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# From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context

Olufunmilayo B. Arewa

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# FROM J.C. BACH TO HIP HOP: MUSICAL BORROWING, COPYRIGHT AND CULTURAL CONTEXT

OLUFUNMILAYO B. AREWA\*

*Musical borrowing is a pervasive aspect of musical creation in all genres and all periods. Copyright doctrine does not adequately reflect the reality of such borrowing. Instead, copyright doctrine incorporates notions of Romantic authorship that assume independent and autonomous authorship and even genius in the creation of original musical works. This individualistic and autonomous vision of musical authorship, which is central to copyright law, has deemphasized the importance and continuity of musical borrowing practices generally. The tension between conceptions of musical production and actual music practice is particularly highlighted in the case of hip hop music, which is now the second most popular type of music in the United States and an important musical and cultural force globally. The advent of hip hop has raised serious copyright law concern as a result of sampling, which is a form of musical borrowing that involves the use of pieces of pre-existing recorded music within hip hop works. Courts have held sampling to constitute copyright infringement. The pervasive nature of borrowing in music suggests that more careful consideration needs to be given to the extent to which copying and borrowing have been, and can be, a source of innovation within music. Existing copyright frameworks need to*

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*recognize and incorporate musical borrowing by developing commercial practices and liability rule-based legal structures for music that uses existing works in its creation.*

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## INTRODUCTION

What do Beethoven and Public Enemy have in common? Both have been enormously popular performers and composers.<sup>1</sup> Both are credited with fundamentally transforming music composition and performance during their respective times.<sup>2</sup> Both have copied and incorporated existing works of their own or others into their own works.<sup>3</sup> As such, Beethoven and Public Enemy illustrate the continuity of musical borrowing. This continuity and the importance of musical borrowing remain largely unacknowledged by the legal commentary and unreflected in copyright law.

Musical borrowing, which includes a range of practices from copying to more subtle influences, is a pervasive aspect of musical production.<sup>4</sup> Current copyright doctrine does not adequately reflect the reality of musical borrowing. Existing copyright structures are based on a vision of musical authorship that is both historically and culturally specific. This vision has led to representations of musical authorship in the legal sphere that do not adequately consider the ways in which musical borrowing is an integral part of authorship of many genres of music, not just hip hop music. Existing copyright structures are rooted in a notion of musical practice and authorship that is linked to the formation of the classical music canon, an invented tradition that had largely emerged by the last half of the nineteenth century. Copyright legal structures and the classical music

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1. See TIA DENORA, BEETHOVEN AND THE CONSTRUCTION OF GENIUS 130, 175–77 (1995) (noting that Beethoven achieved fame first as a keyboard virtuoso and later as a pianist-composer and that his success and acclaim enabled him to advocate successfully for changes in then non-uniform piano technology in Vienna); Robert Walser, *Rhythm, Rhyme, and Rhetoric in the Music of Public Enemy*, 39 ETHNOMUSICOLOGY 193, 193 (1995) (noting that Public Enemy is one of the “most successful and influential groups” in the history of hip hop).

2. See DENORA, *supra* note 1, at 2 (“Beethoven is often regarded as a ‘revolutionary’ composer, a pivotal force in the development of music.”); Monte Young, *Thirty Years of Hip Hop*, NEWSDAY, Oct. 13, 2004, at B4 (noting that Public Enemy is credited with having revolutionized rap music, transforming it from party music into a serious political force).

3. In addition to borrowing from others, Beethoven reworked his existing music in some way in more than one-third of his compositions. See *infra* notes 299–301 and accompanying text. Through extensive use of sampling, hip hop music groups incorporate existing music into their works. See *infra* notes 59–62 and accompanying text.

4. See *infra* Parts II.A.1.b–II.B.2.

canon have thus relied on a common vision of musical authorship that embeds Romantic author assumptions.<sup>5</sup> Such assumptions are based on a vision of musical production as autonomous, independent and in some cases even reflecting genius.<sup>6</sup> The centrality of the autonomous vision of musical authorship to both copyright law structures and conceptions of the canonic classical music tradition reflects an increasing tendency to minimize the importance and continuity of musical borrowing practices generally.

Further, current copyright structures reflect a pervasive bias toward musical features that lend themselves more readily to established forms of musical notation.<sup>7</sup> As a result, these structures reflect an emphasis on fidelity to the musical text. That emphasis is derived from the classical music tradition and has become predominant since the formation of the classical music canon in the nineteenth century.<sup>8</sup> In contrast, other types of musical expression, including classical music prior to the last half of the nineteenth century and jazz, have generally related to musical texts in a different way. Improvisation was once an important part of classical music practice.<sup>9</sup> However, aside from a few limited cases such as cadenzas and ornamentations in da capo arias,<sup>10</sup> improvisation is no longer typical in classical music performance today.<sup>11</sup> The decline of

5. See, e.g., Peter Jaszi, *Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29 *passim* (Martha Woodmansee & Peter Jaszi eds., 1994) (discussing the Romantic author concept in law); Martha Woodmansee, *Genius and the Copyright*, in *THE AUTHOR, ART, AND THE MARKET* 35, 35–39, 52–53 (1994) [hereinafter Woodmansee, *Genius*] (discussing origin of Romantic author concepts in literature); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE*, *supra*, at 15, 16–17 [hereinafter Woodmansee, *Author Effect*] (discussing the Romantic author concept).

6. See *infra* notes 73–87, 179–88, 206 and accompanying text.

7. See *infra* notes 71, 442–47 and accompanying text.

8. See Robin Moore, *The Decline of Improvisation in Western Art Music: An Interpretation of Change*, 23 *INT'L REV. AESTHETICS & SOC. MUSIC* 61, 79 (1992) (“Classical performers, bound both to the score and a desire to interpret it ‘correctly,’ feel constrained by a ‘tyranny of tradition.’”); James Parakilas, *Classical Music as Popular Music*, 3 *J. MUSICOLOGY* 1, 6 (1984) (noting that classical performers are “faithful to history in matters of style as well as of text”).

9. See *infra* notes 349–54 and accompanying text.

10. A da capo aria has an ABA structure where the A section is repeated with ornamentations. See Jack Westrup, *Da Capo*, in 6 *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS* 829, 829 (Stanley Sadie ed., 2001), available at <http://www.grovemusic.com> [hereinafter *NEW GROVE DICTIONARY*]. Cadenzas are improvised musical phrases that occur near the end of arias and concertos. See Eva Badura-Skoda & Andrew V. Jones, *Cadenza*, in 4 *NEW GROVE DICTIONARY*, *supra*, at 783.

11. Parakilas, *supra* note 8, at 6.

improvisation in the classical tradition is connected to Romantic notions of authorship and fidelity to sacred musical texts that became part of the emerging classical music canon in the nineteenth century.<sup>12</sup>

This Article focuses on some implications of musical borrowing for visions of musical authorship and copyright law. It considers how such visions relate to representations of musical authorship that largely fail to take into account the pervasive and widespread borrowing that characterizes much musical production. In addition, it discusses how hip hop and other forms of music that use existing works in their creation have challenged such representations. One such challenge in the case of hip hop is its unmistakable and overt use of musical borrowing through sampling. Part I examines the construction of music copyright, focusing on the implications of the vision of musical authorship or composition evident in legal commentary and court cases in the music copyright area. Part II focuses on the vision of authorship and performance in music copyright in historical and cultural context. Part III discusses potential ways to incorporate a liability rule-based framework for sampling based partly upon existing statutory frameworks and current musical industry licensing practices.

## I. THE CONSTRUCTION OF MUSIC COPYRIGHT: SAMPLING, POSTMODERNITY AND LEGAL REPRESENTATIONS OF MUSICAL BORROWING

Treatment of hip hop under copyright law should be placed within the context of changing technological standards, the expanding application of copyright doctrine, and historically rooted notions of music authorship and originality. All of these factors have significantly influenced musical borrowing as well as representations of musical borrowing.

### A. *Copyright, Music and Changing Technology*

Hip hop musical practices have been greatly facilitated by changing technology in music, which illustrates a recurrent theme in music history more generally. The application of copyright to music has been tested historically by the introduction of new technologies in musical performance and practice.<sup>13</sup> For example, the advent and

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12. See *infra* notes 349–54 and accompanying text.

13. See generally H.R. REP. NO. 94-1476 (1976), reprinted in 1976 U.S.C.C.A.N. 5659 (discussing the 1976 general revision to United States Copyright Act and noting that technological changes have affected the operation of copyright law generally). The 1976

adoption of printing technology,<sup>14</sup> the phonograph and player piano,<sup>15</sup> radio,<sup>16</sup> recorded song media<sup>17</sup> and digital music content<sup>18</sup> have all presented challenges for copyright regimes in place at the time such technologies were introduced.<sup>19</sup> Changing technology has led to

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general revision to United States Copyright Act, as amended, is hereinafter referred to as the Copyright Act.

14. See Wiliam Weber, *Mass Culture and the Reshaping of European Musical Taste, 1770–1870*, 25 INT'L REV. AESTHETICS & SOC. MUSIC 175, 180 (1994) (noting that technological improvements, including movable type that could be used to create sheet music for the mass choral market, improvements in engraving technology that facilitated the creation of more complex virtuosic and orchestral scores and the invention of lithography at the turn of the nineteenth century, enabled publishers to print versions of sheet music with colorful illustrations that were easier to sell).

15. See *White-Smith Music v. Apollo*, 209 U.S. 1, 17–18 (1908) (holding that perforated player piano music rolls were not copies within the meaning of the applicable copyright statute); Lisa Gitelman, *Reading Music, Reading Records, Reading Race: Musical Copyright and the U.S. Copyright Act of 1909*, 81 MUSICAL Q. 265, 274–75 (1997) (noting that the introduction of the player piano and phonograph seriously damaged the sheet music industry).

16. See Reebee Garofalo, *From Music Publishing to MP3: Music and Industry in the Twentieth Century*, 17 AM. MUSIC 318, 322–23, 331–32 (1999) (noting that the advent of radio broadcasting changed how music was experienced by its audience and led to the formation of Broadcast Music Incorporated (“BMI”), which was formed by radio broadcasters as a result of their increasingly adversarial relationship with the American Society of Composers, Authors and Publishers (“ASCAP”)); Lucia S. Schultz, *Performing-Rights Societies in the United States*, 35 NOTES 511, 516–22 (1979) (noting that radio broadcasters formed BMI in response to alleged excessive pricing, price-fixing and other practices by ASCAP).

17. See MICHAEL CHANAN, *REPEATED TAKES: A SHORT HISTORY OF RECORDING AND ITS EFFECTS ON MUSIC* 33–35, 83–86, 102–03, 161–64 (1995) (discussing the effects of recording and recording technology on music and the music industry); CHRISTOPHER SMALL, *MUSIC OF THE COMMON TONGUE: SURVIVAL AND CELEBRATION IN AFRICAN AMERICAN MUSIC* 395 (1987) (noting that records and the recording industry profoundly influenced Western musical performance in the twentieth century); Garofalo, *supra* note 16, at 336 (noting that records becoming a staple of radio programming was the basis of records displacing live performers in radio broadcasting and record companies’ displacing publishing houses as a power center).

18. See CONG. BUDGET OFFICE, *COPYRIGHT ISSUES IN DIGITAL MEDIA*, at vii (2004), available at <http://www.cbo.gov/ftpdocs/57xx/doc5738/08-09-Copyright.pdf> [hereinafter CBO] (“The digitization of creative content poses a more serious challenge to copyright law than did earlier episodes of technological advance.”); JESSICA LITMAN, *DIGITAL COPYRIGHT passim* (2001); Simon Frith & Lee Marshall, *Making Sense of Copyright*, in *MUSIC AND COPYRIGHT* 1, 3 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (noting that musical copyright is particularly important because the music business was “the first sector of the entertainment industry to experience the ‘threat’ of digital technology”); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 267 (2002) (“[C]yberspace and the economics of digital technology require the unbundling of the public’s interests in the creation and distribution of digital works.”).

19. See Gitelman, *supra* note 15, at 265 (noting that changing technology at the turn of the twentieth century, including phonographs, wax records, pianolas and paper music rolls, “challenge[d] visual habits of musical practice” and “troubl[ed] the established musical



major changes in the organizational structures of the music industry, which have in turn influenced copyright doctrine.<sup>20</sup> Likewise, copyright legal structures have had a parallel effect on music industry organization and business structures. In some instances, organizational structures and entities have arisen to enforce legal rights granted under copyright laws.<sup>21</sup>

Broad technological changes since the late twentieth century have also profoundly influenced many areas, including music and copyright.<sup>22</sup> Peer-to-peer file sharing reflects the introduction of new methods of music dissemination in the digital era.<sup>23</sup> Changing technologies of dissemination and production and a copyright framework with an increasingly broad reach have led in part to conceptual difficulties reflected in the way courts and legal commentators periodically grapple with the appropriate scope of copyright.<sup>24</sup> These difficulties are also related to an increase in the

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trade" partly as a result of the questioning of visual performance norms).

20. See Garofalo, *supra* note 16, at 319 (noting that major changes in popular music in the twentieth century can be "traced to the technological developments that enabled record companies to displace publishing houses as the power center of the music business").

21. For example, collective rights organizations such as ASCAP were established following Congress's extension in 1897 of the Copyright Act of 1831 to performance rights in musical works. See Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 684 (2003) (discussing the formation of ASCAP); Schultz, *supra* note 16, at 512–13 (noting that ASCAP was formed to facilitate enforcement of such rights).

22. See Paul Théberge, *Technology, Creative Practice and Copyright*, in MUSIC AND COPYRIGHT, *supra* note 18, at 139 *passim* (discussing technological changes with respect to the creative practice of music); Loren, *supra* note 21, at 675 ("The layering of copyright interests and the complexity of the law began long before digital technology. Digital technology, however, has laid bare the flaws of the current system that have been created by a process of accretion.").

23. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1095–98 (9th Cir. 2002) (describing how Napster's peer-to-peer file sharing service conducts searches and attempts to filter out copyrighted works); CBO, *supra* note 18, at 17–18 (noting the dramatic increase in peer-to-peer file sharing, and describing how peer-to-peer networks function); Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1625–26, 1631–47 (2001) (noting differences between internet copyright infringement and earlier copyright infringement technology); Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales* *passim* (Mar. 2004) (unpublished manuscript, [http://www.unc.edu/~cigar?papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar?papers/FileSharing_March2004.pdf)) (concluding through empirical analysis that file sharing has an effect on music sales that is statistically indistinguishable from zero).

24. See, e.g., H.R. REP. NO. 94–1476, at 51–52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664–65 (noting historic expansion of copyright from the time of first copyright statute in 1790 to the present day); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 19 (1996) ("[I]n copyright law—to a greater extent than in most other fields of legal doctrine—there is a routine and acknowledged breakdown of the simplifying assumptions of the discourse, so

level of abstraction or intangibility in copyright generally, as is evident in derivative rights that cover all “acts of exploitation” relating to the protected work.<sup>25</sup>

## B. *From Bach v. Longman to Bridgeport: Music Copyright and Hip Hop Music*

### 1. The Inexact Fit of Copyright for Music

Copyright statutes were originally enacted for literary property.<sup>26</sup>

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that mundane issues force lawyers, judges and policymakers to return to first principles.”); BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* 55, 61 (1999) (noting conflicts inherent in intellectual property law between the demands of replication (or abstraction) and identification and the fact that many current debates reflect the law working through these conflicts in new contexts); TIMOTHY D. TAYLOR, *STRANGE SOUNDS: MUSIC, TECHNOLOGY AND CULTURE* 3 (2001) (“The advent of digital technology in the early 1980s marks the beginning of what may be the most fundamental change in the history of Western music since the invention of music notation in the ninth century.”); Jessica Litman, *Copyright in the Twenty-First Century: The Exclusive Right To Read*, 13 *CARDOZO ARTS & ENT. L.J.* 29, 34 (1994) (noting that copyright is now applicable to a broader range of things); David McPhie, *Access Made Accessible: Shaping the Laws and Technologies that Protect Creative Works*, 51 *J. COPYRIGHT SOC’Y U.S.A.* 521, 523 (2004) (“[A]s new and sophisticated technologies emerge, the technologies themselves are making apparent the inherent weaknesses in the whole of copyright law as it exists today.”); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 290 (1996) (describing controversy surrounding the expansion of copyright scope by lengthening its term, extending it to personal uses and constricting authors’ ability to borrow from existing works).

25. See Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 *U. CHI. L. REV.* 1009, 1018 (1990) (reviewing PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* (1989)) (“[J]udges interpreting the original copyright statutes largely took the position that any substantial creative effort, even when it was applied to someone else’s copyrighted work, could not infringe a copyright.”); Martin Kretschmer & Friedemann Kawohl, *The History and Philosophy of Copyright*, in *MUSIC AND COPYRIGHT*, *supra* note 18, at 21, 35 (noting that copyright “employs a new concept of an *abstract* authored work to which all acts of exploitation are related, be they publication, engraving, reprinting, recital, translation or arrangement. Previously, each of these activities was subject to its own separate regulation (or non-regulation) according to specific policy circumstances”); Olufunmilayo B. Arewa, *Blocking, Tackling and Holding: Boundaries, Marking and Strategic Business Uses of Intangibles* 6, 42–44 (Case W. Reserve Univ., Working Paper No. 04-13, 2004), available at <http://ssrn.com/abstract=586483> (noting the increasing importance of intangibles in business practice, which makes determinations about what constitutes copyright infringement more difficult); *cf.* *Stowe v. Thomas*, 23 *F. Cas.* 201, 208 (C.C.E.D. Pa. 1853) (No. 13,514) (holding that translation of Harriet Beecher Stowe’s *UNCLE TOM’S CABIN* into German did not constitute copyright infringement).

26. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 1–9 (1993) (explaining how the development of the printing press prompted the notion that authors could have an intangible property right beyond the manuscript); Meredith L. McGill, *The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law*, 9 *AM. LITERARY HIST.* 21, 24 (1997) (noting that the debate

Consequently, copyright's application to music is a subject of considerable historical interest.<sup>27</sup> The literary copyright model has provided an inexact fit for music in a number of important respects. As such, adapting copyright to the context of music has not always been a smooth process.<sup>28</sup>

Courts' considerations of music in copyright cases tend to limit discussion to three principal features: melody first and foremost, and to a lesser extent, harmony and rhythm.<sup>29</sup> This focus largely reflects the historical emphasis of certain European musical traditions. The Western musical scale has twelve tones from which musical works may be constructed.<sup>30</sup> This scale, combined with harmonic and other structures built around these twelve tones, creates constraints on musical composition choices that are not present to the same extent in the literary context. For example, certain general harmonic chord progressions are typical of particular music traditions.<sup>31</sup> Music is

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over literary property in America was a pivotal point over a number of interlocking transitions, including the transition to a market economy and the shift from a patronage system to a market for books); Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 3, 6-10 (2002) (discussing the historical origins of the concept of the book as real estate and copyright as protecting literary property in the same manner as real property); Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 75 (2003) (discussing early copyright debates and the origins of conceptions of literary property, which is often seen as reflecting the settlement and enclosure of the literary world).

27. See generally Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005) [hereinafter Carroll, *Music Copyright*] (discussing the early history of musical copyright in Britain and the United States and considering how this early history relates to current copyright conflicts); Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1408 (2004) (surveying historical literature to trace "how and when in Western history music came to be the subject of proprietary claims vindicated by law").

28. See Gitelman, *supra* note 15, at 273 (noting that the "combination of pliable uses and new forms made music hard to pin down" for intellectual property questions, which had proven particularly difficult for music and its mechanical reproduction).

29. See Carl Dauhaus, *Harmony*, in 10 NEW GROVE DICTIONARY, *supra* note 10, at 858 (noting that, in contrast to melody, harmony involves "[t]he combining of notes simultaneously, to produce chords, and successively, to produce chord progressions"); Justin London, *Rhythm*, in 21 NEW GROVE DICTIONARY, *supra* note 10, at 277 (noting that rhythm and pitch are two essential elements of music, with melody and harmony being related to pitch and rhythm being "concerned with the description and understanding of their duration and durational patternings"); Alexander L. Ringer, *Melody*, in 16 NEW GROVE DICTIONARY, *supra* note 10, at 363 (noting that melody and harmony relate to pitch and that melody may be defined as "pitched sounds arranged in musical time in accordance with given cultural conventions and constraints"); *infra* notes 443-60 and accompanying text.

30. See GEORGE THADDEUS JONES, MUSIC THEORY 10 (1974) (noting that in the western European musical system, the entire range of useful sounds is divided up into seven white keys and five black keys of the piano).

31. See SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF

inherently relational in its construction: the harmonic meaning of a particular note or series of notes depends on the context of those notes.<sup>32</sup> In addition, music is typically related in some way to performance, which distinguishes it from other types of cultural production, such as literature.<sup>33</sup> Music is often less representational than literature,<sup>34</sup> which also strains the relationship between copyright and music. The restricted nature of the musical scale, limitations imposed by cultural and musical conventions, the centrality of performance in music, and the nonrepresentational and relational nature of music are all factors complicating the ease of translation of literary copyright to the musical context.

From the first application of the Statute of Anne<sup>35</sup> to music in the seminal 1777 case *Bach v. Longman*,<sup>36</sup> to the recent *Bridgeport* cases

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INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 118 (2001) (noting that the I-IV-V chord progression is characteristic of the blues tradition and is generally not considered protectible by copyright); FRANK ZAPPA WITH PETER OCCHIOGROSSO, *THE REAL FRANK ZAPPA BOOK* 187 (1989) ("Tin Pan Alley songs and jazz standards thrive on II-V-I [chord progression].").

32. See V. KOFI AGAWU, *PLAYING WITH SIGNS: A SEMIOTIC INTERPRETATION OF CLASSIC MUSIC* 15 (1991) ("Musicians are familiar with [the concept of music as a relational system rather than a substantive one] from the system of functional harmony, for example, by which a given note can take on different meanings depending on the key in which it occurs, and, within that key, the actual chord within which it functions.")

33. This reflects the fact that music is considered to be a performing art, distinguishing it from the literary field more broadly, despite the fact the literature field does include performance arts such as drama that involve works created for performance. See Ric Allsopp, *Performance Writing*, 21 PAJ: J. PERFORMANCE & ART 76, 76 (1999) (discussing the relationship between writing and performance and the fact that the study of writing "has until relatively recently been divorced from the study of . . . performance"); John G. Cawelti, *Performance and Popular Culture*, 20 CINEMA J. 4, 4 (1980) (distinguishing performing arts such as music, drama and dance, which require the mediation of a performer, from other arts such as fiction, painting and poetry, and noting that most of the popular arts are centrally involved with performance); Kingsley Price, *The Performing and Non-Performing Arts*, 29 J. AESTHETICS & ART CRITICISM 53, 62 (1970) (discussing the distinction between the performing and non-performing arts and noting that the performing arts "must be understood by reference to certain performances").

34. See Susan McClary, *The Blasphemy of Talking Politics During Bach Year*, in *MUSIC AND SOCIETY* 13, 16 (Richard Leppert & Susan McClary eds., 1987) (noting that music is nonrepresentational in that musical notes do not involve everyday world phenomena).

35. The Statute of Anne is generally considered to be the first British copyright statute. An Act for the Encouragement of Learning, 1709-10, 8 & 9 Ann., c. 19. Music was not at first protected under the Statute of Anne. See Kretschmer & Kawohl, *supra* note 25, at 27 ("Music was not thought to be protected under the Statute of Anne but although unauthorised publication of a composer's work was therefore not illegal, accusations of piracy still flew between music publishers.").

36. (1777) 98 Eng. Rep. 1274, 1275 (K.B.). The *Bach v. Longman* case was brought by Johann Christian Bach on account of unauthorized editions, published by music publishers Longman & Lukey, of two Bach works, a lesson and a sonata. Bach brought

about hip hop music,<sup>37</sup> courts and commentators have grappled with how to apply copyright to music.<sup>38</sup> The first U.S. copyright statute was enacted in 1790.<sup>39</sup> Music became protected under U.S. copyright law in 1831 with the first general revision of the 1790 act.<sup>40</sup> Although the broader history of the application of copyright to music is not a focus of this Article,<sup>41</sup> aspects of the cultural history of music and music copyright are central. Particular emphasis is given to the conceptual underpinnings of copyright reflected in its application to hip hop music.

## 2. Hip Hop as Musical, Cultural and Business Phenomenon

The term hip hop is “[a] collective term for black American urban art forms that emerged in the late 1970s” and refers “to a style of music that uses spoken rhyme (Rap) over a rhythmic background mainly characterized by the manipulation of pre-existing recordings.”<sup>42</sup> Although multiple definitions of hip hop exist, usage of the term hip hop overlaps considerably with the term rap, which is often used to refer to the musical aspects of the broader hip hop

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the suits seeking to effect legal changes to provide composers with copyright protection equal to that of authors. Bach, who was a prominent composer, had obtained a royal privilege, which granted protection from copying to works that Bach chose to publish himself. See David Hunter, *Music Copyright in Britain to 1800*, 67 MUSIC & LETTERS 269, 278–82 (1986) (describing the background of *Bach v. Longman*); John Small, *J.C. Bach Goes to Law*, 126 MUSICAL TIMES 526, 526–29 (1985) (same). For discussions of cases leading up to and contemporary with *Bach*, see Carroll, *Music Copyright*, *supra* note 27, at 958–69; Nancy A. Mace, *Haydn and the London Music Sellers: Forster v. Longman & Broderip*, 77 MUSIC & LETTERS 527, 529–39 (1996); Ronald J. Rabin & Steven Zohn, *Arne, Handel, Walsh and Music as Intellectual Property: Two Eighteenth-Century Lawsuits*, 120 J. ROYAL MUSICAL ASS'N 112, 112–14 (1995).

37. The *Bridgeport* cases involve copyright infringement actions brought with respect to a two-second sample of a guitar chord from a song by George Clinton and the Funkadelics. See *Bridgeport Music, Inc. v. Dimension Films*, 2004 FED App. 0297P, 3, 401 F.3d 647, 651 (6th Cir. 2004), *amended by* 2005 FED App. 0243P, 2, 410 F.3d 792, 795 (6th Cir. 2005); *Bridgeport Music, Inc. v. Boutit*, 101 F. App'x. 76, 77–79 (6th Cir. 2004); *Bridgeport Music, Inc. v. Still N the Water Publ'g*, 2003 FED App. 0130P, 3–4, 327 F.3d 472, 475 (6th Cir. 2003); see also *infra* notes 123–34 and accompanying text.

38. Difficulties in music copyright reflect difficulties in copyright generally. See LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 203, 213 (1968) (noting that the concept of copyright established in *Wheaton v. Peters*, a seminal American copyright case, is the basis for basic copyright doctrine, but has been unsatisfactory from its inception).

39. *Id.* at 197.

40. *Id.* at 201.

41. For a discussion of the history of the application of copyright to music, see generally Carroll, *Music Copyright*, *supra* note 27.

42. David Toop, *Hip Hop*, in 11 NEW GROVE DICTIONARY, *supra* note 10, at 542.

phenomenon.<sup>43</sup>

Despite being associated primarily with music today, hip hop originated as part of a broader urban and youth-centered cultural movement that emerged in the mid-1970s and that also included dance and art.<sup>44</sup> Rap music was actually the last element to emerge in hip hop culture.<sup>45</sup> Hip hop emerged from the experiences of African American and Latino urban, working class, largely male youth.<sup>46</sup> The practice of sampling appears to have been borrowed from disc jockeys in Jamaica.<sup>47</sup> Hip hop has since expanded to become the

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43. See David Toop, *Rap*, in 20 NEW GROVE DICTIONARY, *supra* note 10, at 848 (defining rap music as “[a] predominantly African-American musical style that first gained prominence in the late 1970s . . . [and which is] characterized by semi-spoken rhymes declaimed over a rhythmic musical backing, drawn from the sampling of pre-existing recordings and the use of DJ mixing techniques”). Although the term rap is also used to refer to hip hop music, “[m]any rap artists still consider hip hop to be a more authentic description of a way of life that extends beyond professionalism and specialization.” Toop, *supra* note 42, at 542; see also DAVID TOOP, *THE RAP ATTACK: AFRICAN JIVE TO NEW YORK HIP HOP* 12 (1984) (describing hip hop as a “lifestyle”).

