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Illegitimate Media:
Race, Gender and Censorship in Digital Remix Culture

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Abigail T. Derecho

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ABSTRACT

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Abigail T. Derecho

In 2008, the term "remix culture" is widely understood to refer to mash-up videos and movie parodies, distributed on websites such as YouTube and authored primarily by white male teenagers. This dissertation argues that digital remix was invented primarily by African American men, who, in the mid-1980s, began using digital samplers to cobble together pieces (or "samples") of existing recordings to form new sonic compositions, and by white American women, who, in the early 1990s, formed online communities on Usenet groups to share fan fiction (fanfic) – stories based on their favorite characters from television and film texts. In other words, digital remix culture was pioneered largely by communities that had long been (and continue to be) marginalized by mainstream mass media industries.

Both digital sampling and online fan fiction were censored soon after they appeared. In the case of sampling, censorship was imposed from forces outside the music industry, by a New York District Court, which ruled in 1991 (five years after digital sampling began) that all unlicensed sampling was equivalent to theft. In the case of fan fiction, censorship was imposed from within fanfic communities, as peers' negative reactions to explicitly sexual content caused writers to cease posting such content. I argue that the constraints and limits imposed on early digital remix production, from without and within, were the direct result of the Culture Wars that raged in the U.S. during the eighties and nineties. The Culture Wars consisted of numerous

battles regarding representations of race, gender, class, and sex. Although sampling and fan fiction did not loom large in the public's consciousness during these years of heated debate, both forms of remix were closely associated with social groups and cultural forms – inner-city black youth culture, rap music, and pornography – that came under attack in this period. The censorship to which early digital remix was subjected was a mere by-product of larger conflicts in American society, but the ramifications of these early restrictions, including the status of remix production as, for the most part, illegal, artistically illegitimate, and incapable of yielding financial benefit for its makers, persist today.

ACKNOWLEDGEMENTS

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THE AGE OF REMIX

Remix culture's practitioners make extended dance mixes of popular songs, "sample" (that is, extract fragments from) songs and incorporate the sampled excerpts into new songs, and produce cover versions of songs; they create fan productions, such as re-cut trailers, re-enactments, fan fiction, fan art, fan films, fan vids, game mods, and machinima, which are all expansions or alternative versions of mass media texts; they make mash-ups of songs, music videos, films, television shows, and video games; they disseminate their creations in person (trading mixtapes or CDs or flash drives) or through the postal service (mailing out fanzines or edit tapes) or via digital networks (posting on, or uploading to, or streaming through, Web message boards like Yahoo!Groups and communities like LiveJournal and blogs and individually-owned-and-operated sites and clearinghouse sites like YouTube). A producer of remix culture is anyone who transforms a cultural object and then makes that transformation public. A consumer of remix culture is anyone who listens to, watches, reads, or plays these transformed media texts. Producers and consumers of remix now number in the millions.

The popularity of remix culture, its penetration of everyday life in the U.S. and around the world, is so extensive today that several cultural critics and theorists call remix the defining cultural practice of the present historical moment. In recent years, the phrase "The Age of Remix" – the common context being, "We live in the Age of Remix" – has echoed across a wide span of media outlets. Here are some excerpts, in chronological order, from essays that have

crowned remix with the title of early twenty-first-century *zeitgeist*:

From Pete Rojas, *Salon.com*, August 1, 2002: "Pop culture in general seems more and more remixed – samples and references are permeating more and more of mainstream music, film, and television, and remix culture appears to resonate strongly with consumers. We're at the point where it almost seems unnatural not to quote, reference, or sample the world around us....To the teens...recombination – whether legal or not – doesn't feel wrong in the slightest. The difference now is that they have the tools to sample, reference, and remix, allowing them to finally 'talk back' to pop culture in the way that seems most appropriate for them....In a world of constantly recycled sounds and images, bootleg culture is no aberration – it's part of the natural evolution of all things digital."[1]

From Bernard Schütze, *HorizonZero*, April/May 2003, in the "remix: generate/regenerate" issue: "[W]e are clearly living in a remix culture: a culture that is constantly renewing, manipulating, and modifying already mediated and mixed cultural material....[There were] many forerunners of remix culture....The fundamental difference between these previous forms and the remix is that the latter does more than gather, juxtapose, or rearrange preexisting materials: It actively transforms and reworks these elements in a way – and to an extent – that was not possible before. This is largely due to the creative harnessing of electronic and digital technologies, as well as to the cultural climate of an ailing postmodernity."[2]

From the Introduction to the "Remix Planet" issue of *WIRED* magazine, July 2005: "Have you noticed? Everywhere you look, pop culture has been digitized, resequenced, and

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[1] Pete Rojas, "Bootleg culture," *Salon*, 1 August 2002, http://dir.salon.com/story/tech/feature/2002/08/01/bootlegs/index.html (accessed 29 November 2007).

[2] Bernard Schütze, "Samples from the Heap: Notes on Recycling the Detritus of a Remixed Culture," *HorizonZero* 8 (May 2003), http://www.horizonzero.ca/textsite/remix.php?tlang=0&is=8&file=5 (accessed 29 November 2007).

reassembled. Remixed. It started in music with hip hop samples and extended dance versions.

It moved to movies, with director's cuts and Tarantino-style swipes from other films. Now it's

spread to TV, games, music videos – even cars and fashion. From Kill Bill to Gorillaz, from

custom Nikes to Pimp My Ride, this is the age of remix."[3]

From Jon Pareles, *New York Times*, May 27, 2007: "[This is] the age of the sample, the

remix and countless YouTube parodies."[4]

From Lev Manovich, "What Comes after Remix," Winter 2007: "It is a truism today that

we live in a 'remix culture.' Today, many cultural and lifestyle arenas – music, fashion, design,

art, web applications, user created media, food – are governed by remixes, fusions, collages, or

mash-ups....If I had any doubts that we are living not simply in Remix Culture but in a Remix

Era, they disappeared right at [the 2005 O'Reilly Emerging Technology]

conference....[R]emixing...was made possible by electronic and digital technology....Remix

culture has arrived."[5]

Remix culture has recently been the subject of documentary films,[6] art exhibitions,[7]

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[3] "Remix Planet: Intro," *WIRED* 13.07, July 2005, http://www.wired.com/wired/archive/13.07/intro.html (accessed 29 November 2007).

[4] Jon Pareles, "The New Tributes, and an Old Single," *New York Times*, 27 May 2007.

[5] Lev Manovich, "What Comes after Remix?" Winter 2007, http://www.manovich.net/ (accessed 29 November 2007).

[6] See *Mixtape, Inc.*, dir. Walter Bell, 2005, and *Good Copy, Bad Copy*, dir. Andreas Johnson, Ralf Christensen, and Henrik Moltke, 2007.

[7] The exhibition "Illegal Art: Freedom of Expression in the Corporate Age," organized by *Stay Free!* magazine, toured several major American cities between 2002 and 2006 (and the Illegal Art website, http://www.illegal-art.org, contains references and links to many remix productions of various genres); the "Airs de Paris" exhibition at the Centre Pompidou in Paris (April-August 2007) titled one of its sections "Un autre espace urbain, remix et utopies"; Jon von Seggern, while at the University of California – Riverside, designed and curated an online exhibition called "Postdigital Remix Culture and Online Performance" (http://ethnomus.ucr.edu/remix_culture/index.htm). A list of contemporary artists who frequently employ remix techniques and currently exhibit work in galleries and museums would be too long to list here, but notable examples are Jun Yang, Rico Gatson, and Paul D. Miller (a.k.a. DJ Spooky).

professional and academic conferences and initiatives,[8] and a healthy amount of scholarship.[9]

However, despite remix's ubiquitousness in popular, artistic, and scholarly circles, a haze of

uncertainty and indeterminacy still surrounds it: What, exactly, *is* "remix"?

DEFINING REMIX

The broadest definition of "remix" might be "textual appropriation,"[10] which implies

more than imitation, or rather, "more-than-imitation," "imitation *plus*." An appropriation of an

existing text repeats the text, at least in part, and modifies, augments, revises, re-contextualizes,

transforms, and/or translates the repeated text. As I have suggested elsewhere,[11] textual

appropriation, or remix, exemplifies Gilles Deleuze's concept of "repetition with a difference,"

not only in the sense that an act of textual appropriation *is* a repetition of a source text with some

sort of differentiation or distinction made from the source, but also in the sense that Deleuze uses

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[8] The theme of the 4th Annual (2005) O'Reilly Emerging Technology Conference, referenced by Manovich, was "Remix." In March 2006, the Center for Internet and Society at Stanford Law School organized a symposium called "Cultural Environmentalsim at 10," which explored questions of how public domain has become increasingly difficult to preserve, and how the current legal climate constrains cultural appropriation. The theme of the 2007-08 John Hope Franklin Humanities Institute Seminar at Duke University is "Recycle." MIT's Convergence Culture Consortium has organized two "Futures of Entertainment" conferences (in 2006 and 2007) that have facilitated analyses of the interplay of fan productions and mainstream media productions. In February 2008, USC's Institute for Multimedia Literacy (in the School of Cinematic Arts) is hosting "24/7: A DIY Video Summit," which will feature screenings of DIY video, including remix video genres such as fan vids, machinima, and political remix, as well as academic panels and workshops on intellectual property and new media design tools.

[9] See Nicholas Bourriaud, *Postproduction* (New York: Lukas & Sternberg, 2005); Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (New York: Penguin, 2005); Lev Manovich, "Remixability," http://www.manovich.net/DOCS/Remix_modular.doc,October-November 2005 (accessed 29 November 2007) (in addition to the Manovich essay cited above); Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York: New York University Press, 2006); and Kembrew McLeod, *Freedom of Expression: Resistance and Repression in the Age of Intellectual Property* (Minneapolis, MN: University of Minnesota Press, 2007), as well as other works in the Bibliography.

[10] I use the phrase "textual appropriation" to distinguish this form of appropriation from that usually associated with the economic appropriation regularly practiced by capitalists regularly described by Marxist theorists. [make some reference to such allusions here] There is, without doubt, a relationship between capitalist economic appropriations and textual appropriations, but my concern in this section of the is to define "remix" as clearly as possible, without digressing too far into remix culture's economic and Marxist implications just yet. Therefore, the form of appropriation to which I refer in this paragraph is not labor surplus appropriation, but specifically textual appropriation.

[11] Abigail Derecho, "Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction," in *Fan Fiction and Fan Communities in the Age of the Internet*, ed. Karen Hellekson and Kristina Busse (Jefferson, NC: McFarland, 2006).

"repetition with a difference" to name what he perceives to be a pervasive drive in contemporary thought and artistic production, just as I (and many others) regard remix a (if not *the*) characteristic cultural practice of our day (which I discuss in greater detail below). In his Preface to *Difference and Repetition*, first published in 1968,[12] Deleuze writes that "The subject dealt with here is manifestly in the air...[in] the structuralist project...; the contemporary novelist's art which revolves around difference and repetition...; the discovery in a variety of fields of a power peculiar to repetition, a power which also inhabits the unconscious, language and art."

One of Deleuze's primary concerns in *Difference and Repetition* is to break with the long tradition in Western philosophy of clearly demarcating identity from its negative, identity and contradiction. Philosophy has long conceived of representation as identity, with anything less-than-the-identical (the securely and sharply delimited Same) or contradictory-to-the-identical being subordinate, but recent circumstances – that is to say, modern life and modern(ist) art – have rendered such a demarcation untenable. "[M]odern thought is born of the failure of representation, of the loss of identities....The modern world is one of simulacra....All identities are only simulated, porduced as an optical 'effect' by the more profound game of difference and repetition."[13] Deleuze suggests two concepts to replace the worn-out tenets of pre-modern thinking: the first is "difference without negation," and the second is "a concept of repetition in which physical, mechanical or bare repetitions (repetition of the Same) would find their *raison d'être* in the more profound structures of a hidden repetition in which a 'differential' is disguised and displaced....The simulacrum is not just a copy, but that which overturns all copies by *also*

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[12] Gilles Deleuze, *Difference and Repetition*, trans. Paul Patton (New York: Columbia University Press, 1994). First published as *Différence et Repetition* (Paris: Presses Universitaires de France, 1968).

[13] Ibid., xix.

overturning the models: every thought becomes an aggression."[14] In other words, neither

identity nor difference is primary, and neither the Same nor its repetition is primary. Rather,

difference and repetition "correspond closely,"[15] they are two forces or tendencies

simultaneously at work in much of modern thought, life, "language and art." Deleuze's

intertwining of the concepts of repetition and difference therefore provides an excellent starting

point for defining "remix," for it is the echo-of-the-Same, the aspect of copying, coupled with the

"twist," the "fresh take," the "new light," added or imposed or inserted or laid-over by the remix

version that seems to be the most salient shared quality of all the texts that can be said to belong

to the remix genre.

The historical context in which Deleuze wrote of repetition and difference then prompts

this question: Does "remix" refer to the same set of cultural and textual objects that inspired

Deleuze's research in France in the late 1960s, or does it refer to some more recent

phenomenon? I have included the phrase "Digital Remix Culture" in this project's title; is the

reader to infer that Remix Culture manifests only through digital technology, or is Digital Remix

Culture to be thought of in opposition or contrast to non-digital and pre-digital Remix Cultures?

I do see a continuity between Deleuze's objects – modernism and postmodernism's key ideas

and artifacts – and Digital Remix Culture, and given that, remix might be thought of as a very

old and persistent philosophical, cultural, and artistic tradition, one that in fact dates back to

times much earlier than the modern era, to the earliest human societies, textual appropriation

being a core creative method in oral cultures and in (for example) ancient Babylonia, Greece,

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[14] Ibid., xx.

[15] Ibid., xx.

and Rome, in which producing variations of myths was a common cultural practice. On the other hand, the word "remix" emerged from late 20th-century U.S. music production, and therefore seems to designate more recent texts than allusion-filled modernist masterpieces like T.S. Eliot's *The Waste Land* or James Joyce's *Ulysses*. Although Eliot and Joyce's works might be considered remixes of the Grail legend and Homer's *Odyssey*, respectively, the term "remix" in these cases seems too retroactively applied to be the best descriptor, and the same logic precludes, in my opinion, "remix" from being linked to other early twentieth-century appropriation-based movements such as Dada and Surrealism. What texts, from what time, then, can we fittingly call "remixes"?   In the late sixties, at the time of Deleuze's writing *Difference and Repetition*, postmodernism was already in high vogue. Jasper Johns completed his *Flag*, an appropriation of the U.S.'s national symbol, in the mid-fifties and became famous for it by the end of that decade; Andy Warhol began painting his iterations of Campbell's soup cans and celebrity portraits in the early sixties, and by 1968, these variations on and re-workings of familiar icons had launched Warhol as a star and Pop Art as a movement.

Closer to Deleuze (and, I think, informing his *Difference and Repetition* project) was the French Situationist movement and its strategies of appropriation. In 1958, the Situationists founded their magazine, *Internationale Situationniste*, in which they promoted their views that culture and everyday life must not be experienced as separate spheres, and that every individual in everyday life can and must be an artist; in 1967, two Situationist masterworks, Guy Debord's *The Society of the Spectacle* and Raoul Vaneigem's *The Revolution of Everyday Life*, publicized the concept of *détournement*, or re-routing existing events, spaces, images, and words (in *Society*, Debord made famous the phrase, "Plagiarism is necessary," which Debord plagiarized

from Isidore Ducasse's 1859 *Les Chants de Moldoror*),[16] and Situationist philosophy played a large role in the May 1968 protests. The style of appropriating existing texts in order to parody, resist, and ridicule them, or, alternatively, to praise and honor them, did not die out when the May '68 protests did, but swelled into the postmodern period chronicled and critiqued by Robert Venturi[17] and Frederic Jameson[18] in the late 1970s and early 1980s. The history of digital remix begins with the invention of digital sampling in the mid-eighties, right on the heels of – indeed, in the thick of – postmodernism as described by Venturi and Jameson.

Because the postmodern period began (in the genealogy I have just given) with Pop Art and Situationism in the fifties and continued and expanded without break throughout the sixties, seventies, and eighties, and because digital remix (and the term "remix") started in the eighties, I consider "remix culture" to be, if not precisely synonymous with, then a significant subset of, "postmodern culture." DJs and record producers may not have put the word "remix" into circulation until the mid 1980s, but they were describing a method of making that had already been in wide circulation for thirty years. One can say, then, either that postmodern appropriations were remix *avant la lettre*, or music producers invented the term "remix" to describe, somewhat after-the-fact, a postmodern style of appropriating. Even though a "remix" had never technically been done before the mid-eighties, remixing was a logical adaptation of postmodern styles of creativity to the music industry. If anyone were to claim that DJs and producers from New York's boroughs and inner cities in the mid-eighties were unaware of

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[16] Bureau of Public Secrets, http://www.bopsecrets.org/SI/detourn.htm (accessed 29 November 2007).

[17] Robert Venturi, *Learning from Las Vegas: The Forgotten Symbolism of Architectural Form* (Cambridge, MA: MIT Press, 1977).

[18] Frederic Jameson, "Postmodernism and Consumer Society," in *The Anti-Aesthetic: Essays on Postmodern Culture*, ed. Hal Foster (New York: The New Press, 1998). This essay was written in 1982.

postmodern styles, I would retort that hardly anyone at that time, anywhere in the U.S., could

have been totally unaware of postmodernism; at the very least, the American advertising industry

by the 1980s was making thorough use of postmodernist collage,[19] and even more relevant to the

inventors of sampling and remix, the Music Television (MTV) cable channel launched in 1981,

broadcasting postmodern visuals to music fans of every race and income level across the nation,

approximately five years before the birth of digital sampling.[20]

I therefore define remix as a subset/outgrowth/development of postmodernism.

However, according to U.S. law and most U.S. university curriucula, postmodernism is clearly

distinct from remix. The charge of "mere copying" haunts remix culture today, while for the

most part, postmodern art has escaped or overcome this charge. That postmodern works which

appropriate copyrighted images, such as Warhol's Brillo boxes or Robert Rauschenberg's

assemblages, do *not* currently have the legal status of unauthorized duplications or reproductions

– that is, the status of stolen goods[21] – while works made with sampling and other digital remix

techniques are considered to be illegally-made copies, is due to the difference in the cultural

capital that has accrued to postmodern texts vs. remix texts. Postmodernism is currently

recognized as a high-art movement, and is now located at the end of the series of acknowledged

high-art movements (after Classical, Medieval, Renaissance/Baroque, Romantic, and Modernist),

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[19] Deleuze claimed, "[O]ur advertising...is fed by postmodernism in all the arts and inconceivable without it" (Ibid., 124).

[20] One can argue that "remix" was coined before MTV, as early as the late 1970s, when DJ Kool Herc began isolating the breakbeats of records to make extended dance "mixes" of songs. It is uncertain when or exactly where the term "remix" originated, but even if one subscribes to the theory that "remix" predates MTV, postmodernism had already saturated U.S. popular culture by the late seventies, and therefore one must acknowledge that there is a strong likelihood that Kool Herc and other DJs who pioneered mixing and remixing were influenced by postmodernism to some extent.

[21] The exception is Jeff Koons's "String of Puppies" (1988), a sculpture which copies the composition and subject matter of a copyrighted photograph (which Rauschenberg found printed on a postcard) by Art Rogers. In 1992, the U.S. Court of Appeals for the Second Circuit ruled in *Rogers v. Koons* that Koons's work did not constitute a parody, and therefore was not an instance of fair use. However, a court judgment in a later case involving a Koons work seems to reverse the *Rogers v. Koons* ruling, as I discuss later in this chapter.

each movement having its own set of canonical *chef d'œuvres* and genius creators (Warhol and

Rauschenberg are two such geniuses in the postmodernist canon). Remix, on the other hand, has

no comparable cultural cachet. When academic scholarship or cultural criticism does grant

remix a measure of prestige, it is in studies that examine remix from a sociological or otherwise

ethnographic perspective; that is, remix texts are sometimes thought to be of interest as

manifestations of audiences' active engagements with media, but hardly ever are they regarded

as exemplars of aesthetic value. Remix's lowbrow cultural production would seem to account

for its degraded place under the law and in the academy, although postmodernism, too, has

spurred lawsuits – both Warhol and Rauschenberg were sued for copyright infringement,

although the Warhol case was dropped and the Rasuschenberg case was settled out-of-court.

The difference between the law's treatment of remix texts and the law's treatment of postmodern

texts is that remix has, with rare exceptions, been consistently judged to violate copyright laws,

while postmodernism has, with rare exceptions, either avoided court rulings altogether (thereby

preventing a pile-up of precedents declaring appropriative postmodern art to be illegal) or been

found to constitute fair use.

REMIX VS. POSTMODERNISM

Two court decisions, *Cambpell v. Acuff-Rose Music* and *Blanch v. Koons*, illustrate this

contrast well. The case of *Campbell v. Acuff-Rose* concerned the rap group 2 Live Crew's song

"Pretty Woman" (1989), which sampled the famous bass riff and the lyric "oh, pretty woman"

from the Roy Orbison rock hit of the same name without securing permission from the holders of

the song's publishing rights, Acuff-Rose. In 1994, the U.S. Supreme Court ruled that 2 Live

Crew's version was a parody, and the act of parody necessitates some copying (in order for the mockery to be legible to audiences). However, Justice Anthony Kennedy's opinion makes clear that the judgment in favor of 2 Live Crew must not serve as a precedent for future cases. Wrote Kennedy, "Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self proclaimed parodist. We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original....If we allow any weak transformation to qualify as parody...we weaken the protection of copyright....While I am not so assured that 2 Live Crew's song is a legitimate parody, the Court's treatment of the remaining factors leaves room for the District Court to determine on remand that the song is not a fair use. As future courts apply our fair use analysis, they must take care to ensure that not just any commercial take off is rationalized *post hoc* as a parody."[22]

The Supreme Court, therefore, did not set a precedent that sampling used in parodies constitutes fair use; Kennedy's opinion declares that the *Cambpell v. Acuff-Rose* ruling should *not* serve as a precedent for future sampling cases, by insisting that future courts must "not make it easy" for future sampling-based music producers to claim that their works are parodic, and must "take care to ensure that not just any commercial take off is rationalized *post hoc* as a parody." This last statement implies some suspicion on the part of the Court that producers who sample may be prone to retroactively classifying their works as parodies with the sole intent of avoiding legal action and punishment for copyright infringement. Sampling-based musicians are thus portrayed as likely evaders of the law, and Kennedy states that the Court will not allow their

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[22] *Campbell v. Acuff-Rose Music* (92-1292), 510 U.S. 569 (1994).

decision in the 2 Live Crew case to be used as a loophole. In the wording of Kennedy's opinion, the loop is tightly cinched against all future sampling artists; no precedent is set that allows them room to practice their art without fear of reprisal.

From the time that a lawsuit involving unlicensed sampling[23] was decided in a court of law – in the 1991 case *Grand Upright v. Warner Bros. Records*, which I will discuss at length in Chapter 1 – to the present day, no judge has found in favor of a recording artist or producer who has used a sample without paying a licensing fee. *Campbell*, the one exception to this rule of sampling law, was never intended by the Supreme Court to serve as a precedent for future sampling cases, and indeed, since the 1994 *Campbell* decision, courts have become increasingly harsh in their rulings against unlicensed sampling. In the 2004 decision in *Bridgeport Music v. Dimension Films*, the Sixth U.S. Circuit Court of Appeals determined that there can be no *de minimis* defense of sampling; in other words, no matter how small the sample used (in the *Bridgeport* case, the sample consisted of a two-second guitar chord, altered and looped), said the court, the producers using the sample must pay a licensing fee. The ruling reads, "If you cannot pirate the whole sound recording, can you 'lift' or 'sample' something less than the whole? Our answer to that question is in the negative....Get a license or do not sample. We do not see this as stifling creativity in any significant way."[24] *Bridgeport* did away with the one legal refuge for sampling-based producers who wished to avoid negotiating licensing fees, the minimal and unrecognizable sample. Wrote *USA Today* at the time of the ruling, "Lower courts had already ruled that artists must pay when they sample another artists' work. But it has been legal to use

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[23] A sample is called "unlicensed" in instances where the party using a sample does not pay any licensing fees to the parties that own the publishing or performance copyrights to the sampled song.

[24] John Gerome, "Court Says Any Sampling May Violate Copyright Law," *USA Today*, 8 September 2004.

musical snippets — a note here, a chord there — as long as it wasn't identifiable. The decision

[in the *Bridgeport* case]...gets rid of that distinction. The court said federal laws aimed at

stopping piracy of recordings applies to digital sampling."

Thus, *Campbell*, the only case in which judges declared unlicensed sampling to be fair

use, has so far stood as the only such case, a lone exception in a sea of court rulings against

unlicensed sampling. Far from setting a precedent for subsequent sampling cases, *Campbell* has

not caused judges of these cases a moment's hesitation as they have placed increasingly severe

constraints around the appropriative practice of sampling.

On the other hand, in the 2006 case *Blanch v. Koons*, which concerned the artist Jeff

Koons incorporating a portion of a copyrighted photograph into a collage-painting without

paying a licensing fee, the judges of the Second U.S. Circuit Court of Appeals not only declared

the unlicensed appropriation to be fair use, but explicitly stated that they based their decision on

Campbell. Judge Robert Sack's opinion quoted the wording of *Campbell* to explain that Koons's

use of the copyrighted photograph was "transformative" in that it "adds something new, with a

further purpose or different character, altering the first with new expression, meaning or

message." In interviews, Koons' attorney John B. Koegel revealed that he regarded the

Campbell ruling as a precedent applicable to his client's unlicensed appropriation. The *New

York Law Journal* reported, "The decision, [Koegel] said, was a further implementation of

Campbell. 'Campbell was an important moment in copyright law because that was where the

pendulum stopped, it had swung far too much in favor of copyright owners,' he said."[25]

Koegel's statement goes directly against Kennedy's warning in the *Campbell* opinion that

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[25] Mark Hamblett, "Artist Koons' 'Transformative' Use of Photo Affirmed by Second Circuit," *New York Law Journal*, 31
October 2006,   http://www.law.com/jsp/article.jsp?id=1162215323449 (accessed 29 November 2007).

Campbell must not serve as a precedent for later cases, but Koegel obviously argued

persuasively enough to the Second Circuit Court that they should take direction from *Campbell*.

Ironically, prior to *Blanch*, Koons had been the only practitioner of the appropriation-

based genre of Pop Art to have a court declare his work infringement. While Warhol,

Rauschenberg, and others managed to escape legal judgments on their acts of appropriation

altogether, the Second U.S. Circuit Court of Appeals ruled in the 1992 case *Rogers v. Koons* in

1992 that Koons' sculpture "String of Puppies," which Koons based on a copyrighted

photograph for which Koons paid no licensing fees, was not fair use, and therefore constituted

copyright infringement. For 14 years, *Rogers* stood as the one legal decision in the world of

high-market-value postmodern visual art that might have been considered a precedent for later

courts, but at least one artist – Joy Garnett, another appropriation artist represented in a past

infringement lawsuit by Koegel – wrote that the *Blanch* judgment in Koons's favor "reverses the

damage done" by *Rogers*.[26] Although Judge Robert Katzmann, one of the Second Circuit judges

on the *Blanch* case, told the *New York Journal* that "The facts of this case...were quite different

from those in *Rogers v. Koons*, 'in which Koons slavishly recreated a copyrighted work in a

different medium without any objective indicia of transforming it or commenting on the

copyrighted work,'" *Blanch* is already being viewed as a new precedent that displaces the *Rogers*

ruling. Certainly Koegel has demonstrated that attorneys in infringement lawsuits, at least those

representing prominent postmodern artists, can ignore judges' injunctions *not* to treat their fair-

use rulings as precedents and achieve success.

Therefore, the one case in which music sampling was deemed fair use, *Campbell*, has

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[26] Joy Garnett, "Koons Wins Landmark Copyright Lawsuit," *NEWSgrist*, 20 January 2006,
http://newsgrist.typepad.com/underbelly/2006/01/koons_wins_land.html (accessed 29 November 2007).

never provided any legal shelter for sampling-based artists, while the one case in which

postmodern visual appropriation was deemed copyright infringement, *Rogers*, has not prevented

later courts from ruling this style of unlicensed borrowing to be fair use. The fact that the same

visual artist who lost the *Rogers* lawsuit won the *Blanch* case seems to imply, as Garnett writes,

a reversal or inversion of terms. For postmodernist Koons, copyright law is a pendulum that

once swung in an unfavorable direction, but now has swung back onto his side, the side of

unlicensed appropriation. For sampling-based music producers who have appropriated

copyrighted works without paying licensing fees, however, the law has always been in the

opposite corner, an opponent with the unquestionable advantage in size and strength, which not

even a favorable ruling handed down by the Supreme Court could render more friendly. That

Koons' lawyer made good use of that one pro-sampling decision, *Campbell*, for postmodern

appropriation, when no sampling artist's attorney has been able to do the same, only sharpens the

distinction between the U.S. legal system's treatment of postmodernism versus its treatment of

sampling.

IDENTIFYING SAMPLING

If, as I argued earlier, the remix genre is a close relation of postmodernism, what

accounts for the dramatic difference in the legal status of remix productions and that of

postmodernist productions? I mentioned that remix culture lacks of prestige in the view of

cultural critics and scholars, its lowbrow status remaining firmly in place despite the recent spate

of articles and essays announcing remix as the characteristic form of cultural production of our

times. However, remix's paltry amount of cultural capital does not alone explain why sampling,

a type of remix, should occupy such a degraded position in the eyes of the law when appropriation paintings, a type of postmodernism, should enjoy (in the majority of cases) the law's favor. What does explain the difference between remix and postmodernism is remix's origins in African American inner-city youth culture.

Now I must return to the question I posed in the first section of this Introduction: What *is* remix? The historical answer is: Remix is a genre of artistic appropriation that began in the boroughs of New York in the late 1970s. The identity of its inventor is undisputed. Every reliable source names DJ Kool Herc,[27] who immigrated to the Bronx from Jamaica as a child, as the person who first spun two copies of the same record on side-by-side turntables in order to extend the "break," or "breakbeat," usually defined as an instrumental part of a dance song or pop song, the part where the rhythm dominates, what S. Craig Watkins calls "the get down part,"[28] and what Grandmaster Flash calls "the best part of a great record."[29] In order to lengthen the rhythmic "best part" of songs, the part that made partygoers "get down," Kool Herc spun two identical records on turntables at the same time, first throwing the needle down at the beginning of the breakbeat on one record and lifting the needle when the breakbeat finished, then immediately throwing needle down at the start of the breakbeat on the second record, and at the end of that break, playing the break again on the first record. Alternating between the records, Herc could, in theory, extend the break forever. Many DJs soon took up Herc's method of

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[27] See: Paul Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (Cambridge, MA: Harvard University Press, 1993), 103; Tricia Rose, *Black Noise: Rap Music and Black Culture in Contemporary America* (Middletown, CT: Wesleyan University Press, 1994), 51-53; Janice Rahn, *Painting without Permission: Hip-Hop Graffiti Subculture* (Westport, CT: Bergin & Garvey, 2002), 3; and S. Craig Watkins, *Hip Hop Matters: Politics, Pop Culture, and the Struggle for the Soul of a Movement* (Boston: Beacon Press, 2005), 26-27.

[28] Watkins, *Hip Hop Matters*, 27.

[29] Rose, *Black Noise*, 73.

spinning records to isolate and extend the breaks, and also adopted Herc's method of speaking

rhymes over the breaks.[30] Several DJs became famous for the techniques of spinning and

"rapping" that they invented; Flash and Grand Wizzard Theodore are the most revered of these.

Turntablism, rapping, breakdancing, and graffiti quickly emerged as the four core

practices of a new black urban youth subculture called hip-hop; hip-hop music thus is a remix

genre, a type of music that depends on bits of records being cobbled together to form a new

track. Hip-hop music has always necessitated the collaging of preexisting sounds.

Appropriation has, from the start, been essential to rap/hip-hop music, not incidental to it.

Music producers soon discovered that the highly popular hip-hop style of making music,

which consisted of a live DJ spinning together breaks while a live person (sometimes the DJ

himself) rapped over the beats, could be recorded on vinyl. Sylvia Robinson was the first

producer to translate hip-hop from the party scene to the recording studio in 1979, when she

pieced together a group from friends of friends of her son's and recorded them rapping over a

repeating segment of beats and vocals that were either taped off of, or cover versions of, the hit

"Good Times" by the group CHIC.[31] Robinson had a huge hit with the result, "Rapper's

Delight," and in addition to proving the economic viability of rap/hip-hop as a recorded music,

she also invented the practice of mimicking turnatblists' repetition effects by editing tape

together – she pioneered the recorded loop. Six years after "Rapper's Delight," when relatively

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[30] Rapping, or rhyming over music, originated in the tradition of Jamaican toasting (see Dick Hebdige, *Cut 'n' Mix: Culture, Identity and Caribbean Music* (New York: Routledge, 1997, first published in 1987). The fact that Kool Herc immigrated from Jamaica to the Bronx as a 13-year-old stands as evidence of a direct link between the two styles of performance. By claiming that postmodernism influenced early hip-hop, I am not denying the importance of Jamaican culture as an origin point of hip-hop music, but neither can one argue that postmodernism's popularity in the U.S. had no influence at all on the development of turntablism and rap/hip-hop.

[31] Steven Daly, "Hip-Hop Happens," *Vanity Fair*, November 2005.

affordable digital samplers became widely available,[32] fans of Kool Herc, Grandmaster Flash,

Grand Wizzard Theodore, and the albums turned out by Robinson and her Sugar Hill label, were

certain of how to put the new technology to excellent use: they used it to isolate and combine bits

of music from existing records.

Digital sampling began immediately after the release of mass-marketed digital samplers,

due to the fact that established and aspiring music producers in New York had already been

developing sampling techniques with analog technologies for several years. Digital samplers

were the first consumer appliances that facilitated the translation of analog information into

digital bytes, the storing of those bytes in a memory, and the cutting-and-pasting of those stored

bits/bytes into a new whole. Although the earliest samplers permitted only a few seconds of

recorded music to be stored at a time, hip-hop DJs and producers exploited their potential as

much as possible, and quickly. As the technology of samplers improved, so did producers'

sampling skills. Between 1986, the year that digital sampling started, and 1991, at least 70 hip-

hop albums were made, incorporating a total of more than 1,100 samples.[33] In that five-year

span, rap/hip-hop became a national and then global pop culture phenomenon; numerous

landmark hip-hop albums such as the Beastie Boys *License to Ill*, Eric B. and Rakim's *Paid in

Full*, De La Soul's *3 Feet High and Rising*, and Public Enemy's *Fear of a Black Planet* were

produced in this period, and many music fans and critics call the late 1980s "the golden age of

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[32] In a span of just four years, the price of digital samplers dropped significantly: In 1982, the Fairlight CMI Series II sampler was priced at approximately $25,000. (Greg Holmes, "The Fairlight CMI," *The Holmes Page*, http://ghservices.com/gregh/fairligh/ [accessed 30 November 2007]). In 1986, the E-mu SP-12 sampler had a list price of $2,745 (Joseph G. Schloss, *Making Beats: The Art of Sample-Based Hip-Hop* [Middletown, CT: Wesleyan University Press, 2004], 30).

[33] Jesse Kriss, "The History of Sampling" version 1.2, May 2004, http://jessekriss.com/projects/samplinghistory/, (accessed 30 November 2007). Data from http://the-breaks.com.

hip-hop."[34] Years before digital recording, editing, and publishing tools became integrated into the everyday lives of millions of people via personal computers, a relatively small coterie – the hip-hop subculture in the U.S. – was mastering digital manipulation and inventing new methods of digital recombination and transformation at a breakneck rate.

From this brief history of digital sampling, a description of remix can be established: 1) remix culture's first genre was sampling, which was initially a live performance art; 2) remix is not necessarily digital, but it was the mass availability of digital tools that allowed producers to advance and popularize remix techniques to such heights that remix became a massively popular form of production; 3) remix was pioneered mostly by young, poor, black men living in economically depressed and poorly serviced dense urban centers in the U.S.; and 4) this population, not often stereotyped as cutting-edge technological developers, were the inventors and earliest masters of the first highly profitable and widely consumed genre of digital media production. These four points are not so much a definition of remix as an identification of the genre, a linking of the genre to a specific race, class, and geographic identity.

INVESTIGATING THE CENSORSHIP OF SAMPLING

It is important to acknowledge the minority and lower-class origins of remix culture, especially digital remix culture, because the first two chapters of this dissertation investigate sampling's degraded legal status in light of the U.S. Culture Wars of the 1980s. In the wake of Ronald Reagan's victory in the 1980 presidential elections, numerous movements against what

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[34] Writes Schloss, "As the 1980s wore on, the potential of digital sampling to go beyond the mere replication of deejaying techniques led to an increasingly sophisticated aesthetic for hip-hop music....The creative exploitation of these new techniques, along with parallel advances in emceeing, has led to the late 1980s being called the "golden era" of hip-hop" (*Making Beats*, 39).

were perceived to be "dangerous" cultural productions rose to public prominence. These included the Parents' Music Resource Center, founded by Tipper Gore and other wives of powerful Washington politicians and businessmen, which led a crusade against explicit lyrics in rock and rap music due to the harm that these lyrics inflicted upon the nation's children; Jesse Helms' effective indictments of the National Endowment of the Arts' decisions to fund artworks, such as Robert Mapplethorpe's and Andres Serrano's photographs, that depicted explicitly homosexual or anti-Christian subject matter; and various grassroots "family values"-based campaigns to ban books, movies, record albums, and music concerts that contained discriminatory language or inappropriate references to sex or drugs. Taken all together, these movements can be regarded as a large pro-censorship lobby.

In Chapter 1, I argue that the 1991 *Grand Upright v. Warner Bros. Records* decision, which declared unlicensed sampling to be illegal, and led to a severe reduction in the complexity and frequency of sampling in popular music, was a reflection and manifestation of the cultural values so heavily promoted and discussed in the mid-to-late eighties. Judge Kevin Duffy's ruling in *Grand Upright* was, if not inevitable, then at least completely reasonable in the context of the public discourse at that time. Duffy's ruling, which may, from an early 21st-century perspective, seem overly harsh in its blanket condemnation of an emerging cultural form, and informed by race and class prejudice, was well in line with the "common sense" of its day. I explore the concept of common sense as it was defined during the Reagan years, and argue that most cultural censorship campaigns, which claimed to be rooted in basic common sense, were in fact efforts to unite America under a more common culture than existed following the divisive sixties and seventies. Implicit in this attempt at finding a common American culture, however,

was the assumption that the influence of minority discourse on mass cultural production had to be lessened in order to make American culture "safe" for the majority's consumption.

In Chapter 2, I investigate digital sampling's connection to many sources of outrage and anxiety in the 1980s. Sampling was an integral part of rap music, and rap music was filled with language and sounds that were harmful to youth, that transformed youth into social problems. Sampling was a copying technology, and as such, resembled viral diseases, such as HIV and crack addiction, that threatened to spread from poor minority populations into the middle- and upper-classes by making infinite copies of themselves. Sampling was an integral part of rap music, and rap was the signature music of inner-city black young urban men, those young men purportedly manufactured and marketed crack, and fought each other with military-grade weapons in gang wars over drug districts. All of these negative associations allowed sampling to be interpreted as a threat to the nation's future, as one of numerous forces contributing to the U.S.'s transformation into a dystopia. Ironically, the practice of sampling was, and is, a highly futuristic enterprise, but in a very different way than its critics contended. Sampling emerged from urban African Americans' experiments with futuristic technology and often-otherwordly sound effects, and harkened to a redemptive, extraordinary and possibly extraterrestrial future for African Americans, in the tradition of Afro-futurist writing, music composition, and performance. And sampling's insistence on the public's right to "steal" or appropriate private properties constituted a sonic protest against unjust appropriations in both the physical and artistic worlds, which historically have been firmly rooted in racial bias.

IDENTIFYING FAN FICTION

In Chapters 3 and 4, I consider a different genre of digital remix production, one which, like sampling, had a long pre-digital history: fan fiction. Fan fiction, broadly speaking, is any work of fiction that builds upon, revises, expands upon, or provides an alternative version of an existing narrative. In keeping with my earlier argument that remix culture is more or less contemporaneous with postmodernist art, I will not claim that fan fiction, or fanfic, dates back to classical times, but will date fanfic's origins to the late 1960s, when fans of the short-lived (1966-69) television series *Star Trek* began writing their own *Trek* stories, compiling them into fan magazines, or fanzines, and mailing them out to other *Trek* fans, whom they met at fan conventions or contacted through other various fan mailings. These *Trek* fans were predominantly female, and every study of fanfic communities since then has found that the overwhelming majority of fanfic writers and readers are girls and women.[35] It is logical, then, that when electronic methods of publishing and distribution became widely available at a relatively low cost, via e-mail and the Internet in the early 1990s, women immediately established fanfic communities using the new technologies and protocols. Just as in the case of sampling, a large body of knowledge and a tradition of practice preceded the advent of digital tools, so once digital tools became integrated into everyday life for millions of people, women ported their zine activities onto the new media.

Online fanfiction was therefore another early type of digital remix, and, like sampling, it emerged from a minority culture. Apart from the fact that men and women have always held

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[35] See Joanna Russ, *Magic Mommas, Trembling Sisters, Puritans and Perverts: Essays on Sex and Pornography* (Trumansberg, NY: Crossing Press, 1985); Constance Penley, "Feminism, Psychoanalysis, and the Study of Popular Culture," in *Cultural Studies*, ed. Lawrence Grossberg, Cary Nelson and Paula Treichler (New York: Routledge, 1991); Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (New York: Routledge, 1992) for the earliest assertions that the vast majority of fan fiction writers and readers are female. All subsequent scholarship has reiterated that fanfic production and consumption is dominated by girls and women.

power in unequal amounts in U.S. society, in the field of mass media production, women have always made up a small percentage of owners, creators, and distributors. In fact, the reason that two of the earliest forms of popular digital culture were invented by African Americans and women might be that both groups sensed a bounty of opportunity in the new technologies. Since the old media, up to and including television, had long been staked out as the property of the dominant class, race, and gender, African Americans and women may have quickly discerned that new media was a field of unclaimed and uncharted territory. However, their attempts to establish ownership, or at least unquestionable rights of free and far-ranging use, over certain digital technologies were short-lived. The court ruling in *Grand Upright* rigidly fenced in sampling-based artists' spree of experimentation with digital tools. Censorship also constrained online fanfic soon after it appeared, but in a different way.

INVESTIGATING CENSORSHIP IN FAN FICTION

Sampling has been subjected primarily to external censorship, imposed on it by judges' decisions. Fanfic, on the other hand, has been censored mostly by internal forces. That is, the movements to censor fan fiction have originated, for the most part, within fanfic communities, and have been initiated by fanfic authors' fellow writers and/or readers. Chapter 3 offers a case study of this type of internal censorship in the subculture of online fanfic, a board war over explicitly sexual fanfic stories that took place in 1994-95 on the first-ever Internet group dedicated to fan fiction, the ATXC (alt.tv.x-files.com), a community established for fanfic based on the FOX network's hit TV show, *The X-Files*. I argue that the criticisms that women fans leveled at their peers were strongly influenced by the feminist anti-pornography campaigns of

the 1980s and early 1990s. A significant subset of the Culture Wars was the Pornography Wars, in which left-wing feminists allied with right-wing Moral Majority members to lobby fiercely against all pornography, and to "educate" the public about porn being degrading to, and, in one way or another, harmful to women. The anti-porn movement won significant victories, getting ordinances passed in several cities (which were eventually overturned by courts), and more significantly, influencing Attorney General Edwin Meese's 1986 Commission on Pornography to link porn consumption to violence against women, and to call for much stricter regulations (and, in some cases, bans) on businesses selling pornography. The censorship that shows up in the first online fanfic community, and continues to show up in online groups years later, demonstrates how effectively women internalized anti-porn, pro-censorship discourses from the Culture Wars era. Indeed, arguably the most visible and powerful women's political efforts in the U.S. for 15-20 years had to do with advocating for greater censorship.

Chapter 4 considers the movements toward censorship within fan fiction communities in light of fanfic groups' absolute refusal to commodify their productions. While the anti-sampling legal judgments have made it the norm for remix texts to circulate in a gift economy rather than a money economy, the forms of remix that have been commodified and sold as mass media have done very well. Sampling is the best example of this: hip-hop artists made monster profits in the late 1980s, when they had the greatest freedom to sample (because no court ruling against that form of appropriation had yet been handed down), but after *Grand Upright*, hip-hop did not become a totally underground, non-commodified scene. In fact, hip-hop's revenues increased exponentially after Judge Duffy ruled that unlicensed sampling is illegal. What seems to have been of greatest importance was that hip-hop successfully launched itself as a product in the

minds of consumers. Once the market for hip-hop was opened up, the artistic quality of the music beneath the raps could suffer without impacting the industry's sales too much. In other words, it was necessary for hip-hop to reach a certain critical mass, in terms of audience awareness and popularity, in order for the young genre to survive the kind of blow to its artistic integrity that *Grand Upright* dealt. Video game mods also have been successfully commercialized. Fanfic communities, however, have consistently shied away from even the possibility that they could trade their products for revenues. I argue that this reluctance to commodify fanfic is connected to the long-standing concept in women's literature and political discourse of the importance of "safe spaces." In contrast to sampling practitioners' insistence on appropriating sonic territory that does not legally belong to them, fanfic authors seem to be invested in finding and making their own undisturbed islands of communication and recreation, free of male domination and financial obligation, but also closed to potential avenues for profit.

The three-part mission of this project is to place African Americans and women at the beginning of the history of popular digital culture, to ensure that they are credited with the invention and popularization of the earliest forms digital remix culture, and to attempt to explain why their genres of remix have been subjected to so much censorship and restraint, from outside and in. Digital remix is still illegitimate in many ways – illegitimate not only in the sense that remix texts are the "bastard offspring," the unauthorized derivatives, of preexisting texts, but also in the sense that remix texts have no cultural or legal legitimacy. The conventional wisdom on the Culture Wars of the 1980s and 90s is that they are over, and remain as inaccessible and strange to us as the Salem witch trials or the details of everyday life during the Gilded Age. However, we live with the legacy of the Culture Wars daily. Their legacy is repression: there is

not as much freedom in artistic expression, digital production, or minorities' and women's cultural forms in the U.S. as there might have been. Rather than accepting that the current copyright climate, and pro-censorship mentalities inspired by copyright law, as unchangeable norms, this project is an effort to trace out how our present-day norms arose over the last two decades out of a roiling mass of conflicting dreams, desires, values, tastes, and hopes for a better America.

CHAPTER 2
Common Sense v. Common Sound:
How the Culture Wars Killed Digital Sampling

THE LEGACY OF THE CULTURE WARS

On March 6, 1998, *The Chronicle of Higher Education* published a Colloquy titled, "Are the Culture Wars Over?" The U.S. Culture Wars comprised a number of highly publicized battles that took place between different groups – groups that, according to most press accounts, were either left-wing or right-wing, although the lines separating the camps were not always clearly party lines – over the value and acceptability of various cultural forms, with "value" and "acceptability" defined mostly in relation to the nation's children. "To what cultural productions should American children be exposed?"; "What cultural productions should American youngsters be permitted to consume?"; and, "What cultural productions should American teens be required to study in college?" were questions central to almost every heated conflict said to be one of the Wars.

