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# Legal Writing, the Remix: Plagiarism and Hip Hop Ethics

by Kim D. Chanbonpin\*

## I. PRELUDE

I begin this Article with a necessary caveat. Although I place hip hop music and culture at the center of my discussion about plagiarism and legal writing pedagogy, and my aim here is to uncover ways in which hip hop can be used as a teaching tool, I cannot claim to be a hip hop head.<sup>1</sup> A hip hop “head” is a devotee of the music, an acolyte of its discourse, and, oftentimes, an evangelist spreading the messages contained therein.<sup>2</sup> One head, the MC<sup>3</sup> (or emcee) KRS-One,<sup>4</sup> uses religious

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In September 2009, Stetson University College of Law hosted the Southeast Regional Legal Writing Conference, “Remixing the Classics.” The conference theme provided part of the inspiration for this Article, and a farewell mixtape from my 2007 Legal Writing and Research class from the Loyola University New Orleans College of Law furnished the rest. Linda L. Berger, Twinette L. Johnson, and Debra M. Schneider offered critique and encouragement after reading an early draft of this Article. Additional credit goes to Daryl (DJ D-Reel) Dellera, Ismail Nasr, Goldie (DJ Goldick) Gareza, Ted Pickett, Nicholas Espiritu, Robert Jonathan (DJ PantyROBber) del Rosario, Joey Bernal, Warren (Focus 1) Fu, Darryl (Blue Boy) Durham—true hip-hop heads—for suggesting many of the examples cited in this Article. Jeffrey A. Arnold, Anne Schmidt, and Anthony Wilson supplied helpful research assistance and support. Finally, Rhodora V. Derpo schooled me in Knowledge of Self thirteen years ago—a continuing lesson for which I will always be grateful.

1. But I am certainly a self-identified fan and enthusiast. Cf. MARC LAMONT HILL, BEATS, RHYMES, AND CLASSROOM LIFE: HIP-HOP PEDAGOGY AND THE POLITICS OF IDENTITY 32-33 (2009) (describing the way high-school-aged hip hop fans asserted themselves as experts on “real”—as opposed to commercial or mainstream—hip hop).

2. A hip hop head is “not someone who [merely] listens and copies the music, lingo, fashion, and dance. It is someone who knows and appreciates its history, going back to the Negro spirituals of the plantation.” Yvonne Bynoe, *Getting Real about Global Hip Hop*, 3

discourse to describe hip hop culture, naming his community organization, The Temple of Hip Hop.<sup>5</sup> In this sense, I count myself as one of the faithful, but if hip hop is a temple, I confess that I am not a regular attendee. As a result, the cases that I cite below are drawn from a well of limited knowledge. I encourage readers who are dissatisfied with these limits to “dig in the crates” to summon their own favorite examples.

## II. INTRODUCTION

In this Article, I focus on hip hop music<sup>6</sup> and culture as an access point to teach first-year law students about the academic and professional pitfalls of plagiarism. Hip hop provides a good model for comparison because most entering students are immersed in a popular culture that is saturated with allusions to hip hop.<sup>7</sup> As a point of reference for incoming law students, hip hop possesses a valuable currency as it represents something real, experienced, and relatable.

Significant parallels exist between the cultures of United States legal writing and hip hop, although attempting direct analogies would be absurd. Chief among these similarities is the reliance of both cultures on an archive of knowledge, borrowing from which authors or artists build credibility and authority. Whether it is from case law or musical recordings, the necessary dependence on a finite store of information means that the past work of others will be frequently incorporated into new work. The ethical and professional danger inherent in this type of production is that one who borrows too freely from the past may be merely copying instead of interpreting or innovating. In the academic

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GEO. J. INT'L AFF. 77, 78 (2002) (quoting music journalist, Kevin Powell).

3. “MC” stands for “mic controller” or “master of ceremonies.” For Rakim, “MC means move the crowd.” ERIC B. & RAKIM, *Eric B. is President, on PAID IN FULL* (4th & B'Way/Island 1987), lyrics available at <http://www.ohhla.com/anonymous/rakim/paid/ebispres.rkm.txt>.

4. KRS-One's name means “Knowledge Reigns Supreme Over Nearly Everyone.” ENCYCLOPEDIA OF THE AFRICAN DIASPORA: ORIGINS, EXPERIENCES, AND CULTURES 611 (Carol Boyce Davies ed., ABC-CLIO 2008).

5. EMMETT GEORGE PRICE, HIP HOP CULTURE 223-24 (ABC-CLIO 2006); see also KRS-ONE, THE GOSPEL OF HIP-HOP: THE FIRST INSTRUMENT (2009).

6. All lyrics have been verified by the Author using THE ORIGINAL HIP-HOP LYRICS ARCHIVE, <http://www.ohhla.com> (last visited Oct. 25, 2011). For further details on any lyrics referenced in this Article, see <http://www.ohhla.com>.

7. See BAKARI KITWANA, WHY WHITE KIDS LOVE HIP-HOP: WANKSTAS, WIGGERS, WANNABES, AND THE NEW REALITY OF RACE IN AMERICA 39-44 (2005).

world, this is plagiarism.<sup>8</sup> Members of the hip hop community call this “biting.”<sup>9</sup> In neither culture is this mode of production celebrated.

My goals for this project are two-fold. First, as a professor of legal writing, I want to ameliorate the problem of plagiarism that I have seen growing worse each year. Second, as a scholar, I would like to contribute to the growing body of literature on hip hop and the law.<sup>10</sup> This

8. See, e.g., RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 22-23 (2007).

9. ADAM BRADLEY, *BOOK OF RHYMES: THE POETICS OF HIP HOP* 212 (2009). “Biting, or co-opting another person’s style or even specific lines, qualifies as a high crime in hip hop’s code of ethics and aesthetics.” *Id.* at 147; see also JOSEPH G. SCHLOSS, *MAKING BEATS: THE ART OF SAMPLE-BASED HIP HOP* 108-09 (2004) (discussing hip hop’s “no biting” rule and the adjudicatory process to which those accused might be subject).

10. See, e.g., SpearIt, *Raza Islamica: Prisons, Hip Hop & Converting Converts*, BERKELEY LA RAZA L.J. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1652121](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652121); andré douglas pond cummings, *A Furious Kinship: Critical Race Theory and the Hip-Hop Nation*, 48 U. LOUISVILLE L. REV. 499 (2010); David Lacy, *Represent: Hip Hop Culture, the NBA Dress Code and Employment Discrimination* (Oct. 12, 2010) (unpublished research paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1691161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691161); Camille A. Nelson, *Lyrical Assault: Dancehall Versus the Cultural Imperialism of the North-West*, 17 S. CAL. INTERDISC. L.J. 231 (2008); Akilah N. Folami, *From Habermas to “Get Rich or Die Trying”: Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235 (2007); Imani Perry, *Let Me Holler at You: African-American Culture, Postmodern Feminism, and Revisiting the Law of Sexual Harassment*, 8 GEO. J. GENDER & L. 111 (2007).

Law professors are regular contributors to the Hip Hop Law blog. See HIPHOPLAW.COM, <http://hiphoplaw.blogspot.com/> (last visited Jan. 20, 2012). Academic conferences frequently have panels devoted to the intersection of hip hop and the law. See, e.g., Hip Hop and the Law, Panel Presentation at the Association for the Study of Law, Culture & the Humanities 13th Annual Conference, Brown University (Mar. 19, 2010); The Hip Hop Movement at the Intersection of Race, Class and Culture: Hip Hop Music’s Effect on Life, Liberty and the Pursuit of Happiness, Panel Presentation at the LatCrit Legal Scholarship Conference, American University Washington College of Law (Oct. 2, 2009). In 2009, West Virginia University College of Law hosted an entire conference on the topic. Rapper Talib Kweli and Professor Cornel West were keynote speakers at the event. Symposium, The Evolution of Street Knowledge: Hip Hop’s Influence on Law and Culture, West Virginia College of Law (Feb. 12-13, 2009), available at <http://lawmediasite.wvu.edu/mediasite/catalog>.

The two substantive areas that seem to generate the most academic literature about hip hop and the law are property and criminal law. For examples in property law, see Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843 (2011); Megan M. Carpenter, *Space Age Love Song: The Mix Tape in a Digital Universe*, 11 NEVADA L.J. 44 (2010); Horace E. Anderson, Jr., “Criminal Minded?": *Mixtape DJs, The Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111 (2008); Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007); Andre L. Smith, *Other People’s Property: Hip-Hop’s Inherent Clashes with Property Laws and its Ascendance as Global Counter Culture*, 7 VA. SPORTS & ENT. L.J. 59 (2007); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop:*

Article marks the beginning of my attempt to theorize a hip hop ethic and develop its application to the teaching, the academic study, and perhaps eventually, the reform of the law.

In Part II, I set out by providing preliminary definitions for the terminology used in this Article. I describe the key term, “plagiarism,” and identify three types of the offense that occur frequently in the legal writing classroom. In doing so, I also provide cases demonstrating that plagiarism in the academic setting is not without adverse consequences in law practice. Next, I assert that hip hop music is based in a tradition of borrowing from prior works. The custom of borrowing, as in the use of samples and the creation of mixtapes, is not completely unrestricted, however. Hip hop maintains an internal system of regulation, guided by the principle of “no biting.”

Part III is a comparative analysis of the shared and divergent values of the legal writing and hip hop cultures. Social constructivist composition theorists frame the writing process in terms of a writer’s relationship to language using groups or “discourse communities.”<sup>11</sup> As a discrete discourse community, hip hop incorporates a citation system that is certainly distinct from, but that is also comparable to, the system of citation that lawyers use. Drawing on the work of social constructivists, I argue here that by studying hip hop as a comparative citation system, professors can facilitate a law student’s acculturation to an insider’s position in legal writing and also help students avoid the pitfalls of plagiarism.

Part III also aims to reconcile the two seemingly oppositional value systems of hip hop and legal writing. I suggest that the objectives of good hip hop music and good legal writing are similar. In both forms of production original thought and innovative analysis are celebrated and rewarded. Consumers of these products value an active (versus passive) exchange between original formats and remixes. Part IV concludes.

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*Musical Borrowing, Copyright and Cultural Content*, 84 N.C. L. REV. 547 (2006).

For examples in criminal law see Teri A. McMurtry-Chubb, *Kick, Push, Coast: Teaching the Implications of Hip-Hop as Evidence in Criminal Proceedings*, in HIP-HOP(E): THE CULTURAL PRACTICE AND CRITICAL PEDAGOGY OF INTERNATIONAL HIP-HOP (forthcoming); PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009); andré douglas pond cummings, *Thug Life: Hip Hop’s Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515 (2010); Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004).

11. See Debra M. Schneider, *Refashioning Legal Pedagogy After the Carnegie Report: Something Borrowed, Something New* 50 (Sept. 2009) (unpublished manuscript), available at [http://works.bepress.com/debra\\_schneider/1](http://works.bepress.com/debra_schneider/1).

### III. LEGAL WRITING VS. HIP HOP

This Part defines what is meant by plagiarism, in both the academic and law practice settings. It also provides examples of three different types of plagiarism: (1) plagiarism outright, (2) failure to properly attribute source materials, and (3) cut-and-paste plagiarism. These types of plagiarism are disfavored because the written work of scholars and attorneys is judged on the writer's ability to demonstrate knowledge about the relevant body of law. It is impossible to evaluate the strength of a legal memorandum or trial brief if it lacks citations to the underlying sources of law. It is also unethical to present the ideas of another as if they were your own.

Casual observers might view the production of hip hop mixtapes as comparable to cut-and-paste plagiarism. Superficially, amateur mixtapes involve analogous mechanics—taking a variety of source materials and rearranging them. Yet a more careful study of hip hop music production reveals that borrowing is only one step in the process of transforming prior works into new and original artist statements. At times, artists tread too closely to the line of simply copying prior works, but hip hop's admonition against biting is a powerful and effective force in regulating hip hop plagiarists.

#### A. *The Legal Writing Classroom: Plagiarism in Context*

Most law schools in the United States have a published plagiarism policy that is distributed to each student during orientation.<sup>12</sup> At both of the institutions where I have taught,<sup>13</sup> first-year students are required to read the plagiarism policy and sign a statement acknowledging that they have read and understood it and will abide by its restrictions or face serious consequences, including reprimand, suspension, and even dismissal.<sup>14</sup> Despite these harsh sanctions, inevitably

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12. See *Plagiarism Resources*, LEGAL WRITING INSTITUTE, <http://wiki.lwionline.org/index.php/Plagiarism> (last visited Oct. 25, 2011).

13. Westerfield Fellow, Loyola University New Orleans, College of Law (2006-08) and Assistant Professor, The John Marshall Law School (John Marshall or JMLS) (2008-present).

14. At John Marshall, the section on plagiarism in the Student Handbook provides: Plagiarism is an extremely serious offense that may result in disciplinary action.

There are two major types of plagiarism:

1. Failure to cite the source of an idea; and
2. Failure to use quotation marks around a direct quote.

Use of an idea. If you use the idea (or an organization) of another author, you must attribute that idea to the other author. Merely paraphrasing the other author's words is not sufficient. You must also cite to the other source.

one or more of my students violates the policy each semester by plagiarizing some portion or portions of their writing assignments.

Unlike other academic transgressions, plagiarism is often treated as a strict liability offense.<sup>15</sup> This means that a student can be found in violation of the prohibition against plagiarism even without having intended to cheat. Except in the case of the outright theft of another person's work, probably very few law students intend to plagiarize, but instead simply do not understand the rules governing the production of their academic work.<sup>16</sup> Regardless of intent, however, if a student in fact appropriates another author's work without proper attribution, she can be subject to varying degrees of punishment.