44. See Toop, *supra* note 42, at 542 (noting that “[a]ctivities covered by the term [hip hop] included graffiti art and ‘breaking,’ a competitive acrobatic style of dance largely popularized by young Latinos. Music was central to the movement, and was created almost entirely by DJs”); Mtume ya Salaam, *The Aesthetics of Rap*, 29 AFR. AM. REV. 303, 308 (1995) (noting that hip hop culture of the late 1970s and early 1980s included rap music, graffiti art and break-dancing).

45. See TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 51 (1994) (noting that rap music was the last element in hip hop to arise but became its most prominent facet).

46. See HOUSTON A. BAKER, JR., *BLACK STUDIES, RAP, AND THE ACADEMY* 62 (1993) (characterizing blackness and youthful maleness as indispensable aspects of rap music); ROSE, *supra* note 45, at 27–34 (discussing the postindustrial urban context from which hip hop emerged); Greg Dimitriadis, *Hip Hop: From Live Performance to Mediated Narrative*, 15 POPULAR MUSIC 179, 179 (1996) (noting origin of hip hop in a range of cultural practices).

47. See S.H. Fernando Jr., *Back in the Day 1975–1979*, in *THE VIBE HISTORY OF HIP HOP* 13, 14–15 (Alan Light ed., 1999) (discussing the contributions of Clive Campbell (a.k.a. Kool Herc), a Jamaican born DJ who was influential in the early history of hip hop); Havelock Nelson, *DJ Kool Herc*, in *THE VIBE HISTORY OF HIP HOP*, *supra*, at 16, 16–17 (noting that Jamaican born DJ Kool Herc, who arrived in the United States in 1967, established the funky, flowing format of the hip hop art form); David Sanjek, “Don’t Have to DJ No More”: *Sampling and the “Autonomous” Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 610–11 (1992) (noting development of technique and technology of portable sound systems used by DJs in Jamaica to engage in audio combat that later became the technological creation of dub, which most likely made its way to the United States through Kingston, Jamaica-born Kool DJ Herc, who emigrated in 1967 and purchased a sound system in 1973, and who along with other early key DJs “began to establish the techniques that would lead to sampling”); Henry Self, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347, 349–50 (2002) (discussing the role of Kool Herc in bringing the sound system concept to the United States from Jamaica); Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 277 (1996) (noting use of sampling by Jamaican disk jockeys beginning in the 1960s).

second-best selling musical genre in the United States, surpassed only by rock and roll,<sup>48</sup> and a dominant musical force internationally.<sup>49</sup> The global cultural influence of hip hop is reflected in fade hair cuts, untied sneakers, conspicuous gold jewelry and baseball caps worn sideways,<sup>50</sup> the emergence of a multi-billion dollar hip hop industry and successful hip hop business figures,<sup>51</sup> as well as words introduced into mainstream American English such as *dis*, *def*, *yo*, *chill*, *wack*, *blunt* and *fly*.<sup>52</sup> Hip hop is now also mixed in all types of music,

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48. See *Rap*, THE HARVARD DICTIONARY OF MUSIC 704–05 (Don Michael Randel ed., 4th ed. 2003) (noting that with the emergence of gangsta rap, “a substantial white audience developed” for rap music); Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 985 (2004) (noting that hip hop is the second-best selling genre in the United States, with a culture that extends beyond music to television, movies, fashion, theater, dance and visual art); Christopher John Farley, *Hip-Hop Nation*, TIME, Feb. 8, 1999, at 54, 55 (noting that “rap outsold what previously had been America’s top-selling format, country music”); Neil Strauss, *Crossing Racial Boundaries, Rap Gains Ground*, N.Y. TIMES, Oct. 15, 1998, at E1 (discussing rap’s dominance of that week’s album charts).

49. See Butler, *supra* note 48, at 986 (noting that hip hop is international with variants in Africa, Brazil, the Caribbean, Western Europe, Southeast Asia and Japan); Dietmar Elflein, *From Krauts with Attitudes to Turks with Attitudes: Some Aspects of Hip-Hop History in Germany*, 17 POPULAR MUSIC 255, 255–57, 262–64 (1998) (discussing hip hop in Germany with a focus on the role of immigrant youth); Tony Mitchell, *Questions of Style: Notes on Italian Hip Hop*, 14 POPULAR MUSIC 333, 333–36 (1995) (commenting on hip hop music in Italy); William Eric Perkins, *Youth’s Global Village: An Epilogue*, in DROPPIN’ SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 258, 262 (William Eric Perkins ed., 1996) (noting that rap music and the hip hop style have widespread appeal to youth and have crossed linguistic and cultural boundaries); Thomas Solomon, *‘Living Underground Is Tough’: Authenticity and Locality in the Hip-Hop Community in Istanbul, Turkey*, 24 POPULAR MUSIC 1, 1 (2005) (discussing the ways in which participants in the Istanbul hip hop community construct a specifically local version of hip hop); Mark Espiner, *Hip-Hop on the Frontline: Globalised Rap Music May Have Lost Its Bite, But in the Middle East It’s Giving Voice to Both Sides in the Conflict*, GUARDIAN, Oct. 26, 2004, at 22 (discussing appeal of hip hop in Arab-Israeli Palestinian communities in Israel); Juan Farero, *For Colombia’s Angry Youth, Hip-Hop Helps Keep It Real*, N.Y. TIMES, Apr. 16, 2004, at A4 (discussing political rap music in Colombia); Ben Jacobson, *Rappers of the World Unite*, JERUSALEM POST, June 24, 2004, at 24 (discussing the burgeoning hip hop scene in Israel).

50. See ROSE, *supra* note 45, at 36–38 (discussing hip-hop fashion); *Hip Hop*, THE HARVARD DICTIONARY OF MUSIC, *supra* note 48, at 391–92 (noting the cultural influence of hip hop); Sonia Murray, *25 Years of Hip-Hop: Atlanta’s Dupri Is a New-Style Mogul*, ATLANTA J.-CONST., Sept. 26, 2004, at 1A (noting that hip hop is “a social and political force, an incubator of fashion and lifestyle trends, and a form of entertainment that doubles as a launch pad into the business world”).

51. See Yvonne Bynoe, *Money, Power, and Respect: A Critique of the Business of Rap Music*, in RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC 220, 220 (Norman Kelley ed., 2005) (noting that “rap music is a hierarchical, \$1.8 billion-a-year industry”); Alex Williams, *To the Top: A Hip-Hop How-To*, N.Y. TIMES, Sept. 25, 2005, § 9, at 1 (discussing the clout of hip hop impresarios and a business how-to book recently written by hip hop business impresario Kevin Liles).

52. *Hip Hop*, HARVARD DICTIONARY OF MUSIC, *supra* note 48, at 392.

including rock, reggae, jazz, and electronica.<sup>53</sup>

Hip hop has become increasingly commercial since the 1980s,<sup>54</sup> which some associate with a decline of hip hop as a vehicle for positive social change.<sup>55</sup> Domestic record sales of hip hop music have increased greatly in the last decade, from 6.7% of total domestic record sales in 1995 to 12.1% in 2004.<sup>56</sup> This upward trend contrasts significantly with rock music, whose share fell from 33.5% to 23.9% between 1995 and 2004.<sup>57</sup>

During its brief existence as a commercial phenomenon, hip hop has garnered significant legal attention, particularly surrounding the practice of sampling, which has emerged as a core aspect of early hip hop musical production.<sup>58</sup> Sampling is “[a] process in which sound is taken directly from a recorded medium and transposed onto a new recording.”<sup>59</sup> Another hip hop production practice is looping, which entails reiteration of a particular sample.<sup>60</sup> Originally done using vinyl records during live performances,<sup>61</sup> sampling can now be accomplished with digital technology.<sup>62</sup> Although closely associated with hip hop music, sampling is actually widespread in the recording

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53. See Glenn Gamboa, *30 Years of Hip Hop*, *NEWSDAY*, Oct. 10, 2004, at A6 (noting mixture of hip hop into all kinds of music, including reggae, jazz and electronica and that the combination of hip hop and rock has produced platinum-selling artists such as Linkin Park and Korn).

54. See Greg Tate, *Hip Hop Turns 30: Whatcha Celebratin' For?*, *VILLAGE VOICE*, Jan. 4, 2005, <http://www.villagevoice.com/news/0501,tate,59766,2.html> (noting that hip hop began as folk culture, becoming commercial following the release of the song “Rapper’s Delight”).

55. See Ricardo Baca, *At Weekend’s Summit, It’s More Message than Music*, *DENVER POST*, May 14, 2004, at FF-01 (noting that mainstream hip hop today is a contrast to the activism and community involvement of hip hop’s earlier years).

56. Recording Indus. Ass’n of Am., 2004 Consumer Profile, <http://www.riaa.com/news/marketingdata/pdf/2004consumerprofile.pdf>. In fact, rap/hip hop, together with its sister genre rhythm and blues/urban, represented 23.4% of domestic record sales in 2004. *Id.*

57. *Id.*

58. See AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING 1477–1548* (3d ed. 2002) (giving overview of legal and licensing issues associated with hip hop); TAYLOR, *supra* note 24, at 153 (noting that hip hop was the first popular musical genre to use samples “as musical instruments and not just shortcuts or cost-cutting devices”).

59. Will Fulford-Jones, *Sampling*, in 22 *NEW GROVE DICTIONARY*, *supra* note 10, at 219.

60. See generally Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179 (2002) (discussing looping of samples).

61. Fulford-Jones, *supra* note 59, at 219.

62. Théberge, *supra* note 22, at 139 (noting that technologies of sound recording and reproduction are central to understanding of creative practice in popular music); Matthew G. Passmore, Note, *A Brief Return to the Digital Sampling Debate*, 20 *HASTINGS COMM. & ENT. L.J.* 833, 838–839 (1998).



industry and is utilized in non-hip hop works.<sup>63</sup> A prominent example is Natalie Cole's 1991 recording of the song "Unforgettable" as a duet with a sample from her father's famous version of the song.<sup>64</sup>

### 3. Copyright Doctrine and Hip Hop Music: Situating Hip Hop in Copyright Law

#### a. *Hip Hop Musical Production Practices and Copyright*

Only a limited number of court cases address the copyright implications of hip hop sampling practices.<sup>65</sup> Many of these cases demonstrate how hip hop production practices collide with copyright assumptions. For example, *Santrayall v. Burrell*<sup>66</sup> reflects the multiple layers of borrowing that may occur in hip hop music: *Santrayall* involved samples made by hip hop artist M.C. Hammer from another hip hop group, who in turn had sampled from existing music.<sup>67</sup> Although hip hop has been discussed extensively by legal commentators,<sup>68</sup> much of this dialogue focuses on hip hop in isolation

63. See A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 136 (1993) (noting that Peter Gabriel, Kate Bush, Art of Noise, Fishbone, Kraftwerk and Depeche Mode all use digital samples); Mary B. Percifull, *Digital Sampling: Creative or Just Plain "CHEEZ-OID?"*, 42 CASE W. RES. L. REV. 1263, 1266 (1992) (discussing hip hop artist Vanilla Ice's sampling of the base guitar line of the Queen recording of the David Bowie composition "Under Pressure"); Sharon Colchamiro, Note, *To Clear or Not To Clear: Licensing Digital Samples*, 5 HOFSTRA PROP. L.J. 157, 157 (1992) (noting that much contemporary music incorporates samples); Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 589 (1992) (noting that "digital sampling is widespread across the music industry," with Peter Gabriel, Iggy Pop, U2, David Byrne and Brian Eno, Fishbone, Faith No More, EMF and Robert Plant all having incorporated digital sampling into their recordings).

64. See Jeffrey H. Brown, Comment, *"They Don't Make Music the Way They Used To": The Legal Implications of "Sampling" in Contemporary Music*, 1992 WIS. L. REV. 1941, 1942 (noting that the Nat King Cole sample used was recorded forty years earlier).

65. See *infra* notes 118-34, 151-59 and accompanying text.

66. 993 F. Supp. 173 (S.D.N.Y. 1998).

67. See *id.* at 174-75 (denying defendant's motion for summary judgment and granting plaintiff's motion to preclude evidence of copying by plaintiff in a case involving the sampling by M.C. Hammer of a song by the rap group The Legend, who in turn had also sampled a melodic line from a George Michael song and used portions of the theme from the television program *S.W.A.T.*).

68. See generally Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65 (1993) (proposing a compulsory licensing solution to the dilemmas posed by digital sound sampling and discussing the history and modern usage of digital sampling, its effects on the music industry and the application of copyright law to digital sampling); Sanjek, *supra* note 47, at 609 (discussing the origins of digital sampling in hip hop music and the implications of digital sampling for conceptions of autonomous musical

or with respect to twentieth century postmodern forms of cultural production.<sup>69</sup>

Analyses that situate hip hop in isolation as a peculiar form of piracy or as simply a postmodern art form fail to comprehend fully

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creation, noting that digital sampling “made everybody into a potential musician [and] bridged the gap between performer and audience”); Self, *supra* note 47 (discussing the cultural roots of sampling in New York, Jamaica and Africa and relative absence of case law in the sampling area); Szymanski, *supra* note 47 (exploring the legal implications of digital sampling); Wilson, *supra* note 60 (discussing the process, history and case law surrounding digital sampling, noting that looped samples may not be amenable to the de minimis defense); Ronald D. Brown, Note, *The Politics of “Mo’ Money, Mo’ Money” and the Strange Dialectic of Hip Hop*, 5 VAND. J. ENT. L. & PRAC. 59 (2003) (discussing the book *The Hip Hop Generation—Young Blacks and the Crisis in the African American Culture*, by Bakari Kitwana); Carl A. Falstrom, Note, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359 (1994) (noting that the *Grand Upright* decision was a missed opportunity for a court to provide needed legal guidance in the area of digital sampling and proposing a statutory solution for hip hop sampling that would provide samplers with a potential defense to copyright infringement claims); Jeffrey R. Houle, Note, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad “Rap”?*, 37 LOY. L. REV. 879 (1992) (discussing the legal implications of digital sampling, including with respect to copyright law and state piracy law remedies); Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approaches to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227 (2000) (considering whether the Second Circuit’s analysis in the *Ringgold* and *Sandoval* cases can be extended to music and hip hop digital sampling); Randy S. Kravis, Comment, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231 (1993) (discussing the issues that arise from digital sampling for the music industry and legal community and arguing that Congress should amend the Copyright Act and provide a compulsory license system for digital sampling); Jason H. Marcus, Note, *Don’t Stop that Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767 (1991) (discussing sampling as a post-modern art form); Passmore, *supra* note 62 (arguing that transformative sampling is a legitimate tool of artistic expression and advocating expansion of the boundaries of fair use to include certain aesthetic frameworks that utilize transformative digital samples).

69. See Eric Shimanoff, *The Odd Couple: Postmodern Culture and Copyright Law*, 11 MEDIA L. & POL’Y 12, 20–24 (2002) (discussing sampling in terms of postmodern artistic production in which appropriation is a key aspect); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1221 (1997) (noting that appropriation is “considered an essential component of a Post-Modern art expression”); Marcus, *supra* note 68, at 772 (finding that digital sampling is a postmodern art form comparable to Andy Warhol’s artistic work from the 1960s); Brandon G. Williams, Note, *James Brown v. In-Frin-JR: How Moral Rights Can Steal the Groove*, 17 ARIZ. J. INT’L & COMP. L. 651, 653–54 (2000) (discussing the implications of pastiche and digital sampling for African American digital sampling artists). How the term postmodern is used and defined within legal commentary on music is not always clear. As is the case outside of the legal area, a diversity of theories is often referred to under the rubric of “postmodern.” STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATORIES* 2 (1991) (“[O]ne is struck by the diversities between theories often lumped together as ‘postmodern’ and the plurality—often conflictual—of postmodern positions . . . [as well as] the inadequate and undertheorized notion of the ‘postmodern’ in the theories which adopt, or are identified in, such terms.”).

hip hop as an aesthetic form. Such a limited inquiry ignores hip hop's relation to other musical forms generally, as well as its connection with African American aesthetic traditions.<sup>70</sup> Complete consideration of hip hop and copyright must also assess hip hop within the broader context of music borrowing generally, so as to identify the extent to which practices in the hip hop genre are not as atypical as they might seem.

Court cases involving hip hop reflect the extent to which the aesthetics of genres not based on existing musical notation do not fit comfortably within the rubric of copyright law assumptions. One commentator has noted that:

The origins of musical copyright law are rooted in a particular, restrictive notion of the musical work (defined as a combination of melody and harmony) and its fixation in graphic form (the musical score). Thus, from the outset, copyright law valorised composition (and by extension, the composer) over performance as a form of musical practice . . . and, as a result, many forms of music not based in notation—including various types of folk music, jazz, and indigenous people's music—have not been well served by copyright.<sup>71</sup>

This same lack of fit between assumptions and actual practice, however, also extends to certain aspects of the traditions at the core of copyright law assumptions, particularly the European classical tradition.<sup>72</sup>

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70. See Houston A. Baker, Jr., *Handling "Crisis": Great Books, Rap Music, and the End of Western Homogeneity (Reflections on the Humanities in America)*, 13 CALLALOO 173, 183 (1990) ("[R]ap situates itself with respect to rhythm and blues, intermixing in its collaged styles the saxophone solos, bridges . . . . Rapping as art is endorsed as a challenging form of creativity that converts oppression and lack into a commercial and communal success."); Andrew Bartlett, *Airshafis, Loudspeakers, and the Hip Hop Sample: Contexts and African American Musical Aesthetics*, 28 AFR. AM. REV. 639, 650 (1994) ("And as the disjuncture seen by some in hip hop sampling indicates to them the fragmentations of post-modernity, there is a simultaneous inability to see the act's vibrant connectedness in historical relation to African American aesthetics.").

71. Théberge, *supra* note 22, at 140; see also Kurt Blaukopf, *Westernisation, Modernisation, and the Mediamorphosis of Music*, 25 INT'L REV. AESTHETICS & SOC. MUSIC 183, 190 (1989) ("The concept of copyright, as developed in Europe and, by now, also applied in many non-European countries, does not take into consideration the specificity of musics that are partly or totally independent of notational efforts.").

72. See *infra* notes 353–56 and accompanying text. The term classical herein is used in its broader sense, to refer to a body of music that emerged in Europe over several centuries as opposed to the specific musical period following the Baroque era and preceding the Romantic era. See *Classical*, THE HARVARD DICTIONARY OF MUSIC, *supra* note 48, at 183–84 (noting that the term classical in popular usage refers not only to "serious" music as opposed to popular music" but also to a musical period that succeeds

*b. Originality, Copyrightability and Hip Hop Music*

One key aspect of the development of copyright in the United States, particularly from the nineteenth century onwards, has been an overriding focus on what constitutes sufficient originality to make a creation copyrightable.<sup>73</sup> Although originality is not explicitly included in the Intellectual Property Clause of the U.S. Constitution,<sup>74</sup> it is a fundamental assumption of current copyright law that originality is implicitly mandated by the Constitution's references to "authors" and their "writings."<sup>75</sup> Originality thus serves as a minimum threshold for copyrightability. Although a musical work must demonstrate some originality to receive copyright protection,<sup>76</sup> the required amount of originality is not defined statutorily. It is, however, discussed extensively in case law.<sup>77</sup> Cases

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the Baroque and precedes the Romantic).

73. See 17 U.S.C. § 102(a) (2000).

74. The Intellectual Property Clause of the Constitution states: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

75. See H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (stating that the phrase "original works of authorship" in the Copyright Act "is substantially the same as the empowering language of the Constitution.").

76. See 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.").

77. See, e.g., *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship."); *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002) ("The particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element. Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection."); *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992) ("All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' ") (citations omitted); *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) ("It is well established that the originality requirement for obtaining a copyright is an extremely low threshold, unlike the novelty requirement for securing a patent. Originality for copyright purposes amounts to ' . . . little more than a prohibition of actual copying.' No matter how poor the 'author's' addition, it is enough if it be his own.") (quoting *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951)); *United States v. Hamilton*, 583 F.2d 448, 451 (9th Cir. 1978) ("[O]riginality may be found in taking the commonplace and making it into a new combination or arrangement."); *BMS Entm't/Heat Music LLC v. Bridges*, No. 04 CV 2584, 2005 U.S. Dist. LEXIS 13491, at \*14 (S.D.N.Y. July 7, 2005) (finding that a court cannot rule a composition unoriginal as a matter of law in case of two compositions involving "a call-and-response format, the lyrics 'like that' preceded by a one-syllable word, and a rhythm pattern consisting of an eighth note, quarter note, eighth note"); *Jean v. Bug Music, Inc.*, No. 00 CV 4022, 2002 U.S. Dist. LEXIS 3176, at \*18 (S.D.N.Y. Feb. 27, 2002) (finding that summary judgment was appropriate where the lyrics "clap your hands"

and commentary do not consistently define what constitutes an original musical work.<sup>78</sup> One core element that runs across many definitions is that originality requires an independent creation, which essentially appears to rule out or significantly limit borrowing.<sup>79</sup> As is the case with literary copyright, concepts of originality in music copyright are full of assumptions about the nature and manner of artistic creation that are largely based on an image of a Romantic author.<sup>80</sup> Romantic author discourse is based on concepts of authorship that became increasingly predominant in the eighteenth century.<sup>81</sup> Scholarship in this area has highlighted the fact that modern conceptions of authorship as the product of inspired and original genius are a fairly recent development. Such conceptions were used to justify allocation of property rights to authors, who were deemed worthy of such ownership rights by virtue of their genius and originality.<sup>82</sup>

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accompanied by a common three-note sequence were "so common and unoriginal that even when they are combined they are not protectible," and that remaining portions of the song were not substantially similar).

78. See *supra* note 77; *infra* notes 83–85 and accompanying text.

79. See, e.g., *Callaghan v. Myers*, 128 U.S. 617, 650 (1888) (finding original arrangement of opinions copyrightable where a product of labor, talent or judgment); *Jean*, 2002 U.S. Dist. LEXIS 3176, at \*16–21 (noting that the allegedly infringing musical phrase lacks requisite originality and is not protectable because it uses common musical and lyrical phrases that have been used in other recordings); *Tempo Music, Inc. v. Famous Music*, 838 F. Supp. 162, 169 (S.D.N.Y. 1993) (noting that for copyright purposes, originality focuses on creative process rather than novel outcomes or results); *Jarvis v. A&M Records*, 827 F. Supp. 282, 291 (D.N.J. 1993) ("There is no easily codified standard to govern whether the plaintiff's material is sufficiently original and/or novel to be copyrightable."); *Consol. Music Publishers v. Ashley Publ'ns*, 197 F. Supp. 17, 18 (S.D.N.Y. 1961) (noting that fingering, dynamic marks, tempo indications, slurs, and phrasing were original copyrightable elements of a musical compilation of public domain selections); *McIntyre v. Double-A Music*, 166 F. Supp. 681, 683 (S.D. Cal. 1958) (finding that musical composition does not qualify for common law or statutory copyright because it consisted of de minimis contributions and technical improvisations that are the "common vocabulary of music" and that "are made every day by singers and performers"); *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473, 474–75 (N.D. Ill. 1950) (noting that the purpose of copyright law is to protect creation, not mechanical skill, and holding that the bass clef arrangement of a musical work was too simple to be copyrightable since it was a mechanical application of a simple harmonious chord); *Cooper v. James*, 213 F. 871, 872 (N.D. Ga. 1914) (citing *Jollie v. Jaques*, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7437)) (stating that musical composition must be substantially new and original work, not a copy of a piece already produced, with additions and variations that might be made by a music composer with skill and experience).

80. See Jaszi, *supra* note 5, at 40 (stating that the concept of Romantic authorship emphasized original ideas rather than "successive elaborations of an idea or text by a series of creative workers").

81. See *infra* notes 176–88 and accompanying text.

82. See Jaszi, *supra* note 5, at 40 ("Eighteenth-century theorists . . . minimized the element of craftsmanship . . . in favor of the element of inspiration, and they internalized

In the music context, Romantic author discourse highlights a number of features presumed to be the essence of true authorship, including the role of individual and autonomous acts or even genius in the creation of original cultural products.<sup>83</sup> Although courts and legal commentators sometimes acknowledge the existence of borrowing and collaboration in "original" works,<sup>84</sup> the full implications of such borrowing and collaboration rarely filter through in the application of copyright doctrine. Judges have also increasingly incorporated a higher standard for creativity into the originality and authorship requirements of copyright law generally.<sup>85</sup>

A clear tension exists between concepts of originality as applied in copyright law, which highlights the fact that originality is and has historically been "a highly contested idea in the West."<sup>86</sup>

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the source of that inspiration. That is, the inspiration for a work came to be regarded as emanating not from outside or above, but from within the writer himself. 'Inspiration' came to be explicated in terms of *original genius*, with the consequence that the inspired work was made peculiarly and distinctively the product—and the property—of the writer." (citations omitted)).

83. See, e.g., *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) ("Nor is the creativity in the underlying work of art of the same order of magnitude as in the case of the 'Hand of God.' Rodin's sculpture is, furthermore, so unique and rare . . . that a significant public benefit accrues from its precise artistic reproduction."); *Grove Press, Inc. v. Collectors Publ'n, Inc.*, 264 F. Supp. 603, 605 (C.D. Cal. 1967) ("These changes required no skill beyond that of a high school English student and displayed no originality."); *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) ("The musical compositions of some few set their composers apart from all others. Their works are distinctly characteristic and possess an individuality which mark the work of extraordinary genius. Such in popular music are the productions among others of Victor Herbert, George Gershwin, Jerome Kern and Cole Porter."); *Jollie*, 13 F. Cas. at 913-14 ("The original air requires genius for its construction; but a mere mechanic in music, it is said, can make the adaptation or accompaniment . . . . The right secured is the property in the piece of music, the production of the mind and genius of the author, and not in the mere name given to the work."). But see *West Publ'g Co. v. Mead Data Cent.*, 799 F.2d 1219, 1223 (8th Cir. 1986) (noting that standard for originality is minimal and only requires that work originate with author and be independently created); *Alfred Bell v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951) (noting that originality "means little more than a prohibition of actual copying").

84. See, e.g., *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) ("In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1450 (1997) (noting that "new ideas are never wholly new" and often "use prior ideas as building blocks, whether by accepting them or rejecting them").

85. See Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 2 (2001) ("In many court decisions through the years, however, copyright judges have imported a . . . requirement: that to be copyrightable, a work must exceed the utterly banal, trivial and commonplace.").

86. Martin Scherzinger, *Music, Spirit Possession and the Copyright Law: Cross-*

Consequently, concepts of originality present problems even within core European traditions and do not adequately or accurately reflect how musical production has actually occurred.<sup>87</sup> Questions about originality are thus in large part questions about how to represent the process of music production that forms the basis upon which copyright rules operate.

