

Fared Use: A Political Economy of the Digitally-Empowered Subject

Author's Note

The following essay was edited from a of lecture given at the UCSD Visual Art Department conference *Distributed Creativities* on April 4, 2009. I'd like to take a moment to contextualize it in relation to the conversation between Rick Lowe and Teddy Cruz, printed in this volume. In it, the two speak primarily within the framework of housing and architecture, and the ways artists can (and perhaps must) now act not just as facilitators, but as challengers to those normally tasked with problem-solving in those areas (i.e., the urban planner, the architect). While my frame does not pertain to architecture or housing per se, it does touch upon fundamental aspects of Rick's and Teddy's talk: the critique of increasing specialization within disciplines, the role of public culture, the agency of the artist, and community-building. Both texts share a realization—that old systems of production, which depended on a model of increased specialization in all domains, are experiencing “growing pains” as alternatives show real (and very interesting) signs of viability. In the case of digital tools, which forms a portion of my essay's focus, I don't think it is an exaggeration to state that there has never been a time when the heretofore specialized processes and techniques of cultural production have been so radically “generalized.” Ultimately, my concern echoes one of Teddy's: “the fact that artists...continue to be subordinated to particular institutions of power.” Thus my attempt here is to dislodge some of the institutional roadblocks confronting producers today who, equipped with new toolsets, actively seek to realize new cultural relations.

Notwithstanding the “digital divide” barrier to entry into the networked society, well along now in its “2.0” phase, the author, it seems, has become the producer. Today's digital subject has now folded “reading” (downloading) and “writing” (producing/uploading) into one another, altering our preconceptions of the creative act, which has in turn altered the very definition of what it means to be a creator. And while Roland Barthes' proclamation of the “death of the author” four decades ago may be somewhat misguided, as I intend to argue, it cannot be denied that there has been, on an

unprecedented scale, a “birth of the reader,” which has consequently shifted the sites of cultural agency in contemporary society.

Creative Industries advocate John Hartley has recently called for the study of media and its effects to shift its focus from (negative) political economy questions (i.e., “what do media do to audiences?”) to (positive) questions of agency (i.e., “what do audiences do with media?”). Hartley terms this a “text-audience” approach, which ideologically parallels the “rise of the creative class” discourse articulated by Richard Florida in 2002. Undergirding both Hartley’s and Florida’s ideas is the notion that the liberation of the creative subject is a more or less completed project, that new technological processes and a productivist ethos centered on innovation have unlocked the shackles that had previously restrained the creative capacities of the masses.¹ Yet I believe swapping a political economy discourse for a text-audience one is a risky endeavor, for the latter cannot exist without the former. The struggle for control over the logistics of the creative act, while seemingly in a state of transformation from a centralized, top-down model to a decentralized, lateral or user-defined model, is far from over. We must not ignore the fact that any realignments in today’s methods of digital cultural production come in spite of the desires of powerful interests that strive to maintain a stranglehold on content creation, by continuing to administrate the abilities of the creative subject according to the conventions of consumption that have defined Western culture for the last sixty years. The battle is not easily abandoned. In order to better understand its front lines, and thus the importance of the agency recently afforded the digital author-subject in today’s mediascape, I’d like to begin by tracing a

genealogy of modern media production in the “broadcast era,” how it was authored and by whom.²

In his well-known essay *The Work of Art in the Age of Its Technological Reproducibility*, Walter Benjamin presciently diagnosed the relationship between technology, the masses and creativity. Benjamin realized that modern forms of media, in their mass production, were fundamentally changing the roles of art, artist and viewer. No longer tied to premodern ritual and tradition, no longer emitting an “aura,” modern media would be based on a different practice: politics, one positioned for use both in aestheticizing dominant political regimes through their officially sanctioned authors, and in “politicizing art” by an emerging, popular movement offering alternatives to the status quo through aesthetic experimentation. The formation of such a movement necessarily entailed rethinking just who qualified as an author in the modern era; for Benjamin, the film, photograph, publication and recorded sound, each in their ability to be multiplied and disseminated—would emancipate the creative capacities of the masses, unleashing new political consciousnesses. “The distinction between author and public,” Benjamin states, anticipating Barthes in some respects, “is about to lose its axiomatic character...At any moment, the reader is ready to become a writer.”³