If one identifies the Culture Wars with the period when it dominated news headlines, one might say that the Wars began in approximately 1980, when media outlets began to run stories on a sharp rise in book censorship, and one might date the end of the Wars to 1998, when the Child Online Protection Act was passed. In 1998, mainstream journalists and academic scholars ceased to write about conflicts over culture as frequently they had done over the preceding two decades, and in the *Chronicle* Colloquy's opening piece, "A Truce Prevails," Todd Giltin argued that this dying-down of attention marked the Wars' end. "If the culture wars look quiet today,"

Gitlin wrote, "one reason is that the media gatekeepers have lost interest in them....But there's much more to the calm than media boredom. My impression, based on talking with colleagues on various campuses, is that a cultural truce is in effect." The "institutional normalization" of minority-group studies, women's studies, and queer studies in U.S. universities, plus a set of national history standards for U.S. schools that gives a "more-honored place" to non-Western history, amounted, Gitlin claimed, to an overall victory for the Left: "[W]ho won and who lost the culture wars? In matters of curriculum, the reactionaries lost, as they repeatedly have lost throughout American history. A few will try to roll back the changes in the canon, partly for principle's sake and partly because they can detect no other bugbear that promises to unify their forces nationally. But I will be surprised if their numbers or their successes grow. To paraphrase the sociologist Nathan Glazer, we are almost all revisionists now." However, Gitlin warns, the truce resulting from the curriculum revisionists' gains may not last, for there is a considerable imbalance between how thoroughly the Left and Right have accomplished their agendas. "[W]hile the culture warriors have been revising books, cultural conservatives have been revising global markets to their benefit. For the Left, many victories in the culture war therefore have been Pyrrhic."[1]

Gitlin's brief essay has proved to be both false and true, both overly optimistic and prescient in its caution. For while he was correct on the whole that ethnic and gender studies programs and departments would remain in place on college campuses (although their continued funding has perhaps been more tenuous, and their possibilities for growth more constrained, than

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[1] Todd Gitlin, "Background: A Truce Prevails; for the Left, Many Victories Are Pyrrhic," in *The Chronicle of Higher Education*, Colloquy on "Are the Culture Wars Over?" 6 March 1998, http://chronicle.com/colloquy/98/culturewar/background.htm (accessed 30 November 2007).

Gitlin predicted), and that history and literature curricula would continue to include diverse

perspectives and voices, Gitlin's admission that the Left won "in matters of curriculum" fell

short of acknowledging that curriculum matters, along with a curtailment of "hate speech," hate

crimes, and acts tantamount to sexual harassment, were the *only* significant wins enjoyed by

liberals at the presumable end of the Culture Wars. If one examines the list of the major

battlefields on which the Wars were waged – the issue of whether warning labels should be

affixed to music records warning parents of "inappropriate" lyrics and whether records bearing

this sticker would be then sold everywhere or not, the issue of whether the NEA should fund the

production and exhibition of "offensive" art, and the issue of whether the sale of sexually explicit

materials should proceed according to market demand, or should be subjected to government

restrictions – on these issues and all the others that constituted the Culture Wars, the groups that

lobbied for increased censorship, regulation, and limitation of cultural productions emerged

unquestionably victorious. Certainly believers in freedom-of-expression triumphed in some

skirmishes: they turned out in massive numbers to support art exhibitions that were threatened

with censorship,[2] and they persuaded courts to rule several censorship laws unconstitutional.[3]

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[2] In June 1989, the Corcoran Gallery of Art in Washington, D.C. canceled their planned exhibition of *Robert Mapplethorpe: The Perfect Moment*, which consisted of photographs with sexual content. The cancellation was made one month after Senator Alphonse D'Amato tore up Andre Serrano's photograph *Piss Christ* in front of the U.S. Senate, decrying the fact that the National Endowment for the Arts (NEA) had funded Serrano's work, and the Corcoran feared that if they featured controversial photos, they would endanger the NEA's congressional reauthorization. The Washington Project for the Arts exhibited the Mapplethorpe show instead in July 1989, and in its first twenty-five days, almost fifty thousand people saw *The Perfect Moment*. "We improvised tickets to handle the long lines that formed every day, sometimes stretching around the block....The longest lines...were those snaking through the galleries as crowds waited patiently for hours to view the *X-Portfolio* [the most controversial, sexually explicit photographs in the show]," recalls WPA curator Philip Brookman ("Preface," in *Culture Wars: Documents from the Recent Controversies in the Arts*, ed. Richard Bolton [New York: New Press, 1992], xv-xvii). When the Mapplethorpe exhibition traveled to the Contemporary Arts Center in Cincinnati, a grand jury indicted the center and its director on obscenity-related charges. Despite the indictment, the exhibition remained open, and within the first dozen days, the show attracted more than 23,000 visitors. Said Cincinnati painter Brent Riley, "People are voting with their feet on this show, and there have been lines around the block" (Glenn Collins, "How Cincinnati Sees the Arts and Art Figures See the City," *New York Times*, 18 April 1990).

But the pro-censorship groups active in the eighties and nineties influenced American culture in far deeper and longer-lasting ways than those who opposed constraints on cultural forms. Gitlin's greatest point of accuracy in his 1998 piece was in his closing sentiments, which pointed out that while left-wing educators may have succeeded in increasing the representation of minorities in humanities course syllabi, conservatives succeeded in guiding U.S. cultural policy in virtually every other arena. The Left's victories in the Culture Wars were "Pyrrhic" because they did not extend beyond the establishment or reformation of certain college departments and programs, and the definition of what forms of speech and action would not be tolerated on campuses or in workplaces. Reviewing the last thirty years, it is evident that the Right's cultural priorities have dominated. And if one does away with left-wing and right-wing distinctions between camps in the Culture Wars, and instead chooses to call one side "liberal," in the sense of "against censorship," and the other side "conservative," in the sense of "for censorship," it is unclear that curriculum reform and the regulation of prejudiced and sexually harassing speech and actions were guided by strictly liberal sensibilities. These may have been victories for the Left, but they may not have been victories for liberalism, since they were motivated at least partly by an impulse to impose greater controls and regulations on the circulation of culture than existed previously, an impulse to mandate that some texts, words, and actions must be deemed proper for inclusion and that some texts, words, and actions must be

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[3] In 1984, Indianapolis passed an ordinance that "defined and penalized pornography as discrimination against women." In 1986, the Supreme Court declared the ordinance unconstitutional. The successful suit to strike down the law was filed by the American Booksellers Association, the Association for American Publishers, an Indianapolis video store, and some independent readers (Stuart Taylor, "Pornography Foes Lose New Weapon in Supreme Court," *New York Times*, 25 February 1986). In 1996, Congress passed the Communications Decency Act (CDA), aimed at protecting minors from indecent material, which banned "indecent" or "patently offensive" speech circulating on the Internet. In the 1997 case *Reno v. ACLU*, in which the pro-free-speech plaintiffs included Planned Parenthood, the Human Rights Watch, the Queer Resources Directory, and various nonprofit education and advocacy groups, the Supreme Court declared the CDA unconstitutional (Marjorie Heins, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* [New Brunswick, NJ: Rutgers University Press, 2007] 6-7 and 157-179).

regarded as lying outside the realm of the acceptable or tolerable – the same impulse that drove the conservative movements for increased censorship.

The ramifications of the conservatives' ascension to power over U.S. culture during the Culture Wars are still playing out today. We live in a cultural environment largely shaped by the conservative gains of this period, many of them unplanned, but highly consequential nonetheless. This chapter is an attempt to contextualize a single battle of the Culture Wars, only halfheartedly fought and summarily decided, which was scarcely remarked upon at the time that it occurred, and since then, has gone largely unnoticed by historians of the Wars. Although seemingly so minute an event, its has turned out to have enormous importance for U.S. and global culture, particularly digital culture. This is the story of the U.S. District Court of Southern New York's 1991 ruling in the case of *Grand Upright v. Warner Bros. Records*, which declared all unlicensed digital sampling to be illegal. Because of the *Grand Upright* judgment, the vast majority of digital remix production is illegal today. Although the *Grand Upright* decision, given by Judge Kevin Duffy, might appear to be extreme in its dismissal of the value of an entire cultural form, it was utterly logical in its historical context. I am not referring here to the newness of digital sampling at the time. Although digital sampling was very new in 1991 – only five years old – and one might argue that Duffy was unfamiliar with its merits, and so ruled against it because of his ignorance, this would be insufficient to explain the harshness and scope of the judge's decision. The context that explains Duffy's putting an end to the legal existence of a form of cultural production that was already, in 1991, extraordinarily popular and profitable, and has, in the intervening years, become one of the predominant forms of digital creation across the globe, is the Culture Wars. Duffy made a decision in the *Grand Upright* case in accordance

with the predominant conservative tenets about culture at that time.

THE BEGINNING AND "END" OF DIGITAL SAMPLING

I am now going to attempt to explain the distinction between digital sampling pre-1991 and digital sampling post-1991 by describing the samples that I hear on two favorite songs of mine, one from each era. Describing the minutiae of music is a somewhat ridiculous effort; as Greg Tate has said of great records, "In our memories they loom like monuments; dissected, they're fluff."[4] Nevertheless, I believe this close description of some rap/hip-hop music is necessary in order to convey the magnitude of difference made by the *Grand Upright* ruling.

In my iTunes playlist, I select a track from an album greatly renowned as one of the fullest flowerings of the art of digital sampling: "Don't Believe the Hype" from Public Enemy's 1988 *It Takes a Nation of Millions to Hold Us Back*. I press play, and this is what I hear. About three notes from a bass guitar riff taken, or lifted – in other words, sampled – from some other song, and I'm not sure which one, because I'm no expert in 1970s funk and soul songs, from which most of PE's samples in the late eighties were taken (when they sampled music recordings, that is, because I know they sampled plenty of industrial sounds and voice recordings, too). Anyway, right on the tail of the three notes from the bass are two notes from an electric guitar, or maybe one, since it's the same note repeated, and then a scratch – a high, whiny, electronic-like sound that in 1988 was usually created by a DJ spinning a record and "scratching" the vinyl by swiftly pushing a particular part of the record back and forth under the needle (today, such effects can be generated using software, but recording someone actually

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[4] Greg Tate, "Black Medallions, Soul Gold," *Village Voice*, 4 September 1990. Cited in Lawrence Grossberg, *We Gotta Get Out of This Place: Popular Conservatism and Postmodern Culture* (New York: Routledge, 1992), 153.

scratching on a turntable was the way to sample this type of sound at the time of *It Takes a*

Nation). That combination, of three notes of bass + two notes of guitar riff + a scratch, "loops,"

that is, repeats, three times.

Then comes a voice saying assertively, "Now here's what I want y'all to do for me"

(James Brown, I think; when voices are sampled on albums from this period, even [especially] if

it's just a yell or a kind of "Yeaaow!", it's usually James Brown's voice, and it does sound like

him in this instance), and beneath the voice is a series of drum beats, just four counts' worth.

Oh, I forgot to say that over the first combo (three bass notes + two guitar riffs + a scratch),

Flava Flav (the "comic" rapper of the Public Enemy crew)'s voice says "Don't," right on top of

the guitar riffs, before the scratch. In fact, his "Don't" is the first sound on the track, so really I

should have said that the opening of the track goes: "Don't" + three bass notes + two guitar riffs

+ "Don't" + a scratch. Also, the "Don't" also follows the scratch immediately. So there are

seven "Don't"s over the three loops of the opening combo: "Don't" + three bass notes + two

guitar riffs + "Don't" + a scratch + "Don't" + three bass notes + two guitar riffs, etc. I know

Flav's "Don't" is sampled, Flav isn't rapping "Don't" into a mike seven times for the opening of

the track, I can tell because the "Don't" is sort of clipped at the end, it terminates before Flav can

complete the full "t" sound at the end, meaning that the engineers chopped it out of a "flow" (a

whole sentence or series of sentences of a rap) and wanted to just get the "Don't" and not the

next word. Also, the "Don't" sounds exactly the same all seven times in the opening, a sure

giveaway that the voice is sampled as part of what is meant to be the underlying score and not

rapped on top of the underlying score.

Alright, so after what I think is James Brown's "Now here's what I want y'all to do for

me" and the four counts' worth of drums, the track really begins. Chuck D begins his powerful rap (these are among my favorite lyrics on any rap song ever, they include the great "Rock the hard jams, treat it like a seminar/Reach the bourgeois, and rock the boulevard"), and underneath him I hear some beats from a snare drum, three notes from what I think is an electric guitar, and then comes the first industrial sound of the track, a brief excerpt from the sound of a high-pitched siren, meaning that only the highest-sounding part of the siren is there, not the lower part of the siren's whirr, because sirens on ambulance and police cars usually build and decrease, like "whhhhhhIIIIRRRRRRRRrrrrrrrrrr" (this siren sample actually has a higher pitch to the earlier scratch, but fulfills the same function of "punctuating" the other two instrumental samples that the earlier scratch fulfilled). Unlike the opening combo, though, these samples – drum + guitar + siren – are not sequential, but all laid on top of one another. This loops for a while. Every once in a while, I can hear a very faint "Ya!" in the underlying score (Flav's "Ya!"? Or Brown's?). The "Ya!" is so short it's like a quarter-note from some other instrument, just a "!" really, not even a word, not even a quarter of a word. After Chuck D concludes first verse, Flav does the chorus, saying, "Don't believe the hype! Don't! Don't! Don't believe the hype!" and what's interesting is that I think this is made up of two samples: I think they used a single recording of Flav saying "Don't believe the hype," and sometimes they sample the entire phrase, and sometimes they only sample the "Don't." And as part of the chorus, there is a sample of a (I think a male) singer from one of those '70s songs sighing-singing "Yea-aaa-aahhh."[5]

At this point, I am less than a minute into the track. I'm at 0:55. This track is 5:19 long. This means I could write about five more paragraphs, perhaps not quite as long as the one above

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[5] Tricia Rose quotes a similar attempt at describing virtuoso sampling in *Black Noise*: Nelson George's account of listening to "The Adventures of Grandmaster Flash on the Wheels of Steel" (54).

(some of this does loop, after all), about all of the samples that make up what I call the "score"

for "Don't Believe the Hype."   (I use the term "score" for what makes up the track over which

the rapper raps, so really the "score" is whatever is not rapping, but then again sometimes raps

are sampled for the score, like Flav's "Don't believe the hype," so any delineations between the

score and the rap can be quite blurry.) I don't have the space, nor you the patience, to read my

attempt at describing all of the samples, and the way they have been probably been altered from

the way they sounded on their original tracks, and how they are all combined into this track. I'm

disappointed not to have the space to describe the silences, the places where the noise stops for a

moment, which are just as affecting as the sounds, and I'm sad to not have the opportunity to

comment on the sample of media activist Harry Allen's voice.

One website states the "Don't Believe the Hype" samples four songs.[6] Another website

states that five samples are included on the track.[7] However, to quantify sampling on a Public

Enemy album from the eighties in this way, by identifying and counting the number of songs

sampled, is absurd. As my description above attests, "Don't Believe the Hype" contains

somewhere between 11-13 distinct samples, depending on how one counts Flav's "Don'ts,"

inside of its first minute. Most of the samples are so brief that the source from which they were

extracted cannot be identified with absolute certainty by anyone other than a member of Public

Enemy's *It Takes a Nation* production team. Therefore, while four or five recognizable songs

may be sampled in "Don't Believe the Hype," probably a dozen or more songs were

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[6] "It Takes a Nation of Millions to Hold Us Back," Wikipedia,
http://en.wikipedia.org/wiki/It_Takes_a_Nation_of_Millions_to_Hold_Us_Back (accessed 7 December 2007). The section
listing the samples used in each of the tracks on the *It Takes a Nation* album is entitled, "Partial list of samples," acknowledging
that the list is not comprehensive.

[7] The-Breaks.com, http://the-breaks.com/search.php?term=don%27t+believe+the+hype&type=7 (accessed 7 December 2007).

unrecongizably sampled. What complicates the recognition of samples in "Don't Believe the Hype," and many other rap/hip-hop songs from the late eighties, is that the samples are not only brief, but in most cases have been altered (slowed down or speeded up, played at a higher or lower pitch). One can reasonably assume, therefore, that a 16-song album LP like *It Takes a Nation*, then, includes at least one hundred samples, with a strong likelihood that the true number is at least double that.

Keeping in mind, as a point of comparison, that "Don't Believe the Hype" includes around a dozen samples in its first 55 seconds, I will now describe a song from Missy Elliott's 2001 hit album, *Miss E...So Addictive*, "Get Ur Freak On":

For first three seconds of "Get Ur Freak On," the only sound is a man speaking in Japanese.[8] Then Elliott says "Headbanger." Then we hear six notes from a sitar – those are probably sampled from a single song, and they sound like they're being played at a faster speed than their speed on the original song. The six-note sitar sample loops, over and over again. After every second loop, Missy's voice says "Hit me" faintly, twice followed by an even fainter "Hit" or "Ye-ah." After the fourth time that she says "Hit me," she starts saying (again after every other loop), "Gimme some new shit," again with a faint "Ye-ah" in the background. Beneath Missy's spoken words, the six-note sitar sample is still looping. After the fourth "Gimme some new shit," Missy begins rapping in earnest. After the third line of her rhyming, the six-note sample halts, briefly, while Missy and/or some backup voices give a cry (it sounds like, "Skirr," to me, but I'm not sure what they're saying), then Missy raps, "Y'all can stop me now," and then six-note sample resumes. After three more loops of the sample, there is musical

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[8] One translator (named "Vavieca") renders the Japanese as, "Let's dance as fuck and go on the spree." The Lyric Archive, http://www.thelyricarchive.com/lyrics/geturfreakon.shtml (accessed on 7 December 2007).

silence once more, while Missy and her backups say "People!" and Missy says, "Then come on get me now" (completing the rhyme with the earlier line-spoken-over-silence, "Y'all can stop me now"). This pattern continues: the six-note sample loops, then Missy "interrupts" the loop with an exclamation and one line of her rap, then the loop of the sample continues again. At about 0:47, a synthesizer adds to the musical score of the track, one note from the synthesizer played at a time.

That is a complete summary of the musical score of "Get Ur Freak On": one six-note sample of a sitar, speeded up, and a few drawn-out notes played on a synthesizer.

The '88 Public Enemy track and the '01 Missy Elliott track exemplify two different styles of sampling, the style of the late-eighties and the style of the nineties and 2000s. The difference between these two styles is at least a dozen samples, if not dozens of samples, per track. The reason that sampling devolved – came to be much less complex, with every song using far fewer samples – between 1988 and 2001 is Judge Kevin Duffy's judgment in the 1991 case *Grand Upright Music v. Warner Brothers Records*,[9] which centered on the rapper Biz Markie's 1991 song, "Alone Again," sampling, without permission, eight bars from Gilbert O'Sullivan's 1972 hit "Alone Again (Naturally). In the *Grand Upright* ruling, Duffy declared that unlicensed sampling is stealing, and that producers who used samples without paying licensing fees to the copyright holders of the music they sampled were committing acts of copyright infringement. The result of Duffy's ruling was a normalization in the music industry of exorbitant rates for sampling licenses, forcing rap/hip-hop producers to drastically reduce the volume of samples they used on a given track or album, and to cease practicing their techniques for intricately

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

layering and editing together multiple samples. The standard for sampling, post-*Grand Upright*,

became what is audible on "Get Ur Freak On": one sample, looped over and over again

throughout the song.

In a 2002 interview with Kembrew McLeod for *Stay Free!* magazine, Public Enemy's

Chuck D and Hank Shocklee explain why sampling became much simpler after 1991:

> **Chuck D:** Public Enemy's music was affected more than anybody's [by
> copyright holders' successful lawsuits against sampling] because we were
> taking thousands of sounds. If you separated the sounds, they wouldn't
> have been anything—they were unrecognizable. The sounds were all
> collaged together to make a sonic wall. Public Enemy was affected
> because it is too expensive to defend against a claim. So we had to change
> our whole style, the style of *It Takes a Nation* and *Fear of a Black Planet*,
> by 1991....Putting a hundred small fragments into a song meant that you
> had a hundred different people to answer to. Whereas someone like
> [rap group] EPMD might have taken an entire loop and stuck with it,
> which meant that they only had to pay one artist.
>
> ***Stay Free!*:** So is that one reason why a lot of popular hip-hop songs
> today just use one hook, one primary sample, instead of a collage of
> different sounds?
>
> **Chuck D:** Exactly. There's only one person to answer to....It's easier to
> sample a groove than it is to create a whole new collage. That entire
> collage element is out the window.[10]

In other words, the practice of sampling did not completely halt after 1991. But it decreased, by

every measure. The number of samples used per song; the number of songs using samples; the

number and range of artists sampling, and attempting new methods of sampling, and innovating

new ways to combine sampled beats; and the complexity of editing, of cutting and mixing, that

gave rise to the multifaceted, baroque "collage element" characteristic of Public Enemy's and

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[10] Kembrew McLeod, "How Copyright Law Changed Hip Hop," *Stay Free!* 20 (Fall 2002),
http://www.stayfreemagazine.org/archives/20/public_enemy.html (accessed 7 December 2007).

other rap/hip-hop artists' work in the late eighties, all diminished in the 1990s, and have never

regained or even approached their pre-*Grand Upright* levels.

THE DUFFY DECISION: SHOCKING OR NOT?

A number of scholars have written on the courts' invalidation of unlicensed sampling,

protesting sampling's degraded legal status as regrettable from an artistic and/or cultural

standpoint. Tricia Rose, Andrew Bartlett, Mark Dery, Greg Dimitriadis, Nelson George, Richard

Shusterman, and Joseph Schloss have all defended sampling's aesthetic legitimacy; some have

pointed up the long tradition in black music of repetition and difference, of borrowing from and

building upon earlier songs, and others have aligned sampling with postmodern art and its

already-legitimized strategies of appropriation.[11] However, very little analysis has been done on

the Duffy ruling in particular, although it was *Grand Upright* that swiftly and decisively altered

the legal landscape for sampling, stacking all of the odds in favor of the copyright holders and

against rap/hip-hop producers. In fact, I am aware of only two academic pieces that have

addressed *Grand Upright* in a significant way, by Siva Vaidhyanathan and Andrew Ross.

Siva Vaidhyanathan, in his 2001 book *Copyrights and Copywrongs*, presents a strong argument

for Duffy's ruling against Biz Markie constituting a shocking turn of events in the legal world.

What made Duffy's judgment so unexpected, according to Vaidhyanathan, was the fact that

during the years of rap/hip-hop's appearance and ascent on the music charts, prior to *Grand*

Upright, when no court had officially ruled on how U.S. copyright laws would be applied to

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[11] See Rose, *Black Noise*; Schloss, *Making Beats*; and, from *That's the Joint: The Hip-Hop Studies Reader*, ed. Murray Forman and Mark Anthony Neal (New York: Routledge, 2004): Andrew Bartlett, "Airshafts, Loudspeakers, and the Hip Hop Sample: Contexts and African American Musical Aesthetics," Mark Dery, "Public Enemy Confrontation," Greg Dimitriadis, "Hip-Hop: From Live Performance to Mediated Narrative," Nelson George, "Sample This," and Richard Shusterman, "Challenging Conventions in the Fine Art of Rap."

sampling, all music industry participants and observers anticipated that the first official ruling

would establish some set of standards for distinguishing fair-use instances of unlicensed

sampling from instances of copyright infringement, and would put in place the basis for

determining fair licensing fees. In other words, lawyers, artists, record companies, and music

critics and fans anticipated, in the late eighties, that the first lawsuit involving sampling that was

not settled out-of-court (as all sampling-based lawsuits were up until *Grand Upright*) would

result in a judicial decision that struck a balance between copyright holders' wish for fair

compensation for the use of their music, and sampling-based artists' wish to use copyrighted

materials. Writes Vaidhyanathan,

> Until 1991, no one in the rap or licensing businesses knew what the guidelines for
> digital sampling were. This means that on any given day, an artist may have been
> ripped off by an overpriced licensing fee, or a publishing company may have
> gotten burned by charging too little for a sample that helped produce a top hit.
> That's why several legal scholars in the late 1980s and early 1990s tired to
> formulate licensing systems based on the use, length, and type of sample. Still,
> the industry was waiting for a court to weigh in so there could be some
> predictability and stability in the system.[12]

The industry, rap/hip-hop aritsts, and fans of rap/hip-hop music did not get what they hoped for

from Duffy's judgment, but copyright holders did. Duffy's ruling, explains Vaidhyanathan,

> did not articulate any nuanced standard by which a song could be sampled,
> manipulated, or revised without permission. It left no 'wiggle room' for fair use.
> It did not consider whether the new use affected the market of the original song in
> any way. It did not try to clarify how long a sample must be to qualify as an
> infringement. The fact that the sample in question was a mere twenty seconds did
> not bode well for fair use. Duffy's brevity clarified these issues by ignoring them:
> 'how much?' and 'for what purpose?' need not even be asked after Duffy's
> ruling. It was safe to assume that any sample of any duration used for any
> purpose must be cleared.[13]

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[12] Vaidhyanathan, Siva, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001), 140-141.

Duffy's *Grand Upright* ruling disregarded years of legal scholarship that debated the precise

criteria for determining 'how much?', 'for what purpose?', and 'what amount should be charged

for licensing?' in cases of digital sampling, and dismissed any possible claims for sampling's

legitimacy in one brief (1600-word) opinion.[14] Accepting that Duffy's opinion defied a great

many expectations, the question becomes, How could any judge have reached such a

conclusion? What informed Duffy's summary judgment against all unlicensed sampling?

Vaidhyanathan argues that race and class have not been determining factors in the law's

condemnation of unlicensed sampling. Vaidhyanathan writes, "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."[15] Andrew

Ross, however, interprets Duffy's *Grand Upright* ruling differently. While Vaidhyanathan

frames the battle over unlicensed sampling as primarily a power struggle between two

"generations" of music producers, those already established and all newcomers seeking to make

use of the older generation's sounds, Ross foregrounds race and class issues in explicating

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[13] Vaidhyanathan, *Copyrights and Copywrongs*, 143.
[14] There is evidence to support Vaidhyanathan's claim that there was, prior to the 1991 *Grand Upright* ruling, a great deal of public debate about how copyright law should regard sampling. Legal scholar Thomas Schumacher has noted that between 1987 and 1991, 12 different law review articles by 12 different lawyers on the topic of sampling appeared, and I know of five additional articles (by two attorneys) not mentioned by Schumacher.   Even though most of the essays cited by Schumacher were unsympathetic to practitioners of sampling, Schumacher distinguishes four different schools of thought represented among the 12 articles as to how sampling should fit into existing copyright laws, demonstrating that there was no strong consensus about how a court should or would rule on sampling. See Thomas Schumacher, "'This Is a Sampling Sport': Digital Sampling, Rap Music and the Law in Cultural Production," in Forman and Neal, *That's the Joint*; and Steven R. Gordon and Charles J. Sanders, "The Rap on Sampling," *New York Law Journal*, 28 April and 5, 12, and 19 May 1989.

[15] Vaidhyanathan, *Copyrights and Copywrongs*, 133.

Duffy's decision.

In a March 2003 article for *ArtForum*, Ross describes Judge Duffy as "overzealous" in his decision on *Grand Upright* and notes that the judge referenced the Bible twice in his opinion: "Ominously, Judge Kevin Duffy began his opinion by citing religious authority—'Thou shalt not steal'—as an 'admonition followed since the dawn of civilization' and ended by arguing that Markie had violated 'not only the Seventh Commandment, but also the copyright laws of this country.'" Ross also notes Duffy's severity in recommending the maximum penalty for Biz Markie: "Even worse, Duffy concluded the ruling by referring the case to the United States Attorney's Office for consideration of criminal charges. Poor Biz narrowly escaped prosecution for his thieving ways."

Ross then argues that the reason that Duffy dealt so "peremptorily" with sampling because of the Culture Wars, which raged across the U.S. at the same time that sampling came before a federal court for judgment. A number of postmodern artists who practiced appropriation had been sued for copyright infringement, Ross writes, but "it is impossible to imagine a judge addressing any of these defendants as if they were common thieves, as Duffy did Markie. Nor did any of these art-world rulings have the effect of stopping an artistic practice in its tracks, as it were. The tone of Duffy's verdict is perhaps best understood in the context of the Culture Wars, which had lately opened up to a new dimension of hostility on the racial front." Ross then lists several threads linking the Duffy ruling on sampling to the Culture Wars. One thread was the fact that rap was "a highly talkative affair, "the first musical genre where almost anything could be said, and so it tested the limits of permission at every turn." The problem with rap's verbosity was that, from the mid-1980s through the mid-1990s, "[s]peech of

all sorts increasingly carried a hefty price, and legal scrutiny of its impact escalated

accordingly"; the speech acts subjected to such scrutiny included hate speech and workplace

harassment, and rap was another form of talk considered, by many, to exceed the limits of the

socially permissible or legally tolerable. The controversy surrounding rap lyrics eventually led

to Duffy's decision against sampling – which, in most cases, involves only music, not lyrics –

because of heightened fears surrounding all black youth cultural productions in this time period.

Ross writes,

> Tracks like [rap group N.W.A.'s 1988] "Fuck Tha Police" triggered the vogue for
> rhymes about cop killing, and throughout the '80s rappers fed off playful fantasies
> of outlaw behavior. But the West Coast gangsterization of N.W.A. and their
> followers had an in-your-face tenor that pushed too many Culture War buttons to
> escape rebuke. For the most part, gangsta rappers were themselves signifying on
> the menace-to-society stereotypes of urban black males, but the distinction was
> easily lost in the tone-deaf moral panic that ensued. It only made the rappers more
> menacing. The response was a potent cocktail—as American as apple pie—of
> property fright and race hatred....Everything about hip-hop soon got bundled into
> a criminal profile that was mined by its critics for political advantage and by its
> exponents for monetary gain. One of the incidental casualties was the free-form
> art of sampling. Without the high visibility of this profiling, it is unlikely that
> sampling would have been dispatched with such rough justice to the felon's
> corner. An entirely novel and brilliantly executed way of making music had
> compromised long-standing notions about authorship and originality. This threat
> was magnified by the race and self-assurance of its practitioners, and it was
> resolved the way that American courts have customarily dealt with uppity blacks
> whenever property was on the block.[16]

Ross thus argues that mainstream U.S. society began "criminal profiling" rap/hip-hop because of

gangsta rap lyrics that advocated violence, but quickly extended its suspicion and condemnation

to everyone and everything associated with that genre of music, including sampling. Ross

implies that the fact that sampling *could* be regarded as intellectual property theft, if one did not

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[16] Andrew Ross, "Princes among thieves: sampling in the '80s," *ArtForum*, March 2003,
http://findarticles.com/p/articles/mi_m0268/is_7_41/ai_98918671/pg_1 (accessed 7 December 2007).

concede that postmodern visual artists had set precedents for appropriation-as-fair-use, played on white Americans' long-standing fear of minorities, especially black Americans, encroaching on "their" property.

The remainder of this chapter will expand on Ross's claim "the era of impudent, libertine creativity" in sampling came to a close – with the 1991 *Grand Upright* ruling – largely because of the Culture Wars. In fact, in light of the numerous movements for increased censorship of cultural productions, particularly productions that involved popular music, technology, or urban black male consumers, that dominated U.S. public discourse in the years just before Grand Upright came to trial, Judge Duffy's decision must be regarded as not shocking at all, but well in line with the zeitgeist of the day. Duffy's opinion bears the hallmarks of pro-censorship rhetoric prevalent in the late 1980s and early 1990s – explicit references to Christianity, a moralizing tone, and an express belief that an offender in cultural matters, especially a male African American maker of offensive culture, can and should be punished as a criminal. While Duffy's judgment, as Vaidhyanathan explains, may have surprised attorneys, artists, music industry employees and other participants in and close observers of the world of sampling, a glance at what was transpiring in broader American society at that time makes Duffy's ruling appear not only understandable in retrospect, but more or less inevitable.

CENSORSHIP AS THE PEOPLE'S PREROGATIVE

The Culture Wars comprised numerous battles, and were waged on multiple fields. Although the general issues at stake in each of the skirmishes – free speech, morality, potential harm inflicted on young consumers, potential harm committed by young consumers, race,

gender, and class – have been invoked in controversies over culture in America since colonial times, the Reagan presidency saw a marked increase in populist, grassroots activism against "bad" culture. Numerous politicians, academics, journalists, and other public figures supported the groundswell of pro-censorship sentiment, with left-leaning individuals choosing to rally to different causes than those who leaned right. But whatever the ostensible party allegiances of the various culture warriors, overall, the 1980s and most of the 1990s were dominated by cultural conservatism.

The first cultural productions to be targeted for censorship following Ronald Reagan's election were books. Judy Blume, bestselling author of novels for children and young adults, put it this way: "[A]lmost overnight, following the presidential election of 1980, the censors crawled out of the woodwork, organized and determined. Not only would they decide what *their* children could read but what *all* children could read....Suddenly books were seen as dangerous to young minds."[17] That book censorship could flare up so suddenly after two decades of increasing liberalism in culture, after the Civil Rights movement, the women's movement, and the counterculture movement, surprised many. *The New York Times'* Ray Walters wrote of this jarring turn when he opened his 1981 article on the new trend of book censorship by quoting Charles Rembar's 1968 *The End of Obscenity*: "'So far as writers are concerned, there is no longer a law of obscenity.' So wrote Charles Rembar...[an attorney who] had played a central role in the legal battles that lifted the bans on 'Lady Chatterly's Lover,' 'Tropic of Cancer' and 'Fanny Hill.' Mr. Rembar was unduly optimistic," writes Walters. Walters' article then gives

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17 Judy Blume, "The Ubiquitous Censor: Artists and Writers on Self-Censorship," in Censoring Culture: Contemporary Threats to Free Expression, ed. Robert Atkins and Svetlana Mintcheva (New York: The New Press, 2006), 322.

details about a law passed in Georgia that 'declares it to be a misdemeanor of the highest degree to display publicly in a place frequented by minors 'any book, pocketbook or magazine' containing material that may 'provoke or arouse lust or passion.'" The Georgia law, according to counsel for the American Booksellers Association, was the first time "that something less than obscene has been banned in this country." Similar laws were being considered in Pennsylvania and several municipalities in Los Angeles County, California, and the American Library Association reported that "protests by local groups against the circulation of certain books by school and public libraries have tripled during the past year, with 34 states heard from." A 1973 Supreme Court case, *Miller v. California*, ruled that criteria for determining what is and is not obscene must be determined by "local contemporary community standards," and thus began the "retreat from the victories celebrated by Mr. Rembar...accelerated in the past year or two by the nationwide swing to conservatism and the proliferation of groups campaigning for their conception of morality."[18]

A similar note of dismay at the rise of book-banning activity characterized another 1981 article, "The Growing Battle of the Books" in *Time* Magazine: "Lately...it has been easy to assume that when the everything-goes New Permissiveness gusted forth in the 1960s, it blew the old book-banning spirit out of action for good. Quite the contrary. In fact, censorship has been on the rise in the U.S. for the past ten years. Every region of the country and almost every state has felt the flaring of the censorial spirit. Efforts to ban or squelch books in public libraries and schools doubled in number, to 116 a year, in the first five years of the 1970s over the last five of the 1960s....The upsurge in book banning has not since let up, one reason being that some 200

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[18] Ray Walters, "Paperback Talk," *New York Times*, 5 July 1981.

local, state and national organizations now take part in skirmishes over the contents of books

circulating under public auspices. The American Library Association...has just totted up the

score for 1980. It found, without surprise, yet another upsurge: from three to five episodes a

week to just as many in a day....The resurgence of a populist censorial spirit has, in a sense,

sneaked up on the nation....[W]hy have so many people with such an outlook begun lurching

forth so aggressively in recent years? They quite likely have always suffered the censorial

impulse. But they have been recently emboldened by the same resurgent moralistic mood that

has enspirited evangelical fundamentalists and given form to the increasingly outspoken

consitutency of the Moral Majority." The article mentions book-banning crusades in Kanawha

County, West Virginia; Idaho Falls, Idaho; Anaheim, California; Whiteville, North Carolina;

Long Island, New York; Chicago, Illinois; Drake, North Dakota; and statewide censorship

efforts led by the Texas Daughters of the American Revolution and a Florida Organization called

Save our Children. The list was not exhaustive; the article states that such cases number "in the

hundreds." Some of the protests involved book burning. The list of banned and/or burned books

included Ken Kesey's *One Flew Over the Cuckoo's Nest,* Richard Wright's *Black Boy*, John

Steinbeck's *The Grapes of Wrath* and *Of Mice and Men*, J.P. Salinger's *Catcher in the Rye*,

Aldous Huxley's *Brave New World*, Harper Lee's *To Kill a Mockingbird*, Joseph Heller's *Catch-

22*, Shakespeare's *The Merchant of Venice*, Bernard Malamud's *The Fixer*, the works of "reputed

homosexuals" Emily Dickinson, Willa Cather, Virginia Woolf, Tennessee Williams, Walt

Whitman and John Milton, the work of historian Arthur Schlesinger Sr., and a book called

Making It with Mademoiselle, whose ban was lifted when a school board discovered "it was a

how-to pattern book for youngsters hoping to learn dressmaking."[19]

The *New York Times* and *Time* articles touched on the same themes in their discussions of book censorship. First, the efforts to ban books centered on the concept that children must be protected from culture. Second, these calls for censorship were taking place throughout the U.S., not only in specific regions. Third, the increase in pro-censorship activism was tied to a shift in the nation's overall political leanings, from left-wing to right-wing. The presidential campaign of Reagan announced the emergence of the New Conservatives, and coincided with the formation of Reverend Jerry Falwell's Moral Majority; the strong support that Falwell's evangelical Christian followers gave to Reagan and the Republicans in the 1980 elections implied that an alliance between the New Conservatives' and the Moral Majority's agendas had been forged. To be sure, the public mission of the Moral Majority was to persuade government representatives to enact laws regarding certain controversial issues that reflected the values of the New Christian Right. The Moral Majority's platform was against abortion, the Equal Rights Amendment, busing schoolchildren with the goal of diversifying schools' student populations, gay rights, sex education, and SALT II, and it was in favor of school prayer.[20]

Reinforcing the popular notion that the federal government under Reagan would pass a number of laws designed to please the Moral Majority were Falwell's declarations immediately following Reagan's victory that "[The day of Reagan's election was] the greatest day for the cause of conservatism and American morality in my life," and that liberal legislators had better "examine their records and get in step with conservative values or prepare to be unemployed."[21]

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[19] "The Growing Battle of the Books," *Time*, 19 January 1981.
[20] Lance Morrow, "To Revive Responsibility," *Time*, 23 February 1981.

But what the book censorship campaigns of the early eighties demonstrated was that the most effective and important movements for cultural change in the nation would not be driven by the federal government, but by grassroots organizations, led and staffed by ordinary Americans. The groups that protested the circulation of certain books in schools, public libraries, and stores shared the Moral Majority's perspective on cultural issues, explicitly in some cases, but rather than urging the federal government to impose national standards for culture, they lobbied for change at the local level – complaining to schools, libraries, and stores, and to city and state governments rather than to Washington. Moreover, these organizations achieved success in many localities, more effectively regulating the dissemination of cultural productions than if they had aimed to convince the U.S. Congress to pass book-banning laws.

The grassroots nature of the book censorship campaigns, like later pro-censorship movements (which I discuss below), spared the federal government from having to make any overt gestures of allegiance to the Moral Majority's platform. Despite the Moral Majority's enthusiasm for Reagan, there was a clear danger for the Republicans if they chose to turn Falwell's positions into legislation for the nation. *The Washington Post*'s David Broder warned in November, 1980 that "Reagan and the Republicans face a fateful choice in which agenda they accept....[I]f they choose the economic agenda, they have a chance of success that can broaden their constituency and give them a leg up on the Democrats in the struggle for the future of American politics. If they choose the social agenda, they will squander their energies in what is probably a losing cause, divide their own ranks and alienate the very voters who could make

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[21] Frederick S. Lane, *The Decency Wars: The Campaign to Cleanse American Culture* (Amherst, NY: Prometheus Books, 2006), 119-120.

them the majority party of the next three decades."[22] *Time*'s Lance Morrow warned that "The

Moral Majority's platform...does not always square with the opinions that most Americans have

registered with Gallup and ABC/Harris."[23] Indeed, the Reagan White House did little in its eight

years to further Falwell's agenda, and Frederick S. Lane, in his 2006 *The Decency Wars*, argues

that Reagan's presidency proved to be a disappointment to religious conservatives. Writes Lane,

> In political terms, the problem for religious conservatives was that they mistook
> both the country's mood and the core nature of Reagan's conservatism.
> Unquestionably, President Reagan saw the electoral importance of the
> conservative social agenda and learned the lines well, but...[h]is election in 1980
> had far more to do with the country's desire to restore American preeminence in
> the world, defeat communism, and improve the nation's faltering economic
> prospects than with so-called moral values. And once in office, Reagan and his
> advisers (most of whom were themselves far more neoconservative and
> economically conservative than religious) demonstrated their awareness of that
> fact by making it clear that any push to promote a conservative social agenda
> would have to take a backseat to Reagan's economic program.[24]

And yet, despite Reagan's refusal to attend to the religious conservatives' desire for

change in America's cultural and social landscape, significant changes did take place over the

course of the 1980s. The federal government, whether by conscious planning or fortuitous

serendipity, delegated the task of lobbying for cultural conservatism to the millions of ordinary

Americans who cared deeply about how American cultural productions reflected, or failed to

reflect, certain morals and values. The government's tacit endorsement of ordinary citizens'

right to censor "offensive" cultural objects was reminiscent of an earlier time of rampant

censorship, the 1950s. Ronald Cohen has written about the April 1954 hearings held by the

Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary on

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[22] Lane, *The Decency Wars*, 120.

[23] Morrow, "To Revive Responsibility."
[24] Lane, *The Decency Wars*, 122.

the topic of whether comic books like the tantalizing *The Crypt of Terror* and *Weird Science*, the irreverent *Mad*, and even the mainstream *Superman* and *Batman*, with their non-traditional families, should be censored. According to Cohen, the 1954 Senate hearings "easily assumed a connection between comic reading and the perceived delinquency scourge" and "agreed [with censorship advocates] that many comics were detrimental to the health and safety of children," but "rejected any thought of federal censorship." However, "[w]hile the senators refused to take explicit action...they did encourage citizens' groups to pressure vendors and wholesalers and also endorsed self-regulation by the comics industry." The result was the industry-formed Comics Magazine Association of America and a new Comics Code, to which publishers submitted their comics for prior review in exchange for a seal of approval. Violent and sexual content, and any comics bearing a title with "horror" or "terror," were not authorized. "While the national government took no overt action," writes Cohen, "by 1955 thirteen states had passed legislation regulating crime and horror comics. The crusade [for comic book censorship] appeared triumphant." Among the groups calling for censorship measures were the General Federation of Women's Clubs, the American Legion, and the Junior Chamber of Commerce, all grassroots organizations similar to the groups that promoted book censorship around 1980, such as the Texas Daughters of the American Revolution and Save Our Children.[25]

The Reagan government choosing to abstain from legislating censorship, but encouraging citizens' groups to impose censorship by whatever means they wished (including campaigning for local governments to pass restrictive laws), and supporting industry self-censorship, thus had a historical precedent in an earlier Republican government. This middle stance suits Republican

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[25] Ronald D. Cohen, "The Delinquents: Censorship and Youth Culture in Recent U.S. History." *History of Education Quarterly* 37, no. 3 (Autumn 1997): 251-270.

strategy well, for the government can show support for the Republicans' social and cultural conservative constituents without having to enact laws that would alienate voters who are liberal on social and cultural issues. Also, by calling for culture industries to police themselves, without issuing federal mandates for this policing, Republican governments can appear to be *laissez-faire* towards business while still endorsing the restrictions demanded by cultural conservatives. By choosing this approach, the Republican party can maintain the appearance of ideological consistency with both its economic and social/cultural agendas, even though playing both sides of the fence brings the party dangerously close to hypocrisy, since guaranteeing as free a market as possible and enforcing morality in American culture are often inherently contradictory objectives.

The book censorship activism of the early 1980s thus established that when it came to regulating the distribution of cultural products, the federal government would play a supporting role, and the average American would be the most forceful instigator of policy change. The coverage by *The New York Times* and *Time* Magazine helped to build a popular perception of the power of average Americans to control culture. It was the shock of the old – the resurgence of a kind of moralizing crusade against too-liberal culture that was thought to have died in the countercultural moment of the sixties – that these and other prominent news outlets eagerly reported in their stories on book censorship. Throughout the 1980s and most of the 1990s, these stories of conflict between "traditional" and "liberal" valuations of cultural productions made for good news; the press attention fed the grassroots censors' sense of empowerment and significance, and therefore contributed to the proliferation of censorship campaigns. The book censorship efforts of the early 1980s set a pattern that was to repeat over and over again for

almost two decades following: local organizations demanded restrictions placed upon certain cultural texts, the federal government did not put those restrictions in place but demonstrated its support for the local organizations' goals, the local organizations succeeded at getting some censorship laws passed at the local (or state) levels, and the press announced that another battle of the Culture Wars had begun. Todd Gitlin's comment in his *Chronicle* article that "If the culture wars look quiet today, one reason is that the media gatekeepers have lost interest in them" hints at the role played by the press in fueling the fires of those wars, primarily, I argue, by promoting the idea that average American citizens were the new regulators of culture, that a few individuals had the right and the ability to decide, based on their personal values, what forms of culture could or could not be consumed by all Americans.

I emphasize the sense of empowerment that must have been felt by all who participated in censorship movements in an effort to explain why millions of Americans chose to engage in this type of activity over a two-decade span. The need to feel powerful was surely one motivation for the instigators of the Culture Wars. The *Time* article on "The Growing Battle of the Books" stated that pro-censorship activists "probably hunger for some power over something, just as everybody supposedly does these days. They are moved, as American Library Association President Peggy Sullivan says, 'by a desperation to feel some control over what is close to their lives.'"[26] Many pro-censorship campaigners during the eighties' and nineties' Culture Wars, as well as during all previous battles for regulation of culture, were women, and cultural activism has proven to be one means for American women to garner public attention, recognition, and prominence in the public sphere, and to successfully instigate changes in U.S.

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[26] "The Growing Battle of the Books."

society. Catherine Rymph, in her 2006 book *Republican Women*, argues that one of the keys to

the success of Elizabeth Farrington, president of the National Federation of Republican Women

in the years leading up to Eisenhower's election, was Farrington's emphasis on "traditional

elements of women's politics...[such as] women's difference from men in their unique concerns

about morality, religion, and the family. She also defined political campaigns as crusades around

a single issue that, if not acted upon, posed a grave danger." Farrington's rival for leadership of

the Federation, Marion Martin, criticized Farrington's for (wrongly) playing to "women's

tendencies toward extremism" and to the fact that women "liked to be alarmed." But in the

elections of 1950 and 1952, writes Rymph, alarming voters worked for the GOP. "Appealing to

women's role as religious crusaders and moral purifiers was a generic message that could be

interpreted by the diverse constitutencies of American women to which the Federation tried to

appeal."[27]

The women who lobbied for cultural restrictions in the 1980s and 90s, then, were

following a precedent laid out by politically active conservative women decades earlier, and

throughout the twentieth century and into the twenty-first, women have parlayed their

stereotypical role as society's moral guardians and child protectors into a form of public power.