Copyright protection may cover different aspects of a particular piece of music. Historically, copyright has attached to the musical composition, which is the notated, written score, including the music and any lyrics.<sup>88</sup> In addition to a copyright connected to the composition itself, since 1972, federal law has recognized recordings as being a distinct expression requiring separate copyright protection.<sup>89</sup> This means, for example, that recorded performances of compositions that are in the public domain would be protected as recordings despite the fact that the composition on which the performance is based is not protected by copyright. For this reason, hip hop cases usually involve alleged infringements with respect to two different copyright protected expressions: the recording that is actually sampled and the musical composition from which the recording derives.<sup>90</sup>

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*Cultural Comparisons and Strategic Speculations*, 31 Y.B. TRADITIONAL MUSIC 102, 105 (1999).

87. See KOFI AGAWU, REPRESENTING AFRICAN MUSIC: POSTCOLONIAL NOTES, QUERIES, POSITIONS 64 (2003) (discussing representations of African rhythm in music scholarship and noting that problems of notation with respect to rhythm are universal and equally problematic for African music and Western music).

88. See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406, 409 (2d Cir. 1946) ("The words and music of a song constitute a 'musical composition' in which the two contributions merge into a single work to be performed as a unit for the pleasure of the hearers; they are not a 'composite' work, like the articles in an encyclopedia, but are as little separable for purposes of the copyright as are the individual musical notes which constitute the melody."); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[B] (2003) ("It was clear under the 1909 Act, and remains clear under the [Copyright Act], that if words and music have been integrated in a single work, the copyright as a 'musical work' will protect against unauthorized use of the music alone or of the words alone, or of a combination of music and words.").

89. See 17 U.S.C. § 102(a)(7) (2000) (granting copyright protection to sound recordings); Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1974) (amending the Copyright Act to provide for the creation of a limited copyright in sound recordings for various purposes, including protecting against unauthorized duplication and piracy of sound recordings).

90. See *Ulloa v. Universal Music*, 303 F. Supp. 2d 409, 412 (S.D.N.Y. 2004) (noting that copyright protection extends to two distinct aspects of music, the musical copyright, which includes music and lyrics, and the physical embodiment of a particular performance of the musical composition, usually in the form of a master recording (citing *Staggers v. Real Authentic Sound*, 77 F. Supp. 29, 57, 61 (D.D.C. 1999)).

c. *Hip Hop Music and Copyright Infringement*

A finding of copyright infringement rests on two distinct elements: copyright ownership and the copying of constituent elements of the work that are original.<sup>91</sup> Although varied terminology is used, the copying element is sometimes described as involving access and substantial similarity.<sup>92</sup> Despite the purported requirement of both access and substantial similarity for liability to attach, courts have found copyright liability where access has not been proven.<sup>93</sup>

The application of copyright law to hip hop reflects an evolving doctrine that is by no means standardized or consistent. The legal standard for infringement depends on whether the alleged infringer copied a portion of the work or the work's overall structure. In his

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91. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); NIMMER & NIMMER, *supra* note 88, §§ 13.01, 13.03[B][2][b]; *see also* Arnstein v. Porter, 154 F.2d 464, 468–69 (2d Cir. 1946) (discussing the elements of copying and unlawful appropriation); Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 277 (1993) (noting that copyright ownership, access and substantial similarity must all be proven to show infringement, and point out that substantial similarity is the most important but the most difficult to define and apply).

92. *See* 4-13 NIMMER & NIMMER, *supra* note 88, § 13.01[B] (noting that copying as a factual matter typically depends on proof of access and probative similarity); Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1206 (1990) (noting that "proof of copying may have nothing to do with the substantiality of the protected material taken" and suggesting a test of probative similarity be used in copyright infringement cases).

93. *See* Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir. 1984) (noting in copyright infringement case where access was found that "[a] resemblance in details of setting, incident, or characterization that falls short of close paraphrase may be enough to establish substantial similarity and infringement"); Warner Bros., Inc. v. Am. Broad. Cos., Inc., 654 F.2d 204, 210–11 (2d Cir. 1981) ("[S]ufficient differences between two works will preclude a finding of substantial similarity notwithstanding the presence of similarities that would otherwise be sufficient to support such a finding."); Tuff 'N' Rumble Mgmt. Inc. v. Profile Records Inc., No. 95 Civ. 0246 (SHS), 1997 U.S. Dist. LEXIS 4186, at \*12 (S.D.N.Y. 1997) ("As proof of access, a plaintiff may show that '(1) the infringed work has been widely disseminated or (2) a particular chain of events exists by which the defendant might have gained access to the work.'" (citations omitted)); Sanford v. CBS, Inc., 594 F. Supp. 713, 717 (N.D. Ill. 1984) (denying plaintiff's motion in limine and noting that "significant differences between two works will not always preclude a finding of substantial similarity. The trier of fact should focus on the similarities, not the differences. Nevertheless, numerous differences tend to undercut the likelihood of substantial similarity and are thus relevant considerations"); 4-13 NIMMER & NIMMER, *supra* note 88, § 13.03[D] (noting that "evidence of striking similarity sometimes permits a finding of copying without proof of access" (citing *Sanford*, 594 F. Supp. 713)); VAIDHYANATHAN, *supra* note 31, at 126–29 (discussing the *Bright Tunes v. Harrisongs Music* case and pointing out that its standard "puts a heavy burden on those who snatch a groove out of the air and insert it as one part of a complex creative process").



treatise on copyright law, Professors Nimmer and Nimmer discuss two major tests of substantial similarity: comprehensive nonliteral similarity and fragmented literal similarity.<sup>94</sup> Comprehensive nonliteral similarity is commonly used to evaluate whether an overall work infringes another<sup>95</sup> and includes a number of tests, including the abstractions test<sup>96</sup> and the total concept and feel test.<sup>97</sup>

Fragmented literal similarity is the test of substantial similarity in cases where only a portion of a work is copied, without copying of the work's overall essence or structure.<sup>98</sup> This type of similarity is the focus of sampling disputes. For example, fragmented literal similarity analysis was applied in *Newton v. Diamond*.<sup>99</sup> In this case, the Beastie Boys sampled a six second, three note segment from a recording by jazz flautist James Newton, who also composed the work that was sampled.<sup>100</sup> Although the Beastie Boys obtained a license to sample from the sound recording of Newton's performance, they did not obtain a license to sample from the musical composition.<sup>101</sup> The Beastie Boys sample from the Newton recording reflects the type of borrowing involved in hip hop cases. The distinction between fragmented literal similarity and other measures of substantial similarity is not necessarily clear-cut.<sup>102</sup> Copyright's legal standards

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94. 4-13 NIMMER & NIMMER, *supra* note 88, § 13.03[A]; accord *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (noting that infringement requires substantial similarity between the infringing work and the work copyrighted that is caused by defendant's copying the copyright holder's creation); *Jarvis v. A&M Records*, 827 F. Supp. 282, 290 (D.N.J. 1993) (commenting that courts and commentators have noted that substantial similarity is "difficulty to define and vague to apply").

95. See 4-13 NIMMER & NIMMER, *supra* note 88, § 13.03[A][1] (noting that questions of substantial similarity are often reformulated in terms of the "idea-expression" dichotomy).

96. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) ("Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.").

97. See *Roth*, 429 F.2d at 1110 (noting that the total concept and feel of the United greeting cards were the same as Roth's copyrighted cards).

98. See *Newton v. Diamond*, 349 F.3d 591, 596 (9th Cir. 2003); *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at \*3 (S.D.N.Y. 2001) (noting that fragmented literal similarity exists when parts of the pre-existing work are copied into the new work); 4-13 NIMMER & NIMMER, *supra* note 88, § 13.03[A][2].

99. 349 F.3d 591.

100. *Id.* at 592.

101. *Id.*

102. See *Williams*, 2001 WL 984714, at \*3 ("[T]he point at which fragmented literal similarity stops and substantial similarity begins is not easily identified." (citing 4 NIMMER

for measuring the similarity of two works form an important backdrop for considering hip hop sampling.

*d. Hip Hop Music and the Scope of Derivative Works*

Tensions with regard to works that use existing material under current copyright standards that measure the similarity of two pieces of music are intensified by the definition of what constitutes a derivative work. The conception of a derivative work in copyright is a key reason why a tension exists in the applying copyright to music forms that use existing works.<sup>103</sup> Under current copyright standards, any work that is based on an existing work may be considered a derivative work of the existing work,<sup>104</sup> at least with respect to the portions of the derivative work that meet the copyright originality standard.<sup>105</sup> In the case of sound recordings, the scope of derivative rights does not extend to independent fixations of other sounds, even if such sounds imitate or simulate the sound recording.<sup>106</sup> This limitation in the scope of derivative rights for sound recordings permits future artists to make cover recordings of existing sound recordings.<sup>107</sup>

Since music borrowing is a pervasive feature of musical

& NIMMER, *supra* note 88, § 13.03[A][2])).

103. See Jaszi, *supra* note 5, at 40 (“Copyright law, with its emphasis on rewarding and safeguarding ‘originality,’ has lost sight of the cultural value of what might be called ‘serial collaborations’—works resulting from successive elaborations of an idea or text by a series of creative workers, occurring perhaps over years or decades.”); Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 246 (1991) (noting that models of authorship in copyright law assume two extremes, one the romantic model, which depicts each work as unique, and the other the rational author, who can plan the authoring process with sufficient precision so as to acquire the necessary permissions in advance).

104. See 17 U.S.C. § 101 (2000) (defining a derivative work as “a work based upon one or more preexisting works”); Williams, 2001 WL 984714, at \*2 (“[A] work is not derivative simply because it borrows from a pre-existing work . . . . When deciding whether a work is derivative [by § 101], courts have considered whether the work ‘would be considered an infringing work’ if the pre-existing material were used without permission.”).

105. United States v. Taxe, 380 F. Supp. 1010, 1013 (C.D. Cal. 1974); see also Woods v. Bourne Co., 60 F.3d 978, 990 (2d Cir. 1995) (noting that qualifying as a derivative work requires independent copyrightability); Gorman, *supra* note 85, at 6 (noting that copyright protection for derivative works is based on potentially different artistic standards, including “minimal creativity, substantial creativity, and gross creativity,” depending on the circumstances of the case and the circuit, which amounts to giving judges an “aesthetic yardstick”).

106. See Rebecca Morriss, *When Is a CD Factory Not Like a Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L.J. 257, 265–66 (2000); see also 17 U.S.C. § 114(b) (excluding independent fixations from protections given to an owner of a copyright in a sound recording).

107. See *infra* notes 495–511 and accompanying text.

composition across various traditions and times,<sup>108</sup> the derivative work concept, combined with the emphasis on originality that pervades copyright law, is at times problematic when applied to music. As a result, it is not always clear in music how much originality is required to make something copyrightable. In the sheet music area, for example, the amount of originality that would make a new arrangement of an existing work copyrightable is not always clear.<sup>109</sup> As a result, music publishers take advantage of the uncertainty “by affixing copyright symbols to public domain music” and “trivially different arrangements of public domain music.”<sup>110</sup> The result is significant confusion for consumers of sheet music and additional cost in deciding to purchase rather than photocopy existing music.<sup>111</sup> In addition to complexities resulting from lack of clarity about what is copyrightable, copyright holders and copyright authors are not necessarily the same persons or entities. As was true in the *Newton* case, it is common for ownership of copyrights for the musical composition and sound recording to be split between different persons or entities,<sup>112</sup> which may complicate the process of obtaining licenses for samples.<sup>113</sup>

Copyright law gives copyright holders the exclusive right to reproduce the copyrighted work and prepare derivative works from the copyrighted work.<sup>114</sup> Although the scope of what is considered a copyrightable derivative work is not always clear,<sup>115</sup> a derivative work

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108. See J. Peter Burkholder, *Borrowing*, in 4 NEW GROVE DICTIONARY, *supra* note 10, at 33 *passim*.

109. Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 244 (1996) (noting uncertainty of parameters of applicable legal standard for determining when a new arrangement of an existing choral work is copyrightable).

110. *Id.* at 244–45.

111. *Id.* at 244 (noting that photocopying costs some three cents per page, while purchasing a printed version of a choral work costs about thirty cents per page).

112. See *Newton v. Diamond*, 349 F.3d 591, 592 (9th Cir. 2003) (“In 1981, Newton performed and recorded ‘Choir’ and licensed all rights in the sound recording to ECM Records for \$5000. The license covered only the sound recording, and it is undisputed that Newton retained all rights to the composition of ‘Choir.’” (citations omitted)).

113. See *infra* notes 490–511 and accompanying text.

114. See 17 U.S.C. § 106 (2000).

115. See 1–3 NIMMER & NIMMER, *supra* note 88, § 3.01 (noting that “in a broad sense, almost all works are derivative works in that in some degree they are derived from pre-existing works” but that a “work is not derivative unless it has *substantially* copied from a prior work”); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y 209, 214–15 (1983) (noting that Congress first granted derivative rights in 1870 and further expanded the scope of derivative rights in the 1909 and 1976 Copyright Acts); Lydia Pallas Loren, *The Changing Nature of Derivative Works in the Face of New Technology*, 4 J. SMALL & EMERGING BUS. L. 57, 58, 62 (2000) (noting that defining the

of a copyrighted work is protected by copyright in the same manner as the copyrighted work.<sup>116</sup> This has serious implications for music forms such as hip hop, which borrow from existing works, and may limit the ability of creators of such forms to receive copyright protection, as their works might be deemed unauthorized derivative works.<sup>117</sup>

*e. Copyright and Permissible Borrowings*

(1) De Minimis Copying

Although definitions of substantial similarity and derivative works tend to cast hip hop musical practices in a negative light, current copyright doctrine does permit copying in certain limited instances. Even if a court found infringement due to substantial similarity, it could nonetheless find a work does not infringe if the use was deemed de minimis.<sup>118</sup> Courts have applied the de minimis

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contours of what constitutes a derivative work is one aspect of the struggle of copyright law to keep pace with new technologies and that the broad statutory language in relation to derivative works “provides little guidance in determining the scope of the derivative work right”); Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1152 n.71 (2001) (noting that “the appropriate scope of the derivative works right is the subject of considerable controversy in the offline context”); Voegtli, *supra* note 69, at 1233–39 (noting progressive expansion of scope of derivative rights in U.S. copyright doctrine).

116. See 17 U.S.C. § 103(a) (establishing that the subject matter of copyright includes compilations and derivative works); *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (9th Cir. 1983) (“The requirement of originality is significant chiefly in connection with derivative works, where if interpreted too liberally it would paradoxically inhibit rather than promote the creation of such works by giving the first creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work.”); 1-3 NIMMER & NIMMER, *supra* note 88, § 3.01 (noting that “any work based in whole, or in substantial part, upon a pre-existing (or ‘underlying’) work, if it satisfies the requirements of originality discussed below and is not itself an infringing work, will be separately copyrightable” (citations omitted)).

117. See Stephen R. Wilson, *Rewarding Creativity: Transformative Use in the Jazz Idiom*, 6 PGH J. TECH. L. & POL’Y 1, 3–5 (2003), available at <http://tlp.law.pitt.edu/articles/Vol6Wilson.pdf> (noting problems of current copyright frameworks for jazz artists who create “cover” versions of existing works, noting that such jazz versions are derivative works that need the original copyright owner’s permission, and that without such permission, the creators of the jazz version of the work cannot receive any copyright protection for their artistic contributions); see also Note, *Jazz Has Got Copyright Law and That Ain’t Good*, 118 HARV. L. REV. 1940, 1941 (2005) (noting that copyright law provides little protection for improvised material and thus “discourages vital reinterpretation” in musical forms such as jazz).

118. See, e.g., *Newton v. Diamond*, 349 F.3d 591, 594 (9th Cir. 2003) (“Assuming that the sampled segment of the composition was sufficiently original to merit copyright protection, we nevertheless affirm on the ground that Beastie Boys’ use was de minimis and therefore not actionable.”).

standard in musical and nonmusical cases alike.<sup>119</sup>

One test used to assess whether a use is de minimis is whether an average audience would recognize the appropriation.<sup>120</sup> Although a clear standard for de minimis use has not yet been established by courts,<sup>121</sup> in determining when a particular use is de minimis, courts have tended to look at the amount of use and the extent to which the portion used was central to the composition from which it was taken.<sup>122</sup> The recent ruling in *Bridgeport Music, Inc. v. Dimension Films* illustrates the lack of clear standards for determining de minimis uses in the music context.<sup>123</sup> The *Bridgeport* case involved a two-second sample of an arpeggiated guitar chord from a song by George Clinton and the Funkadelics.<sup>124</sup> This sample was lowered, looped and extended to sixteen beats.<sup>125</sup> This sample of seven seconds appeared five times in the song "100 Miles and Runnin'."

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119. See *infra* note 122 and accompanying text.

120. See *Newton*, 349 F.3d at 598 (finding of de minimis use and noninfringement of musical composition in sampling and looping by the Beastie Boys of a three note segment of approximately six seconds from a recording of the song "Choir," composed and performed by James Newton); *Fisher v. Dees*, 794 F.2d 432, 432–33 (9th Cir. 1986) (finding more than de minimis use of a musical composition in the case of the song, "When Sonny Sniffs Glue," which was based on the 1950s standard, "When Sonny Gets Blue," where defendant copied six of the thirty-eight bars of the original song, but nonetheless finding that defendant's use was a noninfringing parody constituting fair use under § 107 of the Copyright Act).

121. See Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 139–44 (2003) (noting that "a clear standard for de minimis use has not yet been settled upon in the courts," including with respect to the characteristics of the standard, burden of proof and relationship to the fair use defense).

122. See, e.g., *Sandoval v. New Line Cinema*, 147 F.3d 215, 217–18 (2d Cir. 1998) (finding de minimis use of copyrighted photographs in the film *Seven* and noting that where de minimis use is found, no cause of action will lie for copyright infringement, making a determination of fair use unnecessary); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (noting that de minimis can mean a trivial technical violation of copyright law or copying falling below the quantitative threshold of substantial similarity); *Jean v. Bug Music*, No. 00 CIV 4022, 2002 U.S. Dist. LEXIS 3176, at \*18 (S.D.N.Y. Feb. 27, 2002) (finding that even if a musical phrase was protectible, no infringement occurred because the excerpts at issue were de minimis and trivial compared to the entire work); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741, 742 (S.D.N.Y. 1980) (finding taking of four notes for a *Saturday Night Live* skit from the song "I Love New York," which contained 45 words and 100 measures, to be more than a de minimis taking, but finding the copying to constitute fair use as a parody).

123. See *Bridgeport Music, Inc. v. Dimension Films*, 2004 FED App. 0297P, 9, 401 F.3d 647, 655 (6th Cir.) (noting that the analysis for determining infringement of a musical composition is not the same as the analysis applied to determine infringement of a sound recording).

124. See *id.* at 6, 401 F.3d at 653 (noting that an arpeggiated chord involves keys being played one at a time in succession rather than all at once).

125. *Id.*

which was then used in the movie soundtrack for the film *I Got the Hook Up*.<sup>126</sup> The *Bridgeport* decision appears to derive from the court's desire to establish a bright line rule for determining infringement of sound recordings.<sup>127</sup> The court analogized sampling to a physical taking rather than an intellectual one.<sup>128</sup> The *Bridgeport* court also used a highly restricted interpretation of §§ 106 and 114 of the Copyright Act, which concern derivative works and sound recordings, respectively.<sup>129</sup> The *Bridgeport* holding is based on a reading of § 114 as prohibiting sampling and remixing of any type, thus precluding use of substantial similarity tests for infringement.<sup>130</sup> The *Bridgeport* court cited this interpretation of §§ 114 and 115 in relation to the sampling of sound recordings and, as a result, found that the copyright owner has an exclusive right to sample.<sup>131</sup> As a result of the *Bridgeport* ruling, de minimis copying of sound recordings may not be permitted in the Sixth Circuit.<sup>132</sup> *Bridgeport* does not foreclose sampling entirely. Rather, the *Bridgeport* ruling gives samplers two options: obtain a license or duplicate the sounds instead of using the existing recording for sampling.<sup>133</sup> The *Bridgeport* court, however, assumed that sampling and duplicating the sounds are equivalent, which may not be the case from the perspective of the aesthetics or compositional process. As a result, some hip hop artists, who make a conscious aesthetic choice to

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126. See *id.* (noting that the looped sample appeared specifically at 0:49, 1:52, 2:29, 3:20 and 3:46).

127. See *id.* at 10, 401 F.3d at 655 ("The music industry, as well as the courts, are best served if something approximating a bright-line test can be established.").

128. See *id.* at 16, 401 F.3d at 658 ("For the sound recording copyright holder, it is not the 'song' but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.").

129. See generally 17 U.S.C. §§ 106, 114 (2000) (giving copyright owners the exclusive right to prepare derivative works based on the copyrighted works they own (§ 106) and limiting the scope of rights of owners of copyrights of sound recordings under § 114 with respect to, among other things, certain rights of public performance and display under §§ 106(4) and 106(5)).

130. See Latham, *supra* note 121, at 125–26 (noting that § 114 does not permit sampling or remixing of any type, precluding use of substantial similarity analysis in instances of infringement, that the compulsory license provisions of § 115 do not provide for compulsory license and suggesting that even de minimis uses of sound recording samples may be a violation of the Copyright Act).

131. See *Bridgeport*, 2004 FED App. at 14, 401 F.3d at 657 (citing Latham article, *supra* note 21).

132. See *id.* (holding that the owner of a sound recording has "the exclusive right to 'sample' his own recording").

133. *Id.* at 14–15, 401 F.3d at 657–58; see also *infra* notes 490–511 and accompanying text (defining the two types of licenses available for these actions).

sample from preexisting works, may be significantly impeded by such a standard.<sup>134</sup>

## (2) Fair Use and Transformative Borrowings

In the event that infringement is found by a court, a defendant may assert a fair use defense, which may serve as a shield against copyright liability.<sup>135</sup> Current interpretations of fair use, however, generally tend to favor borrowings that are either parodies or that in some way constitute transformative copying of existing works.<sup>136</sup> This

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134. Cf. ROSE, *supra* note 45, at 93 (noting that some commentators have emphatically asserted that the crackdown by record companies on sampling “has seriously affected rap music production, making bold sample uses, especially samples from the more powerful publishers and artists less likely. It does ensure that musicians (including sampled rappers) are being compensated for their work, and on the flip side it encourages more sophisticated cloaking devices—ways to use interesting material without detection”); Candace G. Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 464 (2005) (“When major record companies became conscious of rap’s musical sampling phenomenon, they began charging prohibitive prices for the use of sound recordings they owned. As a result, Public Enemy suffered artistically as their style of simultaneously sampling a multitude of different sound recordings finally became too expensive under this new regime.” (citations omitted)); Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy’s Chuck D and Hank Shocklee*, STAY FREE!, Fall 2002, at 22, available at [http://www.stayfreemagazine.org/archives/20/public\\_enemy.html](http://www.stayfreemagazine.org/archives/20/public_enemy.html) (discussing how copyright law changed hip hop sampling practices and including commentary by Chuck D concerning how copyright enforcement policies cause Public Enemy to change its style because its practice of making a collage of sound into a sonic wall had become too expensive to license and defend against claims). Even in the non-hip hop context, concerns about similarity of two independent works can influence behavior and can lead to license arrangements in which the creator who is first in time licenses rights to use an existing song on the basis of the similarity of an independently composed work. Conversation with Bertis Downs, R.E.M. Counsel, in Athens, Ga. (Sept. 27, 2005) (discussing the song “Hope” that was composed by R.E.M. but whose similarity to the Leonard Cohen song “Suzanne” led R.E.M. to ask Leonard Cohen for and receive a license with respect to their composition).

135. Determinations of fair use focus on the four criteria outlined in § 107 of the Copyright Act:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

17 U.S.C. § 107 (2000).

136. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (finding fair use in copyright infringement action about parody of Roy Orbison’s song “Pretty Woman”); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (finding that allegedly infringing defendant is entitled to a fair use defense, denying injunction against the novel *THE WIND DONE GONE*, a parody based on Margaret Mitchell’s novel *GONE WITH THE WIND*, and remanding the case for further proceedings); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (describing a

focus on transformative uses results in a wide range of outcomes.<sup>137</sup>

Factors used by courts to determine whether transformative uses exist include "whether the new work 'merely supersede[s] the objects' of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."<sup>138</sup> In addition to raising serious concerns about ambiguity, this standard privileges certain types of borrowings but results in other types of borrowings being deemed infringements and is biased against certain types of borrowing.<sup>139</sup>

The notion of transformation as a primary indicator of fair use is also a concept that does not translate well from literary copyright to music copyright. The historic role of critical commentary, parody and satire in literary traditions differs in some important respects from their role in musical traditions.<sup>140</sup> Although the textual aspects of music raise concerns similar to those in literary traditions, inherent limitations exist to developing concepts of transformative uses in a system based on only twelve tones. This difficulty is reflected in legal discussions of parody that focus entirely on parody as a literary

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transformative standard for fair use and identifying socially beneficial contributions for a different purpose or manner as being core elements of transformative uses); Wilson, *supra* note 117, at 9 (noting that the transformative fair use standard was first articulated in 1990 and has given additional opportunities for courts to find fair use); Jeremy Kudon, Note, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 583–84 (2000) (suggesting the addition of a functionality component to transformative use analysis to expand the availability of the fair use test and help eliminate rigid bright-line application of this test).

137. See Gorman, *supra* note 85, at 14–16 (noting that the transformative standard has resulted in unpredictability and a wide range of outcomes).

138. *Campbell*, 510 U.S. at 579 (alteration in original) (citations omitted); see also *id.* ("[T]he goal of copyright . . . is generally furthered by the creation of transformative works . . . . [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." (citations omitted)).

139. See *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132, 135, 145 (2d Cir. 1998) (finding copyright infringement and no transformative purpose in *Seinfeld* Aptitude Test, which tested knowledge of the television program *Seinfeld*); *Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 117 (2d Cir. 1998) (finding fair use parody in case involving an Annie Liebovitz photograph); Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell*, 7 COMM. L. & POL'Y 1, 24 (2002) ("Courts often have widely varying notions of what sorts of uses constitute transformative uses, and sometimes appear to manipulate that determination based on the desired result. Moreover, some courts appear to use the presence or absence of transformative use as a proxy for the fair use determination itself.").

140. Cf. Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395, 1395–96 (1984) (discussing parody in literature and music with a focus on textual matters).



genre.<sup>141</sup> This difference between music and literature arises in part from the nonrepresentational nature of musical notes and the fact that such notes do not involve everyday world phenomena. Consequently, musical compositions are often more abstract than literary works and are based on principles often "known explicitly only by initiated practitioners."<sup>142</sup>

In addition, the notion that transformative fair use is more acceptable because it involves more creativity than other types of borrowings is based on assumptions about the nature of borrowing and creativity that are not sustainable either in light of hip hop practices or the European classical tradition generally. In both of these traditions, we see instances of borrowing being a basis for creativity, even if the use of the existing work may not be fundamentally transformative. The use of borrowings by George Friedrich Handel, for example, is creative regardless of whether such borrowings are fundamentally transformative.<sup>143</sup> Although some commentators have characterized Handel's borrowings as involving transformative imitation,<sup>144</sup> Handel in any case borrowed extensively and often from his own prior works and the works of others.<sup>145</sup>

Handel's borrowings illustrate the highly subjective nature of determining what borrowings are transformative and what exactly is transformative about a particular use of prior material. In addition, the criteria used to assess what is transformative about a musical work can entirely determine whether a work is deemed transformative. Most court considerations of hip hop music focus on the borrowing of musical notes and tend to ignore lyrics or text, other than in cases involving overt parodies.<sup>146</sup> Since rapping in hip hop has

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141. See Charles C. Goetsch, *Parody as Free Speech: The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39, 40-42 (1980); Gary Myers, *Trademark Parody: Lessons from the Copyright Decision in Campbell v. Acuff-Rose Music, Inc.*, 59 L. & CONTEMP. PROBS. 181, 182 (1996); Marlin H. Smith, Note, *The Limits of Copyright: Property, Parody and the Public Domain*, 42 DUKE L.J. 1233, 1247-51 (1993) (discussing *Rogers v. Koons*).