Benjamin’s writing on the reformation of the author-subject, and his or her agency as a newfound cultural producer, came just on the cusp of Europe’s decent into war. As such, his words were formed against the very real backdrop of the rises of Fascism and Communism, and the ways each harnessed the politics of aesthetics in order to advance their aims. As we know, Benjamin did not live to see the conclusion of World War II, so it remains to be seen just how he might have reconsidered his thoughts

about the work of art in the age of mechanical reproduction given the balance of power established following the war's outcome. It is with particular curiosity that one wonders how Benjamin might have viewed mass media and the agency of the reader-as-author-as-producer during the post-war consumer boom in the United States. Writing in exile from Los Angeles, and thus witnessing the effects of an "entertainment industrial complex" firsthand, Benjamin's colleague Theodor Adorno had a very different opinion of the creative potential of the masses. Criticizing Benjamin's *Work of Art* essay, he writes, "The idea that a reactionary is turned into a member of the avant-garde by expert knowledge of Chaplin's films strikes me as out-and-out romanticization."⁴ For Adorno, mass media, far from awakening a revolutionary spirit in its audiences, instead arrested their critical consciousness, even as it trumpeted its activities under the banner of liberated subjectivity in a new democratic age. "Every visit to the cinema," Adorno writes, continuing his lambast of American film, "leaves me, against all my vigilance, stupider and worse."⁵ Absent from Adorno's rather bleak assessment is the authorial empowerment of the consuming subject, a member of the working class historically situated as the beneficiary of increased general education (i.e., having acquired the capacity to "read"), but who had not yet won the leisure time and economic means needed to mass circulate a creative voice (i.e., not having acquired the capacity to "write back" in response to what he or she was reading). For Adorno, the population was instead encouraged to spend what little free time it did have swallowing the cultural products generated for it: Hollywood films, TV shows, pop music, comic books, fashion, and so on.

But who actually made that stuff? Here I'd like parse out the "authorship" of culture from its "production" during the post-war era and continuing into the present. By production, I mean a relatively large-scale chain of actors, each with their roles in generating a final "expression" through a division of labor; by author, I am referring to the model, established roughly at the end of the eighteenth century, of the uniquely creative subject, one who is ultimately celebrated as the authentic creator of that expression. Part of the power of the broadcast model is that authorship and production are conflated, while the former is foregrounded even as it increasingly relies on the expanding technological apparatus of the latter. Examples have abounded in mass culture since the invention of modern media: Movie directors win awards for their artistic visions, while the films attributed to them have seemingly ever expanding ending credits; pop music stars are known on a first-name basis, yet anyone who has read their production notes knows the artist's music and image are tightly scripted operations involving a cast of dozens; even the author in the most traditional sense—say the best-selling novelist—has behind her or him editors, public relations agents, not to mention those who work the printing presses and drive the delivery trucks. Such a totalizing notion of authorial subjectivity is very powerful, because it reinforces an apparent singular control, through comprehensive ownership, of the productive apparatus. I believe this last point is especially noteworthy, for still today it is often the claim that the singular artist has a "natural" ownership right to her or his creations that corporate entertainment uses in order to justify their draconian control over what audiences can and cannot do with the mass culture produced for them. When record labels and film production companies threaten litigation over an unauthorized music remix or film

appropriation, they are merely protecting the creative autonomy of the artist, they say, protecting the “genius”—though we can imagine the claim that corporate entertainment has an artist’s best interests in mind is a rather dubious one.

Collapsing the distinction between the owners of the means of media production, and the actual authors of such media then perpetuates the belief in the triumph of the self—it’s ultimate constitution of identity and expression of creativity through private property. The notion of possessive individualism has been a foundational component of the social construction of authorship since the seventeenth century, when Locke and Hobbes first proposed a labor theory of property and correlated authorship with ownership. According to Locke, subjects, in having proprietorship over their own bodies, could lay claim to those elements in nature with which they mixed their labor. And as Hobbes states, “He that owneth his words and actions, is the Author...the Right of doing any Action, is called Authority.”⁶ But I want to make clear that, especially in the United States, the development of the author-subject has occurred as much in the legal domain as it has in any social one. More specifically, the articulation of authorial rights in American copyright law stem from what some legal scholars identify as the law’s long-time deferential treatment of the “romantic author.” As James Boyle states in describing the legal formation of the author-subject in the eighteenth and nineteenth centuries, “it is the *originality* of the author, the novelty which he or she adds to the raw materials provided by culture and the common pool, which justifies the property right.”⁷ Furthermore, this right was defined through the “work,” initially understood as the objectification of the author’s intellectual labor, the material extension of his or her unique personality.