From the temperance crusades of the early 20th century through the Culture Wars and beyond, it

is interesting to note that conservative women have consistently employed the "crusader" tactic,

organizing "political campaigns as crusades around a single issue that, if not acted upon, posed a

grave danger," probably because this tactic has yielded success time and time again. The role of

conservative single-issue crusader has certainly worked to women's advantage, in that it has

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[27] Catherine E. Rymph, *Republican Women: Feminism and Conservatism from Suffrage through the Rise of the New Right*
(Chapel Hill, NC: The University of North Carolina Press, 2006), 118-119.

allowed them access to political and social influence and has provided them a recognized place in American public life, but it has also worked against women, for the "moral crusader woman" stereotype has become so firmly rooted in the consciousness of the American public and press that it is now virtually the only type of public political engagement in which American women can effectively engage.

The Reagan Congress' rejection of the task of cultural censorship, its tacit handover of that job to the American citizenry, and the strong interest of the press in the story of conservativism's triumph after decades of dominant liberalism, opened the door wide for American women, who (thanks to the gains of Third Wave feminism) enjoyed a greater sense than ever before of their own rights to participate in American public life, to cast themselves in the traditional role of moral crusaders, and pitch cultural battle after cultural battle throughout the eighties and nineties.

THE BATTLEFIELDS OF CULTURE

One of cultural battles most relevant to the *Grand Upright* case was that over popular music. In 1985, Tipper Gore, wife of then-Senator Al Gore, and Susan Baker, wife of then-Treasury Secretary James Baker, joined with eight other wives of Washington politicians and business leaders to combat what they sensed was too much explicit sex and violence in the lyrics of rock music records being listened to by their children and their children's peers. Gore, Baker, and their circle formed the Parents' Music Resource Center (PMRC), and sent a letter (signed by a total of 20 women, all of them also wives of powerful Washingtonians) to the Record Industry Association of America (RIAA) requesting that 15 hit songs of that time be labeled, so that

parents would know that the lyrics of those songs contained references to sex, drug/alcohol abuse, violence, and/or the occult. In the letter, the PMRC members expressed their hope that the RIAA would label not only the 15 named songs, but all other records that included similar references. The PMRC informed the press of their budding campaign to convince the RIAA to voluntarily label certain records, and the press eagerly made the PMRC a bigger story than the book censorship campaigns of a few years prior, the high-profile status of the members' husbands contributing the story's appeal. Over 150 newspaper editorials, cover articles in *Newsweek* and *People* on the PMRC's agenda, and appearances by PMRC members on television shows including *Donahue*, *Good Morning America*, *Today*, *The CBS Morning News*, *Entertainment Tonight*, and the ABC, CBS, and NBC evening news programs, followed the PMRC's initial letter to the RIAA.[28] Although the RIAA announced in August 1985 that its members would work with the PMRC to establish procedures by which warning stickers would be affixed to records with questionable content (thereby meeting the PMRC's demands), the U.S. Senate Committee on Commerce, Science, and Transportation convened a hearing on the question of whether certain records should bear warning labels on September 19, 1985. Of the 17 Senators who sat on that Committee and heard testimony at the hearing, five were the husbands of PMRC members.[29]

The Committee hearing on record labels, like the 1954 Subcommittee to Investigate Juvenile Delinquency hearing on comic books, did not result in a recommendation for a federal law requiring a labeling system (in both cases, the affected industries opted to self-impose a

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[28] Eric Nuzum, *Parental Advisory: Music Censorship in America* (New York: HarperCollins, 2001), 20.

[29] Nuzum, *Parental Advisory*, 20.

labeling system), but did express support for the organized private citizens calling for restrictions to be applied to certain cultural products. The three Senators who delivered the opening statements at the hearings did not even wait for testimony to be given before they delivered their endorsement of the PMRC's objectives. Senator Earnest Hollings' statement began with, "I first want to commend the Parents Music Resource Center for bringing this to the nation's attention," and referred to the albums found objectionable by the PMRC as "porn rock" and "outrageous filth." Senator Paul Trible's statement argued that, "When we are constantly confronted by that which is coarse, we become coarsened. Repeated exposure to song lyrics describing rape, incest, sexual violence, and perversion is like sandpaper to the soul....One becomes literally demoralized." Senator Gore's statement neatly summarized what I have called the "middle stance" of the federal government regarding censorship initiatives by first stating that "the proposals made by those concerned about this problem do not involve a Government role of any kind whatsoever," and then supporting the PMRC's proposals by arguing that record company executives "should take a look at what their companies are doing and just ask themselves as human beings whether or not this is the way they want to spend their lives, if this is the way they want to earn a living, if this is the kind of contribution they want to make to the society in which we live." Added Gore, "No one is proposing or contemplating the government answering that question for them, but as citizens of this country it seems to me we have the right to ask them whether or not they wish to answer the question, and I hope that they will."[30]

Despite the fact that the federal government and the PMRC both disavowed any desire to

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[30] U.S. Government Printing Office, "Hearing before the Committee on Commerce, Science, and Transportation, United States Senate, Ninety-Ninth Congress, First Session on Contents of Music and the Lyrics of Records," S. Hrg. 99-529, September 19, 1985 (Washington, 1985), http://www.joesapt.net/superlink/shrg99-529/index.html (accessed 8 December 2007).

regulate record sales apart from reaching an agreement with record companies on warning labels, the years between 1985, when the PMRC formed, and 1990, when the RIAA put its Parental Advisory warning label system into effect, numerous other grassroots groups implemented their own measures to restrict the circulation of offensive music. The PMRC developed ties to the Parent Teacher Association, the American Academy of Pediatricians, and fundamentalist organizations such as Focus on the Family and the American Family Association.[31] Building on the PMRC's efforts, the Reverend Jimmy Swaggart urged his followers to pressure stores to stop selling rock albums, and some of the nation's largest retailers, including Wal-Mart, Sears, and J.C. Penney, agreed to the demands of the Swaggart campaign (Wal-Mart stopped carrying what it deemed to be controversial rock albums; Sears and J.C. Penney announced that they would not sell albums bearing a PMRC-approved warning label).[32] As Eric Nuzum chronicles in his 2001 book *Parental Advisory*, small record stores also took controversial albums off their shelves, not because PMRC sympathizer groups had asked them to, but because they feared antagonism from such groups. Nuzum writes, "Some music retailers renting space in suburban malls were warned that they would be evicted if conservative protesters picketed their stores."[33]

In addition, all of the major record companies decided to invent warning stickers that complied with the PMRC's wishes, not waiting for the RIAA's 1990 release of an industry-wide standard for stickering. Forty-nine albums released between 1986 and 1989 carried some kind of warning label, with each company formulating its own criteria for determining which albums

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[31] Grossberg, *We Gotta Get Out of This Place*, 5.
[32] Nuzum, *Parental Advisory*, 23.

[33] Nuzum, *Parental Advisory*, 23.

deserved the labels.[34] And while the PMRC did not ask for government regulation of music, and the federal government made clear it would not impose such regulation, 12 state legislatures (Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Missouri, New Mexico, Oklahoma, Pennsylvania, Virginia, and Maryland) did consider bills that would ban or restrict the sale of albums bearing warning stickers,[35] in yet another parallel to the aftermath of the 1950s campaigns against comic books. While neither the 1954 Subcommittee hearing nor the 1985 Committee hearing resulted in federal censorship, the visibility and credibility with which the Senate endowed grassroots censorship movements in both cases resulted in state lawmakers seriously debating, and in some cases passing, censorship laws.

The emergence of PMRC sympathizer groups, and retailers' responses to these groups, exemplify the contagion of censorship. By this I mean that the PMRC's efforts to regulate culture were contagious: their activities sparked other citizens' groups into action, the objectives of those supporter groups went beyond the original group's stated aims (although the PMRC did encourage boycotts and demonstrations[36]), and the successes of those groups were greater than what they had anticipated, since not only major retailers (who were the taggart of the Swaggart campaign) but local stores began to impose censorship on rock music records, out of fear of how concerned citizens' protests *might* negatively impact their businesses. The impulse to censor thus spread, within the category of popular music, up (from the PMRC to the Senate, gaining endorsements from high-ranking government representatives; from the PMRC to record

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[34] Darrick Lee, "Parental Advisory Warning Labels Steeped in Controversy," *Hush Your Mouth*, Spring/Summer 2003, http://www.hushyourmouth.com/parental_advisory_labels.htm (accessed 8 December 2007).

[35] Nuzum, *Parental Advisory*, 34.
[36] Grossberg, *We Gotta Get Out of This Place*, 7.

companies; from the PMRC to state legislatures) and out (from the PMRC to other citizen-

activist groups), and back up again (from the sympathizer groups to retailers, both large and

small). The contagion of censorship spread even farther and deeper as rap music, which first

made significant showings on the record charts at the same time that the PMRC began its efforts,

in the mid-1980s, increased in sales and popularity.

Documented efforts to censor rap music on the grounds of offensive lyrics in the late

1980s and early 1990s were initiated by individual local citizens, city officials, city police

departments, district attorneys, organized citizens' groups like the American Family

Organization and Focus on the Family, local radio hosts and other media personalities, one state

governor (Florida's Bob Martinez), one Federal Court judge (Florida's José Gonzalez), and the

FBI. Many of these efforts were successful, leading to convictions and fines for music retailers

who sold rap albums deemed "obscene," the banning of certain albums in some counties, and

restrictions placed upon rap concerts.[37] Rap concerts in particular suffered due to press reports

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[37] In April 1988, city officials of Alexander City, Alabama sent letters to the town's merchants warning them not to sell obscene material. In June 1988, a woman complained to the Alexander City police that her son had obtained a tape cassette of the rap group 2 Live Crew's album Move Somethin' at a local store, Taking Home the Hits, owned by Tommy Hammond. Alexander City police chief Lynn Royall, "said it took less than a minute of listening to the sexually explicit 2 Live Crew tape to authorize Mr. Hammond's arrest" (Peter Appleborne, "Tape Obscenity Conviction Is Upset," *New York Times*, 23 February 1990). Hammond was arrested by an undercover police officer for violating a state law that prohibited the sale of obscene materials. In July 1988, Hammond became the first American to be found guilty of selling recorded obscenity. In December 1989, Hammond's brother Bob, owner of Breezeway Record Shop in Sylacauga, Alabama, was fined $3,000 and given a one-year suspended sentence for selling a tape with explicit lyrics by a rapper named Too Short. In 1990, a group called the American Family Organization organized a private "sting" operation against three record stores, which the group accused of violating a state statute banning sales to minors of recordings depicting "sexual excitement or activities." The tapes sold by the three stores were 2 Live Crew's As Nasty as They Wanna Be and "Me So Horny" (Tom Wicker, "In the Nation: Lyrics and the Law," *New York Times*, 1 February 1990). Tommy Hammond, whose conviction carried with it only a $500 fine, decided to file an appeal, because, as he told a New York Times reporter, "Unlike some Americans, he doesn't want to be a censor telling others 'what they can or can't listen to,' because he believes 'music is up to the person who's listening to it.'" The *NYT* article on Hammond said of his appeal hearing, "the outcome will be watched throughout the recording and entertainment industries for its effect on artists and performers, and could be a step toward government censorship of what Americans can listen to in the privacy of their homes" (Wicker, "Lyrics and the Law").

Although Tommy Hammond's conviction was overturned by an Alabama Circuit Court in February 1990, As Nasty as They Wanna Be had already become the censorship movement's favorite target. In late 1989, a group called Focus on the Family, acting on a tip from parents that the album was obscene, transcribed the album's lyrics and informed its membership that, according to Focus on the Family's vice president Paul Hetrick, "there has never been an album recorded in our nation's history

linking them to gang warfare and bodily danger to innocent teens. Tricia Rose, writing in her

1991 article "Fear of a Black Planet" about the fatal stabbing of a 19-year-old boy at a 1988 rap

concert in Nassau, Long Island, argues that the media coverage of the event depicted black fans

of rap as irrepressibly violent. Despite the fact that the Nassau incident was "not the first to

result in an arena death, nor [was it]...the largest or most threatening [outbreak of violence at a

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for sale to the public with this level of explicit sex and degradation. There are 87 descriptions of oral sex, 116 mentions of male and female genitalia and other lyrical passages referring to male ejaculation" (James LeMoyne, "Three Men Who Took Aim at a Rap Group," *New York Times*, 12 June 1990). A local radio host in Miami, Florida received the transcript of As Nasty as They Wanna Be from Focus on the Family, and passed it on to an evangelical Christian Miami lawyer, Jack Thompson in January 1990 (LeMoyne, "Three Men"). That month, Thompson sent copies of the lyrics to Florida Governor Bob Martinez and the prosecutors and sheriffs of 65 counties in the state, encouraging the officials to ban sales of the album. Governor Martinez then publicly denounced the album as obscene, and in eight counties, prosecutors brought the album before state judges or grand juries and obtained opinions that As Nasty as They Wanna Be was "probably obscene." In March 1990, Sheriff Nick Navarro of Broward County, Florida, then took the opinion by one of the Circuit Court judges to record stores and warned the owners that if they did not remove the 2 Live Crew album from their shelves, they might face criminal charges (Robert D. McFadden, "Shock Greets Banning of a Rap Album, *New York Times*, 8 June 1990; and Sara Rimer, "Obscenity or Art? Trial on Rap Lyrics Opens," *New York Times*, 17 October 1990).

      In June 1990, The New York Times quoted Sheriff Navarro stating his position on As Nasty as They Wanna Be: "It's an obscene album. You sell it, you're going to jail" (McFadden, "Shock Greets Banning"). 2 Live Crew's label, Skyywalker Records, filed a Federal Court lawsuit against Sheriff Navarro, claiming that no court had ruled the album obscene, and that Navarro was therefore practicing the most egregious type of censorship, prior restraint, against the rap group by effectively banning its album's sales. On June 8, 1990, Judge José Gonzalez found that As Nasty as They Wanna Be was obscene under the Supreme Court's 1973 criterion of contemporary community standards. According to The New York Times, "The judge upheld the complaint against the sheriff, saying he should have waited, but he ruled nonetheless that the album was obscene and could be banned because it appealed to prurient interests, was patently offensive to the community and lacked any serious artistic merit." The judge did not prohibit sales of the album, and did not make any finding of criminality against Skyywalker Records or 2 Live Crew, but the ruling, said the NYT, "cleared the way for police and prosecutors in Broward, Dade and Palm Beach Counties to bring criminal charges against anyone who sells the album or even possesses it in public." The obscenity ruling had never before been applied to a music album's lyrics by a Federal court. The NYT reported at the time of the judgment, "A spot check of some of the 40 stores selling records in Broward County yesterday found none that were still carrying 'As Nasty As They Wanna Be'" (McFadden, "Shock Greets Banning"). Although Sheriff Navarro was the respondent in the lawsuit heard by Judge Gonzalez, it was he who triumphed, along with Governor Martinez, Jack Thompson, and Focus on the Family, in their quest to have the rap album banned.

      Other bans against rap music were enforced by different sectors of the government. In 1989, the Federal Bureau of Investigation took an official stand on a work of art when its chief spokesperson sent a letter on F.B.I. stationery to Brian Turner, the president of Priority Records, the company that distributed the album Straight Outta Compton by the rap group N.W.A. (Niggaz With Attitude). The F.B.I. letter stated that one song on the album, "F--- tha Police," (according to a contemporaneous story in The New York Times, the dashes were part of the official title [Jon Pareles, "Outlaw Rock: More Skirmishes on the Censorship Front," *New York Times*, 10 December 1989]), "encourages violence against and disrespect for the law enforcement officer." The letter also gave statistics on the number of police officers killed in the line of duty in 1987 and 1988. The letter concluded, "I wanted you to be aware of the F.B.I.'s position relative to the song and its message. I believe my views reflect the opinion of the entire law enforcement community" (Pareles, "Outlaw Rock"). The F.B.I.'s letter did not threaten any action to stop Straight Outta Compton's sales, but N.W.A.'s live performances were constrained by police efforts directly inspired by the letter. Jon Pareles wrote in December 1989: "As Billboard magazine reported, local police departments faxed a version of the song's lyrics from city to city, and since off-duty police officers often double as concert security personnel, promoters found it increasingly difficult to put on N.W.A concerts without them. During its curtailed summer tour, N.W.A. didn't perform "---- tha Police" on stage; when it sang a few lines in a Detroit concert, police officers moved toward the stage, ending the set. Freedom of speech could be debated later" (Pareles, "Outlaw Rock").

concert]," newspaper articles reinforced "White fears that Black teens need only a spark to start an uncontrollable urban forest fire." Following the Nassau concert, the TransAmerica insurance company refused to cover other concerts staged by the Nassau event's promoter, which resulted in what Rose calls "a pall [being cast] over rap shows, resulting in many venues imposing stringent conditions or refusing to host the shows at all," effectively limiting rap groups' opportunities to reach live audiences.[38]

The contagion of censorship spread beyond the realm of popular music lyrics to other cultural forms in the eighties and nineties. In addition to book censorship and music censorship movements, the Culture Wars comprised a wide variety of battles, including campaigns against pornography (I discuss the anti-pornography campaigns of this period at length in Chapter 3), against the exhibition and federal funding of controversial visual and performance art,[39] for the automatic application of the PG-13 film rating to movies depicting drug use,[40] and against attempts to reform college humanities curricula to include a greater diversity of authors.[41] Earlier in this chapter, I suggested that several of the Left's most productive struggles during the Culture Wars, such as the attempts to restrict discriminatory speech, gestures, and actions in public settings such as workplaces and college campuses, were more conservative than liberal. Lawrence Grossberg argues in his 1992 book *We Gotta Get Out of This Place*,

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[38] Tricia Rose, "'Fear of a Black Planet': Rap Music and Black Cultural Politics in the 1990s." *The Journal of Negro Education* 60, no. 3 (Summer 1991), 280-281.
[39] See Bolton, *Culture Wars*; and Svetlana Mintcheva, "Revisiting *Free Exchange*: The Art World After The Culture Wars," in Atkins and Mintcheva, *Censoring Culture*.

[40] See David F. Musto, "When It Comes to Drugs, Beware the Censor's Fix," *New York Times*, 28 June 1987.

[41] See Allan Bloom, *The Closing of the American Mind* (New York: Touchstone, 1987); Dinesh D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus* (New York: Free Press, 1990); John Guillory, *Cultural Capital: The Problem of Literary Canon Formation* (Chicago: The University of Chicago Press, 1993); and Jeffrey Hart, "How to Get a College Education," *The National Review*, September 1996.

> [T]he Left has often acceded to [the New Right's] operation. Consider one of
> the more interesting and paradoxical political events in recent years: the
> emergence of left-wing anti-free speech movements. While attempts to limit
> speech are too often assumed to be implicitly right-wing, the current scene makes
> obvious the variations within, and the complexities among, such practices. Many
> of these campaigns are located on college campuses around the country, where
> the issue is not banning speech that is critical of authority, but rather banning
> speech which in some way 'harms' the atmosphere within which such critical
> speech can flourish....In the name of opposing a discursively hostile environment
> in which various minorities (whether racially, ethnically, sexually or gender
> marked) are discomfited, some people challenge the right of such obnoxious
> speech to exist.[42]

In other words, the traditionally Leftist position of defending open and free debate among equals

ironically developed into an opposition to free speech. Whether the Left achieved its goal of

facilitating an "atmosphere within which...critical speech can flourish" on campuses is not the

issue; rather, I am claiming that the attempt to regulate speech was well within the logic and

pattern of other censorship campaigns at the same historical moment, even down to the fact of its

success.

Another left-wing struggle of the eighties and nineties that accomplished its objectives,

the canon revision struggle, also conformed to the logic of the censorship efforts, in that

revisionists sought to regulate what forms of culture America's youth must or must not consume,

and justified the need for this regulation on the grounds that their criteria for judging cultural

products were the most moral, and the best-suited to shape the sensibilities of impressionable

young people such that they would likely become ethical, rational adults. The fact that a strong

movement to defend the traditional literary canon, which also adhered to the logic of censorship,

opposed the revisionist movement does not automatically mean that canon revisionism was *not* a

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[42] Grossberg, *We Gotta Get Out of This Place*, 298.

censorship campaign. In the 1980s and 90s, cultural censorship efforts in the U.S. were numerous and largely effective, and the logic of censorship was deemed acceptable and correct by many Americans, even Leftists, so much so that censorship initiatives achieved a kind of pro-regulation consensus among the gatekeepers of a wide range of culture industries.

WARRING FOR ONE NATION, INDIVISIBLE

It would be simple to declare that the Culture Wars were motivated by certain individuals' and groups' dislikes, distastes, and desire to condemn other groups' tastes and preferences. In other words, one can easily frame the Culture Wars as driven primarily by a set of negative impulses, such as the impulse to limit, to shut down, to foreclose, to ban, to restrict, to deny access, to forbid. However, I argue that the Culture Wars were just as motivated by positive impulses as by negative ones, and positive not only in the sense meant by Svetlana Mintcheva and Robert Atkins when they refer, in their 2006 essay collection *Censoring Culture*, to the "perverse pleasure" experienced by the "narrow-minded and prudish bureaucrat blind to the transcendent flights of imagination we call art, burnishing his red pen or his stamp and inkpad."[43] I argue that pro-censorship activists felt strong desires to achieve positive, constructive results such as unity, cohesion, agreement, togetherness. In short, what culture warriors wanted above all was *commonality*.

I have already summarized the press' perspective on the resurgence of censorship in the early eighties. Journalists tied the trend in cultural regulation to the election of Ronald Reagan to the White House and a Republican majority to the Senate in 1980, a set of victories made

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[43] Svetlana Mintcheva and Robert Atkins, "Introduction: Censorship in Camouflage" in Atkins and Mintcheva (eds.), *Censoring Culture*, xv.

possible in large part by the campaigning of religious conservatives. But one must also ask,

What made cultural censorship so appealing to so many Americans, both religious conservatives

and individuals who did not define themselves as right-wing Republicans or politically active

fundamental Christians? After all, not all of the PMRC's initial members were Republicans;

most obviously, Tipper Gore, the organization's co-founder, was and is a high-profile Democrat.

Although many of the organizations that supported various censorship campaigns were affiliated

with the religious right, some, including the PTA and the American Academy of Pediatricians,

were not. Several censorship efforts, including the anti-pornography movement and the speech

and curriculum movements I discussed above, were led by left-wing activists. Censorship drew

support from Americans on both the right and left of the political spectrum, despite the fact that

censorship has long borne the label of Rightism. Earlier, I claimed that the government's

implicit investment of ordinary citizens with the responsibility to impose restrictions on certain

cultural forms, and the media's willingness to put the spotlight on citizens who took up this task,

surely made many people feel empowered and important, and the opportunity to gain power and

control probably attracted numerous Americans to censorship causes. Now, I will propose an

additional set of reasons for the mass appeal of censorship: common ground, common sense, and

common culture.

The 1980s followed two decades of division and upheaval in the U.S. After the Civil

Rights movement, the assassinations of a President, a Senator, and multiple Civil Rights leaders,

the Third Wave feminist movement, the rise of the counterculture, the drawn-out and heavily

protested U.S. military engagement in Vietnam, the development and destruction of the Black

Panther Party, the refusal of one President to run for re-election due to controversies over

Vietnam, the disgrace and resignation of another President, the Arab oil boycott of 1973 that

threw the U.S. into a major energy crisis, the legalization of abortion that same year, and the

protracted Iran hostage crisis, runaway inflation, and two recessions, the nation suffered from

exhaustion. In his "Epitaph for a Decade" column in *Time* Magazine's first issue of 1980, Lance

Morrow writes,

> [M]ostly the air in the '70s was thick with a sense of aftermath, of public passions
> spent and consciences bewildered...[T]he decade was bathed in a cold Spenglerian
> apprehension that the lights were about to go out, that history's astonishing
> material indulgence of the U.S. was about to end. Possibilities seemed to
> contract. Americans tutored in the gospels of progress began for the first time to
> peer at the future as a possible enemy....Material progress advanced handsomely
> enough, but the psychology of the decade seemed to follow a downward
> trajectory. A consensus was lost, and authority seemed to operate only
> erratically. The nation split into single-interest power factions. The screws of the
> American machine jarred loose; the whole thing rattled.

Morrow concludes his epitaph on a note of optimism for the decade to come: "There is an

impression now of national unity, a feeling that the U.S. is emerging from the privatism

and divisions of the Me Decade....[I]t may not be entirely wistful to hope that the mood

will last, that the '80s may even prove to be the Us Decade."[44] Morrow's diagnosis of

the illness plaguing the nation at the close of the seventies is "privatism and divisions" –

individuals focusing too much on themselves, and not focusing enough on the larger

polity – too much "Me" and not enough "Us." Morrow's prescription for the American

psyche is "unity," a rediscovery or forging-anew of the "consensus [that] was lost."

What Americans need, Morrow effectively argues, is to find some common ground with

one another.

This felt need for some way for all Americans to come together, to unite behind

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[44] Lance Morrow, "Epitaph for a Decade," *Time*, 7 January 1980.

some cause, was one major reason that Reagan's presidential campaign and early

presidency attained such heights of popularity with the voting public, for Reagan's credo

throughout the late seventies and early eighties was the value of "common sense." In

May 1980, months before the presidential election took place, *New York Times* political

commentator predicted that Reagan would come from behind to win because so many

Americans identified with his tone: "[Reagan is] an engagingly low-keyed character a

breezy American style that a lot of voters recognize as their own....Sophisticates may

love to mock his 'banalities' and 'slogans' but the people seem to think they're hearing

their own brand of common sense."[45] Reagan's call for common sense was more than a

rhetorical style; he incorporated the phrase into almost every major speech he delivered

as president during his first term. In one of his first presidential addresses, Reagan's

concluding statements were, "We can leave our children with an unrepayable massive

debt and a shattered economy or we can leave them liberty in a land where every

individual has the opportunity to be whatever God intended us to be. All it takes is a

little common sense and recognition of our own ability. Together we can forge a new

beginning for America."[46] Reagan often portrayed average Americans as filled with

common sense: "with the common sense that characterizes the people of this country"

and "with the common sense that the people have already shown"[47] were two of his

favorite preambles. *The New York Times* reported, early in Reagan's first term, that the

president defended his refusal to state his foreign policy positions by insisting "that he

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[45] Tom Wicker, "Clearing the Record," *New York Times*, 2 January 1981. Citing his *NYT* article from May 25, 1980.
[46] "Transcript of Reagan Address Reporting on the State of the Nation," *New York Times*, 6 February 1981.

[47] "Transcript of Reagan Speech to Houses of Congress," *New York Times*, 29 April 1981.

was following a consistent course of 'common sense' and questioned the wisdom of publicly disclosing his plans and ideas. 'Now I assure you we know where we're going,' he said, 'and we think it might be counterproductive to make a speech about it.'"[48] (Evidently, common sense did not always translate into common knowledge.)

When speaking about the nation's chances to get out recession mode, Reagan said, "You in the private sector – corporations, firms, merchants, family farmers, mom-and-pop stores all over the country – you hold the key. I believe this with every ounce of my being and that's why I'm confident about our economic recovery program: because it places a premium on individual initiative, on we the people....Our economic program will work because Americans want it to work. And we're going to make it work because it's based on common sense: reduce the percentage of gross national product that is being taken by the Government."[49] In another talk on the nation's economic condition, Reagan said, "I think the people are sending a message of common sense if we'll just listen. They're asking their government to have enough courage to bring Federal spending under control, not just for a quick fix but permanently."[50]

Reagan often used "common sense" as a rallying cry for the citizenry, harkening back to the myth-laden era of the American frontier, when pioneers sought refuge in forts in the unconquered wilderness: "Back over the years, citizens like ourselves have gathered within these walls when our nation was threatened; sometimes when its very existence was at stake. Always, with courage and common sense they met the crises of

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[48] Howell Raines, "Reagan Assails Critics of Tax Cut and Defends His Foreign Policy," *New York Times*, 8 July 1981.
[49] "Excerpts from Address by Reagan on Role of Private Groups," *New York Times*, 15 January 1982.

[50] "Transcript of Remarks by Reagan on Budget," *New York Times*, 17 April 1982.

their time and lived to see a stronger, better and more prosperous country."[51] So often

did "common sense" occur in the president's speeches that the *Times* began taking

Reagan at his word, referring to him as "Mr. Reagan, a man of common sense"[52] and to

his supply-side economics as "the new 'common sense.'"[53] Businessman Charles Wick,

one of Reagan's biggest funders, neatly summed up Reagan's brand when he described

his conversion to Reagan Republicanism to the *Times*: "Wick was once a Democrat but

became disenchanted by the deleterious effects of big government. Such incidents as the

Watts riot of 1965 – 'a lot of people on welfare with free time on their hands' –

convinced him that the society was disintegrating. More 'social scientists' were clearly

not the solution; he sought the 'innate common sense' of a Ronald Reagan. 'I don't want

to knock intellectuals,' Mr. Wick says. 'There's a tremendous need for those kinds of

people. The debate over whether Reagan is as smart as Keynes or Plato is preposterous.

I wouldn't trust them to fix my car. Reagan would identify the problem swiftly, get

someone to fix it who didn't necessarily go to Harvard."[54]

Despite what could have been interpreted as over-reliance on a catch phrase,

Reagan's use of "common sense" was so effective that it pervaded the discourse of

Republicans and Democrats, politicians and private citizens, in the eighties. For

example, Democratic Mayor Ed Koch of New York City employed the phrase to great

effect, according to *The New York Times*: "[The Mayor's] popularity quotient seems to

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[51] "Transcript of President's State of the Union Message to the Nation," *New York Times*, 26 January 1983.

[52] "Tinkering," *New York Times*, 27 September 1981.

[53] Clyde Haberman, "Behind the Mayor's Success," *New York Times*, 11 June 1981.
[54] Sidney Blumenthal, "Whose Side Is Business On, Anyway?" *New York Times*, 25 October 1981.

rise each time he announces that the citizenry has "good common sense" and and

therefore knows he is doing the best any man could do with limited resources."[55] Koch

repeatedly labeled himself the "common sense" city official, saying he displayed

"nothing more than common sense" and making seemingly contradictory statements such

as, "I don't follow the crowd. But I have good common sense. And I believe that people

with good common sense come out with the same positions."[56] A letter to the *Times*

editors supported Senator Jeremiah Denton's suggestion that Congress pass legislation to

promote chastity among teenagers by stating, "If abstinence and chastity work so well for

half the teen-age population, then let the Government promote it for the other half.

Senator Denton's bill reflects the bright light of common sense."[57] Another *Times* letter

to the editors endorsed Reagan's proposed tax cuts by arguing, "This is a very healthy

and long-overdue reaction to excesses in Washington over the past decade....The public is

tired of footing the bill for this grand old game. This is no paradox, just common sense

sharpened by overtaxation."[58] Former Democratic presidential candidate George

McGovern founded a nonprofit organization named "Americans for Common Sense"[59] as

a liberal counteroffensive to the National Conservative Political Action Committee and to

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[55] Sydney H. Schanberg, "A New Common Sense," *New York Times*, 5 May 1981.

[56] Haberman, "Behind the Mayor's Success." During his failed gubernatorial bid in 1982, Koch practically ran on a platform of common sense. In a debate with the eventual Governor, Mario Cuomo, Koch stated, "So what I'm simply saying is, if I have to sum it all up, I believe in the rights of society, in the common sense approach. That doesn't mean I take a poll on an issue. I believe that because I have common sense, taht generally speaking that when I do take a position it reflects the positions of the ordinary person who exercises, in my judgment, common sense. And those are whites and blacks and Hispanics - they have common sense, and that's what I stand for, and I believe it's what most of the people in this state stand for." ("Excerpts from Debate by Democratic Candidates for New York Governor," *New York Times*, 16 September 1982.)
[57] Kevin Barry, "Letter to the Editor," *New York Times*, 26 May 1981.

[58] Thomas F. Finnegan, "Letter to the Editor," *New York Times*, 4 August 1981.

[59] Francis X. Cline and Bernard Weinraub, "Briefing," *New York Times*, 2 November 1981.

Falwell's Moral Majority.[60] One of the *Times* articles reporting on McGovern's left-wing

"Americans for Common Sense" was aptly titled "Democrats Borrow G.O.P.

Strategies." Reagan and his New Right Republicans laid claim to the phrase "common

sense" during the 1980s presidential campaign, and it resonated so well with the

American public that Reagan's supporters and enemies alike appropriated it.

Reagan's solution to the malaise afflicting the U.S. after the trying seventies, then,

was common sense. The president's recurring invocation of common sense as the quality

which all Americans shared, the trait which would enable Americans to band together

and overcome their economic difficulties, indicated that common sense was the means by

which Americans would find much-needed common ground with one another. And yet,

as demonstrated by the two *Times* letters quoted above, common sense became a

convenient rationale for very particular beliefs and positions. Adopting Reagan's logic,

the letter-writers justify measures as controversial as legislating the promotion of teen

chastity and abstinence (although Senator Denton did not offer much detail as to what

such a bill would entail) and severe tax cuts leading to a dramatic downsizing of

government with the argument that both amount to simple, readily available, crystal clear

"common sense." The difficulties and paradoxes of Reagan's implied connection of

common ground to common sense became most visible in issues of culture.

Throughout the eighties, pro-censorship activists argued that the need to restrict

the production and distribution of certain types of culture arose from common sense. For

example, when the U.S. Supreme Court ruled that the state of New York had the

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[60] "Democrats Borrow G.O.P. Strategies," *New York Times*, 4 January 1982.

constitutional right to ban topless entertainment from bars licensed by the State Liquor

Authority in June 1981, the Court quoted an earlier judgment that read, "Common sense

indicates that any form of nudity coupled with alcohol in public places begets undesirable

behavior."[61] Lance Morrow, in an column for *Time* printed a year after his "Epitaph for a

Decade," exhorts Americans to find common ground by raising "their sense of individual

responsibility for themselves, for the communities and the nation around them. It is not

enough to say that the Government has failed, that the System has failed....No society can

flourish, or even function, if its people do not feel responsible for it any more." These

sentiments made explicit the federal government's unspoken investment of ordinary

Americans with the authority to effect social change, by means of censorship if they

wished. Morrow then blames the "liberal, sometimes radical 'new class' – academics,

elitists, journalists – which, although accurate up to a point, somehow got the story [of

America's history and character] wrong...[and as a result,] Americans developed a moral

inferiority complex of historic proportions: where they once hubristically viewed

themselves as the world's best, many came to see America as the worst."

Morrow then praises the rise of conservatives and the Moral Majority:

"Conservatism is being called the ideology of ideas just now because...it is tending

toward the firmer, common sense moral ground that radicalism and experimental youth

abandoned years ago for more fantastic terrain. The formerly young of the 1960s have

helped the movement toward more civil and sensible behavior."[62] In February 1983, the

U.S. Justice Department declared that three Canadian documentaries – two on the

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[61] Linda Greenhouse, "High Court Upholds Rights of New York to Ban Topless Bars," *New York Times*, 23 June 1981.
[62] Lance Morrow, "To Revive Responsibility."

environmental hazard of acid-rain pollution in the U.S. and Canada, and one on the threat

of nuclear war – were "political propaganda" and had to be labeled for screenings in the

U.S. as the work of registered foreign agents. The *New York Times* reported that "John

Spano, a Justice spokesman, said that...'Our decision as to whether printed material or

films are within the definition of political propaganda is based primarily on common

sense.'"[63] One critic of the Justice Department's decision asked, "how will Justice confer

its 'P' [for 'propaganda'] ratings? If the measure is what it calls 'common sense,' will it

furnish a definition?"[64]

But the very definition of common sense is that no elaboration of it is necessary.

A decision rooted in common sense is, supposedly, understood by all who possess sense,

thoroughly transparent and obvious, and obviously correct. This advantage of pointing to

common sense as the basis for censorship campaigns – the elimination of the need to put

forth a complex and detailed argument – was even more evident at times when censorship

activists spoke in commonsensical phrases without uttering the term "common sense."

For instance, during a February 1986 hearing convened by the Marlynad State Senate to

debate a proposed bill that would expand the state's obscenity laws to include music

records, the bill's primary advocate, Judith Toth (who said the PMRC's efforts inspired

to draft the legislation), told rock musician Frank Zappa, who testified in opposition to

the bill, "[S]top worrying about [children's] 'civil rights.' Start worrying about their

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[63] Robert D. McFadden, "3 Canadian Films Called 'Propaganda' by U.S.," *New York Times*, 25 February 1983.

[64] "'P' Film Ratings Rate an 'X'," *New York Times*, 26 February 1983.

mental health, and about the health of our society."[65]

Much of the PMRC's rhetoric followed similar lines, advocating the constriction of music distribution as the best and only means of protecting children from harm and ensuring the well-being of future American society. The wishes to keep youth safe and to defend the health of society at large are unimpeachable aims; no one would or could disagree with such goals. To want safe and healthy children, and a safe and healthy society, is plain common sense. It is natural. But, as Tricia Rose argues, "naturalized concerns" over issues such as public safety were used in the Culture Wars to provide "justification for a wide range of efforts to contain the Black teen presence," and to minimize or ban live audiences for rap music. Clifford Geertz warns, in his 1983 book *Local Knowledge*, that common sense may seem natural, like "what the mind cleared of cant spontaneously apprehends," but it is in fact a "cultural system," "what the mind filled with presuppositions...concludes." "An air of 'of-courseness,' a sense of 'it figures' is cast over things" by common sense, writes Geertz. "They are depicted as inherent in the situation, intrinsic aspects of reality, the way things go." But common sense in fact has "an ingenerate order to it capable of being empirically uncovered and conceptually formulated," although the work of uncovering and formulating it is difficult, as "[t]here is something...of the purloined-letter effect in common sense; it lies so artlessly before our eyes it is almost impossible to see."[66]

Stuart Hall has written even more pointedly about the constructedness of common

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[65] Nuzum, *Parental Advisory*, 35-36.
[66] Clifford Geertz, "Common Sense as a Cultural System," in *Local Knowledge: Further Essays in Interpretative Anthropology* (New York: Basic Books, 1983), 73-93.

sense, claiming that the conservative Thatcher government in the United Kingdom (a

government that was very sympathetic to, and a close ally of, the Reagan government in

the U.S.) presented itself as an "organic ideology," one of those ideologies "that seek to

propagate themselves throughout society and create a new form of national-popular

will...[and] to interrupt, renovate, and transform in a more systematic direction the

practical consciousness of the masses, the given dispositions of their mental life."

Thatcher's rhetoric, Hall argues, sought to redefine British common sense such that

certain economic and social policies – those approved of by the state – were regarded as

exactly corresponding to the will of the people. "Common sense, the 'given ground and

dispositions of a culture,'" writes Hall, citing Gramsci, "— itself the complex result of

previous struggles, reflecting previous forms of hegemony and earlier 'unstable

equilibria' – becomes the object that organic ideologies...seek to refashion and

transform."[67]

The common sense with which culture warriors explained and justified their

causes, then, was not the manifestation of a common ground, a common understanding, a

common value system inherent in all Americans. Like all forms of common sense, the

common sense of pro-censorship activists arose from a specific set of historical

circumstances. One of those circumstances was, as Hall's analysis highlights, a

successful ideological campaign carried out by the state. The other was the psychological

lack suffered by the many Americans at the end of the 1970s, which I described earlier.

Both the state and the American psyche had much to gain in the 1980s from embracing

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[67] Stuart Hall, "The Toad in the Garden: Thatcherism among the Theorists," in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (Champaign, IL: University of Illinois Press, 1988), 55.

common sense as a guiding principle, which was, to reiterate, the establishment of common ground for "all" (meaning most) Americans, the reforging of what Morrow argued the nation needed most: a consensus. The Reagan government needed Americans to regard commonality, unity, togetherness as so important an objective that "special interests" had to be disregarded, ignored, and shunned. James Reston wrote in the *Times* in February 1981 that "One of the main criticisms of American life over the last generation is that increasingly we have become a divided or separated people, with a growing concern for our personal, local or special interests and a declining sense of the common good or national interest."[68] As if in response to this urgent problem, Reagan announced in April 1981, "When I took the oath of office, I pledged loyalty to only one special interest group – 'We the people.'"[69] But what, exactly, were the "special interests" against which Reagan's common sense, and America's newfound common ground, offered protection and defense? Often, the term "special interest" served as a coded reference to racial and ethnic groups, women, the disabled and ill, the elderly, homosexuals, and the poor. For it was against the increased consciousness of difference in the U.S. – a raised consciousness that was the fruit of much liberal activism in the sixties and seventies – that both the Reagan government and the national psyche needed protection. As Reagan's tax cuts eliminated services and programs designed to benefit women, minority groups, and the poor, the government needed Americans to regard these would-be beneficiaries of federal assistance as "cheaters" and "leeches," selfish and small

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[68] James Reston, "The Ends and the Means," *New York Times*, 22 February 1981.
[69] "Transcript of Reagan Speech to Houses of Congress."

special interest groups that sought to bilk honest taxpayers in order to get an unearned free ride.

As for the national psyche, the boon that it derived from the institution of common sense and common ground was a sense that, despite the disturbing and unchangeable differences that separated Americans from one another, such as race, gender, class, age, and sexuality, Americans could still partake of a common culture. I regard the censorship movements as driven by a passionate longing to make the nation whole again, after two decades of internal conflict, by insisting that American culture be defined in such a way that every and any American would agree, using his or her in-born, God-given common sense, that their national culture was healthy, beneficial, rational, and appropriate for all citizens. Culture is, after all, a likely meeting ground for radically opposed factions: no matter what your race or gender, you can listen to American music, you can read American literature, you can watch American movies, and in this consumption of mass media, you are American, united with other Americans by your enjoyment of American cultural productions. According to my interpretation, the censorship campaigners' demand that their standards for the evaluation of cultural forms become the standards for *all* Americans, not just for their children or their particular students but for the entire nation, arose largely from a need to join the divergent cultures of the polity together into one general and broad culture available and acceptable to all.

One aspect of the 1980s and 90s attempts at cultural censorship that has always puzzled scholars and artists is, Why did censors feel that they had to impose their judgment on the entire country, rather than being judicious about what cultural

productions their own children could and could not consume, and encouraging other

adults to do the same? My answer is that the censors strove to *save* the country, to heal

its fractured psyche and depressed spirit by unifying its people under one regulated,

standardized culture that adhered to the highest morals and most ethical aspirations of

America. These highest morals and most ethical aspirations were based on what the

censors called "common sense." By building their cases on a logic as unassailable as

common sense, the censorship activists managed to win over plenty of Americans to a

pro-censorship mindset, thereby transforming their lie into truth, by turning their version

of common sense into a sensibility that became common to millions.

THE COMMONNESS OF THE *GRAND UPRIGHT* RULING

Finally, I will return to the subject of Judge Duffy's judgment in the 1991 case

Grand Upright v. Warner Bros. Records. As I mentioned earlier, Vaidhyanathan has

deemed Duffy's ruling surprising, because it was illogical, and possibly irresponsible, of

Duffy to ignore years of scholarly debate among legal experts on the issues of how and

when sampling should be deemed fair use, and how and when sampling artists should be

required to pay a fee, and how much those fees should be for what quantities and types of

sampling. I aimed to present, in the preceding pages, the context for Duffy's decision,

and by demonstrating the events that immediately preceded *Grand Upright*, to make that

judgment legible.

Duffy's decision exemplified the logic of the U.S. Culture Wars that raged

before, during, and after the *Grand Upright* hearing. He accepted responsibility, in the

way that *Time*'s Morrow strongly recommended all Americans do, for himself and for the

nation, by taking the initiative to censor a form of cultural production that he deemed

harmful to U.S. society. The reluctance of Congress to impose restrictions on culture,

coupled with Congressional support for individuals' and grassroots groups' censorship

efforts, created an atmosphere in which lone Americans sometimes occupied the role of

cultural arbiters. The brevity and harsh tone of Duffy's ruling, and his recommendation

that a federal prosecutor follow up on his judgment by charging Biz Markie with a

criminal offense, showed that Duffy took seriously the power with which the U.S.

Congress entrusted him, and all ordinary citizens, to defend proper culture and repress

undesirable culture, to the point that he prioritized his power to reform American culture

over his official obligation to be even-handed. Duffy had likely read about numerous

high-profile cases of cultural censorship for years prior to 1991, such as the anti-rock and

anti-rap music campaigns, and clearly he supported the PMRC's agenda. Duffy

facilitated the spread of the contagion of censorship, from music lyrics to music

sampling, and the campaigns against rap, which, as Tricia Rose has pointed out, depicted

rap as the most immoral and crime-inducing music ever played in the U.S., made Duffy's

decision to declare all digital sampling (which was, at that time, the sole technique used

to create rap's "musical score") illegal, whatever the length or purpose or amount of

alteration of the sample, a very easy conclusion at which to arrive.   Duffy's several

references to religion in the *Grand Upright* ruling, and his equating religious with secular

law (as when he writes, "The conduct of the defendants herein...violates not only the

Seventh Commandment, but also the copyright laws of this country"), reveal that Duffy

was in all likelihood a religious conservative, the religious conservative faction of the

Republican party being the most involved with censorship campaigns.

Duffy's sweeping judgment against an emerging and complex cultural practice,

his wish to do away with it as swiftly as possible and to punish the offending party with

time in prison, evinces his desire to ban an unacceptable cultural form from U.S. society,

just as the culture warriors fought to rid American culture of its corrupting and immoral

productions, so that all Americans could all access and enjoy one common, healthy,

enlightening national culture. I thus read Duffy's ruling in *Grand Upright* as simply

another instance of a pro-censorship individual acting in his nation's best interest, using

his common sense to determine what should constitute America's common culture.

When viewed against the backdrop of the Culture Wars, Duffy's decision appears utterly

banal, one in a steady stream of censorship incidents that were all motivated by similar

drives, commitments, and desires. While in another era Duffy's willful shunting aside of

all debate concerning sampling's possible legitimacy and potential paths for it to be

treated as fair use, or free speech, or worthy of a court-mandated standard schedule of

licensing fees might have seemed improper and highly questionable, in the time of the

Culture Wars, it was to be expected. His *Grand Upright* decision adhered to the

consensus logic, the common sense, of the day.

Duffy's judgment against digital sampling may have been wholly ordinary given

the numerous censorship battles raging at that time, but a set of extraordinary

developments followed the *Grand Upright* case. The technology of digital sampling –

cut-and-paste, mix-and-burn computer technology – grew from a small category of

specialty tools into components of millions of Americans' everyday home and work lives. When digital media became a mass media (like radio before it, a mass interactive media rather than a mass consumption media) amateur cultural producers began to use its capabilities in the same ways that digital sampling-based producers had done in the 1980s (and continued to do, though in very limited ways, as my description of post-1991 sampling above shows). Legions of ordinary people began to remix. And the extreme legal disadvantage to which Duffy subjected digital sampling suddenly applied to one of the fastest-growing cultural forms of the digital age: remix culture. *Grand Upright*, a decision that seemed so natural to Duffy that he barely required 1600 words to deliver it, has proven to be one of the most significant legal judgments in the history of American culture.