142. McClary, *supra* note 34, at 16 (noting that music appears to be non-representational, "unlike literature and the visual arts, which at least make use of characters, plots, color, and shapes that resemble phenomena in the everyday world").

143. See Ellen T. Harris, *Integrity and Improvisation in the Music of Handel*, 3 J. MUSICOLOGY 301, 302-03 (1990) (noting controversy since the nineteenth century about how to treat and interpret Handel's extensive use of borrowing in his compositional process); see also *infra* notes 273-81 and accompanying text.

144. See *infra* notes 346-48 and accompanying text.

145. Paul Brainard, *Aria and Ritornello: New Aspects of the Comparison of Handel/Bach*, in BACH, HANDEL, SCARLATTI: TERCENTENARY ESSAYS 21-33 (Peter Williams ed., 1985); Harris, *supra* note 143, at 305.

146. See *supra* notes 140-42 and accompanying text; *infra* notes 458-60 and

typically involved new text set to excerpts of existing music,<sup>147</sup> just looking at borrowings of musical notes could lead to a different legal outcome than consideration of text, either alone or together with musical notes.

The difficulties of determining what is transformative suggest a need to reconsider the categories used to analyze types of borrowing in the legal arena, as well as the fact that borrowing and creativity are not mutually exclusive. As a result, assumed dichotomies need to be reexamined in light of actual musical composition practice. Such reexamination would necessitate recognition that many composers and musicians, from Johann Sebastian Bach to George Friedrich Handel to Pete Townshend to Public Enemy and other hip hop groups have found founts of creativity in borrowing, some of which has not necessarily been transformative.

### C. *Dichotomies and Continuities: Representing the "Other" in Contemporary Music Copyright Law*

#### 1. Creativity Versus Copying: Musical Theft as a Core Aspect of Representations of Hip Hop Music

Discussions of copyright in legal scholarship and court cases are at least implicitly grounded in dichotomies applied and used to represent the nature of musical production. Such dichotomies tend to be based on representations of music practice that may or may not reflect actual music practice. These representations of musical practice are ideal types,<sup>148</sup> which serve as the basis for making determinations about how to regulate legal relationships within the musical arena. As a consequence of this process of representation and the lack of recognition that assumptions about musical practice may diverge in some cases significantly from actual practice, legal commentators and courts may discount or even ignore manifest

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accompanying text.

147. See *supra* note 42 and accompanying text; *infra* note 177 and accompanying text.

148. The term ideal type derives from Max Weber's use of the concept and term. See MAX WEBER, *The 'Objectivity' of Knowledge in Social Science and Social Policy*, in THE ESSENTIAL WEBER 359, 387–88 (Sam Whimster ed., 2004) (explaining that an ideal type "is formed by a one-sided *accentuation* of one or *several* perspectives, and through the synthesis of a variety of diffuse, discrete, *individual* phenomena, . . . subsumed by such one-sided, emphatic viewpoints so that they form a uniform construction *in thought*"); John Drysdale, *How Are Social Scientific Concepts Formed?: A Reconstruction of Max Weber's Theory of Concept Formation*, 14 SOC. THEORY 71, 81 (1996) (discussing Weber's conception of the constructive nature of ideal type concepts as self-conscious and deliberate "procedures" undertaken by the scientist).

continuities in music production and practice.<sup>149</sup> Prominent among such overlooked continuities is the manner in which musical borrowing has long been and continues to be a widespread and pervasive aspect of musical production.<sup>150</sup>

*Grand Upright v. Warner Bros. Records*<sup>151</sup> was the first case to rule on the use of sampling in hip hop music.<sup>152</sup> *Grand Upright* involved a sample made by hip hop artist Biz Markie of the Gilbert O'Sullivan song "Alone Again Naturally."<sup>153</sup> The *Grand Upright* court noted that Biz Markie had requested and been denied permission to sample and, as a result, found that Biz Markie's sample had infringed Gilbert O'Sullivan's copyright.<sup>154</sup> The most interesting aspects of *Grand Upright* are the structure, content and language of the court's brief decision. The court did not analyze why the sample was infringement under applicable copyright law standards. Instead, the court used specific language ("theft") and framed its decision in a way that clearly showed the court's negative view of hip hop music: beginning the decision with a quote of the Seventh Commandment prohibition "Thou Shalt Not Steal."<sup>155</sup> The association of hip hop with theft is by no means limited to legal commentary and is also discussed in general discourse about hip hop.<sup>156</sup> The discussions of

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149. See Latham, *supra* note 121, at 121 ("It seems to be a widely accepted truism that the wealth of creative works amassed . . . serves as a foundation for each generation of new works. For most of our copyright history, . . . this truism was fairly palatable to most because it expressed the norms of subtle inspiration and creative transformation rather than wholesale lifting of original creative expression. However, with . . . 'hip-hop,' . . . this foundational concept [has been elevated] from a subtle truism to a conspicuous mantra through the practice of unlicensed digital sampling.").

150. See, e.g., J. Peter Burkholder, *The Uses of Existing Music: Musical Borrowing As a Field*, 50 NOTES 851, 852 (1994) [hereinafter Burkholder, *Uses*] (presenting a preliminary overview of musical borrowing as a field); Burkholder, *supra* note 108 (illustrating musical borrowing throughout music history).

151. 780 F. Supp. 182 (S.D.N.Y. 1991).

152. See *id.* at 183 (finding copyright infringement in hip hop artist Biz Markie's sampling of the song "Alone Again Naturally," which was written and composed by Raymond "Gilbert" O'Sullivan).

153. *Id.*

154. *Id.* at 185.

155. *Id.* at 183; see also *Jarvis v. A&M Records*, 827 F. Supp. 282, 295 (D.N.J. 1993) ("[T]here can be no more brazen stealing of music than digital sampling, and defendants Cole and Clivilles did sample a fair portion of plaintiff's work.").

156. See, e.g., Steven R. Gordon & Charles J. Sanders, *The Rap on Sampling: Theft, Innovation, or What?, in ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK* 207, 207 (1989) (discussing the legal, economic and ethical issues raised by digital sampling); Susan Upton Douglass & Craig S. Mende, *Deconstructing Music Sampling: Questions Arise As Practice Becomes Increasingly Common*, N.Y.L.J., Nov. 3, 1997, at S3 (discussing sampling from a legal perspective); Judith Greenberg Finell, *A Musicologist Discusses Disguised Infringement*, N.Y.L.J., May 29, 1992, at 5 (discussing implications of sampling

hip hop in *Grand Upright* and other hip hop cases reveal a disdainful, if not contemptuous, view by judges for the type of musical borrowing involved in hip hop as a genre. This essentially represents an evaluation of the aesthetic merit of hip hop works and is certainly not limited to hip hop, although it is at times a pronounced feature of discussions about hip hop.<sup>157</sup>

The characterization of hip hop borrowings as theft forms the basis for a negative view of hip hop as a genre that effectively isolates hip hop borrowing from other types of borrowing in music. Terminology can be of critical importance. Terminology used to describe hip hop borrowings is often taken from the setting of tangible, physical goods and applied in the context of intangible cultural products such as music.<sup>158</sup> This application can be misleading because characteristics of intangible knowledge assets are quite different than those of tangible goods, particularly with respect to exclusivity of possession and the drawing of boundaries.<sup>159</sup>

Further, defining sampling as theft or appropriation immediately indicates, prior to any discussion, that something illegal, illegitimate or, at best, inappropriate has occurred. Standard English language definitions of these terms highlight this proposition.<sup>160</sup> In contrast,

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from a musicologist's perspective); Martin Kihn, *Policing Sampling with the Beat Cops*, VIBE, Fall 1992, at 39 (discussing the sampling police, who work for music publishers and who attempt to obtain permission to use samples or detect use of samples without clearance); Jon Pareles, *In Pop, Whose Song Is It Anyway?*, N.Y. TIMES, Aug. 27, 1989, § 2, at 1 (noting that sophisticated copying the past and present has overtaken innovation in today's music and culture at large); Neil Strauss, *Sampling Is (a) Creative or (b) Theft?*, N.Y. TIMES, Sept. 14, 1997, at 28 ("Only when plundering and originality come together to create something new does sampling become reminiscent of pop's pre-rock days, when new and vital music came out of the intersection between a good song, a good interpreter, and perhaps a good arranger.").

157. See Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 194-95 (1990) (arguing that judges' assessments of the artistic value of works, a subjective determination that reflects the personal values and background of the judge, is a basis for infringement determinations, rather than the often advanced objective labels of idea and expression); cf. *Hein v. Harris*, 175 F. 875, 876-77 (S.D.N.Y. 1910) (noting that ragtime music "has resulted in the production of numberless songs, all of the same general character . . . . [T]hey have a monotonous similarity, which only adds to the general degradation of the style of music which they represent . . .").

158. See *Bridgeport v. Dimension Films*, 2004 FED App. 0297P, 16, 401 F.3d 647, 658 (6th Cir.) (analogizing sampling to "a physical taking rather than an intellectual one"); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 182-83 (S.D.N.Y. 1991) (calling sampling "theft").

159. See Arewa, *supra* note 25, at 22-24.

160. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1334 (4th ed. 2000) (defining theft as "the act or an instance of stealing; larceny"), available at <http://www.bartleby.com/61> [hereinafter AMERICAN HERITAGE DICTIONARY]; OXFORD

borrowing has a much more neutral definition and does not by itself indicate anything illegitimate, illegal or undesirable.<sup>161</sup> Use of the term borrowing also connects hip hop to pervasive borrowing practices in music and highlights the reality that many “original” works involve borrowing.

Even if courts or legal commentators deem hip hop or other musical borrowing practices unacceptable in specific instances, such practices should be seen in light of a continuity of musical borrowing practices that extend from the earliest days of music to the present time. This tendency to detach hip hop from the broader history of musical borrowing runs counter to clear evidence that use of existing works has been characteristic of a wide range of composers across a broad range of time periods.<sup>162</sup>

## 2. Differences and Hierarchies: Framing Hip Hop Musical Practice

Use of dichotomies is central to representations of hip hop and hip hop musical practices as an “other.”<sup>163</sup> The construction of this “other” is based on historical, political and cultural assumptions, categories and hierarchies and is underscored by the idealization of artistic production based on a conception of Romantic authorship.<sup>164</sup> Legal commentary about hip hop reflects what might be termed discourses of difference. Discussions of hip hop at times include a series of explicit dichotomies by which hip hop practices are marked and evaluated, including serious and superficial, original and copied, composition and performance, creative and copied, transformative and nontransformative, individual and collective, autonomous and collaborative and artistic and pirated.<sup>165</sup> Also evident, but at times

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ENGLISH DICTIONARY 886 (2d ed. 1989), available at <http://dictionary.oed.com> (defining theft as “the action of a thief; the felonious taking away of the personal goods of another; larceny”).

161. See AMERICAN HERITAGE DICTIONARY, *supra* note 160, at 153 (defining borrow as “[t]o adopt or use as one’s own”); OXFORD ENGLISH DICTIONARY, *supra* note 160, at 418 (defining the verb borrow as “To take (a thing) on credit, on the understanding of returning it, or giving an equivalent; hence, to obtain or take the temporary use of (a thing recognized as being the property of another, to whom it is returnable)”).

162. See Burkholder, *supra* note 108.

163. See TERRY EAGLETON, LITERARY THEORY 115 (2d ed. 1996) (discussing the concept of otherness using an example of woman as the opposite of man, as the “other” of man, a non-man, defective man, “assigned a chiefly negative value in relation to the male first principle”).

164. See generally JOHANNES FABIAN, TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT (Columbia Univ. Press 2002) (1983) (noting that anthropological representations of the other are necessarily temporal, historical and political acts).

165. One prominent dichotomy, that of transformative and nontransformative, is

only implicit, in such discussions are dichotomies of elite and popular, intellectual and entertainment, suburban and inner city, high and low class and white and black.<sup>166</sup> The focus on such differences has the potential to distort representations of the music so characterized.<sup>167</sup>

Views of hip hop reflect the general use of nineteenth century hierarchies in describing music. Such hierarchies are also evident in the commonplace division of music into categories such as folk music, popular music, religious music and art music.<sup>168</sup> As a result of such

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apparent in cases that discuss fair use. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1993) (discussing transformative fair use in the context of a rap parody). The contrast between art and piracy is emphasized in cases that analogize sampling to theft. See *Jarvis v. A & M Records*, 827 F. Supp. 282, 295 (D.N.J. 1993); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991); see also Baroni, *supra* note 68, at 93 (discussing the dichotomy between piracy and artistry).

166. Legal discussions of hip hop occur within a broader societal context in which the categorization of music by race has been a pervasive feature of the music industry. See GUTHRIE P. RAMSEY, JR., *RACE MUSIC* 3 (2003) (noting that certain genres of music, including jazz, gospel, rhythm and blues and their stylistic progeny were historically marketed and mass mediated in the culture industry as “race records”); Amy Binder, *Constructing Racial Rhetoric: Media Depictions of Harm in Heavy Metal and Rap Music*, 58 AM. SOC. REV. 753, 765–66 (1993) (noting different frames invoked by the media to address the “white” genre of heavy metal and the “black” genre of rap, noting that discussions of heavy metal focused on the concern of the effects of graphic music for teenage listeners, while discussions of rap focused on the dangers posed by black youths to the broader society); Murray Forman, ‘Represent’: *Race, Space and Place in Rap Music*, 19 POPULAR MUSIC 65, 66 (2000) (noting that “rap music provides a unique set of contexts for the analyses of public discourses pertaining to youth, race and space”); Jason Middleton & Roger Beebe, *The Racial Politics of Hybridity and “Neo-Eclecticism” in Contemporary Popular Music*, 21 POPULAR MUSIC 159, 168–69 (2002) (discussing trend since late 1990s to greater eclecticism in musical production and consumption evident in rap and hip hop hybrid music and increased consumption of rap music by white suburban listeners); Derek Pardue, *Putting Mano to Music: The Mediation of Race in Brazilian Rap*, 13 ETHNOMUSICOLOGY F. 253, 255 (2004) (“The legacy of ‘whiteness’ as unmarked, especially in popular music performance and scholarship, motivates ‘other’ performers to distinguish their performances as ‘black,’ ‘Afro-Latin,’ etc. . . . [T]hese lines of demarcation are reinforced in media structures as music, culture and film channels continue to be organized along categories of race[.]”).

167. See Kofi Agawu, *Contesting Difference: A Critique of Africanist Ethnomusicology*, in *THE CULTURAL STUDY OF MUSIC: A CRITICAL INTRODUCTION* 227, 234 (Martin Clayton et al. eds., 2003) (noting that a discourse in Africanist ethnomusicology that focuses on differencing “has produced . . . distorted, ideologically one-sided, and politically disadvantageous representation”).

168. Art music is defined largely in contrast to other types of music such as popular and folk music and refers to music composed in the classical tradition intended as serious art. See Philip V. Bohlman, *On the Unremarkable in Music*, 16 19TH-CENTURY MUSIC 203, 205 (1992) (commenting that in the nineteenth century various types of music were “cordoned off into spheres that were at least as much the product of a discourse about social conditions as about musical conditions”); Robert Walser, *Eruptions: Heavy Metal Appropriations of Classical Virtuosity*, 11 POPULAR MUSIC 263, 301 (1992) (“In the academy, heavy metal (along with rap) remains the dark ‘Other’ of classical preserves of sweetness and light.”).

hierarchies, certain categories of music are depicted in light of their "otherness" in relation to the European classical music tradition.<sup>169</sup> In the case of hip hop, discourses of difference have the effect of characterizing and framing hip hop in a way that justifies negative evaluations of hip hop's aesthetic value.<sup>170</sup>

Even those with more positive views of hip hop than the *Grand Upright* court often rest their analyses on many of the same underlying dichotomies as do critics. Such proponents tend to interpret dichotomies in different ways, placing hip hop, for instance, together with postmodern forms of cultural production as types of creation that are appropriative in nature.<sup>171</sup> Although such characterizations of hip hop may seem positive, such views of postmodern production often reflect the same dichotomy between original and copied material as is generally evident in discourse about hip hop, albeit in the form of transformative as opposed to nontransformative uses. Such views similarly obscure historical continuities with respect to musical borrowing and other practices and minimize or ignore the role of borrowing as a characteristic feature of musical production in different contexts and historical periods.

As a result of these dichotomies and discourses of difference, classical music lies at the apex of a musical hierarchy and hip hop is

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169. See Bohlman, *supra* note 168, at 206 ("The 'othering' of these musics [folk music, tribal music and popular music] was not simply a matter of keeping them at a safe social distance from art music. It was also, quite consciously, an aesthetic gesture . . . . In short, it became common-place to impose an aesthetic distance between art music and Other musics.").

170. See Binder, *supra* note 166, at 754 (noting framing in portrayals of rap music evident in the fact that "rap music—with its evocation of angry black rappers and equally angry black audiences—was simultaneously perceived as a more authentic and serious art form than was heavy metal music, and as a more frightening and salient threat to society as a whole than the 'white' music genre"); see also *infra* note 184 and accompanying text.

171. Even those strongly critical of the application of copyright doctrine to explicitly appropriative forms of music such as hip hop implicitly accept the validity of categories upon which assessment of hip hop within music copyright is often based. See, e.g., Negativland, *Two Relationships to a Cultural Public Domain*, 66 LAW & CONTEMP. PROBS. 239, 255 (2003) (noting that copyright hinders and prohibits collage and other art forms that are now well entrenched in the array of creative possibilities); David Sanjek, *Fairly Used: Negativland's U2 and the Precarious Practice of Acoustic Appropriation*, in MUSIC AND TECHNOCULTURE 358, 359 (René T.A. Lysloff & Leslie C. Gay, Jr. eds., 2003) (noting the explicit and self-conscious borrowing exemplified by Negativland, whose 1990 release *U2* has been characterized as an example of satiric deconstruction); Self, *supra* note 47, at 351–52 (discussing digital sampling in context of postmodern art); Szymanski, *supra* note 47, at 280–89 (discussing sampling as a postmodern art form); Passmore, *supra* note 62, at 842 (describing digital samples as a postmodern pastiche).

most certainly at or near the bottom.<sup>172</sup> Similarly, certain types of borrowings, particularly transformative borrowings, are more acceptable than others.<sup>173</sup> The framing of discourse about hip hop is important because copyright reflects and projects cultural assumptions about the appropriate aesthetics of cultural production.<sup>174</sup> Copyright is thus not only shaped by conceptions of authorship but is also a powerful force in melding notions of authorship and delineating appropriate and inappropriate methods of artistic production. As a consequence, what is characterized as unacceptable copying within copyright law can play a critical role in determining what types of cultural production may occur.<sup>175</sup>

Recognition of the importance of borrowing has been obscured by Romantic author conceptions of musical composition embedded in copyright doctrine. These conceptions became predominant for certain high culture forms of cultural production such as classical music.<sup>176</sup> The implications of this historically specific view of composition are quite significant, both with respect to classical music itself, as well as with regard to other forms of cultural production that are also evaluated in light of this same model. Current conceptions of authorship assume a dichotomy between copying and creativity and presume that borrowing is inimical to creativity and innovation. By focusing upon a dichotomy between originality and borrowing, such views of musical authorship fail to recognize that the use of existing works for new creations can be an important source of innovation. Examination of the historical development of conceptions of musical

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172. See HOUSTON A. BAKER, JR., *BLUES, IDEOLOGY AND AFRO-AMERICAN LITERATURE: A VERNACULAR THEORY* 11 (1984) (noting that "Afro-Americans [are] at the bottom even of the vernacular ladder in America"); SMALL, *supra* note 17, at 350 ("[T]he attitude of classical musicians towards the Afro-American tradition has been at best of incomprehension and condescension, at worst of violent antagonism."); Garofalo, *supra* note 16, at 325 ("Because of an elitist bias toward high culture, European classical music was considered to be the hallmark of good taste and opera singers occupied the highest rung on the entertainment ladder.").

173. See *supra* notes 135–47 and accompanying text.

174. See Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENVER J. INT'L L. & POL'Y 109, 112 (1995) (noting that laws "reflect the underlying values of a society").

175. See Latham, *supra* note 121, at 124 ("[T]he [*Grand Upright*] court struck fear into the music industry and left behind the impression of a per se bar to unlicensed digital sampling. Consequently, the pendulum swung in the direction of extreme caution, or paranoia, and the licensing of digital samples skyrocketed." (citations omitted)).

176. See Janet Wolff, *The Ideology of Autonomous Art*, in MUSIC AND SOCIETY, *supra* note 34, at 1, 2 (noting that the Romantic notion of the autonomy of art, still dominant in the late twentieth century, is a product of nineteenth century ideology and social structure).



composition sheds light on the manner and nature of their construction.

## II. MUSICAL COMPOSITION AND MUSICAL BORROWING: MUSICAL AUTHORSHIP IN HISTORICAL AND CULTURAL PERSPECTIVE

[R]eworking of borrowed music has been going on in music from early notated chant, with its formulaic composition, revisions, tropes, and sequences, up to recent music by composers such as Peter Maxwell Davies, John Cage, Mauricio Kagel, Frank Zappa, and the early creators of rap music, who used tape loops of existing songs as background for their own recitation.<sup>177</sup>

### A. *Canonic Classical Music: The Historical Specificity of Visions of Musical Composition*

Hip hop is often discussed in legal discourse as an example of a form of musical production based on appropriation.<sup>178</sup> Implicit and at times even explicit in such discussions is a comparison to other models of cultural production that are assumed to fit within Romantic author concepts.<sup>179</sup> Romantic author notions of musical composition have become implicit assumptions in the construction of musical authorship and how we engage in the experience of music.<sup>180</sup> Romantic author conceptions have also influenced the creation of the classical music canon.<sup>181</sup> Furthermore, the notion of originality that has been a core aspect of copyright debates from the eighteenth century onwards was a key aspect of discussions about musical

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177. Burkholder, *Uses*, *supra* note 150, at 863.

178. See *supra* notes 151–62 and accompanying text.

179. See Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 455 (discussing "how copyright received a constructed idea of 'authorship' from literary and artistic culture and to explore ways—sometimes peculiar and even perverse ways—in which this 'authorship construct' has been mobilized in legal discourse"); Woodmansee, *Author Effect*, *supra* note 5, at 21 (discussing the "modern myth that genuine authorship consists in individual acts of origination").

180. See SCOTT BURNHAM, *BEETHOVEN HERO* xiii (1995) (noting that Beethoven and the idea of Beethoven as a musical hero in "the paradigm of Western compositional logic . . . proved so strong that it no longer acts as an overt part of our musical consciousness" and has become "a condition of the way we tend to engage the musical experience").

181. See Trevor Ross, *Copyright and the Invention of Tradition*, 26 EIGHTEENTH-CENTURY STUDIES 1, 19, 21 (1992) (noting that the notion of a limited copyright, as was the subject of eighteenth century debates about copyright, "heightened the sense that the canon was made up exclusively of old works" and "helped to crystallize certain notions of canonicity and textual authenticity").

composition in the eighteenth and nineteenth centuries.<sup>182</sup>

As was the case in literature, the distinction between genius and craftsmanship was a key aspect of conceptions of musical authorship.<sup>183</sup> This distinction is still evident today, for example, in discussions of whether hip hop should be considered music.<sup>184</sup> As the compositional process of many composers suggests,<sup>185</sup> this vision of musical authorship based upon notions of creativity, invention, originality and even genius is far too restrictive a representation of musical creation. Such representations are often incomplete in that they assume that musical works are autonomous creations.<sup>186</sup> Furthermore, these ideas are reflected in the development of a pervasive discourse in copyright doctrine concerning originality that construes borrowing as reflective of a lack of originality.<sup>187</sup> Such

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182. Cf. Scherzinger, *supra* note 86, at 103 (noting that the “invention of copyright protection for music in the nineteenth century was logically implicated in notions of originality beholden to the quasi-divine nature of inspiration that ravished the composer”).

183. See, e.g., David Clarke, *Musical Autonomy Revisited*, in THE CULTURAL STUDY OF MUSIC: A CRITICAL INTRODUCTION, *supra* note 167, at 159, 161 (noting that autonomous music or music “emancipated from ritual or ceremonial function; music whose meaning is not dependent on an accompanying text or imagery,” emerged around 1800); Harris, *supra* note 143, at 301 (“A commonly held but infrequently spoken set of assumptions about music is that the composer as ‘artist’ achieves god-like status by creating a ‘work of art’ out of nothing.”); Hans Lenneberg, *The Myth of the Unappreciated (Musical) Genius*, 66 MUSICAL Q. 219, 221 (1980) (“In the Romantic tradition, great composers are usually depicted as not only destined to be gifted, but also innovative or radical and of extraordinary integrity . . . . [This] idea of the artist as an inevitably misunderstood genius is a myth, or at least an over-simplification.”); Edward E. Lowinsky, *Musical Genius—Evolution and Origins of a Concept*, 50 MUSICAL Q. 321, 338 (1964) (noting that the classical formulation that dominated musical thinking was “the contrast between counterpoint as a craft and dramatic music as the creation of genius.”); Woodmansee, *Genius*, *supra* note 5, at 37 (“Eighteenth-century theorists . . . minimized the element of craftsmanship . . . in favor of the element of inspiration, and they internalized the source of that inspiration. That is, the inspiration for a work came to be regarded as emanating not from outside or above, but from within the writer himself.” (citations omitted)).

184. See Walser, *supra* note 1, at 195 (“Classical musicians and critics often see themselves as guardians of musical culture, and for most of them hip hop is beneath notice, barely worth dismissing. But popular musicians, too . . . have characterized rap as simply not constituting ‘music.’”).

185. See *infra* Parts II.A.2.–3.a, notes 339–56 and accompanying text.

186. Wolff, *supra* note 176, at 2.

187. See *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author.” (citations omitted)); Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 811 (1993) (discussing definitions and conceptions of originality in copyright law); Olufunmilayo B. Arewa, “Piracy,” Borrowing and Global Intellectual Property Frameworks: History, Hierarchies and Conceptions of

notions of independence, autonomy and genius in artistic production obscure the reality of their social construction.<sup>188</sup>

# 1. Sacralization and Hierarchies of Taste: Aesthetic Value and Musical Composition

## a. *Copyright, Composers and Deification*

The nineteenth century was an important time period for both the development of copyright structures, and for the refinement of underlying rationales for such structures. The development of truly modern copyright frameworks may be traced back to the first half of the nineteenth century.<sup>189</sup> Concurrent with the development of such frameworks, cultural hierarchies began to develop in the United States with respect to forms of cultural production such as music, literature and museums. Historian Lawrence Levine highlights the process of what he terms “sacralization,” which entailed the separation of elite culture from popular culture and the creation of sacred authors. Works of these sacred authors could not be abridged or altered and were to be performed in worship-like settings in which audience participation was not permitted.<sup>190</sup> This process of sacralization contributed to what may be described as hierarchies of taste, or rankings of forms of cultural production according to their deemed aesthetic value.<sup>191</sup> Hierarchies of taste, in turn, influenced the formation, development and operation of intellectual property frameworks.<sup>192</sup>

Hierarchies of taste were marked in the musical arena, where “[t]he enhanced prestige of the composers and the sacralization of

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Culture 5–9 (2005) (unpublished manuscript, on file with the North Carolina Law Review) (discussing historical role of hierarchies of taste in determining treatment of local knowledge in global intellectual property frameworks).

188. See DENORA, *supra* note 1, at 189 (discussing the power of the ideology of genius and how “conventional ways of accounting for Beethoven’s success through reference to his individual and charismatic ‘gift’ elide the complex and collaborative processes of mobilizing resources, presentation devices, and practical activities that produced Beethoven’s cultural authority”).