Through a series of court rulings in the United States crossing over the late 1800s and into 1900s, the scope of what constituted the “work” eventually expanded beyond the literal text. This helped establish romantic authorship as the default artistic model within copyright jurisprudence, but it also paradoxically had the long-term consequence of shifting copyright’s emphasis away from the author’s intentions (they were regarded as “given,” “irreducible,”) and towards formal analyses of his or her productions. As copyright law uncritically embraced the ideology of authorial originality, it nevertheless mitigated its novel or innovative aspects in favor of recognizing the author merely as the work’s point of origin.

Into the twentieth century, author’s rights, while perhaps appearing to uphold the myth of an antiquated figure from a pre-industrial moment, acted as a foil for copyright’s actual purpose: providing the means for a fluid and expanding intellectual property market in an emerging post-industrial economy. This is illustrated in the authorial category first mentioned in the U.S. Copyright Act of 1909 and given greater clarification in the U.S. Copyright Act of 1976: the doctrine of work-made-for-hire. In the case of a work-made-for-hire, the Act states, “the employer or other person for whom the work was prepared is considered the author...and, unless the parties have expressly agreed otherwise...owns all of the rights comprised in the copyright.”⁸

With the articulation of work-made-for-hire, the 1976 Act provided legal buttressing for a twentieth century economic structure already dependent on the division of labor, allowing oligopolistic tendencies to emerge within the production of culture. Far from facilitating a romantic conception of authorship, copyright’s work-made-for-hire doctrine essentially seized control of individual agency, returning the author to his or her

place as a “just another cog in the wheel” in the fabrication processes of a postmodern culture industry, one awash in new creative tools and transmission technologies. Work-made-for-hire provided a booster shot for the copyright market at the outset of an information economy, but it had become the publishers (i.e., corporate media), not authors, who would benefit from the vaccine. This, however, did not stop corporate entities from employing the rhetoric of individualism. As Boyle further points out, “The true irony comes when we find that large companies can use the idea of the independent entrepreneurial creator to justify intellectual property rights so expansive that they make it much harder for future independent creators actually to create.”⁹

Now, Boyle’s statement might seem a touch antiquated—he wrote it in 1996, before web 2.0 and before the ubiquity of cheap technologies, especially in video production. As we all have witnessed, the explosive growth of new communications tools within the last decade has presented a radical challenge to the broadcast model of cultural production. A great many people have been afforded the ability not only to consume content but to produce it in a wide variety of media across an expanding array of channels. If there has been a triumph of the self, there has also been a triumph of the amateur. Major music labels are by many accounts in dire straits, and the film industry is in a panic. Outlets such as YouTube are changing the way we author culture. But has the *ownership* of culture entirely changed?

In many ways, certainly yes. But we would do well to recognize that the paradigms of corporate and other types of centralized authorial control remain, though they have been updated according to the new productive modes of the digitally-empowered subject. Whether tethered to an office job working late nights, or

emancipated from cubicle culture as a “free agent,” the author to a great extent still relinquishes control of his or her creations as a contract employee through copyright’s work-made-for-hire.

But contract regulation extends beyond the author-subject’s labor time. It also extends into his or her leisure time. Even more insidious perhaps has been the insertion of corporate control, acting under the rubric of “distributed creativity,” into the recreational media space. Take for example the 2008 NIKEiD/5D2F National Design Contest [FIG. 1], in which the company solicited its consumer base to “author” their own pair of customizable shoes through the NIKEiD web site. Twenty pairs of shoes were awarded to the finalists, who were not otherwise afforded any rights to their designs. Nike’s Terms and Conditions stated that the entries would become the exclusive property of the company, allowing it a “non-exclusive, non-revocable, worldwide, perpetual right” to freely use “any comments, information, designs, ideas, or other content contained in any design posted...without notice, compensation or acknowledgement...whatsoever.”¹⁰ Thus Nike had melded the creative capacities of the author-as-editor, as-selector—to use scholar Eduardo Navas’ term—and the mode of consumption made possible by post-Fordist small-run, production-on-demand.¹¹ Through its shoe design contest, the company seemingly presented itself as an advocate of the DIY spirit that characterizes contemporary remix culture, essentially providing a mechanism for consumers to donate their free research and development labor to Nike within the framework of innovative creative expression.

