop style which sprang from the innovations of Black composer, Scott Joplin, and other ragtime artists creating a highly syncopated piano-based music.[8] Ragtime's roots have been traced to African Juba rhythms,[9] and this style has been utilized by the likes of Irving Berlin and other white composers.[10] The newspapers of the time described ragtime as "'vulgar, filthy, and suggestive' because of its vibrant, sexual danceablility."[11] However, the economics of the music industry at that time did not let this racist reception of ragtime inhibit the production or success of this genre of music.

Ragtime was succeeded by the big bands of the 1920s. Black talent performing Black music was an integral part of the business at this time; artists like Louis Armstrong and the Hot Five, Duke Ellington and Jimmy Lunceford, and their big bands were very popular.[12] Ragtime evolved into Jazz after the 1920s. Jazz is a music which puts great emphasis on improvisation. The term "jazz" probably came from Black vernacular, but was popularized in print by whites. Jazz had great appeal and was made popular by white people because of its danceablility. It became so popular and so many white artists emerged that Jazz was seen as white music.[13] This was at a time when lynching in the South was at its highest during the century, and F. Scott Fitzgerald described the "Jazz Age" as an era of white indulgence which led whites to explore the "primitive" artistic expression of Blacks for amusement, not edification.[14] It was a white man—Paul Whiteman—who was dubbed the "King of Jazz," and he was given equal

7. *Id.* at 709.

8. GEORGE, *supra* note 2, at 8.

9. GROUT & PALISEA, *supra* note 5, at 765.

10. GEORGE, *supra* note 2, at 8.

11. *Id.* "Vulgar, filthy, and suggestive" are terms which have been used to define music from people who were merely a generation away from slavery. It is very important to note the adjectives used to describe new forms of African music as they are introduced to the market, even today. Yet, white music businessmen profit, white musicians profit, and once the new form of music is transformed into "white" music it becomes not only acceptable, but also a landmark of American history.

12. *Id.* at 9.

13. *Id.*

14. *Id.* The use of the term "primitive" is indicative of the racist lens through which music innovated by Africans was viewed. *See* supra note 11 and accompanying text.

weight with the likes of Duke Ellington. Bix Beiderbacke was compared to Louis Armstrong.[15]

At this time, Black music which was not adopted by white culture was referred to as "race music." This encompassed primarily blues music. The use of the term race music is critical for understanding the destructive nature of "colorblind" approaches to the law. When Black music is referred to as "race" music, it somehow implies that the term race only applies to Black people. Today, race is no more than a social construct. The way it is constructed, white people have no race. White is the norm—and that is why it does not have to be distinguished or described as white. Black, however, is not the norm and therefore must be distinguished. Today society is "colorblind". This makes the experience and history of Black people in America irrelevant and invisible.

The blues were a grass roots form of "race" music.[16] In the early part of the 1900s much of the Black population in America, particularly in the South, was unassimilated. Artists like Robert Johnson, Tampa Red, and Sunhouse spoke to the unassimilated Black people of the time who visited juke joints and barrelhouses. Blues eventually led way to rhythm-and-blues in the 1940s. Bebop emerged in the aftermath of World War II because everything became more expensive, records replaced live performances, and big-bands were not economically feasible anymore. On one hand, the focus changed from the big band to the big band singers like Nat King Cole, Frank Sinatra, and Perry Como. On the other hand, musicians like Dizzy Gillespie, Charlie Parker, and Thelonious Monk—refugees of big-bands—moved in another direction now known as Bebop. Bebop musicians formed small bands, and took jazz to a new level with mesmerizing improvisations. In the 1940s Louis Jordan was popular with Black audiences for his blend of blues, jump blues, ballads, gospel, saxophone-led instruments, and a fading black swing orchestra. Here, the blues began to emerge in another form and there were no white artists who could compete or match the style of the music of the late 1940s. Black people innovated Jazz, and white people took it over. Then Black people innovated bebop and an integrated blues/gospel style. Record labels, primarily white owned, emerged to accommo-

15. GEORGE, *supra* note 2, at 9. It may only be fans of music of that time who will know who Paul Whiteman and Bix Beiderbacke were. Today, however, people recognize the talents of Duke Ellington and Louis Armstrong, giving them their due as Jazz geniuses.

16. *Id.* at 10.

date the demand for this ancestor of R&B which emerged in the 1950s.[17]

From Bebop grew Doo wop, another R&B innovation brought to America by its African inhabitants. This music reflected the innovative innocence and romance of the young Black singers who made it popular. It was a time when kids stood on street corners and sang sweet harmonies, got discovered, and went into a studio to make a record. It was also at this time that the electric bass and electric guitars began to replace the piano and horn as the focus of the music. This technological development was first introduced to music by Lionel Hampton's rocking band.[18] The willingness of R&B musicians to integrate new technology into their vision is part of what made R&B a constantly innovative genre of music.

In the 1950s, white authors like Norman Mailer explored their fascination with Black America, and wrote about their fantasies of rebellion against the mainstream.[19] These fantasies of the "hipster" were borrowed from the experiences of Black America and were being lived out by many teenage white Americans. Mailer wrote an essay, called "The White Negro," about a new white social outlaw whose primary inspiration was the sexuality and music of Black Americans.[20] Elvis Aaron Presley had been recording for three years when "The White Negro" was published. Presley's music was heavily laden with blues and gospel because Presley was a country boy with a Mississippi background. He even tried to look like a Black man in much of his fashion and hairstyles. The pomade that he used to form his ducktail was modeled from black processed hair which required pomade to achieve a straight "white" look. Elvis shopped for his clothes in Memphis' notorious "Black sin strip."[21] Elvis came very close to capturing the swaggering sexuality projected by so many R&B vocalists. Rock-n-Roll is the white adoption of R&B, and along with it came the dangerous sexuality that was associated with Black people by the mainstream. Elvis embodied the rebellion of white youth and therefore became a symbol of white negroism. Elvis' style was popular and acceptable because he was a white man playing Black music, and he capitalized off of this expropriation.