189. SHERMAN & BENTLY, *supra* note 24, at 61. See generally PATTERSON, *supra* note 38, at 180–202 (outlining the development of early American copyright).

190. See LAWRENCE LEVINE, HIGH BROW, LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA 30–32 (1988) (noting the change in the relationship of Shakespeare to the American audience, from a part of mainstream popular culture to become part of elite culture).

191. See Arewa, *supra* note 187, at 18–20 (noting that sacralization is an underlying process by which intellectual property protection is often at least implicitly justified that involves the creation of sacred texts that cannot be altered).

192. *Id.* at 45–49.

their work changed . . . long-standing attitudes toward them and their compositions that had prevailed throughout most of the nineteenth century . . . and [meant that] singers and soloists were obliged increasingly to stick to the sacred text of the great masters.”<sup>193</sup> As such, the sacralization process reflected the influence of Romantic author concepts in music. The sacralization process also reflected the increasing influence of commercial forces such as the sheet music industry and the increasing commercial focus of composers more generally.<sup>194</sup> Prior to the nineteenth century, composers’ names were not always included in programs.<sup>195</sup> One consequence of sacralization in music was thus to enhance composers’ prestige through a process akin to deification.<sup>196</sup>

Although such sacralization and hierarchies depicted ideal types, they nonetheless became a significant cultural force.<sup>197</sup> The power of such hierarchies ultimately rested in their potential to legitimize the social hierarchy,<sup>198</sup> thus marginalizing “the voices of all musicians who stand outside of the canon, representing those who stand at the margins of social power.”<sup>199</sup> These hierarchies of culture and taste are intimately and inescapably intertwined with the notions of authorship upon which copyright laws are based.<sup>200</sup>

193. LEVINE, *supra* note 190, at 137–38.

194. See *infra* notes 235–45, 329–37 and accompanying text.

195. LEVINE, *supra* note 190, at 137.

196. *Id.*; see also Weber, *supra* note 14, at 175 (“Around the walls of the older European concert halls are emblazoned the names, often even the faces, of the master composers, those awesome figures who have acted as secular deities in modern musical culture.”).

197. LEVINE, *supra* note 190, at 168.

198. See JACQUES ATTALI, *NOISE: THE POLITICAL ECONOMY OF MUSIC* 51 (Brian Massumi trans., 1985) (noting that value assignments in the creation and interpretation of music were part of the process of music becoming institutionalized as a commodity); Moore, *supra* note 8, at 75 (noting that “[w]estern attitudes about music have been defined partially in deference to pre-existent conceptions of status”).

199. Walser, *supra* note 168, at 265; see also WILLIAM WEBER, *MUSIC AND THE MIDDLE CLASS: THE SOCIAL STRUCTURE OF CONCERT LIFE IN LONDON, PARIS AND VIENNA BETWEEN 1830 AND 1848* xxiii (2d ed. 2004) (“[P]opular music by definition involves an ideologically based aesthetic that assumes a hierarchy of supposed (though not always real) levels of musical education.”); Moore, *supra* note 8, at 76 (noting that conceptions of “true art” had changed dramatically by the end of the nineteenth century and that the term “popular artist” carried a “pejorative connotation[]” in the mind of the public).

200. See ALAN P. MERRIAM, *THE ANTHROPOLOGY OF MUSIC* 260 (1964) (“[I]n discussing the aesthetic, Western aestheticians have made it primarily applicable to but one kind of art. In so doing, they have strengthened the division made in our culture between ‘fine art’ as opposed to ‘applied art,’ or the ‘artist’ as opposed to the ‘craftsman.’”); Blaukopf, *supra* note 71, at 189 (“This European value system [based on a hierarchy of values in the arts], which found its expression, at least to a certain extent, in

*b. Sacralization and Musical Borrowing: The Historical and Cultural Specificity of Visions of Authorship*

Sacralization and the formation of hierarchies of taste suggest that notions of authorship that currently pervade copyright law are both historically and culturally specific.<sup>201</sup> Such conceptions of authorship are historically specific in that they emerged at a particular historical context and served to project and reinforce cultural norms developed or established in that context. These notions were then applied to reinterpret and represent the nature of present and past artistic production.<sup>202</sup> In addition, such notions of musical authorship are culturally specific in that they are not broadly applicable and were initially formulated based on particular types of cultural production at the top of such hierarchies.

Although cultural production forms categorized as postmodern do typically engage in borrowing as an important aspect of the manner of production, the use of existing works in the musical arena is by no means limited to hip hop or postmodern forms of production. Rather, use of existing works has historically been a core feature of the musical composition process.<sup>203</sup> The fact that borrowing was characteristic in the classical music tradition is not often noted in legal discourse,<sup>204</sup> although it is a focus of discussion in musicology.<sup>205</sup>

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philosophical and aesthetic reasoning also gave rise to legal measures that were adopted both at the national and international level.”).

201. Cf. Wolff, *supra* note 176, at 5 (noting that “Art” is itself a “historically specific fact, produced in particular and contingent social circumstances”); Ross, *supra* note 181, at 21 (“[T]he copyright debate arguably helped to crystallize certain notions of canonicity and textual authenticity.”); Arewa, *supra* note 187, at 45–49 (discussing hierarchies of taste and copyright).

202. See J. Peter Burkholder, *Museum Pieces: The Historicist Mainstream in Music of the Last Hundred Years*, 2 J. MUSICOLOGY 115, 117 (1983) (noting that in response to the increased mass appeal of music, serious musicians “turned back to Beethoven, Mozart and Haydn, creating the concept of the ‘master’ and the ‘masterpiece’ in music and deifying these three (and to a lesser extent Bach) as the geniuses of a great musical art”).

203. Burkholder, *supra* note 108, at 25–27.

204. At best, legal scholarship discussing hip hop will note that even classical composers borrowed. See, e.g., Hampel, *supra* note 63, at 584–85 (pointing out that classical composers from Bach and Handel to Stravinsky and Ives all borrowed in their musical compositions).

205. See Burkholder, *Uses*, *supra* note 150, at 861 (noting that the *New Grove Dictionary of Music and Musicians* did not have an entry for borrowing, quotation, modeling or intertextuality). Since the time of publication of the Burkholder article in 1994, a definition of borrowing has been added to the *New Grove Dictionary*. See Burkholder, *supra* note 108, at 5–8. In addition, the Indiana University online annotated bibliography on musical borrowing now includes more than 1,200 entries. See MUSICAL BORROWING: AN ANNOTATED BIBLIOGRAPHY (J. Peter Burkholder et al. eds.), <http://www.music.indiana.edu/borrowing/> (last visited Dec. 5, 2005).

Sacralization and the vision of authorship inherent in discussions of musical composition misrepresent the processes by which music has actually been produced historically. Sacralization replaces actual production methods with an idealized view of sacred works reflecting the operation of individual composers, some of whom demonstrate genius but most of whom operate autonomously and individually in the creation of musical works.<sup>206</sup> This idealized view presents a highly distorted and incomplete picture of actual musical practice.

The classical music category is important because it is the source of implicit comparisons in discussions of hip hop and other music.<sup>207</sup> At times, such comparisons are made explicit, such as in court cases that appeal to the authority of sacred authors, artists and composers.<sup>208</sup> Classical music has also had a powerful influence in shaping broader cultural ideas about musical authorship.<sup>209</sup> Understanding how the classical tradition was constituted can shed light on the assumptions upon which views of musical authorship rest. Not surprisingly, music forms seeking to establish canons in the twentieth century have modeled themselves after the nineteenth century classical tradition.

*c. Hierarchies of Taste, Sacralization and the Creation of Musical Canons*

The ascension of jazz in the twentieth century reveals something of both the sacralization inherent in Romantic author processes and the operation of hierarchies of taste.<sup>210</sup> Borrowing from the classical

206. Cf. Wolff, *supra* note 176, at 2 (“The Romantic notion of the autonomy of art, which is still dominant in the late twentieth century, is essentially a product of nineteenth-century ideology and social structure.”).

207. See Bohlman, *supra* note 168, at 205–06 (noting that other types of music were placed at an aesthetic distance from and consequently defined by reference to art music).

208. See, e.g., *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 249–51 (1903) (invoking Velasquez, Whistler, Rembrandt and Steinla); *Rockford Map v. Directory Serv.*, 768 F.2d 145, 148 (7th Cir. 1985) (“In 14 hours Mozart could write a piano concerto, J.S. Bach a cantata, or Dickens a week’s installment of *Bleak House* . . . . All of these are copyrightable.”); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (invoking Rodin); *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (invoking popular music deities Herbert, Gershwin, Kern and Porter).

209. See DENORA, *supra* note 1, at 189 (discussing the implications of the ideology of genius for the production of cultural authority of Beethoven and the ways in which his success was explained in the broader social context).

210. See Gary Tomlinson, *Cultural Dialogics and Jazz: A White Historian Signifies*, in *DISCIPLINING MUSIC: MUSICOLOGY AND ITS CANONS* 64, 78 (Katherine Bergeron & Philip V. Bohlman eds., 1992) (noting that the jazz canon has retraced the trajectory of earlier European canons and “now shares all the misguided pretensions to transcendent value and meaning that characterize those other canons”); Robert Walser, *Out of Notes: Signification, Interpretation, and the Problem of Miles Davis*, 77 *MUSICAL Q.* 343, 347–349

model, jazz has effectively achieved a status in the United States of the sort associated with the classical tradition based on strategies similar to those used in the invention of the classical tradition.<sup>211</sup> Consequently, the establishment of the jazz canon also reveals some of the tensions inherent in the process of institutionalization of elite music forms.<sup>212</sup> In the process of its ascension, the jazz tradition came to be characterized in a way that emphasized "individualism rather than collectivism [and] autonomous statements rather than dialogue and collaboration."<sup>213</sup> Discourse associated with establishing jazz in the model of the classical tradition also blurred "its variety and its debt to the collective struggles of African-Americans, and [effaced] the fact that jazz has long flourished outside of the United States."<sup>214</sup>

In contrast to the increasingly canonical status of jazz today, hip hop music rests at the bottom of a number of hierarchies of taste, including those in relation to race or ethnicity, class and age.<sup>215</sup> As has been the case with other musical forms, including rock and roll, hip hop has been closely associated with young people, which is no doubt a factor in its dismissal by "serious" musicians.<sup>216</sup> The characteristics of hip hop—its composition, construction and broader social context—make it virtually impossible to fit hip hop within the autonomous Romantic author representation of musical production

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(1993) (discussing how jazz came to be characterized as "America's classical music" and noting, with respect to Gunther Schuller, a leading commentator on jazz, that "[Schuller] has also accepted from musicology the idea that Western art music operates in an autonomous domain; his writings on jazz are colored by his desire to prove that jazz is equally autonomous and thus equally worthy of respect"). Much like the jazz canon, the Broadway canon aspires to the same standards as the classical music canon. See Geoffrey Block, *The Broadway Canon from Show Boat to West Side Story and the European Operatic Ideal*, 11 J. MUSICOLOGY 525, 525 (1993) ("[T]he criteria for Broadway canonization are strikingly similar to those established for the European musical canon.").

211. See Tomlinson, *supra* note 210, at 75–76 ("The jazz canon has been forged and maintained according to old strategies—Eurocentric, hierarchical notions behind which the rules of aestheticism, transcendentalism, and formalism are apparent.").

212. See *id.* at 76–77 (noting that jazz signification has remained extracanonial while at the same time the institutionalized jazz canon is being taught as "exemplars of timeless aesthetic value" as opposed to within the context of their creation).

213. Walser, *supra* note 168, at 348.

214. *Id.*; see also Philip V. Bohlman, *Musicology as Political Act*, 11 J. MUSICOLOGY 411, 430 n.45 (1993) ("Making it more politically correct to study jazz within musicology has been the persistent reference to it as 'America's classical music' . . . . The standard jazz historiography is just that, a canonic body of works that employs either the trope of great musicians or style histories.").

215. See *supra* notes 163–75 and accompanying text.

216. See BAKER, *supra* note 46, at 62 (noting association of hip hop with young African American males); ZAPPA WITH OCCHIOGROSSO, *supra* note 31, at 201 (noting that adults were completely hostile to rock and roll when it first appeared); *supra* note 184 and accompanying text.

associated with the classical music tradition.

## 2. Inventions and Themes: Historicism and the Development of the Classical Canon

The status of hip hop in the twentieth century reflects the operation of hierarchies of taste and a sacralization process that became widespread by the end of the nineteenth century.<sup>217</sup> The sacralization process in the United States took place within a broader context of the development of a middle class that wanted to emulate upper classes.<sup>218</sup>

The development of such hierarchies is noteworthy for several reasons. First and foremost, such hierarchical categories functioned to segregate the types of cultural production that were at the apex of hierarchies of cultural forms. As such, these hierarchies of the nineteenth century demonstrate how aesthetic rankings of cultural forms may derive from social distinctions.<sup>219</sup> Secondly, the sacralization process had significant implications for the relationship of music and audience. Audiences prior to this time in opera and public concerts behaved in a fashion similar to audiences today at popular music concerts.<sup>220</sup> By the late nineteenth century, audiences were expected to passively receive classical music and other elite forms of cultural production in silence and without participation.<sup>221</sup>

217. Walser, *supra* note 168, at 265.

218. See Regina Lee Blaszczyk, *The Aesthetic Moment: China Decorators, Consumer Demand, and Technological Change in the American Pottery Industry, 1865–1900*, 29 WINTERTHUR PORTFOLIO 121, 122 (1994) (noting that aestheticism evident in the late nineteenth century “art craze” represented the democratization of genteel living); Simon J. Bronner, *Reading Consumer Culture, in CONSUMING VISIONS: ACCUMULATION AND DISPLAY OF GOODS IN AMERICA 1880–1920* at 13–53 (Simon J. Bronner ed., 1989) (discussing the preoccupation of the middle class with consuming goods during the late nineteenth century).

219. See TIA DENORA, *AFTER ADORNO: RETHINKING MUSIC SOCIOLOGY* 29 (2003) (“[T]he fascination with ‘high’ music culture during the nineteenth century was simultaneously a vehicle for the construction of class and status group distinction.”); see also Wolff, *supra* note 176, at 5 (“It can also be shown that the division between ‘high art’ and both ‘popular art’ and the so-called ‘lesser arts’ (decorative arts and crafts) is based on social, rather than aesthetic distinctions.”).

220. Walser, *supra* note 168, at 284; see also LEVINE, *supra* note 190, at 192 (noting that early nineteenth century audiences reacted spontaneously to public concerts with cheers, yells, gesticulations, hisses, boos, stamping of feet, whistling, crying for encores, and applause).

221. See JAMES H. JOHNSON, *LISTENING IN PARIS: A CULTURAL HISTORY* 1–2 (1995) (discussing why listening behaviors were transformed and music audiences stopped talking and began listening in the century between 1750 and 1850); LEVINE, *supra* note 190, at 57, 192 (noting that by the middle of the nineteenth century, audiences no longer responded loudly to performers, instead giving only polite applause and a few bravos); Walser, *supra*



The experience of the music listener was thus also "regarded as an individual one."<sup>222</sup> Finally, the sacralization process also influenced the meaning of music for audiences. Examining the construction of the classical music canon should begin with an awareness of the category of classical music as a constructed grouping of music and composers.

The classical music tradition as generally conceived today is a decontextualized museum tradition in which the majority of works deemed appropriate for performance are either old and revered pieces or pieces categorized as works of lasting value with distinctive musical personality and other characteristics.<sup>223</sup> The predominance of such museum pieces is a significant contrast to the living musical traditions that had previously been dominant before the eighteenth century.<sup>224</sup> Prior to the eighteenth century, European music other than religious music did not have a "learned, classical tradition comparable to that of literature and the fine arts."<sup>225</sup> Production of musical works was oriented to the immediate present.<sup>226</sup> In addition, music and music audiences were intermingled, producing a lack of clear delineation between high and low culture musical forms prior to the last half of the nineteenth century.<sup>227</sup> The classical music category as it exists today is an invented tradition that arose partially through hierarchies of taste.<sup>228</sup>

The rise of a classical tradition in music has been attributed to the "simultaneous collapse of the patronal tradition and the rise of the printing industry."<sup>229</sup> Under the older patronal tradition,

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note 168, at 281 (noting that, until the late nineteenth century, the behavior of "concert audiences was far from today's 'classical' norms of silence and passivity").

222. Burkholder, *supra* note 202, at 119.

223. *Id.*

224. *See id.* (discussing classical music as a museum tradition and the decline in performances of works by living composers).

225. Weber, *supra* note 14, at 185; *see also* WILLIAM WEBER, *THE RISE OF MUSICAL CLASSICS IN EIGHTEENTH-CENTURY ENGLAND* 2 (1992) (noting the lack of a classical tradition in music prior to the eighteenth century).

226. *See* Weber, *supra* note 14, at 185 ("The art remained oriented toward the immediate present; works were composed, enjoyed, and quickly forgotten.").

227. *Id.*; *see also* LEVINE, *supra* note 190, at 57 (noting increasing segregation of audiences by the mid-1800s).

228. *See* Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 1-14 (Eric Hobsbawm & Terence Ranger eds., 1983) (discussing the invention and acceptance of traditions that are given an aura of traditionality); Walser, *supra* note 168, at 265 (noting that the classical tradition is an invented tradition in which present interests have constructed a vision of the past to legitimate present-day institutions or social relations).

229. *See* Weber, *supra* note 14, at 186.

musicians were members of upper class households.<sup>230</sup> The relationship between patrons and performers under this tradition was “the central source of social order of music life.”<sup>231</sup> In addition to being a time period during which hierarchies of taste emerged in force, the late nineteenth century was also a fertile time for the development of invented traditions.<sup>232</sup> Invented traditions have been defined as “responses to novel situations which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition” and represent “an attempt to structure at least some parts of social life within [a modern world of constant change and innovation] as unchanging and invariant.”<sup>233</sup> The corpus of the invented classical music tradition was largely assembled during the latter half of the nineteenth century.<sup>234</sup>

The invention of the classical music tradition as comprised of museum pieces was at least partially due to the development of commercial interests with respect to music and the emergence of early forms of musical mass culture. The rise of the secular deity masters of classical music in the 1850s and 1860s owes much to the evolution of European mass culture from 1770 to 1870, particularly the growth of the printing industry.<sup>235</sup> These secular deity composers include Bach, Handel, Haydn, Mozart and Beethoven, as well as later composers such as Schubert, Weber, Schumann and Mendelssohn.<sup>236</sup>

During the nineteenth century, the changing relationship between composer and audience that characterized the operation of hierarchies of taste was reflected in the development of a classical music concert hall tradition that served “primarily [as] a museum for

230. *Id.* at 177–78.

231. *Id.* at 178.

232. See Eric Hobsbawm, *Mass-Producing Traditions: Europe, 1870–1914*, in *THE INVENTION OF TRADITION*, *supra* note 228, at 263, 303 (noting that 1870 to 1914 was a period during which many invented traditions emerged in Western countries).

233. Hobsbawm, *supra* note 228, at 2.

234. See Parakilas, *supra* note 8, at 4 (“The repertoire of Western ‘classical music,’ however, was formed under the spell of nineteenth century European ideas of history: the archeological idea of history as reconstruction, the evolutionary idea of history as a process of perpetual change, the progressive idea of history as the formation of the present.”); cf. Robert Fink, *Elvis Everywhere: Musicology and Popular Music Studies at the Twilight of the Canon*, 16 *AM. MUSIC* 135, 141 (1998) (“Since about 1830 or so we have lived in the West with a quite circumscribed repertoire of so-called Classical Music . . . [which until 1965] occupied a secure . . . position at the top of a generally accepted hierarchy of musical culture.”).

235. See Weber, *supra* note 14, at 176 (noting that the growth of the publishing industry “provided the main impetus behind the commercial development of the musical world”).

236. *Id.* at 175.

the display of works of art from previous generations.”<sup>237</sup> This shift is evident in concert programs, where the works of dead composers came to characterize concert life in Europe.<sup>238</sup> By the 1860s, only thirty to forty percent of concert works were by living composers, a substantial drop from sixty to seventy percent in the late eighteenth century.<sup>239</sup> In fact, by the 1870s, new music in concert life was looked upon with suspicion.<sup>240</sup>

A number of factors have been proposed to explain this shift. One such factor was the advent of the mass music market, fostered by virtuosi composers and performers of the early nineteenth century. The success of Liszt and Paganini,<sup>241</sup> two such artists, was at least partly based on the market for sheet music.<sup>242</sup> The development of this mass music market directly related to copyright:

An even more explicit action in the commercial direction by nineteenth century composers was their campaign for a universal copyright. This movement was, clear and simple, an effort to obtain a legal mass market. It is sobering to one's classical fancies to remember that one of the key exponents of the reform was the master of the masters, Ludwig van Beethoven.<sup>243</sup>

The virtuosi and increasing influence of the mass market also had a substantial effect on the way classical music was performed.<sup>244</sup> This transformation is the root of the professionalization of performance that, in the contemporary context, has been characterized as widening the distance between audience and performer.<sup>245</sup>

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237. Burkholder, *supra* note 202, at 117.

238. *Id.* at 127.

239. Weber, *supra* note 14, at 187.

240. *See id.* (attributing changes in public taste for a preference of the music of dead composers as a partial result of symphony orchestra conductors learning to use the new mass musical market).

241. *See id.* at 186 (noting that Liszt and Paganini were among the few virtuosi to enter the classical music canon).

242. *Id.* at 181–82; *see also* EDWARD W. SAID, *MUSICAL ELABORATIONS* 4 (1991) (noting that virtuosi emerged at the beginning of the eighteenth century).

243. Weber, *supra* note 14, at 182 (citations omitted); *see also infra* notes 329–37 and accompanying text (detailing how commercial interests influenced the classical museum tradition).

244. *See id.* at 183 (noting that the development of public formal orchestral concerts “spelled the death of the public amateur orchestral tradition in the three major capitals [of London, Paris and Vienna]”).

245. *See SAID, supra* note 242, at 3 (“[T]oday’s complete professionalization of performance . . . has widened the distance between the ‘artist’ . . . and, in a lesser, lower, far more secondary space, the listener who . . . is routinely made to feel the impossibility of

The development of the classical museum tradition also influenced the production of music: “[j]ust as the experience of music as a listener was regarded as an individual one, so each composer was considered to speak with an individual voice.”<sup>246</sup> This individualistic model focused on the creation of “musical works of lasting value,”<sup>247</sup> which was a departure from the practices of the masters such as Bach, Haydn and Beethoven. These artists sought to “create music which had current value, however ephemeral: providing music for a specific function, whether that be ceremony, worship, public entertainment, dancing, or amateur music-making.”<sup>248</sup> As a result of the museum tradition, works of past time periods increasingly became the source of new music.<sup>249</sup> The predominant notions of musical composition in the invented classical music tradition thus came to echo the Romantic author conception upon which emerging copyright structures were also based.

The recent emphasis on historically accurate performances,<sup>250</sup> particularly of early music, is a present day example of an attempt to create a tradition of performance that is in reality a type of invented tradition. The element of invention is apparent in the use of assumed invariant past practices as a way to justify current performance choices. The emphasis on historically accurate performances also reflects the dominant historicist discourse that has come to

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attaining the packaged virtuosity of a professional performer.”).

246. Burkholder, *supra* note 202, at 119.

247. *Id.*

248. *Id.*

249. *Id.*; see also ATTALI, *supra* note 198, at 68–69 (noting that the star system, which began in the middle nineteenth century when a repertory was constituted, was based on valorization of a stockpile of rediscovered music of past centuries).

250. See, e.g., Margaret Bent, *Authentic Listening*, 25 *EARLY MUSIC* 567, 567 (1997) (noting that the twenty-five years leading to 1997 had seen a spectacular rise in early music performance); Randall Dipert, *The Composer's Intentions: An Examination of Their Relevance for Performance*, 66 *MUSICAL Q.* 205, 205 (1980) (noting that the centrality of a composer's intentions in performance has become almost cliché with few questioning what this principle means); Laurence Dreyfus, *Early Music Defended Against Its Devotees*, 69 *MUSICAL Q.* 297, 297–98 (1983) (suggesting that justifications for historical performance are evasive and empty and that a key question is understanding why twentieth century culture places such a value on historically “correct” renditions of centuries old music); Joseph Kerman, *Introduction to the Early Music Debate: Ancients, Moderns and Post-Moderns*, 10 *J. MUSICOLOGY* 113, 113 (1992) (noting that as Early Music grew more expert and successful, broader claims were made for its historical authenticity); Bernard D. Sherman, *Authenticity in Musical Performance*, in *THE ENCYCLOPEDIA OF AESTHETICS* 166 (Michael J. Kelly ed., 1998) (noting that, in Western art music today, “authentic” usually refers to a class of performances that have become more influential since the 1960s that seek historical verisimilitude through use of period instruments and attempts to recreate period idioms).

characterize discussions of the classical canon.<sup>251</sup> This historicism is reflected in “the understanding that the past has become alien to us and the desire to recapture what is slipping away.”<sup>252</sup> Such historicism leads to an emphasis on the achievement of authenticity in musical performance. As is the case in invented traditions, the quest for authenticity in music performance is in many respects much more a commentary on the sociocultural system in which an emphasis on authenticity arises than it is about the original context to which concerns about authenticity relate.<sup>253</sup> Not surprisingly, the current emphasis on authenticity in performance of Baroque music only extends so far. Modern musical culture eschews certain aspects of Baroque performance that fall outside current conceptions of classical music practice, particularly improvisation.<sup>254</sup>

As a result of the museum tradition, the thread of a tradition that was collaborative was transformed and “both emulation and renewal acquired a new character during the transformation of the concert hall into a museum.”<sup>255</sup> The museum tradition had been largely developed by the end of the nineteenth century. One consequence of this transformation was that young composers who created works after the development of the museum tradition had both living and dead models against whom their creations might be compared.<sup>256</sup> Pieces that had survived the “test of time” were seen as being worthy exhibits in this museum.<sup>257</sup> Such works were also seen as being distinguished from works of lesser contemporaries on account of their craftsmanship, beauty and inspiration.<sup>258</sup> These internal characteristics alone were seen as accounting for the elevated status of such pieces, rather than the broader social context within which

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251. See Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1627 (1991) (reviewing AUTHENTICITY AND EARLY MUSIC (N. Keynon ed., 1988)) (noting that the Early Music movement “is best understood as attempting what the English historian Eric Hobsbawm calls the ‘invention of tradition’”).

252. *Id.* at 1644.

253. See DANIEL BARENBOIM & EDWARD W. SAID, PARALLELS AND PARADOXES: EXPLORATIONS IN MUSIC AND SOCIETY 126–27 (Ara Guzelimian ed., 2002) (noting that discussions of authenticity are “a contest in the present over a construction of the past” and that “there has never been a generation so preoccupied with the past as now”).

254. See DEREK BAILEY, IMPROVISATION: ITS NATURE AND PRACTICE IN MUSIC 27–28 (1992) (noting that in the at-times acrimonious debate about authenticity in performance of Baroque music, the issue of “improvisation is rarely, if ever, mentioned . . . [highlighting the fact that the Baroque performer would assume that] improvisation was an automatically accepted part of performing music”).