There are many more examples like this that illustrate the degree to which the digitally-empowered subject inhabits a complex permission culture. Terms and

conditions like those in the Nike contest are repeated over and over on screens across the network. I don't think it would be presumptuous of me to think that you, the reader, has dealt with this type of thing on one occasion or another; how many times have we clicked "OK" at the end of a software license agreement—after having carefully read its every line, of course. Suffice to say that regimes of intellectual property guide the creative potential of the author as producer every bit as much as the tools he or she employs.

I'd like to mention one more example that I believe could be indicative of a future trajectory for distributed creativity in the network age. It is about permission, and also about a contest. In October 2007, as some will recall, the pop band Radiohead released its album *In Rainbows*. What was remarkable about this album, again as some may remember, was that the band released it as a "pay-what-you-will" download, bypassing traditional record label distribution entirely. Radiohead was heralded as symbolic of a new model of authorial control over cultural production and dissemination. In homage, the Oakland, California based hip hop producer AmpLive put out his own remix album of *In Rainbows* the following month, without Radiohead's consent. The producer's *Rainydayz Remixes* [FIG. 2] was also slated to be a free download for "purchasers" of the original recording, but just before its proper release in early 2008, AmpLive was sent a cease-and-desist Letter from Warner Music, who owns the publishing rights to Radiohead's work. The remix album was subsequently taken offline.¹²

Within days of AmpLive's public display of Warner's take-down letter, a blogosphere campaign had launched in support of his music being released. Public pressure mounted, and by February, AmpLive and Radiohead (and presumably Warner

Music) reached an agreement to allow the remixes to be made available to the public for free. A “DIYers of the world unite” buzz was certainly in the air, and Radiohead’s concession fueled the drive for otherwise amateur music producers to take creative decisions into their own hands.

Two months later, Radiohead announced a remix “contest” of one of its singles from *In Rainbows*. Fans were invited to purchase the song’s individual tracks from Apple’s iTunes store for a nominal fee and create their own versions. The remixers uploaded their new versions of the single to the contest web site, where the public could vote for its favorite. No prize other than the satisfaction of being voted as the best was offered. The novelty of such a “collaboration” propelled Radiohead’s original single further up the pop music charts, while the remixers received some fanzine-type recognition. But like the Nike example, the following conditions were laid out: “...all rights in and to any remixed versions...created by the Entrant shall be owned by Warner/Chappell Music Ltd...If requested by [Warner], the Entrant shall...sign a formal assignment of copyright to give effect to the foregoing...all rights in and to any Remixes...shall be owned by _Xurbia _Xendless Ltd...and to the extent necessary the Entrant hereby assigns all rights...throughout the World for the full life of copyright... [Warner] will be registered and credited as the sole...publishers of the Remixes...the Entrant will not acquire a copyright interest in the Song.”¹³

The remix contest proved so popular that another one was introduced a short time later under more or less the same conditions. What changed was merely the price of the remixable tracks users had to purchase in order to participate. Radiohead, their publishers, and Apple were gracious enough to reduce the “entry fees,” though they did

not eliminate them entirely. As such, the band and ultimately its publishers profited both in the short and long term on the desires of would-be authors to participate in popular culture through a type of “pay-to-play” system—more than giving away their labor, the remixers were paying for the privilege to do so. This example is more concerning than the Nike case, for it establishes a model that, on the surface, seems to solve the author/owner dilemma that has plagued intellectual property for some time. But it does this by replacing “fair use,” the copyright doctrine that facilitates free expression and authorial autonomy—and the one AmpLive could have initially used in his defense had Radiohead not acquiesced—with what legal scholar Tom Bell has described as “fared” use.¹⁴ With fared use, any or all elements of a creative expression become accessible, but mediated piecemeal through incremental micro-transactions, yielding a sort of “death by a 1000 cuts of the author,” with each “cut” being a 25-cent fee here, a 99-cent fee there. Now the pros and cons of such authorial regulation could be an essay unto themselves, and at the very least raise many questions about the value of authorship. Under a fared use system, authorial control is compromised; the author as producer remains limited in his or her creative options when prefigured as a conduit for culture industry, however decentralized and “bottom-up” it may be.