In law schools, various mechanisms for policing and enforcing plagiarism policies exist. These mechanisms are not uniform in all institutions, but a plagiarism case typically begins when a professor suspects that a student has plagiarized an assignment or an exam answer. At this stage, the professor has a number of options in addressing the issue. She can meet with the student to ask for an explanation. She can give the student a failing grade. She can also forward the case to an academic dean. Most professors would combine

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Use of the same words. If you use the idea and the words of another author, you must put quotation marks around those words and cite to the source. Both are required. If either the quotation marks or the citation is missing, you have plagiarized the other author's work.

Intent is not required for a writing to be plagiarized.

Using the ideas or words of another student may also be plagiarism.

Regardless of what rules you may have followed on this subject before law school, or what practices you may observe elsewhere, this is the standard that you must adhere to in all of your Lawyering Skills classes, in all seminar papers, in all Moot Court briefs, and in all *Law Review* or *Computer Journal* papers. This definition may be supplemented for Lawyering Skills classes.

JOHN MARSHALL LAW SCHOOL, STUDENT CODE OF CONDUCT 52 (2010-2011). The plagiarism policy at JMLS is currently undergoing revision. The aims of the revision are as follows: (1) more clearly communicate what types of plagiarism and other acts of academic dishonesty will be subject to sanction; (2) establish a "sentencing guideline" for violations; and (3) provide for remedial education for students who have been found in violation. The new JMLS policy is not available at the time of this printing.

15. *Plagiarism: Pilfered Paragraphs*, THE SECOND DRAFT (Legal Writing Inst., Macon, Ga.), Apr. 1993, at 3-4 (citing the plagiarism policies at Wake Forest University School of Law, the District of Columbia School of Law, Dartmouth College, Howard University, University of San Diego, University of Baltimore School of Law, University of Missouri-Kansas City, and the University of Tennessee); see also *Kerr v. Bd. of Regents of the Univ. of Neb.*, 739 N.W.2d 224, 226 (Neb. Ct. App. 2007) (describing the strict liability provision in the University of Nebraska College of Law's Honor Code).

16. Kristin Gerdy, *Law Student Plagiarism: Why it Happens, Where It's Found, and How to Find It*, 2004 B.Y.U. EDUC. & L.J. 431, 432-33 (2004) (discussing root causes of student plagiarism in law schools).

these approaches before instituting more formal proceedings. Formal proceedings within the institution may involve administrative reviews or peer review panels.<sup>17</sup>

Sanctions for plagiarism offenses also vary in severity. Inevitably, some students get a “slap on the wrist” and escape with only minor damage to their academic record; for example, a letter detailing the incident in the student’s file. Other sanctions, such as temporary suspension, expulsion, or the withholding of a degree, carry with them more serious consequences. Not surprisingly, law students who have been subjected to such punishments have often initiated litigation against their academic institutions, sometimes naming individual professors and administrators as defendants.<sup>18</sup>

In a recent case, third-year law student Katrina Yu was suspended from the University of La Verne College of Law during her final semester.<sup>19</sup> Yu was charged with plagiarism after submitting an assignment for a contracts drafting class that contained portions of a supply contract she found on the internet.<sup>20</sup> Yu’s case went to trial before the law school’s judicial board, where she was found guilty of plagiarism and academic dishonesty.<sup>21</sup> When Yu appealed, the dean of the college decided not to allow Yu to claim any credits for the class, inserted a formal letter of censure in Yu’s student file, and actually increased the severity of Yu’s original punishment by suspending her.<sup>22</sup>

For Yu, these sanctions have had far-reaching consequences. The suspension forced her to delay her plans to sit for the California Bar Exam for at least eighteen months.<sup>23</sup> Furthermore, even when Yu

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17. See *Cho v. Univ. of S. Cal.*, No. B180321, 2006 WL 1476911, at \*3 (Cal. Ct. App. May 31, 2006) (describing the disciplinary review procedures available to students under the University of Southern California’s Conduct Code).

18. See, e.g., *Mucci v. Rutgers*, Civ. No. 084806 (RBK), 2011 WL 831967 (D.N.J. Mar. 3, 2011); *Kerr*, 739 N.W.2d at 227; *Boozer v. Univ. of Cincinnati School of Law*, No. 05AP-1099, 2006 WL 1431402 (Ohio Ct. App. 2006); *Kiani v. Trustees of Boston Univ.*, No. 04-CV-11838-PBS, 2005 WL 6489754 (D. Mass. Nov. 10, 2005); *Viriyapanthu v. Regents of the Univ. of Cal.*, No. B157836, 2003 WL 22120968 (Cal. Ct. App. Sept. 15, 2003); *Easley v. Univ. of Mich. Bd. of Regents*, 906 F.2d 1143 (6th Cir. 1990); *In re Lamberis*, 443 N.E.2d 549, 553 (Ill. 1982) (publicly censuring attorney for plagiarizing his LL.M. thesis, in response to the attorney’s argument that the academic plagiarism incident was detached from his ability to ethically practice law).

19. *Yu v. Univ. of La Verne*, 126 Cal. Rptr. 3d 763, 767 (Cal. Ct. App. 2011).

20. *Id.* at 766; Brief for Petitioner at 4, *Yu v. Univ. of La Verne*, 126 Cal. Rptr. 3d 763 (Cal. Ct. App. 2011) (No. B229949), 2011 WL 578912, at \*4.

21. *Yu*, 126 Cal. Rptr. at 766.

22. *Id.* at 768.

23. Brief for Petitioner, *supra* note 20, at 8, 10 (under the suspension, the earliest Yu could sit for the California Bar Exam would be February 2012).



passes the examination portion of the application process, she will likely face difficulty in qualifying for admission under California's moral character requirement. In California, the Committee of Bar Examiners (Committee) requires that applicants demonstrate "good moral character."<sup>24</sup> Good moral character is defined by "qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process."<sup>25</sup> The Committee includes in its consideration any acts of misconduct, including violations of an applicant's law school's honor code.<sup>26</sup> Under California rules, Yu is obligated to disclose a "detailed narrative" of the plagiarism charge and its ultimate resolution.<sup>27</sup> The University of La Verne is also entitled to forward relevant information to the Committee.<sup>28</sup> In other jurisdictions, similar incidents involving law school academic dishonesty have resulted in delays in licensure or have even prevented applicants from obtaining licensure altogether.

The Georgia Supreme Court recently held that a bar applicant could be rejected because of a law school plagiarism incident.<sup>29</sup> During his second year of law school, Willie Jay White submitted a paper "that was a virtually verbatim reproduction of sections of five previously published sources, none of which was cited in the paper."<sup>30</sup> White's law school sanctioned him by imposing a one-year academic suspension, and the Board to Determine Fitness of Bar Applicants (Board) refused to certify White's fitness to practice law.<sup>31</sup> In its judgment, the Board reasoned "White's explanation of the plagiarism incident was not credible, that he had not yet accepted full responsibility for his actions, and that he did not currently possess the character and fitness required of a prospective member of the State Bar."<sup>32</sup> The Georgia Supreme Court affirmed the

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24. RULES OF THE STATE BAR OF CAL. R. 4.40(A), available at <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=-2KV5j0w6Cw%3d&tabid=1227> (last visited Nov. 14, 2011).

25. *Id.* R. 4.40(B).

26. See *Statement on Moral Character Requirement for Admission to Practice Law in California*, STATE BAR OF CAL., <http://admissions.calbar.ca.gov/MoralCharacter/statement.aspx> (last visited Nov. 14, 2011).

27. See *Application for Determination of Moral Character, Form 9-Scholastic Discipline*, STATE BAR OF CAL., <http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=Z3CvQNwqOhQ%3d&tabid=258> (last visited Nov. 14, 2011).

28. See *Statement on Moral Character*, *supra* note 26.

29. *In re White*, 283 Ga. 74, 75, 656 S.E.2d 527, 528 (2008).

30. *Id.*

31. *Id.* at 527.

32. *Id.* at 528.

Board's judgment, concluding that White had not yet been rehabilitated.<sup>33</sup>

White's story is not uncommon; similar situations have been resolved in the same way in other states.<sup>34</sup> The rationale given for this harsh penalty is that, in admitting an applicant to the practice of law, the licensing body is publicly certifying that the applicant represents the "traits of integrity, honesty[,] and trustworthiness necessary for a lawyer to possess when he or she represents clients."<sup>35</sup> These cases should serve as cautionary tales to all law students. No one wants to be denied admission to the practicing bar after investing three years of study and hundreds of thousands of dollars in tuition and fees.

Incidentally, the concern about student plagiarism is not limited to the law school context. Students at all levels of education, from elementary to graduate and professional schools, violate academic expectations by plagiarizing.<sup>36</sup> Observers have blamed students' ready access to the Internet as the primary cause of plagiarism.<sup>37</sup> Some educators suspect

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33. *Id.*

34. See, e.g., *In re Howard*, 855 N.E.2d 865, 868 (Ohio 2006); *Doe v. Conn. Bar Examining Comm.*, 818 A.2d 14, 28 (Conn. 2003); *Friedman v. Conn. Bar Examining Comm.*, 824 A.2d 866, 878 (Conn. App. Ct. 2003); *In re Application of Valencia*, 757 N.E.2d 325, 327 (Ohio 2001); *Radtke v. Bd. of Bar Examiners*, 601 N.W.2d 642, 649-50 (Wis. 1999); *In re K.S.L.*, 269 Ga. 51, 51, 495 S.E.2d 276, 278 (1998); *Barth v. Kaye*, 178 F.R.D. 371, 380 (N.D.N.Y. 1998); *In re Widdison*, 539 N.W.2d 671, 678 (S.D. 1995); *McMillan v. Hunt*, 968 F.2d 1215, No. 91-3843, 1992 WL 168827, at \*2 (6th Cir. July 21, 1992); *In re Green*, 553 A.2d 1192, 1198-99 (Del. 1989).

35. *In re Zbiegien*, 433 N.W.2d 871, 877 (Minn. 1988) (Kelley, J., dissenting).

36. See, e.g., Katherine Hobson, *Study: Medical Residency Applicants and Plagiarism*, WSJ.COM HEALTH BLOG (July 19, 2010), <http://blogs.wsj.com/health/2010/07/19/study-medical-residency-applicants-and-plagiarism/?KEYWORDS=cheating+plagiarism> (noting one study indicating that plagiarism in medical residency applications has increased 5%); Trip Gabriel, *To Stop Cheats, Colleges Learn Their Trickery*, N.Y. TIMES, July 5, 2010, <http://www.nytimes.com/2010/07/06/education/06cheat.html>; Karen Kaplan, *Should the Hippocratic Oath include a pledge not to plagiarize?*, L.A. TIMES, July 22, 2010, <http://www.latimes.com/news/health/boostershots/la-heb-0722-plagiarism,0,1881344.story>; Nicholas Kulish, *Author, 17, Says It's "Mixing," Not Plagiarism*, N.Y. TIMES, Feb. 12, 2010, <http://www.nytimes.com/2010/02/12/world/europe/12germany.html?scp=5&sq=plagiarism&st=cse> (noting a German teenage author's defense to plagiarism charges: "There's no such thing as originality anyway, just authenticity"); Carolyn Kellogg, *"Free" plagiarism charge frames Internet content debate*, L.A. TIMES, June 25, 2009, <http://www.latimes.com/entertainment/news/arts/la-et-free25-2009jun25,0,3226325.story>.

37. Trip Gabriel, *Plagiarism Lines Blur for Students in a Digital Age*, N.Y. TIMES, Aug. 1, 2010, [http://www.nytimes.com/2010/08/02/education/02cheat.html?\\_r=1&scp=1&sq=plagiarism&st=cse](http://www.nytimes.com/2010/08/02/education/02cheat.html?_r=1&scp=1&sq=plagiarism&st=cse); Brian Hansen, *Combating Plagiarism*, 13 THE CQ RESEARCHER 773, 775 (2003), available at <http://www.cqpress.com/docs/Combating%20Plagiarism.pdf>.

that students have not been taught how to properly cite sources.<sup>38</sup> In polls, students say that they know plagiarism is wrong, but they cheat because they know they will not get caught.<sup>39</sup> The Yu incident and others like it illustrate the need for educators at all levels of education to engage in early intervention with their students. Early intervention should take place in the form of clearly-communicated rules about academic honesty and plagiarism. This Article makes the case for using a comparative approach to teaching law students about plagiarism and ethics through hip hop music.

### 1. *Plagiarism and Ethics in Law Practice*

In defending herself against the law school's plagiarism charges, Katrina Yu argued that researching on the internet was equivalent to searching for precedent—"as any attorney would have done."<sup>40</sup> Yu's supporters asserted that all attorneys use forms to create contracts and that Yu's behavior was not outside of the norm for law practice.<sup>41</sup> Yet plagiarism rules are not limited to the classroom, and even law practitioners will be held to a high standard of ethical responsibility when it comes to using other people's work.<sup>42</sup>

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38. Hansen, *supra* note 37, at 776-77 (citing Professor Rebecca Moore Howard, who states: "All writers appropriate language from other sources and reshape it as their own, but inexperienced writers don't do that very well . . . . They don't realize that what they're doing is plagiarism.").

39. Furthermore, if they get caught, chances are that they will not be held accountable, or, if they are prosecuted for the infraction, that the punishment will be minimal. See Tracy L. McGaugh, *Millennial Cheating*, THE MILLENNIAL LEGAL WRITER, <http://lrw.themillennials.org/> (last visited Nov. 14, 2011) (follow "MillennialCheating-LWI2008.pdf" hyperlink at bottom of page).

40. Brief for Petitioner, *supra* note 20, at \*4.

41. See User Comments to Debra Cassens Weiss, *Appeals Court Upholds Suspension for 3L Who Used Online Contract in Drafting Class*, ABA JOURNAL (July 20, 2011), [http://www.abajournal.com/news/article/appeals\\_court\\_upholds\\_suspension\\_for\\_3l\\_who\\_used\\_online\\_contract](http://www.abajournal.com/news/article/appeals_court_upholds_suspension_for_3l_who_used_online_contract).