255. Burkholder, *supra* note 202, at 120.

256. *Id.*

257. *Id.*

258. *Id.*

such works were developed.<sup>259</sup>

Young composers in the post-museum era thus came to focus on developing distinctive personal styles in order to create works that could merit a showing in the music museum.<sup>260</sup> They modeled their activities based upon what “they perceived composers of previous eras to have done,” while ignoring the goal of such composers to create music with current value for an audience.<sup>261</sup> Progressivism purported to focus attention on and foster the forward progress of music, but in fact was closely intertwined with emulation.<sup>262</sup> Progressivism and emulation caused composers of new music to model their works after the masters of the past but to do so in an elusive and esoteric fashion.<sup>263</sup> Progressivism may also be seen as a quest for novelty in music, which further connects the development of the classical music canon with contemporary views of copyright in which conceptions of originality are central.<sup>264</sup>

The development of the classical music museum tradition has a number of significant implications for copyright. Most importantly, many contemporary conceptions about how musical production occurs are at least implicitly based on a model of individual and autonomous production that is also at the core of post-museum perceptions about how music production should occur.<sup>265</sup> This model is not an accurate representation of how musical production actually occurred, even with respect to works produced in much of what is now termed the classical music tradition, but which was not so termed during the time that much of such music was actually created.<sup>266</sup>

The invention of the classical tradition also influenced the social role of music. As a result of the twin processes of progressivism and emulation that were complementary sides of the historicist

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259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 133.

263. *Id.* at 121–28.

264. See Levinson & Balkin, *supra* note 251, at 1643 (noting connection between progressivism and novelty).

265. See Burkholder, *supra* note 108, at 25–27 (noting changing attitudes toward and practices of borrowing beginning in the eighteenth century leading to nineteenth century notions of originality); Jaszi, *supra* note 5, at 48 (noting that assumptions about cultural production evident in *Rogers v. Koons* “discourage artists whose methods entail reworking preexisting materials, while rewarding those whose dedication to ‘originality’ qualifies [sic] them as true ‘authors’ in the Romantic sense”).

266. See Levinson & Balkin, *supra* note 251, at 1635 (noting that the label classical is a term now applied to certain types of music).

mainstream in classical music,<sup>267</sup> classical music has become increasingly esoteric since the invention of the classical tradition.<sup>268</sup> A final important aspect of the museum tradition is that it involves a significant degree of decontextualization. Works that are presumed eternal are increasingly viewed as being largely if not entirely removed from any particular historical context or context of performance.<sup>269</sup>

The view of artistic creation as a product of independent autonomous acts of origination is well-suited to a museum tradition where copying and borrowing are necessarily limited by virtue of the fact that new music is rarely being added to the canon. Views of musical composition as individualistic and autonomous fail to take adequate note of the centrality of borrowing in the creative processes of many composers throughout music history and as an aesthetic underpinning to the compositional practice of individual composers. Transformation of the classical tradition from a living tradition to a museum tradition has made sustaining an individualistic, autonomous or genius model of musical composition much easier. Applying this model to living traditions today is more problematic. The vision of classical music authorship under the invented tradition is in serious friction with actual practices of classical composers, many of whom made extensive use of existing works.

Borrowing and improvisation are often thought of as characteristics distinguishing classical music from other forms of music, such as jazz, for example. Such views of classical music, however, fail to recognize that the classical music tradition encompassed both improvisation and borrowing and continues to include the latter, but not the former, except in certain limited areas.

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267. See Burkholder, *supra* note 202, at 124 (noting that composers writing museum pieces must partake in both progressivism and emulation in creating new work).

268. See LEVINE, *supra* note 190, at 70 (noting that, by end of nineteenth century, serious forms of entertainment could no longer be sullied by being commingled with other popular forms of entertainment); Burkholder, *supra* note 202, at 116, 125 (describing the split between popular and classical streams of music and noting that the difficulty of "modern music" makes it esoteric); Robert R. Roberts, *Gilt, Gingerbread, and Realism: The Public and Its Taste*, in *THE GILDED AGE: A REAPPRAISAL* 169, 173 (H. Wayne Morgan ed., 1963) (noting transformation in the theater and other forms of entertainment that produced an increasingly wide gap between popular culture and higher standards of art).

269. Walser, *supra* note 168, at 301; see also THEODOR W. ADORNO, *Bach Defended Against His Devotees*, in *PRISMS* 133, 136 (1981) (noting transformation of composers such as Bach into "neutralized cultural monument[s]").

### 3. Improvisation and Musical Borrowing in the Classical Tradition

#### a. *Nature and Types of Musical Borrowing*

Classical music composers often recycled themes, motifs and segments of prior works.<sup>270</sup> Musical borrowings have been studied by musicologists for over a century.<sup>271</sup> Discourse concerning classical music does not always recognize the “context of a long tradition of musical borrowing” in classical music.<sup>272</sup> The types and intensity of borrowing in the classical tradition varied among composers.

The tension between visions of musical composition and actual practice is most evident in the uses of existing music by George Frederick Handel.<sup>273</sup> Handel used others’ works extensively in his musical compositions, which by the early nineteenth century had engendered significant discussion as to whether Handel should be considered a plagiarist.<sup>274</sup> For example, in what is considered one of his more egregious borrowings, the Handel oratorio “Israel in Egypt” used material from every movement of Erba’s “Magnificat.”<sup>275</sup> Although Handel changed the order of events in the movements of his work, expanded and contracted material, and added his own material, he is “clearly indebted to Erba in nine out of eleven

270. See Burkholder, *supra* note 108, at 5 (pointing out that “the use of existing music as a basis for new music is pervasive in all periods”); Burkholder, *Uses*, *supra* note 150, at 851 (discussing treatment of musical borrowing as a field that crosses periods and traditions); Hampel, *supra* note 63, at 584–85 (noting that borrowing has occurred throughout music history, specifically citing Bach, Handel, Stravinsky, Bartok, Ives, Satie, Copland, Milhaud, Poulenc, Bloch, Pousseur and Stockhausen).

271. Burkholder, *Uses*, *supra* note 150, at 851.

272. See *id.* at 858 (“The common view of Ives’s borrowing as bizarre and almost wholly unprecedented is largely the result of a failure to recognize what his characteristic methods share with those of his predecessors. . .”).

273. See John T. Winemiller, *Recontextualizing Handel’s Borrowing*, 15 J. MUSICOLOGY 444, 445–46 (1997) (“The disquiet over Handel’s borrowing is thus symptomatic of a more general discomfort with creative efforts that in any way incorporate existing ideas or materials.”); see also George J. Buelow, *The Case for Handel’s Borrowings: The Judgment of Three Centuries*, in *HANDEL TERCENTENARY COLLECTION* 61, 62 (Stanley Sadie & Anthony Hicks eds., 1988) (noting that it remains unknown why Handel, more than any other composer, composed in a way that emphasized the reworking, revising, adapting and transcribing his own and others’ musical ideas); John H. Roberts, *Why Did Handel Borrow?*, in *HANDEL TERCENTENARY COLLECTION*, *supra*, at 83, 91 (hypothesizing that Handel borrowed to overcome deficiencies in melodic writing and noting that such speculations by no means diminish Handel’s stature); John H. Roberts, *Handel and Vinci’s ‘Didone Abbandonata’: Revisions and Borrowings*, 68 MUSIC & LETTERS 141 *passim* (1987) (discussing borrowing by Handel of aspects of the melody of Vinci’s “Didone Abbandonata”).

274. See Harris, *supra* note 143, at 302–03; Percy Robinson, *Was Handel a Plagiarist?* 80 MUSICAL TIMES 573, 575–77 (1939) (discussing views of why Handel borrowed).

275. Harris, *supra* note 143, at 307.



consecutive movements in Part II, which has eighteen movements overall.”<sup>276</sup> The score and lyrics of the Handel’s serenata or masque “Acis and Galatea” reflect extensive borrowings. The libretto involves significant borrowings from poems by Dryden and others,<sup>277</sup> while the score relies extensively on prior works by Handel and Keiser.<sup>278</sup>

The debate about Handel became more pronounced in the late eighteenth and early nineteenth centuries as changing views relating to originality became increasingly evident.<sup>279</sup> In addition to borrowing from others, Handel also borrowed from himself numerous times.<sup>280</sup> Although Handel may have been at one end of the scale in terms of his use of existing music,<sup>281</sup> such practices were by no means atypical among canonical classical composers.<sup>282</sup> Tracing the influences and borrowings is easier in the case of certain composers, including Beethoven, Brahms and Elgar,<sup>283</sup> than with respect to others, such as Chopin and Debussy.<sup>284</sup> This is because different composers have taken divergent approaches toward musical production and have derived inspiration from different sources. Musicologists use a number of terms to describe composers’ uses of existing works, including borrowing, self-borrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, recomposition, influence, paraphrase and indebtedness.<sup>285</sup> The

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276. *Id.*

277. See Winemiller, *Recontextualizing*, *supra* note 273, at 450–54.

278. *Id.* at 454–69.

279. See Burkholder, *supra* note 108, at 26 (noting that by the early nineteenth century, Handel was accused of plagiarism “for practices that seem today like particularly excellent examples of what had been a long and distinguished tradition of creatively reshaping borrowed material”).

280. See Harris, *supra* note 143, at 305 (noting that Handel frequently borrowed from himself and others); Winemiller, *supra* note 273, at 454–55 (discussing self-borrowing in “Acis and Galatea”).

281. See Hugh Arthur Scott, *Indebtedness in Music*, 13 *MUSICAL Q.* 497, 499 (1927) (commenting that “it would be impossible to discuss the subject of plagiarism in music without referring to the most amazing of all exploits in that line . . . [I]t is impossible to apply any other term to Handel’s procedure in this matter . . .”); see also Winemiller, *supra* note 273, at 444 (discussing Handel’s extreme borrowing).

282. See Burkholder, *supra* note 108, at 5–8 (noting that musical borrowing is pervasive in all periods and musical traditions).

283. Scott, *supra* note 281, at 497.

284. *Id.*; see also Lenneberg, *supra* note 183, at 231 (noting that Monteverdi, Caravaggio and El Greco were artists who broke with tradition and who were, as a consequence, ahead of their audiences).

285. See, e.g., Howard Mayer Brown, *Emulation, Competition, and Homage: Imitation and Theories of Imitation in the Renaissance*, 35 *J. AM. MUSICOLOGICAL SOC’Y* 1, 1 (1982) (using terms emulation and homage); Burkholder, *supra* note 108, at 4 (using terms borrowing, quotation, modeling and allusion); J. Peter Burkholder, “Quotation” and

variety and breadth of such terminology gives a good indication of the widespread nature of borrowing in the European classical music tradition.<sup>286</sup> Such borrowing includes a range of practices, from verbatim copying of musical phrases to uses of existing works that involve some level of influence or allusion.

Self-borrowing involves a composer's use of her own prior works in later compositions. The nature and scope of self-borrowing is an additional area of potential divergence between music and literature. As a result of the limited number of tones in the Western musical scale, it is not at all atypical for musical composers to borrow passages or elements from prior works.

Handel was by no means the only classical composer to base compositions on existing works.<sup>287</sup> Johann Sebastian Bach, for example, in addition to borrowing from other family members,<sup>288</sup> practiced extensive self-borrowing,<sup>289</sup> as well as borrowing from composers such as Telemann, Frescobaldi and Albinoni.<sup>290</sup> Bach's

*Emulation: Charles Ives's Uses of His Models*, 71 *MUSICAL Q.* 1, 2–3 (1985) [hereinafter Burkholder, *Quotation*] (using term paraphrase); James Ladewig, *Bach and the Prima Pratica: The Influence of Frescobaldi on a Fugue from the Well-Tempered Clavier*, 9 *J. MUSICOLOGY* 358, 358 (1991) (using term influence); Charles Rosen, *Influence: Plagiarism and Inspiration*, 4 *19TH-CENTURY MUSIC* 87, 87 (1980) (using term influence); Scott, *supra* note 281, at 497, 501 (using term indebtedness and discussing a composer's borrowing from his own material (self-borrowing)); Joseph N. Straus, *Recompositions by Schoenberg, Stravinsky, and Webern*, 72 *MUSICAL Q.* 301, 301 (1986) (using term recomposition); Winemiller, *supra* note 273, at 448, 454–55 (using term transformative imitation and discussing Handel's use of musical figures he had previously used (self-borrowing)).

286. See Burkholder, *Quotation*, *supra* note 285, at 19; Burkholder, *Uses*, *supra* note 150, at 854 (outlining a typology of fourteen different uses of existing music based on the works of Charles Ives).

287. See Christopher A. Reynolds, *The Counterpoint of Allusion in Fifteenth-Century Masses*, 45 *J. AM. MUSICOLOGICAL SOC'Y* 228, 228 (1992) (noting that fifteenth century composers often alluded, paraphrased and quoted from existing works).

288. The Bach family produced first class musicians for over two hundred years. Karl Beiringer, *Artistic Interrelations of the Bachs*, 36 *MUSICAL Q.* 363, 366 (1950). See generally CHRISTOPH WOLFF ET AL., *THE NEW GROVE BACH FAMILY* (1983) (giving an overview of Bach family musicians and noting that the Bach family produced musicians from the sixteenth to the nineteenth centuries).

289. Scott, *supra* note 281, at 501; J.A. Westrup, *Bach's Adaptations*, 11 *STUDIA MUSICOLOGICA ACADEMIAE SCIENTIARUM HUNGARICAE* 517, 517 (1969).

290. See NORMAN CARRELL, *BACH THE BORROWER* 13 (1967) (giving an overview of Bach borrowings and self-borrowings and noting that Bach was a great borrower who derived creative stimulus from the works of other composers); Ladewig, *supra* note 285, at 358 (discussing Bach's Fugue in C# Minor from the first part of the *Well-Tempered Clavier*, which was directly inspired by Frescobaldi's *Ricercar primo* and which also shows Bach's indebtedness to Frescobaldi in transmitting the *Prima Pratica* contrapuntal musical style to Bach); Michael Talbot, *A Further Borrowing from Albinoni: The C Major Fugue BWV 946*, in *DAS FRÜHWERK JOHANN SEBASTIAN BACHS* 142, 142 (Karl Heller &

transcriptions of Italian and German concerti for keyboard are "regarded as an important early stage" in his process of assimilation of Vivaldi's principles of concerto form.<sup>291</sup> Thus, Bach altered, arranged, and developed both his own work and works of other composers.<sup>292</sup> J.S. Bach's son, C.P.E. Bach, borrowed extensively from his father and Telemann during his tenure as music director in Hamburg.<sup>293</sup> Haydn used melodic source material as part of his creative process from various sources.<sup>294</sup> In addition to borrowing melodies from other composers,<sup>295</sup> Mozart's fugal Gigue for Piano (K 574) was influenced by Haydn's Quartet in C Major, op. 20, no. 2.<sup>296</sup> Mozart also converted J.C. Bach sonatas into concertos.<sup>297</sup> Gounod adapted J.S. Bach's First Prelude into a version of the "Ave Maria."<sup>298</sup>

Beethoven reworked existing music in more than a third of his compositions.<sup>299</sup> Beethoven used a variety of Ranz, a melody sung

Hans-Joachim Schulze eds., 1995) (discussing fugue based on a subject from an Albinoni sonata); Steven Zohn & Ian Payne, *Bach, Telemann, and the Process of Transformative Imitation in BWV 1056/2 (156/1)*, 17 J. MUSICOLOGY 546, 547-548 (1999) (discussing transformative borrowing by Bach from Telemann that turns "preexistent music by another composer into a distinctive expression of his own compositional voice").

291. Robert Hill, *Johann Sebastian Bach's Toccata in G Major BWV 916/I: A Reception of Giuseppe Torelli's Ritornello Concerto Form*, in DAS FRÜHWERK JOHANN SEBASTIAN BACHS, *supra* note 290, at 162, 162; accord Leslie D. Paul, *Bach as Transcriber*, 34 MUSIC & LETTERS 306, 307 (1953) ("[T]he second [of Bach's organ concertos] is an adaptation of Vivaldi's Concerto Grosso, Op. 3, No. 8, for two violins and orchestra, and the third is a resetting of yet another Vivaldi concerto.").

292. Werner Breig, *Composition as Arrangement and Adaptation*, in THE CAMBRIDGE COMPANION TO BACH 154, 154 (John Butt ed., 1997).

293. See Stephen L. Clark, *C.P.E. Bach and the Tradition of Passion Music in Hamburg*, 16 EARLY MUSIC 533, 534 (1988) (noting that C.P.E. Bach was disparaged by later commentators on account of his borrowings); Stephen L. Clark, *The Letters from Carl Philipp Emanuel Bach to Georg Michael Telemann*, 3 J. MUSICOLOGY 177, 177-95 (1984) (discussing correspondence between C.P.E. Bach and Georg Michael Telemann, grandson of Georg Phillip Telemann).

294. David Schroeder, *Melodic Source Material and Haydn's Creative Process*, 68 MUSICAL Q. 496, 496 (1982).

295. See Frederick W. Stornfeld, *The Melodic Sources of Mozart's Most Popular "Lied"*, 42 MUSICAL Q. 213, 218 (1956) (noting that the tunes in Mozart's opera *Zauberflöte* "in several instances are derived from other composers").

296. See Rosen, *supra* note 285, at 89 (noting that a more tenuous connection also exists between Haydn's Symphony No. 81 in G Major and Mozart's "Prague" Symphony in D Major, K. 504).

297. Philip Keppeler, Jr., *Some Comments on Musical Quotation*, 42 MUSICAL Q. 473, 473 (1956).

298. Mina Curtiss, *Gounod Before "Faust"*, 38 MUSICAL Q. 48, 51 (1952); see also Martin Cooper, *Charles Gounod and His Influence on French Music*, 21 MUSIC & LETTERS 50, 50 (1940) (noting Gounod's "Ave Maria" was arranged as a descant to the first prelude of Bach's Forty-Eight Preludes and Fugues).

299. See Burkholder, *supra* note 108, at 28 ("More than a third of Beethoven's compositions reworked his existing music in some way."); Scott, *supra* note 281, at 501

and played for centuries in Switzerland on an alphorn to summon the cows from pastures, at the opening of the last movement of the Pastoral Symphony.<sup>300</sup> Beethoven also borrowed from other composers, including Cherubini and Clementi.<sup>301</sup> Schubert,<sup>302</sup> Richard Strauss<sup>303</sup> and Mahler,<sup>304</sup> among others, also practiced self-borrowing. Debussy's opera *Pelleas and Melisande* was strongly influenced by Wagner's opera *Tristan and Isolde*.<sup>305</sup> Wagner borrowed extensively from other composers and was also borrowed from a great deal.<sup>306</sup> Rossini was frequently parodied.<sup>307</sup> Schubert borrowed from Beethoven, particularly in the early part of his career,<sup>308</sup> as well as Mozart.<sup>309</sup> Brahms, who has been described as a master of allusion,<sup>310</sup> composed pieces that demonstrate an influence from Beethoven<sup>311</sup>

(noting the use of one favorite theme no fewer than four times by Beethoven).

300. A. Hyatt King, *Mountains, Music, and Musicians*, 31 MUSICAL Q. 395, 397, 403 (1945).

301. See Alexander L. Ringer, *Clementi and the "Eroica"*, 47 MUSICAL Q. 454, 455 (1961) (noting that "thematic foundations of the *Eroica* were further obscured by a romantic cult of the originality, which refused to acknowledge the often decidedly humble sources of Beethoven's inspiration"); Scott, *supra* note 281, at 503-04 (noting that Beethoven's Pathetic Sonata bears a striking resemblance to Cherubini's Medea that "could hardly have been accidental").

302. Scott, *supra* note 281, at 501. Schubert also borrowed from a song he composed for his String Quartet No. 14 in D Minor. James Wierzbicki, 'Sampling' Recycles Old Music into New, ST. LOUIS POST-DISPATCH, Apr. 28, 1991, at 4C.

303. Keppler, *supra* note 297, at 484.

304. *Id.*

305. Carolyn Abbate, "Tristan" in the Composition of "Pelleas", 5 19TH-CENTURY MUSIC 117, 118 (1981).

306. Keppler, *supra* note 297, at 476.

307. *Id.*

308. See Edward Cone, *Schubert's Beethoven*, 56 MUSICAL Q. 779, 779-80 (1970) (discussing Schubert's resemblances to Beethoven); Nigel Nettheim, *How the Young Schubert Borrowed from Beethoven*, 132 MUSICAL TIMES 330, 330 (1991) (discussing borrowings from Beethoven by Schubert in his Fantasie for Piano four hands, D.48 of 1813, which Schubert wrote at sixteen years old); Nicholas Temperley, *Schubert and Beethoven's Eight-Six Chord*, 5 19TH-CENTURY MUSIC 142, 142 (1981) (discussing the profound influence of Beethoven on Schubert).

309. See David Humphreys, *Something Borrowed*, 138 MUSICAL TIMES 19, 19-24 (1997) (discussing Schubert's borrowings from Mozart's F minor Fantasia for mechanical organ K. 608 for his Fantasia in F minor for piano duet D.940).

310. See J. Peter Burkholder, *Brahms and Twentieth-Century Classical Music*, 8 19TH-CENTURY MUSIC 75, 77-78 (1984) (discussing Brahms's borrowings and noting that Brahms matured during the final stages of the transformation of the classical concert hall into a museum).

311. See Rosen, *supra* note 285, at 91 (noting that the finale of Brahms's Piano Concerto No. 1 in D Minor depends on the last movement of Beethoven's Piano Concerto No. 3 in C Minor, but also noting that even the cultivated listener is unlikely to be reminded of one by the other); Scott, *supra* note 281, at 505 (noting resemblance between Brahms's opening theme of the Finale of his C Minor Symphony and the subject of Beethoven's Ninth Symphony).

and Chopin.<sup>312</sup> Brahms also composed "Variations on a Theme from Haydn," which borrowed from a theme attributed to Haydn.<sup>313</sup> Mendelssohn's early works emulated certain aspects of Beethoven's later works.<sup>314</sup>

In the twentieth century, Charles Ives made extensive use of borrowed materials that included hymns, songs, ragtime, college songs and patriotic songs.<sup>315</sup> Bartok, Grieg, Glinka, Kodály, Vaughan Williams, Falla and Moussorgsky were enormously influenced by folk music<sup>316</sup> and Richard Strauss by Liszt.<sup>317</sup> Gershwin borrowed from blues and other African American-derived musical forms,<sup>318</sup> Villa-Lobos from Brazilian popular music and Schoenberg and Bernstein from Jewish scales and motifs.<sup>319</sup> Schoenberg, Stravinsky, and Webern composed works that were recompositions of existing works that imposed a new, post-tonal music structure on an existing tonal model.<sup>320</sup> Similarly, Alban Berg borrowed in the final adagio of his "Violin Concerto," a chorale from J.S. Bach, incorporating the Bach chorale into his 12-tone model.<sup>321</sup> Wuorinen's 1988 piece "Machault Mon Chou" borrowed material from a fourteenth century mass by Guillaume de Machault.<sup>322</sup> Respighi's "The Birds" "almost note-for-note paraphrases keyboard pieces from the 17th and 18th centuries."<sup>323</sup> Mahler borrowed from his "Songs of the Wayfarer" for his "Symphony No. 1,"<sup>324</sup> while Aaron Copland's "Symphony No. 3"

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312. See Rosen, *supra* note 285, at 93 (noting reference to Chopin's Scherzo in B-flat Minor in Brahms's Piano Sonata in C Major).

313. J. Peter Burkholder, *supra* note 108, at 27.

314. Joscelyn Godwin, *Early Mendelssohn and Late Beethoven*, 55 MUSIC & LETTERS 272, 272 (1974).

315. See Dennis Marshall, *Charles Ives's Quotations: Manner or Substance?*, 6 PERSP. NEW MUSIC 45, 45-46 (1968) (noting that Ives's use of borrowed materials is at the core of Ives's compositional thought); see also J. PETER BURKHOLDER, ALL MADE OF TUNES: CHARLES IVES AND THE USES OF MUSICAL BORROWING 1 (1995) (listing the types of songs that Charles Ives borrowed and used in his music); Burkholder, *Quotation*, *supra* note 285, at 19 (noting the pervasive use of existing music by Ives).

316. Burkholder, *supra* note 108, at 29-30; Scott, *supra* note 281, at 498.

317. Scott, *supra* note 281, at 498.

318. Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess and Unfair Use*, 37 RUTGERS L.J. (forthcoming 2006) (discussing Gershwin's borrowings from African American musical forms).

319. Burkholder, *supra* note 108, at 30.

320. See Straus, *supra* note 285, at 301 (discussing neo-classical recomposition in Stravinsky's *Pulcinella*, Schoenberg's Concerto for String Quartet and Orchestra and Webern's orchestration of the Ricercare from J.S. Bach's *The Musical Offering*).

321. Wierzbicki, *supra* note 302.

322. *Id.*

323. *Id.*

324. *Id.*

was partially based on his "Fanfare for the Common Man."<sup>325</sup> Shostakovich quotes from the Rossini opera *William Tell* in his "Symphony No. 15" from 1971,<sup>326</sup> while Rachmaninoff borrowed a theme from Paganini,<sup>327</sup> and Puccini borrowed from the "Star-Spangled Banner" and Japanese music for his opera *Madama Butterfly*.<sup>328</sup>

The classical music canon offers numerous examples of musical borrowing, which has not led critics or commentators to question the ability or artistry of master composers such as Mozart, Haydn, Bach, Beethoven and others. The pervasiveness of such borrowings has been obscured by the process of creation of the classical canon, which was at least partly a function of the development of commercial interests.

#### *b. Borrowing, Improvisation and Commercial Interests*

The influence of commercial interests was another important factor in the creation of the classical museum tradition.<sup>329</sup> The development of the classical tradition highlights the reciprocal relationship between commercial interests and copyright that continues today.<sup>330</sup> The classical invented tradition arose in part as a result of the mass market for sheet music.<sup>331</sup> As a result, it represents an early, prominent example of the influence of commercial interests on copyright law.<sup>332</sup> Just as Beethoven was a prominent advocate of copyright law as a mechanism to enhance the development of a market for his works, commercial interests have been a significant force in the adoption of copyright regimes for their commercial

325. *Id.*

326. James Wierzbicki, *Sound Familiar? Rules Are Fuzzy on Music Quotes*, ST. LOUIS POST-DISPATCH, Nov. 21, 1993, at 4C.

327. *Id.*

328. See Burkholder, *supra* note 108, at 30 (discussing Puccini borrowings from Japanese music); Wierzbicki, *supra* note 326 (discussing Puccini borrowing from the "Star Spangled Banner").

329. See Burkholder, *supra* note 108, at 29 (noting that the growing market for sheet music and public performances was one of several mutually reinforcing trends that dramatically changed musical culture in the nineteenth century).

330. See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22–23 (1996) ("Until now, our copyright law has been addressed primarily to commercial and institutional actors who participated in copyright-related businesses.").

331. See *supra* notes 229–42 and accompanying text.

332. See Jeffrey Kallbert, *Chopin in the Marketplace: Aspects of the International Music Publishing Industry in the First Half of the Nineteenth Century: Part I: France and England*, 39 NOTES 535, 536 (1983) ("International commerce in music publishing in the first half of the nineteenth century derived much of its character from the evolution of copyright laws in the individual countries and states.").

benefit.

The development of international copyright systems also reflects such interests.<sup>333</sup> Commercial interests played a role, for example, in how the United States engaged in international copyright systems that were developed by the end of the nineteenth century. United States music publishers experienced a net loss in their import and export of cultural products through much of the nineteenth century.<sup>334</sup> These publishers did not "embrace reciprocal arrangements with foreign publishers" at the time of the Berne Convention in 1886.<sup>335</sup> United States dominance in popular music began following the birth of Tin Pan Alley in the 1880s.<sup>336</sup> As American popular music became a more important force internationally, American music publishers began to focus on obtaining legal protection.<sup>337</sup>

Although the protection and advancement of commercial interests has been a key aspect of expanding copyright law protection, the legal regimes adopted in response to such institutional pressures and concerns have had potentially deleterious consequences in the long run for the creation of music. The promotion of Romantic author-inspired sacralized musical masters in the nineteenth century was one aspect of the development of both musical mass culture and music copyright protection. This conception of authorship has, however, been potentially harmful to the creation of future music: borrowing and changing existing music, which have long been an intrinsic and important part of musical production, are essentially no longer seen as legitimate methods of creation.