17. *Id.* at 28.
18. *Id.* at 39.
19. *Id.* at 61.
20. *Id.*
21. *Id.* at 62-64. *See also infra* note 78.

Rock-n-Roll was R&B with a new name, nothing more than a marketing concept.[22] Chuck Berry was successful in making the guitar the instrument of focus, taking it away from the saxophone players of the past. Unfortunately the credit fell on white performers of Black music like Elvis Presley and Jerry Lee Lewis.[23] Throughout the 1960s and 1970s, the rock-n-roll and rock era was dominated by white artists; however, the styles stemmed from Black culture. For example, Jimi Hendrix's style was emulated by many white rock guitarists. In the sixties there was soul music, which was taken by white performers like Mick Jagger and the Beatles; in the seventies there was funk and disco, also derived from great innovators like Curtis Mayfield and George Clinton. Country music developed out of the blues and particularly Southern Blues, and Gospel developed out of Negro Spirituals and church music. Over the decades of the twentieth century Black dance music was consistently reinvented. Although the mainstream never came to accept the innovation, they often took it and made it their own, as has been shown here. In the forties there was R&B; in the fifties there was rock and roll; in the sixties there was soul; in the seventies there was funk and disco, and in the eighties there was rap music. Today there is *still* rap music and a resurgence of R&B.

B. History of Digital Sampling

Digital sampling was a new technology which surfaced with the advent of rap music in the early 1980s. As the pattern has shown, it was Black musicians who first incorporated new technology into music. Also, as the pattern has shown, this music was and has not been received well by mainstream America, and it still will not be received unless it is performed by white groups like Beck, a Grammy award winning white rap group.[24]

The digital sampling technique was first developed in Jamaica in the 1960s by disc jockeys (DJs) who experimented with

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22. *Id.* at 67.

23. *Id.* at 68.

24. Mark Kemp, *Beck,* ROLLING STONE, Apr. 17, 1997, at 60. Beck won two Grammys in 1997 for Best Alternative Music Performance and Best Male Rock Vocal Performance. Beck's style is described as a "cross-pollination of styles — from hip-hop to country rock to funky seventies soul — [which] has shown him to be one of the most innovative and forward looking artists of the nineties." *Id.* at 62. *See supra* note 22 and accompanying text; note that although Beck uses samples and admits to his style being hip-hop and funky soul, he is honored by Grammys under an alternative and rock label as an innovator.

a form of music called "dub."[25] Dub is a style of music which mixes different sounds together by means of a sound system. A sound system is the instrument of the DJ, who would manually mix sounds and segments from Jamaican and non-Jamaican records and additionally scat or chant over the mix. DJs would engage in all out war against each other trying to compete to be the best through the choices of music that would be played as well as the words they spoke to the audience and each other.[26] Jamaican-born Kool DJ Herc innovated techniques that would lead to sampling, which was later shared by and with Afrika Bambaataa and Grand Master Flash.[27] These techniques changed the face of music forever because the DJ was not only playing the records, but also performing the mix, the rap, and scratching. The turntables and the mixing board of the sound system became instruments in themselves while the records they played became the notes.

Then came the technology of digital sampling in the 1980s—MIDI.[28] The MIDI synthesizer allows an artist to push a key on a keyboard to trigger a sound, whether it is a trumpet or a bass drum. Now as we approach the twenty-first century, digital sampling has become an integral part of many forms of popular music. It originated in rap music and is now used in R&B, pop, industrial, and techno music.[29]

III. ANALYSIS

With a general understanding of the history of music and the role of African-Americans as a driving force in the innovation and

25. David Sanjek, *"Don't Have to DJ No More:" Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 610 (1992).

26. These DJs used to and still do engage in an all out battle, known to West Indians as a "sound clash" where two sound systems would compete with music and rap to outdo each other. Rap music has its roots in Jamaica with this movement called "dub." The interesting thing to understand about this music is that everyone borrows from each other. The fans of what is now known as dancehall music create their own art to the music in the form of dance. Thus, if a particular rhythm is made popular by an artist, that same rhythm may reappear over and over again like a standard. This, however, does not necessarily become redundant. If the vocalist/rapper is creative, the music will never sound the same. In other words, copyright protection in Jamaica is thin at best, and Jamaica is still innovating music which has spread and is popular internationally.

27. Sanjek, *supra* note 25, at 611.

28. Robert M. Symanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA L. REV. 271, 278 (1996) (citing Sanjek, *supra* note 25, at 612). MIDI stands for Musical Instrument Digital Interface, a system of electrical equipment needed for sampling.

29. *Id.* at 279.

creativity of American music, it is appropriate to consider policy and law in the area of copyright law. There has been legislation in the area of compulsory licenses which profoundly affected Black musicians throughout most of the twentieth century. Legislators, for fear of a publishing monopoly, allowed the ability of new artists to "cover" copyrighted material to outweigh a copyright owner's exclusive right to reproduce her own work. Now, there is judicial interpretation of the Copyright Act of 1976, which was written before digital sampling was ever used in America.[30] This is profoundly affecting Black musicians and contravening the aim and policy of copyright law.

