

Rap Record for Sale -
Sampling practice and commodification in Madlib Invazion.



Daan van den Brink (s4369106)
Email: vanden.brink@student.ru.nl

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Supervisor: dr. Vincent Meelberg
Email: v.meelberg@let.ru.nl

Abstract.

Within our capitalistic society, much if not all the music we consume is to be regarded as commodities. Musical products are subject to numerous processes, rules and regulations, one of which being copyright. Essentially, copyright enables the musical product as commodity, and as David Hesmondhalgh puts it, has become the main means of commodifying culture. A musical practice that is particularly at odds with copyright is sampling, which makes use of previously recorded material through recombination and re-contextualisation. For the use of samples, a proper copyright license must be in place, whether the sample-based song is being monetized on or released for free. However, hip hop producers often do not comply in licensing the use of copyrighted material in their music, which challenges not only the copyright regime, but also copyright as a means of commodification. Over the years, copyright has become an extensive set of rights, resulting in the criminalization of unlicensed use of samples, but not in prevention, as technological advancements have made sampling a more widespread and accessible practice. Within this thesis, the sample-based work of Madlib as released on his Madlib Invazion label is used as a case study to map the current copyright regime, the costs of licensing and the risks of unlicensed sampling. The use of copyrighted material through sampling is often regarded as ‘theft’ or blatant ‘copying’. This thesis does not deal with a discussion surrounding the creativity of sampling, but rather aims to establish sampling as a form of creative engagement, which can also have positive effect on the original source material used. By researching the use of samples as released on the Madlib Invazion label, together with these samples’ relation to copyright, an understanding is formed concerning the problematic relation between the commodification of music through copyright, and sample-based music.

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1. Introduction.

1.1 *Sampling and copyright, an evident problem.*

David Hesmondhalgh argues copyright has become the main means of commodifying a culture.¹ Copyright holders have a bundle of exclusive rights which allows them to issue copies of a work to the public, but also to make adaptive or derivative works. These exclusive rights enable copyright holders to take part in the marketplace, allowing a work to be bought and sold. As Hesmondhalgh notes, this process favours ownership over access: “When commodities were bought, this involved private and exclusive ownership rather than collective access.”² However, commodification is a far from simple process, and Hesmondhalgh points to the complexities by describing it “as ambivalent, as enabling and productive, but also limiting and destructive.”³ If we focus on the problems surrounding commodification in relation to copyright, the main issue is not the abstraction and concealment of labour and exploitation, which can be located at the production side. Rather, there is the limiting of access, which happens through consumption, as “commodification spreads a notion of ownership and property as the right to exclude others.”⁴ This notion of ownership is directly relatable to the use of copyright. Copyright holders use their bundle of rights to exchange access to their works for money. However, copyright is also used in order to maintain exclusive ownership over a work, and copyright holders use their rights to only permit adaptive or derivative works when properly licensed.⁵

Within the current copyright regime, music has the dubious honour of being the leading discipline for jurisdiction.⁶ Like any law, copyright laws have been and remain to be challenged. One practice that is at odds with the current copyright regime is sampling. Sampling differs from other forms of copyright infringement such as illegal downloading or distributing unauthorized or counterfeit copies because it is embedded with a sense of creativity and can be placed within a longer tradition of musical quotation and reinterpretation.⁷ Despite making for very interesting analyses, the creativity of sampling is only of little interest to my thesis, because including such a discussion would be of a too wide scope for the limited space within this thesis. Rather, I want to research the relation between copyright as a means of commodification and the practice of sampling. Many copyright scholars have expressed their concerns that the current copyright regime makes it exceedingly difficult for musicians to use copyrighted material by the practice of sampling, be it through monetizing their music or even releasing it for free. Sample-based music can only take part in the marketplace when complied to licensing and approval, pointing to a tension between sampling creators and copyright holders.

Despite the legal problems surrounding the use of samples, it is now an accepted practice within popular music. For this thesis, I would like to focus on the use of samples within the genre of hip hop, for a number of reasons. Most notably because the practice of sampling was made popular through hip hop, and it can be seen as essential to the genre.⁸ Kimbrow McLeod

¹ Hesmondhalgh (2013), p. 159.

² Ibidem, p. 69.

³ Ibidem.

⁴ Ibidem, p. 70.

⁵ Frith & Marshall (2004), p. 7.

⁶ Ibidem, p. 22.

⁷ McLeod & Dicola (2011), p. 73.

⁸ Ibidem, p. 4, 5.

and Peter Dicola argue in *Creative License* (2011) that through the current copyright regime, sampling hip hop artists are pushed to the margins of the music industry and forced to release their music in a more ‘underground’ fashion. In doing so, unestablished or lesser known artists have found a way to release their music that possibly keeps them from being sued, or at least minimises the risk of litigation.⁹ In her article ‘Records that play: the present past in sampling practice’ (2009) Vanessa Chang renders sampling as something disruptive, because it is capable of transforming and even dissolving the origin of its musical source material.¹⁰ I believe that this disruptive quality can also be applied to the tension between copyright as a means of commodification and the practice of sampling. Despite the difficulties surrounding sampling practice, creators still release sample-based music without licensing, continuing to challenge the copyright regime. Unlicensed sampling thus has a weird position within the marketplace, because it is at risk of litigation and at odds with copyright laws.

1.2 *Object of study: Madlib and the Madlib Invazion label.*

An example of a hip hop artist that works from the margins of the industry is Otis Jackson Jr., who releases music under the name Madlib as well as countless other aliases and guises. Madlib is a DJ, producer and multi-instrumentalist hailing from Los Angeles, United States. After a string of critically acclaimed releases on the independent label Stones Throw, Madlib launched his own Madlib Invazion label in 2010. The Madlib Invazion label started with the twelve volume *Madlib Medicine Show* series, spread over twelve CD’s and six LP’s intended to be released over the course of twelve months, starting in January 2010. The series however, took over two years to complete, ending in March 2012 with the release of a surprise CD, making it the thirteenth volume in the series. Jackson confessed to not having a mission statement for his label, describing his approach in a 2016 interview as: “Just putting out stuff I want to hear and it has nothing to do with anybody else.”¹¹ The label’s first release, *Madlib Medicine Show #1: Before the Verdict* (2010), does indicate an off-centre approach, stating that: “Madlib Medicine Show is a music series by producer Madlib consisting of experimental hip-hop, jazz fusion and electronic music, produced, marketed and released with little concern for traditional norms of the commercial record industry – except for this barcode.”¹² The music released on the Madlib Invazion label includes extensive use of samples or other unauthorised use of copyrighted material. “The little concern for traditional norms of the commercial record industry” mentioned on the label’s first release is not only referring to the unorthodox mode of producing and marketing, but perhaps also to a neglect of copyright.

At the time of writing only one release on the label indicates the use of copyrighted material, namely Freddie Gibbs & Madlib – *Pinata* (2014), which credits the use of samples in two of its seventeen songs.¹³ The use of copyrighted material by Madlib Invazion is however not limited to sampling. The cover of Madlib – *Madlib Medicine Show #8: Advanced Jazz* (2010) shows an artwork called *Jazz Cats Crossing the Hudson*, which is a collage of jazz artists

⁹ McLeod & Dicola (2011), p. 13, 14.

¹⁰ Chang (2009), p. 157.

¹¹ Madlib (2016).

¹² *Madlib Medicine Show #1: Before the Verdict* (2010).

¹³ *Pinata* (2014).

inserted in Emanuel Leutze's *Washington Crossing the Delaware* (1851).¹⁴ Furthermore, the booklet to the CD Madlib – *Madlib Medicine Show #13: Black Tape* includes a reprinted review of an earlier Madlib release, which critiques Madlib over his use of other people's work, with the only given context that the review is reprinted without the author's permission.¹⁵ Together with the extensive use of uncredited sampled material, it becomes clear the Madlib Invazion label does not operate along the guidelines of copyright law. This is why the releases as found on the Madlib Invazion label are used as object of study, since they show an obvious neglect of copyright. For this thesis however, I would like to focus solely on the use of samples, because it is argued that sampling practice is challenging music copyright, being the leading jurisdiction in copyright law.

The fact the music on Madlib Invazion is released with little concern for traditional norms of the commercial record industry, does not mean they are not part of the commercial record industry, or subject to its workings. This is to say, the releases on the label function as commodities like other musical products. However, this notion can be problematized through copyright infringement. In short, the music found on the label is challenging copyright, and in this way, the Madlib Invazion label shows what is permitted and what is not. This implied tension between copyright law and the challenging thereof by Madlib Invazion through sampling is of main interest to my thesis. In order to explore and analyse this tension, I have formulated the following research question:

How does the use of copyrighted material by practice of sampling as issued by Madlib Invazion problematize the commodification of music through copyright?

This research question can be dissected into three main themes. Firstly, a proper background needs to be in place about what sampling is, and what sampling is done by Madlib as found on the Madlib Invazion label. As the research question already foreshadows, sampling practice makes use of copyrighted material. Therefore, the current stance of the music industry and copyright law towards sampling must be articulated and analysed, which makes copyright the second theme. Thirdly, there is the notion of commodification, which needs to be clarified in order to analyse how copyright is used as a means to commodify a culture, and how this relates to the commodification of sample-based music.

1.3 Theoretical framework: Sampling practice, copyright laws and commodification of music.

These three aspects, sampling, copyright and commodification of music are intertwined with each other. However, each 'theme' so to say, has its own theorists. In order to analyse sampling and the use of pre-recorded material (whether copyrighted or not), I will predominantly draw on the writings and theories of Vanessa Chang and Brian Kane. As outlined earlier in this introduction, I am not so much interested in establishing sampling as a creative practice. Rather, it can be argued that the distinguishing feature of sampling as a practice is the use of pre-existing and/or pre-recorded material. Through the use of pre-existing material, the sample-based song has a relation to its origin. The theories of Chang and Kane are used in order to analyse this

¹⁴ *Madlib Medicine Show #8: Advanced Jazz* (2010).

¹⁵ *Madlib Medicine Show #13: Black Tape* (2012).

relation between sounds and their origins, and how sampling is both disruptive of this relation as well as continuing it. Chang explores this relation by referring to various philosophers and theorists, most of them from the field of semiotics. Kane does not deal with sampling directly, but argues that sounds naturally have a visual source, such as hearing a birdsong and seeing birds. Acousmatic sound however, is sound through which this relation is purposefully undercut and disrupted, in order to aestheticize the sound. Next to Chang, the notion of acousmatic sound can be used in order to dissect the relation between a sample and its source.

Next to this theoretical framework about sampling, is sampling's relation to copyright. I am not a student of law but have tried to understand and research the copyright laws concerning sampling as fully and thoroughly as possible. However, copyright laws differ between countries, and are subject to change over time. The object of study for this thesis helps to bring this into focus, because Madlib Invasion is issued in the United States. However, Madlib is known for sampling obscure music from around the world, and therefore strictly speaking his infringement is not limited to the United States copyright laws, but also include the copyright laws concerning infringement as in place in the country where the sample source was initially issued. However, the difference between copyright laws per country can be problematized. Firstly, the United States is recognised as the largest exporter of copyrighted works, which makes their jurisdiction leading in copyright. Secondly, as Simon Firth and Lee Marshall note, various trade agreements made by the World Trade Organisation (WTO) have established a form of Western-style copyright protection that is in effect in 146 countries.¹⁶ Furthermore, the differences between copyright in various countries have been evened out by the advent of the internet, because it functions as a world-wide distribution platform. Firth and Marshall under scribe the fact that digital technologies, such as sampling, but later the internet, have challenged copyright, leading to a widened scope. The legislative response to copyright protection on internet has helped to put a more protective and universal Western-style of copyright in place globally.¹⁷ When dealing with copyright within this thesis, it will be of this Western-style of copyright as described by Firth and Marshall. Their book *Music and Copyright* (2004) covers much ground when dealing with the copyright law, as well as their theoretical background and perhaps more importantly, their pragmatic function within the music industry. Next to this I will predominantly use the writings of Siva Vaidhyanathan and Lawrence Lessig. Both scholars articulate a critical stance towards copyright and its relation to sampling. The aforementioned McLeod and DiCola help applying the stances of both Vaidhyanathan and Lessig to the use of samples in hip-hop.

The theories and critiques on sampling and copyright help provide a background for studying copyright as a means to commodify culture, and the musical product as commodity. Therefore, the theory of commodification is arguably the main theoretical framework of this thesis. When studying the process of commodification, different approaches present themselves. Firstly, there is the work of Karl Marx and his extensive theory surrounding commodification. However, in answering my research question I will predominantly use more recent theories that in some way or another make use of Marx and his notion of the commodity. An example of this is Hesmondhalgh's notion of copyrights as a means to commodify culture,

¹⁶ Firth & Marshall (2004), p. 13.

¹⁷ Ibidem, p. 4.

which I already briefly demonstrated earlier in this introduction. Whereas Hesmondhalgh focusses on a rather broad use of commodification in relation to copyright, other scholars underscore the individual nature and importance of context when dealing with the musical product as commodity. This is more in line with another approach when studying the commodity, namely that of anthropologists Appadurai and Kopytoff. Essentially, they argue that the commodity state is but one stage in an object's 'life.'

The process of commodification within this approach is seen as a circumstance in which an object is awarded economic value. This approach is used by Timothy D. Taylor for instance, who dissects the musical product as commodity through the advent of the player piano and its marketing. In his article 'The Commodification of Music at the Dawn of the Era of "Mechanical Music"' (2007), Taylor writes: "[W]hatever the music-commodity is, it is utterly dependent on the circumstances surrounding its commodification, which is largely driven by its means of reproduction, themselves commodities."¹⁸ In a later article, Taylor further dissects the circumstances under which music becomes commodified, establishing three regimes of commodification, namely as a published score, a live performance or as recorded sound.¹⁹ These different regimes all have their own means of reproduction, implying a different process of commodification, together with a different relation to copyright as a means of commodification.

Hypothetically speaking, Madlib *Invazion* is challenging copyright by releasing sample-based music, commodifying it in neglect of the law's requirements. It belongs to third regime of commodification, since it concerns recorded sound. However, through the use of samples, it also contradicts one of this regime's means of reproduction, which is copyright. In order to study how the music on Madlib *Invazion* is subject to the process of commodification, either the anthropology or the Marxian approach can be used. An attempt to reconcile and analyse both approaches is found in Rasmus Fleischer's article, 'If the Song has No Price, is it Still a Commodity? Rethinking the Commodification of Digital Music' (2017). In this article, Fleischer takes streaming service Spotify as a case study for his research into the commodification of digital music. Fleischer presents his findings in comparison to Taylor, arguing for a more defined relation between production and distribution when theorizing the musical product as commodity. Fleischer argues that next to the three regimes of commodification as described by Taylor, a fourth regime can be named, namely that of the branded music experience, which he connects to the streaming service Spotify.²⁰ The texts of both Taylor and Fleischer show that when studying the process of commodification, a clearly demarcated and specific case study is needed, due to the individual and context dependent nature of the musical product. In order to critically analyse the relation between sampling in hip hop and the commodification of music through copyrights, I will predominantly make use of the text by Fleischer, mainly because his article features a clear definition of the musical product, in which both the anthropology approach as well as the Marxian definition of commodity is present. Like Taylor and Fleischer, I have tried to select a demarcated

¹⁸ Taylor (2007), p. 283.

¹⁹ Taylor (2015), p. 21.

²⁰ Fleischer (2017), p. 157.

circumstance in which music becomes commodified to use as an overarching case study within this thesis, namely the work of Madlib as issued on the Madlib Invazion label.

1.4 Method

Concluding his article ‘The Commodification of Music at the Dawn of the Era of “Mechanical Music”’ (2007), Taylor once again underscores the importance of the circumstance in which music is commodified. He writes:

I would like to emphasize that it is not productive to speak simply of music as a commodity in general; one can only speak of particular ways and circumstances in which music becomes a commodity, and specific historical nodes in the complex history of the commodification of music in a particular culture.²¹

As foreshadowed above, copyright protection presents the sampling practice with a number of difficulties. These difficulties stem from the use of earlier, pre-recorded, and thus copyrighted music. This use is central to singling out a particular way or circumstance in which music becomes a commodity. Copyright generally prescribes that before releasing sample-based music, it must comply to a license and permission from the copyright holder. As outlined above, these rules are challenged by the neglect of labels or producers. Such neglect is also presumed to be the case with the Madlib Invazion label, as the products as issued show little concern “for the traditional norms of the commercial record industry.” One way to analyse this presumed friction between copyright law and sampling, is to single out the position of sample-based music within the marketplace as a circumstance in which music becomes a commodity, as the sample-based song shares this marketplace with the song used as sample source. Taking the musical products as released on the label as objects of study allows for an analysis of how they function as commodities, and how they relate to copyright as a means of commodification.

With the releases on the Madlib Invazion label as object of study, throughout this thesis I will refer to selected releases as case studies. However, this thesis is not attempting to give an overview of all the music available on the label, but rather chooses to give an in-depth analysis of selected songs in the Madlib Invazion catalogue. In doing so, I will focus on the Madlib Invazion label as being a particular circumstance in which music is commodified. Being strictly an artist endeavour, the releases on the label showcase how far an artist is permitted to go, or how an artist is capable of securing his own place in the market despite the hostile stance towards sampling of the copyright regime. While the ‘underground’ mode of releasing as mentioned by McLeod and DiCola is present – the label includes some releases available only on vinyl, pressed in limited runs – most of the label’s releases are also available on streaming services such as Spotify, Tidal and Apple music, which presupposes a different relation to copyright. The extensive use of samples as found on the label, together with the little concern for the traditional norms of the commercial record industry, also presupposes violation of copyright. This presupposed violation not only challenges the current copyright regime, which only allows licensed use of samples, but also the musical product as commodity, since it undermines the notion of ownership and property right to exclude others.