42. For additional examples of practitioner plagiarism, see Matthew C. Mirow, *Plagiarism: A Workshop for Law Students*, LEGAL WRITING INSTITUTE, <http://www.lwionline.org/publications/plagiarism/lawschool.pdf> (last visited Aug. 31, 2011) (citing *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081 (1st Cir. 1994); *Dewilde v. Guy Gannett Publ'g. Co.*, 797 F. Supp. 55 (D. Me. 1992); *Jackson v. Fed. Aviation Admin.*, No. 89-2000, 1991 U.S. App. LEXIS 11857 (1st Cir. May 7, 1991)); Jaime S. Dursht, *Judicial Plagiarism: It May Be Fair Use But Is It Ethical?*, 18 CARDOZO L. REV. 1253, 1282-83 (1996) (on judicial plagiarism); M.C. Mirow, *Confronting Inadvertent Plagiarism*, 6 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 61, 61 (Winter 1998); see also *Iowa Sup. Ct. Attorney Disciplinary Bd. v. Cannon*, 789 N.W.2d 756 (Iowa 2010); *Threadgill v. Bd. of Prof'l Responsibility of S. Ct.*, 299 S.W.3d 792 (Tenn. 2009); *Columbus Bar Ass'n v. Farmer*, 855 N.E.2d 462 (Ohio 2006); *Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Lane*, 642

In 2007, for example, a federal bankruptcy court found that attorney Peter Cannon had violated the Iowa Rules of Professional Conduct<sup>43</sup> by copying seventeen pages of a nineteen-page brief from an internet article authored by two other lawyers.<sup>44</sup> Cannon had billed his client 25.5 hours for “writing” this brief, an amount totaling \$5,737.50.<sup>45</sup> In addition to ordering Cannon to repay his client for these charges, the court required him to successfully complete a law school course in professional responsibility.<sup>46</sup> The court declared: “Because Mr. Cannon does not appreciate the nature of plagiarism, a continuing education class will not cure his ethical shortcomings. Mr. Cannon’s deficiency calls for the more-involved method of instruction offered in a law school course on professional responsibility.”<sup>47</sup> The Iowa Supreme Court Attorney Disciplinary Board initiated separate proceedings against Cannon, and in 2010, the Iowa Supreme Court found that Cannon’s plagiarism was in violation of the rules of professional conduct and merited public sanction.<sup>48</sup>

Nonlawyers are also held accountable when they cheat. Professionals whose jobs depend on writing and credibility are particularly vulnerable to accusations of plagiarism. *New York Times* writers Zachary Kouwe<sup>49</sup> and Jayson Blair<sup>50</sup> lost their jobs as journalists when plagiarism accusations called their integrity as writers into question.<sup>51</sup> Politicians

N.W.2d 296 (Iowa 2002); *In re Harper*, 645 N.Y.S.2d 846 (N.Y. App. Div. 1996); *In re Hinden*, 654 A.2d 864, 866 (D.C. 1995) (reciprocal censure in Illinois and the District of Columbia); *In re Steinberg*, 620 N.Y.S.2d 345 (N.Y. App. Div. 1994); *In re Brennan*, 447 N.W.2d 712, 713-14 (Mich. 1989) (discussing a judge’s plagiarism in a law review article).

43. IOWA R. PROF’L CONDUCT (2010), available at [http://www.iowacourtsonline.org/Professional\\_Regulation/Rules\\_of\\_Professional\\_Conduct/](http://www.iowacourtsonline.org/Professional_Regulation/Rules_of_Professional_Conduct/).

44. *In re Burghoff*, 374 B.R. 681, 683 (Bankr. N.D. Iowa 2007). The bankruptcy court judge became suspicious of Cannon’s submissions because of their “unusually high quality.” *Cannon*, 789 N.W.2d at 757.

45. *In re Burghoff*, 374 B.R. at 685.

46. *Id.* at 687.

47. *Id.* (internal citations omitted).

48. *Cannon*, 789 N.W.2d at 760. Unlike the bankruptcy court, however, the Iowa Supreme Court found that the Grievance Committee had not met its burden of proving, “by a convincing preponderance of the evidence,” that Cannon’s \$5,737.50 bill was unreasonable. *Id.* (internal quotation marks omitted).

49. See John Koblin, *The Accidental Plagiarist*, N.Y. OBSERVER, Feb. 17, 2011, <http://www.observer.com/2010/media/accidental-plagiarist>.

50. See Rem Rieder, *The Jayson Blair Affair*, AM. JOURNALISM REV., <http://www.ajr.org/article.asp?id=3019> (last visited Aug. 31, 2011); Online NewsHour, *Credibility in Question, Jayson Blair: A Case Study of What Went Wrong at the New York Times*, PBS.ORG, [www.pbs.org/newshour/media/media\\_ethics/casestudy\\_blair.php](http://www.pbs.org/newshour/media/media_ethics/casestudy_blair.php) (last visited Aug. 31, 2011).

51. In January, the *New York Daily News* fired journalist Rob Sgobbo when it was discovered that he had invented a source and quotes from that source for a freelance article

are likewise expected to maintain a certain degree of rectitude when it comes to ethical writing. Scott McInnis, a former frontrunner for the Republican Party nomination for governor of Colorado, lost party support when his campaign was tainted by two allegations of plagiarism.<sup>52</sup> Similarly, after facing weeks of criticism for plagiarizing portions of his doctoral dissertation, Germany's Minister of Defense Karl-Theodor zu Guttenberg was forced to resign from office in March 2011.<sup>53</sup> Prior to this scandal, many politicians had anticipated Guttenberg to succeed current German Chancellor Angela Merkel.<sup>54</sup>

Understanding what plagiarism is and why it should be avoided is an important step in educating lawyers and law students to avert circumstances that could lead a careless writer into inadvertent plagiarism. If students better understood why the rules exist and why they apply with special force in law school (as well as in law practice), the growing number of plagiarism incidents in law school might recede.

Plagiarism, as Cannon's case suggests, can be a violation of an attorney's professional ethics. Rule 8.4(c) of the Model Rules of Professional Responsibility provides: "It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation."<sup>55</sup> Presenting the work of others as if it were your own involves misrepresentation and conduct that is dishonest.<sup>56</sup>

Maintaining a high standard of ethics should be a strong motivating factor for lawyers, but proper attribution and citation of legal sources is also a critical part of legal strategy. In the United States common law

he wrote for *The Village Voice*. *Village Voice Says NY Reporter Fabricated Sources*, ABCNEWS.COM (Jan. 8, 2011), <http://abcnews.go.com/Business/wirestory?id=12568756>.

52. Gail Collins, *Poison Pen Politics*, N.Y. TIMES, Mar. 4, 2011, <http://www.nytimes.com/2011/03/05/opinion/05collins.html>; Eli Stokols, *Another Plagiarism Case? McInnis Campaign Says No*, KDVR.COM (July 27, 2010, 6:13 PM), <http://www.kdvr.com/news/politics/kdvr-mcinnis-forest-op-ed-txt,0431626.story>; Aaron Blake, *McInnis's Colo. Gubernatorial Bid Derailed by Plagiarism Charges*, THE FIX BLOG (July 14, 2010, 3:06 PM), <http://voices.washingtonpost.com/thefix/governors/plagiarism-campaign-killer-hun.html>; Dan Frosch, *Candidate for Governor in Colorado Apologizes*, THE CAUCUS BLOG (July 14, 2010, 10:18 PM), <http://thecaucus.blogs.nytimes.com/2010/07/14/candidate-for-governor-in-colorado-apologizes/?scp=3&sq=scott%20mcinnis%20plagiarism&st=cse>.

53. Michael Kimmelman, *In Germany, Uproar Over a Doctoral Thesis*, N.Y. TIMES, Mar. 14, 2011, <http://www.nytimes.com/2011/03/15/books/merkels-possible-successor-resigns-in-plagiarism-scandal.html?nl=todaysheadlines&emc=tha28>.

54. *Id.*

55. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2010), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html). The corresponding rule in Illinois is identical. See ILL. RULES OF PROF'L CONDUCT R. 8.4(c) (2010), available at [http://www.iardc.org/newrules/2010.htm#RULE\\_8.4:\\_MISCONDUCT](http://www.iardc.org/newrules/2010.htm#RULE_8.4:_MISCONDUCT).

56. See Mirow, *Plagiarism, A Workshop for Law Students*, *supra* note 42, at 1.

system, sound legal argument depends on accurate citation to primary authority, such as case law and statutes.<sup>57</sup> Secondary authority, such as treatises and law review articles—depending on the source—can also be persuasive.<sup>58</sup> The weight that a reader places on such authority, however, depends largely on the information contained in the citation. In this regard, information critical for a reader includes the author, the title of the work, the name of the publication, and the date of publication.<sup>59</sup>

Citing primary legal authority in interoffice memoranda and pleadings filed in court not only demonstrates to the reader that support exists for the propositions contained within but also strengthens the author's argument. Professor David E. Sorkin advises: "Citing to the source (and including quotation marks if you're not merely paraphrasing) lends support to your argument, so why not tell the reader where you found your information? When in doubt, cite early and often."<sup>60</sup> Indeed, few lawyers could be accused of citing too much.<sup>61</sup>

In the legal writing classroom, plagiarism rules serve multiple purposes. On one level, the prohibition against plagiarism exists to insure that students are evaluated for their individual work product. When a student submits her own work (as opposed to group work), the professor is better able to gauge that individual student's progress. In law schools, most first-year law students are graded on a competitive curve. Class rankings along this curve determine everything from eligibility for merit scholarships to invitations to join the law review. The prohibition against plagiarism serves to maintain a level playing field among students by making grades dependent on individual work and effort. The focus on individual work also means that the student must actually learn and develop the writing skills necessary for the successful practice of law.

## 2. *Plagiarism and Ethics in the Legal Writing Classroom*

As in law practice or other professional settings, a student commits plagiarism when she uses the words or ideas of another and presents

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57. See CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 281, 284 (5th ed. 2006).

58. *Id.* at 78-79.

59. ALWD & DARBY DICKERSON, *ALWD CITATION MANUAL 3* (4th ed. 2006); *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* R. 9.1, at 24 (Columbia Law Review Ass'n et al. eds., 19th ed. 2003).

60. David E. Sorkin, *Practicing Plagiarism*, 81 *ILL. B.J.* 481, 488. Professor Sorkin teaches law in Chicago. *Id.* at 487 n.a.

61. Placement of citations, however, is a different matter altogether. See CALLEROS, *supra* note 57, at 301-04 (instructing law students not to burden the reader with citations embedded within textual sentences and to prefer use of separate citation sentences).

them as her own original work.<sup>62</sup> The offending work, however, may come in various guises. In my experience, first-year law student plagiarism comes in one of (or a combination of) three types: outright plagiarism, a failure to properly attribute source materials, and cut-and-paste plagiarism.

**a. Type 1: Plagiarism Outright.** The first is the “ultimate” or unforgivable type of plagiarism—where one student steals someone else’s work in toto, for example, by placing her name on someone else’s work. In five years of teaching, I have not yet encountered this type of wrongdoing. Stealing the whole of someone else’s work takes a cavalier attitude that, fortunately, my students do not seem to possess.<sup>63</sup> But I do not claim that my personal experience is the norm.<sup>64</sup> While teaching an undergraduate writing seminar, Professor Stefan Senders discovered that one of his students had simply lifted their assignment from someone else’s work on the Internet.<sup>65</sup>

**b. Type 2: Failure to Properly Attribute the Source Materials.** The second type of plagiarism involves two sub-types: (1) the student fails to place quotation marks around language that originates from another source (whether it be a case, statute, legal encyclopedia, or other legal authority), and/or (2) she does not provide a citation for the source of some assertion or argument. A “mere” failure to properly attribute the source materials is an often-invoked defense to type 2 plagiarism.<sup>66</sup>

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62. Compare this to the definition from Merriam-Webster’s online dictionary, which defines the verb “plagiarize” as: “to steal and pass off (the ideas or words of another) as one’s own: use (another’s production) without crediting the source.” MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/plagiarizing> (last visited Aug. 31, 2011). Judge Richard A. Posner frames the offense of plagiarism differently, emphasizing that the real injury to an audience when an author plagiarizes is a fraud rather than a theft from the original writer. POSNER, *supra* note 8, at 106-09.

63. Regrettably, during the last semester of my fifth year of teaching, and while I was preparing this Article for publication, two of my Lawyering Skills I students admitted to Type 1 plagiarism on a research assignment. The students had submitted identical answers to an assignment worth less than 10% of their final grade.

64. See, e.g., Stefan Senders, *Academic Plagiarism and the Limits of Theft*, in ORIGINALITY, IMITATION, AND PLAGIARISM: TEACHING WRITING IN THE DIGITAL AGE 195, 201-05 (Caroline Eisner & Martha Vicinus eds., 2008) (chronicling the author’s experience with a case of student plagiarism, from his first office meeting with the student through the student’s subsequent temporary expulsion and return to campus).

65. *Id.* at 199.

66. See POSNER, *supra* note 8, at 94.

When accused by his professor for having plagiarized his research paper for a class on legal history, UCLA law student Paul Viriyapanthu argued that he was not culpable for the offense because he had no intention to deceive.<sup>67</sup> He claimed mere carelessness in his writing process. During the informal disciplinary proceedings that followed the accusation, Viriyapanthu's professor identified a book by Robert McClain as the main source of Viriyapanthu's copied work. At Viriyapanthu's request, two other members of the law school community investigated the plagiarism charge. Independently, each of them came to the conclusion that Viriyapanthu had copied large portions of the McClain book into his paper with either incorrect citations or no citations at all—a “clear” case of plagiarism.<sup>68</sup> Viriyapanthu's defense—that he had inadvertently plagiarized—was rejected, and he was suspended from law school.<sup>69</sup>

**c. Type 3: Cut-and-Paste Plagiarism.** Paul Viriyapanthu attributed his careless citation form to his research practice; he would “take notes into his laptop, then cut and paste passages in writing the paper.”<sup>70</sup> The third type of law student plagiarism is closely related to this writing method. I call this “cut-and-paste” plagiarism.<sup>71</sup> In this type of writing, students cut rule statements, fact patterns, legal analysis, or conclusions from various legal authorities, then paste and rearrange these quotes into a document that the students then present as their own original work. This type of plagiarism is distinct from a failure to attribute sources (type 2) because the student follows the technical rules of citation by use of quotation marks and attribution. It is nevertheless a type of plagiarism because the student is not engaging in any independent cognitive process apart from shuffling legal authorities and placing them in a new order.