A. Public Policy and Copyright Doctrine

The United States Constitution states that "The Congress shall have the 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."[31] It is important to remember that copyright is a monopoly which burdens both competitors and the public.[32] However, these burdens should never outweigh the benefits to the owner. The protection of copyright should not stifle independent creation. The world goes ahead because each of us builds on the work of our predecessors.[33] Copyright protection is based on the ideal of encouraging independent creation, but it is balanced by society's competing interest in the free flow of ideas, information and commerce.[34] "The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents . . . [of artists]."[35]

B. Colorblind Copyright Law

There have been two areas of copyright law that have directly affected the interests of Black artists and innovators.[36] The first

30. *See* Sanjek, *supra* note 25, at 612 (describing how digital sampling entered the market in 1981).

31. U.S. CONST. art. I, § 8, cl. 8.

32. Zachariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 506-11 (1945).

33. *Id.* at 511.

34. Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (U.S. 1984). *See also id.* at 429 n.10 (discussing legislative intent from 1909).

35. Mazer v. Stein, 347 U.S. 201, 219 (1954).

36. The Copyright Act of 1976 is codified in 17 U.S.C.A., and this body of law governs compulsory licenses and digital sampling. Keeping the history of Black music

area, in a historical context, is §115 of the Copyright Act of 1976—the compulsory license.[37] The second area, and an area of current controversy, is digital sampling under §114.[38] These two areas together exemplify inconsistencies when one looks at the effect of the legislation of § 115 and the effect of judicial construction of §114(b) on Black musicians, and when one attempts to reconcile that with public policy. In addition, within the area of digital sampling, the failure of courts to see the relevance of the fair use defense is another specific example of where the law has acted to suppress or inhibit innovation, public education, and dissemination of expressive diversity.[39]

1. Compulsory Licenses: The Right To Make A "Cover"

The concept of a compulsory license was introduced into our copyright law in 1909.[40] This decision was based primarily on fear of monopolistic control of music for recording purposes. It was retained in 1976 and codified in §115.[41] Subsection (a) of §115 addresses three questions for infringement which are not necessarily determinative, non-discriminatory, or non-biased.[42] The first question is the nature of the original recording which makes the recording available under a compulsory license. The second question is the nature of the sound recording that can be made under a compulsory license.[43] The last question is the extent to which someone acting under a compulsory license can depart from the work as written or recorded without violating the copyright

in mind, consider the effects of style not being copyrightable. There is logic to this fact; however, it certainly led to a consistent expropriation of style by white musicians from Black innovators.

37. 17 U.S.C.A. §115 (West 1996 & Supp. 1996).

38. *Id.* at §114.

39. *Id.* at §107.

40. H.R. REP. No. 2222, 60th Cong., 2d Sess. 9 (1909). The Supreme Court had already decided in White-Smith Music Pub'g Co. v. Apollo Co. that piano rolls (since sheet music was the primary medium of music) did not embody a system of notation (or phonorecords by analogy) that could be read; therefore, piano rolls did not constitute "copies" of the musical composition within the meaning of the law. However, they did constitute parts of devices for mechanically performing the music. At this time, the copyright owner had the exclusive right to public performance, including performing by mechanical instruments; however, the law was silent as to who had the right to make such devices, so Congress granted such a right, but not without intending to extend the right of copyright to the mechanical devices themselves. *Id.* (citing White-Smith, 209 U.S. 1 (1908)).

41. H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 107-09 (1976).

42. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). Justice Holmes would turn in his grave if he could see that bias was necessarily incorporated into the analysis of legal use of a compulsory license under §115(a).

43. 17 U.S.C.A. §115(a)(1) (West 1996 & Supp. 1996).

owner's right to make an "arrangement" or other derivative work.[44] Certain things under the compulsory license scheme have changed since codification. For example, licenses are only available after the first authorized public distribution by the copyright owner.[45] In addition to reducing the possibility of a publishing monopoly, compulsory licenses reduced the protection to the original song's composer. As long as the licensee did not change the fundamental character of the original music composition as written or recorded, new artists were entitled to "cover" copyrighted music. When the compulsory license was retained in the copyright law of 1976, the fee owed to the involuntary licensor was raised for the first time in seventy years. The statutorily mandated rate for compulsory licenses used to be 2 cents per unit until 1976. As of 1998, the rate has been increased to 7.1 cents per unit.[46]

2. Digital Sampling: The Lack of Clarity With A Popular Technique

Digital sampling can infringe two copyrights, the underlying musical composition and the sound recording which falls under Section 114 of the Copyright Act of 1976. Section 114(b) says in relevant part:

> The exclusive rights of the owner of copyright in a sound recording is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the *actual* sounds fixed in the recording.[47]. . . The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.[48].

The first sentence could be interpreted in two ways. Since this legislation was contemplated before the creation of digital sampling, there is neither a determinative interpretation, nor is

44. *Id.* at §115(a)(2). This question involves the bias in the analysis of infringement under compulsory licenses. Changing the "fundamental character of the work" is an inescapably subjective.

45. *See supra* note 36.

46. 37 C.F.R. §255.3(i). As of Jan. 1, 1998 the rate is 7.1 cents or 1.35 cents per minute of playing time or fraction thereof, whichever is greater.

47. 17 U.S.C.A. §114(b) (West 1996 & Supp. 1996)(emphasis added).

48. *Id.* (emphasis added).

there explicit language to indicate where Congress stood on the undiscovered matter. The term *actual* could be interpreted as prohibiting the use of an exact sound from a sound recording of a song. Conversely, since infringement is based on substantial similarity, "actual" may be better interpreted as being based on that standard. Thus, if the sample is altered beyond substantial similarity, it would not constitute infringement.[49] The second sentence could also be interpreted in at least two ways. Congress could have intended in its use of "entirely of an independent fixation" to mean that a recording containing any sounds of another sound recording would constitute infringement per se of the sound recording copyright.[50] However, with the growing popularity of digital sampling, that may be too much protection for the copyright owner. This is where the judicially applied standard of de minimus copying, or copying which is substantially similar to the original work, would act as a defense to a claim of infringement.[51] In other words, if the sample used is unrecognizable because it is minuscule, or it is altered digitally beyond recognition, it cannot infringe the original work.