²¹ Taylor (2007), p. 302.

My method will thus be a combination of things. Firstly, when it comes to the use of copyrighted material, my method will focus on what exactly that use is. Through musical analysis I will list what samples are being used, and in what way the musical parameters have been shifted and transformed through sampling in regard to the original. Next there is the presupposed violation of copyrights through sampling as found on the Madlib Invazion label. In order to analyse this copyright infringement, I will try to dissect and map the current stance of copyright law regarding sampling. This thesis is by no means a study of Madlib or the Madlib Invazion label, whose catalogue is of too wide scope to study in full here. However, on certain topics, the case study of Madlib Invazion will not suffice, or other case studies will be more fitting. This is the case with the mapping of the current copyright regime and its stance towards sampling. I found that other case studies were more exemplary or salient than those included in the object of study as outlined within this introduction. The case studies on this particular aspect are focussed on the illegalities surrounding the use of copyrighted material and referring to the legal actions taken against them is necessary when trying to dissect copyright law's stance towards the use of samples. For this, I will draw on Vaidhyanathan, Lessig and McLeod and Dicola. Within these texts, a handful of court cases concerning sampling reoccur, because of their salient or significant outcomes. Therefore, I will comply selected court cases or other legal disputes over the use of samples together with the examples as named in texts above in order to articulate the stance of copyright law regarding sampling.

Use also consists of releasing and monetizing the musical product, essentially the process in which commodification takes place. So next to using musical analysis and analysing copyright law's stance towards the use of samples, I will analyse selected releases in the Madlib Invazion catalogue as musical products that are subject to the process of commodification. My primary concern is the relation between the musical product as commodity and the practice of sampling. In order to research this relation, I will make use of Fleischer's findings as presented in his article, in which he approaches the musical product as commodity through both Marx and anthropologists Appadurai and Kopytoff. By applying these two different approaches, a more complete understanding of the commodity and commodification process is formed. The anthropology approach is concerned with the biography of the commodity and can be used in order to point to the different stages an object passed through. The Marxian approach is more concerned with production and the creation of value and profit. In Fleischer, a formula detailing this process is printed which I will apply to the case study of this thesis. I will apply both these approaches as found in Fleischer to selected releases on the Madlib Invazion label and attempt to reconcile the two approaches through comparing my findings, in order to form a more complete understanding of the musical product as commodity.

1.5 Structure

The structure of this thesis is derived from its three central themes as present in the research question. The following chapter will deal with sampling as a practice, exploring and analysing the relation between samples and their origin, and more fundamentally sounds and their sources. For this I will use the writings of Chang. Next to Chang I will also make use of Kane, who does not deal with sampling but with acousmatic sound. In this chapter I will relate Kane's findings about acousmatic sounds with Chang's approach of the sampling practice as being disruptive. Although the relation between sound and their sources, explored either through acousmatic

sound or semiotics, arguably runs throughout all sampling, I single out two releases in the Madlib Invazion catalogue, namely *Trouble Knows Me – From Trouble They Know Me* (2015) and Madlib – *Madlib Medicine Show #3: Beat Konducta in Africa* (2010). I have chosen these two records because 1) the use of samples can be connected to Chang, through which the relation between a sample and its origin is explored, and 2) the samples point to their own status as samples, exemplifying the disrupted relation between sounds and their natural cause as explored through Kane. Next to the theoretical framework that analyses sampling and its relation to origin, this chapter is also invested in pointing to aspects of the sampling practice that can be deemed positive and arguing why it functions as a form of cultural engagement, which is exemplified through *Madlib Medicine Show #3*, and relates to Chang's notion of the archive. For this, I will also refer to creative commons founder Lawrence Lessig, particularly his book *Remix: Making Art and Commerce Thrive in The Hybrid Economy* (2008).

The third chapter is dedicated to copyright and articulates the problems creators face because of the law's the current stance on sampling. Vaidhyanathan's text, *Copyright and Copywrongs* (2001) figures as a critique on copyright and intellectual property and is used as a theoretical background on which the current copyright is discussed. Next to Vaidhyanathan, this chapter will also use Lessig, as his writings can be used in order to support and sometimes nuance Vaidhyanathan's findings. More importantly, Lessig's writing and work is concerned with digital technologies, and can be used to show how copyright has become so extensive online. As already noted, to only refer to Madlib within this chapter does not suffice, because although he makes extensive use of samples and therefore is infringing copyright, there is only little information about disputes with copyright holders over his use. Therefore, this chapter will also refer to other cases related to sampling or copyright infringement in order to establish a more thorough view of copyright law and its stance towards the use of samples.

After dealing with sampling and copyright law, a background is created in order to discuss the musical product as commodity, and how this process of commodification relates to the use of samples. The predominant source for doing so will be the text of Fleischer, since it is clearest in what the process of commodification is to music, and whether something can be considered a commodity or not. This chapter will also use two chapters from *Music and Copyright*, namely 'Musicians' (2004) by Jason Toynbee and 'Technology, Creative Practice and Copyright' (2004) by Paul Théberge. Both do not directly connect their findings to the musical product as commodity, or copyright as a means to commodify a culture, but nevertheless their texts show how sampling relates to key terms surrounding commodification such as 'marketplace' and 'added value'. Within this chapter I will refer to one release by Madlib in particular, namely *Madlib Medicine Show #11: Low Budget Hi-Fi Music* (2011).

2. Sampling practice.

Before analysing sampling's relation with copyright law and the musical product as commodity, this chapter compiles different views and theoretical approaches on sampling. I feel that writing on sampling is most concerned with establishing sampling as a creative act or placing it within a wider tradition of intertextuality. This is of no interest to my thesis. I believe that the widely opposing views on sampling, either as theft or as tribute, stem from the practice's complex relation to origin. This relation is by any means an intertextual relation, but unlike a reference in a book or a quote in a movie, intertextuality is the foundation, the absolute backbone on which sampling takes place. For my analysis, I will draw mostly on the writing of Vanessa Chang, who critically assesses sampling through different philosophical concepts. Furthermore, the concept of acousmatic sound is used in order to analyse the relation between sample and origin, and sound and cause. For this, the writing of Brian Kane is used. This chapter therefore hopes to offer an analysis of the relation between the samples as used by Madlib and their origins.

2.1 *Sound recording and acousmatic sound.*

The technological development instrumental to the use of samples in music is the advent of sound recording. In her article 'Records that play: the present past in sampling practice' Vanessa Chang takes this as her starting point in order to analyse the philosophical implications behind sampling practice. She writes: "Sound recording transmogrified music from a performance, inhabiting a specific space time, into an object, freed from an origin."²² As music is captured through a recording, the real-time performance is transferred into an object. This process detaches the performance as origin from the sound. Furthermore, sound recording enables (re)combination and layering. The (re)combination of sound recordings is not unique to sampling but occurs throughout music production. Multiple recordings are layered or combined, creating 'overdubs,' establishing the playback of the recording as the performance as opposed to the initial musical performance in real-time. By transferring a musical performance, something that before only existed in real-time onto an object, the relation between sound and its origin is undermined. As Chang writes, this does not mean the origin in sound recording is of no importance: "As recording technology occasioned the reification of sound, it provoked a deep cultural concern for the origin."²³

Sound that has been freed or split from its origin is perhaps best understood as 'acousmatic sound.' In his book *Sound Unseen: Acousmatic Sound in Theory and Practice*, Brian Kane gives a thorough overview of the term and its employment in avant-garde music, most notably the musique concrète of Pierre Schaeffer. Kane's introductory definition of the term draws on Michel Chion, who summarised many of Schaeffer's findings: "[T]he standard definition of the term, cited by Pierre Schaeffer and others: 'Acousmatic, adjective: a sound that one hears without seeing what causes it.'"²⁴ In his musique concrète, Schaeffer composed by combining sounds using tape recorders, alienating the sounds from their original context. In doing so, Schaeffer argued, the listener's attention was drawn away from the sound's worldly

²² Chang (2009), pp. 143, 144.

²³ Ibidem.

²⁴ Kane (2014), p. 3.

cause and directed “onto its intrinsic audible properties.”²⁵ Noteworthy is the etymology of the term ‘acousmatic’:

Etymologically, the term “acousmatic” refers to a group of Pythagorean disciples known as the *akousmatikoi* – literally the “listeners” or “auditors” – who, as legend has it, heard the philosopher lecture from behind a curtain or veil. According to Chion, Pythagoras used the veil to draw attention away from his physical appearance and toward the meaning of his discourse. The central role of the Pythagorean veil in Schaefferian tradition blocks the *causal* identification of acousmatic experience with modern audio technology in order to make a more striking claim. Modern audio technology does not create acousmatic experience; rather, acousmatic experience, first discovered in the Pythagorean context, creates the conditions for modern audio technology. Radio, records, the telephone, and the tape recorder exist within the horizon first opened by the Pythagorean veil.²⁶ (Kane’s italics and quotation marks)

As Kane argues through Schaeffer and Chion, the playback that is allowed through modern audio technology is essentially acousmatic by nature. However, the etymology of the term shows that it is wrong to think acousmatic sound is originated through modern audio technology. Technology however, has made acousmatic sound an everyday and ubiquitous phenomenon. By tracing the term back to Pythagorean times, Chion and Schaeffer show that by obscuring the source, listeners are forced to put their full attention towards the sound and are left wondering about the cause.

In order to analyse this sound/source relation, Kane proposes three different aspects, establishing a model of sound: source, cause and effect. Sounds can only occur when one “object activates or excites another.”²⁷ Writing this thesis for instance, I am surrounded by sounds. There are traffic noises coming from the street besides my apartment, I can hear the sound of raindrops against my window. As for the traffic noise and the sound of the raindrops, the sources are visible: every time I hear the sound of a car passing over wet asphalt, I only have to look outside my window to identify the traffic passing by as being the supposed origin of the sounds I hear. In Kane’s model, the source would be the asphalt, and the interaction between the asphalt and the cars passing over it is the cause for the audible effect, namely the sounds I hear. If I was to record the sound of traffic passing by, in combination with the raindrops on the windowpane, the audible effect would be isolated from its cause, and transferred onto a new source, being the sound object that holds the recording. Playing back that recording or combining that recording as happens in Schaeffer’s *musique concrète*, not only alienates the sound from its source, but also disrupts the relation between the effect and its cause. By isolating a sound from its context and source, possibly recombining it with other dislocated sounds, the sound becomes aestheticized. Like Chang, Kane emphasises the reification of sound. In order to capture sound within a recording, objects are necessary. These sound objects can be of any medium, for instance vinyl records or digital files stored on a hard

²⁵ Kane (2014), p. 6.

²⁶ Ibidem, pp. 4, 5.

²⁷ Ibidem, p. 7.

drive. Sound objects are acousmatic of nature, as they are capable of bringing about a sonic effect, obscuring the sound's cause in the process.²⁸

Although Kane does not mention the practice of sampling, it is easy to see how Schaeffer's musique concrète was anticipative of the use of samples in music. The influence that avant-garde composers like Schaeffer had on sampling is often recognised, particularly the work of American composer John Cage.²⁹ Cage's work is of provocative and anarchistic nature, and therefore is not easily translated within a few words. It is however noteworthy that Cage wrote one of the first compositions involving phonographs, titled *Imaginary Landscape No. 1* (1939).³⁰ Both Cage and Schaeffer wanted to invite their audience into a different mode of listening.³¹ For Schaeffer, the re-contextualisation of sounds meant reduced listening. This mode of listening, as Kane writes, is focused solely on the sound object. In reduced listening, we can no longer distinct the natural order of what causes the sound. The sounds we hear are reduced to only their effect, the identified source being the medium of playback, which leads us to no longer knowing what causes it.³² Reduced listening is invoked by the instructions that Cage provided for the performance of *Imaginary Landscape No. 1*, which "asked for any forty-two records to be 'treated as sound sources, rather than being what they were.'"³³ The performer of the piece should thus focus only on the records as sources capable of producing sonic effects, and let go of any ideas surrounding the cause of those effects. The sources used are compositions of themselves, but by placing them within a larger composition, they are effectively reduced to sonic effects. In other words, *Imaginary Landscapes No. 1* shows how by treating sound objects strictly as sources, the individual compositions become subservient to the hegemony of Cage's composition.

Schaeffer and Cage both used reduced listening in order to aestheticize sounds normally considered outside of music, perhaps most strikingly achieved through Cage's *4'33''* (1952), a piece that problematizes the relation between silence and sound. In sampling however, particularly the sampling in hip hop, the sources used are sounds already considered music, like the vinyl records included in *Imaginary Landscapes No. 1*. There is however an important difference between Cage's and Schaeffer's employment of sound objects. *Imaginary Landscapes No. 1* uses records for the simple reason it preceded the invention of audio tape.³⁴ The sounds employed in Schaeffer's compositions stem from special phonographic discs manufactured exclusively for Schaeffer, which allowed him to capture and compile his own recordings.³⁵ The records used in *Imaginary Landscapes No. 1* were the work of someone else, as well as being available to the public, whereas the sounds Schaeffer used were not. Although Cage instructed for the use of any, randomly selected records, it is possible to trace down the records used in the recorded performances of the composition. Regarding this fact, it can be argued that *Imaginary Landscapes No. 1* is closer to the sampling as used in today's hip hop culture than Schaeffer's work is. However, does the disclosure of the sound objects used mean

²⁸ Kane (2014), pp. 4, 5.

²⁹ McLeod, Dicola (2011), pp. 37, 38.

³⁰ Miller (2008), p. 15.

³¹ McLeod, Dicola (2011), pp. 37, 38.

³² Kane (2014), p. 6.

³³ McLeod, Dicola (2011), p. 37.

³⁴ Jordan, Miller (2008), p. 98.

³⁵ Kane (2014), pp. 16, 17.

the Pythagorean veil is lifted? In other words, what does use of publically available sound sources say about the relation between sample and origin?

2.2 Aural quotation.

Chang notes there is no “aural equivalent of quotation marks to call attention to a sound’s status as sample,” leaving open the possibility that listeners who have not heard the original source from which the sample draws, to not know they are listening to a sample.³⁶ Chang continues by stating that this ambiguous relation to the origin does not mean the origin is of no importance in sampling practice: “In fact, the origin plays a unique role in the aesthetics and ethics of sampling practice, and is never simply ignored in the process of creation.”³⁷ In this aspect, Chang points to a couple unwritten rules in sampling practice, which she draws from Joseph Schloss. One of these unwritten rules is the “somewhat strict usage of vinyl records over compact discs or compilations.”³⁸ One reason for which vinyl records are preferred is for their characteristic sound, and it is not uncommon for producers to sample a worn-out record, leaving the sample with static and other vinyl related noise attached.

As Chang herself says, it is ‘somewhat strict’ to use vinyl for samples. Like any musical genre, hip hop too has artists that do not play by the rulebook. Although known as an avid record collector, Madlib has acknowledged drawing from other media for sample sources, such as cassette, VHS, digital files or even YouTube videos.³⁹ As is with vinyl, other sound objects have their own sets of characteristics and quirks. Sounds from cassette or VHS tape often have a typical ‘hiss’ attached, whereas low-bit rate digital files or audio from YouTube videos have a distinct digital quality. Through sampling, characteristics of these media become untethered from their origin, possibly creating a discrepancy between the medium of playback and the sound object used as source. Like surface noise from vinyl records, these characteristics form a set of clues for the listener, indicating a sampled sound. This discrepancy even exists when a sound sampled from vinyl reappears on vinyl, because it makes a new record sound like it is already worn out. While it is true there is no aural equivalent of quotation marks, it can be argued listeners are able to hear traces of the source’s sound object through the sample, suggesting that another, earlier sound recording was used.

There is also a second argument for why listeners often do realise they are listening to a sample. The use of samples in hip hop is sometimes compared to the use of standards in jazz music. Jazz musicians often rely on a repertoire of compositions that are known to other musicians, allowing them to ‘sit in’ during each other’s concerts. This way, musicians can have impromptu and unrehearsed performances together, because they all know how to play a certain composition by heart. The use of standards also allows the musicians to make their own distinctive version of a known composition, essentially recomposing the standard in the process. As Lawrence Lessig writes, the use of standards is the jazz musician’s way of “creating by building upon the creativity of others before.”⁴⁰ To the average listener, it is possible to not know they are listening to a recreated version of a standard such as *‘Round Midnight* or *Body*

³⁶ Chang (2009), p. 145.

³⁷ Ibidem.

³⁸ Ibidem, p. 147.

³⁹ Torres (2013), p. 56.

⁴⁰ Lessig (2008), p. 103.

and Soul. The more frequent and trained jazz listener however, is able to recognise when a standard is being played or reinterpreted. The same can be argued for the use of samples. As Chang notes, it is perfectly possible for a listener of hip hop to not know he or she is listening to a sample-based composition. More dedicated listeners of hip hop however, know that most of the time they are listening to music which is produced through recombination and re-contextualisation of other sound objects. Together with the characteristics such as surface noise or hiss, implicating the use of sound objects as source, there is an understanding within the hip hop audience that samples are being used.