Not everyone agrees, however, that a cut-and-paste method results in poor quality work product. Law professor Lawrence Lessig, a “free culture” advocate, praises it.<sup>72</sup> In the following excerpt, Professor

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67. See *Viriyapanthu v. Regents of Univ. of Cal.*, No. B157836, 2003 WL 22120968, at \*1 (Cal. Ct. App. Sept. 15, 2003).

68. *Id.* at \*1-2.

69. *Id.* at \*5.

70. *Id.* at \*1 (internal quotation marks omitted).

71. See generally SUSAN D. BLUM, MY WORD!: PLAGIARISM AND COLLEGE CULTURE (2009).

72. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 76-82 (2008). But see MARK HELPRIN, DIGITAL BARBARISM: A WRITER'S MANIFESTO 161-64 (2009).



Lessig describes the cut-and-paste writing style used by his college friend, Ben:

Ben's writing had a certain style. . . . Every paragraph was constructed through quotes. . . .

And he was rewarded for it. Indeed, in the circles for which he was writing, the talent and care that his style evinced were a measure of his understanding. He succeeded not simply by stringing quotes together. He succeeded because the salience of the quotes, in context, made a point that his words alone would not. And his selection demonstrated knowledge beyond the message of the text. . . .

Ben's style is rewarded not just in English seminars. It is the essence of good writing in the law. A great brief seems to say nothing on its own. Everything is drawn from cases that went before, presented as if the argument now presented is in fact nothing new. Here again, the words of others are used to make a point the others didn't directly make. Old cases are remixed. The remix is meant to do something new.<sup>73</sup>

I distinguish between what Type 3 cut-and-paste plagiarism and what Lessig calls the remix.<sup>74</sup> The remix style of writing is a transformative act, one that takes existing work (mostly judicial opinions, in the context of the legal writing classroom) and creates something new and more valuable. Cutting-and-pasting, on the other hand, lacks the critical engagement with source materials that remixing requires.

Hip hop utilizes a variety of production techniques that could be described as either Type 3 cutting-and-pasting or as remixing. Borrowing prior work is an integral part of hip hop music production, but hip hop also enforces a culturally-specific rule that prohibits "biting," which regulates abuses of the borrowing tradition.<sup>75</sup> The next section provides historical context for the comparison of cultural values in the legal writing and hip hop communities by highlighting important achievements in hip hop music in the United States.<sup>76</sup>

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73. LESSIG, *supra* note 72, at 51-52.

74. For an intriguing example, see Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER'S MAG. (Feb. 2007), <http://www.harpers.org/archive/2007/02/0081387>.

75. See *supra* note 9 and accompanying text.

76. Hip hop music was born in the United States, but it is not a uniquely American phenomenon. Hip hop music traces its roots to the musical traditions of the African diaspora, drawing from African drum beats and Jamaican toasting culture. Moreover, hip hop is created and enjoyed by artists and fans around the world. A more complete treatment of hip hop's international genealogy, however, is outside the scope of this Article. For comprehensive discussions, see generally IMANI PERRY, *PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP* (2004), and JEFF CHANG, *CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION* (2005).

*B. Hip Hop's Mixtape Tradition: Borrowing as Music Production*

I am interested in using hip hop to teach first-year law students about plagiarism because they are millennial students who have entered adulthood as a part of the hip hop generation.<sup>77</sup> Forty years ago, hip hop was still in its nascent stages; developing in fits and starts in the working class neighborhoods of the South Bronx in New York City.<sup>78</sup> For the law school Class of 2012, however, hip hop is and has always been part of mainstream American culture.<sup>79</sup> Hip hop has also permeated the judicial consciousness, as evidenced in a 2005 opinion by Judge Terence Evans of the United States Court of Appeals for the Seventh Circuit, which explicitly references the well-known rapper Ludacris.<sup>80</sup> Thus, hip hop music and culture provide a valuable,

77. Cf. Tracy McGaugh, *Generation X in Law School: The Dying of the Light or The Dawn of a New Day?*, 9 J. LEGAL WRITING INST. 119 (2003).

78. cummings, *Furious Kinship*, *supra* note 10, at 508; cf. DIGABLE PLANETS, *Appointment at the Fat Clinic*, on REACHIN': A NEW REFUTATION OF TIME AND SPACE (Pendulum/Elektra Records 1993) (group member Doodlebug describes hip hop's synergistic relationship with jazz music).

79. Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 541-42 (2007). One interesting and entertaining assessment is Beloit College's annual Mindset List. See *The Mindset List*, BELOIT COLLEGE (2007), <http://www.beloit.edu/mindset/2007>.

80. *United States v. Murphy*, 406 F.3d 857, 859 n.1 (7th Cir. 2005). Judge Evans cited the rapper Ludacris to prove the assertion that a garden hoe was different from a sex worker. See *id.* The footnote reads in full:

The trial transcript quotes Ms. Hayden as saying Murphy called her a snitch bitch "hoe." A "hoe," of course, is a tool used for weeding and gardening. We think the court reporter, unfamiliar with rap music (perhaps thankfully so), misunderstood Hayden's response. We have taken the liberty of changing "hoe" to "ho," a staple of rap music vernacular as, for example, when Ludacris raps "You doin' ho activities with ho tendencies."

*Id.* Judge Evans did not cite the actual Ludacris song, but it is *Ho* from the 2000 album, *Incognegro*, released on the Disturbing the Peace record label. LUDACRIS, *Ho*, on INCOGNEGRO (DTP Entertainment 2000); see also Long, *supra* note 79, at 542.

In 2003, Michigan Judge Deborah Servitto penned her own rap in an opinion dismissing a defamation case brought against the rapper Eminem. See *Bailey v. Mathers*, No. 2001-3606-NO, 2003 WL 22410088, at \*6 n.11 (Mich. Cir. Ct. Oct. 17, 2003). In part, Judge Servitto explained:

The lyrics are stories no one would take as fact  
They're an exaggeration of a childish act  
Any reasonable person could clearly see  
That the lyrics could only be hyperbole  
It is therefore this Court's ultimate position  
That Eminem is entitled to summary disposition

*Id.* The appellate court affirmed Judge Servitto's ruling. *Bailey v. Mathers*, No. 252123, 2005 WL 857242, at \*5 (Mich. Ct. App. Apr. 14, 2005).

mutual point of reference upon which to base classroom discussions about plagiarism and legal writing.

On a superficial level, hip hop can be described as a type of popular youth music. Hip hop also signifies a concept much broader and more potent than a musical genre. Hip hop is a living culture, and now the phrase describes an entire generation.<sup>81</sup> The music of hip hop certainly includes rap, in which MCs (or rappers) rhyme over a beat. But hip hop culture comprises more than just beats and rhymes, it encompasses at least three additional elements—breakdancing, graffiti, and DJ-ing.<sup>82</sup> The often-ignored fifth element of hip hop is Knowledge of Self.<sup>83</sup> When the foundation of hip hop culture is defined by Knowledge of Self, this means that, in order to be a true hip hop head, a fan must not only be able to appreciate each of the artistic (or aesthetic) elements of hip hop culture, but must also strive to obtain a heightened consciousness; this requisite consciousness refers not only to music, art, and dance, but also to the politics, sociology, history, and economics that impact the stories and messages disseminated through hip hop.<sup>84</sup> One becomes a

81. See generally CHANG, *supra* note 76; BAKARI KITWANA, THE HIP HOP GENERATION: YOUNG BLACKS AND THE CRISIS IN AFRICAN AMERICAN CULTURE 4 (2002); cummings, *Furious Kinship*, *supra* note 10, at 516 n.100.

82. CHANG, *supra* note 76, at 110.

83. See Kyra D. Gaunt, "One Time 4 Your Mind": Embedding Nas and Hip-Hop into a Gendered State of Mind, in BORN TO USE MICS: READING NAS'S ILLMATIC 151, 288 n.2 (Michael Eric Dyson & Sohail Daulatzai eds., 2009). Gaunt explains the origins of the phrase "knowledge of self":

The Five Percent Nation is a splinter group from the Nation of Islam founded in Harlem in 1964 that has inspired many hip-hop artists, including Nas. Though a violation of traditional Islamic practice, Five Percenters view themselves as their own God. Men in the group are called Gods and women Earths. The name of the group comes from the belief that 85 percent of the population is blind and needs to be led; 10 percent has some knowledge of self but misuses it to control the 85 percent; the remaining 5 percent possesses knowledge of self and the way the world system works and strives to educate and liberate the 85 percent.

*Id.*; see also BLACK STAR, *K.O.S. (Determination)*, on MOS DEF & TALIB KWELI ARE BLACK STAR (Rawkus/Umgd 2002). Canadian MC k-os (pronounced "chaos") takes his name from the phrase "knowledge of self." Del F. Cowie, *K-OS: Beat Generation*, VIBE MAG., Mar. 2003, at 112, available at [http://books.google.com/books?id=0yYEAAAAMBAJ&pg=PA112&dq=k-os+knowledge+of+self&hl=en&ei=yfR\\_Tbq6N5TrgQfHoK2bCA&sa=X&oi=book\\_result&ct=result&resnum=1&ved=0CCKQ6AEwAA](http://books.google.com/books?id=0yYEAAAAMBAJ&pg=PA112&dq=k-os+knowledge+of+self&hl=en&ei=yfR_Tbq6N5TrgQfHoK2bCA&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCKQ6AEwAA).

84. Edgar Pieterse, *Youth Cultures and the Mediation of Racial Exclusion or Inclusion in Rio de Janeiro and Cape Town*, in URBAN DIVERSITY: SPACE, CULTURE, AND INCLUSIVE PLURALISM IN CITIES WORLDWIDE 187, 194 (Caroline Wanjiku Kihato et al. eds., 2010); PERRY, *supra* note 76, at 39-42 (arguing that hip hop embodies both the sacred and the profane, and that to ignore or dismiss the politically problematic aspects of the music results in a stunted analysis).

hip hop head over time by accumulating a breadth of knowledge and by “showing and proving” when called on to demonstrate this expertise.

Hip hop’s ascendance in popular culture has much to do with the creativity of artists who have introduced countless innovations to the styling and production of the music. Hip hop culture encourages artists to break new ground by building on the traditions that have come before. The only exception is the “no biting” rule. If an artist can pass scrutiny of the no biting rule, he or she can borrow freely from cultural products of the past to create new music. Borrowing is a staple of hip hop music production, exemplified in the DJ’s manipulation of music through sampling and mixtapes.

### 1. *The Proscription Against Biting*

*There’s a sign on the door, no biting allowed.*<sup>85</sup>

In hip hop, “biting” another artist’s lyrics, beats, or even all-around style is a mortal sin. Also known as “swagger jacking,” copying someone else’s technique or unique sound is understood as a crime of theft.<sup>86</sup> Biting comes in many forms. Sometimes biting involves adopting another’s lyrical flow. Ohio-based rap group Bone Thugs-n-Harmony, known for their sing-song, fast-paced verbal delivery, were a major record label hit in the late 1990s.<sup>87</sup> Yet the type of harmonizing that

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When I reference hip hop music in this Article, I am including not just rap music, but also R&B/Soul, neo-soul, reggae, dancehall, house, and other sonically familial strands that come from the African American music tradition. See PERRY, *supra* note 76, at 10 (defining hip hop as a distinctively African American enterprise). Thus, in my definition of hip hop music, I include soul singers like Mary J. Blige and Erykah Badu, and other artists like DJ Danger Mouse, who other commentators might not consider “hip hop” per se. See cummings, *Furious Kinship*, *supra* note 10, at 572 n.287 (noting that R&B singers Mary J. Blige and Erykah Badu “are universally considered hip-hop artists, together with [rapper/actress] Lauryn Hill”). But see *Add New Lyrics* THE ORIGINAL HIP-HOP LYRICS ARCHIVE, [http://www.ohhla.com/add\\_lyrics.html](http://www.ohhla.com/add_lyrics.html) (last visited Jan. 20, 2012) (“Contributions must be songs by an established hip-hop artist[] or prominently featuring an established hip-hop artist. This may include duets with R&B, Reggae, Metal, or Funk artists. OHHLA does not accept R&B lyrics such as 112, Allure, Mary J. Blige, Faith Evans, Jewel, or Mark Morrison UNLESS they feature a hip-hop artist. Mary J. Blige alone is R&B, but Mary J. Blige with Grand Puba is hip-hop. Whitney Houston alone is R&B, Whitney Houston with Wyclef Jean is hip-hop.”).

85. MARLEY MARL featuring MASTA ACE, CRAIG G, KOOL G RAP, BIG DADDY KANE, *The Symphony*, on IN CONTROL VOLUME 1 (Cold Chillin’/Warner Bros./WEA Records 1990) (Masta Aces verse).