Another issue regarding digital sampling and infringement arises out of the copyright owner's right to make derivative works. This is a right which was recently given to copyright owners. Throughout most of the nineteenth century, authors were free to borrow from existing works as long as they made their own substantial contribution. One relevant example is the case brought by Harriet Beecher Stowe's *Uncle Tom's Cabin*, which was translated by a German without her permission. She did not prevail in her action for infringement because the court held that the translation was a new work and not merely a reproduction of the original.[52] This ability for an artist to borrow from an original work began to erode in the nineteenth century and has become almost non-existent in the twentieth century.[53] Now, in the Copyright Act of 1976, there is an exclusive right for a copyright owner to prepare derivative works based on the original.[54]

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49. Randy S. Kravis, *Does A Song By Any Other Name Still Sound As Sweet?: Digital Sampling And Its Copyright Implications*, 43 AM. U. L. REV. 231, 251 (1993).

50. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1294 (2d ed., 1996).

51. *Id.* at 1295. With "de minimus" copying, the law does not concern itself with small matters of copying. *See infra* note 72 and accompanying text.

52. Neil W. Netanel, *Copyright in a Democratic Civil* Society, 106 YALE L.J. 283, 302 (1996) (citing Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514)).

53. *Id.* at 302 n. 70.

54. *See* 17 U.S.C.A. §106(2) (West 1996 & Supp. 1996).

The definition of a derivative work in the Copyright Act is broad to include translations, arrangements, versions in other media, and "any other form in which a work may be recast, transformed, or adapted."[55] By definition, the use of a digital sample of a copyrighted work would infringe an owner's exclusive right to produce derivative works, especially since this right is construed liberally in favor of the copyright owner of the sampled work.[56] This use of samples is more commonly being referred to as "transformative uses," which includes the use of pieces of copyrighted materials in other mediums such as multimedia.[57] In light of the creation of compulsory licensing and the growing need for transformative uses of copyrighted material, the time has come to reconsider the growing protection of copyright owners and the difficulty it has caused the artists who follow and wish to utilize the technology available. What is troubling is that this analysis takes place in a vacuum, there is little regard for the social context in which it exists, and this is reflected in the effects of judicial and legislative interpretation. Here, the sampled artist was given power, in the face of new and burgeoning technology and innovation, that uncomfortably grants monopoly rights of digital samples of a copyrighted work to the owner of the copyright. The artist is entitled to remuneration, but not to exercise his discretion as to whether the music may be sampled and how it should be priced. This is too much power and discretion.

3. Case Law and Digital Sampling

The first decision regarding the use of sampling was not until December 1991 in New York. In *Grand Upright Music Ltd. v. Warner Bros. Records Inc.*, the U.S. District Court for the Southern District enjoined the production and sale of rap artist Biz Markie's album "I Need A Haircut" because it contained samples taken from Gilbert O'Sullivan's 1972 hit "Alone Again (Naturally)."[58] This action took place ten years after digital sampling found its way into rap music. The court characterized the sampling as "stealing" and even recommended criminal prosecution under §506 of the Copyright Act of 1976. Biz Markie had attempted to receive permission from Gilbert O'Sullivan to use the

55. *Id.* at §101 (definition of "derivative work").

56. *See* Netanel, *supra* note 52, at 302 (citing 3 NIMMER ON COPYRIGHT §13.03[A][1][b], at 13-36 (1995)).

57. *Id.* at 301, 306.

58. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

sample for which he was denied. In the song "I Need A Haircut," the rap artist incorporated three words from plaintiff's copyrighted song into his recording. Since a significant amount of copyright law comes through New York courts, this decision has had a substantial impact on copyright law.[59] This court never chose to do a thorough analysis of digital sampling and its ten year history in American music, much less how to reconcile that with copyright policy. The defendant made an argument, albeit ineffectively, that "others in the 'rap music' business are also engaged in illegal activity," and the court responded by saying that this was "totally specious. The mere statement of the argument is its own refutation."[60] The court indifferently referred to "rap music" as a form of music with over ten years of history—with quotations around it. This can easily be interpreted as racist bias; however, for constructive purposes, it could also be interpreted as a colorblind view that rap is novelty. Even though Biz Markie asked the copyright owner in good faith for permission to use the sample, this was viewed as "willful and wanton" under §506, which permits criminal prosecution of the copyright infringers. The court did not even discuss the innovative nature of digital sampling and its continued success in the marketplace. The court even referred to the facts in this case as "unique circumstances," although defendants claimed that this is common practice in the industry with digital samples.

a. Defenses To Claims of Infringement

There are a few defenses available to the defendant in an infringement case. These defenses include fair use, de minimus copying, laches, estoppel, and unclean hands.[61] Their application is not clear and in some cases the courts apply them inconsistently.

i. Fair Use

One limitation to copyright protection is the judicially created fair use defense, now codified in §107 of the Copyright Act of 1976.[62] The primary concern in the early application of fair use

59. Kravis, *supra* note 49, at 236.

60. Grand Upright, *supra* note 58, at 185 n.2.

61. Perry Z. Binder, *Proof of Music Sampling In Copyright Infringement,* 26 AM. JUR. 3D *Proof of Facts* §25 (1994).

62. 17 U.S.C.A. §107 (West 1996 & Supp. 1996). Fair use was judicially created by Justice Story in Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

was market-based, looking to the harm caused to the original work's value.[63] As the equitable doctrine of fair use developed, a copyrighted work became available for unauthorized use if it served a public benefit.[64] In either case the defendant's use must be productive. Productive use is at the heart of the fair use analysis, for reasons well articulated by Professor Zachariah Chafee: "The world goes ahead because each of us builds on the work of our predecessors. A dwarf standing on the shoulders of a giant can see farther than the giant himself."[65] In addition to these factors the statute explicitly qualifies criticism, comment, news reporting, teaching, scholarship, or research as fair use; however, this list is not exhaustive.