2.3 Aural quotation in *From Trouble They Know Me*.

To exemplify, I would like to refer to the song *From Trouble They Know Me* (2015), a collaborate effort between Madlib and rapper Samuel Herring, who together make up the group Trouble Knows Me. The song has two prominent sample sources: Sunny & The Sunliners – *Should I Take You Home* (1969) and Timothy Wilson – *Say It Again* (1968). Most of the instrumental backdrop to *From Trouble They Know Me* consists of the looped intro of *Should I Take You Home*. On top of this loop, the harp of the intro of *Say It Again* is layered. Both songs have been released as vinyl singles, but whereas *Say It Again* can still be considered affordable, the vinyl single of *Should I Take You Home* is known for exchanging hands for approximately 200 Euros online.⁴¹ Although it is possible that Madlib, who is often portrayed as a record collector, owns both the singles, it is remarkable that both songs are also available on the compilation CD *Underground Oldies – Volume 4* (1999), released by I.T.P. Records. Both songs even appear in consecutive order on the CD.⁴² In this instance, it is the absence of vinyl related sounds that indicate the usage of the compilation CD instead of the vinyl singles.

Although the two main samples from *From Trouble They Know Me* do not incorporate any sounds directly relatable to the usage of sound objects as sound sources, there are other clues indicating the usage of sound objects. First of all, the song opens with a short, two second collage of sounds and voices. Firstly, a voice that can be identified as that of rapper MF DOOM, who has worked with Madlib as part of the Madvillain duo, is heard saying: “And he said.” This is followed up by a voice that can be identified as Wild Man Fischer’s, a singer songwriter known for addressing his schizophrenia within his erratic and chaotic recordings.⁴³ Although slightly inaudible, the voice can be heard saying something along the lines of: “Threw the fucking beat on.” The two voices are not isolated, but both appear with different background sounds. Like the medium related sounds such as static, surface noise or low bit-rate quality, these sounds hint at the fact they are copied from other sound recordings, and lifted from other sound objects.

After the song is finished, a short interlude appears, titled *Interlude (Vision Complete)*. Like *From Trouble They Know Me*, this interlude also starts with a voice. It can be heard saying: “Hi! [laughter] The first thing I have to tell you is this: This CD was made from the original music. It is not a counterfeit; this is the real one. This one is true, this one is real.” Added to the voice is a large amount of reverb, and towards the end, some delay. The voice is sampled from

⁴¹ <https://www.discogs.com/master/view/850915> [15 Jun. 2018].

⁴² <https://www.discogs.com/Various-Underground-Oldies-Volume-4/release/8533280> [15 Jun. 2018].

⁴³ Fox (2011).

two different songs by an artist called Luie Luie. The first two sentences, “Hi! The first thing I have to tell you is this”, stem from his recording *El Touchy* (1974), which first appeared on the *Touchy* (1974) album. Like Sunny & The Sunliners – *Should I Take You Home*, *Touchy* is extremely rare and hard to come by as vinyl record.⁴⁴ The last three sentences however, “This CD was made from the original music. It is not a counterfeit; this is the real one. This one is true, this one is real,” stem from *A Message from Luie* (2008). This is an added bonus track to the *Touchy* CD reissue as done by Companion Records. It serves as an announcement from Luie himself, explaining that his *Touchy* record was subject to bootlegging, but that the Companion CD reissue is authentic and made with his consent. Again, this shows that as a producer, Madlib does not sample strictly from vinyl records, but looks into other sound objects for his sample sources as well.

Both *From Trouble They Know Me* and *Interlude (Vision Complete)* were released only as limited vinyl, and later made available on streaming services Spotify, Tidal and Apple Music. The absence of vinyl related sounds in *From Trouble They Know Me*, together with the fact that the samples used were released on a compilation CD together, hint at the possibility that CD, and not vinyl was used. I do agree with Chang that sampling is often done with consideration for the origin, but as the samples from *From Trouble They Know Me* point out, this concern is not invested in the strict usage of vinyl records. By sampling *A Message from Luie*, a discrepancy exists between the possible sound object used for playback, which is either vinyl or digital, and the sample which addresses the listeners of a CD. By re-contextualizing this message through sampling it becomes clear we are listening to a sound lifted from another sound object. The original message was one that addressed bootlegging and unauthorised production of *Touchy*. In its new context of *Interlude (Vision Complete)*, this message becomes subverted. By mentioning “This CD”, the sound hints at its own status as a sample, which contradicts the declaration of authenticity and originality of the lyrics. Furthermore, this also leaves trace of the origin within the sample.

2.4 Sampling and the workings of the archive.

Producers who make use of samples often explain their choice of method by stating that they are simply responding to their environment.⁴⁵ In this light, it is important to understand that acousmatic sounds are a ubiquitous phenomenon, which runs through all audio recordings. As the samples used in *From Trouble They Know Me* and *Interlude (Vision Complete)* show, sounds are in fact capable of addressing their status as samples, and traces of the origin can be found through these sounds. However, the relation between origin and sound is still disrupted, because even if the listener is aware he or she is listening to a sample, it is unclear who the original recording artists are. As we have seen, this relation between sound and origin is disrupted not only through sampling, but by sound recording altogether. Chang recognises a tendency to restore and preserve this relation. Consider for instance the need to catalogue music through encyclopaedias, or even by structuring discographies by artist name alphabetically. These efforts are attempts of structuring the past through what Chang calls “the logic of archival

⁴⁴ <https://www.discogs.com/Luie-Luie-Touchy/master/543260> [15 Jun. 2018].

⁴⁵ McLeod, Dicola (2011), p. 36; Lessig (2008), p. 71.

memory.”⁴⁶ Memory, so argues Chang through Pierre Nora, is an open process, “unconscious of its successive deformations, vulnerable to manipulation and appropriation, susceptible to being long dormant and periodically revived.”⁴⁷ Memory, as opposed to history, is ongoing and constructive. The archival processes that Chang speaks of are active ways of structuring, or rather constructing the past:

As a practice, sampling subverts the logic of archival memory. Even as the existence of sound recording calls the origin into question, cultural impulse attempts to use that technology as a historical preservative. Producers recognise that histories are constituted by various interpretations of the past, and that the archive is a creative medium rather than the static imprint of that past.⁴⁸

All sound objects are subject to the logic of archival memory, for which they figure as a constructive interpretation of the past. This happens through various practices such as categorizing them or placing them under a genre. But archival memory also happens through sampling, where the producer is capable of forming his own interpretation of this past by taking various sound objects as his source. However, as Chang points out, this brings the sampling composition in a problematic relation to its origin; an origin that is already disrupted by sound recording, becomes disrupted through sampling because the origin is now twice removed from its source. Nevertheless, sampling creates the possibility for producers to engage with their surroundings, establishing their own interpretation of the past in the process.

In this aspect I would like to single out another release on the Madlib Invazion label, namely *Madlib Medicine Show #3: Beat Konducta in Africa* (2010). The label described the record as following: “37-track instrumental hip-hop album produced by Madlib, inspired by and based on African records of the early 1970s – obscure & independent vinyl gems from afro-beat, funk, psych-rock, garage-rock & soul movements from Africa.”⁴⁹ This description already contains multiple references to sound objects used, and their supposed origin. Striking is the emphasis on vinyl, but unlike the *Trouble Knows Me* work, *Beat Konducta In Africa* is literally scattered with vinyl noises. These sounds back up the claim that the album is based on vinyl, but more importantly, are testament to the use of unfixed and re-contextualized sound objects. The reason I refer to *Beat Konducta in Africa* is because it exemplifies Chang’s notion of sampling and the archive. Like other releases in the *Medicine Show* series, such as *Madlib Medicine Show #2: Flight to Brazil* (2010) and *Madlib Medicine Show #8: Advanced Jazz* (2010), consisting solely of Brazilian music and obscure jazz respectively, *Beat Konducta in Africa* is dedicated to African music. However, both *Flight to Brazil* and *Advanced Jazz* are DJ mixes, and although therefore they are still linked to copyright, they are of less relevance to this thesis because they do not relate directly to the practice of sampling. *Beat Konducta in Africa* however, as already mentioned in the album’s description, is an instrumental hip hop album made up of African samples.

The usage of strictly African samples implies the workings of an archive: the sounds compiled on the record are named and grouped together as African, because the common

⁴⁶ Chang (2009), p. 157.

⁴⁷ Nora (1989), quoted in: Chang (2009), p. 157.

⁴⁸ Chang (2009), p. 157.

⁴⁹ *Madlib Medicine Show #3: Beat Konducta in Africa* (2010).

denominator is their African origin. It is also subversive of the archive since the only artist mentioned is Madlib, who is American. Neither could the record be considered ‘African music’ or even the problematic term ‘world music’, but instead belongs to the genre of hip hop, more specific instrumental hip hop. In this aspect, the album would normally be categorised under (American) hip hop, whilst drawing on African music as source. However, *Beat Konducta in Africa* also shows how this archive is used creatively. Throughout the album there are fragments of rap lyrics, all in some way concerned with or connected to Africa. Albeit their subject matter is Africa, their origin most likely is not. Their inclusion establishes an archival memory of its own, which includes both American hip hop artists rapping about Africa as well as African musicians.

However, there are also other lyrical fragments whose relation to Africa is perhaps more ambiguous. For instance, a sample of Steve Reich - *Come Out* (1966) is included towards the end of *The Frontline (Liberation)*. At the 1:26 mark, the sample from *Come Out* appears with the following lyric: “I had to open the bruise up, and let some of the bruise’s blood come out, to show them.” *Come Out* has its own interesting backstory. Reich constructed the piece out of 20 hours of tape recordings done by the piece’s commissioner, civil rights activist Truman Nelson. The voice is of Daniel Hamm, an African-American teenager from Harlem that was beaten and harassed by the police in April 1964. The story goes that Hamm, together with a friend, intervened as police tried to break up a group of Harlem street kids throwing around fruit from a capsized fruit cart. We hear Hamm recounting his ferocious beating only days after the incident took place.⁵⁰ The original composition of *Come Out* is constructed out of tape loops that move in and out of phase with each other. It can be seen as a study in acousmatic sound, as the words “come out to show them” are looped until a percussive character is formed, void of any meaning or origin, which leads to the sound becoming aestheticized. As a sample, it has both links to police brutality towards African-Americans, as well as being a continuation of Schaeffer’s and Cage’s tape experiments. The fact remains it is but one of the many lyrical fragments on the album that do not have a direct link to the overarching subject matter, namely Africa.

Besides the inclusion of such seemingly unrelated vocal fragments, *Beat Konducta in Africa* also features samples not from Africa at all, or at least only partially connected to Africa. On two songs from the album, *Tradition* and *Brother and Sister*, a sample from Nigerian artist Aleke Kanonu is heard. The song sampled is *Keep New York Clean* (1980), which was recorded in New York, using an all-American backing band.⁵¹ The song *Heritage Sip* features a short intro that samples the voice of Bob Marley, who was Jamaican. The song continues with a beat that samples from another Jamaican artist, Ras Michael and the Sons of Negus – *Booma Yeah* (1977). Unlike the looped, mainly untouched samples in *From Trouble They Know Me*, the sample in *Heritage Sip* has been set to a new rhythm and is recombined with electronic drum sounds. Despite not being African in origin, *Booma Yeah* features lyrics about Africa, and the name of the continent can be heard chanted throughout the intro of *Heritage Sip*.

On *Freedom Play*, the sample used is of Georges-Edouard Nouel – *Merci Bon Die* (1975), a reinterpretation of a composition made popular by Harry Belafonte. Nouel hails from

⁵⁰ Beta (2016).

⁵¹ Aleke (1980).

the small island of Martinique, an overseas region of France, located in the eastern Caribbean Sea.⁵² Like *Heritage Sip*, *Freedom Play* features electronic drum sounds, and even a vibraphone is added. From the 0:36 time mark towards the end, the sample is occasionally manipulated through time stretch, a digital sampling technique that slows down the sample whilst leaving the key unaltered. Like many other songs on *Beat Konducta in Africa*, there are vocal fragments added to *Freedom Play*. This time, we hear a male voice reciting the following words:

Although many people would want to forget, that the civilization generally recognised as the world's oldest / was African born. / Along the banks / of the Nile river. / Africa. / These same people would ignore the richness of the Black cultures which thrived during the greatness of empires such as Mali / Ghana / (...) For centuries the creative genius of Black people has had a decisive influence on the development of universal art.

This voice has a large amount of hiss attached, signalling the use of another sound object as sound source. It is however the message that is of importance here. As the voice recites, contrary to popular belief, Black people were of great importance to our world's civilization, and the richness of their culture is often left unrecognised. Striking is the mention of the importance of the Black creative genius, and its influence on "universal art." The common denominator on *Beat Konducta in Africa* is not necessarily the use of samples from African records. The one thing that Daniel Hamm, the American backing band of Aleke Kenonu, Bob Marley, Ras Michael and Georges-Edouard Nouel have in common is that they are part of this Black creative genius. Because of this, they belong to the African diaspora, and their art, or in the case of Hamm, their inclusion within art, is as African as the other sounds included on *Beat Konducta in Africa*. The universality of the Black creative genius is resonated by the use of Aleke Kenonu's – *Keep New York Clean in Tradition* and *Brothers and Sisters*. On both songs, the fragment sampled has Kenonu chanting: "Forget the Jewish / Forget the Irish / I am Korean / I am Chinese." Underscoring this supposed neglect of nationality or ethnicity, in *Brothers and Sisters*, a voice is added stating: "I don't care where you come from." As the sources used on *Beat Konducta in Africa* exemplify, producers are capable of forming their own archive through by engagement with sound objects. By drawing from such diverse sources, Madlib simultaneously disrupts the workings of the logic of archival memory, and creates his own archive of what he considers African music. In this case, Madlib's take on the archive of African music is invested with a sense of Pan-Africanism.

2.5 Restoring the sample/origin relation.

The use of samples does not mean that the archive is deconstructed or that the concern for the origin is completely lost. Sampling is both disruptive of the archival process, as well as a means of archiving on its own. Chang writes that: "cultural impulse attempts to use that technology as a historical preservative."⁵³ Hip hop is no exception to such attempts. If we suppose that the listener is aware he or she is listening to sample – either because the recording reveals that other

⁵² Chodo (1975).

⁵³ Chang (2009), p. 157.

sound objects were used in the process, or because the listener recognises the recurring use of samples within hip hop – the listener is also aware there is an origin, a cause, albeit obscured.

This understanding has shaped its own archive for the use of sound objects by practice of sampling. Amongst other initiatives that express a concern for the origin as well as a practice of archival memory, internet users have created online spaces that disclose the original sound objects used in hip hop recordings. One of these is the website WhoSampled.com, which allows its users to make entries disclosing how two different compositions are connected. As the website's main page boasts: "Discover music through sampling, cover songs and remixes. Dig deeper into music by discovering direct connections among over 517,000 songs."⁵⁴ Interestingly enough, samples can only be contributed when posted with a link to an online file, such as embedded YouTube videos, SoundCloud audio or streaming services such as Tidal or Spotify. If a song is unavailable online, a contribution cannot be posted. At the time of writing, there are 1,808 samples used by Madlib listed on the website.⁵⁵ Out of the thirteen samples used by Madlib discussed in this chapter, only five are listed, namely Sunny & the Sunliners – *Should I Take You Home*, Timothy Wilson – *Say It Again*, Steve Reich – *Come Out* and Luie Luie – *El Touchy* and *A Message from Luie*. Another example of an online space dedicated to the disclosure of sample use is the Stones Throw Message Board, set up by the independent hip hop label Stones Throw.⁵⁶ The Stones Throw label used to be the primary outlet for Madlib's releases prior to the establishment of the Madlib Invazion label. Stones Throw marketed the *Medicine Show* releases on their website, whose overview to all the releases in the series also forwarded the reader onto the discussions on the message board.⁵⁷ The message board was used to discuss the samples used for the *Madlib Medicine Show* series. At the time of writing, the message board is off-line, and can only be rudimentary accessed through the Internet Archive Wayback Machine.⁵⁸ This sadly prevents me from discussing the samples disclosed on the board in relation to those discussed in this chapter.

The sound objects used by Madlib are available to the public, and can be traced down, as is shown in this chapter. By comparing the original to the sampling composition, listeners become slightly more aware of a producer's contribution. However, this resorts to a discussion concerning creativity in sampling. As Madlib himself notes, he often leaves his samples largely unchanged, which can result in annoyance from his fan base or critics.⁵⁹ But the disclosure of the original sources used also contribute to the archival memory. For instance, the inclusion of Steve Reich – *Come Out* might not make sense when included within an all-African sampling hip hop album. But if someone encounters the sample when listening to *Frontline (Liberation)*, he or she is capable of tracing down the origin, through a website such as WhoSampled.com. Although it is possible such a listing would falsely suggest that Reich is of African origin, subverting the archive, it can also point towards the backstory of the composition, which shows

⁵⁴ <https://www.whosampled.com/> [17 Jun. 2018].

⁵⁵ <https://www.whosampled.com/Madlib/samples/?ob=1&sp=37> [17 Jun. 2018].

⁵⁶ <http://board.stonesthrow.com> [17 Jun. 2018].

⁵⁷ <https://www.stonesthrow.com/news/2012/02/madlib-medicine-show> [17 Jun. 2018].

⁵⁸ <https://web.archive.org/web/20171208042723/http://board.stonesthrow.com:80/index.php?/forum/7-stones-throw/> [17 Jun. 2018].

⁵⁹ Madlib (2016).

the connection to police brutality towards African-Americans or as an experiment in acousmatic sound.

