18. The Evolution Control Committee, "Past Releases: The Whipped Cream Mixes," The Evolution Control Committee, http://evolution-control.com/.

19. House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, *The Digital Future of the United States: Part II, the Future of Radio*, 110th Cong., 1st session, 2007, statement of Representative Mike Doyle of Pennsylvania.

20. Kembrew McLeod, *Freedom of Expression: Resistance and Repression in the Age of Intellectual Property* (Minneapolis: University of Minnesota Press, 2007), 163.

21. Wikipedia, "Danger Mouse," "The Grey Album," http://en.wikipedia.org/ (accessed March 2, 2007); Recording Industry Association of America (RIAA), "Gold and Platinum: Searchable Database," RIAA.com, http://www.riaa.com/ (accessed December 17, 2009). Note that because these are interactive sites with user-generated content, it is possible that the data on them have changed since the accessed dates stated.

22. Various documents relating to the exchange between Negativland and the RIAA are available at Negativland, "Negativland and the RIAA," NegativWordWideWebLand, http://www.negativland.com/.

23. Mark Jenkins, "In Negativland's Plus Column," *Washington Post*, September 20, 1998, G4.

24. Negativland, "Negativland and the RIAA."

25. Ibid.

26. Ibid.

27. Ibid.

CHAPTER 6. CONSEQUENCES FOR CREATIVITY

1. Coleman, *Check the Technique*, 27.

2. Roni Sarig, *Third Coast: OutKast, Timbaland, and How Hip-Hop Became a Southern Thing* (New York: Da Capo, 2007), 124.

3. David Sheppard, "What Kept You?" *MOJO Magazine*, May 2008, 62–67.

4. Mike McGonigal, *Loveless* (New York: Continuum, 2007), 55–56.

5. Landes and Posner, *The Economic Structure of Intellectual Property Law*, 52–53.

6. By "expected harm" we mean the probability of being sued multiplied by the following tripartite sum: (1) the probability of losing a lawsuit (if sued) times the amount of damages and the amount of legal fees in the instance of losing, plus (2) the probability of winning a lawsuit (if sued) times the amount of legal fees in the instance of winning, plus (3) the probability of settling a lawsuit (if sued) times the amount of the settlement and the amount of legal fees in the instance of settling.

7. Whether musicians employing the noncommercial-recording model could lawfully engage in *paid* live performances of their sample-based works is a more complicated issue. See the discussion below of the model of live performance only.

8. Creating a sample-based work live in concert (i.e., mixing the music live, in real time) without sample licenses implicates two of the exclusive rights of copyright owners. First, live performances infringe the public performance right in the musical composition copyrights in sampled songs. Sound recording copyrights have a public performance right, but it is limited to online performances. *U.S. Code* 17 (2006), § 106(6). The blanket licenses that concert venues purchase to cover live performances of entire songs may not apply to samples; whether they do depends on the specific terms of those licenses. Second, sample-based works performed live could implicate the derivative-works right in both the sound recording copyright and the musical composition copyright. The sample-based works would certainly infringe as unauthorized derivative works if they were captured and fixed as they were performed. But there is some controversy over whether fixation is required to infringe the derivative works right. See Tamara C. Peters, "Infringement of the Adaptation Right: A Derivative Work Need Not Be 'Fixed' for the Law to Be Broken," *Journal of the Copyright Society of the U.S.A.* 53 (2006): 401–46. Fair use could still succeed as a defense to infringement of either the performance right or the derivative works right. But any fair use defense would be weakened (though not foreclosed, as the Supreme Court held in *Campbell v. Acuff-Rose Music*) by the commercial nature of the live performance.

9. A concert promoter who booked a Girl Talk show told us that he had assumed that the blanket license that allows for bands to play covers—or DJs to spin whole songs—also allowed mash-ups to be performed at the venue. Whether the promoter's assumption was correct depends on the specific terms of his venue's licenses.

10. *U.S. Code* 17 (2006) § 512(c)(3)(A).

11. Samantha M. Shapiro, "Hip-Hop Outlaw (Industry Version)," *New York Times Magazine,* February 18, 2007, 29.

12. Chuck D, *Lyrics of a Rap Revolutionary*, 107.

13. Xombi, The-Breaks.com, http://the-breaks.com/index.php; Wikipedia, "Fear of a Black Planet: Partial List of Samples," "Paul's Boutique: Samples List," http://en.wikipedia.org/. The data from these sites were originally collected in December 2006. Note that because these are interactive sites with user-generated content, it is possible that the data on them have changed since the accessed dates stated.

14. Brad Benjamin, Paul's Boutique Samples and References List, http://paulsboutique.info/.

15. The values contained in table 2 are based primarily on Whitney Broussard, "Current and Suggested Business Practices for the Licensing of Digital Samples," 503, as well as on our discussion with him in 2006 to update some of the figures. We are grateful for Broussard's assistance with this project. We also relied on Passman, *All You Need to Know about the Music Business*, 306–8, and various project interviews, especially the comments of Danny Rubin, to estimate license fees for usage of samples.

16. See Union Square Music, "The Story of Curtom," Union Square Music, http://www.unionsquaremusic.co.uk/.

17. U.S. Copyright Office, "Mechanical License Royalty Rates."

18. Many authorities say that the statutory rate of section 115(a) acts as a ceiling—it is the most that record labels will pay. See, for example, Passman, *All You Need to Know about Music Business*. Other commentators we spoke with noted that the statutory rate need not be a ceiling—if composers had more bargaining power they could demand slightly more than the statutory rate, and the record label might pay it to avoid the cost of complying with the statute's administrative procedures. But practitioners maintain that the rate functions as a ceiling.

19. The fifteenth track on *Paul's Boutique*, "B-Boy Bouillabaisse," is actually a medley of nine songs. We treated it as just one track for the purposes of estimating the impact of the controlled composition clause and the excess mechanical royalties clause. But we do break down the licensing fees by each of the nine songs within the medley in table 4.

20. A controlled composition clause is a standard part of most major label contracts with recording artists. Many recording artists record their own songs. When that occurs, record labels seek to pay less than the statutory rate (just because they can). A controlled composition clause typically limits those recording artists who are also composers to receiving only 75 percent of the statutory rate, or $0.06825, on compositions in which they own the copyright. We allowed for the potential impact of this clause, but with or without the controlled composition clause each album bumps up against the excess mechanical royalties limit of $0.91.

21. Jerry R. Green and Suzanne Scotchmer, "On the Division of Profit in Sequential Innovation," *RAND Journal of Economics* 26, no. 1 (1995): 20–33.

22. For a fuller discussion of this economic model, see Peter DiCola, "Sequential Musical Innovation and Sample Licensing," in "Essays on Regulation of Media, Entertainment, and Telecommunications" (Ph.D. diss., University of Michigan, 2009), 76–112.

23. We address fair use in much more depth in chapter 7.