This chapter has traced the underlying logic of the censorship of sampling; I will uncover even more layers of that logic in the next chapter, and will also delve into the logic of digital sampling. But before I leave the topic of common ground, common sense, and common culture, I must remark on a terrific irony of the *Grand Upright* ruling. As it turns out, from the perspective of an American in 2007 looking back twenty years, the most definitively American cultural form of the late 1980s, the type of culture which most Americans associate with that period and therefore have in common with one another, is rap music. The five years that digital sampling proceeded unfettered are now regarded as rap's "golden age." Every American who was a child or a teen during that time, and I was one, is still deeply affected by that music, not because it left us harmed and scarred, but because it is the soundtrack of our youths. And because most of the

tracks of those years were collages of dozens of brief samples of older music, the rap/hip-hop songs of 1986-1991 encapsulate the soundtracks of earlier generations of Americans' youths.

In a way, unlicensed digital sampling produced the genre that, of all American music genres, most powerfully calls forth listeners' nostalgia for the innocence of bygone days, because each rap and hip-hop song of that era produces not just nostalgia for itself, but for the many musical forebears it has incorporated into its structure. One last time, I will draw a parallel between the censorship battles of the eighties and nineties and those of the fifties, this time by quoting cartoonist Jules Feiffer, who fortuitously uses the word "samples" in this statement from 1965: "Comic books, which had few public (as opposed to professional) defenders in the days that Dr. [Fredric] Wertham [the nation's leading anti-comic crusader from the late forties through the fifties] was attacking them, are now looked back on by an increasing number of my generation as samples of our youthful innocence instead of our youthful corruption."[70] In a way, the pro-censorship campaigners, so eager to standardize a common culture for America's young, permanently damaged the style of sound production that might have served, for many future generations, as that common ground for which they fought so many wars.

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[70] Cohen, "The Delinquents," 260.

CHAPTER 3
Sampling, Cyborg Children, and the Race for the Future

REPLICATING FEAR

In Chapter 1, I described how the Culture Wars of the 1980s and 90s contributed to the

censorship of digital sampling in 1991. In this chapter, I will explore other factors that played a

significant part in sampling's legal condemnation, some of which were contemporaneous with

digital sampling's invention, and others that pre-dated digital sampling by centuries. There is an

unstated assumption in the statements given and lawsuits filed by copyright holders against

unlicensed sampling, which is that sampling is dangerous. Whom or what does sampling

threaten? When Judge Kevin Duffy ruled that unlicensed sampling constitutes copyright

infringement and violates the seventh commandment, "Thou shalt not steal," sampling was

deemed to pose a danger to the market value of the recorded compositions that served as its

source texts. But, as Siva Vaidhyanathan points out, hip-hop tracks that incorporate samples

hardly ever compete directly with, or decrease the marketability of, the sampled songs.

Vaidyanathan states that there is a "question as to whether the newer work detracts from the

market of the original. In fact, as has been shown repeatedly, sampling often revives a market

for an all but forgotten song or artist. The best example is the revival of Aerosmith since Run

DMC's version of "Walk This Way" reminded young listeners of the power of the original song.

Aerosmith, almost forgotten after a string of hits in the 1970s, collaborated on that project. But

even an unauthorized use of the original song would have revived interest in Aerosmith, one of

the most successful bands of both the 1970s and 1990s."[1]

Despite the ways that sampling could help, and has helped, the earning potential of the composers and recording artists whose works they appropriate, the perception that sampling presents a threat that must be stopped by force of law runs deep in the minds of copyright holders, their attorneys, several judges who have presided over cases involving unlicensed sampling, and significant portions of the general public. I argue that this perception can be linked to numerous other fears of technological or viral copying that emerged in the U.S. in the eighties and nineties; in other words, digital sampling embodied a popular fear held not only by members of the recording industry, but by the American populace, that unregulated mechanical and electronic replication might lead to an unwanted, dystopian future for the nation.

NEXT-GEN TECHNOLOGY

Americans' dread of copying in the eighties and nineties can be thought of as a discursive rope woven from multiple strands, or areas of concern. One thick strand, or concern, was the welfare of the nation's children. During the Culture Wars, the predominant justification given by pro-censorship organizations and individuals, both liberal and conservative, for containing or constraining the production and consumption of certain words, images, and sounds, was a fear for America's youth. There was an implicit futurity in the arguments made for censorship during the Reagan and G.H.W. Bush presidencies. Any public movement to "protect the children" insinuates that the young are endangered. A threat to a nation's rising generation is a threat to the nation itself, for if the youth, who constitute the future leadership, citizenry, and workforce,

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[1] Vaidhyanathan, *Copyrights and Copywrongs*, 144.

are damaged or harmed, then at some future point, perhaps ten or twenty years from the present,

when the corrupted youth grow into adults, their faulty *bildung* (formation) will render them

incapable of generating a healthy society, and the nation will fall into weakness,

unproductiveness, and immorality. This was the underlying logic of the groups that participated

in censorship campaigns. The connective tissue between the aim of various grassroots parents'

and Christian organizations to "protect the children" and their efforts to restrict the circulation of

certain forms of cultural production, pop music being one of the most visible targets, was the

theory of "media effects."

In her 2001 book *Not in Front of the Children*, Marjorie Heins writes that "media effects"

is "a shorthand term for the whole complex of studies, theories, and debates about the effects of

art, literature, and electronic communications on human attitudes and behavior, particularly those

of youth."[2] From the Culture Wars on, a widespread belief in media effects, or more

specifically, in the damaging effects media has on children, has served as the ostensible

motivation for censorship. "Over the past several decades, the protection of children has

surpassed obscenity and blasphemy as the leading rationale for censorship," states Svetlana

Mintcheva in the 2006 anthology *Censoring Culture*. "With blasphemy no longer a universally

acceptable reason to ban a film or burn a book, with the legal standard of obscenity defined

narrowly enough to allow for most kinds of sexual expression, children remain the last sure-fire

refuge of the censor....But are the effects of exposure to words and images really so harmful?"[3]

Heins, founder of the Free Expression Policy Project, argues that the "harm to minors"

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[2] Heins, *Not in Front of the Children*, 9.

[3] Svetlana Mintcheva, "Protection or Politics? The Use and Abuse of Children," in Atkins and Mintcheva, *Censoring Culture*, 167-168.

justification for censoring mass media productions is too simplistic to describe the impact that

cultural forms have on young audiences. "Positing a consistent, predictable causative

relationship between 'violent' media content and bad behavior...blinds us to the fantastically

complex way in which ideas, images, and stories affect individuals, and to the much more

significant factors, from genetic predisposition to family and community environment, that

influence child and adolescent development," Heins claims.[4] "[G]iven the overwhelming

difficulty in even defining what it is we want to censor, and the significant costs of censorship to

society and to youngsters themselves, we ought to be sure that real, not just symbolic, harm

results from youthful pursuit of disapproved pleasures and messages before mandating indecency

laws, Internet filters, and other restrictive regimes."[5]

Censorship in the name of preventing children from accessing "inappropriate" media has

additional undesirable consequences, says Heins. Efforts to prevent mass media from damaging

children have often "become the justification for restrictions that affected adults as well,"[6]

"usually hurts the nonprofit more than the for-profit media" (because "with their limited budgets,

PBS stations could be wiped out by just one FCC fine," hence, public TV stations self-censor

more rigorously than corporate-run TV stations), and "it also tends to be non-white bread culture

that government censors condemn."[7] Despite the fact that censorship movements cause

demonstrable harm to adults' rights, nonprofit media, and the circulation of non-white cultural

productions, while there has been no scientific demonstration of harm done to children by mass

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[4] Heins, *Not in Front of the Children*, 10-11.

[5] Heins, *Not in Front of the Children*, 11.

[6] Heins, *Not in Front of the Children*, 5.

[7] Heins, *Not in Front of the Children*, xxvii.

media,[8] censorship crusades that seek to limit or shut down the distribution of some forms of

mass culture for children's sake have been effective from the 1980s onward.

Heins traces the popularity of the belief in media effects to claims made by "social

learning" psychologists, "whose perspective was popular in the 1970s," that "youngsters will

imitate attitudes and behaviors they see in the media."[9] It is this fear, that children will mimic

what they hear or see in popular music or on television or on the Internet, that has been central to

most censorship movements. The assumption of children's helpless tendency to imitate appears

in most of the statements by politicians and parents in the September 1985 hearing convened by

the U.S. Senate in response to the Parents' Music Resource Center (PMRC) call for warning

labels to be affixed to music albums that contained "offensive" lyrics. In his opening statement

at the hearing, Senator Paul Trible (R-Virginia) said that rock music that references rape, incest

and sexual violence "rubs raw one's sensibilities, resulting in a state of emotional numbness.

The effect on the troubled child...can be disastrous, pushing the child over the emotional

precipice. This becomes the real social problem."[10] Susan Baker, one of the PMRC's founders,

said in the same hearings, "There certainly are many causes for these ills in our society, but it is

our contention that the pervasive messages aimed at children which promote and glorify suicide,

rape, sadomasochism, and so on, have to be numbered among the contributing factors. Some

rock artists actually seem to encourage teen suicide....Just last week in Centerpoint, a small

Texas town, a young man took his life while listening to the music of AC/DC. He was not the

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[8] See Heins, *Not in Front of the Children*, xiv-xvi, for a review of some influential literature on the relationship of violent media to aggressive behavior in children, and the debunking of those studies.
[9] Heins, *Not in Front of the Children*, 10.

[10] Nuzum, *Parental Advisory*, 26.

first."[11] Around the time of the Senate hearing, another PMRC founder, Sally Nevius, told

People magazine, "We want the industry to police itself. If they refuse, we're going to look into

legal ways to stop what we feel is a form of contributing to the delinquency of minors."[12] In

February 1986, the Maryland State Senate debated a proposed bill, inspired by the PMRC's

campaign, that would expand the state's obscenity laws to include music albums, tapes, and laser

discs, and at that hearing, rock musician Frank Zappa testified that "This [bill] is censorship,"

and that "The idea that the lyrics to a song are going to cause 'antisocial behavior' is not

supported by science." The bill's primary advocate, Judith Toth, replied, "We're talking about

minors...[S]top worrying about their 'civil rights.' Start worrying about their mental health, and

about the health of our society."[13] The title of Tipper Gore's 1987 book, *Raising PG Children in*

an X-Rated Society,[14] conjures an image of parents struggling to combat dangerous cultural

forces that assault their children from all directions, valiantly striving to shield their innocent and

defenseless youngsters from the ubiquitous evils of society. In a 1986 interview, Gore explicitly

stated the PMRC's core assumption when she said that she believed "television and films have

led the way – particularly television – in desensitizing people to violence and to sex."[15]

The declarations of Trible, Baker, Nevius, Toth and Gore each made the same series of

claims: that popular music affects young listeners in serious and negative ways, that the effects

of music on youth pose a danger to "the health of our society" (Toth), contribute to the "ills in

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[11] Nuzum, *Parental Advisory*, 27.
[12] Nuzum, *Parental Advisory*, 22.

[13] Nuzum, *Parental Advisory*, 35-36.

[14] Tipper Gore, *Raising PG Children in an X-Rated Society* (Nashville, TN: Abingdon Press, 1987).

[15] Steven A. Holmes, "The 1992 Campaign: Political Memo; Forgiving Tipper Gore but Not Quayle," *New York Times*, 6 September 1992.

our society" (Baker) by facilitating "the delinquency of minors" (Nevius) and "desensitizing

people to violence and to sex" (Gore), that "the effect on the troubled child...becomes the real

social problem" (Trible); and therefore, that popular music which might cause such harm to

youngsters must be labeled, or picketed by concerned parents, or physically segregated in stores

from other (presumably non-harmful) music, or not sold in stores at all, or legally banned as

obscenity (a measure which Toth and other state legislators sought to accomplish, motivated by

the PMRC's efforts, by expanding the purview of state obscenity laws). So effective were the

late-1980s efforts of the PMRC and related pro-censorship organizations to characterize media as

harmful to youth that a 1995 survey showed that 20 percent of the American public blamed

television more than any other factor for teenage violence, despite the following facts: according

to Sissela Bok, "No reputable scholar accepts [this] view"; the National Research Council's 1993

report, *Understanding and Preventing Violence*, "does not consider the media a serious factor";

and, states Heins, "Even those who believe that art and entertainment have widespread imitative

impact usually acknowledges that social factors such as family environment are far more

important influences on children than the media, and have not claimed a 'media effect' on

attitudes and behavior of more than 5 to 15 percent."[16]

    Suspected media effects, writes Heins, can be classified into four categories: *imitation*

(watching or hearing about violence in a media product inspires a young person to act violently),

desensitization (watching or hearing about violence in a media product makes a young person

"more callous about antisocial or dangerous behavior"), *excitation* (watching or hearing about

violence in a media product is arousing, and, in a moment of stress, a young person might

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[16] Marjorie Heins, "Media Effects," in Atkins and Mintcheva, *Censoring Culture*, 175-179.

transform that physiological arousal into aggressive behavior), and *the 'mean world' effect* (watching violence in a media product imbues a young person with an unreasonable fear of being victimized).[17] The definitions of media effects implicit in the statements of Trible, Baker, Nevius, Toth, Gore, and their sympathizers comprised the imitative effect, the densensitization effect, and the excitation effect, but not the 'mean-world' effect. This is significant in terms of understanding how censorship activists perceived the agency of the youth for whom they feared. The PMRC and other censorship groups were concerned with what media might make young audiences *do*, not how media might change how young audiences perceived the world around them. Rather than regarding young consumers of mass media as passive, acted-upon receivers, the PMRC's supporters assumed that the pastimes of listening to music or watching TV and films *activated* young people. That is, the assumption of censorship activists was that popular media implants certain undesirable, antisocial impulses in children, and then flips those switches to the "on" or "go" position.

CHILDREN PLAYING MACHINES

The pro-censorship groups of the 1980s and 90s expressed fears for young people's health and American society's health simultaneously, assuming a causal link between the distribution of music, the formation of a sound (or unsound) individual psychology, and the formation of a sound (or unsound) nation. As I mentioned above, any outcry to "protect the children" – which is a call to protect not only one's own children, or a particularly category of children (such as refugee children or abused children), but to protect *all* American children –

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[17] Heins, "Media Effects," 173-174.

reflects an anxiety over the national future. In the case of movements that aim to "protect the children" from music, the anxiety is directly tied to technologies of replication, distribution, and infiltration/invasion. Concerns over the danger that music might pose to the future of a society, in other words, can be interpreted as concerns over the danger of media technologies, and how those technologies might create a dystopian American "tomorrow."

The beliefs that undergirded the censorship campaigns of the eighties and nineties were themselves can be represented as a specific set of steps, a process of how underage consumers engage with mass media technologies:

Recorded music is intended for replication, with exact copies numbering in the thousands or millions. Recorded music is also intended for distribution, so that masses of young people will listen to the same music at roughly the same time (for example, immediately following an album's release, or during the months that a particular song is widely disseminated via radio broadcasts). Young people will usually consume this music in the privacy of their parents' homes, although very often, this consumption will be done in the sequestered spaces of their own rooms, or in their own "heads" while wearing portable listening devices like Walkmans (or, today, iPods). In this ostensibly safe, private, and domestic zone ("safe" because, in their parents' houses, they are presumably under their parents' protection or guard, though not directly under their parents' surveillance, in their parents' line-of-sight, at all times), America's youth are being penetrated by lyrics that explicitly refer to violence, sex, drug use, suicide, satanic cult rituals, and other antisocial (harmful-to-society) actions. This infiltration of the brains of American youngsters – the brain being, after all, the organ that is sandwiched between the two ears, the two orifices of penetration, the two openings to invasion, making the brain the most

proximate organ to the site of the foreign matter's entry into the body – leads to a duplication or

replication of the antisocial qualities of the music within the brains, bodies, and beings of young

Americans. Once a young American's brain has more or less copied (downloaded) the incoming

messages and meanings injected (uploaded) into them through music, the young American then

re-distributes the messages and meanings by enacting them, engaging in acts of violence, sex,

drug use, and so on, transforming antisocial communications into antisocial behavior. The

young American thus becomes an antisocial being, who deploys his or her being (which has

become infiltrated and made into a copy of the music s/he listens to) against American society.

Society at large is thus penetrated/infiltrated, and corrupted/decimated, by the large numbers of

antisocial youth who begin to pop up everywhere, en masse, as pop music takes them over and

makes them over in its (the music's) own – what? Not its own image, but its own message.

According to this line of logic, an unconscious logic never verbalized by any pro-

censorship advocates but nevertheless evident in all of their public statements, every human

youth – his or her youth indicating his or her un-shaped-ness and incomplete-ness *as* a human –

is vulnerable or susceptible to becoming, or even likely to become, *like a machine*. By

interacting with a machine (a radio, a record player, a tape deck, a Walkman, an iPod) whose

function is to distribute, through play-back, a previously copied (duplicated, replicated)

communication, the young human is made into a site of copying, duplication, and replication,

and then into a being who acts to distribute the communication, playing-back in public the

message s/he has received in private. The young human becomes yet another technology of

play-back, another format in a long line of play-back formats that have proliferated since the late

19th century, and that continue to proliferate as markers of modernity. One way that the story of

modernity can be framed is as a progression of play-back technologies succeeding one another: the cylinder-based phonograph was replaced by the disc-based phonograph, which was replaced by the CD player; the tape cassette recorder/player was replaced by the CD burner/player; the Walkman was replaced by the MP3 player. At some point in this progression, humans joined the ranks of the devices, and became not only consumers of the machines that play-back recorded messages, but simultaneously victims and versions of the machines. (Perhaps this combination of vulnerable human youth and machines occurred very early – after all, mass media has been perceived as dangerous from its beginnings – but possibly the PMRC's conception of the penetration of youth by music in the 1980s versus, say, the 1950s or the 1920s, was that this process sped up and increased in volume, just as technological development overall was much faster and larger in the eighties than in earlier decades, and thus this process posed more of a threat to society as a whole than ever before.)

Like machines, antisocial youth are mass-manufactured, produced (by their interactions with music and music machines) in the thousands or millions. In such numbers, youth can tear down the structures of society, breaking the machine of society itself. There is a sense of divergence from destiny here, of an intended path ignored: young people, rather than becoming the builders of future human society, become its machine-like destroyers. The smooth functioning of U.S. society, pro-censorship logic states, depends on preventing the linkages or connectivity between two kinds of replication/distribution machines: music machines and youth machines. If pop music can "program" young Americans to become wild, immoral, aggressive, and in other ways defiant of social norms, then concerned American parents must work to sever their children from the machines into which they are plugged-in, and from which they are

copying the source codes of antisocial beliefs and behaviors. What the PMRC's members and

their supporters strove to reserve for themselves was the exclusive right to program their

children. The only inputs that should be allowed to enter their children's aural receptors, argued

the pro-censorship activists, would be those approved by them. The cultural censorship

movements of the 1980s and 90s was motivated by millions of parents who felt the need to assert

their positions as the official, authoritative engineers/programmers of young Americans (and,

subsequently, of America's future), and to disable the engineering/programming capability of

popular music and the machines that replicated and distributed it.

SECOND INFANCY

The PMRC's members and supporters often positioned their campaign on a platform of

nostalgia, of wanting America to return to an earlier, idyllic past, a time when American popular

music could refer to sex without crossing a line of impropriety. Baker stated that "I found my

thrill on Blueberry Hill, but this stuff is different,"[18] and "Cole Porter's 'birds do it, bees do it,'

can hardly be compared with the WASP's 'I f-u-c-k like a beast.' There is a new element of

vulgarity and violence toward women that is unprecedented."[19] But the real concern of pro-

censorship activists was the nation's future, not its past. Adult fears about technology's ability to

bring about society's destruction by engaging the minds of young consumers reached far beyond

the realm of popular music from the mid-80s through the mid-90s. The time when media effects

theories became prominent in American parents' discourse coincided with the historical moment

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[18] Nuzum, *Parental Advisory*, 23.

[19] Nuzum, *Parental Advisory*, 27.

of transition between the analog and digital eras for most Americans, a transition that profoundly changed the nature of American adulthood.

Just a few years prior to the PMRC's 1985 launch, the personal computer started to be a common household appliance. In 1982, Apple Computer became the first personal computer company to reach $1 billion in annual sales, more than two million PCs were sold in the U.S, and Drexel University became the first university to require all its students to own a PC. *Time* Magazine's first issue of 1983, usually dedicated to a "Person of the Year," instead featured the personal computer as the "Machine of the Year."[20] The Musical Instrument Digital Interface (MIDI) protocol, and the first MIDI keyboards, were introduced in 1983. Sony launched the audio compact disc (CD) format in Japan and Europe in 1982, and in the U.S. in 1983.[21] The Domain Name Server (DNS) and USENET groups were introduced in 1984.[22] In 1985, the first relatively affordable digital music samplers hit the mass market. Accompanying the sudden burst of digital technologies made available to everyday consumers was a widespread perception among adults that "generation gap" in technical know-how had been created, and might widen into an unbridgeable chasm separating grown-ups from youngsters.

A 1983 article in *The New York Times* by Peggy Schmidt called "The Computer: A Primer for Parents" recorded the deep ambivalence of many parents towards personal computers. On the one hand, parents had the responsibility to decide whether or not to purchase

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[20] Ken Polsson, "Chronology of Personal Computers" (last updated 7 November 2007), http://www.islandnet.com/~kpolsson/comphist/comp1982.htm. (accessed 9 December 2007).

[21] Steven E. Schoenherr, "The Digital Revolution" (last updated 5 May 2004), http://history.sandiego.edu/gen/recording/digital.html (accessed 9 December 2007).

[22] Dave Marsh, "History of the Internet" (last updated 1997), http://www.netvalley.com/archives/mirrors/davemarsh-timeline-1.htm (accessed 9 December 2007).

a computer for their children's home use, and making the wrong choice would have serious

consequences for their children's preparedness for the future. On the other hand, many adults

knew little about what home computing might do for their children, and their unfamiliarity with

the potential of digital technologies frustrated and disappointed their children, who often

demonstrated more curiosity and knowledge about computers than their parents. States the

article,

> Bombarded by advertisements from computer manufacturers, advised by
> high-technology gurus about the educational value of computers and
> besieged with equipment requests from their own children, many parents feel
> pressured and confused about what computers can and can't do for their
> children.
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> "As parents and educators," the president of the national Parent Teachers
> Association, Mary Ann Leveridge, said recently, "we need to overcome our
> initial distrust or fear of computers or we will be on the downside of a
> growing generation gap with our children and students."[23]

Schmidt alludes to the generation gap a number of times, suggesting that parents might send

"computer whiz kids" to computer camps, where students "whose parents and teachers can't give

them the instruction they need" might benefit, and noting that youngsters are generally more

eager to learn about computers than adults because "unlike their parents, they've been primed to

like computers by watching TV and playing video games." Schmidt also emphasizes the sense

of increased agency that youngsters derive from interacting with home computers, stating that

children as young as 4 or 5 years old enjoy playing computer games because, according to a

Lehigh University professor, "controlling a computer can give children a feeling of control over

their environment. They like the power of being able to make words or pictures appear and

disappear on the screen." Parents must therefore be on guard against their children becoming

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[23] Peggy Schmidt, "The Education Consumer; The Computer: A Primer for Parents," *New York Times*, 24 April 1983.

addicted to this power; Schmidt notes that several "parents of junior hackers (the popular

terminology used to describe computer addicts) have resorted to depriving them of time on their

computer as a disciplinary measure."[24] The rise of pro-censorship parents' groups in the 1980s

and 90s can be regarded, then, as one component in a larger regulatory discourse that developed

around digital technologies. Adults' desire to police children's access to mass media was

spurred in part by adults' anxieties over children's desire to master new media, a mastery which,

once achieved, threatened to destabilize the traditional model of generational power, in which

parents are always the masters of their children.

Digital mass media inspired a wave of "protect-the-children" anxieties in American

parents, and this was only the latest wave in a long set. In her 2001 book *Welcome to the

Dreamhouse*, Lynn Spigel writes of the relationship between the emergence of new technologies

(beginning with industrialization), the conception of children as innocent and needing protection

from societal dangers, and parents' – particularly mothers' – placing paramount importance on

their roles as the defenders of children's innocence. "[S]kepticism about mass media," Spigel

argues, has contributed to a long "legacy of child saving" in the U.S.:

> [M]ass media typically have been viewed with trepidation by the adult
> culture. Be it 1920s movie matinee or the contemporary video game, mass
> media have been seen as a threatening force that circulates forbidden secrets
> to children, and that does so in ways that parents and even the state cannot
> fully control. Worse still, parents may not even know how and where their
> children have acquired this information. With the mass, commercial
> dissemination of ideas, the parent is, so to speak, left out of the mediation
> loop, and the child becomes the direct addressee of the message. Perhaps for
> this reason, the history of children's involvement with mass media has been
> marked by a deep concern on the part of adult groups to monitor their
> entertainment and survey their pleasure. From Anthony Comstock's crusade
> against dime novels to the more liberal approach of matinee mothers who

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[24] Schmidt, "The Computer: A Primer for Parents."

chaperoned children at the movies, the adult culture has continually tried to filter the knowledge that mass media transmit to the young.[25]

Spigel highlights how mass media instills a feeling of powerlessness in adults. Implicit in her history of adults' attempts to regulate youngsters' interactions with media is the assumption that these attempts have been, at least in part, rooted in adults' consciousness of their own lack of control. They cannot stop the "threatening force that circulates forbidden secrets to children," and "worse still," they may have no knowledge of how, when, or where their children gained exposure to, and forged a connection with, various media sources. Thus, the "generation gap" – the difference between adults' and children's ease and skill with using technology – that emerged in the first few years of the digital age was only a more recent version of a long-standing burden that mass media has placed on adults, which is that, in a media-saturated society, children seem to be empowered and in control of their cultural consumption, learning about grown-up matters from a range of information sources quite early in life, while adults, especially parents, feel disempowered and infantilized by their inability to determine which media streams and information flows their children participate in. The sense that adults in the 1980s had, that children's comfort with and mastery of digital tools might endow them with authority and superiority over their parents, and render parents childlike, unskilled and unknowing, might seem to be specific to that point in American history when digital technologies were just entering private homes, but it was in fact an iteration of a nexus of fears that adults have always felt regarding their power, relative to children's power, in matters of mass media.

By consuming mass media, adults are infantilized in other ways. Spigel points out that

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[25] Lynn Spigel, *Welcome to the Dreamhouse: Popular Media and Postwar Suburbs* (Durham, NC: Duke University Press, 2001), 190-191.

"while adults historically have argued against the commercialization of children's television, they, too, have been seduced by its consumer fantasies. Indeed, since the 1950s children's programs have found ways to draw adults into the joys of spending money by offering them a ticket for a nostalgic return to a childhood dreamland of make-believe."[26] Spigel also theorizes that adults' concern for the commercialization of children's television is in fact a translation of adults' displeasure with the corporate commercial structure of American television. Most adults are not conscious of their unease with television's system of distributing messages, and project their unacknowledged dissatisfaction onto the realm of children's TV consumption. Writes Spigel,

> [S]ince the inception of television as a privately controlled commercial medium, the American public has rarely argued against its basic corporate structure. Little has been said about the fact that television technology (with its inherent capability for two-way communication) was being developed as a one-way medium used mostly for the financial gain of major corporations. Instead, the only widespread challenge to commercialization of the airwaves has taken place in the name of the child. The child in this configuration becomes an alibi and a conduit for larger issues regarding the commercialization of communication and the price tags attached to free speech in our country's mass media. The discourse of victimization that surrounds the child viewer might, in this sense, usefully be renamed and reinvestigated as a discourse of power through which adults express their own disenfranchisement from our nation's dominant mode of communication.[27]

In Spigel's analysis of parents concerned about children's television, I find yet another suggestion that adults sense that mass media makes children out of them. Broadcast media tells adults what to buy, often playing on their wistful longings to return to the simplicity of childhood. One-way media addresses adults as passive consumers, asking them to choose

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[26] Spigel, *Welcome to the Dreamhouse*, 208.

[27] Spigel, *Welcome to the Dreamhouse*, 211.

among a range of programs that have been selected for production and distribution by a

corporate-owned network, which are transmitted on a schedule also determined by that company,

and are intercut with commercials for a variety of corporate sponsors. Adults' options, through

the early eighties, were few and pre-selected by "parent" companies, so to speak; they could not

"talk back" through their television sets, radios, or movie screens, and they could not escape

being subjected to a barrage of advertising. I associate parent-led movements to restrict

children's engagements with media, therefore, as intrinsically linked to parents' repressed

anxieties about their own childlike position vis-a-vis media.

Lauren Berlant's 1997 *The Queen of America Goes to Washington* expands Spigel's

diagnosis of American adults as disenfranchised "from our nation's dominant mode of

communication" into a characterization of Americans as all-but-disenfranchised political

subjects. Berlant coins the term "infantilized citizens" to describe the American populace,

arguing that, through a wide array of discourses, including television narratives, Americans

repeatedly learn that they can do nothing to change the U.S. political system, and that, in fact, the

most they can aim for is a working knowledge of the system, so that they can endorse it and feel

secure within it. Berlant criticizes "the normative deployment of national allegory" that is the

most common public presentation of American politics, in which

> the overorganizing image or symbolic tableau emerges politically at certain
> points of structural crisis, helping to erase the complexities of aggregate
> national memory and to replace its inevitably rough edges with a magical and
> consoling way of thinking that can be collectively enunciated and easily
> manipulated, like a fetish. In this way...patriotism can be equated with
> proper citizenship. This means that the politically invested overorganizing

image is a kind of public paramnesia....[28]

> [I]n the chain that links the fetus, the wounded, the dead, and the "children"
> as the true American "people," the linkage is made through the attribution to
> normal-style citizens of a zero-sum mnemonic, a default consciousness of the
> nation with no imagination of agency – apart perhaps from voting....In other
> words, the national knowledge industry has produced a specific modality of
> paramnesia, an incitement to forgetting that leaves simply the patriotic trace,
> for real and metaphorically infantilized citizens, that confirms that the nation
> exists and that we are in it. Television is not the cause of this substitution of
> the fact (that the nation exists) for the thing (political agency) but is one of
> many vehicles where the distilling operation takes place.[29]

For Berlant, mass media is not the only means by which American citizens are infantilized; it is

just "one of many vehicles" through which adults entitled to political power are made to

resemble children: powerless, unambitious, and eager to have all inconsistencies and

complexities explained away in a "consoling" fashion by shows of patriotism. Berlant's

discussion of these "deployments of national allegory" as "fantasy norms of the nation" that

"produce normative subjectivity"[30] provides a counterpoint to the fantasy of the child-as-

playback-machine that I related earlier in the chapter: the story that motivated the censorship

movements of the 1980s and 90s was one in which children are vulnerable to infiltration and

encoding by mass media and the machines on which they "play"; but the story that Berlant and

Spigel suggest, of American adults buying into patriotic fictions in order to avoid thinking of

their lack of political and social agency, proposes that the adult population are even more

victimized and disempowered by media than are children (who at least benefit from interacting

with media by, as Joshua Meyrowitz notes, learning about adult secrets through its offerings, and

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[28] Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham, NC: Duke University Press, 1997), 48.
[29] Berlant, *Queen of America*, 50.

[30] Berlant, *Queen of America*, 27.

learning "the 'secret of secrecy'"; in other words, writes Spigel, "Television...makes children privy to the fact that adults are hiding knowledge from them.").[31] That so much fear around children and playback technologies arose at the beginning of the digital era can perhaps be attributed to the fact that the new technologies heightened adults' awareness of their own potential to seem like infants in the shadow of their children's mastery of media.

COPYING AS CRIME

Playback technologies and popular music were regarded as serious threats to America's youth and, hence, America's future, by the PMRC and other pro-censorship crusaders beginning in the mid-1980s, and sampling and rap music were foremost among the genres of technology and music that endangered the nation. The controversies over rap lyrics that took place during the eighties and nineties are well-documented, and popular memory still associates rap from this period with the crack epidemic and gang warfare that, according to the press stories and media fictions of the time, raged out of control in the nation's inner cities. But the manifold ways that sampling was coded as potentially destructive have been ignored. Sampling was not only regarded as a new form of copyright infringement by record companies, songwriters, and performers. This was not the only negative connotation it carried. Sampling also tied into a large network of fears about copying that permeated the American imaginary in the late 1980s. In Chapter 1, I argued that sampling's censorship by Judge Duffy in the 1991 *Grand Upright* ruling was, in part, a manifestation of the *zeitgeist* of the Culture Wars. Here, I propose that sampling's condemnation by copyright holders and law courts also reflected a widespread

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[31] Spigel, *Welcome to the Dreamhouse*, 210.

discomfort with the increased ability of poor and minority consumers to engage in unregulated activities of replication in the eighties and early nineties.

U.S. society in the early 1980s got caught up in a number of wide-scale panics over phenomena perceived to be out-of-control. Earlier in this chapter, I suggested that the panic over pop music and its influence on children assumed that children who interact with mass media are, in a sense, replication and playback machines. The fear that drove censorship crusades, I claimed, was a fear that youngsters were copying inappropriate messages conveyed by the lyrics of their favorite songs. Significantly, this anxiety over replication was not limited to the campaigns related to pop music; a terror of copying and copies characterized many moral panics of that time.

For example, during the American AIDS panic, which began in 1981, when the disease first appeared in the U.S., the national concern was not primarily for the disease's victims and their well-being and medical treatment; it was for the uninfected masses who dreaded that the affliction might spread to them. In 1983, news outlets began depicting the human immunodeficiency virus (HIV) as a disease on the move, self-replicating endlessly, which might infect unsuspecting Americans at any moment. A *New York Times* story from 6 February 1983, entitled "A New Disease's Deadly Odyssey," calls AIDS "the century's most virulent epidemic...as relentless as leukemia, as contagious as hepatitis," and emphasizes that the illness's mobility makes it impossible to contain or to anticipate. "AIDS...has now struck so many different groups that its course cannot be predicted. And despite a massive nationwide microbe hunt involving hundreds of investigators and millions of dollars, scientists simply cannot catch up with it. 'We're always a few steps behind,' says Dr. William W. Darrow, a research

sociologist with the Centers for Disease Control (C.D.C.) in Atlanta, 'and that makes us very, very concerned. The disease could be anywhere now.'" The article describes the disease's movement as unstoppable and unknowable, with experts comparing its surprising path of infection to the plots of movie thrillers and sci-fi: "AIDS continues on its mysterious and perplexing course. 'If Alfred Hitchcock were alive, he'd have his next movie,' says Dr. Abe M. Macher, an infectious-disease specialist at the National Institutes of Health. 'When people discuss this syndrome at scientific meetings, it sounds like something out of *The Andromeda Strain*.'" At the same time, the article seems sure that this unpredictable trajectory will eventually lead out of gay and immigrant urban enclaves into "mainstream America": "As AIDS threatens to move into mainstream America, efforts to find its cause and stop its spread have intensified."[32] According to this article, and the larger discourse of which it was a part, HIV was an aggressor targeting the American populace, and its agency, its special ability to spread danger so far and wide, lay in its self-replication. The virus infecting your neighbor might show up in you; "mainstream" middle- and upper-class, able-bodied Americans might become copies of poor and sick homosexuals or destitute and dying Haitian immigrants. The virus threatened to equalize Americans, to dismantle distinctions of ethnicity, class, citizenship, and sexual preference by copying itself into everyone and anyone, thereby turning every mainstream American into a copy of non-mainstream – that is to say, outcast – Americans.

The country's response to this threat of infection by an endlessly self-replicating virus was to curtail civil liberties and subject all Americans to mandatory HIV testing. In 1987, a Gallup poll stated that 52% of respondents favored testing all Americans for the AIDS virus,

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[32] Robin Marantz Henig, "AIDS: A New Disease's Deadly Odyssey," *New York Times*, 6 February 1983.

90% favored testing all immigrants seeking permanent residence in the U.S., 88% favored testing

Federal prison inmates, 80% favored testing couples applying for marriage licenses, and 66%

favored testing visitors from foreign countries.[33] HIV testing never became law, but when a

similar panic flared up over drugs, particularly crack cocaine, mandatory testing (for illegal drug

use) did become the norm for many government and private-sector employees. In March 1989,

the U.S. Supreme Court upheld two Federal programs to test employees for drug use in the

workplace,[34] and at that time, sixty percent of companies with more than 5,000 employees

subjected all job applicants, and some employees displaying "suspect" behavior on the job, to

drug tests.[35] Said J. Michael Walsh, then-director of the workplace drug-testing programs for the

National Institute on Drug Abuse, "A lot of people in the private sector will see those [Supreme

Court] decisions as a signal to go ahead with drug testing."[36] It was clear that private industry's

primary interest in drug testing originated in the sudden growth of the crack cocaine industry

beginning in the mid-1980s, and the subsequent War on Drugs launched by the federal

government.

By December 1988 (before the Supreme Court ruling on drug testing), at least 15 of the

largest firms on Wall Street had started drug testing and counseling programs, over 100

companies were testing the urine of job applicants for signs of drug use, and over 70 companies

were asking incumbent employees to undergo drug testing; Walsh argued that crack was

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[33] "Most Support Wide AIDS Testing," *New York Times*, 13 July 1987.

[34] "In Passes a Test," *New York Times*, 25 March 1989.

[35] Martin Tolchin, "The Government Still Waits to Test Millions for Drugs," *New York Times*, 26 March 1989.

[36] Tolchin, "The Government Still Waits to Test."

responsible. "The availability of crack-cocaine has made addicts out of people at a much more

rapid rate. [It may take up to] 10 to 12 years for an alcoholic to become totally dysfunctional.

But we are seeing people who have been using crack-cocaine for short periods of only six to

eight weeks who are unable to get up and go to work."[37] In other words, crack addiction was

perceived as spreading like a virus, with white-collar workers coming to resemble

un(der)employed ghetto addicts due to their common need for smokeable cocaine, which was so

cheap that anyone could acquire it.

Both the HIV and crack scares consisted of "normal" Americans fearing that copies of

unstoppable destructive forces – forces that originated in America's underserved minority groups

– would invade their (individual and corporate) bodies, thus transforming them into duplicates of

their degraded Others. Both panics led to the proposal and, in the case of the drug wars, the

institution of practices that violate civil liberties by disregarding individuals' rights to privacy.

The PMRC's suggested solution to the perceived danger of children turning into replicating

machines for pop music's antisocial themes was also one that trod on civil liberties. Copying,

particularly "mainstream America"'s copying of lower-class and minority cultural practices that

were inherently self-reproducing (engaging in unsafe sex that transmits uncurable deadly

diseases, using powerfully addictive and inexpensive drugs, or listening to rap songs with

explicit lyrics about violent or sexual acts), was considered a grave potential danger to the nation

by government and health officials, corporate officers, and cultural watchdog groups. The

curtailing of individual rights seemed to be the appropriate response to the danger of poor,

ethnic, immigrant, and gay subcultures continuously replicating their most harmful products, and

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[37] Milt Freudenheim, "Workers' Substance Abuse Is Increasing, Survey Says," *New York Times*, 12 December 1988.

spreading them to America's dominant classes. "We" could not not copy, or *become copies of*, "Them" and join them in their misery and destructiveness. If labeling music, boycotting record stores, banning concerts, screening workers for drug use, or screening all Americans for HIV – all of which contained the possibility for restrictions on freedom of expression and rights to privacy – were required to separate America's healthy mainstream from its ruined outcasts, then such actions were not optional. They were necessary in order to safeguard America's future.

Unlicensed digital sampling, which is *par excellence* a protocol for copying that emerged from a poor minority community, was similarly shut down by censorship. At a time when copying, and viral replication, was viewed as threatening in many realms of American society, it is possible that digital sampling touched on sensitive nerves within culturally conservative groups, to whose beliefs Judge Duffy certainly subscribed, and that, at an unconscious level, Duffy associated sampling with AIDS, with crack, with rap and rock music, all of which seemed to be infecting increasing numbers of Americans, taking them over from within, self-replicating inside them and morphing them into replicants of disadvantaged minorities, all at the same time.

It is important to note that, at this historical moment, copying was also viewed as severely threatening to another powerful group in American society: media corporations. In 1976, Universal City Studios filed a copyright infringement action against Sony Corporation of America, alleging that "some individuals had used [Sony-produced] Betamax video tape recorders (VTRs) to record some of [Universal's] copyrighted works which had been exhibited on commercially sponsored television and contended that these individuals had thereby infringed on respondents' copyrights." The California Central District Court found for the defendants and ruled that home taping of content broadcast on TV did not constitute copyright infringement, but

in 1981, the Ninth Circuit U.S. Court of Appeals reversed the decision, declaring home taping to violate Universal's copyrights. Hans Fantel, audio technology reporter for *The New York Times*, warned in a 1982 article that the appellate court's decision in *Universal v. Sony* could criminalize masses of media consumers: "[B]y extension the ruling could be construed to apply to taping music from the radio. The effect [of the decision] was to make instant criminals of millions of audio and video fans using their cassette machines to tape broadcasts. As it stands now, the situation is something like Prohibition in the 20's, when taking a drink made you an outlaw."[38] The Supreme Court reversed the appellate court's decision in 1984, finding that home recording did not violate copyright since "the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time," therefore not impairing the commercial value of the copyrighted material. But by 1984, media companies had decided to take other measures to try to mitigate the potential revenue losses that improvements in home taping technologies would cause.

Rather than persisting with their attempts to make home taping illegal, the media industry successfully lobbied U.S. senators and congresspeople to introduce bills that would tax the sales of every tape recorder, audio or video, and every blank cassette used to record audio or video content. Through groups like "The Coalition to Save America's Music," media corporations publicized their call for taxation of home taping as necessary for major labels and studios to continue subsidizing work by lesser-known, less-profitable talent. The Recording Industry Association of America (RIAA) campaigned heavily for the passage of the Audio Home Recording Act, which proposed a royalty of one cent per minute of tape on every blank audio

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[38] Hans Fantel, "Sound; Home Taping. The Legal Issue Comes to a Boil," *New York Times*, 29 August 1982.

cassette sold, from 1983 through 1992, when the act was finally passed (with an added clause

that consumer digital recorders could not be used to copy copyright-protected audio materials);

the RIAA also managed to introduce legislation in Congress in 1987 that effectively prevented

the sale of functional digital audio tapes (DATs), a technology developed by Sony which could

make copies of audio recordings of compact disc (CD) quality.[39] What we understand today as

the media industries' "war on piracy" began in the 1970s as a war on copies made with home

taping machines. As the RIAA spent years, and millions of dollars, persuading government and

the general population that consumers must *not* be allowed to copy, with impunity, any media

they wished, using the most sophisticated recording technologies in existence, advocates for the

"right to tape" recognized that a tax on home taping might violate some constitutional rights, and

claimed that "as a private, noncommercial activity, home taping rightly lies beyond the proper

reach of legislative interference and taxation."[40]

Digital sampling, a practice of making exact copies of recorded sounds, thus lent itself to

multiple associations with phenomena and practices that were regarded as extremely dangerous

to America's dominant classes during the late eighties and early nineties. Unlicensed sampling,

and the rap/hip-hop music of which sampling was an integral part, bore a family resemblance to

two contemporaneous social ills, AIDS and crack cocaine addiction: from the perspective of

upper- and middle-class, predominantly white, able-bodied Americans, they were all viral. They

all generated unlimited copies (sampling copied recorded music; hip-hop songs supposedly

caused youngsters to imitate the violent, misogynist, and highly sexual activities they depicted;

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[39] Recording Industry Association of America, "Audio Technologies – History of Recordings: The Digital Age," http://www.riaa.com/issues/audio/history.asp#digital (accessed on 1 October 2006). This information is no longer available on the RIAA website.

[40] Fantel, "Home Taping."

HIV and crack addiction were both diseases that self-replicated inside their victims and spread to new victims). They all originated in minority communities and then permeated "mainstream America." They all threatened to destabilize the existing social order by turning "normal" Americans into the doubles of America's outcasts, culturally or physically or ideologically. Sampling bore an even greater similarity to another method of copying that was perceived as potentially damaging to American social norms at this time: home taping. Like home taping, sampling-based artists used recording technologies to make their own copies of mass media productions, which they were then able to manipulate and use according to their personal whims. And like home taping, sampling was targeted by media corporations for regulation. Media companies initially claimed that home taping infringed on their copyrights, but had to drop this tactic and shift to lobbying for blank-tape tax proposals; however, media companies succeeded in persuading law courts to declare that sampling constitutes copyright infringement. While home taping did not emerge from specifically minority communities as did sampling, hip-hop, AIDS, and crack cocaine, home taping challenged traditional structures of mass media control and ownership, and in this way was just as much a threat to dominant power systems as the other viral phenomena. The age of mechanical reproduction gave rise to numerous nightmares of technology-driven societies plagued by unrestricted duplication, by identical copies endlessly produced that would overwhelm normal, "unique" individuals and institutions. At the onset of the age of digital reproduction, America's dominant groups perceived themselves to be under attack by a number of plagues of replication. Their response was to eliminate civil liberties wherever necessary to contain the seemingly unstoppable transmissions, the acts of copying that, if left alone, promised to go on and on.

BLACK URBAN CYBORGS

Yet another "social plague" that emerged in the late 1980s that posed a threat to the nation's future, with which sampling was also intimately connected, was inner-city ethnic youth gang warfare. Young poor black males, in particular, were associated with urban gang violence, crack sales, and rap music. Sampling was easily interpreted as just another criminal act committed by a demographic known for its antipathy for the law, as evinced by Judge Duffy's swift condemnation of rapper Biz Markie as a thief, and his recommendation that Markie be prosecuted in a criminal court for stealing a portion of a pre-existing pop song.

Interestingly, the mainstream media frequently portrayed youth gang members in the 1980s as highly technological beings, figuring them as a new type of urban cyborg. The black urban cyborg that loomed large in the U.S. imaginary in the eighties and nineties resided in America's burned-out, broken-down inner cities, and somehow managed to emerge from their degraded environments, like Godzilla rising from the irradiated ocean, more powerful and capable than average humans. Also like Godzilla, these urban cyborgs were bent on destroying their nation's humanity. They were extremely technologically innovative: they created a smokeable form of cocaine that was far less expensive and seemingly more addictive (perhaps because of its accessibility) than its powder equivalent; they built massive, complex drug manufacturing and distribution networks and well-organized gangs in every major U.S. city; they repurposed ordinary electronic devices, such as beepers, video cameras, surveillance cameras,[41]

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[41] Peter Kerr, "Washington Heights: Cocaine Trade Thrives," *New York Times*, 1 April 1986.

walkie-talkies,[42] and electrified doorknobs[43] to turn ordinary houses into fortresses conducive to

the crack trade; and they managed to acquire military-grade semiautomatic weapons, which they

used to battle rival gangs for turf dominance.[44] These ingenious manipulators of an array of

managerial, chemical, and industrial/electronic technologies were stone cold, singularly focused,

and merged with their machinery. The media of the 80s and 90s, including the press, television

series (*Hill Street Blues*, *Miami Vice*, *Cagney and Lacey*), and movies (*Colors*, *Juice*, *New Jack

City*) popularized an indelible image of the average crack dealer/gang member of this period:

      He is male, black, and young, he grew up poor but is now flush with cash, he has both a

gun and a beeper on his person and vials of crack in his pocket, he has a group of homies behind

him, who are similarly armed, and a group of children protecting him, acting as the lookouts for

cops, holding up binoculars to their eyes or walkie-talkies to their mouths. This dealer/gangster

presides over a crack factory and/or crack house like a general over an army base. He commits

execution-style killings and sells drugs in broad daylight, on school playgrounds or in church

parking lots. He announces his presence sonically, by blaring rap music from his amped-up car

speakers or from his boom-box. He goes about his business expressing little or no emotion. He

is a cyborg, a young man who looks human but has no heart, who uses the tools of his trade so

deftly that he has become one with them, with the guns, the vials, the steel-reinforced doors, the

surveillance cams and intercom systems, the gang clothing and handshakes, the loud radio, the

semiautomaic guns. He is inseparable from his appliances, accoutrements, and systems. His

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[42] Peter Kerr, "Opium Dens for the Crack Era," *New York Times*, 18 May 1986.