These online spaces point to hip hop's own logic of archival memory, with its listeners trying to restore the relation between sample/origin, and perhaps more fundamentally, sound/cause. The websites rely strictly on the input from users and are only remotely moderated. The user input points to another important feature in sampling and remixed culture. Professor of law and Creative Commons founder Lawrence Lessig points to the positive aspects of sampling and remixing, emphasizing the importance of community and education.⁶⁰ These online spaces are an example of communities, gathering online in order to disclose the original sound objects as used through sampling. Producers practicing sampling are offered a look into the work of others by comparing the original song to the sample-based song. This shows both the concern for the origin, as well as hip hop's own logic of archival memory. Chang rightfully observes that there is no "aural equivalent of quotation marks to call attention to a sound's status as sample."⁶¹ There are however, sounds that signal the use samples, as well as an understanding within the hip hop community of the recurring use of samples. If these aspects offer the closest thing to quotation marks, then online communities such as Whosampled.com or the Stones Throw Message Board, through user input, can be regarded as the bibliographies citing the sources.

Central to this chapter is the sampling practice, and the use of sound objects as sound sources. Although this can be seen as a distinguishing feature for the sampling practice, the troubling relation between sound and origin is a ubiquitous phenomenon present through modern audio technique. In other words, acousmatic sound is present through the use of sound objects but is reactivated through sampling by taking those objects as sources. This is not without its consequences, because it obscures the origin of its source. Listeners of hip hop however, are not unconcerned about this origin, and initiatives such as WhoSampled are examples of attempting to restore the relation between a sample and its origin. The use of sound objects as source, is also related to copyright. For the next chapter, I will analyse copyright and the use samples, and try to formulate the current stance of the law towards sample use.

⁶⁰ Lessig (2008), p. 77.

⁶¹ Chang (2009), p. 145.

3. Copyright law.

The aim of this chapter is to critically dissect the legalities, or rather illegalities, surrounding sampling, and discuss crucial concepts connected to sampling and copyright. For this I will predominantly use the writings of Lawrence Lessig, Siva Vaidhyanathan and Kimbrow McLeod and Peter Dicola. As we will see, each of these scholars point to the fact that despite the illegalities involved, sampling has not stopped. From this premise, I will analyse some salient case studies connected to copyright infringement through sampling. However, much of the literature on copyright and sampling also shows how sampling as a cultural movement is essentially a movement based on and fuelled by technology. The case studies involved and the academic stances included all deal with this dynamic in some way or another, hoping to provide a background before I analyse the relationship between sampling and the musical product as commodity.

As we will see, many disputes surrounding copyright infringement through sampling are settled outside of court, and copyright holders can also issue claims without notifying the media. The last known infringement issue that dealt with Madlib's sampling was from 2015, when jazz musician Bob James sued him and the Stones Throw label for the use of *Nautilus* (1974) in Quasimoto's *Sparkdala (Original Version)* (2013). I will shortly touch on this case, but the primary goal of this chapter is to dissect the current stance of the music industry towards the use of samples. In order to do so, I will also draw on other case studies related to sampling and copyright infringement in general.

3.1 *Intellectual property and the protection thereof.*

Copyright, trademarks and patents together make up what is referred to as intellectual property.⁶² Although now widely used by governments and scholars, Siva Vaidhyanathan points to the term's recent origin, the first use dating back to 1967. For Vaidhyanathan intellectual property is a highly problematic term, because copyright "was not meant to be a form of 'property right' as the public generally understands property."⁶³ As he points out, Thomas Jefferson was highly cautious of using the word 'property' when contributing to the Founding Fathers' discussion on copyright and patents in the United States: "Jefferson even explicitly dismissed a property model for copyright, and maintained his scepticism about the costs and benefits of copyright for many years."⁶⁴ For Vaidhyanathan the crux is that copyright is a matter of policy, and not of property. Through Jefferson, he argues that:

Unlike tangible property, ideas and expressions are not susceptible to natural scarcity. As Jefferson wrote of copyright, '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.'⁶⁵

⁶² Hesmondhalgh, (2013), p. 159.

⁶³ Vaidhyanathan (2001), pp. 11, 12.

⁶⁴ Ibidem, p. 23.

⁶⁵ Ibidem, pp. 23, 24.

With the approach of copyright as a property, the possibility of artificial scarcity is created. This artificial scarcity is far from desirable, because it installs the possibility of monopoly:

Therefore, Jefferson feared, the monopolists could use their state-granted power to strengthen their control over the flow of ideas and the use of expressions. Monopolies have the power to enrich themselves by evading the limitations of the competitive marketplace. Prices need not fall when demand slackens, and demand need not slacken if the monopoly makes itself essential to the economy.⁶⁶

As Vaidhyathan points out, a strong copyright allows for monopolies on the copyright holders' behalf. Consider for instance that sample use needs to be licensed by the copyright holders before being released and monetised on. These licenses are scarce, costly and can even lay claim on 100% of the sampling song's publishing rights.⁶⁷ Furthermore, there is no such thing as a sample clearance system, but instead sampling fees are a product of private industry, "operating in the shadow of the federal copyright code as enacted by Congress and the case law as decided by the federal courts,"⁶⁸ as Kimbrew McLeod and Peter Dicola write of the US clearance procedure. The fact that licenses have made themselves essential, because otherwise legal consequences will follow, shows how copyright is used to strengthen the copyright holders' position as opposed to the sampler. Although I will deal with the issue of monopoly in the next chapter, Vaidhyathan's point is that the property type of protection of copyrights strengthen the position of the copyright holder, which is undesirable because it places the practice of sample licensing outside the workings of the competitive marketplace, resulting in exorbitant prices for clearance and licensing fees.

This monopoly is held up by artificial scarcity, which in practice implies that access is limited, prices are fixed, licenses are restricted and that potential competitors of the monopoly are litigated and intimidated, "misrepresenting the principles of the law and claiming a measure of authenticity or romantic originality."⁶⁹ Vaidhyathan's point is thus that such protection invokes the idea that composers are lone geniuses, who create original work which they can consider their property. Whilst in reality popular music is subject to an ambiguous creative process which any number of people can take part in, each of them bringing their own set of influences and inspirations with them, conscious as well as unconscious, on which their 'original' composition builds. No work of art is ever created in a vacuum, void of outside influences, and therefore copyright law should be critical towards awarding composers their absolute originality.

The same problem is recognised by Martin Kretschmer and Friedemann Kawohl when writing on the history and philosophy of European copyright. "The concept of property," they argue, "is not very helpful in determining the appropriate regulatory policy for the creation and distribution of culture." A property approach to copyright invokes an incorrect idea of protection not suitable to ideas and expressions, because: "Property is that to which protection

⁶⁶ Vaidhyathan (2001), pp. 23, 24.

⁶⁷ McLeod, Dicola (2011), p. 205.

⁶⁸ Ibidem, p. 247.

⁶⁹ Vaidhyathan (2001), p. 24.

is afforded, not *vice versa*.”⁷⁰ The protection of intellectual property through monopolies is often justified because without proper protection, there would be no (economic) incentive to create.⁷¹ However, by creating artificial scarcity, this justification becomes problematic:

In the case of copyright, it has been said that without the artificial scarcity introduced by property concepts, the costs of production of creative works will remain above the costs of copying. Creative production therefore would not take place. However, this argument from the utility of property provisions is implausible for a copyright term that is calculated from the life of the author (plus fifty to seventy years), and for a copyright scope that prevents desirable cultural engagement, for example, in adaptation and sampling.⁷²

As both Vaidhyathan and Kretschmer and Kawohl point out, the term ‘intellectual property’ is not only confusing, it invites a rhetoric that is unfit for copyright. Ideally, we should approach copyright as a policy and its laws as regulating the natural flow of ideas and expressions. This underscores the purpose of copyright law, which is to encourage creativity. Copyright law therefore implies a balanced approach: a too loose copyright regime would not create proper incentive, but a too strong copyright regime would stifle creativity.⁷³ As Kretschmer and Kawohl point out, by protecting the copyright up to seventy years after the author has passed away, is far too long, and does not justify the argument for incentive. In fact, such protection allows for a maximisation of royalties that it can even be regarded as discouraging incentive to create new work. Moreover, by arguing for a strong, property-like copyright because otherwise there would not be proper incentive for creators, is to deny there is no natural scarcity for ideas and expressions.

To exemplify, I would like to refer to the 2015 ruling in the case of *Williams et al v. Gaye et al*. The case ruled on similarities between Robin Thicke - *Blurred Lines* (2013) and Marvin Gaye - *Got To Give It Up* (1977). This case does not involve sampling, but instead, Thicke and his producer, Pharrel Williams, acknowledged drawing on *Got To Give It Up* for inspiration. Despite the fact that this case was not about sampling, but rather accused Williams and Thicke of plagiarism, it points to the exceedingly strong and widening scope of music copyright of the recent years, allowing for copyright holders to uphold a property type protection. The case ruled that the Gaye’s should be awarded 5.3 million US dollars for reimbursement, together with 50 % of *Blurred Lines*’ royalties, because of the similarities between the two songs. The ruling was heavily criticised because it rendered a very broad copyright to Gaye’s composition. One of the rulings criticisers, Judge Jacqueline Nyugen, stated that the court’s decision “accomplish[ed] what no one has done before: copyright a musical style.”⁷⁴

The ruling has been criticised because the similarities between the two compositions are rooted in a rhythmic structure which can be argued to be unoriginal to both *Got To Give It Up* and *Blurred Lines*. Despite this, Marvin Gaye’s heirs were favoured because *Blurred Lines*

⁷⁰ Kretschmer, Kawohl (2004), p. 21.

⁷¹ Hesmondhalgh (2013), p. 159.

⁷² Kretschmer, Kawohl (2004), p. 21.

⁷³ Vaidhyathan (2001), p. 15; Kretschmer, Kawohl (2004), p. 21.

⁷⁴ Stempel (2018).

shares the same feel, style or groove with their father's composition, which makes for an extremely strong and extensive interpretation of copyright. Firstly, it invests a certain authenticity to *Got To Give It Up*, which is in itself a song characteristic of the late 1970s. The 120 beats per minute tempo applies to many songs from that same period, as does its rhythm, which features a prominent back beat with a steady, 'four / four' kick drum accentuating every quarter note. At the end of each two bars, a sixteenth note is played by the hi-hat to accentuate the upbeat. The groove and style of *Got To Give It Up* is more likely created by Gaye's backing band than Gaye himself, who can be awarded for the song's sung melody and lyrics. However, none of *Blurred Lines* similarities with *Got To Give It Up* were between melody or lyrics, but relied strictly on groove and rhythm. Regardless of this fact, the Gaye heirs can claim copyright infringement because *Got To Give It Up* is copyrighted as a composition by Gaye. This points to an inherent bias within copyright law, which favours lyricists and singers above session musicians.⁷⁵ Amongst the critics of the court's decision is Parliament-Funkadelic singer George Clinton, who himself has been sampled countless times and has seen many disputes over the copyright of his songs. Clinton points to the fact that many musical genres, such as reggae or go-go, share the same rhythmic structures and groove. If copyright can be awarded to such things, complete musical genres can be monopolised.⁷⁶

The court motivated their ruling by stating that there was "not an absolute absence of evidence" of similarity between the two compositions.⁷⁷ In other words, even the little evidence arguing for a similarity between *Blurred Lines* and *Got To Give It Up* was enough for copyright holders to argue for infringement, giving the Gaye heirs a monopoly to the rhythmic structure of their father's composition. As Vaidhyathan writes, almost foreshadowing the ruling in this case: "[W]e must revise our notion of intellectual 'theft.' You cannot 'steal' an idea, a style, a 'look and feel.' These things are the raw material of the next move in literature, art, politics, or music."⁷⁸ Much more can and has been said about the *Williams et al v. Gaye et al* ruling, but even without a thorough musical analysis, it can be seen as an example of a strong copyright regime that enables a monopoly on musical ideas and expressions. As Vaidhyathan stresses, ideas are not subject to scarcity, and by enabling such scarcity through a ruling like this, the competition within the marketplace – i.e., the music industry, becomes distorted. When focussing on similarities between compositions, it should be of highest importance that ideas and expressions, together with their place in the market, are often not subdued or harmed when used by someone else.⁷⁹ A ruling like this however, seems to completely disregard this and invokes the idea that a composition is unoriginal if it is in some way or another similar to an earlier copyrighted composition.

3.2 Sampling and fair use.

When dealing with sampling in relation to copyright it is important to note that music copyright after 1972 is divided up in two parts, with copyright belonging to the composition and another

⁷⁵ McLeod, Dicola (2011), pp. 91-92.

⁷⁶ Clinton (2015).

⁷⁷ Stempel (2018).

⁷⁸ Vaidhyathan (2001), p. 15.

⁷⁹ Ibidem.

copyright belonging to the recording.⁸⁰ When trying to license a sample, permission is needed from the copyright holder of the composition as well as the copyright holder of the recording. This can cause great bureaucratic hurdles when trying to license a sample, and sometimes artists choose to only license the composition, re-recording the sample in order to avoid problems in licensing the copyright of the original recording.⁸¹ A distinction is introduced by Serge Lacasse to avoid confusion surrounding this split in copyrights. Lacasse refers to sampling with the use of both the composition and recording as ‘autosonic quotation.’ If previous material is quoted by re-recording the composition, or through live performance, Lacasse uses the term ‘allosonic quotation.’⁸² However, the use as analysed throughout this thesis is strictly ‘autosonic quotation,’ and is therefore referred to as ‘sampling.’ The case surrounding *Blurred Lines* is of ‘allosonic quotation.’

Furthermore, it is important to note that sampling has a different relation to music copyright than other copyright related cases. In short, to sample a musical work, is to take an existing recording and placing it within a new recording. Through sampling, the existing composition and recording are altered, adapted and placed within a new context, which implies a different relation to copyright than for example requiring a license for including a musical recording in a movie soundtrack or publishing a musical work, which leaves the composition and recording unaltered.⁸³ Even though Madlib is known for sometimes changing very little through his sampling, the sample is looped, creating a new arrangement. If a composition or recording is altered, permission is needed before a license can be issued.⁸⁴ This makes the copyright cases concerning sampling highly individual and dependent on their context. Further complicating sampling’s relation to the law, is that under certain circumstances, no permission or license from the copyright holder is needed. The use of copyrighted content can be defended by arguing for ‘fair use.’ Under US copyright, fair use can be defended by arguing for any of the following four points, as listed in Greenfield and Osborn (2004):

1. The purpose of the use, including whether the use was commercial or for educational purposes;
2. The nature of the original copyright work;
3. The amount of work taken in relation to the work as a whole;
4. The effect of this upon the potential market for the original work.⁸⁵

The fair use argument therefore omits the possibility of a complete monopoly over a musical work’s copyright, which is needed to “ensure that a work can circulate and be commented upon, critically or otherwise, that it can be used for research, that it should be available in certain respects in the public interest.”⁸⁶ Despite the inclusion of fair use and its four provisions, there is no real clear guideline on whether fair use can be applied to sampling. Vaidhyanathan notes how in the past courts have varied widely in determining when a sample is fair use or in

⁸⁰ McLeod, Dicola (2011), p. 76.

⁸¹ Ibidem, p. 171.

⁸² Williams (2014), p. 189.

⁸³ Laing (2004), pp. 75, 76; Greenfield, Osborn (2004), pp. 90, 91.

⁸⁴ McLeod, Dicola (2011), p. 224.

⁸⁵ Greenfield, Osborn (2004), p. 90.

⁸⁶ Ibidem.

violation with copyright law.⁸⁷ As Greenfield and Osborn point out, most sampling cases have no real jurisdictional precedent, “largely because it is in the interests of parties involved in sampling cases to settle out of court, for reasons of costs and because of the potential restricting effects a court decision might have on future conduct.”⁸⁸ The unpredictable outcome a court case can have when arguing for fair use is illustrative of the strong position of copyright holders. It is however important to stress that there is no real system in clearing samples, because of the individual nature of sampling cases. However, despite the differences between sampling cases, a court decision is still capable of restraining all future use of samples.

An example of a court case outcome that has set an undesirable precedent for future legal interpretation is the 2005 case of *Bridgeport Music v. Dimension Films*. McLeod and Dicola refer to this case, which ruled over the inclusion of N.W.A. - *100 Miles and Runnin'* (1990) in the movie *I Got The Hook-Up* (1998). The N.W.A. song includes a two-second, three-note sample of Funkadelic's *Get Off Your Ass and Jam* (1975). The problem was that there was only a limited license for the sound recording, one that provided for the release of the N.W.A. song but did not synchronise its use in other media or cultural outings. This led the copyright holder of the sound recording, Bridgeport Music, to sue the company responsible for the production of the film that included *100 Miles and Runnin'*.⁸⁹ This case had far reaching consequences for copyright law, because it ruled “that no *de minimis* exception applied to sound recordings.”⁹⁰ *De minimis* refers to the threshold of fair use when an insignificant amount of the original work is sampled. The ruling in the *Bridgeport Music v. Dimension Films* case thus rendered the third point of fair use ineffective for the use of recordings, a *de minimis* threshold for the use of compositions however is still in effect.

Fair use is an important feat of copyright law, because it denies a complete monopoly of a musical work's copyright. However, in practice fair use requires creators to prove that their work is either beneficial, because it is used for educational or research purposes, or that is harmless, because either too little amount of the original work is sampled, the transformative outcome of the sample, or because it does not cut into the original work's market. As Greenfield and Osborn show, most creators are hesitant of fighting a case because it is extremely costly. Moreover, the little jurisdictional precedent shows that cases can have unpredictable and undesirable outcomes, effecting all future use of samples. However important the concept of fair use is, it is hard to put in practice. As Vaidhyathan states, “More often than not, fair use is a grey and sloppy concept.”⁹¹

3.3 Hip-hop and copyright law.

In *Creative License* (2011), McLeod and Dicola chronicle sampling as a form of copyright infringement, stating that: “The clashes over sampling that emerged in the late 1980s anticipated both today's remix culture and the legal culture that is largely at odds with it.”⁹² McLeod and Dicola describe a ‘golden age of sampling’, an era that spawned albums now

⁸⁷ Vaidhyathan (2001), p. 139.