In applying the fair use defense, courts will first look to the "purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes."[66] Nevertheless, the commercial nature of the work should not be dispositive.[67] The second matter to consider in a fair use analysis is the nature of the work. The third factor to consider is the amount and substantiality of the portion of the work used in relation to the work as a whole. The final factor considered is the effect the infringing song has on the potential market or the value of the copyrighted work. In addition, in its report on the codification of the fair use doctrine, Congress stated that it is to be interpreted broadly and on a case-by-case basis.[68]

Acuff-Rose v. Campbell was a digital sampling case where the defense of fair use was asserted and the defendants prevailed.[69] The Court noted that "when parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable."[70] In this case and under § 107(4), the market harm prong of the fair use analysis opened up the Court's focus to some of the social context where digital sampling is used. This case acknowledged, through a dissent below, that Luther Campbell's parody of

63. *See supra* Folsom v. Marsh, at 348.

64. Rosemont Enters v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1976).

65. Chafee, *supra* note 32, at 533.

66. *Supra* note 61, at 573 (quoting 17 U.S.C.S. § 107(1)).

67. *Id.* at 573 (citing Acuff-Rose Music v. Campbell, 510 U.S. 569, 588 (1994).

68. H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 65-66 (1976).

69. Acuff-Rose Music v. Campbell, 510 U.S. 569 (1994).

70. *Id.* at 588.

"Pretty Woman" was intended to ridicule the "whitebred original."[71]

ii. De Minimus Copying

Another limitation which has yet to be proven consistent is the de minimus defense. It is available when a defendant is accused of infringing a small portion of a song. However, there is no determinative approach to the de minimus defense, and courts have been quick to reject this defense.[72]

iii. Laches; Estoppel; Unclean Hands

To establish the defense of laches, the defendant must show that plaintiff did not assert its rights diligently, and that the resulting delay prejudiced the defendant in some way. To establish the defense of estoppel, the defendant must have relied on some conduct by the plaintiff to the defendant's detriment.[73]

C. The Effect of Colorblindness on Copyright Doctrine

By not considering race issues and their race's role in society, copyright doctrine in its attempt to be colorblind has given Black artists, who are also coincidentally at the forefront of musical innovation, significantly less protection. It is important now to examine how certain areas of copyright law and the colorblind approach to its interpretation has affected Black musicians. Historically, the compulsory license effectively stripped Black musicians of much of the copyright protection that artists are granted. More recently, the legislation's reluctance to address digital sampling and the court's strict interpretation of the law favoring the sampled artist have effectively inhibited the growth of an innovative technology which Black artists introduced into contemporary music.

1. The Effect of the Compulsory License

The compulsory license made it possible for white artists to shanghai the African-American songbook. Pat Boone was notorious for covering Little Richard's music, and eventually, songs "by niggers for niggers" realized a catalog value as great as those of

71. *Id.* at 582. (quoting Acuff-Rose Music v. Campbell, 972 F.2d 1429, 1442 (6th Cir. 1992)).

72. *See supra* note 61, at §28.

73. *Id.* at §29.

Tin Pan Alley tunesmiths.[74] Another unfortunate reality was that the Black songwriters and performers did not always understand the value of publishing rights which ended up being owned by white record companies. A great deal of revenue was generated by white groups covering Black hits.[75] When the compulsory license was contemplated, there was no evidence that the interests of some of the greatest innovators of that time were considered in this process.

Disturbing examples of how compulsory licensing has affected Black musicians include Eric Clapton's "cover" of Bob Marley's "I Shot the Sheriff;" Led Zeppelin and Stevie Ray Vaughn's covers of Willie Dixon music, and other blues greats.[76] When these songs were remade, it was almost as though the cover artists wrote the song. The original artists *may* have received royalties, and in some small print, credit on the album for writing the song. The credits for songwriting are found in the sleeve of the compact disc, but on the back the credit is given entirely to Eric Clapton.[77] It is highly unlikely that some people who buy Eric Clapton music are aware of this. Eric Clapton is an excellent example of an artist who reached long term fame using a lot of unoriginal music and styles taken from Black artists.

Eric Clapton used songs by Black artists throughout his career, in addition to imitating their styles. When he was with John Mayall's Bluesbreakers he recorded (blues artist) Freddie King's "Hideaway," Otis Rush and Willie Dixon's "All Your Love," Robert Johnson's "Ramblin' On My Mind," and later, with the rock group Cream, he recorded "Crossroads," another Robert Johnson song. When he was with Derek and the Dominos he recorded Willie Dixon's "Evil," Elmore James's "The Sky Is Crying," and later in his solo career he imitated reggae music. He recorded some music in Jamaica (not including "I Shot the Sheriff") where he recorded Peter Tosh's "Whatcha Gonna Do." How would Eric Clapton's career fare a "total concept and feel" analysis like that

74. GEORGE, *supra* note 2, at 31.

75. *Id.*

76. Stevie Ray Vaughn covered Willie Dixon's "Shake For Me" on his album IN THE BEGINNING. STEVIE RAY, IN THE BEGINNING (Epic Records 1992).