[43] Peter Kerr, "Submachine Guns and Unpredictability Are Hallmarks of Crack's Violence," *New York Times*, 8 March 1988.

[44] Robert Reinhold, "Gang Violence Shocks Los Angeles," *New York Times*, 8 February 1988.

cyborgian pose makes him quite futuristic-seeming, and indeed, the black urban gangster/dealer was often discussed in terms of the harm he was doing to America's future. By ruining the nation's children (employing them as runners and spotters in his drug trade, causing them grave or sometimes fatal injuries due to his waging gang warfare in residential streets, and even, in the case of "crack babies," getting them hooked on the drug while they gestated in their mothers' wombs), the black urban cyborg was draining away any hope for America's blighted urban centers to build bright futures, according to news and fictional accounts.

Although the cyborg gangster/dealer was understood to be a youngster himself, usually a teen, he was to blame for ruining the nation's youth. He was what is typically the shadow character of "protect the children" campaigns, the opposite of the innocent child in need of shielding: the "juvenile delinquent." "Juvenile delinquency was blamed primarily on two separate but related causes – a bad family life and mass media," Spigel writes.[45] Adults trying to prevent delinquency in their own children, or punish other children's delinquency, often campaign to regulate potentially harmful media. Rap music, so often depicted as an integral aspect of the black urban cyborg's destructive activities, was banned or restricted in manifold ways as result of such campaigns. Sampling seemed like one in a long series of the gangster/dealer/cyborg's technological manipulations and cunning innovations for illegal purposes. The wording of Judge Duffy's condemnation of sampling indicates that Duffy could not perceive sampling as separate from the often-repeated narrative of young urban black men as technologically-savvy criminals.

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[45] Spigel, "Welcome to the Dreamhouse," 191.

SAMPLING AS THE FUTURE

From the mid-1980s through the early 1990s, pro-censorship activists attributed the

potential ruin of America's future to African American urban youth's development and mastery

of various new technologies. During these same years, African American urban youth *were*

developing and mastering new technologies, but their most significant innovations were of a very

different nature than those of which they were suspected, and for which they were blamed.[46] The

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[46] In 1991, a study by criminologists Malcolm Klein, Cheryl Maxson, and Lea Cunningham argued that the links between street gang organization, crack sales, and gun violence among urban African American youth were not as strong as either the public or police departments believed. By analyzing the Los Angeles Police Department and Sheriff's Department narcotics investigation and homicide files from the years of crack's emergence, 1983-85, the researchers found the following:

> [I]t was said [by the police] that over a thousand crack houses were active on any given day. Further, we were told consistently that *every* crack house contained guns or that "almost every" busted crack house yielded guns of various kinds.
> In our combined samples of 741 cases, crack houses were mentioned in only 39 cases (5%). Fortifications, a defining characteristic of crack houses, were mentioned in 121 (16%) cases. Clearly, this sets something of a ceiling on the "always a weapon" issue and therefore on weapons as harbingers of potential violence. Firearms were seized in 58% of the cases with crack house identifications and also in 58% of the cases in which fortifications were mentioned. Thus, again, the presence of weapons was greatly exaggerated by our police collaborators. After all, it is commonly estimated that over 50% of American homes contain guns of some type. None of these findings is conclusive about violence levels in cocaine sales, but they represent what is available. At best, they offer little support for the widely reported phenomenon of gang involvement in cocaine sales and violence during the 1984-1985 period....
> [D]espite the relative frequency of drug involvement in gang homicides, its *relevance* is more limited than public reports would suggest. The drug dimension of these homicides is perhaps a function of gang member involvement in drug sales, but it is not often a *motive* for homicide....Gang homicides [from 1984 to 1985] manifest essentially no change in drug involvement, contrary to police expectations, but the *nongang* homicides show a dramatic change. The clear suggestion is that the portion of the gang world that got involved with severe violence was already tinged with drug connections, but that nongang homicide came to be drug tinged as the cocaine problem exploded. The gang/drug connection was already there; the cocaine explosion brought more violence to the *nongang* portion of the growing drug arena....The drug/homicide connection...is not basically a gang phenomenon. Gang homicides were not affected over time by the drug scene, but nongang homicides were. More broadly, [Jeffrey] Fagan (1989) has noted similar patterns in a three-city comparison. He reported relative independence among levels of gang membership, drug dealing, and violence and concluded, "One must look to factors other than drug involvement to explain violence among gang members."....[T]he purported gang connection seems in most respects to have been considerably overstated. The implications for violence similarly seems to be have been overstated...Although the growth [in crack sales] was accompanied by a major increase in street gang member involvement, the increase was primarily at the low volume, street level of sales....Gang members seemed neither to have played a predominant role nor to have brought much extra violence or organizational character to crack distribution. We conclude...that the world of crack in Los Angeles belonged
> principally to the regular drug dealers, not to street gangs.

Klein, Maxson and Cunningham acknowledge that their data "was originally downplayed by Los Angeles officials because they do not go beyond 1985 and because of continuing reports of close gang/crack/violence connections," and perhaps an analysis of L.A.P.D.'s narcotics investigations and homicide reports of the late 1980s would have shown an upswing in gang-

myth of the dealer/gangster/cyborg credited poor black urban youth with putting older materials

(cocaine, guns, radios) to novel and devious uses; in actuality, these youth were engaging with

cutting-edge technologies – specifically, digital samplers – and, through that engagement, were

pioneering techniques that have proven to be the most important of the digital age.

There is an uncanny similarity between the myth and the reality of 1980s black

technological invention. In both the black urban cyborg myth and the history of sampling, inner-

city African Americans took up pre-existing artifacts and transformed them to the extent that the

old became new, and produced entirely new trade economies and jobs for city populations in dire

need of them. Both the dealer/gangster and the sampling practitioner are cyborg figures, men

who made the choice to "become-machine" by identifying so closely with the tools of their

trades that they could no longer be regarded as distinct from their prostheses. But sampling

artists did not merge with instruments of death, but with turntables, mixers, soundboards, and

digital samplers. While the black urban cyborg was imagined as America's "enemy within" for

appropriating cocaine to make crack, for appropriating ordinary electronics to defend drug

houses, and for appropriating military-grade arms to battle rival gangs, digital music sampling

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related and/or drug-related violence. (Malcolm W. Klein, Cheryl L. Maxson and Lea C. Cunningham, "'Crack,' Street Gangs, and Violence," *Criminology* 29, no. 4 (1991): 642-47). However, what is interesting about the criminologists' conclusions is that they emphasize a consistent tendency toward exaggeration and overstatement on the part of the news media and law enforcement officials with regards to the trifecta of 1980s urban black danger: "gangs/crack/violence." Klein, Maxson and Cunningham found plenty of evidence showing that the number of violent incidents, including homicides, increased in Los Angeles after the introduction of crack, but they found little evidence that the violence was enacted by black youth gangs who were overseeing the distribution of crack and controlling its sales on a large scale. Klein, Maxson and Cunningham's data shows that while gang members did sell crack and engage in hostile turf wars, the drug-dealing and violent activities of gangs did not undergo significant growth post-crack versus pre-crack; rather, it was the non-gang population that engaged in drug dealing and violence on a far greater scale in the post-crack years versus the pre-crack years. Even crack houses, which were supposedly the sites of the majority of the crack business, well-armed fortresses run by youth gangs, were found by the researchers to be far fewer in number, and much less heavily fortified, than the police had claimed. The *perceptions* of the urban situation held by law enforcement officers, local and national government officials, the press, and, therefore, the public, differed from the data, however. In the popular American imagination of the late 1980s and early 1990s, three elements were constantly and inextricably linked together: the "crack plague," a dramatic rise in the number of brutal homicides in the nation's cities, and young black men banding together in gangs. It was a triangle of doom for American cities, and each point in the triangle supposedly strengthened the other two.

was a method of appropriating pre-existing sounds to make new beats and forge new tracks, producing a new kind of music that harkened to a new kind of future.

Sampling situated African American and Afro-diasporic culture at the forefront of technology-human engagement. This project did not originate in the 1980s. Long before samplers hit the mass market, black musicians and recording artists had been interested in ways of making the case that black people, black aesthetics, black thought, and black "noise" would be very prominent, if not dominant, in the technoculture-to-come. The Afro-diasporic musics that emphasize themes of space travel, robots, and aliens form the sonic components of what Mark Dery has deemed "Afro-futurism."[47] Although Miles Davis, Herbie Hancock, Bernie Worrel, Jimi Hendrix and others can all be seen as contributors to Afro-futurist music, the three artists most often recognized as the pioneers of Afro-futurist sound are jazz musician and bandleader Sun Ra, who recorded "cosmic jazz" with his Arkestra (alternately called The Solar Myth Arkestra, The Blue Universe Arkestra, and The Jet Set Omniverse Arkestra) from 1957 to 1992; Jamaican dub/reggae producer Lee "Scratch" Perry, whose Black Ark studio operated from 1973 through the early 1980s; and "The King of Interplanetary Funk," George Clinton, whose bands Parliament and Funkadelic recorded albums like *Mothership Connection*, *The Clones of Dr. Funkenstein*, and *Cosmic Slop* in the 1970s and early 1980s.

Ken McLeod points out that "Sun Ra, Lee Perry and George Clinton all call upon similar tropes and metaphors of space and alienation that link their common diasporic African history to a notion of extraterrestriality,"[48] indicating that all three godfather-prophets of Afro-futurism

[47] Mark Dery, "Black to the future: interviews with Samuel R. Delany, Greg Tate, and Tricia Rose," *The South Atlantic Quarterly* 92, no. 4 (1993): 736.
[48] Ken McLeod, "Space oddities: aliens, futurism and meaning in popular music," *Popular Music* 22, no. 3 (2003): 344.

promoted a version of history very different from traditional Western (white) history, a history of earth that began with black peoples ruling over great African kingdoms in possession of powerful, possibly alien-connected technologies, then entered a long "dark age" in which black Africans became alien, first as slaves (Kodwo Eshun asks, "How much more alien do you think it gets than slavery?"[49]), then as the underclass of a Euro-American civilization in which they were, as Greg Tate says, like the typical science fiction protagonist, who is "at odds with the apparatus of power in the society, whose profound experience is one of cultural alienation, estrangement....Most sci-fi tales are about how an individual deals with alienating, dislocating experiences, which pretty much sums up the mass experience of black people in the post-slavery 20th century."[50] That phase, in which members of the African diaspora experience themselves as aliens in strange Western civilizations, is the present moment; the phase has endured for hundreds of years.

But the next phase of history, the one that Afro-futurist music not only anticipates and prophesies, but celebrates in advance of its coming and causes/calls to come into being, is a period in which black culture will once again be preeminent. Says Eshun, "The MC is...a link between Africa as a lost continent of the past, and Africa as an alien future."[51] Juan Atkins, co-founder of Detroit Techno in the early 1980s and producer of albums including Cosmic Cars, Techno City, No UFO's and Deep Space, claims, "We perpetuate the technological revolution through music....If we're going to be ready for a technological future, I think music prepares

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[49] Interview in *The Last Angel of History*, dir. John Akomfrah, dir., 1995.

[50] Interview in *Last Angel of History*.
[51] Interview in *Last Angel of History*.

them. Technological music better prepares them for the future."[52] McLeod writes, "[George]

Clinton's futuristic lyrical references served as powerful markers of the potential for black

wealth and power – a futuristic vision in which, in effect, the previously marginalized aliens

assume control of the world."[53] So the spacey ("far out") sci-fi hi-tech metaphors, allusions,

names, props, lighting and costumes in the recordings and performances of Sun Ra, Lee Perry,

and George Clinton all contributed to form an empowering "imaginary" for black listeners. I use

this term in the sense that Édouard Glissant employs it: Glissant's translator Betsy Wing writes,

"For Glissant the imaginary is all the ways a culture has of perceiving and conceiving of the

world. Hence, every human culture will have its own particular imaginary."[54] Afro-futurist

music responds to the story of the rise and dominance of Western civilization (this story goes by

the name History), which has depended in large part on the subjection of Africans and their

descendants in the diaspora, and transforms it into a particularly Afro-diasporic imaginary, a way

of conceiving the world such that advanced black civilizations reigned at the world's beginning,

and will reign again in the technological future, until the world's end. In fact, one can interpret

the counter-history suggested by Afro-futurist recording artists as ignoring official History

altogether: the Afro-futurist story of humanity seems to go straight from ancient Egypt to the age

of interplanetary space travel, disregarding the hundreds of years when EuroAmericans ruled the

world as largely unimportant to the *longue durée* of black culture.

  The potential for empowerment through this new imaginary is often noted by scholars of

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[52] Interview in *Last Angel of History*.

[53] McLeod, "Space oddities," 344.

[54] Betsy Wing, "Glossary," in *Poetics of Relation*, by Édouard Glissant, trans. Wing (Ann Arbor, MI: The University of Michigan Press, 1997), xxii.

Afro-futurism, but for my purposes, the most important aspect of Sun Ra, Lee Perry, and George

Clinton's work in the '50s, '60s, and '70s is the fact that they believed they could turn their

futuristic metaphors into substantial, physical reality. All three artists did more than talk or sing

about the Afro-diasporic techno-future, or dress up in space-age outfits or give themselves alien-

sounding names; they experimented with ways of making music that sounded entirely new. One

type of experimentation they all conducted was working with new instruments. McLeod calls

Sun Ra "a pioneer of the use of synthesizers and African percussion," mentions Perry's

"electronic manipulation of pre-recorded tracks – saturating individual instruments with reverb

(often achieved through the use of an analogue effects device called a Roland Space Echo),

phase and delay, and abruptly dropping voices, percussion and guitars in and out of the mix,"[55]

and refers to Clinton's "use of synthesizers and other electronic effects associated with the latest

in musical technology."[56] Before digital technology became widely available, Sun Ra, Perry,

and Clinton were acquiring the most cutting-edge music machines that they could find and

afford, and discovering ways to create never-before-heard sound effects with those technologies.

Afro-futurism was always about more than imitating or intimating a future-to-come. From the

1950s through the early 1980s, Afro-futurists were trying to inhabit the future by working with

its instruments as soon as they appeared in three-dimensional reality. They wanted to get their

hands on the materials of future; composing and playing futurist music was a tangible, material

process that took on new dimensions every time a new sonic tool hit the market.

But the tools that were available to Sun Ra, Perry, and Clinton from the '50s through the

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[55] McLeod, "Space oddities," 342.

[56] McLeod, "Space oddities," 343-344.

'70s were only late-stage versions of the primitive analog era. Then, in 1986, digital samplers became widely available at relatively affordable (although by no means inexpensive) prices. Although computer buffs had been hooking up analog synthesizers to computers since the 1970s, the sampler was the first entirely digital musical instrument. The sampler allowed a user to make multiple (brief) sound recordings, then stored the samples in RAM (Random Access Memory), which made alteration and playback of the samples quicker and easier than any tape recording system. By the time the digital sampler debuted, New York DJs, beginning with teenage Jamaican immigrant Kool Herc in the early 1970s, had been evolving the techniques of Jamaican dub (Lee Perry's genre) into the art of DJing, one central technique of which was spinning two identical records on turntables side-by-side at the same time to extend a break beat, playing the break over and over, tripling or quadrupling its length, with the potential to extend the break indefinitely. Digital samplers mechanized this process, enabling users to extend, or "loop," many more breaks, or "samples," than could be done by a DJ performing live with turntables. Tricia Rose makes explicit the transmutation of DJing practices to the sampler: "In the early stages of rap, these break beats formed the core of rap DJs' mixing strategies. Playing the turntables like instruments, these DJs extended the most rhythmically compelling elements in a song, creating a new line composed only of the most climactic point in the 'original.' The effect is a precursor to the way today's rappers use the 'looping' capacity on digital samplers."[57] In other words, when samplers arrived on the African American urban scene, there were DJs already highly skilled in using existing records to make new sounds. They knew just what to do with the digital music machines.

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[57] Rose, *Black Noise*, 74-75.

Young urban black men quickly found other uses for the sampler. As Rose wrote in 1994, after sampling practices had been developed for close to a decade, "To make the noise that characterizes rap's most creative producers and musicians requires approaching sound and sound manipulation in ways that are unconcerned with the intended or standard use of the samplers."[58] Sampling artists began deliberately "working in the red," pushing "sound meters well into the distortion zone"[59] until a sample sounded completely different than the source from which it was copied, until it was "just like a noise in the side," just "shit cracklin.'"[60] They forged new rules of sampling: "keep it hot, keep the drums up front and boost that bass;" they aimed for the "fat sonic boom" made by playing lower-register sounds (like bass) at high volumes.[61]

Samplers made possible a type of intricate collaging of pre-recorded sounds – including not only music but sound bites from films, TV shows, radio talk shows, and news broadcasts, eerie non-musical effects made by manipulating song excerpts, and the sounds of everyday life, such as car tires screeching and water running – that no one could have accomplished (or, perhaps, that no one thought to attempt, because of the time that would have been required) with analog tools. Public Enemy and its production company, the Bomb Squad, used samplers to produce a style of soundtrack that PE frontman Chuck D called a "sonic wall,"[62] and Andrew Ross has called a "dense, multilayered wall of noise...built out of found sound, deep funk, police sirens, and what-have-you...[a] vibrant clamor [that] became the signature sound of hard-core,

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[58] Rose, *Black Noise*, 75.

[59] Rose, *Black Noise*, 75-76.

[60] Rose, *Black Noise*, 75-76, quoting Eric (Vietnam) Sadler.

[61] Rose, *Black Noise*, 76.
[62] Kembrew McLeod, "How Copyright Law Changed Hip Hop."

street-level rap and resurgent Black Nationalism,"[63] and Eric B. and Prince Paul performed

another kind of sampling virtuosity, "[u]tilizing their vast record collections" and emphasizing

"the technical precision and clarity of the mix," their range of sampled musical genres eventually

taking "a quantum leap into the esoteric, patching comedy skits and general looniness into a

heady Day-Glo mix of musical genres (Curiosity Killed the Cat vs. Steely Dan)."[64]

Sampling artists quickly discovered that finding samples and altering them to achieve the

best possible effects were not easy tasks, but required meticulous attention to the smallest sonic

details, as well as the patience to work on individual particular sample for long stretches of time.

Both theorists and practitioners of sampling have used metaphors of scientific experimentation to

describe the close observation, the fine-tooling, the innovating-at-the-micro-level, that are

techniques critical to excellent sampling; the bio-tech terminology links sampling to its

ascendant, Afro-futurism. Harry Allen wrote in 1988, "Like the particle physicists who break

open atoms, hoping to later dig out their most elementary particles, dope DJs break open breaks,

searching for the answer to hip-hop's most basic, yet unanswered question: how small is a piece

of funk?"[65] Eshun writes, "[DJ] Grandmaster Flash [talked] about 'going to a laboratory, so to

speak, and inventing new ideas.' For Flash in '81, going to the lab means approaching the studio

as a research centre for the breaking down of the beat. In the lab, the Breakbeat is isolated and

replicated, to become the DNA of rhythmic psychedelia."[66] Perhaps the most apt scientific

metaphor for sampling is that of recombinant DNA. Sampling-based artists locate the most

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[63] Ross, "Princes among thieves."

[64] Ross, "Princes among thieves."
[65] Harry Allen, "Invisible band," *Village Voice Electromag*, October 1988, 11.

[66] Kodwo Eshun, *More Brilliant than the Sun: Adventures in Sonic Fiction* (London: Quartet Books, 1998), 02[13].

interesting segments of a sound recording, the most exciting strands of a recording's DNA, and then combine those DNA strands with strands of DNA from entirely different recordings, to produce new hybrid sonic sequences that would never have existed but for the experimenter's intervention.

The methods of use and virtuoso skills that sprang up around digital samplers, never foreseen by the manufacturers of the machines, allowed sampling artists to make soundtracks to underscore rappers' rhymes that were a thousand times more sophisticated than they had been in analog times. Samplers upped the complexity and richness of rap music. The start of digital sampling ushered in the period that music critics universally acknowledge as rap/hip-hop's "golden era," which began in the mid-1980s and lasted until the early 1990s, when Judge Duffy's ruling shut down sampling's baroque extravagance and reduced sampling-based artists (the ones who wished to work within the boundaries of the law, at any rate) to using only a few samples at a time, and only the ones for which they could attain permission and afford to pay licensing fees, from which they now construct tracks using simple, repetitive loops, much the way DJs had done on rap records before they had the digital sampler to elevate their game.

But, during the brief period when unlicensed sampling proceeded unchecked, what was made abundantly clear was that African Americans were primed and ready to enter the digital age. Indeed, from the preceding decades of Afro-futurism, it is evident that black musicians were closely following the progression of music technology, eagerly awaiting the time when machine makers finally yielded something truly hi-tech. When the affordable digital sampler landed in black urban America in significant numbers, African Americans made themselves *maestri* of one of the first mass marketed, widely used digital devices, one of the harbingers that

a new time of human existence – the Information Age, the Digital Era – was beginning. DJs

immediately translated their turntablist skills into digital format, and a new wave of music

producers quickly expanded the grammar and vocabulary of sampling, finding more and more

ways that samplers could be used to make sounds, make songs, make tracks. Samplers were the

technology that Sun Ra, Perry, and Clinton had long announced and called for: the technology

that, in the hands of black artists, would bring about the prophesied future in which Afro-

diasporic peoples would exist at the leading edge of technological development. "Rap musicians

are not the only musicians to push on the limits of high-tech inventions," writes Rose. "Yet, the

decisions they have made and the directions their creative impulses have taken echo

Afrodiasporic musical priorities. Rap production resonates with black cultural priorities in the

age of digital reproduction."[67] The Afro-futurist artists of the 1950s through the 1970s

announced that music would bring about a new technological future in which black ways of

knowing and doing, saying and sounding, would rule, and they were right. With the digital

sampler, African Americans defied the stereotype of the person of color always trapped in, as

Homi Bhabha would say, a belated relationship to modernity. In the second half of the 1980s, as

soon as digital media was born, African Americans mastered it. They became the technological

vanguard.

Black urban youths' rapidly-attained facility with new media posed a threat to the

dominant classes' wish to command the future. With black cultural priorities making the rules

for the age of digital reproduction, that age was in danger of getting out of control – out of the

control of the groups that had always controlled technology, especially since the 19th-century

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[67] Rose, *Black Noise*, 76.

advent of "modern" industrial technology – in numerous ways. Black cultural priorities greatly

differed from Euro-American cultural priorities. Sampling built on long-existing Afro-diasporic

practices that privileged repetition and variation over ideas such as "originality," "uniqueness,"

and "progress,"[68] meaning that what sampling artists regarded as their (as the Bomb Squad's

Hank Shocklee put it) "crafty"[69] manipulation of previously recorded noise appeared to be, in the

eyes of the dominant Euro-American culture, theft. Had unlicensed sampling been allowed to

continue without impediment, U.S. law courts and popular sentiment would have had to

recognize sampling as fair use – as art – and in the process, would have re-defined Western

notions of fairness and artistry to include extensive borrowing from, and copying of, earlier

cultural productions owned by other people. The notion of author's rights, which has long been

the foundation of Western European and American copyright laws, would have been replaced by

the right to make derivative works from existing artworks; the notion of individual artistic genius

would have been replaced by the prioritization of communal, collaborative artmaking; the ideal

of the unique masterpiece would have been replaced by an aesthetics that could regard works of

combination and heterogeneity as masterpieces.

In addition to calling into question the fundamental logic, truth, and justness of Western

definitions of law, property, art, and civilization, sampling artists proved beyond doubt that, in

the hi-tech future, copies of anything could be made without limit, and re-distributed without

limit. A digital age characterized by endless proliferation, by unconstrained reproduction and

dissemination, would endanger not only the definition of private property, but even more

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[68] For excellent discussions of how black uses of repetition are at odds with Western ideas of progress and originality, see James A. Snead, "On Repetition in Black Culture," *Black American Literature Forum* 15, no. 4 (Winter 1981); Rose, *Black Noise*, Chapter 3; and Schloss, *Making Beats*, Chapter 6.

[69] McLeod, "How Copyright Law Changed Hip Hop."

seriously, the fact of possession. Sampling artists showed that new media enabled them to "steal," and make their own, any recording in existence, at any time, with great ease. Digitality promised to liberate information from embodiment, but by freeing text from a book, or freeing music from vinyl, or freeing film from celluloid or tape or disk, a door to a society-without-property would be opened. I have already described the fears that pervaded the U.S. during the Reagan-Bush I years about a future marked by unconstrained replication and transmission; I now claim that one of the most significant reasons that cultural conservatives opposed African American activities and culture (drug culture, gang culture, and music culture) in the late 1980s and early 1990s was the potential that African Americans demonstrated, through their mastery of the digital sampler, to bring about a future in which property would be no longer respected or even acknowledged, a future in which all possessions would be reduced to information, which could never be protected or kept "safe" from invaders and raiders, thieves and robbers, who would make their own copies, do with the copies whatever they wished, and distribute them freely for others to consume and copy at will.

Simon Frith has argued that Western copyright law has consistently provided protection for Anglo styles of music while it has afforded African and African American styles of music little or no protection. Writes Frith in his 1987 essay "Copyright and the music business,"

> There can be copyright in the arrangement of a piece of music (if it involves sufficient 'skill and labour') but not in particular instrumental sounds or rhythmic combinations. Bo Diddley, for example, could not copyright the familiar Bo Diddley beat and, to cite a recently controversial case, Paul Simon could use US law to acknowledge and reward his South African collaborators' melodic contributions to *Graceland* but not their musically more significant instrumental sounds. As these examples make clear,
>   copyright law defines music in terms of nineteenth-century Western conventions and is not well suited to the protection of Afro-American

musicians' improvisational art or rhythmic skills.[70]

As a result of the racial bias of music copyright law, white musical performers have been able to appropriate black musicians' and singers' inventions cheaply and legally. Frith states, "One aspect of the white exploitation of black sounds has thus been the 'cover' version. Songwriters and publishers benefited from such copying (particularly as publishing rights could often be bought cheaply – the songs were not yet big hits), but the performers who were the source of the music's vitality, from ragtime to rock 'n' roll, did not."[71] In contrast, American courts have ruled that African Americans' copying recorded music using digital samplers is either illegal (in the case of unlicensed sampling) or prohibitively expensive (in the case of licensed sampling).

In his 2004 book *The Fugitive Properties*, Stephen Best discovers, in the history of the copyright law's protection of mechanically reproduced sound, a close tie to American slavery, highlighting another way in which racial bias inheres in U.S. copyright. Best claims that the reason that sound recordings belong so definitely to their author/originator under copyright law – the reason, in other words, that the person whose composition is recorded has the right to decide how his or her work may be used, and by whom – is that several legal scholars in the late nineteenth century made influential arguments that defined the unauthorized reproduction of sounds and images as theft of personal property. Best summarizes Samuel D. Warren and Louis D. Brandeis's 1890 essay, "The Right to Privacy," as a claim that "the 'too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds' came to possess the privileged and potentially abusive power to abscond with the

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[70] Simon Frith, "Copyright and the music business," *Popular Music* 7, no. 1 (1987): 63.

[71] Frith, "Copyright," 63.

'words spoken,' 'casual...expression[s],' and 'personal appearance, sayings, [and] acts' of any unsuspecting individual. Theft under these circumstances amounted not to trespass against property but to an invasion of solitude and privacy."[72] Warren and Brandeis, and the 1905 case of *Pavesich v. New England Life Insurance Co.* that followed the logic of "The Right to Privacy," linked the unauthorized copying of recorded media to a a violation of "the right to one's personality." Since the taking of a recorded piece of music could not be regarded as "physical appropriation," since no physical object exchanges hands when a recording is copied, Warren and Brandeis defined copying-without-permission as robbing the original author's of "a right to private selfhood," a right "to be left alone," a right to *not* be subjected to "mental suffering," a right to *not* have to suffer "wounded feelings."[73] At the core of this definition is the idea that a person is *not property*: personality cannot be exchanged or traded without the consent of the person in question. If an author's recorded material were to be copied without his or her permission, then s/he would become *enslaved*, according to the *Pavesich* ruling, which stated that unauthorized usage of a person's photographed image "brings...the individual of ordinary sensibility, to a realization that his liberty has been taken away from him....He cannot be otherwise than conscious of the fact that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master."[74] Copyright law, then, protects the authors of recorded material in such a way that defines them as specifically *not slaves*, not property, but as people whose self-expressions, whose manifestations of their individual and unique personalities, should not be taken and used without their consent.

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[72] Stephen M. Best, *The Fugitive Properties: Law and the Poetics of Possession* (Chicago: University of Chicago Press, 2004), 48.

[73] Best, *Fugitive Properties*, 48-51.
[74] Best, *Fugitive Properties*, 52.

According to this metaphor, which is the basis of U.S. copyright law regarding recorded media, to practice sampling is to practice slavery, for making a copy of someone's recorded matter is akin to *taking that person*, to stealing that person's essential being – his or her personality, or an expression thereof – away. What is interesting and ironic about this metaphor is that within African American culture, the culture of the majority of sampling's practitioners, stealing a person is a well-known tactic, for in the system of U.S. slavery, the only way that a human of African descent could be free was to *steal him- or herself.* The concept that theft of a person, the forcible abduction of a personality, a human's essential being, is more than acceptable, but desirable, became normalized in large segments of the black population of the U.S. during the centuries of the slave economy. People of African descent living in America under slavery learned to interpret the "rightness" of taking away personhood and personality very differently than the nation's laws did. U.S. law declared that a slave who became fugitive was somehow indebted to his or her owner, for although the slave's labor had been forcibly expropriated, or stolen, from him or her, s/he still "owed" his or her master that labor for life, and could never refuse to keep giving the master the "gift" of him or herself, and was in arrears if s/he ever attempted to refuse to give that gift.

The logic of fugitive slaves, on the other hand, is that what rightfully belongs to a person, such as him or herself, must be taken in order to be fully realized. The act of using unauthorized samples, then, challenges the metaphorical logic of U.S. law in a number of ways. Sampling asks the question, To whom does a piece of recorded music "rightfully" belong? Whose essential being does the music express? Black American culture does not take for granted that the legal owner of an expression of personality, of personhood, is the true and just owner. There

is an argument implicit in sampling that listeners, receivers, audience members are the proper owners of recorded sound, and that those sounds can, and perhaps even must, be stolen in order for their essence, affect, or meaning to be fully realized. Unauthorized sampling, the stealing of sound, makes a sampled sound fugitive and free: free from being owned exclusively by its original author (and hence, free of the definitions and restrictions of copyright law), free in the sense of costing nothing, free to affect as many people as it can with its sound waves, free to multiply its meanings by being recontextualized, reissued, and re-heard by new and different audiences. However, the fugitive sampled sound is free in these ways only as long as it can remain in circulation. *Grand Upright* and the subsequent case law that supports that ruling have empowered copyright holders to more effectively prevent sounds from going fugitive, and to more rapidly shut down a fugitive sound's circulation, than they could before 1991. What U.S. copyright law encoded, in the early years of the 20th century, as an act of great harm to a private person – the taking of their personality – sampling artists have performed as an act of liberation, of righteous theft. In doing so, they have called American law on its hypocrisy for, on the one hand, defending the inviolate right of a person to control his or her personality and personhood, and, on the other hand, having denied an entire category of people that right for centuries.

The fact that legal slavery came to an end in the 1860s did not completely expunge all traces of the denial of black Americans' personhood from federal law. Frith's analysis demonstrates how music copyright continues to protect the right of the white majority to expropriate the artistic inventions, productions, and performances of the black minority while refusing to offer the minority the same protection. That practitioners of unlicensed sampling disregarded the "wounded feelings" of the people whose recorded sounds they took, and refused

to acknowledge the concept that a right-to-privacy logically gives on to an person's ability to utterly control his or her essential personality traits and expressions, both ironically adheres to the spirit of American law (which treats the right of individuals to wholly own themselves and everything that is an expression of their innermost selves as highly contingent, not at all universal), and counters the broad assumption that the legal owners of a specific person/personality/personhood are the proper and rightful owners.

The American future that sampling made possible was our present: the America of remix culture, of file sharing and media downloading, of online fan vids and fan fiction, of audio and video mash-ups, of You Tube parodies and re-enactments. Sampling artists were the first consumers to turn themselves into producers via digital technology, and they developed a set of attitudes and techniques for new media that became the basis for contemporary American digital culture: "cut-and-paste"; the hunger to plunder old works to make new ones; the insistence upon the validity of multiple versions and variants of texts; the worldview that all manner of information should be digitally transferable and all methods of manipulation/bricolaging/transformation should be permitted; the idea that all archives of art should operate as "open source" systems that allow visitors to take what they find useful and make deposits back into the archives (of their own versions/additions/re-workings) that they feel will be useful to others.

Although not all of these protocols arose with sampling (as stated in the Introduction, Afro-diasporic arts have traditionally relied on repetition and variation, and most Western 20th century art movements, including Cubism, Dada, Surrealism, Situationism, and Postmodernism, highlighted the incorporation of selected fragments of the past into new works), digital

technology enabled appropriations of pre-existing works to take place on a scale that was never before seen. Sampling artists were not a small, elite group whose appropriations of art could be re-appropriated by the mainstream as art, unique products of individual genius, without any lasting damage done to Western aesthetics or the art market. Sampling also could not be entirely dismissed as a simple folk culture practice, not worthy of Western civilization's attention or concern, as were most forms of African artistic appropriation. Sampling was a technology for the masses that also made money. It turned avid media fans into professional media producers, and overstepped plenty of boundaries erected by Euro-American ideology in the process. Sampling threatened to turn everyone into a thief and an artist at the same time, thereby challenging the laws of possession and property and the laws of artistic value.

Sampling showed what new media had the power to accomplish: nothing short of a complete re-thinking/revolution/remix of Western systems of knowledge and power. The myth of the black urban cyborg, and the black-hole future to which this figure would supposedly doom America, motivated Judge Duffy to censor sampling in 1991, only five years after it began. Sampling has diminished, has become flatter and less compelling, since then. Yet, over the last twenty years, the future that sampling showed was possible has increasingly become a reality. Media has come unthethered from physical containers like discs and pages and tapes. Media now flows in digital files across networks, and every day, legions of computer users access a multitude of content, appropriating it for their own various ends. Users cut media content up into clips and post them on the Web, upload it onto file sharing sites so that others can download their own copies, create new versions of it and e-mail their re-workings to their friends list, make icons from it and represent themselves on MySpace with it. Some users pay a significant amount

for the content they appropriate, others pay little, and still others pay nothing, but in almost every case of appropriation, the users are in violation of U.S. copyright law. As media corporations cringe at the dwindling of profits from traditional formats and conservative politicians support their campaigns for more effective TPMs (Technological Protection Measures) against digital piracy and more copyright term extensions, at least two and possibly more generations of Americans today are growing up and growing older as daily practitioners of illegal acts. Sampling, a digital descendant of Afro-diasporic cultural practices and the result of the creativity of young, black, poor American men, has taught the general citizenry to be criminal. The threat posed by African American technological innovation to the right wing's control over America's future has grown, not lessened, since the censorship of sampling. The dominant classes of the 1980s were right to be afraid.

CHAPTER 4
Dam(n) the Flood of Female Fantasies:
Restrictions on Women's Online Pornographic Fan Fiction

In the last two chapters, I explored the history of legal constraints placed upon digital music sampling as an example of external censorship. Not only legal discourses, but fears about the power of new technologies – especially music technologies – over young Americans' minds, and anxieties over the profitable innovations of black urban youth and the destructive power of those innovations (crack, gangs, and rap music), contributed to Judge Kevin Duffy's decision to severely limit sampling in his 1991 decision in *Grand Upright Music v. Warner Bros. Records*. The numerous lawsuits that sampled artists filed against sampling artists in the wake of Duffy's judgment served to quash the multilayered complexity of music sampling. The first genre of digital remix, then, was reduced to a simple and transparent practice quite different from its earliest expressions by a series of legal procedures.

In this chapter, I investigate the second genre of digital remix to achieve widespread popularity: Internet fan fiction, or "fanfic". Fan fiction appeared on the nascent World Wide Web shortly after the 1991 *Grand Upright* ruling caused sampling's decline. Like digital sampling, online fan fiction was rooted in minority discourse, and was subjected to censorship in its early years. Fanfic was the invention of women, who, despite constituting half or slightly more than half of the U.S. population, have always made up a small minority of mass media

producers.[1] An easy assumption to make regarding fan fiction's popularity with women is that women, finding their tastes unsatisfied by mass media, use fanfic to revise, refine, expand upon, and pose alternatives and supplements to the products created for television, film, and print publication by male-dominated studios. However, it is clear that in the early years of Internet fan fiction, the source of censorship of the genre were women within online fan communities. In other words, the case of online fan fiction serves as an example of internal censorship rather than external censorship, although, as in the case of sampling, larger censorship discourses circulating in American culture played a large part in the direction and course of the restrictions applied.

The first Internet-specific site of fan fiction was ATXC, or alt.tv.x-files.creative,[2] which is dedicated to fanfic based on the FOX network's television series *The X-Files* (1993-2002). ATXC was founded in May 1994 as an online community on Usenet, a predecessor of Yahoo! Groups, Google Groups, ezboard/Yuku, and every other Internet message board. Within a few years of ATXC's launch, an auto-archive called Ephemeral (http://www.ephemeralfic.org) was established to collect the fanfic posted to ATXC. Ephemeral then sent the fics to a long-term archive site called Gossamer (http://www.fluky.gossamer.org), where most *X-Files* fanfic can still be found. ATXC, Ephemeral, and Gossamer are all still active today, although the amount of fic posted daily has diminished considerably since the peak of *The X-Files*' popularity, in 1998. In May of that year, Gossamer received 60,000 hits per day, or one hit every 1.44

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[1] For example, a set of 2004 statistics compiled by the Writers' Guild of America states that 27% of television writers are women (10% are minorities), and 18% of feature film writers are women (6% are minorities) (Dave McNary, "Minorities Face Writers' Block," *Variety*, 12 October 2005).

[2] I know of one other website dedicated to fan fiction that preceded ATXC: alt.startrek.creative. Alt.startrek.creative was, like ATXC, a Usenet group, founded in May 1990, four years earlier than ATXC. However, alt.startrek.creative was a successor to analog fan fiction communities (*Star Trek* fan fiction had been circulating in printed fanzines since at least the late 1960s), while ATXC was the first community that published and distributed *X-Files* fan fiction. Therefore, I consider ATXC to be the first Internet-specific fan fiction site.

seconds.[3] As of the last official count, on March 1, 2007, Gossamer housed 33,758 unique story

entries.[4] One must keep in mind, when estimating the volume of fan fiction that currently exists

on the World Wide Web, that the Gossamer site is the (incomplete) archive for stories based on

one television program. Fanfiction.net (http://www.fanfiction.net), which also is far from a

complete archive of fanfic, hosts thousands of stories based on a wide variety anime/manga,

books, cartoons, comics, video games, movies, and "miscellaneous," as well as television shows.

A recent search on Google for the term "fan fiction" yielded 23.6 million results; if even a tenth

of the results are unique fanfic websites, it is clear that Internet fan fiction has gained quite a

following since ATXC began in May 1994.

There is something hopeful and inspiring about the popularity of digital remix culture, the

fact that it is a form of cultural production that allows anyone with access to a computer and an

ISP to become an artist, or at the least, an avid consumer of free art.   Many theorists promote

new media as the facilitator of greater freedom and democratic participation in our country and

around the world, and the growing prominence of remix culture, of websites like Gossamer and

forms like fan fiction, seems to underline the liberatory aspect of the digital age.   Curator and

cultural critic Nicolas Bourriaud, for example, calls remixes, or "postproductions," constituitive

of "an autonomous strata that [can] provide tools of connection between individuals,"

emblematic of "the establishment of new forms of sociality and a true critique of contemporary

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[3] "The Gossamer Project Help Desk – Basic Archive Information," http://fluky.gossamer.org/local/basic.html (accessed 9 December 2007).

[4] "The Gossamer Project Help Desk."

forms of life," and productive "of new relationships to culture in general and to the artwork in particular."[5]

Discussions of fan fiction in both its analog and digital formats have been similarly upbeat about the genre's utopian possibilities. Specifically, scholars have eagerly pointed out the potential of fan fiction to open up spaces of sharing and community for women. Fan fiction groups of readers and writers were lauded as pro-woman groups where mutual support and admiration was the norm. In 1992, Henry Jenkins wrote of the "receptiveness" and "nurturing atmosphere" of most fanzine editors,[6] and Constance Penley reported that the *Star Trek* fic network "is very often referred to by the fans as a family."[7] In 1996, Susan Clerc, basing her claims on her observations of exchanges on the ATXC, wrote that women's online fan communities were characterized by a "lack of flaming and a sense of harmony/community," traits that differentiated them from male-dominated online venues.[8] Adopting models proposed by Susan Herring and Deborah Tannen, Clerc suggested that Internet groups heavily populated by men generate a great deal of "'report-talk,' a distinctly male mode of discourse that values information and independence," while online sites dominated by women more frequently generate "'rapport-talk,' a female model of communication that stresses connections to others and avoidance of open conflict."[9]

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[5] Bourriaud, *Postproduction*, 8.
[6] Jenkins. *Textual Poachers*, 159-61.

[7] Penley. "Feminism, Psychoanalysis," 489.

[8] Susan Clerc, "DDEB, GATB, MPPB, and Ratboy: *The X-Files'* Media Fandom, Online and Off," in *Deny All Knowledge: Reading* The X-Files, ed. David Lavery, Angela Hague and Marla Cartwright (Syracuse, NY: Syracuse University Press, 1996), 45.

[9] Clerc, "DDEB," 44.

Theorists have extended this attitude of techno-utopianism to the sexually explicit content of fanfic; erotic fiction has always been a significant subcategory of fanfic production, and thus fanfic has often been celebrated as a means for women to fantasize "freely," meaning both free of capitalist commodity exchange and free of Puritanical American moral conventions and sexism. In 1985, science fiction author Joanna Russ wrote that Kirk/Spock slash fanfic "is the only sexual fantasy by women for women that's produced without the control or interposition of censorship by commercial booksellers or the interposition of political intent by writers or editors. It's also a labor of love for the women involved, since it is (and must be, because of the possibility of lawsuit) non-profit."[10] Penley wrote that female *Star Trek* fans who wrote slash fanfic demonstrated "ingenious ways...[of] reshaping both romance and pornography to their own desiring ends."[11] Jenkins argued that fans' "eroticization" of television characters' relationships were tangible evidence of their abilities to free their imaginations from the limitations that the mass media texts (the objects of their fandoms) might impose upon them. Jenkins wrote that in fan fiction, women writers' fantasies are "freed of the restraints of network censors....Their stories transform the relatively chaste, though often suggestive, world of popular television into an erogenous zone of sexual experimentation."[12]

However, if we probe into the early history of the Usenet message board ATXC, an incomplete archive of which is now hosted at Google Groups, we find that this first Internet fan fiction community was not simply a counter-public that empowered women to resist cultural norms and freely explore and express their sexual imaginations and fantasies, that was suffused

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[10] Russ, *Magic Mommas*, 95.

[11] Penley, "Feminism, Psychoanalysis," 491.

[12] Jenkins, *Textual Poachers*, 175.

with "a sense of harmony/community," that "stress[ed] connections to others and open avoidance of conflict," that was "receptive," "nurturing," and "helpful," like "a family." The somewhat domestic adjectives just quoted from the writings of Russ, Penley, Jenkins, and Clerc make female fan groups sound like "happy homes" that provide peace, pleasure, and feminist power to women. But as we are about to see, the ATXC, like every domestic sphere, was not free of troubles.

Here is the preface to a fic posted in February 1995, 9 months after the ATXC was launched:

Example 1
IRRESISTIBLE REDUX:
Mulder Escourts Scully Home

Fanfic by Marie Russell
(Marie2441@aol.com)

26 February 1995
(recieved 2/28/95-Sci)

This story contains very graphic scenes of sex, strong language and some hints of graphic violence. If you are under age, or do not want to read this material, please stop now. I really can't take any complaints seriously if you fail to heed this warning.

Caveat lector.

Here is the preface to a fic posted in March 1995, 10 months after the ATXC was established:

Example 2
WARNING
  This story is not for the squeamish. It is Rated NC-17...hell it's even too sleazy for that, call it XXX Rated, nothing truly perverse mind you, like children or animals, but tons of gratuitous sex. Hell, this story has no real plot, just mostly sex strung together

with some flimsy background stuff, and yes the two leads do go at it, so if you don't like that, too bad. You don't have to read it if you don't want to.
...
    So, for those of you with dirty little minds, who are still reading, away we go...

"Burning Leather" March 1995

Everett, Arianwen author

Here is a preface to another fic posted in that same month:

Example 3

From: matthewk@spot.Colorado.EDU (MATTHEWS-SIMMONS KELLIE)
Newsgroups: alt.tv.x-files.creative
Subject: REPOST   "Gemma" 1/6 (NC-17)
Date: 23 Mar 95 19:48:38 GMT

        WARNING! THIS STORY IS NC-17 Rated!
        WARNING! THIS STORY IS NC-17 Rated!

The story you are about to read contains SEX, written in loving detail.

If that bothers you, either do NOT read this story, or get someone who doesn't mind erotica to black out all the juicy parts for you before you read it. If you're underage, get your parent's permission to read it.

Don't flame me if you're silly enough to go ahead and read it after I warned you, and then get offended by it.   –kms

From these three examples of prefaces, we can see that within one year of the launch of the first

Internet fan fiction group, a convention of authorship had been established in the community: the

convention of warning readers away. These prefaces, or "headers" as they came to be called in

the community (and later, they came to be called "headers" in *all* online fan fiction communities;

one of my points is how significant this first group was in terms of setting up templates and rules

and precedents that other online groups followed) are, for the most part, efforts to put off

potential readers. Note, in Examples 2 and 3, the word "WARNING" in capital letters leading

off the posts, and the series of repetitive, emphatic statements making clear the fact that the

stories contain sexual content, and the defensive phrases that seem to anticipate a reader's

negative reaction to the sexual content: (in Example 1) "I really can't take any complaints

seriously if you fail to heed this warning"; (in Example 2) "if you don't like that, too bad. You

don't have to read it if you don't want to"; (in Example 3) "If that bothers you, do NOT read this

story...Don't flame me if you're silly enough to go ahead and read it after I warned you, and then

get offended by it." These prefaces put the onus of the responsibility for the reader's enjoyment

of the erotic fiction squarely on the reader: (in Example 1) "Caveat lector," or "Reader beware."