⁸⁸ Greenfield, Osborn (2004), p. 93.

⁸⁹ McLeod, Dicola (2011), p. 140.

⁹⁰ Ibidem, pp. 139, 140.

⁹¹ Vaidhyathan (2001), p. 27.

⁹² McLeod, Dicola, (2011), p. 5.

considered classics, such as Public Enemy's *It Takes a Nation of Millions to Hold Us Back* (1988), Beastie Boys' *Paul's Boutique* (1989) and De La Soul's *3 Feet High and Rising* (1989).⁹³ The music released during this period in time displayed a wealth in sampling and musical collage, not yet affected by the United States copyright laws. But hip-hop's success in the late 1980s soon caught the attention of copyright holders and record labels: "With the commercial success of a number of hip-hop albums in the late 1980s, the music industry had begun to see the genre as not just an inner-city fad but as a solid source of sales revenue. With commercial validity also came increased scrutiny over samples."⁹⁴ The first law suits started appearing in the new decade, leaving the legal landscape radically changed and exceedingly intolerant towards sampling.⁹⁵ McLeod and Dicola even conduct an analysis of the costs in sample clearance for Beastie Boys' *Paul's Boutique* and Public Enemy's *Fear Of A Black Planet* (1990), estimating that the former would have lost an estimated 19.800.000 US dollars with an estimated two and a half million units sold, and the latter an estimated loss of 6.786.000 US dollars with an estimated one and a half million units sold, if produced under the licensing costs of 2011.⁹⁶

Vaidhyanathan stresses an important aspect within this legal shift. Just as McLeod and Dicola, Vaidhyanathan points to the wealth of cultural outings that the legal loopholes of the 1980s made possible. During this window of time "Rap – for a moment – revealed gaping flaws in the premises of how copyright law gets applied to music and shown the law to be inadequate for emerging communication technologies, techniques, and aesthetics."⁹⁷ However, the reaction that emerged in order to fix the copyright flaw has failed to form a transparent license system for sample clearance, with the following consequences:

The tension in the law is not between urban lower class and corporate überclass. It's not between black artists and white record executives. It's not always a result of conflicts between white songwriters and the black composers who sample them. It is in fact a struggle between the established entities in the music business and those trying to get established. It is a conflict between old and new. As the market for rap and the industry that supports it grew and matured through the 1980s and 1990s, the law shifted considerably in favour of established artists and companies, and against emerging ones. So by the late 1990s, rap artists without the support of a major record company and its lawyers, without a large pool of money to pay license fees for samples, had a choice: either don't sample or don't market new music.⁹⁸

Since the 1990s, copyright holders have successfully attacked the use of unlicensed samples as a form of copyright infringement, narrowing the concept of fair use in the process. This has effectively rendered most, if not all unlicensed sample use illegal. Sampling in itself is not illegal, but in order for a creator to release and monetise sample-based music, a license fee is set and permission of the songwriter is needed. Many famous songwriters and their estates –

⁹³ McLeod, Dicola, (2011), pp. 19, 20.

⁹⁴ Ibidem, p. 27.

⁹⁵ Ibidem.

⁹⁶ Ibidem, pp. 207, 208.

⁹⁷ Vaidhyanathan (2001), p. 133.

⁹⁸ Ibidem.

for instance Led Zeppelin, Prince and George Harrison – deny every sampling request.⁹⁹ If permitted, a fee needs to be negotiated between the sampling artists and the copyright holder. This fee is not determined by the law, but by the private industry. As we have seen, this has made licences extremely scarce, and driven up the costs. The legal stance towards sampling thus favours established artists, or better, artists that have the backing of an established record label, because only they have enough capital to acquire the proper license. There is not so much a legal constrain to sampling, but an economic constrain that is permitted through copyright law. This economic constrain to sampling is negative for unestablished and emerging artists in particular. However, as Vaidhyanathan points out, in spite of these constrains that effectively discourages some artists to sample, it has also led artists to pursue a mode of releasing their music in an ‘underground’ fashion. This goes to show that even a strong copyright regime cannot fully prevent unlicensed sampling, but instead has created an undesirable environment for young artists.

3.4 Protection through disincentive.

No crime is ever fully prevented by law. Rather, a jurisdiction is constantly challenged and changed, arguably for the better. The persistence of sampling despite the hostile stance of the music industry and copyright law can be seen as challenging. However, some argue that a more fundamental copyright reform is needed in order to truly reap the benefits of sampling. In his book *Remix* (2008), Lawrence Lessig makes a case for copyright reform, focussing on the relation between copyright and digital media. In digital media Lessig sees a clear challenging of the copyright laws and jurisdiction, but is critical towards the change in law this has brought about. As Lessig points out, the United States government is fighting a ‘war on piracy’ in the wake of the internet’s rise, implying the same head-on strategy to abstract and complex problems such as the ‘war or terror’ and the ‘war on drugs’ before. As Lessig points out, copyright infringement, be it in the form of piracy, sampling or any other form, has accelerated through the use of the internet and is hard to regulate, especially because most of it happens online. For Lessig, copyright laws are “rules that render criminal most of what your kids do with their computers.”¹⁰⁰ It is important to note that Lessig does not advocate piracy in any form, but points to what he calls ‘collateral damage’ in the copyright war:

The war is not about new forms of creativity, not about artists making new art. (...) But every war has its collateral damage. These creators are just one type of collateral damage from this war. The extreme regulation that copyright law has become makes it difficult, and sometimes impossible, for a wide range of creativity that any free society (...) would allow to exist, legally.¹⁰¹

Just as Kretschmer and Kawohl, Lessig points out that the current copyright regime attacks cultural outings that we should consider ‘desirable’, implying that such outings are beneficial in some way or another. As pointed out earlier, the alleged ‘stealing’ of intellectual property is problematic because ideas and expressions are not subject to natural scarcity, which

⁹⁹ Vaidhyanathan (2001), p. 143.

¹⁰⁰ Lessig (2008), p. 19.

¹⁰¹ Ibidem, p. 18.

problematizes the attacks on sampling as harmful or theft. Furthermore, Lessig recognises two primary benefits to sampling and remix culture as already outlined in the previous chapter, underscoring the community forming and educative nature of sampling. Lessig's comments on collateral damage show that the attack on sampling should be regarded as being part of the intensified copyright regime of the 2000s, which has widened the copyright law's scope in order to attack other infringing activities such as illegal downloading. However, as Lessig points out, the strong copyright regime has criminalised unlicensed remixes and sample use, and criminalizing is not the same as preventing. Lessig thus wages whether we should criminalise, especially when technological developments enable people with more "ways and reach of their speech," allowing people to remix media to greater extent. Lessig concludes by stating that: "More can, and so more will, at least until the law effectively blocks it."¹⁰²

One such effort to block copyright infringement was the 2007 arrest of DJ Drama and his protégé DJ Cannon, an unprecedented and out of the ordinary case for intellectual property. As their Atlanta, Georgia studio complex was raided by the police, an operation supported by the Recording Industry Association of America (RIAA), 81,000 CDs, four vehicles and recording gear, among "other assets that are proceeds of a pattern of illegal activity" were confiscated.¹⁰³ The exact illegal activity DJ Drama and DJ Cannon participated in was the production and distribution of so-called mixtapes. Albeit released on CD and not on cassette, the mixtapes that DJ Drama put his name to are produced in tandem with a rapper or vocalist featuring unlicensed material, often containing sample use without any form of permission. As the New York Times article reporting the arrest of the DJ's described it: "Mixtapes have become a vital part of the hip-hop world. They are often the only way for listeners to keep up with a genre that moves too quickly to be captured on albums."¹⁰⁴ Whereas the 81,000 CDs were destroyed because of the copyright infringing material, the mixtapes were still available in the iTunes store at the time of the arrest.¹⁰⁵ Explaining the raid and arrest to Billboard, Chief Jeffrey Baker of the police department assigned to the operation stated that the DJ Drama mixtapes were not in line with the Official Code of Georgia Annotated (OCGA), which states that CDs "must list the true name and address of their office, which these CDs didn't, nor did they [list] copyright permission. People were able to make purchases over the Internet and these guys sold the pirated discs for profit."¹⁰⁶

Chief Baker's comment can be dissected into three main aspects. Firstly, the DJ Drama mixtapes were not in line with the OCGA. As the name of the code implies, it only goes for the state of Georgia, and such regional law is of no interest to my thesis. It is however a bit trivial and underwhelming reason for such a large-scale raid. Chief Baker briefly touches upon the ambiguous copyright permission under which DJ Drama's mixtapes were issued, making this the second aspect. Thirdly, Chief Baker points to the fact that the CDs were widely distributed, and more importantly, monetised in order to gain profit. New technologies have given creators the possibilities of being their own manufacturer and distributor, as DJ Drama was at the time of the arrest. Chief Baker's comments show how the operation was targeted mainly towards DJ

¹⁰² Lessig (2008), p. 83.

¹⁰³ Sanneh (2007).

¹⁰⁴ Ibidem.

¹⁰⁵ Ibidem.

¹⁰⁶ Crosley (2007).

Drama's illegal distribution methods, and other than 'copyright permission', his statement does not make mention of concepts normally associated with copyright infringement, such as 'license', 'intellectual property' or 'fair use'. Distributing and making profit on your music is of course nothing illegal, it does however become illegal when it is not in line with the laws and rules for releasing music, such as the OCGA or laws concerning copyright. Perhaps the third aspect, the wide-scale distribution with a profit objective, seems to amplify the illegalities of the first two aspects named by Baker, establishing the production and distribution of mixtape CDs as an illegal activity.

The arrest of DJ Drama was also the first time a creator was arrested in connection to copyright infringement, and to my knowledge and research, this has not occurred since. As the Billboard article on the aftermath of the raid mentions, "[R]etailers and sources involved in hip-hop marketing are now left wondering about the future of the crucial marketing tool, and angered about the perception that the RIAA is working selectively when it comes to enforcement."¹⁰⁷ However, the uncertainty as a result of the RIAA's selective and demonstrative action did not put DJ Drama or the mixtape medium to rest. On January 26, 2018, DJ Drama and rapper Lil' Wayne released the extended version of the sixth volume in their aptly titled *Dedication* series, *Dedication 6: Reloaded* (2018). The mixtape was released through the website Datpiff.com, or as a free mobile phone application, allowing the user to listen to the entire *Dedication* series.¹⁰⁸ Although the mixtape was largely distributed through the internet, a CD version was also made available, and like the earlier instalments of the series, does not list an address or a note on the copyright of the material included.¹⁰⁹

DJ Drama clearly falls in the category of collateral damage. By the release and distribution of his mixtapes, DJ Drama was infringing copyright: many of the CDs feature unlicensed samples or even complete copies of instrumental beats, none of which the copyright belongs to DJ Drama. This type of use does not pass for 'transformative' and can be seen as a substantial taking in relation to the whole work. Furthermore, as Chief Baker notes, the mixtapes were released in order to make profit. Even though copyright law in practice leaves only little to no room for fair use, it is clear that DJ Drama's work can be considered as infringement. However, the mixtapes were released as marketing tools, and not as albums. Many of the rappers featured on DJ Drama's mixtapes were able to launch a successful career, and the mixtapes are often regarded as a talent pool for up and coming rappers. This way, the mixtapes serves the music industry by marketing and promoting new talents, enlarging their potential market. This positive aspect is however completely overshadowed by the exaggerated legal measures taken by the RIAA and Atlanta police force. The fact that his arrest has not stopped DJ Drama from releasing his mixtapes, but instead caused confusion within the industry about what is allowed and what is not, problematizes the argument that copyright protection is needed in order to give creators incentive to create new work. The DJ Drama case shows that even by going as far as arresting the infringers, giving them a clear (economic) disincentive, infringement is not prevented or ruled out.

¹⁰⁷ Crosley (2007).

¹⁰⁸ <https://itunes.apple.com/us/app/dedication-by-datpiff/id695835398?ls=1&mt=8> [6 May 2018].

¹⁰⁹ <https://www.discogs.com/Lil-Wayne-DJ-Drama-Dedication-6-Reloaded/release/11625282> [6 May 2018].

In the introduction to this chapter I already mentioned the most recent known dispute over samples used by Madlib, which revolved around the use of Bob James' *Nautilus* in the Madlib produced Quasimoto – *Sparkdala (Original Version)*. Strikingly enough, *Nautilus* can be considered somewhat of a hip hop evergreen, as it has been used in countless songs (WhoSampled lists 304 known samples of the song).¹¹⁰ James defended suing Madlib and Stones Throw by stating that: “One of the problems that confront many ‘Hip Hop’ or ‘Rap’ artists is that they are unable to achieve an instrumental background musical sound quality for their works. As a result, they borrow or ‘sample,’ therefore infringe the performance and composition of others.”¹¹¹ (James’ quotation marks) Although this can be read as an attack at the supposed musical incompetence of hip hop producers, there is no known outcome of James’ copyright claim, which suggests a settlement without a court case. However, there is another interesting aspect to James’ comment in relation to Madlib’s sampling practice. One year after the claim, Madlib made an appearance at the Red Bull Music Academy, where he was asked about the difficulties surrounding sampling and sampling clearance. He stated that: “I started out doing [sampling] and that’s just what I’m doing. Regardless of who’s suing me or who... whatever. That what I grew up on, that’s what [I will continue to] do. (...) They try to act like sampling is not music but it’s hard to do correctly.”¹¹² Madlib’s comments can be seen as countering James’ claim that producers sample out of incompetence, but more importantly, showing that he will continue sampling in spite of the legal and financial hurdles set up by copyright holders. Again, I do not wish to discuss the creativity surrounding sampling, but Madlib’s comments show that if we come to regard sampling as a creative practice, producers will continue to sample regardless the risks of litigation, or in the case of DJ Drama, arrest.

3.5 Copyright in digital media.

Many scholars, Lessig among them, recognise that copyright law is often challenged and even made obsolete with the advent of new technology. In this light, Lessig points to the differences in the consumption of culture through an analog medium or digital medium. For this, Lessig introduces the distinction between Read Only (RO) culture and Read/Write (RW) culture, a distinction he lends from the permissions attached to the files on a computer. If someone has RO permission, the file cannot be altered, contrary to RW permission, which allows the user to make changes.¹¹³ The same goes for RO sound objects, referred to by Lessig as tokens of culture, such as vinyl records. For the ordinary consumer, Lessig writes, these tokens “were to be played, not manipulated.”¹¹⁴ The music industry was thus modelled according the limitations of the analog media, allowing for a strong RO culture:

If you borrowed my LPs, I didn’t have them. If you used my record player to play Bach, I couldn’t listen to Mozart. These are inherent – we could say ‘natural’- limitations of analog technology. From the consumer’s perspective, they were bugs. (...) But from the perspective of the content industry, these limitations in analog technology were not bugs. They were features. They were

¹¹⁰ <https://www.whosampled.com/Bob-James/Nautilus/> [18 Jun. 2018]

¹¹¹ Jordan (2015).

¹¹² Madlib (2016).

¹¹³ Lessig (2008), p. 28.

¹¹⁴ Ibidem, p. 37.

aspects of the technology that made the content industry possible. For this nature limited the opportunity for consumers to compete with producers (by ‘sharing’).¹¹⁵

Digital technologies do away with these features, allowing users to manipulate RO culture to great extent, rendering it RW culture instead. As Lessig underscores, this allows users to no longer play the passive role of consumers, but also become active as producers, placing their art in competition with other copyrighted content online. Throughout this thesis I will refer to, or rather categorise, sampling practice as a form of cultural engagement. The term cultural engagement is used because it captures this shift: cultural tokens, or sound objects that normally only allow passive consumption are engaged with through sampling. Furthermore, the possibilities of digital technologies create enormous demand for RW culture. Much like the digital sampling technologies that brought us the classic hip hop albums of the late 1980s, Lessig points to the amount of remixed media available online, largely made by amateurs instead of professionals. This creates a gap between the possibilities and capacities of the new technologies, and what is allowed by law.

As we have seen, copyright law was reinterpreted in the 1990s to encompass sample-based music, containing the possibilities of new technologies. Lessig shows how the gap between new possibilities online and copyrighted content is fixed in favour of copyright holders and RO culture. However, this time the gap is not fixed by reinterpretation of law, but due to the nature of digital content:

As RO culture has evolved in the digital world, technologies have given the copyright owner an ever-increasing opportunity to control precisely how copyrighted content is consumed. (...) Copyright law supports this control in the digital age because of a deceptively simple fact about the architecture of copyright law, and the architecture of digital technology. The law regulates ‘reproductions’ or ‘copies.’ But every time you use a creative work in a digital context, the technology is making a copy. When you ‘read’ an electronic book, the machine is copying the text of the book from your hard drive, or from a hard drive on a network, to the memory of your computer. That ‘copy’ triggers copyright law. When you play a CD on your computer, the recording gets copied into memory on its way to your headphones or speakers. No matter what you do, your actions trigger the law of copyright. Every action must then be justified as either licensed or ‘fair use.’¹¹⁶ (Lessig’s quotations marks)

Just as the technology allows the user to alter and remix content, share it if they please so, the same technology also allows for extensive control, because a copy must be made in order to consume the content, which triggers copyright law. The limitations of analog media also meant that copyright was not triggered, and use was not regulated. Whereas digital media do away with these limitations, allowing users to actively remix the content, it also allows for far greater regulation and control. Lessig’s point is that we should be critical towards such an extensive control, because ideally the possibilities of digital technologies should belong to all of its users, producers (now a very large and ambiguous group not limited to professionals, but also

¹¹⁵ Lessig (2008), p. 37.