86. BRADLEY, *supra* note 9, at 147.

87. PERRY, *supra* note 76, at 74. Bone Thugs-n-Harmony were discovered by former N.W.A. member, Eazy-E. In 1994, the group signed a major record label deal with Eazy-E’s Ruthless Records and are most famous for songs like *1st of tha Month* and *Thuggish*

Bone Thugs was known for likely originated from the Los Angeles-based, underground hip hop group, Freestyle Fellowship.<sup>88</sup>

A rapper who copies another rapper's lyrics can also be accused of biting. Jay-Z has come under scrutiny for allegedly stealing other rappers' lines. For example, Nas attacked Jay for using the same rhymes as The Notorious B.I.G. (or Biggie): "How much of Biggie's rhymes gon' come out your fat lips?"<sup>89</sup> Jay responded:

With so many different flows there's one for this song  
 The next one I switch up, this one will get bit up  
 These fucks, too lazy to make up shit, they crazy  
 They don't, paint pictures, they just, trace me  
 You know what? Soon they forget where they plucked  
 They whole style from, they try to reverse the outcome  
 I'm like - TOUGH!  
 I'm not a biter I'm a writer for myself and others  
 I say a B.I.G. verse, I'm only biggin up my brother[.]<sup>90</sup>

Jay's response highlights a common danger in hip hop musical production. Drawing a line between homage or tribute and copying is not always an easy task, as will be discussed below. Because hip hop does not have a central governing body, the judgment call between quoting and biting is one made by other artists and the fans. I argue in Part III that accountability takes the form of a loss of street credibility and, often, record sales.<sup>91</sup>

## 2. *Remixes and the Mixtape*

The DJ's mixtape has always played a special role in the growth of hip hop. As hip hop emerged as a distinct culture in the late-1970s Bronx, mixtapes of rap and breakbeat music were crucial to the dissemination of the art form.<sup>92</sup> Rap music was not yet being played on commercial radio stations, so besides live performances at block parties, mixtapes

*Ruggish Bone.* See BONE THUGS-N-HARMONY, *1st of tha Month*, on E. 1999 ETERNAL (Ruthless Records 1995); BONE THUGS-N-HARMONY, *Thuggish Ruggish Bone*, on CREEPIN ON AH COME UP (Ruthless Records 1994).

88. Compare FREESTYLE FELLOWSHIP, *Mary*, on INNERCITY GRIOTS (Fontana Island 1993) (Myka 9's verse), with BONE THUGS-N-HARMONY, *1st of tha Month*, *supra* note 87.

89. NAS, *Ether*, on STILLMATIC (Sony 2001).

90. JAY-Z, *What More Can I Say*, on THE BLACK ALBUM (Roc-a-Fella Records 2003).

91. Though this is not always the case. Bone Thugs-n-Harmony was backed by a major record label and was quite successful. Freestyle Fellowship's popularity has never waned in the underground hip hop scene, but it has never enjoyed the same type of commercial success as Bone Thugs.

92. Samantha M. Shapiro, *Hip Hop Outlaw (Industry Version)*, N.Y. TIMES, Feb. 18, 2007, <http://www.nytimes.com/2007/01/18/magazine/18jdrama.t.html>.

were the only way that young people gained access to hip hop music during those early years.<sup>93</sup> The guerilla-style marketing and distribution method was highly successful, and by 1980, what began as a relatively parochial youth movement in the Bronx had an established following in other urban cities around the country.<sup>94</sup> By 1999, hip hop artists dominated the music charts in the United States and internationally.<sup>95</sup> Record company executives were eager to find ways to continue to develop fans for their new product.<sup>96</sup> Mixtapes had already proven successful in the informal market, so they soon became “the first tier of promotions for hip-hop artists.”<sup>97</sup> In the 1990s, record companies began to recruit DJs with street credibility to create remixes of upcoming artist releases.<sup>98</sup> Labels actively participated by sending artist lyrics and beats directly to the DJs.<sup>99</sup>

For example, DJ Sake One worked in collaboration with Sony Records to produce two mixtapes—*Goapele: Change It All Mixtape, volumes 1 and 2*.<sup>100</sup> According to Sake One’s website, the mixtapes were

[p]roduced with Sony Urban to promote the incredible “Change It All” album by Oakland’s soul queen Goapele[.] [T]hese mixes are a collaboration of the West Coast’s finest (Sake One) and the East Coast’s finest (DJ Eleven)—both of whom rep the legendary (((Local 1200))) Sound System. Both mixes include exclusives, remixes, and a range of music that reflects Goapele and (((Local 1200)))’s dedication to community upliftment and progressive politics.<sup>101</sup>

Each volume contains a series of songs designed to communicate to the listener the other types of music Goapele might be similar to, where she draws her inspiration, and the politically progressive community movement of which she claims a part.

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93. CHANG, *supra* note 76, at 127-28 (describing how bootleg cassette tapes of live performances by DJ Kool Herc and Afrika Bambaataa, two hip hop pioneers, were “passed hand-to-hand” throughout the five boroughs of New York City); Anthony Kwame Harrison, “Cheaper Than a CD, Plus We Really Mean It”: Bay Area Underground Hip Hop Tapes as Subcultural Artefacts, 25 *POPULAR MUSIC* 283, 287 (2006).

94. Smith, *supra* note 10, at 64.

95. Jared A. Ball, *The Mixtape: A Case Study in Emancipatory Journalism* (2005) (unpublished dissertation, University of Maryland), <http://drum.lib.umd.edu/handle/1903/3225>.

96. CHANG, *supra* note 76, at 133-34.

97. Shapiro, *supra* note 92.

98. *Id.*

99. *Id.*

100. See *Shop*, DJSAKE1.COM, <http://www.djsake1.com/shop.htm> (last visited Aug. 31, 2011).

101. *Id.*

The first mixtapes were produced on cassette tapes, and while most mixes are now available only on compact discs (CDs) or even as playlists on iTunes or other electronic music libraries, the designation “mixtape” remains prevalent.<sup>102</sup> As with any art, the level of sophistication of a mixtape depends on the creativity of its maker and the sophistication of the tools used to produce it. When I made mixtapes in the 1980s, I utilized a two-cassette tape player/recorder radio or a CD/tape player combination. This required me to first find and queue the song I selected, then simultaneously press “play” on the device that the source music was coming from and “record” on the tape recorder. The end result was a compilation of different songs from different artists and albums whose collection on a two-sided cassette tape made some sort of thematic sense to me.<sup>103</sup> This amateur method is probably the most elementary way of creating a mixtape. Elementary mixtape making is analogous to the third type of plagiarism, cut-and-paste plagiarism, that I described above. When cutting and pasting songs to create a tracklisting, no additional skills or expert knowledge of music is required.

The work of professional hip hop DJs is, by contrast, much more complicated. On one level, the mixtape can be described merely as a tracklisting or compilation of songs similar to the handmade product I described above.<sup>104</sup> To limit one’s understanding of a mixtape in this reductionist way, however, underestimates the tremendous artistic and technical skill that is required to produce a saleable mixtape. Compare my amateur cutting and pasting methodology to famed mixtape DJ Neil Armstrong’s description of his creative process:

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102. See Ball, *supra* note 95, at 6, 11.

103. Perhaps the most familiar form of the mixtape is the one that an earnest lover makes for her beloved. *Id.* at 11-12. The songs selected for this type of mix are typically intended to illustrate the feelings one has for another, in a way that might not be possible to communicate through spoken words or other media. The physical effort required for such a production is likewise an important corollary means of demonstrating one’s genuine love and affection for the intended recipient. In the 2008 film, *NICK & NORAH’S INFINITE PLAYLIST*, Norah is first introduced to Nick through the mixed CDs he has made for his ex-girlfriend, Tris. *NICK & NORAH’S INFINITE PLAYLIST* (Columbia Pictures 2008). After receiving the most recent edition of Nick’s mixes, Tris shows it to her school friends, and before throwing it in the trash, ridicules its handmade cover art and its sappy song selection. *Id.* In an early scene, Norah rescues the mix from the trash can, and while dusting it off, states that Tris is not capable of appreciating the music and art. *Id.* When Norah adds this rescued item to her larger collection, the viewers learn that it is not the first time that Tris has callously discarded one of Nick’s mixes. See *id.*; see also Say Anything (20th Century Fox 1989); High Fidelity (Touchstone Pictures 2000). Shout out to Jason Wilson for suggesting these two classics.

104. See, e.g., MIXPOD.COM, <http://www.mixpod.com/> (last visited Aug. 31, 2011).

I've put the Smiths on a CD, put The Cranberries next to The Jackson 5, and I've put Talib Kweli next to 50 Cent. On paper, that looks like a bad gamble. I've been lucky that oddly enough the over saturation in music right now has forced people to look back to old classics to find something new. . . . While making the [mixtapes], it's a labor of love, with 99% labor and 1% love. [The] *Bittersweet* [mixtape] took a lot of time to make because of the planning involved in it. Before I did it, I don't think there was a mix tape like it where the point of all the songs on it was that it would tell a coherent story.<sup>105</sup>

Hip hop DJs utilize several different styles of production to create their product, often combining various styles for the end product.<sup>106</sup> A DJ or producer uses turntables (LP, CD, digital, or a combination of all), a mixing board, and often a laptop with audio editing software to create a remix.<sup>107</sup> A mixtape DJ's end product is more akin to the remix that Professor Lessig praises.<sup>108</sup>

### 3. *Sampling*

*You see, you misunderstood  
A sample is a tactic  
A portion of my method, a tool  
In fact it's only of importance when I make it a priority  
And what we sample of, is the majority  
But you are a minority, in terms of thought  
Narrow minded and poorly taught  
About hip-hop.*<sup>109</sup>

Hip hop music has been attacked by critics in the mass media as derivative and unoriginal.<sup>110</sup> The use of sampling to produce hip hop songs has been the object of frequent copyright litigation where sampling has been analogized to theft.<sup>111</sup> In exploring the motives behind these cultural critiques and copyright prosecutions, academics have reached some intriguing conclusions. Professor Tricia Rose, for example, contends that popular media has constructed and encouraged a fear of

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105. DJ Sorce-1, *DJ Neil Armstrong Interview*, HEAVY IN THE STREETS BLOG (May 7, 2007), <http://heavyinthestreets.blogspot.com/2007/05/dj-neil-armstrong-interview.html>.

106. See TRICIA ROSE, *BLACK NOISE: BLACK MUSIC AND CULTURE IN CONTEMPORARY AMERICA* 73-80 (1994).

107. See *id.*

108. See *supra* notes 72-73 and accompanying text.

109. STETSASONIC, *Talkin' All That Jazz*, on *IN FULL GEAR* (Tommy Boy Records 1988).

110. See LESSIG, *supra* note 72, at 53-54.

111. See *infra* notes 125-26 and accompanying text.



hip hop as an existential threat to mainstream America.<sup>112</sup> For Professor Andre L. Smith, copyright prosecutions can thus be seen as attempts by agents of capital (in this case, music industry executives) to reassert the dominant social order.<sup>113</sup> As a matter of law, it seems settled that when a hip hop artist's use of a prior work is more than de minimis, the restrictions of copyright law attach.<sup>114</sup>

Rather than be cut off from the means of production, however, through innovation, hip hop has survived the existential threat posed on it by intellectual property law. Continuing in hip hop's long tradition of improvisation, recording artists have responded to the legal barriers mounted by intellectual property law's compulsory licensing schemes by developing new ways of creating music.<sup>115</sup> It is, therefore, my contention that hip hop music, while it continually draws on the aural traditions that have preceded it, remains vibrant in the face of legal and cultural challenges because of the constant innovation by its artists.

In hip hop, DJs or producers often use samples of other audio sources to create the beat for a new song.<sup>116</sup> Frequently, this process involves sampling the audio recordings of other musical artists, as when Erykah Badu sampled *Funk You Up* by The Sequence<sup>117</sup> for her song *Love of My Life Worldwide*.<sup>118</sup> Hip hop DJs are incredibly innovative with

112. Tricia Rose, "Fear of a Black Planet": Rap Music and Black Cultural Politics in the 1990s, 60 J. NEGRO EDUC. 276, 279-80 (1991), available at <http://www.jstor.org/stable/2295482>.

113. See Smith, *supra* note 10, at 75.

114. See *infra* note 126.

115. Interpolation, for example. When hip hop music producers cannot obtain a license for a sample, they sometimes hire musicians to recreate the sound instead of using the sample. MICKEY HESS, IS HIP HOP DEAD?: THE PAST, PRESENT, AND FUTURE OF AMERICA'S MOST WANTED MUSIC 106 (2007) (explaining that "[b]ecause copyrights to sheet music often are held by different entities from the owners of the sound recordings, interpolation offers hip hop producers a method for working from existing songs without paying record companies royalties for the sound recording"). See, e.g., KANYE WEST featuring SYLEENA JOHNSON, *All Falls Down*, on THE COLLEGE DROPOUT (Roc-a-Fella Records 2004); LAURYN HILL, *Mystery of Iniquity*, on MTV UNPLUGGED (PID 2002). West hired Johnson to sing the vocals to *Mystery of Iniquity*, when he could not obtain a license to use the sample from Hill's song. Shaheem Reid, *Road To The Grammys: The Making Of Kanye West's College Dropout*, MTV.COM (Feb. 9, 2005, 8:48 PM), <http://www.mtv.com/news/articles/1496766/road-grammys-kanye-west.jhtml>.

116. See generally JOSEPH J. SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP (2004). A terrific online resource for sample-based musical recordings is WHO SAMPLED: EXPLORING AND DISCUSSING THE DNA OF MUSIC, <http://www.whosampled.com/> (last visited Nov. 15, 2011).