In all three examples of headers, the writers do *not* advertise the appeal of the sexual fantasies

they have taken the trouble to create; they do not promise the reader pleasure. They do just the

opposite: they address the reader with the assumption that the reader will find these stories about

sexual gratification *unpleasing*, and these headers constitute pre-emptive strikes in the expected

blame game that will ensue from the reader's discomfort and displeasure. These headers state, It

will not be my, the writer's, fault for writing what I should not have if you are made angry or

uncomfortable by this sexually graphic story, instead it will be your, the reader's, fault for

reading what you should not have. At this point, I want to recall Gérard Genette's words on the

purpose of all prefaces (and these are from a scholar whose 1987 book *Paratexts* contains 75

pages on prefaces *alone*). Genette writes, the preface "has as its chief function...two actions,

[which] are *to get the book read* and *to get the book read properly*."[13] So, according to Genette's

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[13] Gérard Genette, *Paratexts: Thresholds of Interpretation*, trans. Jane E. Lewin (Cambridge, UK: Cambridge University Press,

definition of the basic purpose of prefaces, these headers are *not* prefaces, as they seeking, not to lure the prospective consumer to consume the text that follows, but to prevent the reading of potentially undesirable texts. These headers are not prefaces, but paratexts of prevention. They are Internet prophylactics.

Of course, every severe warning can also be read as an invitation, a game of "no means yes," "don't means do," and these headers may be interpreted as sly and flirtatious come-ons, meant to intrigue and entice potential readers. There is the most evidence for this in the second example: "So, for those of you with dirty little minds, who are still reading, away we go." But there is a binary logic, an "if...then" statement, in that invitation: *If* you don't like triple-X-rated writing, then *do not* read this fic; *if* you are the sort of reader who enjoys "dirty" stories, *then* go ahead and begin reading the story. The flowchart of action hinted by this examples is evident in the other two examples as well. The possibility of a reader response that is negative, that is "offended," that is "bothered," that wants to "complain," that makes the reader feel "squeamish," is at least as likely as a reader response along the lines of, "I *do* have a dirty little mind." From this perspective of flowchart logic inherent in the headers, we can allow that Genette's definition of preface-as-invitation and my definition of paratext-of-prevention both hold true.

We know that this type of header, containing one or more explicit warnings about sexual content (very often using the word "warning"), was common to early erotic stories posted to ATXC.

1987), 197.

Chart 1: Number of ATXC Stories with Sexually Explicit Content Posted March-
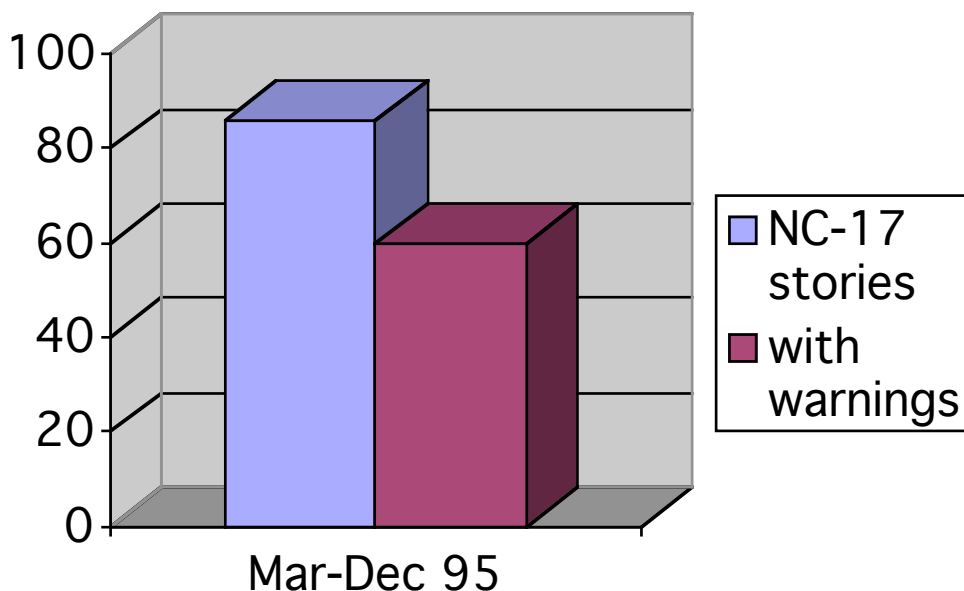
Here you can see that out of 86 stories posted to the ATXC that were sexually explicit, usually

designated with an MPAA-like "NC-17" rating, 60 stories, or 70%, led off with fervently

cautionary language. So this style of warning was a convention employed by the majority of

writers of erotic fiction in this community within the first year and a half of its existence. The

question then becomes, Why? Why did these writers, predominantly women writers, warn off

their would-be readers, the majority of whom were also women, and all of whom clearly had an

interest in the source text (*The X-Files* television series)? Was not this Internet community

already a well-defined subculture? Why the self-segregating performance of the writers of erotic

fiction, then, when such a separation from the rest of the group was antithetical to the "sense of

harmony/community" presumed by Clerc and the other theorists previously cited?

As Lynn Spigel writes in her 2001 analysis of Barbie doll collectors, fan subcultures don't "easily fall into the narrative oppositions we so often find in cultural studies, oppositions that pit 'resistant' popular appropriations of mass-culture texts against 'dominant' meanings in them. Nor [do these groups] display the utopian aspects of community that numerous ethnographies of fans locate in these cultures."[14] The first explanation, the surface explanation, that we have for these warnings about sexual content on the first Internet fan fiction site is that there is evidence of at least two "flame wars," or heated debates, over NC-17-rated fic taking place in the group's first year: the first war took place in late July or early August 1994, just a couple of months after the site's opening in May '94, and the second war took place sometime between May 1995 and August 1995. At this point, I must again state that Google's archives of these early Usenet groups are not complete, so unfortunately I have not been able to find the comments of the parties who apparently objected to NC-17 fic; what I do have are the headers of the fics written by authors that directly comment on, or respond to, the anti-erotica posters.

Here is a comment from a story posted in August, 1994:

Example 4
Hi all,

Yep, it's me again - Steve, writer of many a bad parody. I've recently noticed **several messages in this .creative forum regarding X-Files erotica, and how such stories portray Mulder and Scully as being out of character.**

Personally, I'm not terribly fond of X-Files erotica either, for the exact same reason. But **whenever I see something so controversial in this forum**, I just feel like I have to be a part of it1 :^) Therefore, **I've written up a little story that is sure to further ruffle your feathers.**

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[14] Spigel, *Welcome to the Dreamhouse*, 341.

Another reason I'm writing this story is that up till this time, I've noticed that only the ladies were writing X-Files erotica. I wondered why this was the case, since men are just as capable of generating smut as the ladies (perhaps even more so). Therefore, I've decided to try my hand at erotica, giving the subject my own spin on things (Uh oh!).


```
*   *   *   *  WARNING !!!  *   *   *   *
*   *   *   *  WARNING !!!  *   *   *   *
*   *   *   *  WARNING !!!  *   *   *   *
```


The following material is ***EROTICA***. It contains scenes of nudity, graphic sex, and bestiality (heh heh, just kidding about that last part). In addition, if you do not like seeing Mulder or Scully doing anything that would be out of character, do not read any further. I should warn you that some of the things in this story could be considered deviant behavior, and may therefore surprise you. You even might find certain elements of the story to be morally repugnant.

If you are under 18, or are immature, or lack an open mind, or do not have a sense of humor, or otherwise easily offended by material of an adult nature, ***do not read this story!!!!!***.

I hereby state that anyone who ignores this warning and proceeds to read the story anyway will forfeit all right to criticize or flame me in any matter whatsoever regarding to this story.

* * * * * * * PROCEED AT YOUR OWN RISK!!! * * * * * * * *

Here follows "The Sex-Files," by Steven Han, 8/31/1994

We know from the headers to this story that "several messages" on the ATXC, "recently"

meaning maybe in the weeks preceding this August 31, 1994-dated fic, lambasted the erotic fics

for writing "out of character" portrayals *The X-Files'* main protagonists, Mulder and Scully (who

were, more often than not, depicted as engaged in sex acts in these stories). (And regarding this

header, let us note that the author, Steven Han, remarks on the fact that up to *his* contribution of

erotica, that "only the ladies" were posting erotica for this site. Let us also note his performance

of very extreme cautionary language and defensiveness against flaming.)

We also know that, in November 1994, the ATXC moderators altered their Frequently

Asked Questions, or FAQs, for the site, to include two rules about warning readers about NC-17

fic.

ATXC "Frequently Asked Questions" Comparison: May 1994 v. November 1994

May 8, 1994 FAQ
No mention of nc-17 fanfiction or the need for fic authors to clearly label their work.

November 4, 1994 FAQ
"Stories of an 'adult' nature should be labeled as being NC-17 or 'Erotica' in the subject header so that people who don't want to read that kind of story can avoid it."

"Please mention in the header what kind of story it is, and whether or not it's NC-17/erotica. This would be helpful to those who want to skip that kind of story."

The FAQs on an Internet message board usually serve the function of telling new and current

members what the rules of the community are, so sometime between May, when the first FAQ

was posted, and November, when the revised FAQ was posted, it became clear to the moderators

that rules about putting headers on erotic fiction were necessary.

And here are some indicators about a second flame war over erotic fiction taking place in

the summer of the following year:

Example 5

I've hesitated posting this for weeks now mainly because of the recent backlash against NC-17 stories. In the end, and with a little encouragement,("Just post the damn thing already, Rosie!"), I realized that there might be a few people who might enjoy reading it as much as I enjoyed
writing it, so this is for all of you. As for the rest... well, you can't please everybody...

Once again...

WARNING! WARNING! WARNING!...

(from Rosie Passinisi's "Back to Eden," posted June 7, 1995)

Example 6

WARNING-THIS STORY DEPICTS ACTS OF A SEXUAL NATURE. Well, at least they give it a shot anyways...

Now, before you go off saying, **"<Blank> wouldn't do that,"** etc., this is alt.tv.x-files.*creative*. Got it? Besides, this is just a romp. **I'm having fun writing, damnit! Anybody got a problem with that? Good.**

(from Nicola Simpsons' "Impatient," posted July 28, 1995)

Example 7

Yah, I know, I've read the "not tonight dear, I've got a headache" posts, but I just couldn't resist... ;-)

(from Passinisi's "31 Flavors," posted August 16, 1995)

These headers tell us that during the summer of 1995, there was some flaming again about

whether *X-Files* erotica violated the official or "canon" characterizations of the two protagonists,

and we know that, at least in the mind of one author, these flames constituted a "backlash against

NC-17 stories," and that author found those flames dissuasive: she opted *not* to post her erotica until she received encouragement, in the form of a friend telling her to "Just post the damn thing already, Rosie!" Rosie Passinisi was probably not the only writer discouraged from posting NC-17 fanfic to ATXC this summer.

Chart 2: Decline in NC-17 Fics Written between May and September 1995
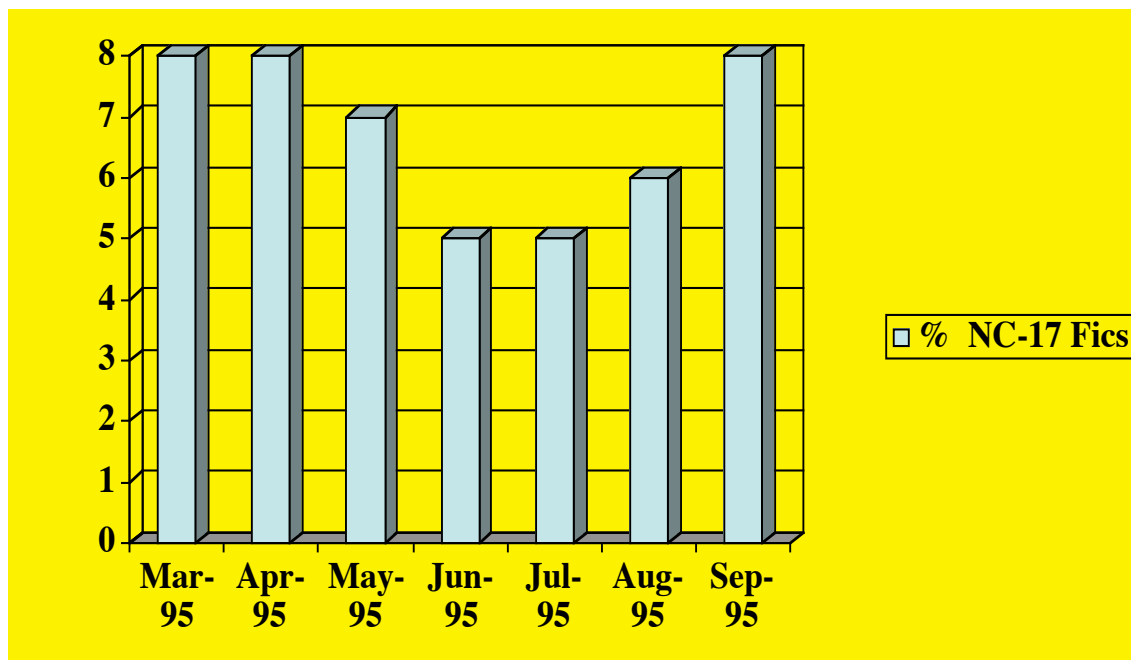
This chart indicates that, between May and August 1995, the period during which we can surmise the second flame war over erotic fan fiction took place on the ATXC, the percentage of *X-Files* stories rated NC-17 fell to its lowest point in history. The archives for March and April 1995 show that 8% of stories in both months were NC-17, but in May 1995, this percentage fell to 7%, then in both June and July, the percentage was 5%, and in August, the percentage of stories that were NC-17 was 6%. Not until September 1995 did the percentage rise back up to

8%, and it was never that low again. (At the most productive point of the *X-Files* fan fiction

community's history, October 2000, out of 393 fics posted, 79 of them, or 20%, bore an NC-17

rating.)

By plowing into the archives of the Internet's early history, then, we know that the first

Internet site devoted to what is now one of the most popular forms of digital remix, fan fiction,

was populated mostly by women; we know that a minority of these women wrote erotic fiction,

and we know that a number of readers protested this erotica. Unfortunately, because of the

incompleteness of the archive of this emergent period of the Internet – and it is frightening to

observe how much we have already lost of the beginning years of the digital age – I haven't

found any of the "flame" posts, I don't know how many protests there were, but we know that

the protests were forceful enough to cause the rules of the ATXC community to be changed,

mandating the inclusion of headers for sexually explicit stories, and causing authors of erotic fics

to either *not publish* their fiction or to *turn away* potential readers by using extreme declarations

like "WARNING" in capital letters in their headers. We can also surmise, just from the fact that

the majority of the community members were women, that most of the protests against erotica

came from women.

Now, we must ask "Why?" at a deeper level. Why did the ATXC's members seek to

censor their fellow members' sexually explicit fiction? To ask an Althusserian question, of what

was this internal censorship "symptomatic"? What is the "undivulged event" that undergirded

and propelled this discourse of censorship, which characterized one of the earliest, and most

influential, digital remix communities? What text is "present as a necessary absence"[15] in this censorship discourse?

In order to answer these questions, let us first acknowledge that the ATXC was founded at a historical moment in which two significant movements overlapped: the start of the digital era, and the anti-pornography, anti-obscenity, anti-indecency movement of the late 20th century. In Chapter 2, I listed several events occurring between 1982 and 1985 that marked the start of digital culture. Between 1985 and 1995, computers and computer networking became even more a routine part of millions of Americans' lives, as Tim Berners-Lee developed the World Wide Web (1990) and the majority of U.S. Internet traffic began to route through commercial providers (1994). During this same timeframe, 1980-1995, several local and national movements campaigned for the increased censorship of cultural productions deemed "offensive," particularly pornographic productions. For example (as I discussed in greater detail in Chapter 1), between 1980 and 1986, incidents of censorship of library books and school curricula rose sharply, more than doubling between '82 and '86, as parents' groups objected to their children's exposure to racist language (for example, in Harper Lee's *To Kill a Mockingbird* and Alice Walker's *The Color Purple*) and sexually explicit drawings or language (for example, in The Boston Women's Health Collective's *Our Bodies, Ourselves*).[16] The introduction of cable television, video cassette recorders (VCRs) and video rental stores in the early '80s provided Americans with more options to pay to view pornography in their homes, and this led grassroots morality groups to lobby states to regulate the "TV pornography boom."[17] In 1983 and 1984,

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[15] Louis Althusser and Etienne Balibar, *Reading Capital* (London: Verso, 1979), 67.
[16] Fred M. Hechinger, "Censorship Found on the Increase," *New York Times*, 16 September 1986.

ordinances passed in Minneapolis, MN and Indianapolis, IN that criminalized pornography,

permitting women who could show proof of being physically harmed or discriminated against as

a result of pornography to sue their victimizers.[18] Although the U.S. Supreme Court declared the

Minneapolis and Indianapolis ordinances unconstitutional in 1986, the Court ruled in that same

year that communities have the right to confine the locations of adult movie theaters, limiting

such theaters to sites away from homes, schools, churches, and parks.[19]

Also in 1986, the Justice Department Commission on Pornography, established by

President Reagan in 1984 and run by Attorney General Edwin Meese, concluded that

pornography "bears some causal relationship" to violence against women, directly contradicting

the findings of the 1970 presidential commission on pornography.[20] Five months after releasing

the results of this investigation, Meese created a special team of prosecutors to handle

pornography cases, vowing to begin an "all-out campaign against the distribution of obscene

material."[21] The anti-pornography efforts of conservatives and feminists combined with the

anti-obscenity stance taken by the Justice Department led to 17,000 stores voluntarily ceasing to

sell sex magazines.[22] In July 1989, the Corcoran Gallery of Art in Washington, D.C. canceled a

touring show of photographs, many of which depicted erotic acts, by the late Robert

Mapplethorpe, yielding to pressure from several members of Congress, including Senator Jesse

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[17] Maggie Kleinman. "State Seeks Rules for 'Hard R' Cable TV." *New York Times*, November 8, 1981. See also: Tony Schwartz. "The TV Pornography Boom." *New York Times*, September 13, 1981.

[18] Drucilla Cornell, "Introduction," in *Feminism and Pornography*, ed. Cornell (New York: Oxford University Press, 2000), 3.

[19] Katherine Roberts, "Court Says Cities Can Curb, Not Ban Pornography," *New York Times*, 2 March 1986.

[20] Philip Shenon, "Justice Dept. Pornography Study Finds Material Is Linked to Violence," *New York Times*, 14 May 1986.

[21] Philip Shenon, "Meese, in a Move on Pornography, Creates Special Prosecution Team," *New York Times*, 23 October 1986.

[22] Nicholas D. Kristof, "X-Rated Industry in a Slump," *New York Times*, 5 October 1986.

Helms, who objected to the National Endowment for the Arts funding the display of "obscene" images.[23] The Mapplethorpe controversy sparked debates over, and campaigns against, public funding for controversial, particularly pornographic, art. The U.S. anti-pornography movement received a boost from the Supreme of Court of Canada in 1992, when that Court ruled that it is legitimate to outlaw pornography on the basis that it is harmful to women.[24] In 1995, exactly contemporaneous with the flame wars on ATXC, the introduction of the Internet as a new mass medium coincided with widespread anti-pornography sentiment to set off a panic over Internet pornography. That year, the U.S. Senate endorsed a ban on Internet "smut" in the form of the Communications Decency Act of 1995 (CDA), which was included with the pending telecommunications act and was intended to impose fines and/or jail time on anyone who knowingly transmits "obscene, lewd, lascivious, filthy or indecent" communications via telephone systems and public and private computer networks.[25] (President Clinton signed the CDA into law as part of the Telecommunications Act of 1996, but the Supreme Court found the CDA unconstitutional in 1997.)

One must recall that, in all of the anti-pornography campaigns that directly or indirectly played a part in all of the above censoring activities, women played a large part, either as concerned parents, Christian moral majority members, and/or feminists. One must also recall that a large number of women also opposed these campaigns. Therefore, an analysis of the early years of the ATXC must be informed by the fact that this digital women's community was born on this cusp, this coincidence of two major events in U.S. culture: one in techno-culture (the

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[23] Grace Glueck, "Art on the Firing Line," *New York Times*, 9 July 1989.

[24] Tamar Lawin, "Canada Court Says Pornography Harms Women," *New York Times*, 28 February 1992.
[25] Peter H. Lewis, "Despite a New Plan for Cooling Off, Cybersex Stays Hot," *New York Times*, 26 March 1995.

penetration of digitality, of personal computers, of the Internet into ordinary, everyday life for many Americans), and the other in women's culture (a long series of public debates that compelled women to declare themselves either pro- or anti-pornography, obscenity, and indecency). I will now attempt to read the censorship of erotic fan fiction on the ATXC through its being historically situated at the overlap of the Digital Era's beginning and the Censorship Surge's peak.

The advent of the digital has meant, in the minds of many, a movement towards plenitude, towards multiplicity, towards more, rather than fewer, ideas and concepts being expressed and shared. A rhetoric of proliferation and multiplicity has attended the Internet from before its beginnings, when it was only an imagined "information superhighway" that engineers and telecom companies would construct on top of the U.S. military's ARPANET grid. The concept of a digital world has always been a *fantasy* of limitlessness, of multiplication and growth without end. And the censorship movement of the late 20th century, whose rise *precisely* coincided with the time that the digital world began to manifest itself in the real, three-dimensional American world, was also a *fantasy*: of restraint, of restriction, of putting a stop to dangerous practices, and preventing undesired outcomes.

What I claim about these two mirror fantasies, these opposite dreams, of digital plenitude and censoring restraint, having arisen side-by-side in the last decades of the last century, is that their simultaneity was no accident. One of the "undivulged events" that motivated censorship advocates was clearly a fear that the future of the United States was shaping up to be quite different from the American past (the "American past" being itself a fantasy). The entrance of personal computing and digital technology into the home and workplace signaled a sea-change

for everyday American life that inspired fear and a desire to impose controls on a society that

was on the verge of becoming "out-of-control" in a number of ways. Some censorship advocates

dreaded that American morality, high culture, and "proper" education was quickly escaping the

control of its traditional arbiters (and by the way, culture had been on a trajectory of such an

escape since at least the 1960s and the rise of the counterculture, but perhaps the onset of the

digital era seemed to promise, or threaten, to exacerbate this movement of culture beyond the

control of traditional safeguards). Other censorship advocates, specifically, the anti-pornography

campaigners, took a stand at the moment when the potential of digital limitlessness was starting

to be actualized to state firmly that pornography had already been out-of-control for long enough

(of course, their larger message was that the rampant oppression of, and discrimination against,

American women had been out-of-control for long enough), and if porn artifacts (understood by

these advocates to be primary tools of women's oppression) were multiplying and diversifying

and were threatening to proliferate even more, then that time, the 1980s and 1990s, was the time

to try to put a stop to them, to get them under control. Am I arguing that the censorship

campaigners were consciously inspired to take up their causes by the impending reality of digital

plenitude? No; I am suggesting a more unconscious connection between the imminence of

computing and the surge in censorship in the '80s and early'90s – but the fact is, as soon as the

Internet was a reality, censorship advocates immediately focused their energies on it, on halting

the exchange of obscenity, indecency, and pornography on the new network. What was likely a

subconscious fear of the Internet's ability to spread images, text, and ideas limitlessly became a

conscious fear and a real rallying point for the censorship movement right away.

The fact is, the Internet and pornography both exist, for many of their users, as fantasies of abundance and endlessness. The Internet and pornography are soul mates, made for each other, destined to be one, in this imagined framework. Laura Kipnis writes, "One key aspect of pornography's form is that there's so very very much of it, it's so vast and endless. It never runs out....[P]erhaps the abundance of pornography...resonates with a primary desire for plenitude, a desire for counter-scarcity economies in any number of registers: economic, emotional, or sexual. Pornography proposes an economy of pleasure in which not only is there always enough, there's even more than you could possibly want."[26] All of the adjectives that Kipnis uses to describe porn's appeal apply equally well to the Internet: "there's so very, very much of it...vast and endless...more than you could possibly want." Zabet Patterson, considering the allure of pornography on the Internet, focuses more on the *technology*'s offer of pleasure-through-plethora than on the pornography's offer of that pleasure: she writes of "the affective charge attached to new and perpetually renewed computer technology...the attraction to and fascination with what we perceive as the vastly new possibilities for subjectivity that technology seems to offer...fascination with the continually shifting capabilities of the computer."[27] In other words, our fantasy of the Internet is a pornographic one; we desire the Internet to not only deliver pornography, but to *be* pornography, in that we expect it continually provide us with new and unexpected means of fulfilling our desires, our lacks, our needs. The Internet, like porn (and through porn), should, we feel, renew itself constantly, and in doing so, renew *us* constantly.

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[26] Laura Kipnis, *Bound and Gagged: Pornography and the Politics of Fantasy in America* (New York: Grove Press, 1996), 201-02.

[27] Zabet Patterson, "Going On-line: Consuming Pornography in the Digital Era," in *Porn Studies*, ed. Linda Williams (Durham, NC: Duke University Press, 2004), 120.

I believe that this fantasy, of the Internet as a gateway to the unlimited, including unlimited sexual fantasy, was one of the primary motivations for writers to post erotic fan fiction to the ATXC group. The ATXC message board was established to be what Kipnis calls "an enclave for fantasy,"[28] for women's fantasies in particular. All of the members of the ATXC wanted to actualize the potential of the Internet to give them a steady stream of fresh fantasies – stories based on their favorite television characters – but some of the women were interested in, and through their writings, insisted upon, some of these constantly renewed, steadily proffered, fantasies being explicitly sexual. This subgroup of the ATXC that produced and consumed erotic fiction was engaged in the process of using the Internet to realize what Gilles Deleuze would call a virtual reality: a technology for women's masturbation. One of the presumptions of the anti-pornography movement was that, as Catherine MacKinnon wrote, "Pornography is masturbation material. It is used as sex. It therefore is sex. Men know this."[29] Men know it because, as Kipnis and Patterson emphasize, there is so much of it for them. But before the Internet, how much pornography – how much mass media-distributed masturbation material – existed for women? We know of two women-centered pornographic media that attained great popularity in the analog era. One of them was romance novels (Kipnis writes that "romance novels hav[e] been aptly referred to as 'pornography for women'"[30]). The other type of well-known pre-digital masturbatory material for women is explicitly surfaced in one scene from the first episode of the fourth season of the HBO series, *Sex and the City*:

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[28] Kipnis, *Bound and Gagged*, 202.
[29] Catherine A. MacKinnon, "Only Words," in Cornell, *Feminism and Pornography*, 101. First published in 1993.

[30] Kipnis, *Bound and Gagged*, 162.

From Episode 4.01 of *Sex and the City*

(The four main characters, best girlfriends Charlotte, Samantha, Carrie, and Miranda, are sitting in a booth in a bar, conversing over cocktails.)

Charlotte: Samantha, your face is glowing! Did you get a facial or something?

Samantha *(smiling)***:** I masturbated all afternoon....I masturbated to my priest....In my fantasy, he tears the food I'm carrying for the homeless out of my arms, rips open my dress, lays me down on the street and enters me!...

Charlotte: Stop! You are talking about a priest!

Samantha: It's a fantasy! I can masturbate to whomever I like! It's imagination. It's fun and perfectly healthy. Who do you all fantasize about?

Miranda and Carrie *(at the same time)***:** Russell Crowe.

Carrie *(squeals)***:** Ah! Jinx! You owe me Coke.

Miranda: That's amazing. What did women do before Russell Crowe?

Carrie and Samantha *(at the same time)***:** George Clooney.

Carrie *(wistful)***:** Ah, Clooney. Clooney's like a Chanel suit. He'll always be in style.

Before the digital era, two popular tools for women's self-pleasure were: 1) printed bodice-ripper novels, and 2) media celebrities. Fan fiction combines these two genres – sexually explicit written text and personae familiar from television shows, films, anime, pop bands, etc. – and Internet fan fiction was able to supply women with much more of this type of text-based, mass-media-based fantasy, much more frequently, than the romance novel publishing industry could

hope to do. As I mentioned earlier, at its peak of production, *X-Files* fan fiction writers were

collectively posting close to 80 NC-17-rated fics every month, drastically outstripping the

romance industry's monthly publishing record. In addition to being more plentiful and less

expensive than romance novels, Internet fan fiction offers a possible advantage over celebrity-

fantasizing for self-pleasure, because it is a more advanced version of that technology; erotic fan

stories provide detailed, sometimes highly elaborate fantasy scenarios involving the well-known

figure or figures (and so, perhaps, they require less work on the part of the user of the self-

pleasuring technology). Internet fanfic is more of a "push" technology than a "pull" technology,

in that sense; it is an attempt to anticipate the user's desires and fulfill them, rather than putting

the onus of decision-making responsibility on the user.

However Internet fanfic works as porn for women, it clearly worked for some women on

the ATXC, and its production on that site was one of the first attempts to use the Internet to build

a sex industry for women consumers, to mass-manufacture and mass-distribute, using a mass

media, a form of masturbation material for women. Men have had a highly developed sex

industry catering to their self-pleasuring desires for so long, hundreds or thousands of years

before the digital era, and a number of institutions have worked to reserve pornography for male

pleasure, to guard its status as a preserve for male fantasy; one of Jane Juffer's central claims in

At Home with Pornography is that, for much of the 20th century, "court rulings, other

governmental procedings, and the pornography industries have worked, in different but often

overlapping ways, to limit access to pornography to men."[31] The Internet opened up a space for

women to try to equalize the distribution of desire-fulfillment resources between the sexes. The

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[31] Jane Juffer, *At Home with Pornography: Women, Sex, and Everyday Life* (New York: New York University Press, 1998), 36.

ATXC authors of NC-17 fics attempted to engineer for women that satisfying fantasy of

unlimited pornography that men have always enjoyed; that sense of having access to a fantasy-

producing industry that understood and fulfilled their needs for sexual pleasure. The fantasy of

these women erotica authors, of being able to use the Internet to create a continually self-

replenishing supply of desirable ideas and products, was well in-line with the larger fantasy, I

would even say, the definitive fantasy, that many people had, and still have, of the Internet,

which is that it offers unlimited access to abundance of pornographic proportions.

What opposed these fantasies of plenitude were fantasies of restraint. The fantasies of

restraint that I hypothesize motivated the critics of erotica on the ATXC in 1994 and 1995 were

multiple but related to one another, and all of them were, I think, related to fantasies of

restriction being promulgated by various parties in the "real" world at that time. First of all, the

anti-pornography movement based its entire rhetoric upon the fantasy that fantasies themselves

are dangerous and have serious real-life consequences, that speaking about or producing images

of or writing texts that communicate fantasies are dangerous acts and should be restricted.

Andrea Dworkin, in her 1994 article "Against the Male Flood," (on which the title of this chapter

is, in part, based) – an article exactly contemporaneous with the first flame war about NC-17 fics

on the ATXC – put forward the view that protesting written pornography does not constitute

censorship. Dworkin claimed that the so-called censorship does no damage to the writer or the

work; she wrote, in nations that are not run by totalitarian regimes, "Censorship [is]...hard to

find, except perhaps as an attitude. It gets used to mean unpleasant, even angry frowns of

disapproval or critiques delivered in harsh tones; it means social disapproval or small retaliations

by outraged citizens where the book is still available and the writer is entirely unharmed, even if

insulted. It hangs in the air, ominous, like the threat of drizzle."[32] Dworkin advocated a much

more precise legal definition of written porn as obscene, enabling its opponents to do more than

meekly protest, and to actually prosecute the makers and purveyors of such obscenity (which

would again, not be censorship, argued Dworkin, because "pornographers are more like the

police in police states than they are like the writers in police states. They are instruments of

terror, not its victims...Intervening in a system of terror where it is vulnerable to public scrutiny

to stop it is not censorship."[33] Even if the objections to erotic fan fiction on the Internet were

more the first type of protest, which Dworkin called harmless and ineffectual, than Dworkin's

preferred type, which would be protecting the safety of innocent citizens by prosecuting

obscenity, it is clear that the ATXC members who "flamed" the NC-17 fic writers acted within

the ethical boundaries drawn by Dworkin and other anti-porn activists.

What the anti-porn movement told women was that objecting to written pornography is

not censorship; in fact, expressing such objections are the least that concerned citizens can do,

and they need not worry about their protests harming either the authors of pornography *or* the

texts of pornography – both author and text will be intact after the "angry frowns of

disapproval," the "critiques delivered in harsh tones." What is interesting about the ATXC is

that it offers evidence of the "small retaliations of outraged citizens" having a definite impact on

the authorship and publishing of erotic fiction: the flame wars resulted in an NC-17 rating

system, and a header system, being mandatory on that message board, and authors reacted to the

flames by habitually employing extreme, fervently cautionary language in their headers, intended

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[32] Andrea Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality," in Cornell, *Feminism and Pornography*, 20-21.   First published in 1994.

[33] Dworkin, "Against the Male Flood," 28-29.

at least in part to discourage the reading of their works; in some cases, as we saw with Rosie Passinisi and the decline in NC-17 fics during the summer of 1995, some authors were dissuaded from posting their fics at all, and who knows how many would-be authors of erotica never authored their fics because they read posts that were critical of sexual content? I spoke earlier of the pornography industry being maintained as a preserve for male pleasure, cordoned off in most cases from female audiences, and the barriers of that preserve were reinforced by anti-pornography activists' injunctions to ordinary citizens to censor porn, visual and written. The fact that the injunctions issued by the anti-pornography movement were dominating national news headlines at the very moment that women began attempting to rope off their own "sanctioned space[s] for fantasy"[34] on Internet websites made the establishment of those women-centric preserves a difficult and tricky enterprise, one characterized at least as much by inhibition and negotiation as much as by exploration and freedom.

Another aspect of the fantasy of restraint that worked against the fantasy of plenitude in the early history of women's online pornographic fan fiction was what I will frame as the desire for universality. One of the engines that powered the anti-pornography movement was the engine of meaning-making, and the meanings made by anti-porn campaigners were rooted in the logic of equivalence, of one-to-one correspondence. That pornography equals violence against women, and that the making and consuming of pornography are integral to the systemic, ongoing oppression and abuse of women, were claims emphatically repeated in anti-porn activists' writings and speeches. It is interesting to note how universalizing language, the words "all" and "every," "none," "only," permeates the rhetoric of these activists.

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[34] Kipnis, *Bound and Gagged*, 163.

Here are some phrases from Catherine MacKinnon, writing in 1993: "All pornography is made under the conditions of inequality based on sex,"[35] "[N]othing else does what pornography does...What pornography does, it does in the real world, not only in the mind...[I]t is not the ideas in pornography that assault women: men do, men who are made, changed and impelled by it...[I]t is only pornography...that gives men erections that support aggression against women in particular."[36] "Sooner or later, in one way or another, the consumers want to live out the pornography further in three dimensions. Sooner or later, in one way or an other, they do. *It* makes them want to..."[37] Here are some quotes from Andrea Dworkin, writing in 1994: "The pornography [the Marquis de Sade] wrote was an urgent part of the sexual abuse he practised.... Pornographers who use words know that what they are doing is both aggressive and destructive.... Pornography, even when written, is sex because of the dynamism of the sexual hatred in it; and for pornographers, the sexual abuse of women...and pornography are both acts of sexual predation, which is how they live."[38]

MacKinnon and Dworkin promoted a worldview in which a cultural form, pornography, has one outcome, the degradation of women; pornographic visual and written representations have one effect on the viewer/reader ("*It* makes them want to..."); and therefore only one possible interpretation or meaning of pornography is legitimate: pornography equals women's powerlessness. Their worldview agrees with other views that were highly contested and staunchly defended in well-publicized debates of that time, the 1980s and early 1990s, such as:

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[35] MacKinnon, "Only Words," 103

[36] MacKinnon, "Only Words," 100-101.

[37] MacKinnon, "Only Words," 102.

[38] Dworkin, "Against the Male Flood," 28.

the idea that there is one literary "canon" worthy of being taught in U.S. university English

departments; the idea that an author's intent produces the "true" meaning of a text (note the way

that Dworkin uses de Sade's intention – as she interprets it – to explain the import of his writing,

and uses his intention to foreclose all other possible readings); the idea that a viewer/reader can

experience a cultural text in only one way (recall MacKinnon's claim that whether "sooner or

later," a man *will* become an abuser of women through pornography, and a woman *will* become a

victim because of pornography).

Let us remember that, in addition to the 1980s and 1990s being the time of the digital

era's beginning and the censorship movement's peak, those years also witnessed the Culture

Wars in the U.S., whose battles included conflicts over whether college liberal arts curricula

should attend to racial and gender diversity; and this time period also saw the rise of

deconstruction and poststructuralism in academic scholarship. Although MacKinnon and

Dworkin's desired goal was the breaking-down of entrenched barriers to gender equality and the

dissolution of outdated and dangerous definitions of words and texts, their line of reasoning put

them in solidarity with the advocates of monolithic interpretations of texts and unchanging

curricula for students. MacKinnon and Dworkin opposed, in tactics if not in spirit, the aims of

deconstruction and poststructuralism, the destabilization of notions of stable identity, unified

subjectivity, exact correspondence between signifier and signified. MacKinnon acknowledged

this stance when she wrote, "I am asking you to imagine that women's reality is real – something

of a leap of faith in a society saturated with pornography, not to mention an academy saturated

with deconstruction,"[39] implying that both pornography and deconstruction unsettle the very

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[39] MacKinnon, "Only Words," 96.

notion of what "the real" is – a justifiable implication, since pornography purports to be "fantasy" rather than reality, and deconstruction questions whether "the real" is a valid ontological term.

We can detect traces of MacKinnon and Dworkin's anti-deconstructionism in the ATXC flame wars, in the comments by readers critical of the erotica (alluded to by several erotica writers in their headers) that sexually explicit depictions of the *X-Files* characters Mulder and Scully were "out of character" ("[Blank] wouldn't do that," was one writer's summary of this type of criticism). What is the desire to limit the characterizations of a fictional persona, but the desire to limit textual interpretation? What is the drive to preserve the official, authoritative, canonical depiction of a television character, but the drive to preserve authorial intent as the source of "true" meaning? The difficulty posed by critics of NC-17 fan fiction on ATXC was that the digital age is an era that favors reader response over authorial intent, multiplicity over canonicity, and the proliferation of significations over the foreclosure of all-but-one interpretation. Fan fiction existed long before the digital; I would argue, with Steven Knapp, that all reading is, and always has been, authorship, since as we read, we mentally write our own version of the text we are reading.[40] What the digital makes possible, however, is the publication – the making public – of these private interpretations, these personal remixes of text. Once the digital age begins, fan fiction exploded onto the public scene, and the ATXC and other Internet message boards operated as the new broadcasting system of this new media, filling up email boxes of avid audience members with multiple and contradictory versions of their favorite characters. These fans signed up to message boards to receive fictions that would elaborate on

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[40] Steven Knapp, *Literary Interest: The Limits of Anti-Formalism* (Cambridge, MA: Harvard University Press, 1993).

their preferred media texts, that would augment the fantasy world created by major media corporations with fellow fans' contributions. But some fans, when confronted by other fans' fantasies, particularly sexual fantasies, about their mutual objects of fascination, discovered that augmentations and elaborations of one's favorite fictions can also be offensive and threatening to one's own preferred readings of those fictions. Like MacKinnon and Dworkin, who at that time were popularizing rationales for censoring written pornography on the basis of those texts always and unquestionably having one, and only one, meaning and consequence, the ATXC critics of erotic fan fiction took issue with the multiple meanings of *The X-Files*'s characters being propounded, and in attempt to shut down this multiplicity, they acted, in accordance with MacKinnon and Dworkin's recommendations, as censors of written porn.

In psychoanalytic theory, fantasy, especially sexual fantasy, functions by allowing the fantasizer to occupy multiple identity positions within the fantasy. As Judith Butler writes, summarizing the concepts of Jean Laplanche and Jean-Bertrand Pontalis, "fantasy does not entail an identification with a single position within the fantasy [the example Butler uses is a fantasy in which "you come up to me as I sit in the cafeteria"]; the identification is distributed among the various elements of the scene: the identification is with the 'you' who comes up, the 'me' who is sitting, but further, with the verbs themselves, 'sitting,' 'coming up,'...even abject as it may seem, the grim landscape of cafeteria life that bespeaks the longing for a sudden and decisive erotic interruption.... [I]dentification is multiple and shifting, and cannot be confined to the 'me' alone."[41] Fantasy, like the act of consuming media itself, is multivalent. The rapid production and proliferation of fantasies on the ATXC confronted media consumers with the fantastical

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[41] Judith Butler, "The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess," in Cornell, *Feminism and Pornography*, 491. First published in 1990.

nature of their leisure activities, forcing multiple interpretations and possible identifications on fan fiction readers, insisting that individual fans/fantasizers acknowledge the fantasies of others, and admit the uncontrollable multiplicity of fantasy itself. The fans who opposed the making-public of sexual fantasies involving their favorite characters longed for a world in which an exact correspondence of signifier to signifier was possible, in which the accepted and official version of Mulder and Scully (or, at least, the individual viewer's version of the accepted and official version) was the only version, in which the "I" or "me" who had pleasurable fantasies about Mulder and Scully could be self-identical, whole, and unfractured, unchallenged by other people's alternative fantasies, which, if consumed, could lead to unexpected and unwelcome identifications. This was their fantasy of restraint, and it countered the flood of fantasies facilitated by personal computing and the Internet.

In the end, the fantasy of restraint and the fantasy of plenitude achieved a kind of balance on the ATXC. Here is an example of how the headers on fan fiction came to be standardized by 2000:

Example 8

Aphrodisia I - Scaling the Last Wall (0-1 of 6)
Kristel S. Oxley-Johns
kjohns@chaos.x-philes.com

Rating: EXTREME NC-17
Classification: SR
Archive: Yes. (Redistribute with permission only, and with headers and disclaimers
     intact.)
Spoilers: Umm, early Season 7, I guess. Definitely "Amor Fati."
Timeframe: Undetermined Season 7
Keywords: Mulder/Scully Romance, Smut, PWP
Summary: Mulder and Scully explore trust and control issues as they embark upon a

D/s relationship.

Author's Notes and Assorted Blatherings: This is a complete departure for me, first in the fact that it is a PWP/erotica series, and second in that the smut goes *beyond* smut and tiptoes on the line between erotica and porn.

This format is now the conventional style for headers on almost all Internet fan fiction, which one can find on any of the millions of websites where fanfic is archived. The headers, with ratings and warnings, serve to warn readers of explicit content. On Fanfiction.net, a sort of aggregator website of fan fiction, erotic stories (carrying an "M" rating, for "Mature," rather than an "NC-17" rating, due to the MPAA threatening to file lawsuits against fan fiction sites using their copyrighted ratings system several years ago) do not automatically appear in story lists; the viewer must specifically request M-rated fics to be listed. In various fandoms, the NC-17 or M designator has been deemed insufficient to mark off sexually explicit fic, and special "adult" or "mature" sites, such as alt.startrek.creative.erotica (a *Star Trek* story site) and Yahoo! Groups "adultsexisfic" (a site for fic based on a couple from the ABC daytime drama *General Hospital*), and "jackchloeadult" (dedicated to a pairing from the FOX prime time series *24*) have been created to more clearly segregate erotic fiction.

Today, fan fiction flourishes, and along with it, pornographic fic – but it is segregated and sequestered, like the adult videos in a video store, like skin mags wrapped in brown paper on convenience store shelves. One half of the legacy of the ATXC's conflicts over NC-17-rated fan fiction is that the system of ratings and headers that its members inaugurated in the mid-1990s still blocks and inhibits women from accessing pornography, and still effectively counters the digital's tendency toward plenitude and limitlessness. The other half of the ATXC's legacy,

though, is that women's pornographic fan fiction has finally become, as Linda Williams would say, "on/scene." Williams defines "on/scenity" as "the gesture by which a culture brings on to its public arena the very organs, acts, bodies, and pleasures that have heretofore been designated ob/scene and kept literally off-scene....On/scenity marks both the controversy and scandal of the increasingly public representations of diverse forms of sexuality *and* the fact that they have become increasingly available to the public at large."[42] Although hidden behind links and cuts, or sequestered into separate sites on the Web, women's stories of media-inspired sexual fantasies are finally available all over the world, "insistently" on/scene and on screens, made visible and usable by women who realized, in early digital culture, an opportunity to construct a new network for women's pleasure.

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[42] Linda Williams, "Porn Studies: Proliferating Pornographies On/Scene: An Introduction," in Williams, *Porn Studies*, 3.

CHAPTER 5
Audacious Incursions vs. "Safe Space" Retreats:
How Internet Fan Fiction Communities Invented a New Model for Media without Making a Dime

FANFIC'S BOTTOM LINE

Internet fan fiction crosses multiple boundaries: people (mostly females) of every age group, ethnic group, nationality, and sexual preference write and read it; actions, plot twists, and characters that have never appeared in the source texts are explored and developed in fanfic; characters engage in sexual liaisons and manifest sexual tastes that are antithetical not only to the "canonical" universe (i.e., the world of the official source text) but to mainstream Western sexual tastes. However, one boundary remains firm and unbreached by fanfic authors. It is the boundary line of economic leverage. Fanfic authors do not sell their work for revenue or profit; fanfic readers pay nothing for the work they consume. To date, there has been one instance of a fic writer attempting to put her fic up for sale, and this incident (which I will discuss in more detail later in this chapter) generated such condemnation from the larger fic community that the writer, and the online store which offered her text for purchase, immediately withdrew the offering. Fan fiction has no monetary exchange value. The reward for writers is pleasure and readers' feedback; the only payment readers need make is in the form of a few lines of praise or thanks posted in a Comments section or e-mailed to an author. There is no financial profit in fanfic.

No financial profit, that is, for fanfic's creators. For media corporations, online fanfic has led to new models of creating, marketing, and distributing media products. Before Internet

fanfic, some movie properties spawned "tie-ins" such as toys, games, novelizations, and comic

books; George Lucas was the first filmmaker to develop a film franchise whose highest revenues

were generated by the ancillary products, not the films themselves. But even in the *Star Wars*

universe, and with similar popular "cult" franchises such as *Star Trek*, copyright holders

(Lucasfilm and Paramount) conceived of fans only as potential consumers of additional

commodities related to their properties, not as participants or partners in the franchise. The

parent companies put books and toys and gear up for sale; fans bought them. If fans sewed

costumes so they could dress up as Princess Leia or Lieutenant Sulu, met at conventions where

they could meet and discuss the objects of their fannish interest, collectively build up their stores

of knowledge about their favorite fictional worlds, and buy, sell, trade, or give away the items

they had in their possession related to the media texts – many of which were homemade, such as

fan art and fan fiction, printed in 'zine form and photocopied – this was not the concern of

copyright holders. Between 1977 and 1981, Lucas issued guidelines about what types of fanfic

could and could not be written (which permitted fanfic to be circulated as long as it was not

sexually explicit or sold for profit[1]), and I have heard anecdotal evidence that Rick Berman,

executive producer of *Star Trek: The Next Generation* and essentially "heir" to Gene Rodenberry

as creative head of the *Trek* franchise, told fans at a late 1990s convention that his policy on fan

fiction was to have no official knowledge of such activities (thereby overlooking possible

copyright infringements by fic writers). But benign disinterest did not *invite* fan contributions.

Today, however, most media companies present a very different face to their fans.