I conclude by stating that I do not mean to discount the ways in which network technologies have afforded the digital subject more creative options as an individual, and just as importantly if not more so, have facilitated new forms of collectivity and collaborative ownership; that AmpLive’s remixes are available is testament to this. The open source software model and its variations in other productive domains (for example medical research) seems promising. But to end with John Hartley’s assertion that we

should be asking “what do audiences do with media?,” I reply, I hope they continue to work media over, authoring not only new expressions but also alternative and “fair” modes of production, towards consciousnesses that do not, by default, equate creativity with industry.

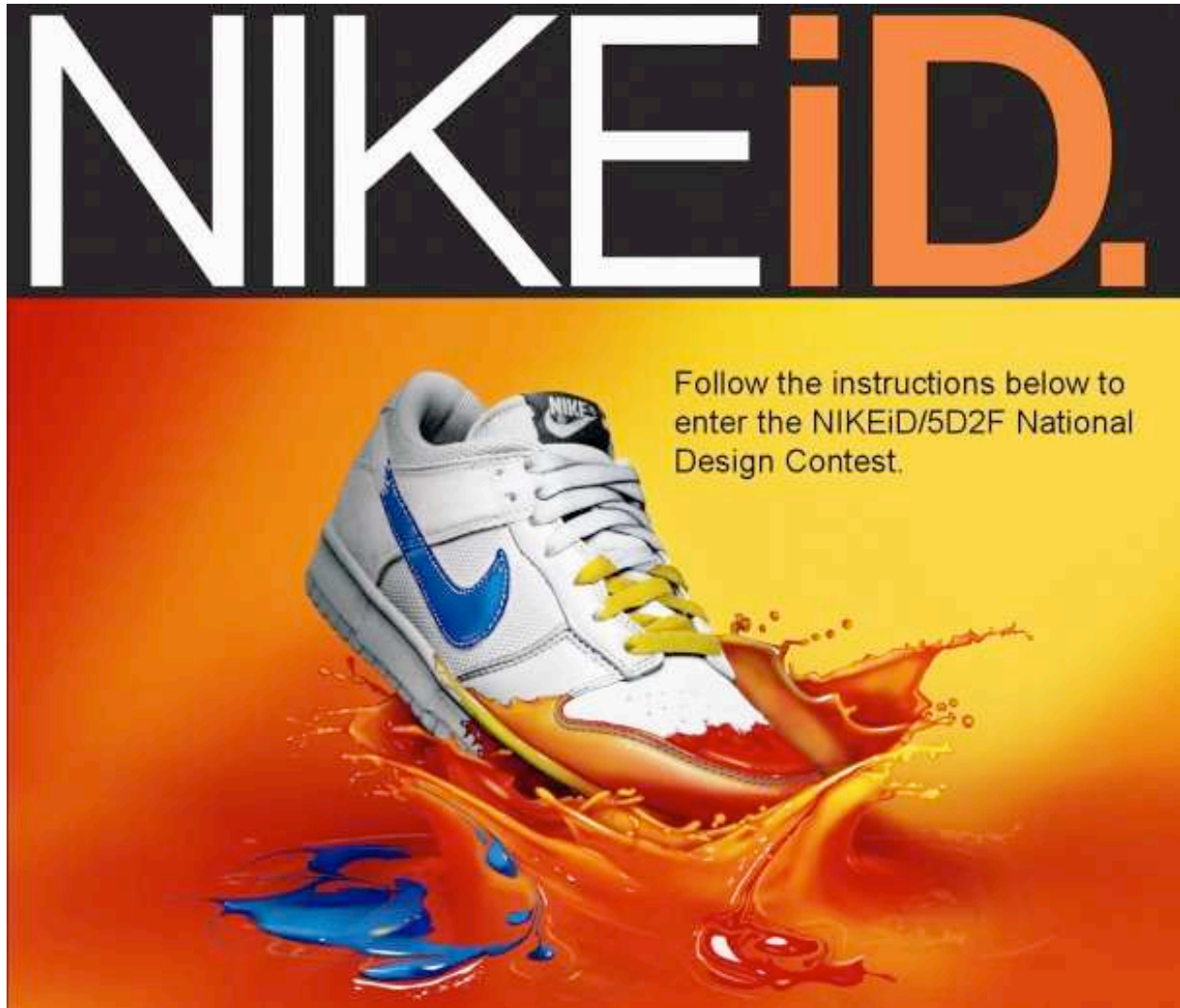


FIG. 1, promotion for the NikeiD Design Contest

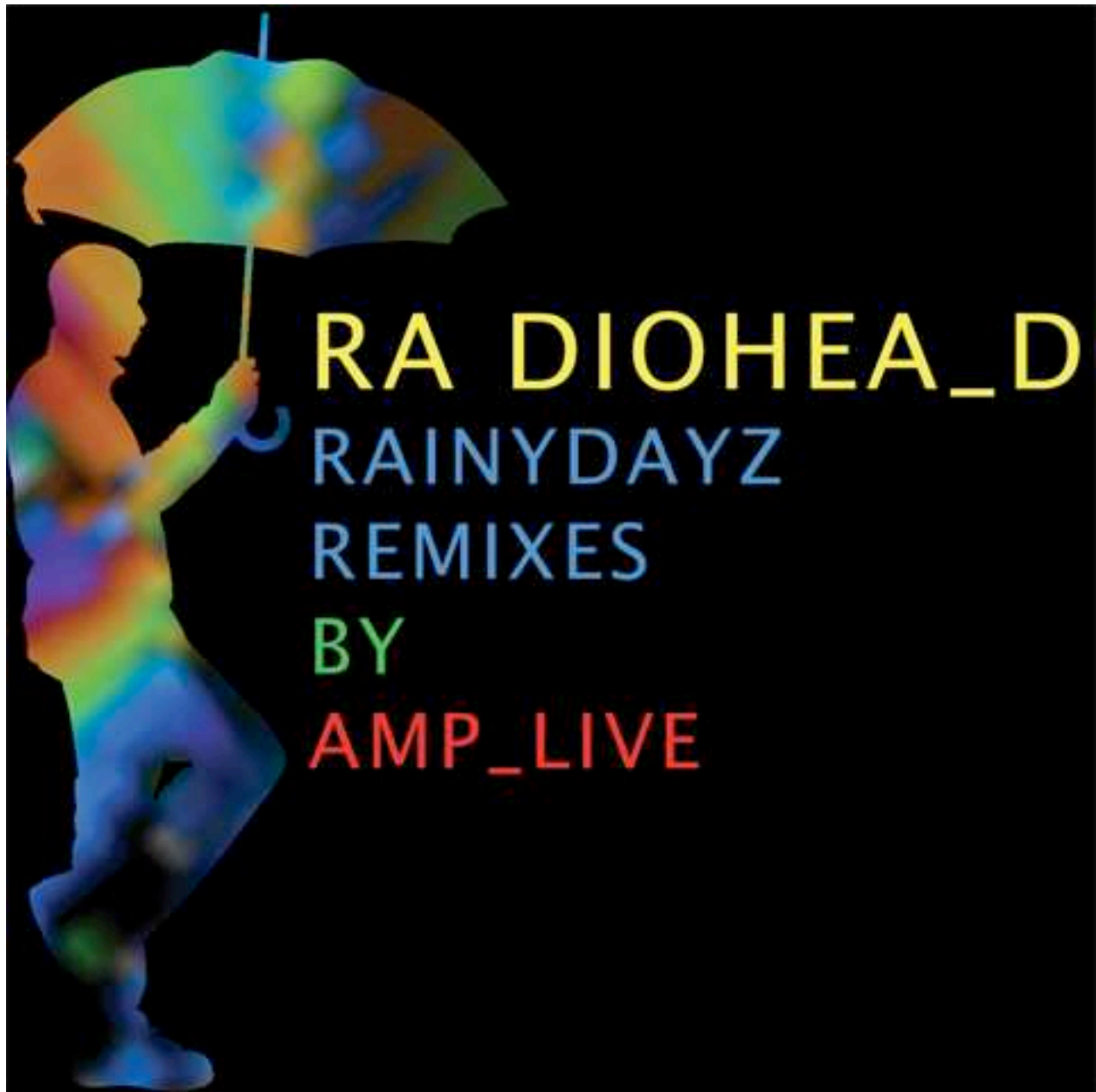


FIG. 2, cover art for AmpLive's *Rainydayz Remixes*

Notes

1. See Richard Florida, *The Rise of the Creative Class* (New York: Basic Books, 2002). See also John Hartley, "From the Consciousness Industry to Creative Industries: Consumer-created content, social network markets, and the growth of knowledge," <http://cultural-science.org/FeastPapers2008/JohnHartleyBp1.pdf> (accessed August 7, 2008). The concepts "Creative Class" and "Creative Industries" certainly have their critics. Prominent among them is Matteo Pasquinelli; see his "ICW-Immaterial Civil War: Prototypes of Conflict within Cognitive Capitalism," in Geert Lovink and Ned Rossiter, ed., *My Creativity Reader: A Critique of Creative Industries* (Amsterdam: Institute of Network Cultures, 2007), 69-79.