¹¹⁶ Ibidem, pp. 98-99.

amateurs), and copyright holders. By regulating the sharing of culture online, allowing strictly for licensed RO culture, is only beneficial to copyright holders.

Lessig wrote *Remix* in 2008, when the music industry was still recovering from the rise of peer-to-peer networks, enabling illegal downloads. The 2018 laptops often do not even have a disc-drive in them, and most of the music industry's attention has been shifted towards streaming. Music consumption through streaming does not necessarily make a copy of the content into the computer's memory, but instead allows access through internet connection to the content that is uploaded by the copyright holder onto an external hard drive. However, as Rasmus Fleischer notes: "Technically, streaming *is* downloading. The only difference is what happens to the data after it is downloaded: either placed in volatile memory for immediate playback (streaming), or it is saved in a more permanent way (downloading)."¹¹⁷ A stream can only be 'tapped into' and save for the so-called 'offline' selection that does not require an internet connection, it cannot be copied, making it RO culture. Nevertheless, this proves Lessig's point that RO culture has become exceedingly dominant through digital media, whilst the technology holds the capacity of altering and modifying it, allowing consumers to actively engage as happens through sampling, rendering themselves producers in the process.

This makes for extensive copyright control, a control that stretches far beyond the control copyright holders had through analog media. As Lessig writes: "this change in the scope of control came not from Congress deciding that the copyright owner needed more control. The change came instead because of a change in the platform through which we gain access to our culture."¹¹⁸ Lessig concludes by stating that this amount of control is regulating our culture, online as well as offline. As he states about the effects this increase in control over music copyright has had on sampling:

Beginning with hip-hop, which introduced sampling to popular culture, and continuing through laptop music today, no creative act would be distributed free of a legal cloud. You might think that artists would be eager to end this insanity. In fact, among their lawyers at least, this craziness is a kind of lottery system. An extraordinary effort is devoted by lawyers to identifying samples used without permission in successful records. The threat of copyright liability is huge, so the payoff to make litigants go away is also huge. The system loves the game; the game thus never ends. But this is much more than a game. There's a profound injustice in the difference of the law here, especially as it affects an emerging class of artists. Why should it be that just when technology is most encouraging of creativity, the law should be most restrictive? Why should it be effectively impossible for an artist from Harlem practicing the form of art of the age to commercialize his creativity because the costs of negotiating and clearing the rights here are so incredibly high?¹¹⁹

As Lessig is keen to point out, the advent of digital technologies has given creators almost endless possibilities for the remixing of culture. Furthermore, these technologies have become less expensive over the years, and as of today, anyone with an internet connection can download free software which allows them to make music by putting samples together. This shift has

¹¹⁷ Fleischer (2017), p. 160.

¹¹⁸ Lessig, (2008), p. 99.

¹¹⁹ Ibidem. pp. 104-105.

effectively removed the economic constraints on the remixing of art. However, the extensive control authorised by copyright laws enable copyright holders to uphold a monopoly of their copyrights. This places not only a huge bureaucratic or legal hurdle on artists but is above all an economic question. As Lessig points out, there is a whole system of lawyers and legal teams dedicated to identifying copyright infringement, resources which emerging, unestablished or independent artists lack. Furthermore, the need for lawyers in order to harness the control over copyrighted material only helps driving up the costs involved. Lessig's point is similar to Vaidhyathan's, as they both under scribe that a strong copyrights regime is in favour of the copyright holder and places the unestablished artist in disadvantage. To speak with the words of Lessig, the 'profound injustice' in the law is within the advantage towards record labels and publishers who own and represent many copyrights. These companies have the resources and the legal teams at their disposal that allows them to commodify and control their copyright, creating a concentration of power and capital within the music industry.

The bias that puts the copyright holder in favour is by no doubt harmful to sampling as a practice, but as I have pointed out, despite serious measures sampling has not disappeared. The hostile stance from the music industry towards sampling can never fully prevent unlicensed sampling. If we come to regard copyrights as a means of commodification and the high licensing costs as an income for copyright holders, licensing for samples will continue. However, I feel that as long as licensed sampling will continue, unlicensed sampling will also continue, especially by young creators who do not have the economic resources behind them to pay for licensing. In other words, the current stance towards sampling is not discouraging sampling, but rather encouraging unlicensed sampling. However, as Vaidhyathan also points out, this has pushed unestablished and emerging artists into a different mode of distributing their music, causing them to stay under the radar so to speak, in order to avoid trouble. Through this, sample-based music has a weird position within the marketplace and problematizes the musical product as commodity. For the next chapter, I try to analyse this position within the marketplace as well as the process of commodification of the musical product.

4. Commodification of music.

Throughout the previous two chapters I have tried to dissect the relation between samples and their origin, and map the music industry's stance towards sampling. In doing so, these chapters already foreshadowed multiple problems surrounding sampling and the commodification of the sample-based product. In many ways, copyright and intellectual property are enabling the musical product as commodity. In this aspect, it is important to refer back to Hesmondhalgh, who described the process of commodification "as ambivalent, as enabling and productive, but also limiting and destructive."¹²⁰ The implied balance between stimulating and limiting productivity is also present in the developments of copyright protection. Copyright was first introduced in order to provide incentive for creators, arguing that without the artificial scarcity as introduced by copyright, the costs of production would outgrow the costs of copying. In 'Technology, Creative Practice and Copyright' (2004), Paul Théberge reflects on this by stating: "While the ideal of encouraging the creation of new works is one of the founding principles of copyright, it has taken a back seat in recent years to industry-dominated appeals for the extension, in both the scope and duration, of copyright protection."¹²¹

This has made copyright into a lucrative asset, with consequences for sampling practice. As the previous chapter illustrated, the music industry places an economic constrain on sampling, and intimidates and litigates those who do not comply. As reflected in one of the provisions for fair use, sampling is allowed once it does not harm the original song's potential market. The idea that the sample-based song acts as a derivate work that competes with its sample source within the market is taken as a starting point for analysing the process of commodification. As already outlined in the introduction, the constrains the copyright regime has put on sampling results in producers trying to avoid these constrains by releasing their music in a more low-key fashion, and sampling from obscure sound sources. Although the process of commodification is highly individual, the outcomes of this avoidance can be studied as musical products. As such they have a place within the market, are offered for a price or involve another form of exchange, making them subject to the process of commodification. The catalogue of the Madlib Invasion label is taken as an example of how simultaneously copyright is avoided and the musical products function as commodities.

4.1 *Commodity state through cultural anthropology.*

When dealing with sampling and the commodification of the musical product, multiple angles present themselves. In his article 'If the Song has No Price, is it Still a Commodity? Rethinking the Commodification of Digital Music' Rasmus Fleischer provides an analysis of two different approaches, and attempts to reconcile both these approaches when analysing the musical product as commodity. Although the word 'commodity' immediately invokes the work and theories of Karl Marx, I start with the approach as introduced by anthropologists Arjun Appadurai and Igor Kopytoff in *The social life of things: Commodities in cultural perspective* (1986). Appadurai formulates his vantage point for the commodity as an object of economic value. Value however, Appadurai argues through Georg Simmel, "is never an inherent property

¹²⁰ Hesmondhalgh (2013), p. 69.

¹²¹ Théberge (2004), p. 151.

of objects, but is a judgment made about them by subjects.”¹²² This allows objects to move in and out of what is called ‘the commodity state’, because value is only temporally assigned to an object. The anthropology approach of the commodity is not focussed on the commodity as a process but approaches commodification as a stage which an object can pass through. This is why Appaduria and Kopytoff refer to the ‘biography’ of things, because they aim to trace the different phases of an object’s life, one being the commodity phase. By focussing on one circumstance in which a musical product can be considered a commodity, as is suggested by Taylor, Appadurai’s and Kopytoff’s notion of the commodity state can help single out such a circumstance.

This however also implies there are circumstances during the life of the musical product in which it is outside of the commodity state. This becomes problematic when viewed in relation to the use of copyrighted material through sampling. Hip hop producers, Madlib among them, draw from sound objects for their production. As we have seen, this happens from various sources, some more obscure than the other. It can be a worn-out vinyl record, a compilation CD or even a YouTube video. However, as commodities these different sound objects all have different relations to copyright. This is in part due to the difference in consumption of analog and digital sound objects, as explained in the previous chapter. As for physical sound objects such as CDs or vinyl, there is a difference between new and second hand products. Copyright holders are often paid through mechanical rights or royalties, which claims a percentage of the sales of a musical product.¹²³ As Chang describes, many hip hop producers are invested in the act of ‘digging’: searching through second hand vinyl for obscure and out of print records to use as sample source.¹²⁴ As second-hand products, the value that is ascribed to them is that of the judgment of the record dealer, and copyright no longer applies to the transaction in acquiring the object, because the mechanical royalties are already paid for. In other words, second hand sound objects are still to be considered commodities, because there is an obvious economic value ascribed to them, but no longer does the exchange involve copyright. This is different from YouTube videos, to which new or second hand does not apply. Even if there is no actual transaction in the form of an exchange involving money, the viewer is likely to be presented with an advertisement. As Rasmus Fleischer writes: “[Y]ou can listen to it for free, but (...) it is not the song itself that is sold to you, but your attention that is sold to advertisers.”¹²⁵ Therefore, they are still to be considered commodities. However, YouTube includes both licensed content uploaded by artists and record labels, and unlicensed content uploaded by individuals, and therefore has a different relation to copyright than other sound objects. The supposed infringement done by uploading a copyrighted song to YouTube is approached differently than the supposed infringement done by sampling, and it is possible copyright holders tolerate one infringement whereas litigate the other.

The problem is that even though these different sound objects are all to be considered commodities with different relations to copyright, they present themselves strictly as sound sources to the hip hop producer. By taking a sound object and rendering it a sound source, RO culture is made into RW culture, as sampling triggers copyright law. However, it can be argued

¹²² Appadurai (1986), p. 3.

¹²³ Rutter (2016), p. 88.

¹²⁴ Chang (2009), p. 146.

¹²⁵ Fleischer (2017), p. 154.

that sampling only seriously infringes copyright law when released to the public, whether monetised through the production of a tangible object or distributed on the internet for free. Copyright law only allows sampling when properly licensed, including permission from the artist, as well as a license for the use of both the underlying composition and the recording. In a way, this relates to the commodity state as described by Appadurai and Kopytoff. In short, as sources, samples can be acquired as being outside of the commodity stage, unrelated to copyright, as can be argued for out of print vinyl or cassettes, or as illegally downloaded files. If a producer wants to release a sample-based composition, the song re-enters the commodity stage because now copyright applies through the necessity of a license. As Harry Allen, producer for hip hop group Public Enemy puts it: “‘I bought the record, so I can do anything with the record, right?’ Well, no, that record represents a whole set of copyrights or properties that belong to someone else and all you have bought is a license to play it in your home.”¹²⁶ For Appadurai and Kopytoff, the sample stands for one specific stage within the biography of a musical product, and through triggering copyright, it re-enters the commodity stage.

Fleischer summarises his criticism of the anthropology approach of the musical commodity by pointing towards an inherent ‘tangibility bias.’ As Fleischer points out, the anthropology approach to the commodity is fixated on the materiality of the commodity.¹²⁷ Therefore, the anthropology approach is somewhat unfit to analyse intangible things such as services. Secondly, by arguing for a biographical approach, it is suggested that objects have a birth and death. As we have seen, the musical product as commodity together with its copyright is highly dependent of context. For a second-hand vinyl record, it is clear what the object is, and whether copyright is triggered or not. Moreover, there are different stages identifiable: as opposed to new products, second hand products are in a stage where as a commodity the exchange is between dealer and buyer, with no connection to the artist or record company, because mechanical royalties no longer apply. Copyright is not triggered in its consumption or exchange. According to Fleischer, in the context of digital music, it is much harder to determine what the actual object is, and in what stage it is in. As we have seen in the previous chapter, digital files do trigger copyright during consumption, because they need to be copied in order to be consumed. This makes for uncertainties in using the anthropology approach when dealing with digital music, as Fleischer argues: “[T]hese uncertainties follow from the strong emphasis on exchange in this approach, as opposed to the Marxian emphasis on production (and productive consumption).”¹²⁸

This is not to say the exchange is of no importance. As Fleischer argues, something can only be considered a commodity if there is a transaction, be it through exchanging a good or service for money, or attention to an advertisement. However, monetising a YouTube video through the use an advertisement is optional, and other platforms are available for those who want to promote their music without charging a price or including advertisements, such as SoundCloud or Bandcamp.¹²⁹ A producer may wish to release his music through such platforms, and therefore his or her music is arguably outside the commodity state, and no exchange is needed in order to acquire the sound object. The inclusion of samples, however,

¹²⁶ Fleischer (2017), p. 131.

¹²⁷ Ibidem, p. 152.

¹²⁸ Ibidem.

¹²⁹ Ibidem, p. 160.

problematizes this. As we have seen, a license is needed, and distributing sample-based music for free is unlawful if unlicensed.¹³⁰ While the approach of anthropologists Appadurai and Kopytoff can be used to analyse how a sound object triggers copyright when used as a sound source, it overemphasises the exchange. By only emphasising the exchange within the commodity form, the relation that a sample-based song has to its copyrighted (and commodified) original is overlooked. The problem is not whether the end-product, being the sample-based song, is commodified, but its relation in the marketplace where according to copyright, it is placed in competition with its origin. This is resonated through one of the fair use provisions, because sampling is seen as permitted once it has no effect on the potential market for the original used. In other words, by including copyrighted material through sampling, a song is part of the marketplace and seen as unlawful even if it presents itself as outside of the commodity stage. Therefore, the anthropology approach shows that through overly extended and widened copyright, sound objects used as sound source through sampling are hardly ever outside the commodity state (with the obvious exception of the public domain).

4.2 *Commodity through Marx and the circuit of capital.*

Whilst the anthropology approach can be useful in deciding when something is outside of the commodity stage, it points to the fact that sample-based songs, through the link with their copyrighted origins, are part of a larger marketplace of commodities. This is perhaps better understood through the theories of Karl Marx. In Fleischer the Marxian definition of commodity is given a short summary before applied:

The commodity's *content* might be a material object or an immaterial service, which gives it a particular use-value. But having a use-value is not enough. In order for something to take on the commodity-*form*, it must also have an exchange value, i.e. it must stand in a market relation to other commodities. While the commodity is initially presented by Marx as the unity of use-value and exchange-value, this should not be mistaken for a final definition. (...) To put it very short, the Marxian definition of a commodity supposes that it has a price. On the other hand, it is not limited to tangible objects, but the commodity can as well be a service.¹³¹ (Fleischer's italics)

The Marxian definition of commodity is easily oversimplified, partly due to the complex and sometimes even contradictory nature of Marx's work. It is important to understand that commodities are only one step within a larger model of production and wealth creation, on which Marx bases his analysis of the capitalist system.

Marx did however create a formula in order to explain and summarise this larger model of production. This formula is referred to as 'circuit of capital' and is listed in Fleischer as following: $M - C \dots P \dots C' - M'$.¹³² The letters translate to the following: money (M) is used in order to acquire commodities (C). These commodities make up the raw material that are processed through this circuit. This happens by applying labour-power and other means of production, which make up the productive capital (P). This is recognised as the first stage of

¹³⁰ McLeod, Dicola (2011), p. 2.

¹³¹ Fleischer (2017), p. 150.

¹³² Ibidem, p. 151.

the circuit of capital. The commodities are then subjected to ‘productive consumption’, and through production the initial commodities disappear to create new commodities (C’). This process is referred to as reification, where intangible things such as labour-power are invested into an object, producing the new commodity (C’). Through production, these commodities have added value (C’ instead of C). In the third and final stage, the producer re-enters the marketplace in order to sell his commodities for money (M’). The idea behind this circuit is that it generates money, otherwise known as profit (M’ instead of M). At the end, the producer has more money than at the start, and thus is capable of acquiring more commodities to upscale his or her production. The process is however not without risk: “Every step in the process, however, implies a risk of capital’s devaluation. The value entering production will be conserved, and a surplus value added, only if the commodity producer succeeds in predicting the market correctly, so that the commodities can actually be sold at a profitable price.”¹³³

Returning to Kretschmer and Kawohl, copyright is introduced because otherwise “the costs of production of creative works will remain above the costs of copying.”¹³⁴ In other words, as the circuit of capital points out, producing a work involves the investment of money, and the acquiring of commodities. By copying, it is suggested that the productive stage is surpassed, and no value is added to the end product, whilst profit is generated for the copying producer. Because these reduced production costs, or rather no production at all, the copied product is likely to be cheaper than the original, creating an unfair competition. Ideally, copyright increases the costs of copying so that unfair competition is ruled out, and the marketplace is restored.