Rather than turning a blind eye, companies actively court audience participation and encourage

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[1] Jenkins, *Convergence Culture*, 150-151.

fannish obsession. Almost every television program's official website offers interactive features such as interviews with cast members, writers, producers, visual effects or animation designers, and crew members; message boards for fan discussion; and access to characters' "personal" records, including cell phone address books, e-mails received and sent, and blogs. A quick tour of the sites of current TV series illustrates networks' trend toward welcoming fan involvement. For several months (the website has since been re-designed), on ABC.com's *Lost* site, a distinctive "Community" section of the home page asked viewers to "Help build the definitive fans' guide to *Lost* here" (linking to the *Lost* Wiki), and also provided a link to the *Lost* Theories page, beckoning fans with, "Think you've got it all figured out? Trade and rate theories here." Close viewers of *Lost* (as it is broadcasted on television) also notice occasional commercials that run during the show's broadcasts for The Hanso Foundation, an organization that exists solely within the show's fictional landscape, and the commercials direct the audience to www.thehansofoundation.org, which is periodically updated, sometimes offering content that leads to greater involvement, such as phone numbers for the Foundation's executive officers which, when called, give the *Lost* fan brief and vague messages that supposedly provide clues to the show's mysteries, and other times offering content consisting of text, such as a message from Hanso's founder, which the viewer must attempt to decode in order to discover yet more clues.

Similarly, NBC's official site for *Heroes* offers an interactive graphic novel drawn by noted artists that supplements the plot of the series episodes, a link to a "Heroes Evolutions" website that offers fans the chance to "Dive into the Heroes universe with interactive mysteries, games, puzzles, character websites, and new stories you will only discover in the world of Heroes Evolutions," links to the blogs and MySpace pages of several major characters, links to

websites of three distinct organizations (the Yamagato Fellowship, Activating Evolution, and Primatech Paper) that are part of the *Heroes* fiction, and a link to 9th Wonders, an unofficial fan site for the show. Even programs without the "cult" status of *Lost* and *Heroes*, shows that don't have long-arc mysteries or superheroes that audiences can work to explain or know better, provide means for fans to become more intimately connected with the shows' narrative and characters. CBS.com's site for the sitcom *How I Met Your Mother*, for instance, publishes a regularly updated, very detailed blog ostensibly written by one of the characters. "Barney's Blog" gives its readers not only written text describing pick-up artist Barney's thoughts, but graphs and charts, illustrations (both computer- and hand-drawn), quizzes so that the female reader/viewer can determine her "Hot/Crazy" quotient, guidelines for evaluating the "three-way potential" in any given room, and scripts (with fill-in-the-blank lines) that the male reader/viewer can use to hit on women by pretending to be a lost Midwestern tourist in New York City.

Henry Jenkins calls media corporations' extension of creative franchises into multiple platforms, products, and points-of-contact, all intended to promote audience interaction, "convergence culture." In his 2006 book by that title, Jenkins argues that convergence culture did not emerge solely from the ideas of innovative corporate employees. Rather, media companies have built upon, or (to use a less generous phrasing) co-opted, fan practices in order to attempt to design a richer, more involving experience of their texts for audiences. Although Jenkins attributes equal importance to three genres of fan inventions – fan films, video game mods, and fan fiction – in tracing the rise of convergence culture, I argue that fan fiction communities played a more significant role than fan films and game mods in pioneering a new style of audience engagement from which media companies have greatly profited. Most of the

additional content and forums for participation designed by television networks and film studios

today are more similar to fanfic than to the other two genres of textual appropriation. Fan fiction

writers build on their source texts, often creating supplemental contexts (by describing incidents

from characters' backgrounds, or detailing "missing" scenes from characters' lives that take

place in the times before, after, and in between the scenes that a viewer sees on her screen) which

make characters' actions and decisions legible and comprehensible, add depth and complexity to

the characters, and raise the emotional stakes of the source texts' larger story arc. In the

paragraph above, of the examples of convergence strategies currently employed by television

networks, many fall into this category of "supplemental context." In some cases, it is the

network/producers distributing fanfic-style supplemental context and sharing it with fans so that

they can enhance their stores of knowledge regarding the characters and plotlines. *Heroes'*

graphic novels[2] and its characters' blogs[3] and MySpace pages,[4] *How I Met Your Mother*'s

"Barney's Blog,"[5] and even the websites dedicated to fictional organizations that play a part in

the series, such as The Hanso Foundation's[6] and Primatech Paper's[7] sites, all give viewers

textual information that augments the information provided by the shows' episodes. In other

cases, the network/producers prompt fans to write fanfic-style supplemental context. During the

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[2] http://www.nbc.com/Heroes/novels/ (accessed on 10 December 2007).

[3] See "Hana's Blog," http://samantha48616e61.com/; and "Hiro's Blog," http://blog.nbc.com/hiro_blog/ (accessed 10 December 2007), which, as of this writing (10 December 2007), consists of 0 posts, but over 1300 comments (the blog's home page reads, "Coming Soon!... Feel free to leave comments and feedback").

[4] See Claire Bennett's MySpace page, http://www.myspace.com/clairebennet, and Hana/Samantha's MySpace page, http://www.myspace.com/samantha48616e61 (accessed 10 December 2007).

[5] http://alpha.cbs.com/primetime/how_i_met_your_mother/blog.php (accessed 10 December 2007).

[6] http://www.thehansofoundation.org/ (accessed 10 December 2007).

[7] http://www.primatechpaper.com/ (accessed 10 December 2007).

summer and fall of 2007, the official ABC *Lost* website invited fans, in a button for its

"Community" section, to publish their speculative solutions to the show's intricate puzzle, and to

share their store of knowledge regarding episode and character details with other fans, on the

Lost Wiki.[8] Speculation is a subgenre of fanfic. One might call it "predictive" fanfic rather than

"reflective" fanfic, and many "alternative universes" are constructed out of these possible

directions suggested by fans, all-but-one of which will turn out to be the wrong, or at least non-

canonical, direction. Information catalogs, including Wikipedia pages, can be read as another

form of supplemental context, just as fanfic is, for although such catalogues do not add brand-

new, unseen contexts to a viewer's knowledge of a narrative world, they allow viewers to learn

about facts and events that they may have missed, and in doing so fulfill the same function that

fan fiction does, the function of leading a viewer/reader deeper into a particular narrative through

text. Fan fiction does more than provide supplemental context, of course; there are at least as

many categories of fan fiction as of literary fiction. But "post-ep[isode]" fic, "pre-ep" fic,

"takes-place-during" fic, "missing scenes" fic, and "speculation fic" are among the most popular

categories of fanfic writing, and these are what media corporations' efforts to structure media

convergence most closely resemble.

There is solid evidence, in addition to this family resemblance to fan fiction, that media

companies based their convergence-culture strategies on the practices of Internet fan fiction

communities. In other words, there is proof that, as media corporations began to realize the

positive potential of more actively engaging their audiences and encouraging more audience

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[8] As of this writing (10 December 2007), the official ABC/*Lost* website makes no mention of the *Lost* Wiki, but does feature posts to the Community Message Boards that consist of speculation, such as "Which other will die this season?" (http://abc.go.com/primetime/lost/index?pn=index).

participation, that they turned to online fanfic writers and readers for a model upon which they could build. This proof comes from Jenkins' *Convergence Culture*, which cites a 1999 tie-in book Darren Crosdale called *Dawson's Creek: The Official Companion* (an information catalog approved by the WB network and *Dawson's Creek*'s producers). Jenkins summarizes some pages from *DC: TOC* that explain the beginnings of a website called Dawson's Desktop. In 1998, a team of Sony employees was team was charged with

> trying to explore new ways to exploit the Web in promoting television series. What they came up with was Dawson's Desktop, a Web site that modeled the computer files of *Dawson's Creek*'s title character, allowing visitors to read his e-mail to the other characters, sneak a peak at his journal, his course papers, his creenplay drafts, and, for the most intrusive visitor, even to dig around in his trash bin. The site was updated each day, filling in the gaps between the aired episodes. At its peak popularity, the site was drawing 25 million page views per week....
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> As a television series, *Dawson's Creek* was not a radical departure from network norms, but what it did on the Web was more innovative. The device of the desktop allowed the producers to take viewers deeper inside the heads of the characters, to see other dimensions of their social interactions....
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> From the start, the Dawson's Desktop team collaborated with the program's active fans. *Its producers said they were inspired to expand the story from reading all of the fan fiction that sprang up around the characters. They closely monitored the five hundred or so* Dawson's Creek *fan sites and created an advisory board of twenty-five creators who they felt had developed the best amateur content. As Andrew Schneider, a leader of the project, explained, 'We were in touch with them all the time, We wanted to make sure the fans were getting what they wanted. They helped us design the interface and they told us what they liked and did not like.'* As the site continued, the fans were encouraged to send their own e-mails to Dawson as if they were fellow Capeside High students, and he would respond to their fictional personas on the site. In that way, the producers integrated the creative energy of the fan community into developing new content, which, in turn, would sustain fan interest.[9] (emphasis added)

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[9] Darren Crosdale, *Dawson's Creek: The Official Companion* (London: Ebury, 1999), 145-147. Cited in Jenkins, *Convergence Culture*, 115-118.

Dawson's Desktop, one of the media industry's earliest attempts to purposefully structure media convergence, strove to emulate and build upon a strategy for increasing and sustaining audience interest and loyalty that a group of fans had invented, the strategy of circulating ancillary texts related to a source text among millions of interested consumers via the World Wide Web. *DC: TOC* makes clear that the group selected for emulation – indeed, the group that inspired emulation – was that of fan fiction website designers, moderators, writers, and readers. It was not fan films, which generally are not expansions or elaborations upon the storylines of media texts (that is, the majority of fan films do not depict scenes that take place within, before, or after the diagesis of a film or television episode), but tend to be parodies and/or re-creations of specific texts. It was not game mods, which make use of a game's source code to generate similar-but-different environments, missions, characters and scenarios (although the influence of video games and game mods has become more evident in recent corporate convergence offerings, such as Lost's Hanso Foundation website offering game-like clues and the Heroes site making available "interactive mysteries, games, puzzles"). Fanfic, so long regarded as the bastard offspring of mainstream media, and still regarded as a fringe subcultural production, became, at the dawn of convergence culture, the ancestor of mainstream media structures.

Sony's decision to adopt and adapt the protocols and practices developed by first-generation Internet fan fiction communities yielded immediate and long-term returns on its investment. Instantly, Dawson's Desktop allowed the WB's parent company to promote other product lines in a more appetizing and less obvious way than before. As Entertainment Weekly noted in a review of Dawson's Desktop shortly after its launch, "You can...read Dawson's Spielbergian screenplays, surf his bookmarked websites, or get an earful of his CDs. Sure,

Dawson only listens to Sony music, but in general Desktop is good enough to make you forget that it's advertising." The launch of the site also added to Sony's cachet as a corporation that understood and could deliver what digital-age media consumers, particularly teens, wanted. The EW review gave Dawson's Desktop a grade of A-, comparing it favorably to other then-emerging teen websites, and called it "Postmodern McLuhanism at its zenith" and a "massive and stylistically ambitious fan site" rather than "another half-baked 'official' site." Dawson's Desktop, said the EW reviewer, was "the response from the oligarchy" to the question, "Who knows what lurks in the hearts of teenagers – or scarier still, in their Web bookmark files?", and the oligarchy appeared to do well with its answer.[10] Over the six-year run of Dawson's Creek, Dawson's Desktop rewarded fans' commitment to the show with substantial bonuses in the form of visual and textual information about the private lives and thoughts of the various characters; although the economic ramifications of this deepening of consumer involvement cannot be quantified, one can venture a guess that the Desktop was at least partly responsible for the show attracting a sufficiently large audience to keep it in production for six seasons and to make it an icon of millennial tween and teen pop culture.

Every media conglomerate, including Disney, NBC Universal, Viacom and FOX, has followed Sony's lead in offering consumers multiple means, across several digital platforms, of engaging with films, television shows, music, and games. These companies have profited in the same way as Sony did, enjoying (when their offerings have been received well by audiences) increased advertising opportunities, a shift in their brand identities from analog/old to

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[10] "Digital Review: Minor Key," *Entertainment Weekly*, 9 October 1998, http://www.ew.com/ew/article/0,,285165,00.html (accessed 9 December 2007).

digital/young, and presumably greater psychological investment from their audiences in their products. Meanwhile, as stated in the opening paragraphs of this chapter, fan fiction authors have not received any compensation for originating the model on which this new manner of branding and marketing media, and retaining the interest and attention of media consumers, was constructed. The 25 fanfic authors selected by Sony's interactive division to help design Dawson's Desktop, who served as the site's advisory board and gave input to the site's producers, were not paid for their labor. They probably received a great deal of gratitude from the Sony employees with whom they worked, and enjoyed a sense of pride and accomplishment from having played an important role in the site's development, but did not receive even a nominal paycheck for investing their time ("We're in touch with them all the time") and intellectual and artistic creativity ("They helped us design the interface"). It is possible that the advisory board's greatest use to the site's production team was as a source of feedback, serving in much the same capacity as a focus group ("they told us what they liked and did not like"). However, it is common practice for marketing firms to pay focus group participants for their time and their opinions. Of course, the Dawson's Desktop advisory board members most likely accepted the invitation to join the board with a "volunteer" mindset; they chose to become involved, and knew it was not a paid position. The board members probably felt that since they had been invited based on the quality of their fanfic writing (they were selected because the website producers felt they had "developed the best amateur content"), and since writing fan fiction is a volunteer practice, they did not expect or ask for compensation for their work on the fanfic-based website.

However, the assumption that fanfic is a volunteer practice, strictly unpaid and circulating in a gift economy (writers make their fanfic available to all readers in exchange for readers' comments/feedback/praise, never for readers' payment), deserves scrutiny. Why has fan fiction never been successfully commodified? Why should it remain exclusively an amateur (not professional) form of cultural production, and never provide a livelihood or a broad, paying public for its best and most popular authors? Another way of asking these questions is: Why have fan fiction writers never, as a group, sought payment for their labor, even when, as in the case of new corporate Internet "tie-ins" or convergence marketing, their labor generates a great deal of value for other parties?

EVIDENCE TO THE CONTRARY

My interrogation of fanfic writers' determined stance against fan fiction's commodification, and against their own professionalization, originates with a comparison between fan fiction and other remix genres. If the twenty years of digital remix's existence had not produced a single form of cultural production that generated revenue, if every type of remix was circulated with no exchange of money, there would be no need to ask why fan fiction writers do not exchange their labor for pay. But in fact, a number of remix genres do generate income for their makers, and next to these examples, fanfic appears to be the exception, not the rule.

Digital sampling stands as the clearest example of remix's potential to become immensely profitable for its practitioners. Sampling – in its pre-digital and pre-recorded incarnation, when DJs like Kool Herc spun vinyls using the "merry-go-round" technique (which Vanity Fair's Steven Daly described as a very simple idea: "put two copies of the same record on

parallel turntables and, by cross-fading skillfully between them, sustain those all-important rhythm breaks until the crowd couldn't take it anymore"[11]) – gave rise to a style of lyrical performance, similar to Jamaican "toasting," that became rap. Then sampling and rap intertwined to form the double-helix DNA of hip-hop music. Hip-hop grew into a global cultural phenomenon, sprouting multiple generations of popular music, clothing, shoes, accessories, perfumes, films, and visual art. Hip-hop today is a multi-pronged industry that makes money for all who have a stake in the production of its various artifacts, with revenue streams flowing in nearly every nation.

Sampling and rap's inventors did not initially regard their musical works as possible sources of massive income. Daly interviewed several DJs who famously pioneered and advanced the arts of scratching, mixing, and spinning in the mid-'70s, and a common theme in their recollections was their lack of awareness, or disbelief, that playing records might have major economic upside. "'I did it for fun,' avers Kool Herc. Any earnings, he says, were spent on more records and equipment. 'Nobody came in and said, "You could take this to a global level – or a citywide level."' Grandmaster Caz...says, 'We were entertainers, but didn't realize we were entertainers.'" When local independent record labels made offers to the pioneering DJs to record their sounds, Daly writes, the DJs balked. Grandmaster Flash told the indie label executives, "Nobody will buy it. Nobody would want to buy a record when they can come to a party and see it." Afrika Bambataa said, "We thought that [records] would be the demise of our parties." This last thought was probably the motivation that lay behind Flash instructing the security details at his parties to destroy any taping equipment they found at the events, during the

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[11] Steven Daly, "Hip-Hop Happens."

years that local entrepeneurs like Tape Master sold bootleg cassette recordings of DJs' and MCs'

live sets.[12] The first generation of samplers and rappers, then, regarded their genre's financial

viability in much the same way that fan fiction authors did, and still do today. To DJs in the

Bronx three decades ago, appropriating music was primarily a form of recreation and pleasure,

not a profession.

Significantly, however, one difference separates the early years of sampling from fan

fiction: DJs always received payment for their playing, even if they regarded their activities as

mostly play. So, the seeds for revenue generation lay within DJing and MCing from the outset,

and perhaps this explains why indie labels and bootleg tape-makers saw that hip-hop could

potentially become a top-selling product, if it could be commodified in recorded form. DJs like

Bambataa and Flash wanted to preserve what they regarded as the value of their music - its

performativity, its liveness, the presence of both the DJ and the dancing fans/listeners/party-

goers; the small labels and Tape Master wanted to multiply the value of the music by setting

aside its live quality and turning it into a recorded form, into performances preserved and

multiplied for mass consumption. The pro-live and pro-recording camps may have had very

different opinions as to what, exactly, endowed hip-hop music with financial value, but both

sides acknowledged that music made with sampling and rap had financial value.

Sylvia Robinson was the independent record label executive who finally succeeded in

transforming sampling and rap from live arts to recorded arts. Daly chronicles the story of how

Robinson heard DJ Lovebug Starski play a set in an uptown Manhattan club in June 1979, and

decided immediately that hip-hop would become the signature style of her and her husband's

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[12] Daly, "Hip-Hop Happens."

fledgling company, Sugar Hill Records. Said Robinson, "A spirit said to me, 'Put a concept like

that on a record and it will be the biggest thing you ever had.'" Robinson instantly grasped the

nature of the quiet, subterranean battle then raging in the small hip-hop world: either the new

music would remain a genre of live performance, its DJs and MCs paid relatively little, its reach

restricted to youth cultures in boroughs of New York, or the genre would transition to a genre of

studio recording, its artists and producers possibly making millions by selling records to music

fans all across America. Robinson did not wait for one of the big-name DJs or MCs to change

his mind about the importance of live hip-hop parties. Instead, she hired a cover band to record a

version of the breaks on CHIC's hit song "Good Times," recruited young rappers that her

teenage son and his friends knew or had heard of, named them the Sugarhill Gang, and brought

them into her studio to rhyme over the CHIC sample-cover track.

The result, "Rapper's Delight," got a tremendous amount of play on urban radio stations,

went to No. 4 on the Billboard R&B charts, and became legendary as the song that launched hip-

hop music as a cultural phenomenon. Robinson, the Sugarhill Gang, and "Rapper's Delight"

have been derided for their inauthenticity; for not having emerged from the ranks of Herc, Flash,

Bambataa, and other first-generation hip-hop DJs; for being rip-offs and copycats instead of

originators and innovators; for never having proven their skills in front of live audiences; for not

having taken the time to build up their reps in the block party or club scene. Daly writes, "Flash

now admits that he made a 'huge error' in waiting so long to record. Whenever the key players

of hip-hop's 'old school' look back on the pregnant moment when the Sugar Hill label blazed a

trail for rap, there remains among them that nagging sense that it all went down the wrong

way."[13] Robinson's decision to form a hip-hop group exclusively for the studio made up of three

completely unknown rappers was indeed an audacious move, and I argue that not only were

Robinson's efforts to convert hip-hop into a recorded form characterized by audacity, but this

audacity characterized the first twelve years of hip-hop's existence as recorded, mass-marketed

music. Hip-hop could not have grown into the giant, multifaceted industry it is today without

years of radical risk-taking. By "audacity" and "risk-taking," I mean that hip-hop flouted,

skirted, or ignored the law in its first dozen years, from 1979 through the year of the Grand

Upright v. Warner Bros. Records ruling, 1991.

 Remix was risky business from the start of its commodification. Robinson used a cover

band to sample CHIC's "Good Times" without paying royalties or giving authorship credit to

Nile Rodgers and Bernard Edwards, "Good Times'" co-writers. When Rodgers and Edwards'

lawyer approached Sylvia and Joe Robinson for payment, recounts Daly, "The Robinsons

appeared unmoved. 'They just wanted to brazen it out, see what happened,'" Adam Levy [son of

famous mob-connected music producer and club owner, "Mo" Levy] told Daly. Right away, as

soon as a remix form (sampling) became a money-maker, the specter of copyright, authorship,

ownership, and legal and fair use began to haunt it. Sugar Hill Records' owners, aware that no

legal precedent stood regarding sampling and that a lawsuit against them would not mean a sure

payout for the plaintiffs, initially opted to "brazen it out," to wait to see if the sampled song's

copyright holders would sue before thinking about offering remuneration. However, Mo Levy

stepped in and encouraged the Robinsons to offer a credit to Rodgers and Edwards before they

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[13] Daly, "Hip-Hop Happens."

filed suit, and in this way avoided a court battle.[14] The Robinsons' interaction with the "Good

Times" writers became a sort of primal scene in hip-hop, a scenario often re-enacted over the

next twelve years (with much greater frequency after 1986, the advent of digital samplers), in

which a hip-hop act sampled an earlier song and decided not to ask for permission and/or offer

credit or compensation, the sampled song's copyright holders threatened legal action, and only

then did the hip-hop act agree to pay.   In many cases, the hip-hop artists' willingness to risk

lawsuits benefited them: they were able to make money from their music without paying

licensing fees to sample or sharing royalties from their sales. In other cases, for example, in the

Turtles' 1991 (pre-*Grand Upright*) suit against the rap group De La Soul, in which De La Soul

ended up settling with the 1960s' pop group out-of-court for $1.7 million,[15] hip-hop practitioners

lost their wager that the sampled parties would not seek payment. What was critical for the

development of hip-hop was that, in its beginning years, the emerging genre's artists were

generally all audacious enough to sample without paying or licensing, and more often than not,

their audacity resulted in their not having to pay for or license any of the samples they used.

This "grace period," when unlicensed sampling proceeded (with only a handful of

exceptions, albeit highly publicized ones) without legal or financial hindrance, allowed the entire

genre to ripen and mature, and to establish a firm foothold in the music and pop culture

marketplace. In retrospect, it is evident that the five years between 1986 and 1991 (and we can

extend the unlicensed years back to 1979 and "Rapper's Delight") were crucial to hip-hop's

eventual global success. If remix artists had not gambled audaciously during those years that

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[14] Daly, "Hip-Hop Happens."

[15] Vaidhyanathan, *Copyrights and Copywrongs*, 141.

they could avoid paying for the use of copyrighted music, and could sell their remixes of that pre-existing music for large amounts of money, then they would not have put out the most fully realized expressions of sampling ever to hit the mass market, and hip-hop may not have become the runaway phenom that it did. If sampling had not had those years of relative freedom from licensing fees, would hip-hop have been able to reach the critical mass of popularity and profitability that allowed it to survive the devastating blow of the 1991 Grand Upright ruling? Following the Grand Upright case, sampling had to be practiced at a much scaled-down level. Hip-hop lost its musical richness. But the unlicensed years permitted hip-hop's appeal to grow to a certain volume and height, so that when its quality had to be trimmed back due to the untenable expense of sampling more than one or two songs on any given track, the hip-hop industry was big enough to survive the cuts and still thrive.

The case of sampling demonstrates that, in the legal climate of the United States over the last twenty years, remix artists who wish to profit from their artworks must willingly risk becoming the target of legal action. When one considers the possible magnitude of attorney fees, out-of-court settlements, and court-mandated restitutions, fan fiction writers' decision not to commodify their work, and to remain voluntary hobbyists rather than paid professionals, is understandable. However, the fact that sampling producers were able to sell their remixes more or less unhindered for some years before a court ruling forced them to restrict their musical plundering, and that their period of freedom gave rise to an entire industry dominated by African Americans, creating jobs for minorities and visibility for a minority culture, stands as evidence that audacity can yield positive results for remix's practitioners. Fan fiction's creators have chosen to take a different route, and have opted to never demand money in exchange for their

remix productions, but the route that sampling's creators chose, one characterized by audacity and defiance of the law, though very risky and eventually shut down by the Grand Upright decision, has proven to be highly lucrative.

Sampling is not the only remix form that has generated money for its makers. A Japanese remix genre called doujinshi, which the Anime News Network lexicon defines as "fan-comics, much like fan-fiction,"[16] are sold at conventions in Japan and in the U.S., and by Internet retailers. In his 2004 book Free Culture, Lawrence Lessig estimated that more than 33,000 "circles" of doujinshi artists actively circulate their self-published works, which are based on mainstream manga (Japanese comics) put out by publishing companies. Lessig also claimed that over 450,000 Japanese doujinshi buffs attend the twice-annual conventions dedicated to these fan texts, and that doujinshi conventions are "the largest public gathering in the country."[17] It must be noted that Lessig's figures do not take into account the volume of online doujinshi sales, which extend doujinshi's reach beyond the borders of Japan (for example, some doujinshi Web stores are based in the U.S., and some Japanese doujinshi clearinghouses only ship to addresses outside Japan[18]). Doujinshi, then, is a commodity that sells in high volume, both in its home country and internationally, while fan fiction, a very similar remix practice, remains non-commodified. One might say that doujinshi cannot serve as a possible example for fan fiction writers to follow, since the reason that doujinshi creators are not constantly sued by the manga

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[16] "Doujinshi," Anime News Network, http://www.animenewsnetwork.com/encyclopedia/lexicon.php?id=16 (accessed 9 December 2007.)

[17] Lessig, *Free Culture*, 26.

[18] For example, the online doujinshi stores Aino Anime Trader (http://www.aino.com/) and Aloha Anime (http://www.alohaanime.com/) are based in the U.S., and Japan-based retailer Comiket, Inc.'s home page (http://www.comiketservice.com/) states that "For the time being, we are accepting orders only from outside Japan. We are planning domestic online sales, but we have no specific details to announce at this time." (Websites accessed 9 December 2007.)

artists or publishing companies whose work they appropriate is that, according to a Japanese law firm (cited by Lessig), "We don't have enough lawyers [in Japan. There] just aren't enough resources to prosecute cases like this."[19] So, even though the letter of Japanese copyright law is against them, doujinshi artists have the size of the Japanese law profession on their side; U.S. fan fiction authors, in contrast, do not live in a country that lacks a sufficient number of attorneys to handle copyright infringement lawsuits.

However, even in the lawsuit-prone U.S., some remix genres have opened up avenues of earnings for their makers. For example, some fan filmmakers have used their productions as "calling cards" in Hollywood, in the hopes that that their fan work would demonstrate their ability to do professional work. Shane Felux's 2005 fan film *Star Wars: Revelations*, made for $20,000 plus an additional $15,000 in premiere party expenses, won Felux a development deal with Disney to make an original sci-fi action short, which Disney intends to release only on the Internet, as an exploration of the Internet as a possible future mass distribution channel for film, and a potential new revenue stream.[20] Another *Star Wars* fan film, the 1999 short George *Lucas in Love*, successfully launched the Hollywood careers of writer Timothy Dowling and director Joe Nussbaum: Nussbaum has directed four films for major studios,[21] and Dowling has sold five

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[19] Lessig, *Free Culture*, 27.

[20] Curt Holman, "Where No Fan Has Gone Before: Fan Films Strike Back," *New York Press*, 2007, http://www.newyorkpress.com/20/6/filmissue/feature.cfm (accessed 9 December 2007).

[21] According to the Internet Movie Database, Nussbaum has directed *Sleepover* (MGM, 2004), *American Pie Presents: The Naked Mile* (straight-to-DVD, Universal, 2006), *Sydney White* (Universal, 2007), and is currently in pre-production on *B.F.F.* (Rogue Pictures, 2009). http://www.imdb.com/name/nm0638271/ (accessed 9 December 2007).

original feature scripts that are currently being produced.[22] Kevin Rubio, director of one of the

earliest and most famous Internet-distributed fan films, 1997's *Troops*, was hired by Lucasfilm

and Dark Horse comics to write for the *Star Wars Tales* comic series as a result of *Troops'*

popularity.[23] Another remix genre, game modding, has also produced professional game

designers from its ranks.

    Jenkins points out that "[F]an communities have historically functioned as training

grounds for entry into the commercial media sector,"[24] and fan fiction groups have occasionally

served as professional training sites in the same way that fan film and modding communities

have. I know of one fic writer who was hired on to the writing staff of a television series

(Melissa Good, who was one of the most respected *Xena: Warrior Princess* fanfic writers before

Xena's producers asked her to join their writing team for *Xena*'s sixth season[25]), and I have

anecdotal evidence that several other television writers secured their staff jobs on the strength of

their fanfic. A number of popular science fiction and fantasy novelists either began as fanfic

writers or currently write fic. For example, Lois McMaster Bujold wrote fan fiction as a

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[22] According to the Internet Movie Database, Dowling's in-production scripts are *Little Big Men* (Universal, 2008), *She's Out of My League* (DreamWorks, 2008), *Outsourced* (Mosaic Media, 2008), *Born to Rock* (MTV Films, 2009), and *Coxblocker* (MTV Films, 2009). http://www.imdb.com/name/nm0000251/ (accessed 9 December 2007).

[23] Jenkins, *Convergence Culture*, 132; and "Kevin Rubio," Wikipedia, http://en.wikipedia.org/wiki/Kevin_Rubio (accessed 9 December 2007).

[24] Jenkins, *Convergence Culture*, 164.

[25] Cathy Young, "Lee Goldberg's War on Fanfic," *The Y-Files* (blog), 7 February 2007, http://cathyyoung.blogspot.com/2007/02/lee-goldbergs-war-on-fanfic_07.html (accessed 9 December 2007); and "Melissa Good," *Xenaville*, http://www.xenaville.com/cast/missy.html (accessed 9 December 2007).

teenager, and Mercedes Lackey is active in the MMORPG (Massively Multiplayer Online Role-Playing Game) *City of Heroes* fanfic community.[26]

However, fan fiction has only seen the movement of individual writers into professional ranks; it has not had its best products picked up for distribution deals, its best authors have not put their works up for sale, and it has never generated royalties for its creators, as has happened in both the fan film and game mod communities. For example, AtomFilms, which calls itself a "broadband entertainment network for original short films and web shows," posts selected fan films on its site (and runs the official annual *Star Wars* fan film contest, the *Star Wars* Fan Movie Challenge) and pays those films' makers royalties; prolific *Star Wars* fan auteur John E. Hudgens claims that he recovered the cost of his latest contribution to the field with his first royalty check.[27] Although Amazon.com does not appear to currently offer *Star Wars* fan films for purchase, they have sold such movies in the past. According to Jenkins, "When Amazon introduced DVDs of *George Lucas in Love* (1999)...it outsold the DVD of *Star Wars Episode I: The Phantom Menace* (1999) in its opening week".[28]

Some game mods, most notably 2002's *Counter-Strike* (a mod of the 1998 game *Half-Life*), have been purchased by the companies that made the source games and met with extraordinary commercial success.   The game company Bioware has included some fans' game mods on the extension packs based on their 2002 product *Neverwinter Nights*. Jenkins notes that among participatory fan groups, "the modding community may be unique in having amateur-

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[26] Carol Pinchefsky, "Wizard Oil: Fan Fiction, Part One: Fan Fiction and Contradiction," *Orson Scott Card's Intergalactic Medicine Show*, May 2006, http://www.intergalacticmedicineshow.com/cgi-bin/mag.cgi?do=columns&vol=carol_pinchefsky&article=008 (accessed 9 December 2007).
[27] Holman, "Where No Fan."

[28] Jenkins, *Convergence Culture*, 132.

produced works taken up directly by commercial companies for distribution." Jenkins mentions

that this modder-industry cooperation goes the other way, too, as there have been instances of

start-up game companies building products that are basically mods, then paying licensing fees to

the companies that produced the source games so that they can distribute their games legally.

Even gamers who build supplementary interfaces rather than outright mods have found a way to

make a modest income from their fannish labor. Jenkins writes of the case of *The Sims* fans who

invented "The Mall of *The Sims* in which they offer various *Sims*-compatible products to other

Sims players through virtual storefronts. When the Mall's subscriber base became so large that

its shopkeepers found themselves faced with extremely high bills for their bandwidth usage,

Electronic Arts, which owns *The Sims*, "rewrote their terms of agreement so that the fans could

charge modest fees to recover the costs of maintaining their distribution centers. Everything in

the shops is produced by other players, and once you've paid your dues, you can download

anything you want for free," Jenkins states.[29]

So digital remix has spawned a number of monetization models that benefits remix

artists: royalties; distribution agreements; reasonably priced licenses that permit remix

practitioners to sell their appropriations legally; and small-scale compensation intended only to

reimburse remixers for their outlay. But while fan filmmakers and game modders have

experimented with these models, fan fiction writers have not conducted similar experiments.

This is despite the fact that a large market clearly exists for fanfic-style writing. Over the last ten

years, as I have discussed elsewhere,[30] a legion of revisions of, and expansions on, pre-existing

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[29] Jenkins, *Convergence Culture*, 165.

[30] Derecho, "Archontic Literature."

literary texts has taken over contemporary fiction. Anita Diamant's *The Red Tent* (1997), Sena Jeter Naslund's *Ahab's Wife* (1999), Alice Randall's *The Wind Done Gone* (2001), Isabel Allende's *Zorro* (2004), and Nancy Rawles' *My Jim* (2005) are books that all achieved critical acclaim and/or commercial success, and all re-tell well-known stories (from the Bible, British or American classic novels, or folklore). Many of these fall into the category of feminist or minority revisionism, what The New York Times' book reviewer Helen Schulman called "the fiction of reaction" in a 2005 article,[31] updating the tradition of postcolonial rewritings begun decades earlier by Jean Rhys's *Wide Sargasso Sea* (1966) and Aimé Césaire's *Une Tempête* (1968). However, to say that published, well-reviewed and best-selling fan fiction differs from Internet fan fiction in its political bent would be a false distinction. Plenty of popular, published fan fiction is not particularly political, but simply aims to delve deeper into, or offer a slightly different spin on, beloved universes, such as the many sequels to Jane Austen's *Pride and Prejudice* that have been printed in recent years, including Linda Berdoll's *Mr. Darcy Takes a Wife* (1999) and *Darcy and Elizabeth* (2006), Pamela Aidan's *Fitzwilliam Darcy, Gentleman* trilogy (2003-2007), Helen Halstead's *Mr. Darcy Presents His Bride* (2007), and at least four others printed between 2004 and 2007 that directly augment the original novel, plus books such as Helen Fielding's *Bridget Jones* duo (1998-2000) that re-imagine the 1813 source text in contemporary times. An equally false claim would be that Internet fan fiction does not do the kind of feminist, postcolonial, or ethnic revisionist work that *The Wind Done Gone* and *My Jim* do; as I have stated earlier, there are at least as many genres of fanfic as there are genres of published fiction. Very little separates fan fiction that appears in print and fan fiction that is

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[31] Helen Schulman, "*My Jim*: Never the Twain," *New York Times*, 30 January 2005.

circulated exclusively on the Internet. Both are written primarily by women,[32] both reach wide

audiences, both have produced intently political as well as lighter, less serious re-writings and

extensions. The difference is that fan fiction stories in print generate royalties for their authors,

while Internet fan fiction writers earn nothing for their work.

One might claim there are many reasons that fan fiction writers have found it easier to

make money from publishing in print than from publishing online, in fan communities. One

reason is that the writers whose fan fiction has been published have almost always based their

work on source texts whose copyrights have expired; expanding stories from the Old Testament

or 19th-century books gives no one grounds to file lawsuits for copyright infringement.

However, not all printed fanfic has built upon stories in the public domain: the heirs of *Gone*

Wind the Wind author Margaret Mitchell sued the Houghton Mifflin Company, Alice Randall's

publisher, for copyright violation, and after several court battles (in 2001, a Federal appeals court

overturned a lower court's injunction to block *The Wind Done Gone* from going to press), the

parties settled out of court for an undisclosed sum in 2002.[33] Internet fan fiction could have

looked at the outcome of the Alice Randall case and determined that commodifying fanfic based

on copyrighted material, though likely to lead to a legal battle with copyright owners, is

possible. After all, the Federal appeals court in Atlanta found that Randall's book constituted

fair use of Mitchell's book, because it needed to cite the earlier work in order to parody it, and if

the Mitchell estate had brought the case to the Supreme Court, the highest court may have agreed

with the Federal appeals court's finding of fair use.

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[32] Some examples of well-received published fan fiction by male authors are J.M. Coetzee's *Foe* (1986), John Updike's *Gertrude and Claudius* (2000), and Donald McCraig *Rhett Butler's People* (2007).
[33] David D. Kirkpatrick, "Mitchell Estate Settles 'Gone With the Wind' Suit." *New York Times*, 10 May 2002.

Therefore, the argument that authors of published fanfic books can receive payment while Internet fanfic writers cannot because fic based on copyrighted material would never be judged legal in a court of law was proven groundless in 2002. It is true that Randall's work was deemed fair use only because it qualified as a parody (just as, in 1994, the Supreme Court unanimously ruled that 2 Live Crew's "Oh, Pretty Woman" was fair use because it parodied the Roy Orbinson original), and that plenty of Internet fanfic is not parody, but it is possible that a few more court rulings involving fan fiction and copyright infringement would set a precedent in favor of Internet fanfic authors' right to sell their work. Of course, if several such cases went before judges, the opposite precedent might be set, as has happened with sampling, and, indeed, the history of sampling's cold treatment by U.S. courts might inform online fanfic writers' reluctance to submit their productions to official judgment. Clearly, entering into court battles would be a risk for online fanfic writers, but it is a risk that none have yet taken.

One might also argue that published fic authors can earn money for their labor while online fic writers cannot because of quality issues. Most printed books have been vetted by a number of gatekeepers (agents, editors), whereas most Internet fanfic communities operate on a self-publishing system, in which no one (or perhaps one moderator) has to approve a fic for online publication. Usually, fic writers can post their work directly to a message board or archive or blog without an intermediary. This means that more low-quality fic appears online than in print, so one might assume that online fanfiction could sell if only it were any good. However, in the realm of printed fan fiction, there is at least one example of a self-published novel turning into a top-seller. Berdoll first published *Mr. Darcy Takes a Wife* herself in 1999 under the title *The Bar Sinister*, and the book sold 10,000 copies over several years. Only then

did Sourcebooks, Inc., a fast-growing Illinois-based publishing house, offer Berdoll a publishing

and distribution contract.[34] Therefore, self-published fanfic can gain, and has gained, popularity

with paying audiences, despite the fact that industry gatekeepers do not verify their quality prior

to publication.   If fanfic writers would consider putting their works up for sale, it is likely that

market forces would weed out the "good" from the "bad," or at least the desirable from the

undesirable stories. In any case, some writers would probably find readers willing to exchange

money for texts they appreciate it, even though many low-skilled writers would probably not.

However, fanfic writers have never tried to charge for their self-published stories, so there is no

way that the odds of success for writers engaging in such a venture could be calculated at

present.

A third explanation for why fan fiction writers can earn royalties from printed books but

not from online publication might be that a great deal of Internet fanfic is sexually explicit.

""Synergy is all well and good until someone stumbles upon that Shrek/Gandalf/Harry Potter

threesome BDSM [Bondage-Discipline/Domination-Submission/Sado-Masochism] fic and has

an aneurysm," one fan remarked upon the launch of a sponsored fanfic archive, FanLib (which I

will discuss later in this chapter).[35] But the romance novel industry, all of whose works are

sexually explicit to some degree, is enormously profitable: the largest romance publisher,

Harlequin, printed 1,113 romance titles in 2002 (out of 2,169 total romance novels published that

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[34] Kristine Huntley, "Review of Mr. Darcy Takes a Wife," *Booklist*, 2004, http://www.amazon.com/gp/product/product-description/1402202733/ref=dp_proddesc_0/105-7346183-4414857?ie=UTF8&n=283155&s=books (accessed 9 December 2007).
[35] Jim McDonald, "Fanfiction, Monetized," in *Making Light* (blog), 22 May 2007, http://nielsenhayden.com/makinglight/archives/009020.html (accessed 9 December 2007).

year) for revenues of $585 million and a gross profit of $124 million, a 21% profit margin.[36] If

anything, sex sells fiction to female consumers. That much of fanfic is "smut" would seem to

give it a greater, not lesser, chance of becoming a big business.

Despite the new types of revenue streams being developed around fan films and game

mods, the short-term gains of digital sampling that launched a global remix industry, the

examples of doujinshi and Randall and Berdoll, the massive revenues generated by romance

novel sales, and the fact that their labor has provided the basis for Hollywood's latest models for

designing and marketing media, Internet fan fiction writers have not yet experimented with ways

to make money off of their work. Also, in spite of Melissa Good's fan writing facilitating her

entrée into network television writing, and in spite of the well-established process of unknown

screenwriters submitting "spec scripts" (scripts for existing television series) as their auditions

for TV staff writing jobs, there is very little discussion within fan fiction communities of fanfic's

potential to serve as a writer's "calling card" to movie and television producers. In contrast,

most fan filmmakers, when interviewed, discuss their intention to use their works as calling

cards, and are explicit about their hopes that their unpaid fan work will help them secure paid

professional work. A discourse of "graduation" from fandom to professionalism permeates fan

filmmaking, but cannot be found in fan fiction. It seems that online fic writers have firmly

committed to the belief that their productions will never provide them with a source of income.

Once again, I ask: why? A better question may be, Why not? Why haven't fanfic authors

attempted to create a working system for reaping financial benefits from their labor, when there

is evidence that, if they made the attempt, they would be successful?

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[36] Edward Wyatt, "Chick lit is the romance novel's newest home wrecker," *San Francisco Chronicle*, 18 August 2004, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/08/18/DDGRI899LA1.DTL (accessed 9 December 2007).

UN-ENTERPRISING WOMEN

When trying to find an answer to why three forms of digital remix culture – sampling, fan films and game mods – have been commodified in a way that benefits their inventors while online fan fiction, another form of remix culture, has not, the issue of gender must be considered. Sampling, fan films and game mods are all male-dominated remix genres, and Internet fan fiction is a female-dominated remix genre.

The female-ness of fanfic has played an important role in fanfic production remaining an unpaid volunteer activity. There have been numerous links between gender and fanfic's non-commodification during the history of online fan fiction, and I will explain these connections one at a time. First, I want to draw attention to the matter of female entrepeneurship in the U.S., and how women have been discouraged from starting Internet companies.

The number of women-owned businesses in the U.S. has been on the rise since 1997. According to the National Women's Business Council's July 2007 report, "Between 1997 and 2006, the number of majority (51% or more) women-owned firms grew by nearly two times the rate of all U.S. privately-held firms. The number of majority-owned, privately-held women-owned businesses grew by 13.9 percent, employment increased (0.4% vs. -1.2%) and revenues rose (4.4% vs. -1.0%)." During this same period, the number of businesses majority-owned by women of color increased nearly 120%. Women and minorities have been entering into self-employment at above-average rates, and "[f]emale-owned sole proprietorships grew much faster than their male-owned counterparts in terms of number of businesses, gross receipts, and net

income."[37] These statistics show that in the last 10 or so years, either more women have sought

to start their own businesses than in previous years, or would-be female entrepeneurs have had

an easier time getting their businesses off the ground than aspiring women business-owners of

earlier generations. However, the positive statistics cover up the fact that in the technology

sector, in the category of Internet start-ups, women entrepeneurs have been significantly

disadvantaged.

In 1997, when the technology boom was on the sharp upswing, the White House-

appointed chairperson of the National Women's Business Council, Kay Koplovitz, began

examining the situation of women entrepeneurs in the "new economy," that is, the U.S. economy

driven by hi-tech rather than traditional manufacturing industries. That year was also the time

when women began founding firms at twice the rate of men, and there were already 9.1 million

women-owned American businesses, contributing $3.6 trillion annually to the GDP, and

employing 27.5 million people. Koplovitz assumed the new economy was favorable to women

who owned, or were looking to start, companies. In her 2002 book *Bold Women, Big Ideas*,

Koplovitz writes, "Surely, I argued with myself, women must be making better strides raising

money in the knowledge industries and the new technologies arena. In the more traditional

service and manufacturing businesses, yes, bank debt was parceled out in dribbles to women

borrowers, but in the new economy, wouldn't the old strictures and prejudices be diminished?"

The facts disproved Koplovitz's assumption. Of the billions in venture-capital investments made

in 1997, only 1.7 percent went to women-owned enterprises.

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[37] National Women's Business Council, "Fact Sheet: Women Business Owners and Their Enterprises," July 2007.

When Koplovitz interviewed approximately 50 venture capitalists and angel investors around the U.S. asking why women had not been funded, she received the following answers: Few, if any, women had applied for VC investment; society's stereotypes about girls being less good at math and science than boys had led to fewer women making their careers in technological or scientific fields, where most high-risk entrepeneurship was originating; motherhood's time demands meant that women who were mothers couldn't dedicate sufficient time to a new business; women are more naturally conservative and less tolerant of risk than men; women entrepeneurs psychologically become "mothers" of their businesses and so cannot bear to considering into a VC deal which would require a mandatory exit strategy for the founder, because it would mean having to "let go" of the company-child; men are used to switching jobs and so find it easy to envision exit strategies for themselves; and finally, "Women in business tend to operate through cooperation, negotiation, and networking...are more passive, more deliberate...[and] lack that single-minded drive and aggressiveness that the high-risk entrepeneur needs in order to succeed."

Koplovitz's response to these claims is that they may be true of women, but they are equally true of many men. Few individuals of either sex are "cut out for the entrepeneurial life, and...fewer still, male or female, are ready for the high-risk, high-reward, white-water version." What Koplovitz doubted was venture capitalists' argument that there simply were far fewer women than men interested in launching high-risk high-tech businesses and, therefore far fewer women than men applying for venture capital. Writes Koplovitz, "The more I heard these 'explanations,'...their increasingly familiar mixing of half-truths and self-justifications, the more I began to wonder if they weren't just a 1990s version of what people used to say about African

Americans in corporate and academic circles alike. 'Blacks don't apply,' it was said. 'Believe

us, we want minorities here in the worst way, but we can't find qualified ones. They just don't

apply.'" Koplovitz's survey of the VC field inspired her to found the non-profit venture capital

forum Springboard, dedicated to seeking out women CEOs of start-up technology companies and

putting them face-to-face with potential VC funders. Springboard received over 300 applications

in its first year, selected twenty-six finalists, provided each finalist with substantial coaching in

how to make presentations to investors, and arranged for a day of meetings between several of

the most prominent Silicon Valley VCs and the twenty-six CEOs that took place in January

2000. Of the Springboard finalists, all but one raised money for their companies. By the end of

2000, they had raised nearly $200 million in aggregate. "Stellar performance and great results,

all in all, for a breed of entrepeneurs who'd never appeared on the radar screen" was Koplovitz's

assessment of the Springboard finalists' results.[38]

Koplovitz's findings between 1997 and 2000 sheds some light on the question of why

women fan fiction writers have not invented a model for selling their work. First, Koplovitz

discovered that venture capitalists and angel investors, most of whom are men, scouted for, and

funded, fledgling companies that were run by "people they knew, people who came from the

same background they did, and even, in some cases, people who'd come from the very

companies [they] themselves worked for. In other words, it was the buddy system in high

gear."[39] Since venture capitalists "tend to be young, male, and accustomed to networking in

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[38] Kay Koplovitz with Peter Israel, *Bold Women, Big Ideas: Learning to Play the High-Risk Entrepeneurial Game* (New York: Public Affairs, 2002), Chapters 2 and 3.