77. *See* ERIC CLAPTON, CROSSROADS (Polygram Records 1988). The ordinary observer/listener would never know that he did not write these songs. If any of these artists challenged the compulsory license in the form of an infringement claim, they would have undoubtedly lost. However, how really different is this from digital sampling? *See also supra* note 21 and accompanying text (Elvis and Eric Clapton are both examples of white negroes).

set forth in *Roth Greeting Cards v. United Card Co.*?[78] This case resulted in a liberal interpretation of the copyright holder's right to reproduction which was eroded for these Black artists by the compulsory license. Here, the public interest clearly outweighed private interest.[79]

Another way that compulsory licenses led to lesser copyright protection and to possibly less incentive on the part of artists, was the fact that the statutory rate for compulsory license given to the original artist remained at $.02 per unit sold for sixty-five years. In 1975, it was increased to $.0275, and in 1980, it was increased to $.04. In 1986, it increased to $.05, and gradually up until 1998, it increased to $.071 or $.0135 per minute of playing time or fraction thereof, whichever amount is larger.[80] It is only recently that the artists whose original composition was "covered" received reasonable remuneration for the compulsory license. Therefore over all of these years, including a retro-resurgence of music of the earlier twentieth century, Black artists have only received minimal reward.

2. The Effect of Legislative Silence on the Issue of Digital Sampling and Judicial Interpretation of that Silence

Even though the music industry recognizes a sampled artist's entitlement to legal protection, there are no industry-wide standards for clearing samples or paying rates to sampled artists.[81] Considering the underlying policy behind copyright protection, it is enigmatic that the artist does not even collect when her song is sampled because the owner of the copyright in the sound recording is usually the record company, and the owner of the musical composition is usually the publishing company.[82] However, it is the artist's primary responsibility to clear any samples that are used in her record because record companies tend to include clauses in songwriting agreements that all work delivered will not infringe on anyone's copyright.[83] The expenses for clearance of a sample falls on the artist as well and are generally included in the

78. 429 F.2d 1106, 1110 (9th Cir. 1970) (holding that defendant's imitative greeting card may be infringing even though it does not include copyrighted text or copyrighted artwork).

79. Keep this in mind as this article proceeds to the effects of digital sampling, how six years have passed since the first case was decided, and how things are at a standstill for Black rap artists.

80. 37 C.F.R. §255.3(i).

81. Symanski, *supra* note 28, at 289-90.

82. MICHAEL ASHBURNE, SAMPLING IN THE RECORD INDUSTRY 2 (1994).

83. *Id.* at 6.

artists recording budget with the record company.[84] In clearing a sample a record company will often get consent from the sampled artist because if the resulting usage is offensive to the sampled artist, it may cause a rift in their relationship, and record companies want to avoid this.[85] It is almost as if moral rights are built into the way the industry functions in clearing samples. Is this discretion appropriate, considering the non-bias principle set forth in *Bleistein*?[86] Cannot artists suffer from bias as well? Is copyright protection excessive here?

In addition to the burdens of expense and liability placed on the artists, clearance is a difficult process.[87] Initially, in order to clear a sample, the sampling artist must provide the copyright owners with the title of the original record and artist, the name and address of the record company and publisher, and information about the length and content of the sample. A copy of the new song, as well as the sampled song is required, and if there is profanity, a typed lyric sheet can be anticipated.[88] Based on this standard which has emerged in the industry, it is necessary for the entire creative process to take place with considerable energy and resources expended before one can even get clearance for a sample. It is more difficult to get clearance when the song is not complete. Honest sampling artists are rewarded with less bargaining power due to their inability to ensure the owner of sampled works the duration of the copyright, the content, the use, and the "offensive" value of the new song.[89]

There is pressure put on an artist to perform, and after putting forth the effort and creative energy to produce a song, it is beyond frustrating, both economically and artistically, for an artist to scrap that song if permission is withheld. Economically, money to the artist is lost in the production of a master or the additional cost of re-mastering. It is also true that both the artist and the record company can often be anxious to release records, and it can take three to four months to clear an album where masters contain samples.[90] Artistically, there is often a spiritual investment in an artist's product. Sometimes the record company releases the song without clearance because it is not liable due to

84. *Id.* at 8.
85. *Id.* at 9.
86. Bleistein, *supra* note 42, 188 U.S. 239, at 251.
87. ASHBURNE, *supra* note 82, at 10.
88. *Id.* at 7.
89. *Id.* at 11.
90. *Id.* at 10.

the indemnity clauses in artist agreements.[91] It is not just young Black rap artists who find this procedure cumbersome. Recently rap artist Lord Finesse filed suit against communications giant AT&T for sampling his copyrighted material without clearance. Lord Finesse was quoted saying, "Now, if we artists use AT&T's stuff without permission, you *know* that they're gonna come right for us."[92] Now, the parties involved have entered into negotiations, and courts will never have an opportunity, if it would have been exercised in the first place, to judge on the matter and introduce §506 (criminal offenses).

When permission is granted, the royalty for samples which generally goes to the record company and the publisher comes out of the sampling artist's royalties. This can often lead to an artist—who spends considerable hours in a studio writing and producing a song which uses a sample—making 50% or less of their artist royalties.[93] Permission will also lead to the sampling artist giving up her bundle of rights almost in entirety by sharing publishing rights, credit for songwriting, and royalties.[94] Record companies are not as organized about clearing samples as one may assume after reading about the law. There is a lot of chaos and vague understanding when it comes to handling samples, and handling then *efficiently*.[95] However, the clearance houses, who are undoubtedly profiting from the complexity of sample clearance, have no complaint. There is a constant influx of calls to get clearance or the information to reach copyright owners to obtain clearance, to hire employees to police mediums for infringing works, and to get firms specifically designed to clear samples.[96] Nevertheless, for an innovative technology which has spread

91. *Id.* at 11.