Such Romantic author-inspired views of musical composition highlight the fundamental tension between varying conceptions of authorship and originality. These diverging conceptions of authorship and originality have been core elements of discourse about how copyright should apply to music. Consequently, although Romantic author-derived conceptions of creation became

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333. See Garofalo, *supra* note 16, at 321 ("By the nineteenth century, music-publishing interests had begun to turn their attention toward international copyright systems because . . . 'music, more than other arts, easily crossed national linguistic and cultural boundaries.'") (citations omitted)).

334. *Id.*

335. *Id.*

336. See *id.* at 321 (noting American dominance of mainstream popular music that lasted until World War II); Charles Hamm, "After the Ball"; or *The Birth of Tin Pan Alley*, in *YESTERDAYS: POPULAR SONG IN AMERICA* 284, 285-86 (1983) (discussing birth of Tin Pan Alley in New York City in 1880s, which by 1900 controlled the popular song industry).

337. See Garofalo, *supra* note 16, at 322 (discussing revision of United States copyright law to accommodate the new medium of records).

predominant in the nineteenth century, they reflect more longstanding tensions about originality and creativity.<sup>338</sup> The Romantic author-derived view of authorship and originality has also been used to promote commercial interests that could be advanced through the expansion of copyright protection. Such commercial interests were evident in the nineteenth and early twentieth centuries during the time that the classical canon and modern music copyright frameworks were both being formed. During that time, such interests were associated with the development of copyright frameworks that increasingly perceived and consequently represented borrowing as inappropriate and indicative of a lack of originality. Such views of borrowing, however, are distinguishable from musical practice, which has consistently been grounded upon a variety of types of borrowing and collaborativity.

As a result, hip hop is not the only form of music that might encounter problems with respect to contemporary copyright standards. Current copyright standards would also present problems if applied to typical musical borrowings in the classical tradition. For example, Bach's transcriptions of Vivaldi's concerti would not be possible under existing copyright standards.<sup>339</sup> Such standards would enable Vivaldi to prevent Bach from performing Bach's version unless Bach obtained permission to borrow and paid Vivaldi appropriate license fees.<sup>340</sup> Contemporary views of authorship within copyright frameworks would suggest that compositional techniques that use borrowing are antithetical to originality.<sup>341</sup>

Borrowing in the classical music tradition might have occurred for a number of reasons—from a young composer learning his or her craft, to use of borrowing as a part of a composer's standard

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338. Winemiller, *supra* note 273, at 446.

339. See Jose A. Bowen, *The History of Remembered Innovation: Tradition and Its Role in the Relationship Between Musical Works and Their Performances*, 11 J. MUSICOLOGY 139, 150–51 (1993) (“Thus copyright law complicates how we have considered musical works historically. For example, under current copyright law Bach's transcriptions of Vivaldi concerti would belong to Vivaldi and not Bach. Vivaldi could enjoin (stop) Bach from performing his (Bach's) version if Bach did not pay Vivaldi the appropriate royalty fee.”).

340. *Id.* at 150.

341. See Winemiller, *supra* note 273, at 446 (noting that those whose creative efforts incorporate existing ideas or material often face questions concerning the originality of their work). A number of copyright cases underscore such views. See, e.g., *Carte v. Duff*, 25 F. 183, 185 (S.D.N.Y. 1885) (suggesting that a piano transcription of an existing operatic work is “condemned by the policy of our copyright laws,” in which the transcriber “originates nothing, composes no new notes or melodies, and simply culls the notes representing the melodies and their accompaniments expressed by the naked chord”); see also *supra* notes 79–85 and accompanying text.



compositional practice. Young composers have often borrowed from existing works as a learning tool.<sup>342</sup> For example, "[f]or the young [Johann Sebastian] Bach, arranging other composers' works was a means of analyzing and coming to terms with the various musical traditions that he was attempting to assimilate."<sup>343</sup> Similarly, Monteverdi's early music exposes its indebtedness to other works more openly than do his later pieces.<sup>344</sup> Others might borrow to pay homage or acknowledge an important musical influence.<sup>345</sup>

Borrowing as a part of a standard classical compositional practice is often ignored in legal discourse. As a result, modern views of borrowing in the legal arena tend to take insufficient account of the fact that borrowing can itself be a tool for innovation. Handel's borrowing in "Acis and Galatea," for example, has been characterized as reflecting "the practice of transformative imitation."<sup>346</sup> Further, Handel's borrowings in "Israel in Egypt" have been described as "transmut[ing] Erba's lead into gold."<sup>347</sup> In Handel's case, such borrowing and transformative imitation were a source of innovation.<sup>348</sup>

The existence of borrowing is obscured in legal commentary by the pervasiveness of the contemporary visions of authorship and originality. The classical cannon also obscures other aspects of musical practice. Reverence of the past can play an important role in shaping actual practice. One example is the fate of improvisation in the classical music tradition following the development of the canon. Improvisation remained an "indispensable ability for most professional musicians" well into the nineteenth century,<sup>349</sup> but was

342. Cf. Rosen, *supra* note 285, at 88 (noting that work of young composers should not be considered in discussing influence in music).

343. See Breig, *supra* note 292, at 154.

344. See GARY TOMLINSON, MONTEVERDI AND THE END OF THE RENAISSANCE 33 (1987).

345. See Brown, *supra* note 285, at 48 (noting that emulation might reflect a sense of competition or a desire to pay homage to an older master).

346. Winemiller, *supra* note 273, at 450.

347. Harris, *supra* note 143, at 307.

348. *Id.*; see also Winemiller, *supra* note 273, at 469 (noting that Handel's practice contrasts with the "modern belief that borrowing categorically represents trespass" and reflects "a time when the ideas of authorship and intellectual property were less clear and less meaningful, and when the use of existing material was the classically sanctioned—indeed, mandated, avenue toward the creation of the best works of art").

349. See Moore, *supra* note 8, at 62–63 (noting that Brahms, Paganini, Chopin, Clara and Robert Schumann, Mendelssohn, Hummel, Cramer, Ries, Spohr, Joachim, and Schubert, among others, were all accomplished improvisers); see also Valerie Woodring Goertzen, *Setting the Stage: Clara Schumann's Preludes, in IN THE COURSE OF PERFORMANCE: STUDIES IN THE WORLD OF MUSICAL IMPROVISATION* 237, 239–40

greatly diminished by the development of the classical canon.<sup>350</sup> Thus, although improvisation was largely eliminated from the European classical tradition by the early twentieth century,<sup>351</sup> it was an important factor in music prior to that time.<sup>352</sup> The elimination of improvisation from the classical tradition is a consequence of sacralization and the reverence given music of the canonized classical tradition.<sup>353</sup> The decline of improvisation in the classical tradition and emphasis on autonomous authorial composition have both served to minimize innovation in performance of existing music in the classical tradition and separate musical composition from performance.<sup>354</sup> Improvisation thus illustrates how views of musical production and authorship have shaped actual musical practice.

The variety of compositional practices in the classical tradition and the extensive use of borrowing and improvisation in this tradition demonstrate the inadequacies of contemporary views of musical composition and copyright. Looking at the classical tradition reveals that contemporary views of originality, creativity and musical authorship are historically specific and inaccurately reflect how

(Bruno Nettl with Melinda Russell eds., 1998) ("Improvisation was so highly regarded that pianists who lacked training in the art resorted to memorizing preludes in instruction manuals and published sets; they could pretend to supply these 'off the cuff,' in imitation of the gestures of accomplished artists." (citations omitted)).

350. See Moore, *supra* note 8, at 63 (noting that this "radical shift in performance aesthetic has occurred without incident and virtually without documentation"); Daniel Delgado, *Lost Art*, HARV. MAG., May-June 2000, at 36 (discussing Harvard music professor Robert Levin, who is attempting to revive the lost art of improvisation in classical music); *Improvisation* with Robert Levin, NAT'L PUB. RADIO, NPR Performance Today, Nov. 24, 1999 (noting that classical music today rarely involves improvisation and discussing the fact that "many great composers were masters at improvisation"), <http://www.npr.org/programs/specials/milestones/991124.motm.improv.html>.

351. See George E. Lewis, *Improvised Music After 1950: Afrological and Eurological Perspectives*, 16 BLACK MUSIC RES. J. 91, 102, 110 (1996) (noting reemergence of improvisation after 150 year gap in twentieth century among composers of experimental, new and avant-garde music such as John Cage and among practitioners of improvised music since 1970); Philip Tagg, *Open Letter: 'Black Music', 'Afro-American Music' and 'European Music'*, 8 POPULAR MUSIC 285, 290 (1989) (noting that improvisation was virtually eliminated from the European classical tradition by 1910).

352. See BAILEY, *supra* note 254, at 19, 29–38 (noting that "improvisation played an important part throughout most of its [classical music's] early history" and is still an active force in the French school of organ performance); Tagg, *supra* note 351, at 290.

353. See Moore, *supra* note 8, at 79 ("Reverence for the music of past eras is in itself an impediment to improvisation. Spontaneous innovations cannot occur in music which is intended to be more a replication from 1790 than a musical event of today.").

354. See *id.* ("Many of the problems facing modern musicians derive from a discrepancy between their own intuitive *understandings* of music, derived from cultural experience, and the aesthetic expectations they have of the music they create and play vocationally." (emphasis added)).

compositional practice actually occurs. Even the classical music tradition, which served as a model for autonomous musical production, does not accord with the standards imposed by contemporary visions of authorship.<sup>355</sup> Reconsidering the actual practices of the classical tradition highlights the ways in which borrowing can be a source of innovation. Such reconsideration should also involve looking at the cultural impact of visions of authorship. In addition to being historically specific, visions of copyright and musical composition have been highly culturally specific and firmly anchored in European cultural traditions of notated music.<sup>356</sup>

### *B. Musical Borrowing in Popular Music Traditions*

Although much of the consideration of musical borrowing in musicology has focused on borrowing in the classical genre,<sup>357</sup> extensive borrowing has also occurred in popular music genres.<sup>358</sup> In the seventeenth and eighteenth centuries, for example, popular tunes and famous airs “were frequently re-used for newly composed texts, in such genres as the vaudeville, broadside ballad and ballad opera.”<sup>359</sup>

#### 1. Borrowing and Nineteenth Century Popular Music

Nineteenth century popular music composers borrowed extensively. Nineteenth century popular music culture reflected a shared musical culture, in which existing works were treated as belonging to the user rather than the composer for far longer than in the art music tradition.<sup>360</sup> Arrangements were in fact “generally received as versions of the original work, although some were rather distant from it . . . .”<sup>361</sup>

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355. See Winemiller, *supra* note 273, at 469 (noting that recontextualizing Handel’s borrowing will “challenge our very ideas about the nature of originality, creativity, and musical authorship in the eighteenth century.”).

356. Garofalo, *supra* note 16, at 323.

357. See Burkholder, *supra* note 108, at 33 (noting that borrowing plays a major role in American and European popular music whose role has only recently begun to be studied).

358. See *Id.* (“The recasting of existing music into new arrangements for new media is a constant feature of popular music, a tradition in which musicians and audiences continued to regard music as belonging to the user rather than the composer far longer than in the art-music tradition.”).

359. *Id.*

360. *Id.*

361. *Id.*

a. *Borrowings from Opera*

Nineteenth century American popular music often borrowed from opera.<sup>362</sup> Treatment of operatic works in such instances demonstrates cultural assumptions about authorship that for a long time did not reflect the now commonplace Romantic author model. Treatment of opera during much of the nineteenth century also reflects the fact that opera remained within the sphere of popular music. As a result, operatic works were treated as parlor music and sheet music anthologies placed Bellini side by side with Stephen Foster and other nonclassical popular composers.<sup>363</sup> This fundamentally unsacralized vision of authorship was evident in the treatment of Rossini's opera *La Cenerentola*.<sup>364</sup> An English language version of this opera, *Cinderella*, had its first American performance just one year after the 1831 London premiere of *La Cenerentola* and became exceedingly popular.<sup>365</sup> This English language version, however, was more than just a translation of the original Rossini opera. Created by Rophino Lacy, *Cinderella* retained much of the original music of *La Cenerentola*, but made extensive additions of music from other Rossini operas.<sup>366</sup> This Lacy version of the Rossini opera also resulted in a large number of publications of sheet music versions of popular songs from *Cinderella*.<sup>367</sup> Such sheet music in fact became part of the popular song repertory.<sup>368</sup>

The premiere of the Bellini opera *Norma* in 1836, five years after its debut in Milan, also reflected how many popular songs borrowed from music in *Norma*.<sup>369</sup> Sheet music from *Norma* was still in print more than thirty years after its first publication.<sup>370</sup> Further reflecting the broad popularity of opera, Stephen Foster arranged popular songs and Italian opera excerpts,<sup>371</sup> while John Philip Sousa created pieces based on melodies from *Carmen*.<sup>372</sup>

362. *Id.*

363. Charles Hamm, "Hear Me, *Norma*"; or *Bel Canto Comes to America—Italian Opera as Popular Song*, in *YESTERDAYS: POPULAR SONG IN AMERICA*, *supra* note 336, at 62, 76.

364. See Arewa, *supra* note 187, at 47–49.

365. See Hamm, *supra* note 363, at 71 (noting that *Cinderella* became one of the most popular works of musical theater in the history of the American stage).

366. *Id.*

367. *Id.* at 74, 76.

368. See *Id.* (noting that operatic sheet music (in English) became part of the American popular song repertory as parlor music that was sung inside the home).

369. *Id.* at 81–83.

370. *Id.* at 82 (noting sheet music versions of *Norma* arias).

371. Burkholder, *supra* note 108, at 33–34.

372. *Id.*

b. *Other Nineteenth Century Borrowings*

In addition to borrowing from operatic sources, Stephen Foster was deeply indebted to folk song.<sup>373</sup> African American musical traditions of the nineteenth century reflect extensive borrowing from existing traditions derived from Africa, Europe and elsewhere.<sup>374</sup> Ragtime, which emerged in the late nineteenth century,<sup>375</sup> incorporated African elements into melodic structures descended from spirituals and other vocal forms.<sup>376</sup> Ragtime was thus "the first African-derived musical style that could be converted into a widely popular synthesis" and which also attracted significant commercial attention.<sup>377</sup> In addition to reflecting the influence of African-derived musical traditions, ragtime was a collaborative tradition that developed through the collaboration of pianists who exchanged ideas and "rags" that were "patched together from the bits of melody and scraps of harmony that all contributed."<sup>378</sup> Although ragtime was popular at the turn of the century, prior to its revival in the 1970s with greater recognition of the contributions of Scott Joplin, it maintained only a marginal audience in the half-century after the United States's entry into World War I.<sup>379</sup>

373. Otto Gombosi, *Stephen Foster and "Gregory Walker"*, 30 MUSICAL Q. 133, 133-34 (1944).

374. See Burkholder, *supra* note 108, at 34 (distinguishing the concept of musical borrowing developed in the study of European written repertoires from the sharing of common traditions said to characterize West African musical traditions). Both types of uses of existing materials are treated as types of borrowing in this Article. See also Samuel A. Floyd, Jr. & Marsha Reisser, *The Sources and Resources of Classic Ragtime Music*, 4 BLACK MUSIC RES. J. 22, 22 (1984) (noting that classic ragtime emerged from two sources—Euro-American social dance music and Afro-American folk dance movement); Mead Hunter, *Interculturalism and American Music*, 11 PERF. ARTS J. 186, 186 (1989) (noting that American music has been intercultural from its earliest days, reflecting a heritage of European and African forms).

375. See A.R. Danberg Charters, *Negro Folk Elements in Classic Ragtime*, 5 ETHNOMUSICOLOGY 174, 174 (1961) (noting that ragtime was a new style of piano music that swept the United States in the 1890s and that included extensive use of syncopation).

376. See EILEEN SOUTHERN, *THE MUSIC OF BLACK AMERICANS: A HISTORY* 308-30 (2d ed. 1983) (discussing the emergence of ragtime); Charters, *supra* note 375, at 179 (noting African American folk idiom of mixed pentatonic, major and minor scales in ragtime); Floyd & Reisser, *supra* note 374, at 22 (noting pentatonic scales, large leaps in melodic lines, use of short phrases in melodic construction, variation of melodic materials, prominent position of percussion and use of polymeters as reflecting the association of ragtime with African music); Hunter, *supra* note 374, at 187.

377. See Barbara B. Heyman, *Stravinsky and Ragtime*, 68 MUSICAL Q. 543, 544 (1982) (noting that ragtime and its predecessor, the cake walk, "were the first examples of Black music to achieve widespread international popularity and commercial distribution").

378. Charters, *supra* note 375, at 174.

379. Peter J. Rabinowitz, *Whiting the Wrongs of History: The Resurrection of Scott Joplin*, 11 BLACK MUSIC RES. J. 157, 157 (1991).

## 2. Borrowing and Twentieth Century Popular Music

### a. *Jazz, Blues and Other Forms*

The popularity of ragtime at the turn of the nineteenth century set the stage for the commercial development of jazz, blues and other African American derived musical forms in the twentieth century.<sup>380</sup> Such popular music genres have incorporated extensive elements over time from various sources. Such borrowings are evident, for example, in jazz, which generally demonstrates significant influence from a number of sources, including African, European and Caribbean traditions.<sup>381</sup> Jazz artists have also typically borrowed passages from existing works, including Louis Armstrong, who borrowed from opera,<sup>382</sup> and jazz soloists, who have created new jazz melodies to the chord changes or harmonic progressions of existing popular tunes.<sup>383</sup> Other musical traditions reflect the influence of jazz and blues, including zydeco and Cajun music, which have absorbed different influences, particularly elements from French and African roots.<sup>384</sup> Rockabilly music, which is a “hybrid of blues and country” and a precursor to rock and roll,<sup>385</sup> reflects a Habanera rhythm derived from Afro-Cuban traditions.<sup>386</sup> Rhythm and blues, which

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380. See SOUTHERN, *supra* note 376, at 330–36 (discussing the origin and characteristics of the blues); Hunter, *supra* note 374, at 187 (describing jazz as ragtime’s godchild with respect to its appropriation by white capital).

381. See GUNTHER SCHULLER, *EARLY JAZZ: ITS ROOTS AND MUSICAL DEVELOPMENT* 4–62 (1968) (discussing the African and European musical sources of jazz); SOUTHERN, *supra* note 376, at 361–65 (characterizing jazz as the fusion of blues and ragtime, brass-band music and syncopated dance music and describing the salient features of jazz); Christopher Washburne, *The Clave of Jazz: A Caribbean Contribution to the Rhythmic Foundation of an African-American Music*, 17 BLACK MUSIC RES. J. 59, 59 (1997) (discussing the influence of Caribbean music, particularly Cuban music styles in the development of jazz in New Orleans).

382. See Joshua Berrett, *Louis Armstrong and Opera*, 76 MUSICAL Q. 216, 216 (1992) (discussing the role of operatic influences in Louis Armstrong’s musical practice); Burkholder *supra* note 108, at 35 (noting that Louis Armstrong “inserted quotations from *Rigoletto*, *Pagliacci* and other operas into his improvised solos alongside popular tunes”).

383. See Burkholder, *supra* note 108, at 35 (noting Charlie Parker and Dizzy Gillespie’s “Anthropology” on the chord progression of George Gershwin’s “I Got Rhythm” and Parker’s “Ornithology” on Morgan Lewis’s “How High the Moon”).

384. See Mark Mattern, *Let the Good Times Unroll: Music and Race Relations in Southwest Louisiana*, 17 BLACK MUSIC RES. J. 159, 160 (1997) (noting that the African influence in Cajun and zydeco music is evident in blues sentiments and expressions, percussive and rhythmic techniques, syncopation and vocal and instrumental improvisation).

385. Roy Brewer, *The Use of Habanera Rhythm in Rockabilly Music*, 17 AM. MUSIC 300, 300 (1999).

386. *Id.* at 303.

became prominent in the 1940s and 1950s,<sup>387</sup> was a product of the Black experience in a segregated world and included influences from a number of sources, including Black gospel music, boogie-woogie, jump blues and electric instruments.<sup>388</sup>

*b. Rock and Roll and Other Twentieth Century Borrowings*

From rock and roll's earliest days, rock and roll artists have borrowed from existing musical works. Extensive commentary has been given to the widespread borrowings of rock and roll artists from the blues tradition.<sup>389</sup> Rock and roll as a musical tradition reflects the influence of a number of sources, particularly rhythm and blues<sup>390</sup> and rockabilly.<sup>391</sup> Rock and roll artists such as the Beatles, the Rolling Stones and Led Zeppelin incorporated and borrowed extensively from blues and African American musical traditions generally as well as from specific works and specific artists.<sup>392</sup>

Elvis Presley was nurtured on rhythm and blues during his childhood and developed a working knowledge of rhythm and blues repertoire.<sup>393</sup> He borrowed extensively from the blues tradition, both

387. Arnold Shaw, *Researching Rhythm & Blues*, 1 BLACK MUSIC RES. J. 71, 74 (1980); see also SOUTHERN, *supra* note 376, at 499–502 (discussing rhythm and blues and noting that Billboard magazine replaced the term race records with rhythm and blues in 1949).

388. Shaw, *supra* note 387, at 74.

389. See SOUTHERN, *supra* note 376, at 504; VAIDHYANATHAN, *supra* note 31, at 117–48 (discussing appropriation of Blues music by rock and roll artists generally); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 340 (1999) (discussing how African-American artists were deprived of legal protection for creative works under the copyright regime); Perry A. Hall, *African-American Music: Dynamics of Appropriation and Innovation*, in BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 31–51 (Bruce Ziff & Pratima V. Rao eds., 1997) (discussing appropriation of African American musical forms); Hines, *supra* note 134, at 484–86.

390. See Carl I. Belz, *Popular Music and the Folk Tradition*, 80 J. AM. FOLKLORE 130, 132 (1967) (noting that the sources of rock and roll music include country western music, jazz, gospel music and rhythm and blues).

391. See SOUTHERN, *supra* note 376, at 505 (noting that rock and roll was a fusion of rhythm and blues, pop and country and western elements); Brewer, *supra* note 385, at 300 (defining rockabilly as a “hybrid of blues and country that became rock & roll”); Peter Wicke, *Rock Music: A Musical-Aesthetic Study*, 2 POPULAR MUSIC 219, 222 (1982) (noting origin of rock and roll in western swing, boogie and various rhythm and blues playing styles).

392. See STEPHEN DAVIS, HAMMER OF THE GODS: THE LED ZEPPELIN SAGA 5 (1997) (“In fact all the young English musicians to flood America in the wake of the Beatles—the Rolling Stones, Animals, Yardbirds, and Kinks in the first wave; Cream, Fleetwood Mac, Jeff Beck, and Led Zeppelin in the second—considered themselves blues scholars.”).

393. See Shaw, *supra* note 387, at 71–72 (noting Elvis Presley’s debt to Arthur “Big Boy” Crudup and Willie Mae “Big Mama” Thornton).

with respect to musical composition and performance styles.<sup>394</sup> Elvis Presley's break out hit "Hound Dog" was recorded three years earlier by blues artist Big Mama Thornton.<sup>395</sup> This reflected a general pattern in which "Presley often took part of the songwriting credit on tunes by black songwriter Otis Blackwell [and] frequently covered songs recorded by black artists for struggling independent labels."<sup>396</sup>

Other early rock and roll artists, including Little Richard, Buddy Holly, Jerry Lee Lewis and Eddie Cochran, were also immersed in blues culture.<sup>397</sup> The Beatles and other British musicians in the early 1960s developed a "vocabulary of musical styles [that] was fundamentally derived from American popular music,"<sup>398</sup> that came from a number of sources, including Elvis Presley.<sup>399</sup> The influence of American popular music was reflected in early Beatles cover recordings of Chuck Berry and Little Richard and soft rock and roll, rhythm and blues and soul covers.<sup>400</sup> The Beatles absorbed and borrowed from the style of a number of existing artists, particularly Little Richard.<sup>401</sup> The Beatles were also influenced by and borrowed from other artists and musical traditions, including Bob Dylan and Asian musical traditions.<sup>402</sup>

Other twentieth century artists used existing classical and other music in the creation of new works, including Duke Ellington, who adapted Tchaikovsky and Grieg for jazz band.<sup>403</sup> Emerson, Lake and Palmer reworked Musorgsky and Copland works to attempt to raise rock to the level of art music.<sup>404</sup> Queen's 1974 hit song "Bohemian

394. *Id.* at 72.

395. *Id.*

396. Bruce Tucker, "Tell Tchaikovsky the News": *Postmodernism, Popular Culture, and the Emergence of Rock 'N' Roll*, 9 BLACK MUSIC RES. J. 271, 282 (1989).

397. See Shaw, *supra* note 387, at 72 (discussing Buddy Holly, Jerry Lee Lewis and Eddie Cochran); Tucker, *supra* note 396, at 286 (discussing Little Richard).

398. Charles Gower Price, *Sources of American Styles in the Music of the Beatles*, 15 AM. MUSIC 208, 210 (1997); see also ROBERT PALMER, DEEP BLUES 235-36 (1982) (noting the influence of blues artists on musicians in Britain).

399. Price, *supra* note 398, at 210-11.

400. *Id.* at 218-21.

401. See *id.* at 219, 228 (noting influence of Little Richard and the fact that the Beatles' style remained "fundamentally derived from African American-inspired popular music").

402. See *id.* at 226-27 (noting the influence of Bob Dylan's lyrics on John Lennon's compositions); Gerry Farrell, *Reflecting Surfaces: The Use of Elements from Indian Music in Popular Music and Jazz*, 7 POPULAR MUSIC 189, 189 (1988) (noting use of Indian music in pop, rock and jazz since the 1960s with a focus on the music of the Beatles); David R. Reck, *Beatles Orientalis: Influences from Asia in a Popular Song Tradition*, 16 ASIAN MUSIC 83, 83 (1985) (noting that in the mid-1960s the Beatles began utilizing elements and influences from Asia in their songs).

403. Burkholder, *supra* note 108, at 35.

404. See *id.*



Rhapsody” parodied various elements of opera.<sup>405</sup> The Barry Manilow song “Could It Be Magic” was inspired by and incorporates portions of Chopin’s Prelude, Opus 28, No. 20 in C minor.<sup>406</sup> Paul Simon’s album *Graceland* reflects a musical collaboration embedded in many levels of the music and musicmaking process.<sup>407</sup> *Graceland* incorporates musical styles from three Black South African genres and integrates different linguistic styles and includes both Zulu and English lyrics.<sup>408</sup> Film is another arena in the twentieth century in which extensive use of existing works is evident.<sup>409</sup>

As was the case with Handel’s borrowings, some borrowings in the popular music context have led to music that surpasses the original work. Jimi Hendrix’s cover recording of the Bob Dylan song “All Along the Watchtower,” is so good that even Bob Dylan prefers it and has played it in the same manner as Hendrix.<sup>410</sup> Through collaboration, influence and other types of borrowing, including cover recordings,<sup>411</sup> nineteenth and twentieth century musicians in the popular arena reflect the pervasiveness of musical borrowing.

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405. See Ken McLeod, *Bohemian Rhapsodies: Operatic Influences on Rock Music*, 20 POPULAR MUSIC 189, 192–94 (2001) (discussing parody of various elements of opera in Queen’s 1974 hit single “Bohemian Rhapsody”).