[39] Koplovitz, *Bold Women*, 44.

high-pressure, quick-acting, all-male milieus,"[40] their "buddies," who benefited from their

investments, also tended to be men. In other words, investors interested in growing tech start-

ups did not create a culture that openly, actively sought out women entrepeneurs. Although

funders' lack of interest in creating a female-friendly investment climate is hardly surprising,

what is important to note is that in the late nineties, the fast-growing hi-tech new economy was

coded as exclusively male, and digital entrepeneurship was coded as extremely, even

exclusively, male and masculinist. The ritual progression, re-enacted many times during the dot-

com bubble years, of the enterpeneur burning midnight oil to get an Internet start-up off the

ground, then getting funded by exciting VCs willing to bet big that the start-up would become

the future of Web-based commerce, and a short while later taking the company public and

becoming an overnight millionaire, was a performance scripted only for men. Founding a tech

company and making a fortune from it became, in the 1990s, one of the best ways to display

masculine prowess; the Internet became the new Wild West frontier, full of adventurers seeking

to prove themselves and their worth in the gold rush atmosphere. Starting an Internet business

was a game for men that invited a cowboy mentality. Narratively and operationally, the first

wave of the new economy made no allowances for women tech entrepeneurs. The thoroughly

masculinist discourse that sprang up around the concept of the Internet start-up gave rise to

conditions in which male remix practitioners – sampling artists, fan filmmakers, and game

modders – could envision themselves creating professional opportunities and new business

models around their digital inventions far more easily than female fanfic writers could.

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[40] Koplovitz, *Bold Women*, 34.

In *The Archaeology of Knowledge*, Michel Foucault wrote, "one cannot speak of anything at any time; it is not easy to say something new; it is not enough for us to open our eyes, to pay attention, or to be aware, for new objects suddenly to light up and emerge out of the ground. But this difficulty is not only a negative one....It exists under the positive conditions of a complex group of relations."[41] The idea that starting successful, well-funded digital companies was an activity "reserved" for men was a reality of Silicon Valley VC and angel investors' modes of doing business, which created a fantasy of enterpeneurship-as-manliness, one shared by participants in, and observers of, the tech boom. This reality and fantasy were among the "complex group of relations" that made it "not easy" for women fanfic authors to think of pioneering a new and profitable way of publishing derivative stories online.

PATRIARCHAL PROHIBITIONS

Another factor in fanfic authors' unwillingness to consider commodifying their production is the history of fan fiction before, and during the early years of, the Internet. During the years when fanfic was published and distributed only through photocopied 'zines, copyright holders – or rather, one copyright holder in particular, George Lucas – set the precedent that the owners of the source texts that served as the bases for fanfic had the right to determine whether or not fan fiction was permissible, and what kind of fic would be allowed. Jenkins and Will Brooker have chronicled the various directives that *Star Wars* fic writers have received from Lucasfilm ever since the company, holder of all copyrights pertaining to the extensive *Star Wars* franchise, became aware of fan fiction's existence in 1977. Over the last three decades,

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[41] Michel Foucault, *The Archaeology of Knowledge and The Discourse on Language*, trans. Rupert Swyer (New York: Pantheon Books, 1972), 44-45.

Lucasfilm has run through a gamut of responses to fanfic writers, from establishing a bureau to "approve" 'zines to forbidding the publication (even in free 'zines) of pornographic fics to issuing cease-and-desist letters to offering to host fanfic on a corporate-owned website.[42] All of Lucasfilm's stances were efforts to control the circulation of fanfic. The relationship established between copyright holders and fic writers by Lucasfilm's actions was that of firm paternal authority to unpredictably wayward children. Brooker writes, "For all the talk of a *Star Wars* family [in a 1996 statement issued by Lucasfilm regarding the company's interest in "developing guidelines" for Internet fan activity], this notice makes it clear that Lucas is still the daddy who can choose to ignore fan activity if it behaves and crush it when it crosses a boundary."[43]

What is important to remember about Lucasfilms' interpellation of fans as utterly beholden to corporate approval –the company's hailing of its consumers as a parent hails its children, or, more specifically as a father hails his daughters – is that it was not inevitable. Elizabeth Durack, a *Star Wars* fanfic writer who started a protest against Lucasfilm's 2000 program of offering fans "an official home for fans to celebrate their love of *Star Wars* on the World Wide Web" stated that (as Brooker summarizes) the "fan creation of 'derivative works' had always...been a legal gray area whereby amateur fiction or art that was not made for profit and that included a disclaimer indicating Lucasfilm's ownership could qualify as 'fair use.' By offering to transfer this fan work onto LFL [Lucasfilm Ltd.] home ground, the company immediately translates this ambiguity into black and white." Durack was critical of fans' conforming to the patriarchal-filial nature of the producer-fan relationship as determined by

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[42] See Will Brooker, *Using the Force: Creativity, Community, and* Star Wars *Fans* (New York: Continuum Books, 2002); Jenkins, *Textual Poachers*; and Jenkins, "The Poachers and the Stormtroopers," http://web.mit.edu/cms/People/henry3/pub/stormtroopers.htm (accessed 9 December 2007).

[43] Brooker, *Using the Force*, 167.

Lucasfilm. Durack said, "Legally, it's theirs [Lucasfilm's]. But emotionally we feel we have a right to participate in the story. It's bigger than George, and too-strong loyalties may be misplaced. My first loyalty as a fan is to other fans."

What Durack finds objectionable is that fans have accepted wholesale the premise that copyright holders have the moral right to set the terms of audiences' interactions with copyrighted texts, when in fact audiences' emotional investment, in Durack's eyes, gives them at least equal authority to create and share their versions of a particular story, to make public what Durack called "other people's *Star Wars*-es...the tens of thousands of pieces of *Star Wars* fanfic which constitute auxiliary myths to complement George's central one." Durack stated, "I believe that, in all fairness, they should have the right to share their 'product' with the world – yes, even if it competes with George's (which fanfic does only marginally, if at all)."[44] Durack's intellectual position was in agreement with the school of literary criticism called reader-response, or reception theory, which argues that a text's meaning is not inherent in the text, but is produced by the reader's engagement with and understanding of it. She was arguing against the intellectual position of Lucasfilm and many fans, which was aligned with an older school of literary criticism, which holds that authorial intention is the sole determinant and regulator of a text's meaning. The problem with believing in an author's exclusive right to control the meanings of his work is that readers then self-censor their responses, and police other readers' interpretations.

Brooker notes several instances in which fans implicitly or explicitly censored other fans' production of fanfic in an effort to adhere to what they perceived to be Lucasfilm's wishes. In

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[44] Brooker, *Using the Force*, 169-170.

1997, one of the first Internet *Star Wars* fan sites, the Usenet group rec.arts.sf.starwars, "refused permission...for a new subgroup dedicated to fan fiction, on the grounds that 'the traffic itself would be illegal.'...In this case, LFL didn't even have to show its muscle: the administrators' fear of what could happen was enough to make them quash the fan fiction group themselves."[45] In 2000 (directly responding to Durack's protest), one fan wrote that fic writers should acknowledge LFL's right to censor "content [that they find] objectionable and damaging to the *Star Wars* name (an example would be a pornographic fanfic using the *Star Wars* characters)."[46] In 2006, when fanfic author Lori Jareo self-published her novel *Another Hope* in print and put it up for sale on Amazon, Lucasfilm did not file a lawsuit for copyright infringement against Jareo. The company did not have to. The outcry from fellow fans against Jareo for daring to violate Lucasfilm's copyright was so intense that Amazon removed the book from its website shortly after listing it. Nearly all fans who called Jareo "stupid," "ill-informed" and "idotic" invoked the legal authority and resources of Lucasfilm, and predicted that company's vengeance against Jareo would be imminent and as wrathful as a blast from the Death Star, in condemning Jareo's publication.

"[N]o one in their right mind would publish [a fanfic book in this way], because then George Lucas' Sith Lord lawyers would unleash their dual-bladed tortsabers on them," wrote one fan, John Scalzi, whose blog post on the topic was titled "The 2006 Stupidest FanFic Writer Award Gets Retired Early." Responses to Scalzi's post included the following comments: "I really hope Lucas sues"; "George Lucas should sue, confiscate every printed copy and place the

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[45] Brooker, *Using the Force*, 167-168.

[46] Brooker, *Using the Force*, 171.

pages in Lucasfilm's restrooms so they might serve a useful purpose"; "This so-called story may have a detrimental effect on the fanfiction community as a whole (Lucas might decide to forbid it entirely) but I hope they come down on her like a ton of rectangular building things. This is a travesty"; "First rule of fandom is 'Thou shalt not profit.' Selling this ... thing ... at *any* price violates that. I shudder at the thought of how such a stunt is going to affect those of us who play with other folk's toys purely out of love"; "This stupid broad makes fanfic writers everywhere want to kill. I hope George Lucas sues her and takes her for everything she has, including all her floor rugs and whatever pet her kids might have. And her kids too." [47] These harsh judgments of Jareo stemmed from fans' anger at her indefensible naïveté and the harm her ignorance of fandom's "rules" might do to other fans: How could anyone *not* know that if you try to make money off of a *Star Wars*-related fan production, that Lucas will sue you for all that you're worth? Doesn't she realize that Lucas might be so enraged by one fan attempting to profit from his universe that he might shut down all *Star Wars* fan productions? The fury directed by fans at Jareo demonstrated how deeply the ideology of corporate ownership and control has been ingrained in the *Star Wars* fan community. When a subordinate group is ideologically mystified, its members believe that the values of the dominant group are correct and must be defended, even if the subordinate group does not benefit from those values being enforced. Just as, in a capitalist society, the proletariat does not take up arms against the bourgeoisie despite vastly outnumbering them, in *Star Wars* fandom, fans do not even think of challenging Lucasfilm's absolute right, morally and legally, to set the terms for their work's production and distribution, even though fans have the technology, as Jenkins has said, "to work around the centralizing

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[47] John Scalzi, "The 2006 Stupidest FanFic Writer Award Gets Retired Early," in *Whatever* (blog – post and comments), 21 April 2006, http://www.scalzi.com/whatever/004162.html (accessed 10 December 2007)

authority of traditional gatekeepers,"[48] even though fans number in the millions, and even though one could argue that fans' interest and their concurrent spending on Lucasfilm products keeps Lucasfilm in business, and that therefore fans are the source of Lucasfilm's power and should not regard themselves as subject to the corporation's power.

In fact, the number of fans who have been sued by Lucasfilm for copyright infringement is *zero*. In addition, a law court has never issued a ruling on whether fan productions violate copyright or not. If Jareo had been willing to become a defendant in a legal battle, the court may have ruled in Lucasfilm's favor, as in the *Grand Upright* case, or it could have ruled in the appropriating author's favor, as in the cases of 2 Live Crew's "Oh, Pretty Woman," Alice Randall's *The Wind Done Gone*, and Jeff Koons' "Niagra." The case law around appropriative, derivative art is still murky about what counts as fair-use (even if the appropriative work generates revenue for its makers, as 2 Live Crew's, Randall's, and Koons' works all did) and what constitutes infringement. However, there is no case law around whether *Star Wars* fan fiction is illegal or not, because Lucasfilm and fanfic writers have never battled in a court of law – and that is because of fans' refusal to rebel against what they are certain is an undefeatable copyright-holding Empire.

A group's internal censorship, its efforts to censor its own members' output, and an individual's decision to prevent herself from making or sharing a certain type of output, are often far more effective in restricting cultural production than external censorship. Since the 1991 *Grand Upright* ruling, most recording artists that use sampling choose, on their own and without any legal intervention, to work with very few samples, rather than repeatedly forcing the courts

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[48] Jenkins, "Poachers and Stormtroopers."

to confront and resolve the artistic difficulties that *Grand Upright* created. *Grand Upright* was

effective not so much in the sense that it gave lawsuit-prone copyright holders a green light to

file suits (although it did do that); it was effective because it has convinced would-be sampling

artists to decide not to try to make a kind of art that they know how to make. Similarly,

Lucasfilm's attempts to regulate fan fiction have been effective because they have convinced fans

to police their own ranks, and ensure that no fanfic writer even tries to profit from their stories.

In fact, I would argue that fans' internalization of Lucasfilm's unfriendliness towards fanfic has

affected even the circulation of non-pornographic, free fanfic. While almost every "universe" of

fan fiction thrives on the Internet, with multiple sites dedicated to stories based on a plethora of

books, comics/manga, anime, video games, bands, movies, and TV shows, in my experience,

Star Wars fanfic is comparatively difficult to find on the Web (that is, fanfic based on the

original trilogy, Episodes IV-VI; in contrast, fanfic based on Episodes I-III, films that were

released after the advent of the World Wide Web, is ubiquitous). I attribute the relative scarcity

of *Star Wars* fic online to the moment in 1997, when the *Star Wars* Usenet group refused to

launch a dedicated fanfic site. Incidentally, other Usenet groups, such as the *X-Files* group and

Star Trek group, did start up fanfic-only sites in the Internet's early period, and those universes

have a large number of functional, easy-to-access, well-organized and cleanly archived fanfic

Web sites operating today, so we might think of mid-nineties Usenet fanfic "spinoff" groups as

predictive of the volume of later Web representation for various fic universes.

The role of gender in this regulation becomes evident when one considers, as Jenkins

points out in several works, that Lucasfilm has treated fan films, made mostly by male fans, very

differently than it has treated fan fiction, authored primarily by women. In his 1998 essay "The

Poachers and the Stormtroopers," Jenkins noted that, "From a classical legal standpoint, [1997 *Star Wars* fan film] *Troops* poses a greater direct threat to Lucasfilm's interests. It has high production values, which could easily be confused with official *Star Wars* materials. It is produced by a professional who seeks entry into the entertainment industry, who wants to profit from his appropriation of Lucasfilm's intellectual property – at least indirectly if not directly. The *Star Wars* fan fiction, on the other hand, is clearly of an amateur quality and is explicitly marked as such. Few people would be likely to mistake it for anything Lucasfilm produced. Its circulation on the net does not require any monetary exchange. Lucasfilm's official rationale for shutting down the fan sites, after all, is that if they turn a blind eye to fan's non-profit appropriations, they will lessen their ability to control the production and circulation of unauthorized commercially-produced materials. So why was a decision made to respond more aggressively to *Star Wars* fan fiction than to *Troops*?"[49] In *Convergence Culture* in 2006, Jenkins attributed the contradiction in Lucasfilm's attitude towards the different fan production genres to the fact that "Lucas and his movie brat cronies clearly identified more closely with the young digital filmmakers who were making 'calling card' movies to try to break into the film industry than they did with female fan writers sharing their erotic fantasies."[50] That Lucasfilm expressed so many variations of disapproval to fanfic writers over thirty years, and accepted and praised fan filmmakers as soon as fan films became a widely-distributed genre, thus appears to be due largely to the company's gendered taste culture, to its decision makers' instinctive

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[49] Jenkins, "Poachers and Stormtroopers."

[50] Jenkins, *Convergence Culture*, 154.

sympathy for male fans' creations and their failure to comprehend, and resultant distaste for, female fans' works.

Since 2000, Lucasfilm has tried to control fan film production by naming one Web site the "official" host of *Star Wars* fan films and disallowing certain types of films, but the only films disallowed were films in the fan fiction genre: "Films must parody the existing *Star Wars* universe, or be a documentary of the *Star Wars* fan experience. No 'fan fiction' – which attempts to expand on the *Star Wars* universe – will be accepted," the site rules state.[51] Thus, the only scenario in which Lucasfilm directs the same antagonism towards fan filmmakers as they do to fanfic writers is if a filmmaker uses a fanfic-like approach. Lucasfilm shows much greater tolerance for fan productions that emerge from male taste cultures than for those that emerge from female taste cultures, and male filmmakers are warned that any of their attempts to "cross over" into a female narrative style will be regarded by the paternal authority, George Lucas, as transgressive, out-of-bounds, and worthy of condemnation.

Lucasfilm is not the only media corporation to demonstrate a different attitude towards female fanfic than towards male fan films or game mods. I have already detailed the ways that fan filmmakers and game modders have found ways to profit from their remixes, often in cooperation with the companies that own the copyrights to the source texts they appropriate. In contrast, moderators of unofficial websites, of which many were fanfic archives, dedicated to FOX television shows received cease-and-desist letters via certified mail from FOX's legal department in at least two different waves during the Web's early years, in 1995 and 2000.[52]

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[51] Jenkins, *Convergence Culture*, 154.
[52] "Guide to the Simpsons on the Net: The Hunt is On,"

Similar letters went out to game modders, but just as in the case of Lucasfilm's rules for fan

filmmakers, gamer fans have deduced that they are likely to receive C&D letters when they take

fanfic-like approaches (in other words, when they seek to develop the source game's stories or

characters, or fill in narrative gaps), and are less likely to be targeted by FOX when their mods

simply take place in the same universe as the source game.[53] Despite the fact that fan fiction has

not proven to pose a far greater threat to media companies' revenue streams than fan films or

game mods – as Jenkins argues, the threat should be greater coming from the similar-looking

films and mods – media companies treat fan fiction, or appropriations which deepen canonical

characters and/or expand on canonical narratives, as a much more radical challenge to corporate

control than the other forms of remix. The thoroughness with which those same companies have

co-opted fan fiction's strategies for their supplementary and interactive media offerings in the

last few years shows how effectively fanfic-style productions intensify audiences' affective ties

to media texts. Fan fiction's efficacy at increasing consumers' emotional investment, its long

persecution by corporate copyright holders, and its more recent adoption as a style of audience

outreach, are probably all connected: if fanfic writers were not inventing a type of media

interaction that has high value and mass appeal, it would not have been so hated as it has been,

nor so well-mined as it is now being. However, the fact that fan fiction writers, from the years of

'zine publishing through the first years of the Web, received so many injunctions from copyright

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http://www.snpp.com/guides/net_2.html; Jo-Ann Parks, "X-Files, Buffy Fans Protest Fox," *SPACE.com*, 16 June 2000, http://www.space.com/sciencefiction/tv/fanstock_000616.html; and Lynn Burke, "Fox Wants Buffy Sites Slain," *WIRED*, 1 March 2000, http://www.wired.com/techbiz/media/news/2000/03/34563 (accessed 10 December 2007).

[53] "Mod (computer gaming)," Wikipedia, http://en.wikipedia.org/wiki/Mod_(computer_gaming)#Foxed (accessed 10 December 2007).

holders, probably contributed to their collective decision not to try to exploit their genre's value and appeal for personal gain.

SAFETY IN PRIVACY?

I have so far suggested only negative reasons that fanfic authors may have chosen not to try to profit from their work: the association of starting technology companies with millennial American masculinity, and the long-running condemnation, and present-day co-opting, of fanfic by media companies. I now wish to suggest that fanfic writers have also made a positive choice by not using their stories to generate revenue; positive in the sense that they have pursued on a path that has contributed to their pleasure and happiness. This choice has to do with the idea that women benefit greatly from establishing, occupying, and guarding "safe spaces" in order to freely and openly discuss their desires and needs. bell hooks writes in her 1994 book *Outlaw Culture*, "In the early years of contemporary feminist movement, solidarity between women was often equated with the formation of 'safe' spaces where groups of presumably like-minded women could come together, sharing ideas and experiences without fear of silencing or rigorous challenges."[54] Several fan-scholars date fans' decision to keep fan fiction separate from monetary exchange to practices that precede second-wave feminism by decades. Ika Willis, a British academic and fic writers, states in a 2004 article, "Slash writing [a genre of fanfic that focuses on male/male sexual and/or romantic encounters] is probably predominantly female for the same reasons that most low-status, amateur creative activities are," Willis says. "There is a tradition of women's creative work, like quilting, being circulated in informal communities

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[54] hooks, bell, "Censorship from Left and Right," *Outlaw Culture* (New York, Routledge, 1994), 76.

rather than entering the art market." In the same article, Dean Kiley, a media production professor at Australia's Swinburne University, claims that the "comparative lack of commercial pressures and professionalising constrictions" enable female authors to "feel empowered to write in more personal ways."[55]

For generations, women have opted to keep their creative practices non-commodified, and out of economic circulation, in order to preserve the exclusivity of those areas of cultural production. As long as women's creative work is not bought or sold, it remains (so the argument goes) free of public scrutiny and interference. Since men typically rule the public sphere while women rule the private, by keeping their work amateur, women supposedly keep it within female control, and beyond male control. Of course, the efforts to regulate fanfic production by male-dominated media corporations, and the fact that women's writing on the Internet is so easily accessed by a broad public, throw into question any assumption that privacy, female exclusivity, and safety from men's influence are achievable objectives for online fic communities. However, it must be acknowledged that women's arts-and-crafts-related societies have often decided to leave their labor un-commodified with the aim of maintaining their arts and crafts as refuges where they could enact female cultural priorities and proclivities without external (male) censorship. It is possible that fan fiction writers have made a decision similar to that of craftswomen of generations past, with the same utopian hopes for safety and privacy in mind.

But because women have not taken the lead in experimenting with ways to profit from fan fiction, institutions run by men have earned all of the financial profits that have been generated by fanfic. As I discussed earlier in this chapter, the media corporations have learned to

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[55] "Fanfic: is it right to write?" *The Age*, 5 January 2004, http://www.theage.com.au/articles/2004/01/02/1072908900255.html (accessed 10 December 2007).

build online features and activities for their consumers that are patterned after Internet fan

fiction. Over the last few years, since perhaps as early as 2001, former Yahoo! executive Chris

Williams has been trying to get his brainchild, an Internet start-up called FanLib off the ground.

Williams has struck partnerships with HarperCollins, Penguin Books, Showtime Networks,

Simon & Schuster, and Starz Entertainment, and his investors and advisors include, according to

a May 2007 press release, "notable names from Hollywood and Silicon Valley, including film

producer Jon Landau (*Titanic*), high-powered entertainment attorney Jon Moonves, and FanLib

Chairman Anil Singh, former Chief Sales and Marketing Officer of Yahoo!." In the press

release, Williams states that FanLib "celebrates and showcases the passion and creativity of the

most avid entertainment fans and brings them closer to the players behind their favorite TV

series, movies and books. Whether it's between sequels or after the series ends, FanLib.com is

where the stories always continue." The release also announces that "While fan fiction has

existed for decades, FanLib is launching a new era by packaging it for mainstream audiences and

introducing features including: Official Fan Events – FanLib works with a growing list of

entertainment partners such as HarperCollins, Showtime Networks, and MSN to produce

collaborative, online storytelling events. Sharing and Content Syndication – Similar to online

video sharing sites, FanLib.com members can extend the audience for their fanfics by embedding

customized promos in personal web pages, blogs, and e-mails." The title of the press release is,

"FanLib Brings Fan Fiction into the Mainstream, Launches New Website with Major Media and

Publishing Partners."[56]

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[56] Todd Beck and Steve Spignese, Beck Media & Marketing (for FanLib), "FanLib Brings Fan Fiction into the Mainstream, Launches New Website with Major Media and Publishing Partners" (press release), 10 May 2007,

The fanfic community's reaction to FanLib has so far been overwhelmingly negative. Fans immediately suspected the site of attempting to make money off of fans' work, and expressed deep mistrust of the organization's motives based on FanLib's Terms of Service, which assign all copyrights to stories posted to the site to the site's owners, while simultaneously pushing all legal liability (should questions of copyright infringement arise) onto the fic writers who post their stories. Most of all, fans have objected to FanLib's attitude towards fandom and fic writers.[57] FanLib's marketing brochure to its media partners, such as Showtime and CBS, reassures the corporations that FanLib will help them control the production and circulation of fanfic based on their television programs. The brochure states that FanLib is a new entertainment marketing service that operates like "a coloring book, players must 'stay within the lines.'" On FanLib, the brochure promises, fans will "collaborate democratically in a fun online game that *you* [the media companies] control" (emphasis in the original). FanLib promises its partners that they will have "[f]ull monitoring & management of submissions & players."[58]

At last, the growth of FanLib, a professional firm clearly designed to turn fan fiction into a profitable business model, has pushed fans to consider the benefits of taking fanfic mainstream – on their own terms, not according to the structures set up by yet another male-run media corporation. Of the dozens of articles posted to the fan-crit site metafandom on FanLib, none gave FanLib positive reviews, but, according to one summary by a fan called icarusancalion, "a

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http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20070510005297&newsLang=en (accessed 10 December 2007).

[57] For just a few of the many fan discussions that are highly critical of FanLib, see: icarusancalion, "Article summing up FanLib," http://icarusancalion.livejournal.com/626928.html?format=light; kitesareevil, "Fanlib," http://kitesareevil.livejournal.com/257387.html?format=light; and the archive of FanLib-related threads on the metafandom community at http://del.icio.us/metafandom/fanlib (accessed 10 December 2007).
[58] Brochure cited in icarusancalion, "Article summing up FanLib."

few suggested FanLib might force the court case that would decide fanfiction's legal standing once and for all." I suggested earlier that a court case, or several, specifically dealing with the question of whether fanfic is copyright infringement or fair use might very well benefit fic writers, not copyright holders, hence the upside of "forcing" such a case. Another metafandom commentator posted, "While I don't mind the increasing public light being brought to bear on fanfiction, I do strongly object to people who aren't fandom making money off it."[59] The implication of this last statement, in which I find much to hope for, is that perhaps female fan fiction writers, who have so long refused to mine their own potential to earn revenues from their cultural productions, are beginning to consider that it would be acceptable for people who *are* "fandom" to make money off of fanfic, and that an "increasing public light being brought to bear on fanfiction" could be a positive development for online fic communities, if the writers and readers who continues to advance the art of fic writing lead the transition to the media mainstream.

As an academic who specializes in the study of digital culture, particularly forms of digital remix such as fan fiction, and as a former business executive with over seven years of experience working for and managing start-up companies, I am convinced that there are a number of models that fanfic writers could pilot that might effectively commodify fanfic, provide a means of income (however nominal) to its producers, and preserve the power of female fan authors over the genre that they invented and evolved. For example, fic writers might explore pay-from-above models, such as soliciting networks' sponsorship or selling much more ad space on their sites. They could explore pay-from-below models, in which readers pay small

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[59] icarusancalion, "Article summing up Fanlib."

amounts directly to authors (or to archive sites in charge of dispensing payments to authors) for the stories they read (readers could determine the amount they pay – the National Public Radio/Radiohead "Rainbows" model, or writers could choose to charge a low price per fic – the doujinshi model). Readers could also pay a reasonable subscription fee for access to fic "channels" or "networks," in which they were guaranteed a certain number of stories (perhaps from certain selected authors) per week or per month.

Fic anthologies compiled by skilled and trusted moderators (editors) could be made available for download at a lump-sum price (similar to online book publishing). Communities could become pay-to-post, in which fic authors would pay in order to join communities and have the right to publish their stories online, or communities could generate ad revenue based on the number of hits they receive, in which case they would have incentive to pay highly skilled and popular writers to post (or even hire them as staff writers), in order to drive up their eyeball traffic. Individual readers could pay writers to have their specific requests (narrative fantasies) fulfilled by fic writers. Site moderators could facilitate a request-fulfillment matching system. Or authors could set their prices for being "contracted" by writers to write specific fic, a sort of story-on-demand system. Authors could make some chapters of longer works available for free, and charge readers for downloading the later chapters. An option I recommend highly is fic writers establishing a licensing fee structure that incorporates a central tenet of old Soviet copyright laws. U.S.S.R. law made provisions for situations in which a copyrighted work could be used without the author's consent, but with the payment of royalties to the author.[60] In other

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[60] "Principles of Civil Legislation of the Soviet Union and the Union Republics, Sections 96-106, Part Four: Copyright," 1961, http://www.marxists.org/history/ussr/government/law/1961/civil-legislation/ch04.htm (accessed 10 December 2007).

words, fic writers could attempt to get a court decision or even legislation passed which would permit them to pay licensing fees to copyright holders of source texts, thereby rendering their appropriations of the source texts legal and giving them the right to earn revenue from selling their appropriations, without asking for the copyright holders to approve of their appropriations. This would circumvent many of the psychological and practical obstacles that stand in the way of fic writers seeking compensation for their labor. Writers would not have to fear the original author's disapproval, or the chance that the original author might decide that simply because s/he found a piece of fan fiction distasteful, s/he could sue the fic author for copyright infringement. Writers would also not have to invest massive amounts of time and money into negotiating licensing fees with each copyright holder individually and separately from every other copyright holder. Instead, a licensing fee schedule based on "fair pay" could be drawn up, according to which fic writers would send a certain amount to any copyright holder whose work they used, without needing to attain authorization to use it.

Equal pay for equal work has historically been an important tenet of feminist activism. In my experiences as an online fan fiction reader and writer, I have often read posts by women who explain that they cannot finish stories they began, or must cease writing fiction for some period of time ranging from a few hours to forever, due to competing demands on their time from the professional and personal sectors. Unpaid, free fan fiction is a hobby that women can put down anytime they wish, and every time they must, like knitting (in cases where the knit wares do not go to market). But women who have created and expanded Internet fan fiction have knit together a uniquely powerful cultural practice that encourages media consumers to forge deeper loyalties and more complex connections with media products, and this practice is currently

making a great deal of traditional male-dominated media organizations significant amounts of money. Fan fiction authors can and must cease their strategy of economic self-censorship, and actively guide their genre of remix toward mainstream visibility and profitability, in the next few years, before media institutions so completely take over women authors' invention that the inventors never receive worthy pay for the work they have done, and continue to do, to make media meaningful.

CHAPTER 6
Conclusion: License to Remix

In the preceding chapters, I have located the origins of digital remix culture in communities that have historically been marginalized by the mainstream media industries, arguing that digital appropriation began in the mid-1980s, when the first relatively affordable digital samplers hit the consumer market, and inner-city black DJs began to experiment and innovate new forms of composition using these early digital devices. More than twenty years after a handful of DJs in Queens and the Bronx began experimenting with ways to cut, mix, alter, and combine sound bits using samplers' computer memory bytes, it has become common practice for millions of computer users around the globe to use software such as Photoshop, iMovie, and Garage Band as tools for manipulating popular music, television shows, still photographs, video games, movies, and animation, in order to create their own revisions, re-writings, and new versions of already-existing mass media.

By tracing the beginnings of contemporary remix culture back to black urban culture in the mid-eighties, we gain more than an accurate understanding of digital history. We also can clearly see that the legal and economic censorship to which digital sampling was subjected had its roots in race- and class-based bias, and that the current norms, or unspoken rules, of remix culture, foremost of which is the understanding that no one can sell a remix production for money without risking a lawsuit. The presumption that, if a digital appropriation artists publishes her or his work in any fashion, usually via the Internet, that she or he must charge nothing for it. "Everyone knows" that to make money off of remix production is illegal, that it violates copyright. But how did "everyone" come to "know" this, and why should such an

assumption, and the court ruling on which this assumption is technically based, stand today? This concluding chapter will make a case for the necessity of the U.S. legal system, media corporations, and media consumers/remix producers to work to change the current consensus around the mandatory non-profitability of digital appropriation.

To return to the beginnings of remix in mid-eighties hip-hop: It would not be accurate to say that remix today does not make money for its makers because it has never made money for its makers. Digital sampling has been an intrinsic part of hip-hop since its start, and as we can see from the massive sales and cultural influence that hip-hop generates in 2008, sampling has made plenty of its practitioners both rich and famous over the last twenty years. However, sampling in the late 1980s, in hip-hop's earliest years, was quite different than it is today. When digitally sampled sounds began to be featured on major music hits, they were not immediately judged to be copyright infringement. Sampling occupied a legally ambiguous space for the first five years of its existence, from 1986 through 1991. Many copyright holders whose works were sampled without permission sued sampling artists during this five-year period, and none led to a court ruling being handed down. All sampling-related copyright lawsuits filed in this period were settled out-of-court, so in sampling's early years, no legal precedent was set as to whether sampling constituted copyright infringement. Most hip-hop acts did not request permission from, or offer payment to, the owners of the rights to the songs they sampled, and many hip-hop artists included dozens of samples on individual tracks, or hundreds of samples on LPs. When a copyright holder filed a suit, hip-hop artists settled, sometimes paying very little, and sometimes paying quite a lot for the music they used. In other words, there was no legal standardization regarding whether a sampling artist should pay a copyright holder for the use of his or her music,

and if sampling rights did warrant remuneration, how much a copyright holder should charge, or how much a sampling artist should offer to pay. There was no legal standardization, that is, until 1991.

In December, 1991, a New York District Court judge, Kevin Duffy, ruled in the case of *Grand Upright vs. Warner Bros. Records*, which concerned the question of rapper Biz Markie sampling a few bars from Gilbert O'Sullivan's 1970s hit, "Alone Again, Naturally." Duffy defined sampling as uncategorically, absolutely, unquestionably equivalent to theft. With the *Grand Upright* ruling, the landscape of digital appropriation changed radically and abruptly. That ruling instituted standard guidelines for sampling, and all forms of digital appropriation that have evolved from computer-based cut-and-paste technology, and these guidelines have persisted to the present day. The guidelines put in place by the 1991 ruling are: 1) all unlicensed sampling is stealing, and artists who want to use samples in their work must obtain a license from the source work's copyright owners; 2) the right to determine how much to charge for a sample lies entirely with the copyright holder. In other words, there is no floor and, crucially, no ceiling, to what a copyright holder can charge an appropriative artist for the use of some portion of their work. In some cases since the 1991 *Grand Upright* ruling, copyright holders have charged thousands of dollars per every record issued that makes use of a few seconds, notes, or drumbeats from their songs.

Since 1991, hip-hop has musically become a shadow of its younger self. Siva Vaidhyanathan argues, "The [*Grand Upright*] case did not kill [hip-hop] music. It just changed it broadly and deeply. Rap music since 1991 has been marked by a severe decrease in the amount of sampling....What sampling did occur in the late 1990s was nontransgressive,

nonthreatening, and too often clumsy and obvious....The 1991 ruling removed from rap music a whole level of communication and meaning that once played a part in the audience's reception to it. The Biz Markie case 'stole the soul' from rap music."[1]

Because sampling-based hip-hop had already built a large, loyal, paying audience prior to *Grand Upright*, the genre was able to continue to be profitable, even though much-diminished artistically, after 1991. However, every other genre of digital remix that developed later than sampling, including viral videos and most online fan productions have never built up a base of paying customers. Various media theorists, including Tim O'Reilly and Henry Jenkins, have termed our current media landscape "participatory culture," "Web 2.0," and "convergence culture," referring to wide-scale engagement by individual users with digital tools and platforms and social-networking sites to blur the line between content consumption and content production. The bulk of Web 2.0 user-generated content, however, is the result of unpaid labor, which (when the content achieves popularity) yields financial benefits primarily for the hosting websites that accrue advertising revenues based on hits per page, and for major media companies whose products get free advertising via widely circulated remixes. Most of participatory culture's creators, who are fans and audiences playing around with existing content and adding their own "spin" or "take" on it, do not participate in the profits of their work.

Why the vast majority of remix artists don't seek compensation for their labor can be traced, in large part, to the 1991 ruling. Judge Duffy's decision against unlicensed sampling could have been regarded as controversial within the music and other media industries; instead, it became common sense. However, the *Grand Upright* decision was far from inevitable.

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[1] Vaidhyanathan, *Copyrights and Copywrongs*, 143-144.

Between 1986 and 1991, a number of legal scholars published papers arguing that the music

industry and digital sampling artists needed to strike an accord that would balance out the needs

of the owners of prior, or source works, with the needs of emerging artists. In other words, if

one frames the struggle between copyright holders and sampling artists as a battle between an

older generation and a newer generation of creators, the older generation wanting payment and

recognition for their work, and the newer generation desiring the freedom to use older work as

the basis for developing new forms of artistic expression, then we can see that, in the late

eighties, a number of legal scholars proposed schema that would protect the rights of older

creations' owners to make money off of the use of their art, and simultaneously would protect

the rights of newer creators to innovate and develop their brand-new art form without having to

pay prohibitively expensive licensing fees to copyright holders. Vaidhyanathan says, "The

turmoil that rap has created in copyright law is more complex than just a clash of stereotypically

opposed cultures. The tension in the law...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."[2]

Until Judge Duffy settled the conflict, apparently once and for all, in favor of the old – in effect,

giving the established powers in the music and media business the right to suffocate efforts by

the new digital vanguard to remix their works for any financial benefit – Vaidhyanathan states,

"on any given day, an artist may have been ripped off by an overpriced licensing fee, or a

publishing company may have gotten burned by charging too little for a sample that helped

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[2] Vaidhyanathan, *Copyrights and Copywrongs*, 133.

produce a top hit. That's why several legal scholars in the late 1980s and early 1990s tried to

formulate licensing systems based on the use, length, and type of sample."[3]

Vaidhyanathan does not name these legal scholars, nor does he go into any detail about

the licensing proposals published during the five years that sampling existed under a cloud of

legal ambiguity, but I am fascinated by the fact that for a brief period, before U.S. courts swiftly

decided the law's antagonism to sampling (and, subsequently, all forms of digital remix), there

was a moment when a "Fair Pay" structure for digital remix was being advocated by multiple

voices in the legal community. I have identified eight published articles that appeared in law

journals between 1989 and 1992 that recommend Fair Pay guidelines for sampling: one in the

High Technology Law Journal (which is now called *The Berkeley Technology Law Journal*) in

1989[4]; one in the *Loyola of Los Angeles Entertainment Law Review* in 1991[5]; one in the *Harvard

Law Review* in January 1992[6] (published just one month after the *Grand Upright* decision, and

obviously composed before that ruling was handed down); and a series of four articles that

appeared in the *New York Law Journal* in 1989[7], all by the same pair of authors. Here are two

key themes that all of the Fair Pay proposals have in common:

- A concern for balancing the interests of copyright holders with the interests of digital

  sampling artists, which takes for granted that sampling artists have the right to develop

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[3] Vaidhyanathan, *Copyrights and Copywrongs*, 140.

[4] McGraw, Molly. "Sound Sampling Protection and Infringement in Today's Music Industry." *High Technology Law Journal*, Vol. 4 (1989): 147-169.

[5] "Current and Suggested Business Practices for the Licensing of Digital Samples." *Loyola Entertainment Law Review*, Vol. 11 (1991): 479-503.

[6] *Harvard Law Review*, Vol. 105, No. 3 (January 1992): 726-744.

[7] Gordon, Steven R. and Charles J. Sanders, "The Rap on Sampling: Theft, Innovation, or What?" *New York Law Journal*, 28 April 28 and 5, 12 and 19 May 1989. Reprinted in *1989 Entertainment, Publishing and the Arts Handbook*, ed. by Robert Thorne and John David Viera (New York: Clark Boardman Company, Ltd., 1989).

their new art, which has been made possible by a new technology. The authors firmly

assert that there is a "need to protect [both] the original works and the value of

sampling....Cooperation between samplers and copyright owners based on mutual respect

and financial interest is the answer" (Gordon and Sanders, *New York Law Journal*). "At

a policy level, the balance is a struggle between the right of artists to control their own

work and that of unencumbering the creative opportunities inherent in a new technology"

(Mc Graw, *High Technology Law Journal*). "Private agreements are unpredictable and

probably unfair in some instances – either to the sampled artist who obtains less or to the

sampling artist who pays more than he might have....A requirement that sampling artists

pay for the use of samples is fair...because [it] ensures both that new artists are not

'stealing' and that artists will not be discouraged from producing new songs" (*Harvard*

Law Review). "The ad hoc approach within the music industry...has unnecessarily

inhibited the growth of a process of creating music that has many artistic and economic

benefits....The author hopes that this effort...will...provide both licensors and

licensees...with common guidelines and language to use when negotiating the price of the

license" (*Loyola Entertainment Law Journal*). I will note again that the "ad hoc" system

of determining licensing fees not only was not remedied by the *Grand Upright* judgment,

it was awarded an infinite lifespan; the current method for determining how much a

remix artist must pay in order to obtain a license to use a copyrighted work is completely

ad hoc, that is, determined on a case-by-case basis solely by the copyright holding

individual or corporation.

- <u>A licensing fee scheduling that assigns different prices for different types of sampling, based on both quantitative and qualitative measures</u>. The *High Technology* article calls for "an appropriate test for establishing substantial similarity between" between the copied work and the copying work. The *Loyola* article states that the "specific qualitative aspect that courts tend to focus on in determining whether an appropriation constitutes copyright infringement is the commercial value of the portion appropriated"; for example, the chorus of a song is often "valuable because it is distinctive and memorable." The *Harvard* piece proposes four criteria for ascertaining the monetary value of a sample: "the popularity of the prior work as a whole, the importance of the sampled portion to the prior work, the duration of the sample, and the importance of the sample to the new work." The maximum statutory licensing fee, the *Harvard* article also suggests, should be the equivalent of the fee required for a cover song (in 1991, this was 6.25 cents per phonorecord distributed). According to current interpretations of copyright law, no nuances between types of digital appropriation exist. In the contemporary legal climate, built on the foundation of the 1991 *Grand Upright* decision, *all* artistic appropriation is piracy, theft, and infringement, no matter what portions of a prior work are copied or how those copied portions figure into the new work (in fact, the 2004 ruling in *Bridgeport vs. Dimension Films* stated that a two-second guitar chord, which was lifted from a previously existing song and altered to be all-but-unrecognizable, constituted copyright infringement). The only safe "loophole" for remixers is the one of zero financial gain: "If you remix, it is illegal, but if you don't make any money, no one will sue you" is the widespread common understanding of copyright law.

What undergirds these arguments for balance between interests, for objective methods of assessing licensing fees, for capping the amount that can be charged by a copyright holder of a remix artist, is a strong argument for the aesthetics of digital appropriation. The legal scholars who published these Fair Pay proposals between 1989 and 1992 perceived in the burgeoning new music form, digital sampling, much aesthetic value. The *Harvard* piece states, "copying less than an entire song requires the new artist to have contributed original creative elements of his own, including the choice, alteration and arrangement of samples within the new environment." This belief in the ability (or even requirement) of an artistic appropriator to demonstrate some uniqueness and originality and, for lack of a better word, "artiness" in his or her use of a pre-existing material, artifact, or text was, and continues to be, held in high-art circles. Picasso's incorporation of African mask-making and sculptural techniques in his Cubist works, the re-working of myth in high modernist classics such as Eliot's *Waste Land* and Joyce's *Ulysses*, the critiques and parodies of mass consumerism offered by Andy Warhol's Brillo boxes and Campbell soup can paintings, the postcolonial counter-discourses of Jean Rhys's *Wide Sargasso Sea* and J.M. Coetzee's *Foe*, as well as the pastiche and collage methods of making postmodern art, have generally been deemed valid artistic practices by art historians, literary critics, and other gatekeepers of highbrow culture. However, for the most part, hip-hop, fan films, fan fiction, viral videos, mash-ups, game mods, and other forms of digital remix today are utterly devoid of the cultural cachet, artistic legitimacy, and aesthetic value that has commonly been accorded to pre- or non-digital appropriations. Again, what is so fascinating about the pre-*Grand Upright* Fair Pay proposals is that they unanimously recognize that digital sampling is not merely

copying or "ripping off" a prior work, but offers opportunities for creative selection, assemblage, alteration, and commentary that amounts to a new mode of artmaking. I think that the minority origins of digital remix are a significant reason that this form of cultural production is not regarded as an art form. But I also think that the fact that digital remix is not allowed to make money for its producers has inhibited the evolution of this type of production into an art form. One can argue that what heights of intricate layering sampling did manage to achieve before 1991 were achieved because hip-hop groups saw a financial benefit in pushing the practice of sampling to its fullest possible expression, to its greatest degree of complexity. Audiences liked the tricky, unexpected play of known signifiers that pre-*Grand Upright* sampling offered, and they were willing to pay for it. What would other forms of digital remix be today if, over the last few years, its most talented and dedicated practitioners had been allowed to aim for substantial revenues and profits, perhaps to the point of being able to make a decent living from their remix productions, maybe even to the point that they were able to invest substantial amounts of money into the types of remix that they created, yielding ever more refined and sophisticated iterations of this still-relatively-new form? Where are the T.S. Eliots, the James Joyces, Andy Warhols, the Jean Rhyses, the Public Enemys of Web 2.0 digital remix? Has the current interpretation of copyright law kept our potential artistic geniuses poor anonymous hobbyists, with no resources – either in time or money – to invest in advancing this new media culture? What if a future court ruling on digital appropriation mandated that the media industries and consumer advocacy groups agree on a Fair Pay system, whereby both copyright holders and appropriators could benefit from a less restricted development of digital remix? We know how much excitement and emotional affect can be generated by the simplest, lowest-quality YouTube mash-up vids.

Imagine a Fair Pay structure that would invite audiences to fund – perhaps via subscription fees to certain online "channels," or perhaps merely by watching advertising that prefaces their favorite productions – the creation of richest, highest-quality remixes that the combination of digital technologies and human imagination could allow.

Today, we live in a time of what Gramscians would call an extraordinarily strong cultural consensus around issues of copyright. Hardly anyone thinks to contest the idea that copyright holders have the absolute power to determine whether their works can be used in artistic appropriations, and if so, how much to charge. This lack of questioning is currently characteristic of American cultural consumers and producers (and remix artists are both), even though the *Grand Upright* ruling was handed down only 17 years ago; even though digital remix has the potential for great aesthetic value and might be considered fair use, just as other forms of appropriation have been deemed to be fair use before it; even though most new media forms, including film, radio, and cable television, were founded on piracy[8]; even though the U.S. government has set the terms for many types of media licensing, including what it costs to record a cover version of an already-recorded song, what radio stations have to pay recording artists vs. composers, and what cable TV companies have to pay for the right to broadcast content made by other TV companies and film studios. I have raised the ghosts of the Fair Pay articles published between 1989 and 1991 partly to encourage a haunting, *our* haunting, by the possibilities that existed in our not-too-distant past for a balance to be achieved between copyright owners and digital remix artists, and partly because those ghosts are the dim traces of a moment in our culture's history before our copyright consensus had been established and sedimented. In the

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[8] See Lawrence Lessig, *Free Culture*, Chapter 4: "Piracy."

end, my raising up of the Fair Pay arguments is not so much a legal argument – although I would greatly enjoy seeing a future judge reverse Judge Duffy's 1991 decision – as much as it is a cultural studies critique. John Storey says (reading Gramsci), that in a hegemonic society, "the interests of one powerful section of society have been 'universalized' as the interests of the society as a whole. The situation seems perfectly 'natural'; virtually beyond serious contention."[9] It is useful, I believe, to resuscitate the Fair Pay proposals of nearly two decades ago as tangible proof that the consensus around copyright, which severely constrains the circulation and use of intellectual property in our society, was not always embedded in our nation's consciousness.

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[9] Storey, John. *Cultural Theory and Popular Culture: A Reader* (Athens, GA: University of Georgia Press, 1998), 64.

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