117. THE SEQUENCE, *Funk You Up* (Sugar Hill 1979).

118. ERYKAH BADU featuring QUEEN LATIFAH, ANGIE STONE, AND BAHAMADIA, *Love of My Life Worldwide*, on WORLDWIDE UNDERGROUND (Motown 2003). Angie Stone was an

sampling and the use of sound.<sup>119</sup> In 1998, for example, Timbaland used the sound of a baby rattle and an infant cooing to create the distinctive beat for Aaliyah's *Are You That Somebody?*<sup>120</sup> Hip hop music is based in sampling, but neither artists nor fans ever considered sampling itself a form of biting. DJs "openly celebrated their method of sampling" as a transformative means of creation.<sup>121</sup> Hip hop DJs actively claim the use of old audio recordings in the production of new musical works.<sup>122</sup>

The ongoing legal controversy surrounding the use of samples to create hip hop music has been adequately addressed by other scholars.<sup>123</sup> For this reason, I will not address copyright law in this Article, except insofar as drawing distinctions between sampling and copyright might serve to illuminate the points I would like to make about hip hop and plagiarism. Sampling and the copyright issues implicated by hip hop artists' use of samples can and should be distinguished from the problem of plagiarism that I tackle in this Article.<sup>124</sup>

The legal controversy involving hip hop artists' use of samples from copyrighted material to create new music has largely been resolved. In a series of cases involving hip hop artists, beginning with *Grand Upright Music Limited v. Warner Brothers Records, Inc.*,<sup>125</sup> in 1991 and ending in 2001 with *Bridgeport Music, Inc. v. Dimension Films*,<sup>126</sup> federal courts have consistently determined that use of samples without

original member of the group The Sequence. Ed Hogan, *The Sequence*, ALLMUSIC.COM, <http://www.allmusic.com/artist/sequence-p194849> (last visited Dec. 13, 2011). *Love of My Life Worldwide* was a remix of Badu's *Love of My Life* featuring Common. ERYKAH BADU featuring COMMON, *Love of My Life (An Ode to Hip Hop)*, on BROWN SUGAR SOUNDTRACK (MCA 2002). In turn, the inspiration for that song was Common's classic *I Used to Love H.E.R.* COMMON SENSE, *I Used to Love H.E.R.*, on RESURRECTION (Relativity 1994).

119. See Richard Shusterman, *Challenging Conventions in the Fine Art of Rap*, in *THAT'S THE JOINT!: THE HIP-HOP STUDIES READER* 459, 461 (Murray Foreman & Mark Anthony Neal eds., 2004).

120. See AALIYAH featuring TIMBALAND, *Are You That Somebody?*, on DR. DOOLITTLE SOUNDTRACK (Atlantic 1998).

121. Shusterman, *supra* note 119.

122. See *id.*

123. See sources cited *supra* note 10.

124. Cf. POSNER, *supra* note 8, at 105 (cautioning readers to avoid "conflating plagiarism with [copyright] infringement").

125. 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (granting an injunction against rapper Biz Markie from using a sample from Gilbert O'Sullivan's *Alone Again (Naturally)* because he had not previously cleared its use with the plaintiff copyright holder).

126. 401 F.3d 647, 654, 661 (6th Cir. 2004) (eliminating the de minimis defense to copyright infringement by holding that hip hop group N.W.A.'s use of a two-second long sample from Funkadelic's recording of *Get Off Your Ass and Jam* was a violation of copyright law).

permission is a copyright violation. The music industry responded by instituting a sampling licensing system that establishes a fee structure (royalties) and facilitates transfers of copyright licenses.<sup>127</sup> Regardless of whether mainstream or underground hip hop artists actually participate in this licensing system, the fact remains that a method and structure for crediting the original sources of new music exists.<sup>128</sup>

Copyright infringement is distinguishable from plagiarism in a legal writing classroom.<sup>129</sup> For instance, a student might include long paragraphs from a law review article in her memo assignment. She is plagiarizing if she fails to explicitly cite the original work. If she uses legal writing conventions such as quotation marks or citations to show that she has borrowed text from another source, she is not plagiarizing. Similarly, if a DJ obtains a license from a copyright holder to use a portion of a recording in her mixtape, she has not violated copyright law. If that DJ uses a prior copyrighted work without permission, however, she is vulnerable to a lawsuit. But making the determination that a student has not plagiarized or that a hip hop artist has not violated copyright law does not implicate in any way the quality of that individual's work product. In other words, even if a student has properly attributed the source for her block quotes, this does not guarantee a strong analysis of the legal issue. Likewise, a hip hop artist may seek and obtain permission to use samples from copyright owners. This does not automatically make the new product good music.

In practice, hip hop does not rely on copyright law to regulate its own notions of originality or innovation. Rather, it maintains a reservoir of collective knowledge that artists freely draw upon in order to build credibility amongst a fan base and also to innovate. But the ability to borrow from this archive of information is not unlimited. As I will discuss in further detail below, regulating agents—other artists and fans—within the hip hop community are empowered by their participation in the culture to call out biters whose work oversteps the line of reference into copying.

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127. See 17 U.S.C. § 115 (2006 & Supp. II 2008). Many hip hop artists would fault me for using the word “facilitate” to describe the sample licensing scheme.

128. Some DJs and producers go to great lengths to find obscure recordings in an effort to avoid the compulsory licensing system. See HESS, *supra* note 115, at 90; Shusterman, *supra* note 119, at 461.

129. See Brett Trout, *Iowa Lawyer Sanctioned for Plagiarism*, BLAWGIT.COM (Sept. 17, 2007), <http://blawgit.com/2007/09/17/iowa-lawyer-sanctioned-for-plagiarism/> (comparing copyright infringement to plagiarism and providing examples distinguishing the two).

## IV. LEGAL WRITING, THE REMIX

In any culture, there are individuals or collectives that occupy positions of power as arbiters of style or excellence. In the legal writing classroom, the professor has discretionary authority to award good and bad grades. The professor's authority to evaluate student work is based on mostly objective, external criteria—for example, a successful law school career and experience in legal practice. Additional credentials may include years in teaching, scholarly reputation, and academic publications. By contrast, in hip hop:

Ethnicity, race, gender, class, sexuality, urbanity, and artistic proficiency are all enlisted to complicate others' claims to hip-hop authenticity in a geomusical game of cultural one-upmanship, a kind of high-stakes "musical chairs" where participants scramble—once the beat stops—to shove themselves sagely atop one or another seat of definable, identity-based certainty.<sup>130</sup>

Unlike the legal writing classroom, each and every participant in hip hop culture is vested with the authority to critique the music, based on their individual, subjective tastes.

This Part contrasts the values and authenticating systems in two distinct cultural spaces—hip hop and the legal writing classroom. In the legal writing classroom, students are inherently less powerful than their professors because they seek the knowledge that professors are charged to transmit. This hierarchical relationship makes sense in the short term, however, Professor Debra Schneider contends that law professors must seek to empower novice lawyers "as authoritative speakers . . . and thus to enable them to become members of both the academic and practice legal communities."<sup>131</sup> Neophyte lawyers must eventually become expert lawyers, and the hierarchical student-teacher model must necessarily cede to an egalitarian paradigm in order for that transition to occur. Used as a comparative model for novice legal writers, hip hop music and culture can provide a democratic space for students where they can be encouraged to participate in the creation and critique of legal discourse.

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130. JOHN L. JACKSON, JR., *REAL BLACK: ADVENTURES IN RACIAL SINCERITY* 176 (2005), quoted in HILL, *supra* note 1, at 31.

131. Schneider, *supra* note 11, at 53.

A. *Hip Hop Ethics and its Regulating Agents*

*I originate, they duplicate.*<sup>132</sup>

What is good hip hop music? Hip hop heads might exclude any artists who did not fit into a narrow definition of hip hop.<sup>133</sup> In his book, *Beats, Rhymes, and Classroom Life*,<sup>134</sup> Marc Lamont Hill, a professor of English Education, records the rigid distinction between rap and “real” hip hop erected by his former high school students.<sup>135</sup> Professor Hill explains: “For them, the term ‘hip-hop’ served as shorthand for ‘real’ hip-hop texts, while ‘rap’ was used, often pejoratively, for all texts that lay outside of their conceptions of authenticity.”<sup>136</sup> The students’ demand for authenticity is one of the central values that I assert any hip hop fan would require of “good” music.

In keeping with its concern for authenticity, hip hop music is incredibly nostalgic.<sup>137</sup> This is remarkable because, as a distinct genre, hip hop is itself no more than forty years old.<sup>138</sup> Despite its relatively recent vintage, contemporary artists constantly hearken “back in the day” to “old school” hip hop as the source of some kind of unassailable authenticity. Professor Imani Perry notes: “The old school is consistently celebrated in hip hop, even as the music becomes exponentially more sophisticated—particularly among independent artists—more polished, and of a higher sound quality . . . . [N]ostalgia becomes an authenticating device.”<sup>139</sup> In good hip hop music, references to a prior work clear a space for transforming that prior work to serve the artist’s own unique purpose.

The fascination with identifying hip hop’s point of origin is constantly displayed in the music. Songs regularly refer back to the personalities considered by most to be hip hop originators. In 1995, for example, 2Pac paid tribute to the New York artists who pioneered hip hop in his song *Old School*.<sup>140</sup> Tellingly, the 2Pac song contained a sample of a 1990 song by Brand Nubian, where Grand Puba raps: “What more could I say,

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132. GANG STARR featuring NICE & SMOOTH, *DWYCK*, on *HARD TO EARN* (Virgin Records US 1994) (Greg Nice verse).

133. See *supra* note 84.

134. HILL, *supra* note 1.

135. *Id.* at 33.

136. *Id.*

137. PERRY, *supra* note 76, at 54.

138. See CHANG, *supra* note 76, at 67.

139. PERRY, *supra* note 76, at 55.

140. 2PAC, *Old School*, on *ME AGAINST THE WORLD* (Interscope 1995).

I wouldn't be here today if the old school didn't pave the way."<sup>141</sup> Pioneers from the "Golden Era" of hip hop—Eric B. & Rakim, Big Daddy Kane, Kool G Rap, and significantly, female emcees Queen Latifah and MC Lyte—are among the most cited hip hop artists.<sup>142</sup> In law, a similar reverence for origins and foundational work appears in the judicial opinions of Justice Antonin Scalia<sup>143</sup> and in the advocacy of the Federalist Society.<sup>144</sup>

Counterintuitively, nostalgia as an authenticating device in hip hop drives rather than stunts the artist's impulse for originality. A contemporary MC or DJ who quotes the old school is claiming their inheritance as creators of a well-established but ever-changing hip hop culture, and as a result, citations to prior works redound in the music of hip hop. In hip hop, citation occurs at different moments and in different spaces. Citations in song exist at two levels: (1) in the song itself, either explicitly as a verbal shout-out or implicitly as an invocation of the hip hop community's collective knowledge; and (2) in the single or album's liner notes.

The first type of citation occurs inside the song itself. Internal citations can be explicit, as for example in *Juicy*, when The Notorious B.I.G. (Biggie) rhymes: "Remember Rappin' Duke, duh-ha, duh-ha / You never thought that hip hop would take it this far."<sup>145</sup> Here, Biggie references a 1984 Shawn Brown song<sup>146</sup> as a personal claim to hip hop expertise. This act of claiming serves two purposes. In doing so, Biggie

141. BRAND NUBIAN, *Dedication*, on ONE FOR ALL (Elektra 1990) (Grand Puba verse). Grand Puba dedicates the song to his favorite hip hop artists:

Just cuz I'm a rapper, doesn't mean I'm not a fan  
My favorite, Rakim, Big Daddy, Kool G and  
LL who always keep the girls jingling  
C'mon honey dip, you can jingle on my (Yo, cool chill)  
When it comes to female rappers, bust it, here's a few  
MC Lyte, Queen Latifah, Monie Love, and Linque  
What more could I say, I wouldn't be here today  
If the old school didn't pave the way.

*Id.*

142. See WILLIAM JELANI COBB, TO THE BREAK OF DAWN: A FREESTYLE ON THE HIP HOP AESTHETIC 47 (2007).

143. See also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989).

144. See generally *About Us*, THE FEDERALIST SOCIETY, <http://www.fed-soc.org/aboutus/> (last visited Nov. 15, 2011); Emily C. Cumberland, *Originalism, in a Nutshell*, THE FEDERALIST SOCIETY (Mar. 31, 2010), [http://www.fed-soc.org/publications/pubid.1823/pub\\_detail.asp](http://www.fed-soc.org/publications/pubid.1823/pub_detail.asp).

145. NOTORIOUS B.I.G., *Juicy*, on READY TO DIE (Arista Records 1994) (CD).

146. SHAWN BROWN, *Rappin' Duke*, on ¿QUE PASA? (JWP Records 1985).

is at once (1) acknowledging his musical forebears (for example, Brown), and (2) proclaiming his status as an emerging talent on the hip hop music scene (“Now I’m in the limelight ‘cause I rhyme tight”).<sup>147</sup>

This Biggie song also contains another type of internal citation; an implicit one that relies on the listener’s breadth of knowledge to establish the linkage between the current work and its progenitor.<sup>148</sup> The chorus in *Juicy* is a variation on the lyrics in the song *Juicy Fruit* by Mtume. Biggie sampled a portion of *Juicy Fruit* in *Juicy*, and it is the source of its infectious melody.<sup>149</sup> Hip hop fans would immediately recognize the implicit citations through Biggie’s quotations of the lyrics and the melody of the Mtume original. In this instance, the listener’s depth and breadth of music knowledge works as the authenticating device. A knowledgeable fan is experiencing the music at a more intimate level than the casual listener, and these references are a means for Biggie as the artist to qualify his fan as a true hip hop head. Even music fans not familiar with Mtume’s original song would have opportunities to access this insider knowledge. *Juicy Fruit* is one of the most often sampled melodies in hip hop, and at least twenty-eight others have incorporated the Mtume song into new works.<sup>150</sup>

Implicit internal citations can also be seen in hip hop texts. A few rap lyrics are so celebrated that they have been used repeatedly by different artists. In the late 1980s, emerging hip hop group EPMD distinguished themselves by using samples from funk music to create their signature underground sound.<sup>151</sup> Calling to their fans, EPMD rhymed “relax your mind, let your conscience be free / and get down to the sounds of

147. NOTORIOUS B.I.G., *Juicy*, *supra* note 145.

148. See WHOSAMPLED.COM, <http://www.whosampled.com/sampled/Mtume/?sp=2> (last visited Nov. 15, 2011).

149. R&B group Total sings the chorus in *Juicy*:

You know very well who you are  
Don’t let em hold you down, reach for the stars  
You had a go, but not that many  
‘Cause you’re the only one I’ll give you good and plenty.