2. By broadcast era I am referring to that period in the United States and Europe, roughly between 1920 and 1980, in which radio and television (and film, although not transmitted with electromagnetic waves) were used as vehicles to disseminate information in a one-way, one-to-many, top-down system. Consumers of this media "tuned in" on regular bases to absorb its subject matter, which has been historically criticized as helping to relieve those who watched or listened from participating as active agents in the world. Herbert Marcuse termed this effect "affirmative culture." See Herbert Marcuse, *Negations: Essays in Critical Theory* (Boston: Beacon Press, 1968), 114-115.
3. Barthes ends his seminal essay *The Death of the Author* with: "...we know that to give writing its future, it is necessary to overthrow the myth: the birth of the reader must be at the cost of the death of the Author." Thirty years earlier, Benjamin allotted agency to the reader not merely through his or her capacities to interpret but also through capacities to produce. See Roland Barthes, "The Death of the Author," in *Image, Music, Text* (New York: Hill and Wang, 1977), 148. See Walter Benjamin, "The Work of Art in the Age of Its Technological Reproducibility," in *Walter Benjamin Selected Writings Volume 4, 1938-1940* (Cambridge: Harvard University Press, 2003), 258.
4. Theodor Adorno, "Letters to Walter Benjamin," in Ernst Bloch, *Aesthetics and Politics* (London: Verso, 1977), 123.
5. Theodor Adorno, *Minima Moralia: Reflections on a Damaged Life* (London and New York: Verso, 2005), 25.

6. John Locke, *Second Treatise of Government*, Chapter 5, Section 27, <http://www.gutenberg.org/dirs/etext05/trgov10h.html> (accessed August 11, 2009); Thomas Hobbes, *Leviathan*, Introduction, Chapter 16, <http://www.gutenberg.org/dirs/etext02/lvthn10.txt> (accessed August 11, 2009).