4.3 *Musical production and the importance of copyrighted recording.*

As stated earlier, employing the Marxian approach to commodification is easily oversimplified. The musical product can indeed be approached as commodity. The use of samples, however, also resort to a discussion about the production of music. In order to apply the Marxian definition of commodity, and its place within the circuit of capital, it is of importance to further understand the notion of production within music. As Jason Toynbee states: “Music, like all symbolic forms, presents a problem for the capitalist mode of production.”¹³⁵ Copyright is introduced in order to invest a sense of authorship and ownership over music, which means access is limited, and derivative use is regulated or excluded. Both the notion of authorship and ownership can be problematized. Consider for instance the commotion surrounding the *Williams vs. Gaye* case as discussed in the previous chapter. The composition of the *Got To Give It Up* is unlikely to be awarded solely to Marvin Gaye, and it is problematic to award his heirs for the alleged allosonic quotation as done by Thicke and Williams. In the case of *Williams vs. Gaye*, the dispute is over the use of the composition, and not the recording. Despite the fact that the role of composer in *Got To Give It Up* can be problematized, there is an acknowledgement of authorship. As for the recording, these rights belong to the facilitator of the recording and are most often held not by the artist but by the record label or publisher.

¹³³ Manzerolle & Kjosen (2012), quoted in: Fleischer (2017), p. 151.

¹³⁴ Kretschmer, Kawohl (2004), p. 21.

¹³⁵ Toynbee (2004), p. 124.

It is through the split in copyrights between recording and composition another problem emerges, with consequences for the sampling producer. As Madlib explains his choice of method, it is the ‘sound’ of old music he prefers, and this sound is lost through allosonic quotation.¹³⁶ In part, this is resonated in the claim made by Bob James, referring directly to the use of his music by Madlib, that producers are “unable to achieve an instrumental background musical sound quality for their works.”¹³⁷ The recording is used for aesthetic reasons, and it is often impossible to recreate or recapture the recording through allosonic quotation. Copyright generally does not recognise any authorship over the recording, only ownership. As Toynbee says of the split between composition and recording copyright:

The contrast here is with traditional copyright which, because it is originally vested in the composer, at least gestures towards the value of creative acts. With recording rights there is no acknowledgement of authorship, no understanding that in much popular music the music work *is* the recording.¹³⁸ (Toynbee’s italics)

By the use of existing recorded material, sampling is not only challenging the notion of authorship, but also the notion of ownership. As I have pointed out, it is extremely hard for sampling creators to argue for fair use. It can however be argued that producers are capable of using existing material in such a way that a new composition is formed. In this aspect, I like to refer to *The Ride – Nightcoastin’ Instrumental* (2011) as credited to The Loopdigga, one of Madlib’s many aliases. This song appears on *Madlib Medicine Show #11: Low Budget Hi-Fi Music*. Among other samples, the main sample used is Bernard Wright – *Won’t You Let Me Love You* (1983), as composed by Wright and Weldon Irvine. From the 0:36 – 0:43 time mark a short portion of the original is heard playing, albeit in low volume contrasted with a much louder voice saying: “What some candy little girl?” Furthermore, there is some manipulation done by panning the sample, so it moves between the right and the left channel, creating an unsettling stereo image. From the 0:43 mark onwards, the sample is under heavy manipulation, transformed to a new tempo, contrasted with electronic drum sounds, a mouth harp that plays the same repeating pattern throughout, and other miscellaneous samples. At the very end, when the fade out has already started, two seconds of source material reappear without the added production. Although it is completely unrealistic to uphold the claim Madlib hereby has created a new composition in court, it is clear that by no means the sampling done in *The Ride – Nightcoastin’ Instrumental* is in any way derivative or acts as a substitute to the original.

However, as Madlib says, it is the sound he is interested in, and therefore the sonic resemblance to the 1983 recording is still present. By use of the recording, regardless whether a new composition is formed or not, copyright is infringed. This copyright infringement rules on the ownership of the recording and is in disregard of any authorship. Although fair use inhabits a notion of transformative use by creating a new composition, the case of *Bridgeport Music vs. Dimension Films* ruled that this does not apply to sound recording, and a license is always needed, even if only a small portion of the recording is taken. As Toynbee notes, there

¹³⁶ Madlib (2016).

¹³⁷ Jordan (2015).

¹³⁸ Toynbee (2004), p. 127.

has been an ad hoc clearance system for producers to acquire licenses, “which has enabled a trade in the supply of samples from rights-owners.” Toynbee continues by correctly observing that: “Sample clearing is certainly testament to the pragmatic nature of capitalism.”¹³⁹ But, as we have seen in the previous chapter, licenses are extremely scarce, and clearance is a costly and time-consuming effort. Unlike the rare and out of print, predominantly independently released samples as used in *From Trouble They Know Me* or *Beat Konducta in Africa*, *Won't You Let Me Love You* is issued by Arista Records, now owned by media conglomerate Sony. Although it is hard to estimate the exact licensing costs of a sample, scholars list an average that ranges from 1,000 US Dollars to 5,000 US Dollars, with the important addition that “some popular recordings can cost several times that amount and/or involve signing away a percentage of the future profits in the new work.”¹⁴⁰

Consider this amount when *Won't You Let Me Love You* is used in *The Ride – Nightcoastin' Instrumental* together with other samples. Although it is hard to identify exactly how many samples are used in the song, there are at least two different samples used in *The Ride – Nightcoastin' Instrumental*. Next to the Bernard Wright sample, the voice of comedian Lord Buckley is heard throughout the beginning of the song. Exact retail numbers are unavailable for the sales of *Madlib Medicine Show #11: Low Budget Hi-Fi Music*, the album on which *The Ride – Nightcoastin' Instrumental* is found. However, licensing only the recording right for the hypothetical amount of 1,000 US dollars per sample would not have made its release a lucrative affair, especially considering the album contains 28 songs all including one or more samples. If sample clearance is testament to the pragmatic nature of capitalism, the releases on Madlib Invazion such as *Low Budget Hi-Fi Music*, are testament to the pragmatic nature of independent labels avoiding the high costs of licensing.

4.4 Sampling as a form of copying.

Although sample clearance can be understood as a commodity movement, where copyright holders, quite justifiably, are able to sell their music for derivative use, the exorbitant prices involved in licensing point to an inherent error within the recording industry. If we relate Madlib's use of samples such as his use of *Won't You Let Me Love You*, the outcome, namely *The Ride – Nightcoastin' Instrumental* is far removed from the original. Although it is hard to pinpoint whether the release of *The Ride – Nightcoastin' Instrumental* had any effect on the market of *Won't You Let Me Love You*, or even its potential market, it does not create a substitute of the original and can be seen as a different work of music. In order to understand the error behind charging such high costs for licensing, we need to locate the licensing costs within Marx's circuit of capital.

This circuit starts with acquiring commodities, the raw materials. If we relate this to sampling, a sound objects must be acquired. For reasons of space I will limit this only to the use of the Bernard Wright sample, and not the other unidentified samples used in *The Ride – Nightcoastin' Instrumental*. The sample is found on Bernard Wright – *Funky Beat* (1983). Multiple physical releases of the album exist, on vinyl, cassette and CD. Although no longer in

¹³⁹ Toynbee (2004), p. 127.

¹⁴⁰ Théberge (2004), p. 147.

print, second hand copies are not too rare or expensive.¹⁴¹ Together with these physical copies, the album is available on multiple streaming services, such as Spotify, Tidal and Apple music, as well as various uploads on YouTube.¹⁴² Acquiring a sound object that includes *Won't You Let Me Love You* should not be difficult nor costly. The next stage is the productive capital. This means that *Won't You Let Me Love You* is sampled. However, sampling triggers copyright law. Therefore, the initial commodity should not be limited to only acquiring the sound object, but also include the copyright license. The exact price of this license is hard to determine, but typically ranges from 1,000 to 5,000 US Dollars. The license fee is not set by industry standard, but product of negotiations between the sampling producer and/or his record label, and the copyright holder of the sampled recording, perhaps even with an intermediary such as a copyright lawyer or a sample clearance agent.¹⁴³ Such high costs put an economic constraint on sampling producers, and as the example above shows, makes the production and release of sample-based music a costly but also time-consuming affair.

Despite the fact that sampling triggers copyright, and the licensing costs should technically be placed as costs before the commodities enter the productive capital stage, the reality is that producers and record labels consider licensing once their product is finished.¹⁴⁴ If we closer examine the stage of productive capital, the sample acts as raw material, and is transformed through effort of a producer. For instance, in *The Ride – Nightcoastin' Instrumental* Madlib altered the sample by adding other samples, such as the Lord Buckley intro, electronic drum sounds, and placing the sample within a new arrangement and tempo, making various edits to the original. Although we must bear in mind that music production is an ambiguous and creative process, and is not equal to labour-power as described by Marx, it is in some ways similar, as the creative effort from Madlib is distilled onto the new musical work that is *The Ride – Nightcoastin' Instrumental*. While the sample is still recognisable in the new work, with audible sonic traces, most prominently being the small portion of the original as played between the 0:36 and 0:43 time mark, most of the original sound object is now transformed.

However, sampling should not be confused with productive consumption. Productive consumption relates to the production where the raw materials disappear through labour, such as it the case with a product like orange juice. You cannot eat the oranges that are processed to make orange juice, because they now exist in a new liquid form. In the case of a sample, the original sound object has not disappeared. Albeit altered, re-contextualised and recombined, the recording is still approached as 'copied.' This points to a discussion whether value can be added through copying. As Théberge writes:

Partly as a result of this, sampling projects are typically understood to be derivative: that is, their value can only be assessed in relation to some other, more 'original' source. In court cases, this usually takes the form of arguments based on the idea that the very success of the sample-based work of art is ultimately dependent upon its use of some particular bit of appropriated material (no matter how minimal). Indeed, insofar as the charge of infringement usually also involves a claim that the market for the original has been somehow

¹⁴¹ <https://www.discogs.com/master/view/154369> [20 Jun. 2018].

¹⁴² <https://itunes.apple.com/us/album/funky-beat/543710497> [20 Jun. 2018].

¹⁴³ McLeod, Dicola (2011), p. 82.

¹⁴⁴ Rutter (2016), p. 82.

negatively impacted by the very existence of the infringing work, it suggests that the relationship of the latter to the original is not simply derivative but *parasitic* in character.¹⁴⁵ (Théberge's italics)

If we return to the Marxian definition of commodity, it is essential that the commodity stands in a market relation to other commodities. This is generally understood as the exchange value. As Théberge points out, the success of sample-based music is understood as derivative, and can only be accredited to the use of the appropriated material. The very existence of a sampling work, for instance through being distributed online for free, is already seen as infringement, because it allegedly effects the market of the original. Therefore, even if a sample-based song presents itself not as a commodity, the use of copyrighted material places it in a market relation to other commodities. As Fleischer noted, something can only be considered a commodity once it has a price. In this case, the price translates to the necessity of a copyright license. In other words, even if a sample-based song is available for free, it still upholds a market relation through not complying to a license. The conclusion of the Marxian approach to the use of samples in the musical product as commodity is thus similar to the anthropology approach: both show that through the necessity of a proper license, a sample-based song automatically is transformed into a commodity because it is argued that through the use of appropriated material it upholds a market relation to its copyrighted original.

4.5 Position of samples in the marketplace.

Théberge's comments also point to another error in the use of copyright as a means of commodification. The high costs of licensing are defended by arguing that the success of a sample-based song is only because it uses appropriated material. By approaching sampling as 'copying', it is argued that no value is added, in disregard of any added or transformative production from the sampling artist. Furthermore, it denies the risk that value is decreased through production, or rather, forwards that risk onto the sampling producer, effectively driving up the costs. As Théberge writes: "Once the act of copying from the original is established, the value of the object is assumed, and a case for infringement seemingly guaranteed."¹⁴⁶ The high costs of licensing, or otherwise the risk of litigation, create an unfavourable economic environment for unestablished artists to release their music in, and only make licensed sampling possible for artists with a major label backing. In other words, the necessity for a license, and the exorbitant prices that go along, show that the law does not ascribe any value or added value through the practice of sampling. It automatically assumes that through sampling, the original song's place in the market is negatively affected.

The primary argument given is that sampling, or the success of a sample-based song, cuts into the original song's market, or even potential market. As stated earlier, it is hard to exactly determine what effect a sample-based song has on an original's song market. However, it can also be argued a sample has positive impact on its original song's market, because it is capable of enlarging that market. The fact sampling is a form of copying means that the original is left in place. As pointed out in the first chapter, the use of publically available sound sources often spark an interest in listeners, creating a tendency to uncover and disclose the originals

¹⁴⁵ Théberge (2004), pp. 148-149.

¹⁴⁶ Ibidem, p. 147.

used. This tendency is also recognised by Lessig: “Knowing that the song is a mix that could draw upon all that went before, each second is an invitation to understand the links that were drawn – their meaning, the reason they were included. The form makes demands on the audience; they return the demands in kind.”¹⁴⁷

In this light, we should approach sampling not simply as blatant copying, where the sample-based song now takes the place in the market of its original, but as an art whose audience has an understanding that an original exists. As dissected in the first chapter, one of the main aspects that define the relation a sample has to its origin is that this concern is not lost, and the audience is interested in disclosing and sharing the original sound object used in sample-based music. The internet as medium is key in this sharing, as happens through websites such as WhoSampled.com. This concern, and the initiatives that go along with it, can be deemed positive, because arguably it enlarges the marketplace for the original sound source by (re)introducing it to a new audience. However, the disclosure of the original sound sources as used in sample-based music is not without risk. Because the copyright regime has developed such a hostile stance towards sampling, claiming copyright infringement can turn out to be a very profitable affair for copyright holders. As Lessig writes, this makes the pay-off huge in infringement cases, for which: “An extraordinary effort is devoted by lawyers to identifying samples used without permission.”¹⁴⁸ Sites such as WhoSampled.com or the now defunct Stones Throw Message Board can actually assist lawyers and copyright holders tracking down the use of their music through unlicensed sampling.

An interesting angle on this is offered by Jeremy Morris in his article ‘Making music behave: Metadata and the digital music commodity’ (2012). Morris argues that through the digitalization of music, the musical commodity has been re-dressed to fit the new mode of consumption. Whereas physical sound objects have a pretext, which include artwork, track titles, artist name and other assorted information about the specifics of the object, digital files come with metadata. Metadata is the digital equivalent of pretext, which brings use-value to the digital sound file, and is thus a tool to commodify digital music. These data however, project a sense of ownership over files. This is problematized for instance through the use of unauthorized downloaded files, as metadata is capable of re-dressing them as commodities, thus “troubl[ing] the standard logic of commodification.”¹⁴⁹

Morris takes the CD Database as an example. This started out as a user generated service, based on voluntary input. In short, users made entries in the database that listed certain information about a CD, namely artist, album title and the individual track titles and length. The database was later transformed from a public service into a service for corporate ends, as its successor is now used in iTunes media to identify what CD is being imported into the iTunes library.¹⁵⁰ Of this shift, Morris heeds a possible risk for other user-generated services, concerning metadata and the musical commodity. He states:

[U]sers’ efforts to make a cultural good more usable in its digital form have led them to take part in the process of commodification, both explicitly – by creating

¹⁴⁷ Lessig (2008), p. 93.

¹⁴⁸ Fleischer (2017), p. 150.

¹⁴⁹ Morris (2012), p. 852.

¹⁵⁰ Ibidem. p. 855.

tools that ultimately make the commodity a more sellable thing – and implicitly – by creating tools that eventually allow for greater data tracking, surveillance and cybernetic commodification in general.¹⁵¹

Throughout this thesis I have made use of multiple services that rely strictly on the input of its users, most notably WhoSampled.com and Discogs.com. Although the former is discussed within the first chapter, the latter still needs some introduction. Essentially compiling discographies, users can upload as much information about a sound object as they wish (from barcode to credits or matrix codes as found on the disc of a CD or run-out groove of a record). Next to the discography feature, the website also maintains a marketplace, where buyers and sellers exchange second hand sound objects. Although strictly speaking they do not belong to a song's metadata, it can be argued that websites such as WhoSampled.com and Discogs.com help market the musical product and assist in creating the product more sellable, adding to the commodity's use-value. These websites can however also be used for data tracking and surveillance when it comes to copyright infringement.

An example of this is when in August 2017, Discogs adopted an increasingly hard stance towards copyright infringing material, removing bootlegs, live concert recordings and other unofficial and unlicensed material from its marketplace. As Discogs' COO Chad Dahlstrom explained, this removal was to stop the selling of counterfeit products in their marketplace adding that: "Edits, remixes, and mash-ups are a little more tricky because only the copyright holder and the creator knows whether or not the underlying tracks were cleared properly."¹⁵² Discogs honours the removal of sound objects from their marketplace when in violation with copyright, and although Dahlstrom comments sound slightly reassuring, it is possible for copyright holders to ask for a removal when proven a sample is used without permission or license. Dahlstrom admitted that the attack on counterfeits in the marketplace was a result of legal consequences webstore Amazon faced.¹⁵³ Through litigation and legal intimidation, companies such as Discogs are forced to comply to the copyright holders terms, showing once again that licensing has made itself essential, further pushing sample-based music to the fringes of the music industry.

4.6 *Monopoly through copyright.*

Concluding this chapter, I would like to refer back once again to Hesmondhalgh. This thesis started with his claim that copyrights have become the main means of commodifying a culture. Throughout this chapter I have taken his balanced approach to the process of commodification, possessing the ability to be either productive and enabling or destructive and limiting as a starting point. Hesmondhalgh correctly observes that "commodification spreads a notion of ownership and property as the right to exclude others."¹⁵⁴ This relates to copyright and the protection thereof. However, ideas and expressions are not subjectable to natural scarcity, and "the notion of ownership and property as the right to exclude others" is used in this instance to create artificial scarcity, which limits access.