92. Shandar Fullove, *Finesse, Please Phone Home: Look Who's Sampling Without Clearance Now*, VIBE, Apr. 1997, at 42.

93. *Id.* at 13. It is tragic that this area is left to the bargaining power of artists over record companies and music publishers. This is an area which should be statutorily regulated to accommodate the part of our population who deserves protection in a society which has historically not afforded them protection. This would be colorblind law which would lead to results which are realistic within their social context.

94. ASHBURNE, *supra* note 82, at 17, 23, 27. Publishers typically ask for either a percentage of copyright ownership in the new song, a percentage of the income from the song, flat fees, advances against mechanical income, or roll-over advances (this one could be the most fair).

95. Telephone Interview & Interview with Dennis Stafford, former marketing executive for Perspective Records (until 1996), (April 4 & 16, 1997) (emphasis added).

96. Telephone Interviews with John Coletta, of Corporate Relations at BMI-NY; Chris Campbell, at Harry Fox Agency-NY; Denise Incorvaja, Anti-Piracy Dept. at RIAA; (Mar. 30, 1997).

throughout diverse areas of contemporary music and which was once *cheap*, the practice of clearing samples has proven to drive up the cost of recording music, and additionally reduce the revenue to the sampling artist. The effects of *Grand Upright* appear to be deterrent.

In spite of the obstacles, the continued demand for sampled music among young record buyers grows. The use of digital samples has proven to be revenue producing for the sampled artist, in addition to rewarding society in ways that are not quantifiable. Over the last few years, the use of digital samples has led to a revival of rhythm-and-blues.[97] Previously, there was a divide growing between young fans gravitating towards hip-hop and the older generation listening to rhythm-and-blues. The New York Times says, "Sampling has helped bring the two generations together."[98] Rhythm-and-blues rules the charts with artists as diverse as Toni Braxton, En Vogue, Brandy, and R. Kelly holding on to Billboard's Top 10. Contemporary rhythm-and-blues has revived itself by looking to its past. Record companies have released compilations of sixties and seventies soul classics with active sales. R&B artists like Keith Sweat innovated the "New Jack Swing" which incorporated R&B vocals and melodies with the open-ended rhythms of early rap.[99] The New York Times also said that "[o]ver the last few years, this rhythm-and-blues renaissance has not received the media attention of the early nineties grunge invasion. . . Yet in its own quiet way, rhythm-and-blues has experienced its own revolution."[100] History proves that the recording industry will not completely drop this innovative recording technique from its collective bag of tricks.[101] The effects of legislative and judicial handling of digital sampling sixteen years after its introduction are in total conflict with the policy which underlies copyright law. Zachariah Chafee should be appalled that the protection given the copyright owner *has stifled* independent creation by others.[102]

97. James Hunter, *Pop View: Hip-Hop's New Find,* N.Y. TIMES, Feb. 2, 1997.

98. *Id.*

99. *Id.*

100. *Id.*

101. ASHBURNE, *supra* note 82, at 29. *See also supra* note 11 and accompanying text.

102. Chafee, *supra* note 32, at 511.

D. *Revisiting Digital Sampling* In Color

This analysis reveals that it is imperative that the legislative and judicial branches of our government reconsider their current approach to digital sampling in an era where everything is about to be digitized. The present state of law in this area has caused parties to avoid litigation to a fault. There is an absence of litigation in this area because parties' bargaining power is often not on equal terms, and the filed action ends in settlement. There is an unacceptable burden on the artist who chooses to sample, and yet the profits all go to the record company and publisher. Most importantly, there is far too much room for bias to enter consideration of sample clearance or adjudicating claims of infringement. History has proven that the law has not been kind to the Black artist, and this calls for a realistic approach to digital sampling. Previous attempts to deal with this area have proven disastrous, and not because there is no doctrinal legitimacy. It is unfortunately how the law is applied in light of wide discretion to the sampled artist, judges, and juries. Therefore, we must revisit this area of law with a keen eye towards encouraging innovation and creativity, and encouraging the free flow of ideas for public good.

1. Fair Use

Fair use is easily deconstructed, prong-by-prong. With respect to the first prong, it is necessary to consider the social context in which fair use applies to the primary community which rap music reaches. The purpose and character of use is determined by whether such use is of a commercial nature or is for nonprofit educational purposes.[103] It is likely that the interest in educating the public would outweigh nonprofit use.[104] The majority of rap music listeners are Black youth. The majority of Black Americans live in ghetto communities in cities which can tend to have substandard public educational facilities. Children today can learn more on the street than in school. Rap music can have a profound influence on youth, from lyrics to the image of the artist. Therefore, when a rap song has a positive message, it should be considered, as Congress intended with a broad reading of fair use, as educational use of copyrighted material which does not require authorization. This would encourage artists to use a positive message, while making it easier for rappers like KRS-One or Public Enemy to cre-

103. 17 U.S.C.A. § 107(1) (1996).

104. *See supra* note 67 and accompanying text; Acuff-Rose, 510 U.S. 569, 588.

ate the social commentary and social critique that they have built their reputations and success on.