7. James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass.; London: Harvard University Press, 1996), 54.
8. U.S. Code Title 17, Section 201, <http://www.copyright.gov/title17/circ92.pdf> (accessed August 1, 2009). See also “Historical and Revision Notes,” House Report No. 94-1476, Title 17, Section 201, http://uscode.house.gov/download/pls/Title_17.txt (accessed August 1, 2009).
9. Boyle, *Shamans, Software, and Spleens*, xiii (emphasis in original).
10. See the NikeID web site’s terms and conditions at <http://www.nike.com/renov/nikestore/us/v1/us/en/info/privacy.jsp?item=terms&sitesrc=USiD> (accessed August 12, 2009). See also the contest “Official Rules” at its Facebook page, <http://www.facebook.com/topic.php?uid=38028000259&topic=5009&ref=mf> (accessed August 12, 2009).
11. See Eduardo Navas, “The Author Function in Remix,” <http://remixtheory.net/?p=309> (accessed August 5, 2009).
12. For the cease-and-desist letter, see <http://www.onesevensix.com/amplive/blckdoutcandd.jpg> (accessed August 10, 2009). For more information on the ordeal, see <http://www.onesevensix.com/amplive/index.html> (accessed August 10, 2009).
13. “Xurbia” is Radiohead’s own music label, while Warner/Chappell Music Ltd. owns the publishing rights to Radiohead’s music. Although the terms go on to state that Xurbia will not commercially exploit any remixes without the remixer’s consent, it is not clear that Warner is extending that same courtesy. See <http://radioheadremix.com/nude/terms/> (accessed August 5, 2009).
14. See Tom Bell, “Fair Use Vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine,” <http://www.tomwbell.com/writings/FullFared.html> (accessed August 12, 2009).