¹⁵¹ Morris (2012), p. 856.

¹⁵² Helfet, (2017).

¹⁵³ Ibidem.

¹⁵⁴ Hesmondhalgh (2013), p. 70.

Contrary to this regime of exclusion stands the argument that ideas and expressions are not necessarily subdued or harmed when used by someone else. However, past court cases have established a take on sampling that overlooks this aspect, and automatically places it as harmful to the original song, dismantling the notion of fair use in the process. The previous chapter argued, through Vaidhyanathan and Lessig, that extensive copyright protection could lead to monopolies, which is seen as undesirable because monopolies evade the competition of the marketplace, whilst making itself essential to production.¹⁵⁵ This can be argued for sample clearance, as past cases have ruled that licenses are essential, or otherwise it can be rendered an illegal activity, with even arrest as a consequence. This has granted copyright holders to set their own, sometimes ridiculously high prices and constraining terms on the clearance of samples. However, this should come with an important footnote. As is argued in the introduction of this thesis, by taking the extensive use of copyrighted material by the Madlib Invazion label as example, it should become somewhat clearer what is permitted by copyright law and what is not. As already pointed out, the law prescribes licensing, and therefore renders every unlicensed sample use illegal. However, the law does not actively engage in such topics, because copyright holders themselves are responsible for going after the infringement of their copyrights. As a practice, sampling makes for highly individual and context reliant cases, where one copyright holder agrees on sampling but the other does not. In this aspect, every copyright holder is capable of upholding his own monopoly on his copyrights. Regarding this aspect, it is sensible that sampling producers and their record labels often release unlicensed material, and take the risk of litigation for granted, because there is a chance either the copyright holder tolerates the use or does not find out.

Although it is hard to exactly estimate this is the case when it comes to the sample use as released on Madlib Invazion, the credits on Freddie Gibbs & Madlib – *Pinata* (2014) do hint at the fact the label licenses once copyright holders actively go after their rights. As stated in the introduction, *Pinata* is the only record in the label's catalogue that makes mention of the use of copyrighted material. In the album's credits the following is mentioned:

Thuggin' contains a sample of *Way Star* performed by Rubba, used courtesy of De Wolfe, Limited. All rights reserved. *Deeper* contains a sample of *A Fool For You* [performed] by The Ledgends, used courtesy [of] Curtis McCormick.¹⁵⁶

In the run up to the release of *Pinata*, the label released three singles in advance, namely *Thuggin'* (2011), *Shame* (2012), and *Deeper* (2013). As the credits to *Pinata* point out, the copyright holders of the samples used in both *Thuggin'* and *Deeper* demanded a form licensing that at least included their mention in the credits. The singles of *Thuggin'* and *Deeper* as released in advance of the album however, do not list any use of copyrighted material, possibly hinting at the fact the copyright holders actively sought out Madlib Invazion after the singles were released, and prior to the production of the *Pinata* album.¹⁵⁷

¹⁵⁵ Vaidhyanathan (2001), p. 23, 24.

¹⁵⁶ *Pinata* (2014).

¹⁵⁷ *Thuggin'* (2011), *Deeper* (2013).

Although Madlib Invazion can be described as an artist endeavour, the label's production is handled by Eothen Alapatt.¹⁵⁸ Next to Madlib Invazion, Alapatt also runs Now Again, a label specialized in re-issuing music, a practice that also demands the proper license is in place. Through these activities, Alapatt also represents artists whose music is sampled, or licensed for the use in movie soundtracks or commercials.¹⁵⁹ In McLeod and Dicola (2011), Alapatt articulates his stance on sampling and licensing:

I'm torn between the laws that prevent people from sampling music because they can't afford to do it – because there's no set guideline to what the person who's being sampled will charge; what the publishers will demand in terms of a writer's split; down to what percentage of mechanical royalties need to be paid. (...) I represent a lot of these old musicians who are broke and need money and should be paid when their music is sampled. So I feel like there's something about sampling – which in and of itself is very beautiful and leads people like myself, and people younger than me, to get into it. But there's also the financial implications of it. And I fall into that weird grey area where I say 'Yeah, some of this stuff is fine. Sample away if you're doing it on an independent because who can afford to pay for samples on an independent level?' and part of me is like, 'Well, everybody can afford to pay.' It's just a matter of how much and how reasonable the person being sampled is.¹⁶⁰

Alapatt's nuanced comment points out that although the law renders sampling illegal if done without permission or license, in practice it is often reliant on the person that is sampled, and his or her demands. However, an important side note must be added. The samples as used in *Thuggin'* and *Deeper* are taken from obscure, independently released sources. In these cases, it is often easier to point to the positive aspects sampling can have: how can you effect a song's position in the market if through its obscurity it previously was not in the market at all? Alapatt's comments can be used in order to nuance the notion of copyright as monopoly, but nevertheless point to the fact that without guidelines, sampling clearance is an unpredictable process.

In his comments, Alapatt refers to both 'publishers' and 'musicians,' which is an important distinction. Scholars point to the fact that copyright has not only failed hip hop producers who want to sample, but musicians also. Copyright has become such a valuable asset to the record industry, as Toynbee writes: "that industry control over the means of exploiting music leads to a situation where most writers and composers are forced to sell their copyright. No-one can make it without a publishing deal, something which always involves the assignment of rights."¹⁶¹ In addition, Lessig writes that copyright is "not speaking for those who create, but those who hold massive amounts of copyright."¹⁶² By holding massive amount of copyright, a concentration of capital is created. As already pointed out in the previous chapter, record

¹⁵⁸ Madlib (2016).

¹⁵⁹ <https://www.nowagainrecords.com/licensing/> [24 Jun. 2018].

¹⁶⁰ McLeod, Dicola (2011), p. 111.

¹⁶¹ Toynbee (2004), p. 124.

¹⁶² Lessig (2001), quoted in: Firth & Marshall (2004), p. 5.

labels and publishing companies who represent many copyrights have the economic and legal resources to go after unlicensed sample use, for which the law supports them by articulating an extensive view of copyright protection. So, while sampling clearance is a very unpredictable and context reliant practice, intimidating creators through the risk of litigation allows copyright holders who hold many copyrights to outprice emerging and unestablished artists, essentially monopolizing their licenses.

If we return to Marx, the concentration of capital is seen as destructive to the market relation between commodities. In true dialectic fashion, for which Marx argued for the end of capitalism, monopolies represent the contradictory nature of capitalism. If such concentration of capital leads to one person or company within the market possessing all the capital, capitalism becomes in conflict with itself. There can no longer be a realistic exchange value as the monopoly undermines the market relation, making a halt to further wealth creation.¹⁶³ Analysing licensing for sample use as a commodity asks for much nuance, because of the highly individual cases. However, throughout this thesis I have tried to point out that copyright has become more extensive and stronger throughout the years, partly because of the concentration of capital. Therefore, even individual cases in which an obscure, independent artist is sampled, a very strong copyright is triggered that overlooks the positive aspects of sampling, which adds to the uncertainty and risks in producing sample-based music.

¹⁶³ Reuten (2017), pp. 45, 46.

5. Conclusion.

On its first release, *Madlib Medicine Show #1: Before the Verdict*, Madlib Invazion proclaimed to produce, market and release music “with little concern for the traditional norms of the commercial record industry.” It can be seen as a mission statement for the label, and reflects the neglect of copyright through the label’s extensive use of samples, which is resonated in much of the label’s collage artwork that graces the covers. This mission statement comes with the addition: “except for this barcode.”¹⁶⁴ This tongue-in-cheek message points to the paradox in releasing sample-based music. On one side, the music as found on the label is overflowing with samples, as if wanting to infringe and violate as many copyright laws as possible. If copyright is to be regarded as the main means by which a culture becomes commodified, Madlib Invazion is surely not wanting to take part in that process. On the other hand, the musical products as issued on Madlib Invazion function as commodities themselves. By including a barcode, as the message already suggest, the label complies to a traditional norm of the commercial record industry. Moreover, a barcode’s function is to regulate the flow of products, allowing authorities to trace a product back to the manufacturers. The title *Before the Verdict* seems aptly chosen, because it is quite a bold move to put a barcode on a product that features such extensive, presumably unlicensed sampling. As if leaving a name-tag after committing a crime. The point is however, sampling was not always considered a crime, and throughout this thesis I have hoped to have given sufficient arguments for why it is unfavourable to consider it so. Fact remains however, that by releasing sample-based music without the proper license, labels know they are infringing someone’s copyright. This supposes a different approach and release tactics, and perhaps a different relation to commodification altogether.

5.1 *Sampling practice and commodification of music in Madlib Invazion.*

The outset of this thesis was to map, formulate, and critique the current stance of copyright law on sampling by viewing copyright as a means of commodification. For this, I took Hesmondhalgh’s definition of commodity as a starting point, as being a process that is either productive and enabling, or destructive and limiting. Researching the process of the commodification in music however, suggests a more demarcated, and object-based approach. As is suggested in Taylor, “one can only speak of particular ways and circumstances in which music becomes a commodity, and specific historical nodes in the complex history of the commodification of music in a particular culture.”¹⁶⁵ When singling out a particular way or circumstance in which music becomes a commodity, sample-based music, as is the music released on Madlib Invazion, presents itself as problematic: is the copyright license to clear the sample or the end-product that presents the sample-based song the circumstance in which music becomes a commodity? As outlined in the introduction, I have chosen for the latter, because by studying the sample-based song, and the sound object turned musical product that includes it, a more complete understanding of the copyright’s stance towards sampling is formed. In other words, by only studying the license to clear samples as a circumstance in which music becomes commodified, unlicensed sampling is not taken into account.

¹⁶⁴ *Madlib Medicine Show #1: Before the Verdict*. (2010).

¹⁶⁵ Taylor (2007), p. 302.

This places the sample-based music at the heart of this thesis' research. In doing so, it has proven two things. As the research conducted within this thesis shows, Madlib as a producer does not apply to the rules as described by Chang, because the samples as used in *From Trouble They Know Me* show no signs of strictly using vinyl as sample source. Regardless, sample-based music is capable of addressing its use of samples, and traces of the origin can be found, as is shown through the use of samples in *From Trouble They Know Me* and *Interlude (Vision Complete)*. As a consequence, the audience knows it is listening to music that has an origin within an earlier sound object now used as source. Through this, the hip hop producer is capable of disrupting, constituting or reimagining the logic of archival memory, as happens through *Beat Konducta in Africa*, an album centred around African music, but invested with a sense of Pan-Africanism. The audience however, has its own logic of archival memory. This is mainly invested in restoring the disrupted relation between a sample and its origin, by disclosing and sharing the sources used.

Secondly, when sound objects turn to musical products, they present a number of rules and regulations. Most importantly, copyright has extended in such a way that fair use can be seen as dismantled, and sampling requires a license. Not complying to these regulations can lead to legal actions, as the arrest of DJ Drama showed. Next to violating copyright laws, his mixtapes CD's did not comply to listing the proper information as regulated through rules such as the OCGA. This shows that musical products come with a host of data around them, either in analog terms referred to pretext, and in digital terms, metadata. As object of study, this data should be taken into account as it can hint at the usage of copyrighted material, as is the case with *Pinata*. If we broaden the notion of metadata and also include websites such as WhoSampled.com, the usage of copyrighted material becomes more evident. Whilst the disclosure of the original sound sources used can enlarge the market of the original song, this metadata can also be used for tracking down copyright infringers, creating a higher risk for litigation.

It is important to understand that the clearance of samples is a highly individual and context reliant affair. Therefore, musical products only vaguely hint whether the samples used have been licensed, because it does not list the demands or price at which the sample is cleared. This problematizes the analysis of copyright as a means for commodification. Because of this, I have used the standard amount as listed in Théberge and McLeod and Dicola, which places the average costs of licensing between the 1,000 and 5,000 US Dollars. The highly individual character of sample clearance does however support a more general claim. The lottery system that sample licensing and clearance has become, with some salient outcomes such as arrest, create an unpredictable and unfavourable environment for independent artists. This could be regarded as creating a disincentive for the use of (unlicensed) samples, but as Lessig points out, it only leads to criminalization and not prevention. Most important, the hostile and intimidating stance of the record industry towards the use of samples overlooks the positive aspects of sampling as a form of cultural engagement.

Both the anthropology approach of Appadurai and Kopytoff as the Marxian approach to commodification have their shortcomings when applied to music production and sample use. However, one thing that is made clear by both approaches, is that if copyright is regarded as a means to commodify a culture, the necessity of licensing shows that the sample-based song cannot escape being commodified. Even if the sample-based song presents itself without any

price or advertisement, it turns into a weird anti- or mirror commodity because it is argued that through the copying of pre-recorded material, infringement is done, regardless of how transformative the sampling is, and perhaps more importantly, the possible positive effects a sample can have. As with the arrest of DJ Drama, the fact that sampling producers make profit of their music only seems to amplify this infringement, but it does not have to be the sole reason for litigation – i.e. copyright has become so extensive it is capable of litigating those who do not make any profit of their infringement.

5.2 *A note on the method, self-reflection and suggestions for further research.*

As outlined within the introduction, the issue of sampling copyrighted material and turning the sample-based song into a musical product, as happens on the Madlib Invazion label, can be tackled from various angles. In order to do so, I have chosen to divide my theoretical framework into three different aspects, namely sampling, copyright and the process of commodification of music. From this division, I abstracted the structure of this thesis, with each aspect its own chapter. However, it was not always easy to demarcate these different theories concerning my research question. At times, the aspects intertwined, as happens mostly throughout chapter three, which deals with the issue of copyright and sampling. The aim of this chapter was to map and analyse the current stance of copyright law towards the use of samples, but in doing so, it foreshadowed a problem that was more concerned with commodification of music than with copyright. This made it challenging at times not to jump to conclusions and stick to my method.

The method I abstracted from this theoretical framework aims to study selected releases on the Madlib Invazion label, list how they make use of samples and research how they are subject to the process of commodification. In studying the use of samples, I was able to draw on musical analysis, which helped me list how various musical parameters shifted through the practice of sampling. However, I could only carry out such analysis once I knew the original source as used by Madlib. Although I was able to trace down various sources and could rely on a handful of websites dedicated to disclosing the original sources used such as WhoSampled.com, this limited me in selecting case studies. Further limiting my research was the highly individual and context reliant nature of musical copyright. As the dispute over the use of Bob James' *Nautilus* in the Madlib produced Quasimoto – *Sparkdala (Original Version)* shows, sample disputes tend to settle before going to court, which leaves little information for research. I have tried to solve this problem by dealing with other copyright-related case studies that held more public information within the third chapter, but still this set a hard limit to my research. However, as stated above, the fact that sample disputes are settled before entering court also points towards the unpredictable nature of sample clearance, for which no system or set of guidelines are in place.

Perhaps the biggest challenge was analysing the sample-based song as a commodity. The various texts upon which my research draws, predominantly Taylor, Toynbee, Théberge and Fleischer, all deal with the musical product as commodity in a different way. For this reason, I chose to use Fleischer as a starting point, because it is the most recent article, but above all makes use of both a Marxian approach as well as the anthropology approach to the commodification of music. For my method, I felt it was best to copy Fleischer in analysing the commodification of music through both the aforementioned approaches, instead of favouring

one above the other. This because, as is argued in Fleischer, a more complete understanding of the musical product as commodity is formed. Furthermore, this allowed me to reconcile the findings that both these different approaches presented me with. Next to Fleischer, I used the texts of Toynbee and Théberge in order to comment on the role of copyright in commodification. As mentioned above, the aspects of copyright and commodification at times intertwined or overlapped, which confirms copyright's role as main means of commodification. Despite these limitations, I have tried to form a thorough and complete understanding of how the sample-based song becomes subject to the process of commodification without losing too much of my focus.

In a way, releasing sample-based music has become somewhat of a hide and seek game. It can be argued that sampling is discouraged through the high costs that come with licensing, and the risk of litigation when not complying. However, labels such as Madlib Invazion show that despite criminalizing sampling, it is not prevented, and artists and labels have tried to find their way around the constraints of the law. One of those ways is by employing a more 'underground' way of releasing. However, this mode of releasing is quite hard to define, as it is often hard to determine whether a musical product is released with the proper licensing in place. One other way is by obscuring the sample use by transforming it until it is unrecognizable. Madlib however, commented on his sample use that he does not mind leaving his source intact. His use of samples however, does point to another tactic in order to minimize risk of litigation. The Bernard Wright sample notwithstanding, the samples discussed throughout this thesis are all released by small, independent labels, and fallen into obscurity over time. By taking from such obscure sources, the producer knows he or she is evading the large and powerful publishers and record labels. As a result, sampling from obscure and forgotten music only contributes to the positive aspects to sampling, where such music is being (re)introduced into a larger audience, and communities are formed concerning the disclosure of the original as used.

There are however also other ways of dealing with the hostile stance of copyright law towards the use of samples. Within this thesis I already shortly touched upon the topic of allosonic quotation, which does not trigger the copyright connected to the recording. As a suggestion for further and future research, it would be interesting to map the use of samples or autosonic quotation in music as opposed to allosonic quotation, as a means to deal with the high costs in licensing rights. The current stance of copyright law on the use of samples as described within this thesis can indeed be called hostile, but ultimately, the decision to litigate is up to the copyright holder. There are plenty examples of copyright holders who are open to the use of their material and applaud the use of their music through sampling. It would be interesting to see what musical projects this welcoming stance towards the use of samples has brought about. Furthermore, by looking into copyright holders' motives either for or against the use of their music through samples, the either positive or negative effects of sampling practice are discussed.

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