The second and third prong—the nature of the copyrighted work and the amount used—should defer to the overall public interest which is sought to be satisfied, and may be determinative when the first prong is not clear. The fourth prong will rely on which style of music is being sampled and if the market is similar to the one which the new music will fall within. It is also important to consider at this juncture how old the song is that is being sampled. If the song is over ten years old, it is safe to say that the market can only be enhanced by its use as a sample. If the sample's use leads to considerable market loss for the original copyright owner and this is provable in some scientific manner, then an action for damages may be reserved. However, this prong of the analysis is tenuous because of the existence of the compulsory license for the right to "cover" copyrighted material. Congress was willing to set aside the private proprietary interest of artists with copyrighted material in exchange for public interest. If Congress was willing to subordinate this interest in §115, why should it be any different here? Fair use should be a tool to encourage more innovative ways of reaching the youth who listen to rap music, and for scholars and educational institutions to take notice of a valuable window into the world of Black youth culture by way of *virtual* ghetto rhetoric.[105]

2. Compulsory License for Digital Samples

In cases where digital samples are not used "productively," there should be a statutorily mandated compulsory license to produce derivative works using digital samples. Under a compulsory license scheme, all parties would be justly compensated for their efforts and property interests, and the statute would eliminate the discriminatory application which currently exists. Copyright owners have the power to decide what can and what cannot be done with their copyrighted work, and therefore restrains the dissemination of information to the public. Judges have the power to grant summary judgment without considering the unique circumstances of Black citizens or those who share social marginaliza-

105. *See infra* note 108.

tion, and juries have the power to determine infringement with their power as the lay listener.[106]

The compulsory license would be structured in a four tier fee schedule for digital samples.[107] If the hook is used (including lyrics), this would lead to a premium fee, and the fee would decrease with the amount used as follows: words of lead singer; words of background vocals; instrumental melody; and for the smallest fee—rhythm and non-essential instrumental components (like a horn or drum riff). Master license fees should be standardized by the age of the sampled work or the current royalty stream, whichever shows more value for the sampled work. Instead of the artist bearing the cost of sampling the copyrighted work, it should be divided among the record company, the publisher, and if there is an independent producer, then the producer as well. The minimal portion should come out of the artist's royalty to alleviate the burden and to protect the incentive interest to the artist for the public. Any artist's portion should be paid at the time that royalty statements are due to the sample owner. The sample owner should warrant that it is the owner-in-fact, and if that warranty is breached, the warrantor will be liable for all expenses paid for use of the sample, including attorney fees and clearing costs. In the case that the warranty is not breached, costs for sampling clearance and master license costs should fall under recording costs and should be borne by the record company.

3. Policy Interests Furthered

Broad interpretation of the fair use defense and a statutorily mandated compulsory license for derivative works using digital samples would further the policy interest which underlie copyright law.

With fair use, the rap artist would have an incentive to produce socially conscious lyrics and subject matter in their *virtual ghetto* rhetoric.[108] Rap music has infinite value in our society today and it should be recognized for that. Instead, artists like

106. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), cert. denied, 330 U.S. 851 (1947). (discussing the substantial similarity test standard for copyright infringement).

107. This is a rough proposal based on what people in the industry would like to see. The author does not profess to have the solution.

108. *See* Nelson George, *In Defense of Rap — Gangsta or Not,* WASH. POST, Feb. 20, 1994, at G3. The term "virtual ghetto" is relied upon to signify that not all rap artists come from lower class poverty-stricken communities; however, because of their skin color, wherever they live in America is a virtual ghetto. Rap music often speaks to the ills of a racist society — whether directly or not.

Beck are hailed for recycling—as *innovators*.[109] Society needs to reward its artists for pushing forth with technology in a productive manner.

In the case that fair use is inapplicable, the compulsory license would act to further the greater public interest in the dissemination of knowledge (ghetto knowledge, technology) and in the free flowing exchanges of ideas from the creative sector of society. A compulsory license would reduce the cost of using digital samples, while rewarding all the artists involved in creations involving digital sampling. It would streamline the process, thereby leading to a more efficient approach to licensing digital samples without inadvertent infringement. Today's practice of sampling is often complex for the sampling artist who seeks to obey the law. Compulsory licensing would also allow artists to pursue this new form of technology without having to blatantly disregard the law.[110] Under a compulsory licensing scheme, Biz Markie would not have faced criminal charges for using a sample after his good faith request for permission from the sample owner was denied.[111] These proposed solutions would realistically realign the legal approach to digital sampling with the underlying policy behind copyright law. It would encourage creativity, innovation with incentive, the free flow exchange of ideas, and public dissemination of that knowledge. Stimulating this intersection of music and technology would create new markets, in addition to protecting older ones facilitating a healthy economic approach to this digital era.[112]

IV. CONCLUSION

Society has transformed from an openly racist regime to a covert colorblind façade. Dominant culture chooses to overlook color perhaps with good intention, while at the same time silencing and making a historically subjugated people and their experience invisible. At the same time, technology is racing far ahead society's spiritual and moral development. It would be a hercu-

109. *See supra* note 24 and accompanying text for discussion about Beck. *See also supra* note 2 and accompanying text.

110. This idea harks back to the policy behind the Home Audio Recording Act of 1992, where legislators noticed the impracticality of criminalizing behavior that was destined to continue.

111. *See supra* note 58 and accompanying text.

112. *See supra* note 93 and accompanying text. *See also supra* note 28 (the author referred to democratic ideals and how we need to adhere to these ideals to maintain a civil society).

lean task to try to prevent the steady growth of technology, so instead we must narrow the gap between our spiritual and moral growth and technology of the nineties. A little cultural sensitivity and thoughtfulness could go a long way—it definitely could not hurt. Furthermore, a historical analysis is appropriate here. Law does not and cannot exist in a vacuum. There is always social relevance and far reaching effects of legislation and jurisprudence. History of music has proven that Black innovations receive lukewarm, if not frigid, welcomes in American society, and these innovations are not validated until they are appropriated by white artists. Yet, Black artists continue to innovate in the face of adversity. Society should reward these heroes and martyrs. This history should teach society deference to rap music, combined with a concerted effort to learn about other cultures which exist in *our* society.