NOTORIOUS B.I.G., *Juicy*, *supra* note 145. These lyrics are based on Mtume’s *Juicy Fruit*:

You know very well what you are  
You’re my sugar thang, my chocolate star  
I’ve had a few but not that many  
But you’re the only love that gives me good and plenty

MTUME, *Juicy Fruit*, on *JUICY FRUIT* (Epic Records 1983).

150. See WHOSAMPLED.COM, <http://www.whosampled.com/sampled/Mtume/> (last visited Aug. 31, 2011).

151. See Interview with EPMD, HIPHOPGAME.COM, <http://hiphopgame.ihiphop.com/index2.php3?page=epmd> (last visited Aug. 31, 2011).

EPMD.”<sup>152</sup> Years later, after EPMD had cemented their status as hip hop originators, Snoop Dogg (Snoop) referenced their seminal work in his *Snoop Bounce*, when he encouraged the listener to “relax your mind and let your conscience be free / and get down, stompin’ grounds is the LBC.”<sup>153</sup> The reference to the “LBC” is Snoop Dogg’s riff on the EPMD lyric—a reference to Snoop’s hometown, Long Beach, California. Puff Daddy (P. Diddy or Diddy) later quoted the same work in his 2006 *Come to Me*, urging the listener to “roll with the sounds of BBE”<sup>154</sup> or Bad Boy Entertainment, Diddy’s record label.<sup>155</sup> In each instance, the reference to the EPMD lyric is indirect; neither Snoop nor Diddy explicitly names EPMD in their songs, but knowledgeable hip hop fans would not need an explicit citation to recognize the quote.<sup>156</sup>

Internal citations in hip hop, whether explicit or implicit, are dependent upon a mutual exchange of insider knowledge between artists and their fans. Artists embed their music with cultural references that have a special meaning for hip hop insiders. By searching for obscure and novel sources, the artist is able to maintain her own insider status.<sup>157</sup> Fans access insider status by recognizing and understanding those references within the context of the larger hip hop culture. Hip hop fans are constantly adding to a deep repository of musical knowledge, even in anticipation of future songs. For a fan, the reward for the effort required to build this knowledge base is the satisfaction of being “in the know.”<sup>158</sup>

Hip hop artists also use external citations to acknowledge the prior work of other artists. By external citation, I mean the formal and explicit acknowledgment of an original work in the new song’s album liner notes. This external citation is often accompanied by a license fee payment to the copyright owner. When an artist identifies the source of the sample, acknowledges the copyright owner, and pays a royalty, this is explicit citation, even if the liner notes are not read by the listener.<sup>159</sup>

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152. EPMD, *You Gots to Chill*, on STRICTLY BUSINESS (Fresh/Sleeping Bag Records 1988).

153. SNOOP DOGGY DOGG, *Snoop Bounce*, on THA DOGGFATHER (Death Row/Interscope Records 1996).

154. P. DIDDY, *Come to Me*, on PRESS PLAY (Bad Boy Records 2006).

155. Shout out to Daryl Deller for this suggestion.

156. See Mickey Hess, *Was Foucault a Plagiarist? Hip-hop Sampling and Academic Citation*, 23 COMPUTERS & COMPOSITION 280, 285 (2006).

157. *Id.* at 288.

158. *Id.* (internal quotation marks omitted).

159. This is quite similar to a footnote in a law review article which identifies the source of the language or idea utilized in the main body of text, but which may not be



The practice of acknowledging prior work through citations is reflected in other aspects of hip hop culture. Harvard University's W.E.B. Du Bois Institute maintains a website called The HipHop Archive (Archive),<sup>160</sup> essentially a digital museum of audio and video recordings, party and show flyers, magazine articles, books, academic papers, course syllabi, and other cultural material emanating from hip hop culture.<sup>161</sup> The Archive is devoted to "the pursuit of knowledge, art, culture and responsible leadership through HipHop,"<sup>162</sup> and to that end, it encourages the use and dissemination of the materials available on its website for the further production of knowledge.<sup>163</sup> Yet, the Archive also warns its users to give proper attribution whenever publishing research based on its materials. Here are the Archive's instructions on citation form:

About Citations—Don't Bite!

Most citation styles will likely require the full article URL. The citation style may request the full date and time of the article revision you are using. *Using incorrect citations or not citing at all is the same as an MC biting a lyric and pretending it is his or her own!* When writing about something you learned about and found somewhere else, you must recognize and give the citation. We have included some of these links about writing and citation styles that might help you. They are: APA Style, MLA Style and Chicago Style. They also include information about writing papers in general. (We apologize that some of them are unnecessarily complicated).]<sup>164</sup>

The Archive's exhortation not to bite reflects hip hop's valuing of authenticity and its demand for innovation. Hip hop artists do not thrive in the competitive industry unless they are able to satisfy the demands of their consumers. As with all writing or performance genres, "specific aspects of quality control (in this case largely imposed from within) determine which of the created musics become most influential in shaping the character of the [genre]."<sup>165</sup> Hip hop fans value certain

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closely examined by the reader.

160. See THE HIPHOP ARCHIVE, <http://www.hiphoparchive.org> (last visited Aug. 31, 2011).

161. *Hiphop Archive Material Collection*, THE HIPHOP ARCHIVE, <http://www.hiphoparchive.org/about/our-projects/hiphop-archive-material-collection> (last visited Aug. 31, 2011).

162. *The HipHop Archive at Harvard University*, W.E.B. DU BOIS INSTITUTE FOR AFRICAN AND AFRICAN AMERICAN RESEARCH, <http://www.dubois.fas.harvard.edu/hiphop-archive-harvard-university> (last visited Aug. 31, 2011).

163. See *About the Archive*, THE HIPHOP ARCHIVE, <http://www.hiphoparchive.org/about> (last visited Aug. 31, 2011).

164. *Id.* (emphasis added).

165. Harrison, *supra* note 93, at 298.

qualities in their music, especially authenticity, originality, and innovation. The presence or absence of these traits in hip hop music largely determine the fate of the artists. As Professor Anthony Kwame Harrison notes, “[t]he literal and figurative competitions that occur between lyricists on recorded hip hop songs target a critical eye on alleged newcomers and lesser emcees, particularly those who use simplistic rhyme schemes, overused themes, and promotional gimmicks.”<sup>166</sup> Therefore, both artists and fans act as regulating agents within hip hop culture. If an artist’s music is found to be lacking in originality, she will be identified as an imitator (not an innovator) and her reputation and record sales will suffer as a result. But, if the artist consciously invokes the work of another in hip hop’s past, she demonstrates herself to be a true innovator, and a native intellectual in hip hop culture.

The trajectory of rapper Ja Rule’s career is one example of hip hop’s internal quality assurance mechanism at work. While he enjoyed a period of commercial success with hits like *Holla Holla*<sup>167</sup> and *I’m Real*,<sup>168</sup> the rapper Ja Rule was seen by many hip hop heads to be a Tupac Shakur (2Pac) imitator. The tone and quality of their voices are indeed similar; but when Ja Rule used the same beats and almost identical lyrics as 2Pac’s song *Pain*<sup>169</sup> in his *So Much Pain*<sup>170</sup> many critics felt that he had crossed the line from homage to outright biting. Where 2Pac rhymed:

Got my mind on danger  
 Never been a stranger to homicide  
 My cities full of gang bangers and drive bys  
 Why do we die at an early age  
 He was so young  
 But still a victim of the 12 gauge  
 My memories of a corpse  
 Mind full of sick thoughts  
 And I ain’t goin back to court  
 So fuck what you thought  
 I’m drinkin’ Hennessey  
 Runnin from my enemies  
 Will I live to be twenty-three  
 There’s so much pain[.]<sup>171</sup>

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166. *Id.*

167. JA RULE, *Holla Holla*, on VENNI VETTI VICCI (Def Jam 1999).

168. JA RULE featuring JENNIFER LOPEZ, *I’m Real*, on PAIN IS LOVE (Def Jam 2001).

169. 2PAC, *Pain*, on ABOVE THE RIM SOUNDTRACK (Death Row Records 1994).

170. JA RULE, *So Much Pain*, on PAIN IS LOVE (Def Jam 2001).

171. 2PAC, *Pain*, *supra* note 169.

Ja repeated:

I spits razors, **never been a stranger to homicide**  
**My city's full** of tote-slangers and chalk lines  
**Why do we die at an early age?**  
 [N\*\*\*\*] **so young, but still a victim of a twelve-gauge**  
 Feel the rage this world has bestowed upon me  
 and I don't give a fuck 'cause they don't give a fuck 'bout me  
 So I keep – **drinkin Hennessy, bustin at my enemies**  
**Will I live to see twenty-three? There's so much pain.**<sup>172</sup>

In response, rappers Eminem, 50 Cent, and Busta Rhymes collaborated on a record “dissing” Ja Rule.<sup>173</sup> The song, *Hail Mary (Ja Rule Diss)*,<sup>174</sup> was performed over 2Pac’s *Hail Mary*,<sup>175</sup> and the purpose of the lyrics was to call out Ja Rule (Ja) for his imitation. Eminem rhymed: “[Ja] is wearin’ rags in photos, Ja’s words bein’ quoted / in The Source stealin’ Pac’s shit like he just wrote it / . . . Now all a sudden I’m a fuckin’ mad man who screams like I’m Pac / but I’m not, enemies, Hennessy / Actin’ like I’m great, but I’m fake, I’m crazy.”<sup>176</sup> While Ja may have intended to record a song in tribute to the late 2Pac, hip hop’s regulating agents called him to task, and declared that Ja Rule was a “faker.” Ja Rule’s rap career had fizzled out by 2005.<sup>177</sup>

In contrast, when North Carolina-based group Little Brother mimicked the styles and lyrical flows of legendary rappers Kool G Rap, Slick Rick, and Doug E. Fresh in a celebrated homage,<sup>178</sup> they were critically acclaimed. Reviewers uniformly praised the group’s skill in drawing on the old school while also setting themselves apart as hip hop innovators with their own unique sound.<sup>179</sup> In so doing, Little Brother avoided

172. JA RULE, *So Much Pain*. I have used bolded text to highlight the portions of Ja Rule’s lyrics that are identical to 2Pac’s.

173. 50 CENT featuring EMINEM & BUSTA RHYMES, *Hail Mary (Ja Rule Diss)*, on HAIL MARY (White Label 2003).

174. *Id.*

175. 2PAC, *Hail Mary*, on THE DON KILLUMINATI: THE 7 DAY THEORY (Death Row Records 1996).

176. 50 CENT, *supra* note 173.

177. See Lola Ogunnaike, *Against All Odds*, VIBE MAG., Apr. 2004, at 102. Ja Rule’s last studio album was released in 2004. See JA RULE, R.U.L.E. (Def Jam 2004).

178. See LITTLE BROTHER, *So Fabulous*, on THE LISTENING (ABB Records 2003).

179. See, e.g., Del F. Cowie, Album Review, VIBE MAG., Apr. 2003, at 178; J-23, Album Review, *Little Brother, The Listening*, HIPHOPDX.COM (Apr. 8, 2003), <http://www.hiphopdx.com/index/album-reviews/id.275/title.little-brother-the-listening>; Robert Gabriel, Review, ALLMUSIC.COM, <http://www.allmusic.com/album/the-listening-r634798/review> (last visited Aug. 31, 2011).

the biting trap perhaps inherent in the borrowing tradition of hip hop, and created what Professor Perry calls good hip hop music:

Good MCs and DJs not only make the history present but they also enmesh it in the new entity created by the given song, to be enjoyed in a distinct way. Substandard hip hop songs, which have inundated the market, simply consist of rhymes over the music of other artists, but excellent ones take the flavor of an earlier song and add it to the stew, creating something new and special with the old.<sup>180</sup>

Furthermore, as southern rappers, the decision to place themselves in this cultural context was probably quite deliberate. MCs from the South had been the targets of criticism from the rest of the hip hop community who expressed the shared opinion that the region was lacking in significant contributions to the development of hip hop music.<sup>181</sup>

As we have seen, hip hop utilizes a peculiar system of citation to protect the culture's values of authenticity and innovation. The hip hop citation system described above encourages efforts to propagate those values, and it establishes a mechanism to regulate artists who offend them. In the next section, I compare the values, skills, and policing system that control production in the legal writing classroom.

### *B. Ethical Legal Writing*

A legal writing and research class is the first-year law student's introduction to the skills that they will need in order to succeed in law school and in legal practice. At John Marshall, I teach Lawyering Skills I (LSI), the first of four semesters of legal writing and skills classes that are required for graduation.<sup>182</sup> In LSI, I assign various research and writing assignments, but here I will discuss only the objective memorandum (memo) assignment.

In assessing a student's performance on these memo assignments, I am the arbiter of good grades, and in evaluating student work, I examine whether the individual student has demonstrated at least four distinct analytical skills: comprehension, organization, rule synthesis, and analogical reasoning.<sup>183</sup> These analytical skills are crucial to the

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180. PERRY, *supra* note 76, at 55.

181. Cee-lo Green declared on his first solo album in 2002: "Now I don't want never hear nobody else say/ goddamn a [n\*\*\*\*] from the South can't rhyme / NEVER!" CEE-LO GREEN, *Big Ole Words (Damn)*, on CEE-LO GREEN AND HIS PERFECT IMPERFECTIONS (La Face 2002).

182. *Lawyering Skills Program*, THE JOHN MARSHALL LAW SCHOOL, <http://www.jmls.edu/academics/jd/lawyeringskills.shtml> (last visited Aug. 31, 2011).

183. Leading textbooks on the subject of legal writing concur: RICHARD K. NEUMANN, JR. & SHEILA J. SIMON, *LEGAL WRITING* (2008); CALLEROS, *supra* note 57; RICHARD K.

law student's development as a professional writer. As a baseline, a first-semester student should know how to structure her analysis. In my class, I use the TREAC paradigm.<sup>184</sup> Comprehension is a discrete skill, but a good understanding of the legal issues presented by a fact pattern is contingent on both accurate rule synthesis and careful analogical reasoning. Rule synthesis requires the student to navigate through the hierarchy of legal authority, read and understand a variety of legal authorities, and, thereafter, articulate a controlling legal rule.<sup>185</sup> Analogical reasoning is the mode of analysis that drives the development of legal doctrine in the United States common law system.<sup>186</sup> Like the hip hop corpus, the body of case law forms a vast and growing, but finite, store of information. Familiarity with the system of precedent that governs a legal issue is critical to drafting a thorough analysis. This is why legal research and writing professors encourage exhaustive legal research and stress the need to Shepardize legal authorities.<sup>187</sup>

The common law's appetite for legal precedent also explains, in part, why law students might be more prone to types of writing or writing processes that tempt plagiarism. First-year law students are overwhelmed with a flood of information, including hundreds of pages in weekly reading assignments and a brand new vocabulary to accompany those pages. As they make their first attempts to use this new language in their writing assignments, students instinctually begin to imitate the language of those around them (that is, the case law). Professor Mirow warns, however: "In imitation lies the danger of plagiarism."<sup>188</sup>

To a law student, the language that a United States Supreme Court Justice uses to resolve a legal issue might seem perfect, exact, and beyond improvement. So, she copies it word-for-word. It may not even occur to the student that the Justice's opinion is an individualized and subjective expression of the law. After all, most Supreme Court opinions are riddled with quotations and citations to other Supreme Court opinions. A law neophyte might come to believe that the expressions of

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NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* (5th ed. 2005); HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* (4th ed. 2003). In my first-semester legal writing class, I use CHRISTINE COUGHLIN ET AL., *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS* (2008).

184. "TREAC" stands for thesis, rule, explanation, application, and conclusion.

185. See Gail Anne Kintzer, Maureen Straub Kordesh & C. Ann Sheehan, *Rule Based Legal Writing Problems: A Pedagogical Approach*, 3 J. LEGAL WRITING INST. 143, 146 (1997).

186. COUGHLIN ET AL., *supra* note 183, at 135.

187. See, e.g., AMY E. SLOAN, *BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES* 130 (4th ed. 2009).

188. Mirow, *Plagiarism: A Workshop for Law Students*, *supra* note 42.

the law contained in judicial opinions are generic. If the student views the Court's words as fungible, she may see no ethical issue in an unattributed paraphrase, or even in repeating those words verbatim.<sup>189</sup> In doing so, the neophyte is making incorrect assumptions about the ethical rules that govern her academic work. The neophyte's mistakes often compound with each other, resulting in sometimes intentional, but more commonly, negligent plagiarism, in any of the three types which I defined in Part III.A.2.

Legal writing professors should address these misunderstandings and insecurities early in the first semester. An important message to convey in this regard is that, while the words of judicial opinions are unique, they are not magical. A good lawyer should engage in a transformative use of the case law in the same way a hip hop artist manipulates existing samples to create new music. At its best, legal writing is as Professor Lessig suggests, a remix.<sup>190</sup> Legal writing is remixing because it incorporates existing legal authorities to provide support for or to formulate new arguments. Remixing is, therefore, a basic legal writing skill, but remixing well is not a simple matter of mechanical cutting and pasting.

It takes extraordinary knowledge about a culture to remix it well. The artist or student training to do it well learns far more about his past than one committed to this (in my view, hopelessly naive) view about "original creativity." And perhaps more important, the audience is constantly looking for more as the audience reads what the remixer has written. Knowing that the song is a mix that could draw upon all that went before, each second is an invitation to understand the links that were drawn—their meaning, the reason they were included. The form makes demands on the audience; they return the demands in kind.<sup>191</sup>

The legal writing professor, then, is tasked with teaching students how to avoid cut-and-paste plagiarism and to engage instead in expert remixing.

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189. The LWI website contains a collection of resources about plagiarism. See *Plagiarism*, LEGAL WRITING INSTITUTE, <http://wiki.lwionline.org/index.php/Plagiarism> (last visited Nov. 16, 2011). The University of Maryland distributes a handout to its law students entitled, *Law Student Plagiarism: You Can't Afford It!*, which contains several great examples of plagiarism and citation rules. See *Legal Writing Resources*, UNIVERSITY OF MARYLAND FRANCIS KING CAREY SCHOOL OF LAW, <http://www.law.umaryland.edu/academics/writing/center/documents/plagiarism.pdf> (last visited Aug. 31, 2011).

190. See LESSIG, *supra* note 72, at 52.

191. *Id.* at 93.

Remixing in the context of legal writing requires the author to weave case names, statutory references, and quotations into a seamless analysis. Professor Charles R. Calleros's popular legal writing textbook contains an entire chapter devoted to the effective presentation of legal authority.<sup>192</sup> Citations should be explicit, but subordinate to the information contained in the textual sentence.<sup>193</sup> When using direct quotes, Calleros instructs his students to use them selectively,<sup>194</sup> and provides the following guidance:

You should generally quote more sparingly from case law. Supervising attorneys and judges are primarily interested in your original synthesis of case law and your analysis of the facts within the legal framework. They are not impressed by your demonstrated ability to cut and paste page-long passages written by others.<sup>195</sup>

When students learn this, their confidence in understanding and communicating in their new legal language grows, and they will make bolder attempts to discuss the law in their own terms and on their own terms. These are revelations about legal writing that distinguish seasoned legal writers from novices.

Novice lawyers begin their writing process by imitating the writing styles available to them, explaining why novice lawyers have a tendency to plagiarize. Expert legal writers, by contrast, approach the legal writing process differently. Whereas novice lawyers begin by incorporating any legal authority that seems relevant or useful, expert legal writers draft their ideas or arguments first, then find authorities to support those arguments.<sup>196</sup> Novice lawyers research first and expert lawyers write first. Expert legal writers can do this because of their familiarity with the relevant law. Many attorneys have specialty practices, and over time, develop an intimate knowledge of the law.<sup>197</sup>

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192. CALLEROS, *supra* note 57, at ch. 14 (Chapter 14: Presenting, Quoting, and Citing to Authority).

193. *Id.* at 301-03.

194. *Id.* at 309-10.

195. *Id.* at 309.

196. Scott P. Stolley, *Shortcomings of Technology: The Corruption of Legal Research*, PURSUIT MAG. (Jan. 5, 2009), <http://pursuitmag.com/shortcomings-of-technology-the-corruption-of-legal-research/> (last visited Aug. 31, 2011) (citing BRYAN GARNER, *THE WINNING BRIEF* 25 (1999)) (describing research-oriented writers and intuitive mode writers); Richard A. Posner, *How I Write*, 4 SCRIBES J. LEGAL WRITING 45, 46-47 (1993).

197. Stolley, *supra* note 196 (quoting Robert T. Sloan, in *THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* 288 (Fred R. Shapiro ed., 1993) (internal quotation marks omitted) ("I have learned from experience that no matter how strange and fantastic is my own notion of the law, it is safe to assume that somewhere in the reports there will be a decision that will support it.")).

Expert lawyers also leave substantial time for legal research and citation work. Our students, by comparison, are learning the law at the same time as they are being asked to present written analyses. In attempting to bridge the divide between experts and novices, the intervention of social constructivist composition theorists can provide some guidance.

Social constructivists posit that the goal of teaching legal writing is “the socialization or acculturation of the novice legal communicator into the legal ‘discourse community’ through the learning of legal vocabulary, legal customs, and legal culture.”<sup>198</sup> The law professor’s job, then, is to teach her students how to think, act, and talk “like a lawyer.” Professor Kathryn M. Stanchi has cautioned, however, that the relentless process of assimilation to which law students are encouraged to succumb often sacrifices the voices of law students who enter into legal culture from outsider positions.<sup>199</sup> The audience for most memo assignments are legal “insiders”—supervising attorneys or judges.<sup>200</sup> According to Stanchi, “[s]tatistically, white, upper-middle class, heterosexual men tend to be overrepresented in these positions.”<sup>201</sup>

Acknowledging this potential downside to the acculturation to law practice is the first step in avoiding it. Legal writing professors must be conscientious of the danger in muting outsider voices, so that they can pursue alternative techniques of socializing novices into the knowledge community of lawyers. If one of the normative goals of a legal writing course is to teach how legal language and discourse is situated in the larger society (not just within the discourse community of lawyers), then we should teach our students about law’s impact on culture and vice versa.<sup>202</sup> Novice lawyers will undertake a variety of different professional roles in the public sphere, as counsel to clients, whether they be multinational corporations or small business owners or criminal defendants or the public at large.<sup>203</sup> Students, then, need to be exposed to an array of different epistemological exercises.

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198. Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9 (1998).

199. *Id.* at 10.

200. *Id.* at 21.

201. *Id.*

202. “All legal communication takes place within a dense web of social and structural relationships which legal writing necessarily reflects (and reproduces). To teach that how lawyers use language is technical and apolitical, that the same ‘rules’ apply whether in a poverty clinic or a Wall Street firm, with the wealthy and indigent client, in my view, presents a dangerous and misleading vision of the legal world.” Lorne Sossin, *Discourse Politics: Legal Research and Writing’s Search for a Pedagogy of Its Own*, 29 NEW ENG. L. REV. 883, 888 (1995).

203. *See id.* at 888-89.



The value of using hip hop as a comparative citation system is perhaps at its most potent here. For students who consider themselves hip hop heads, using hip hop as a teaching tool provides these students with a chance to become insiders and leaders in the classroom, at least for a time. “[W]e sometimes can reduce student alienation by allowing different groups of students to take turns enjoying the status of ‘Insiders’ on a problem, rather than routinely relegating some students to the role of perpetual ‘outsider.’”<sup>204</sup> The more diverse the array of learning exercises available to the students, the more opportunities exist for students to rotate in playing the role of insider.<sup>205</sup>

Legal writing professors should promote the notion that the student is a peer with the law, a perspective that expert legal writers possess. Professor Schneider has observed that the most highly skilled student writers

establish their authority as *writers*; they claim their authority by placing themselves both within and against a discourse, . . . and [by] working self-consciously to claim an interpretive project of their own, one that grants them the privilege to speak. These skilled students write from a critical, rather than an imitative, stance.<sup>206</sup>

Students should be encouraged to cultivate a critical thought process as they are writing. Professors can assist in this process by beginning the writing course with explicit goal statements, stated in the syllabus and repeated often in writing assignments and orally during class discussions.<sup>207</sup> Fostering this self-critical stance to a student's legal education also serves the goal of inculcating metacognitive training.<sup>208</sup> Metacognition, or the process of self-discovery about how one learns, lays the groundwork for teaching a student how to teach herself. In an industry where professionals are constantly having to adapt and innovate to the changing needs of clients, this is a valuable and

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204. Charles R. Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship*, 34 J. MARSHALL L. REV. 281, 292 (2000).

205. See *id.* at 290-91 nn.31-32. In choosing to center hip hop music and culture in my proposed approach to teaching law students about plagiarism and its pitfalls, I remain mindful that while this method might resonate with some students, it might also fall flat or even alienate others. Evening students, for example, who are typically starting their second or third career by the time they arrive at law school, may not have the cultural fluency to be able to participate in a lesson that centers hip hop as a primary discourse.

206. Schneider, *supra* note 11, at 51 (citation and internal quotation marks omitted).

207. See *id.* at 103.

208. See, e.g., Anthony Niedwiecki, *A Process Approach to Teaching Law Students: Using Self-Assessment Tools to Improve Metacognitive Strategies and Formative Assessment Techniques in Law School* (manuscript in progress).

enduring lesson. A student who practices metacognitive learning has the confidence in knowing she can develop the skills she needs to adapt.

The foregoing comparison between hip hop and legal writing concludes that these disparate forms actually share similar values and use similar mechanisms to regulate and punish community members who transgress those normative values. Both hip hop and legal writing value an insider's expert knowledge of the sources that comprise the basis for new work in the respective fields. In hip hop, sources include beats and rhymes; in legal writing, the primary source is jurisdictional case law. Both hip hop and legal writing utilize peculiar systems of citation to aid in a participant's development towards expert, insider knowledge. And, in both hip hop and legal writing, regulating agents will impose sanctions for violations of the rules of citation.

## V. CONCLUSION

In the Prelude, I called my credibility as the author of an article on hip hop and legal writing pedagogy into doubt by warning the reader about my lack of expertise. I have attempted to rehabilitate myself in the intervening pages by citing examples designed to display the breadth of my knowledge, to reclaim for myself some credibility as a type of hip hop insider. My references to songs and artists deliberately span the spectrum of hip hop music—from underground to mainstream, from the East Coast to the West and the Dirty South, from old school to contemporary—with the intention of proving myself to the reader.

Ultimately, my goal in the first-year legal writing classroom is to empower students to confidently use legal authorities when composing memoranda and briefs. In this Article, I have argued that millennial students can become stronger and more proficient legal writers when they have engaged in a study comparing the cultural products of hip hop with the cultural products of the law. Both hip hop music and legal writing are at their best when they demonstrate the author's depth of knowledge of the subject matter by showcasing the author's skill at weaving existing sources with new, innovative ideas and arguments. Although ongoing litigation about hip hop's unauthorized use of sampling might mislead the uninitiated, hip hop culture actually maintains and enforces its own system of citation and authentication. Hip hop citation comes in a different form than citation for academic or legal writing, but it nonetheless serves the dual purposes of announcing the artist's musical sources and contextualizing that artist's work within the culture, thereby authenticating the artist's status within hip hop. The uniform system of citation used in legal writing reflects those two aims. When a lawyer cites case law or statutes in a trial brief, she is calling the reader's attention to the existing legal authorities in support

of her argument. By using correct citation form, the lawyer is also subtly communicating to her audience that she is a credible legal “insider.”