406. See Burkholder, *supra* note 108, at 35 (noting Manilow’s borrowing from Chopin); Jon Finson, *Music and Medium: Two Versions of Manilow’s “Could It Be Magic”*, 65 MUSICAL Q. 265, 267 (1979) (noting that the recording begins with eight measures of the Prelude quoted verbatim on piano).

407. Louise Meintjes, *Paul Simon’s Graceland, South Africa and the Mediation of Musical Meaning*, 34 ETHNOMUSICOLOGY 37, 38 (1990).

408. See *id.* at 43–47.

409. Burkholder, *supra* note 108, at 35–36.

410. See Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 TEX. INTELL. PROP. L.J. 333, 348 n.76 (1997) (discussing Dylan’s composition and recording of “All Along the Watchtower” in a folk rock acoustic style, and noting that according to legend, Hendrix’s electric-based rendition of the song so impressed Dylan that Dylan began performing the piece in an electric style); Albin J. Zak III, *Bob Dylan and Jimi Hendrix: Juxtaposition and Transformation “All Along the Watchtower”*, 57 J. AM. MUSICOLOGICAL SOC’Y 599, 600–01 (2004) (examining transformation by Jimi Hendrix of Dylan’s song *All Along the Watchtower*); All Along the Watchtower, <http://www.bbc.co.uk/radio2/soldonsong/songlibrary/allalongthewatchtower.shtml> (last visited Nov. 13, 2005).

411. See Mike Daley, *Patti Smith’s ‘Gloria’: Intertextual Play in a Rock Vocal Performance*, 16 POPULAR MUSIC 235, 235 (1997) (discussing Patti Smith’s reworking of the Van Morrison garage band standard “Gloria”).

C. *Composition and Musical Practice in an African American Tradition: Cultural Assumptions and Musical Authorship*

1. Discussing African American Musical Forms: Discourses of Difference

Hip hop, like other musical traditions in the United States such as blues, ragtime, jazz and rock, derives from traditions brought to the new world with African slaves.<sup>412</sup> Discussions of hip hop and other African American musical forms often assume that the typical features of African American music are highly distinctive and consequently quite different from those of the classical European tradition.<sup>413</sup> Although clearly differences do exist, some of these distinctive features are overemphasized, while the reality of practices in the classical tradition is not always fully considered.<sup>414</sup>

The emphasis on difference highlights an important way in which musical production and creation is represented in legal discourse. How a particular piece or genre of music is represented by legal commentators can have significant implications for legal treatment of such music. For example, a representation that emphasizes difference can draw attention to particular distinguishing features or characteristics of a musical work or genre. This representation, however, may in fact be distorted due to its overemphasis of particular distinguishing characteristics. A more comprehensive approach, which includes both distinguishing and common characteristics, would result in less distortion and a more complete

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412. See SAMUEL A. FLOYD, JR., *THE POWER OF BLACK MUSIC: INTERPRETING ITS HISTORY FROM AFRICA TO THE UNITED STATES* 6 (1995) (examining the survival of and major role played by African musical traits and cultural practices in the development and elaboration of African American music); LAWRENCE W. LEVINE, *BLACK CULTURE AND BLACK CONSCIOUSNESS* 190–297 (1977) (discussing the rise of black secular song); SOUTHERN, *supra* note 376, at 308–17, 330–36, 361–65, 504–06 (discussing ragtime, blues, jazz, and rock and roll); Cheryl L. Keyes, *At the Cross Roads: Rap Music and Its African Nexus*, 40 *ETHNOMUSICOLOGY* 223, 241 (1996) (“Through its creative processes, rap represents a continuity of African-derived concepts consciously as well as unconsciously. But on a non-musical-lingual level, Africanisms are further suggested through posturing, dress, jewelry, and hairstyles, all of which suggest political statements about an artist.”); John Shepherd, *A Theoretical Model for the Sociomusicological Analysis of Popular Musics*, 2 *POPULAR MUSIC* 145, 150 (1982) (noting cross-fertilization resulting from music that slaves from Africa brought to North America).

413. See Floyd & Reisser, *supra* note 374, at 22 (discussing the association of ragtime with African music).

414. See VAIDHYANATHAN, *supra* note 31, at 125 (noting differences between “West African-derived traditions” and “the ‘progressive’ value system that emanates from the European artistic tradition and informs European and American copyright law”); *infra* note 415 and accompanying text.

picture. In the case of hip hop, distinguishing characteristics such as polyrhythm are significant and should be noted, but so should continuities between hip hop and other musical traditions, as is evident in musical borrowing.

In addition, even characteristics thought to be distinctive features of African-derived music may show elements of continuity with European musical traditions. In characterizing African-derived music in a particular way, however, commentators fail to pay adequate attention to the clear continuities between the classical tradition and African-derived traditions.<sup>415</sup> Further, many features seen as typifying African-derived music, such as polyrhythm, are also found in European and other music and are not limited to African-derived musical traditions.<sup>416</sup>

The coexistence of such similar and dissimilar features underscores a tension that comes with consideration of hip hop as a musical form. Hip hop is similar to virtually all other forms of music in using borrowing, but is clearly different than some in the scope and intensity of such borrowing. As is true of the music of Handel, early hip hop is unmistakably on the borrowing-intensive end of the spectrum.<sup>417</sup> Despite the importance of sampling historically in hip hop, current digital technology may allow an approximation of sampling without the use of existing musical recordings. These two alternative courses are not necessarily equal from an aesthetic perspective, which has important implications for copyright doctrine. From the perspective of copyright law, the approximation is

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415. See, e.g., Tagg, *supra* note 351, at 288–91 (discussing four characteristics typically cited as illustrating the differences between European and African musical traditions: (1) blue notes, (2) call and response techniques, (3) syncopation and (4) improvisation, and noting that all of the features used to distinguish African music are also found in European musical traditions).

416. See *id.* at 289 (noting that polyrhythms are typically African, while syncopated rhythms are not, since syncopated rhythms are also found in European classical music as well); see also *Polyrhythm*, HARVARD DICTIONARY OF MUSIC, *supra* note 48, at 669–70 (defining polyrhythm as the “simultaneous use of two or more rhythms that are not readily perceived as deriving from one another or as simple manifestations of the same meter” and noting that examples can be found in fourteenth century French music, twentieth century Western art music, as well as African and African-derived music); *Syncopation*, HARVARD DICTIONARY OF MUSIC, *supra* note 48, at 861–62 (defining syncopation as “[a] momentary contradiction of the prevailing meter or pulse”).

417. Borrowing has been a core feature of hip hop musical production, particularly in the early hip hop era. See Burkholder, *supra* note 108, at 5, 35 (“Rap emerged from a practice of improvising rhymed poetry over instrumental passages from existing slow disco or funk recordings . . . . The invention of digital sampling made manipulation of recorded material easier, and rap recordings began to include many more ‘samples,’ digitally recorded snippets of music, speech or sounds.”).

acceptable, whereas production of the same artistic work assembled from existing materials may not be acceptable.<sup>418</sup>

Consequently, a question remains about how copyright doctrine should deal with forms of cultural production that use existing works. Current discourse about hip hop highlights the inadequacy of current frameworks in this regard.<sup>419</sup> Looking at hip hop as an aesthetic form necessitates recognition of the importance of representations of musical production in copyright discourse. Conversely, other musical forms also involving borrowing and repetition, such as classical music, are often represented in such a way as to minimize or even ignore repetition; similarly, the pervasive nature of classical borrowing is often overlooked.<sup>420</sup> Between such representations and actual musical production, acknowledgement needs to be given to the widespread nature of borrowing in actual practice, the influence of representations of musical practices generally and the need for copyright frameworks to recognize and understand the nature of borrowing more generally. Further, greater attention should be paid to the fact that borrowing as a practice may also generate or renew interest in the original work, which is a positive aspect of the use of prior works.<sup>421</sup> Borrowing may thus bring attention to existing works from audiences that were not aware of the prior work.

Hip hop is a form of cultural production informed by African American historical and cultural context. Understanding this background can aid in understanding the origin of hip hop and the derivation of hip hop aesthetic values. That is not to say that all African American cultural production is like hip hop or necessarily involves mimicry or repetition, but to demonstrate that hip hop shows cultural and historical continuity with at least one aspect of an acknowledged and recognized African American aesthetic tradition.

The meaning of borrowings in the classical context may also shed

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418. See *supra* notes 131–34 and accompanying text.

419. See Hines, *supra* note 134, at 489–93; see also *supra* notes 65–71 and accompanying text.

420. See *supra* notes 184–88 and *infra* note 441 and accompanying text.

421. See Joanna Demers, *Sampling the 1970s in Hip-Hop*, 22 POPULAR MUSIC 41, 41–42 (2003) (discussing sampling by hip hop artists of 1970s funk and soul recordings and soundtracks from “blaxploitation” films); Errol A. Henderson, *Black Nationalism and Rap Music*, 26 J. BLACK STUD. 308, 311–12 (1996) (discussing Public Enemy sampling of 1970s Isaac Hayes tune and noting that hip hop “allows for creative synthesis in the context of cross-generational cultural transmission”); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 515–16 (2004) (noting that the R.E.M. 1986 cover of the song “Superman” brought attention to the original 1969 release by an obscure group named Clique and resulted in the Clique song being re-issued in a compilation recording in 1998).

light on hip hop aesthetic practices. Handel's borrowing practices, for example, are in part a question about the aesthetic meaning of borrowing practices for Handel.<sup>422</sup> Greater insight into the internal or aesthetic reasons for borrowing practices is an important inquiry that should receive greater consideration in legal discussions of works that are based on use of preexisting materials.<sup>423</sup> Consequently, understanding cultural and aesthetic derivation of hip hop musical practices can shed light on how hip hop is constructed as an aesthetic form, which provides an important counterbalance to representations of hip hop as theft and properly places hip hop within the context of a long history of pervasive musical borrowing.

## 2. Creativity in Certain African American Music and Cultural Forms

How copyright can and should engage with forms of musical production that exist outside the classical music mainstream remains a critical question for hip hop. The first step in any such engagement should be a recognition of the historical specificity of notions of musical authorship and the fact that such conceptions do not even apply to the classical tradition as actually practiced. Such views are also culturally specific and not easily applicable to musical forms such as hip hop.

Aesthetic features in hip hop and the social context within which it operates have served to place hip hop at the bottom of hierarchies of taste. Among the aesthetic features associated with hip hop are intensive borrowing, which is at odds with contemporary perceptions of composition that see borrowing as necessarily signaling a lack of originality. Hip hop borrowing is evident in sampling, which is an important aspect of hip hop musical composition and practice that is closely connected to other aesthetic traditions evident in the African diaspora, in which available media, texts and contexts are selected for use in performance.<sup>424</sup> Another important hip hop aesthetic feature is the dominance of the oral tradition, as evidenced by the practice of

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422. See Harris, *supra* note 143, at 314 (“[B]orrowing may have, at least for Handel, imparted a special meaning to a composition and been used for that purpose.”).

423. Cf. *id.* at 312 (arguing that students of Handel should accept the fact of his borrowings and try to understand Handel's compositional methods and look for the internal or aesthetic reasons for Handel's practices).

424. See ROSE, *supra* note 45, at 88–89 (noting importance of sampling in hip hop composition); Bartlett, *supra* note 70, at 639 (“The art of digital sampling in (primarily) African American hip hop is intricately connected to an African American/African diasporic aesthetic which carefully selects available media, texts, and contexts for performative use.”).

rapping.<sup>425</sup> The emphasis on the oral and textual aspects of music production in rap is reflected in other African American-derived aesthetic traditions, including jazz.<sup>426</sup> Hip hop music also includes complex rhythmic structures, emphasizing rhythmic density and polyrhythm with less emphasis on melodic and harmonic structures,<sup>427</sup> which are more typically characteristic of the classical tradition in general.<sup>428</sup> These differences are really a matter of intensity rather than differences in kind. Polyrhythm, for example, is more typical in African and African-derived music but is not unknown in European musical traditions.<sup>429</sup> Understanding the core features of this African American cultural aesthetic can clarify where hip hop falls along a number of continuums relating to music and how hip hop fits within the context of these broader aesthetic traditions.

*a. Repetition and Revision: Core Features of One African American Aesthetic*

In his exploration of the relationship between African and African American vernacular traditions and literature, Professor Henry Louis Gates, Jr. emphasizes the importance of “Signifyin(g)”, a term used by Gates to refer to a double-voiced rhetorical principle in African American vernacular discourse.<sup>430</sup> Signifyin(g) involves both “parodic narration and the hidden, or internal, polemic,”<sup>431</sup> and is based on an aesthetic of repetition and revision.<sup>432</sup> Scholars have

425. See SMALL, *supra* note 17, at 391 (noting that rap music “stems from the perennial admiration given in black culture to the possessor of highly developed speech skills”); Walser, *supra* note 1, at 208.

426. See Luke O. Gillespie, *Literacy, Orality, and the Parry-Lord “Formula”: Improvisation and the Afro-American Jazz Tradition*, 22 INT’L REV. AESTHETICS & SOC. MUSIC 147, 160 (1991) (describing musical improvisation in the jazz tradition as a blend of literacy and orality); Keyes, *supra* note 412, at 231 (noting that the verbal style of rap is derived from black street speech, a nonstandard dialect that “thrives within African American street culture”).

427. See Ringer, *supra* note 29, at 363 (noting that in some cultures “rhythmic considerations may always have taken precedence over melodic expression, as in parts of Africa where percussive sounds of undetermined pitch are employed in lieu of semantic communication, or as pacemakers for systematic forms of physical effort (whether in daily work or ritual dance), or both”).

428. ROSE, *supra* note 45, at 65.

429. See AGAWU, *supra* note 87, at 81 (noting that polyrhythm is also heard in European music and that the distinguishing feature of African polyrhythms is the degree of repetition of constituent patterns, which is a difference of degree, not of kind).

430. HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM* 44 (1988).

431. *Id.* at 110.

432. See *id.* (“The texts in the Afro-American canon can be said to configure into relationships based on the sorts of repetition and revision inherent in parody and

argued that repetition and revision are fundamental to African American artistic forms, including painting, sculpture, music and language use.<sup>433</sup> Representing a variety of African American forms of discourse, Signifyin(g) is thus a complex rhetorical device that serves as “a metaphor for textual revision.”<sup>434</sup> A number of black rhetorical tropes may be subsumed within the concept of Signifyin(g), including “marking, loud-talking, testifying, calling out (of one’s name), sounding, rapping, playing the dozens,”<sup>435</sup> as well as interpretative commentary in blues music.<sup>436</sup> As is the case with hip hop, Signifyin(g) narratives involve rhyming.<sup>437</sup>

Some scholars have characterized the fragmentation in sampling and reassembly in hip hop musical works as reflective of the African American historical and cultural experience.<sup>438</sup> Examination of hip hop from the perspective of copyright law must properly contextualize hip hop as an example of African American expressive culture.<sup>439</sup> An important part of situating hip hop in this tradition requires recognition of the hierarchies of taste that often color considerations of hip hop.

*b. African American Cultural Production and Copyright Standards: Recontextualizing Hip Hop Musical Practices*

Court cases and legal commentary on hip hop do not adequately situate hip hop in two respects: the relationship of hip hop in the

pastiche.”).

433. See *id.* at xxiv (“Repetition and revision are fundamental to black artistic forms, from painting and sculpture to music and language use.”); James A. Snead, *On Repetition in Black Culture*, 15 BLACK AM. LIT. F. 146, 149–50 (1981) (noting that “[b]lack culture highlights the observance of ... repetition” and “[r]epetition in black culture finds its most characteristic shape in performance: rhythm in music and dance and language”).

434. GATES, *supra* note 430, at 88.

435. *Id.* at 52.

436. See BAKER, *supra* note 172, at 7 (suggesting that blues be considered as a “forceful matrix in cultural understanding ... [whose] performers offer interpretations of the experiencing of experience”).

437. See GATES, *supra* note 430, at 54 (“The rhythm of the poems is also crucial to the desired effect, an effect in part reinforced by their quasi-musical nature of delivery.”).

438. See Baker, *supra* note 70, at 183 (noting that rap is “the continuation in our era of a black musical tradition that has always been syncretic: a collusion of voice and limited instrumentation, social commentary and fortifying entertainment”); Elizabeth Wheeler, *‘Most of My Heroes Don’t Appear on No Stamps’: The Dialogics of Rap*, 11 BLACK MUS. RES. J. 193, 199 (1991) (“Fragmentation and reassembly describe both black music and black history.”).

439. See IMANI PERRY, *PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP 2* (2004) (noting that hip hop is a form of African American music); Houston A. Baker, Jr., *Hybridity, the Rap Race, and Pedagogy for the 1990s*, 11 BLACK MUS. RES. J. 217, 222–23 (1991) (noting postmodern black expressive culture in discussion of hip hop).

broader historical context of musical practices such as borrowing generally, as well as the specific features of hip hop musical practice in light of their sociocultural context and origin. Properly situating hip hop entails understanding borrowing and repetition within the hip hop tradition as reflective of a particular African-derived cultural aesthetic in which repetition and borrowing are valued in their own right and are also a major source of innovation.<sup>440</sup> As a result of the standards reflected in representations of hip hop borrowing practices, repetition is largely disfavored in the European classical tradition. Discomfort with repetition has, for example, led modern symphony performances to omit repetitions.<sup>441</sup>

In addition to framing hip hop in light of its historical placement and sociocultural origins, treatment of specific features of hip hop should also be modified. In analyzing infringement, copyright cases tend to largely focus on melody rather than on harmony or rhythm.<sup>442</sup> Courts at times also appear to confuse rhythm with time signature or even tempo.<sup>443</sup> The ways in which courts focus on these three elements in musical compositions reflects a bias towards aspects of musical expression that lend themselves to notation. As such, this diminution of harmony and rhythm in favor of melody is one example of the cultural specificity of notions of musical composition and practice embedded in copyright law. Further, these three elements are by no means the only elements of a musical work that might be relevant to analysis of copyright infringement.<sup>444</sup> The typical focus on

440. See Russell A. Potter, *Not the Same: Race, Repetition, and Difference in Hip-Hop and Dance Music*, in MAPPING THE BEAT: POPULAR MUSIC AND CONTEMPORARY THEORY 31, 33 (Thomas Swiss et al. eds., 1998) ("The perception of 'repetition' within the Signifyin(g) games of difference is accurate enough on one level—tropes are certainly being repeated. But this misses the point; what is at stake in repetition within African and diasporic traditions is not the same as what is at stake in European ones.").

441. See James Snead, *Repetition as a Figure of Black Culture*, in BLACK LITERATURE AND LITERARY THEORY 59, 72 (Henry Louis Gates, Jr. ed., 1984) (noting that discomfort with repetition has led modern symphony performances to omit repetitions in performances of eighteenth century compositions such as those of Beethoven).

442. See *supra* notes 29, 71 and *infra* notes 443–60 and accompanying text.

443. See *Wihtol v. Wells*, 231 F.2d 550, 552 (7th Cir. 1956) (noting that "[m]usic is expressed by tonal and rhythmic effects" and focusing on the similarity of the notes in the melody in determining whether infringement exists); *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (examining meter, harmony and melody to determine whether similarity exists); *Hein v. Harris*, 175 F. 875, 876 (S.D.N.Y. 1910) (considering time signature and melody in determining infringement); Ronald P. Smith, *Arrangements and Editions of Public Domain Music: Originality in a Finite System*, 34 CASE W. RES. L. REV. 104, 117–18 (1983) (emphasizing that courts often mistakenly focus on analysis of melody in copyright cases).

444. See Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 431–32 (1988) (noting that elements other than melody,



melody or specific notes in a melodic line obscures the relational aspects of music harmonically. Notes and pitches do not necessarily have a fixed meaning or significance, but are highly context dependent.<sup>445</sup> The limited musical elements considered by courts<sup>446</sup> prevent musical forms such as hip hop from being viewed in their entirety. Rather, specific features of such music, typically relating largely to melody, are extracted and used to determine infringement. Even within existing standards, this represents a distorted lens through which to evaluate hip hop music.

Court cases and other legal analyses of hip hop also pay insufficient attention to or seriously misconstrue the nature of rhythm. This is in part due to the emphasis in copyright law on notated aspects of music.<sup>447</sup> Courts are generally inattentive to the rhythmic complexities of hip hop music.<sup>448</sup> This reflects a general tendency by courts in music cases to make questionable assumptions about rhythm. Some courts assume that rhythm cannot be original.<sup>449</sup> A relatively small number of court cases do discuss rhythm and its relationship and importance to copyright. Although treatment of rhythm in these cases is far from consistent, a tendency exists in such discussions to consider rhythm to be less likely to reflect originality than melody and in some instances harmony.<sup>450</sup> Reflecting the

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harmony and rhythm should be considered, including timbre and spatial organization).

445. See AGAWU, *supra* note 32, at 15 (discussing the relational nature of music); Keyt, *supra* note 444, at 432 (noting that "originality is better viewed as a function of the interaction and conjunction of these elements than of any element alone; a change in one element necessarily affects our perception of all others").

446. See Keyt, *supra* note 444, at 430 ("Most discussions of music copyright simplistically define music as a combination of three 'elements': melody, harmony and rhythm.").

447. See *supra* notes 29, 71 and accompanying text.

448. This inattentiveness is reflected in the relative lack of discussion of rhythm in copyright cases generally.

449. See *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (noting that rhythm is simply a matter of tempo and that originality in rhythm is a rarity, if not an impossibility). When the court spoke of tempo, however, it likely intended to speak of time signature. See Justin London, *Tempo*, in 25 NEW GROVE DICTIONARY, *supra* note 10, at 270–71 (defining tempo as the speed or pace of a musical piece and noting that tempo is related to meter).

450. See *N. Music*, 105 F. Supp. at 400 (finding that "[b]eing in the public domain for so long[,] neither rhythm nor harmony can in itself be the subject of copyright"); cf. *Swirsky v. Carey*, 376 F.3d 841, 845 n.9 (9th Cir. 2004) ("Melody is a function of both pitch (i.e. the steps, or tones, on the scale) and rhythm (i.e. time values and relationships between the notes) of a series of notes."); *Boone v. Jackson*, No. 03 CV 8661 (GBD), 2005 U.S. Dist. LEXIS 13172 (S.D.N.Y. July 1, 2005), at \*12 ("The presence of the phrase 'holla back,' rapped in an eighth note, eighth note, quarter note rhythmic pattern in the hook of each song is too common to be protectable."); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 544 (S.D.N.Y. 2000) (finding rhythmic similarity insignificant in case of guitar rhythm common in the pop

general inconsistency in treatment of rhythm in legal discussions of music more generally, other discussions tend to consider rhythm to be the equivalent of meter or even time signature.<sup>451</sup> Time signature is one way, but not the only way, in which the meter of a musical piece may be indicated.<sup>452</sup> The distinction between rhythm and meter can be quite significant in musical forms based on more complex rhythmic structures. Meter involves perceptions of duration, while rhythm involves patterns of duration present in music.<sup>453</sup> Meter is often demarcated by a time signature, such as 3/4, 4/4 or 6/8, for example.<sup>454</sup> Given potential variations in rhythm, including the presence of more complex rhythmic elements such as hemiola and syncopation,<sup>455</sup> two pieces with a 4/4 time signature could have radically different underlying rhythms and rhythmic structures.

Because rhythmic structures in hip hop music can involve syncopation or polyrhythmic elements, which arise from the

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rock genre and featured in Eastern European folk music); *Repp v. Webber*, 947 F. Supp. 105, 112–14 (S.D.N.Y. 1996) (finding noninfringement in music copyright case where court examines rhythmic and harmonic similarities of two pieces, as well as their different meters and modes); *Tempo Music v. Famous Music Corp.*, 838 F. Supp. 162, 169 (S.D.N.Y. 1993) (noting that in most instances harmony is driven by melody, and that “the harmony [when composed separately] may be less likely to reflect originality than in those instances in which simultaneous composition of melody and harmony is utilized to create certain musical effects”). *But see Santrayll v. Burrell*, No. 91 Civ. 3166 (PKL), 1996 U.S. Dist. LEXIS 3538, at \*4 (S.D.N.Y. Mar. 25, 1996) (finding by court in summary judgment proceeding that “the repetition of the non-protectible word ‘uh-oh’ in a distinctive rhythm comprises a sufficiently original composition to render it protectible by the copyright laws”).

451. *See, e.g., N. Music*, 105 F. Supp. at 400 (“Rhythm is simply the tempo in which the composition is written. It is the background for the melody. There is only a limited amount of tempos; these appear to have been long since exhausted; originality of rhythm is a rarity, if not an impossibility.”); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT* 39 (2004) (“Suppose I write a folk song. I select a rhythm (4/4) . . .”).

452. *See London*, *supra* note 29, at 281–82.

453. *Id.* at 278 (“Broadly stated, rhythm involves the pattern of durations that is phenomenally present in the music, while metre involves our perception and anticipation of such patterns.”).

454. The top number in the time signature indicates the number of beats per measure and the bottom number the duration of the note receiving the beat. A time signature of 4/4 would mean that each measure in a musical piece has four beats and that the quarter note would receive the beat. Many different durations and configurations are possible in any given measure within a 4/4 time signature.

455. Syncopation involves stressing a normally unstressed beat or the failure to sound a tone on an accented beat. In 4/4 time, the first and third beats are typically stressed. If the second and fourth beats were stressed instead, the rhythm would be syncopated. *Syncopation*, *THE HARVARD DICTIONARY OF MUSIC*, *supra* note 48, at 861–62. Hemiola is used to describe a pattern in which two bars of music in triple time are treated as if they were three bars in duple time. *Hemiola*, *THE HARVARD DICTIONARY OF MUSIC*, *supra* note 48, at 389.

interaction of rhythm and meter, consideration of meter alone will not give an adequate assessment of hip hop music.<sup>456</sup> One example of the complex rhythmic elements characteristic of hip hop can be found in the Public Enemy song "Fight the Power", which includes a bass line with a syncopated or polyrhythmic pattern.<sup>457</sup>

Orality and linguistic play are also not sufficiently considered in legal analyses of hip hop. In a tradition such as hip hop, in which orality and linguistic play are key elements,<sup>458</sup> focusing on melody and harmony is unlikely to result in a comprehensive examination of the allegedly infringing work. Other than in cases of overt parodies, courts also rarely look at the text that accompanies the music in making determinations of infringement.<sup>459</sup> Given the role and significance of Signifyin(g) in hip hop and other African-derived aesthetics, inattention to text means that a major source of creativity in hip hop musical production is ignored. In hip hop, the importance of text is reflected in terms of the complex and interlinked relationship between music and text especially with respect to rhythmic elements.<sup>460</sup>

### 3. The Social Roles and Social Meanings of Music: Context, and Living and Museum Traditions

Context and meaning are key elements to be considered in assessing the engagement of hip hop with copyright law. Through legal consideration of sampling, hip hop, which arises from a tradition of intertextuality, is confronted with a copyright law tradition that reflects a significant degree of decontextualization.<sup>461</sup> This

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456. See London, *supra* note 29, at 284-85 (noting that "complexities such as hemiola and syncopation may arise from the interactions between rhythm and metre").

457. See Walser, *supra* note 1, at 201-04 ("The bass plays a repeated pattern that can be heard either as syncopated—it pushes against the metric framework just as the kick drum does—or as polyrhythmic, a layering on of the 3-3-2 pulse (here, in eighth notes) that is known as one version of the 'standard pattern' of African and African American music.").

458. See Geneva Smitherman, "The Chain Remain the Same": *Communicative Practices in the Hip Hop Nation*, 28 J. BLACK STUD. 3, 4 (1997) ("Rap music is rooted in the Black oral tradition of tonal semantics, narrativizing, signification/signifyin, the dozens/playin the dozens, Africanized syntax, and other communicative practices.").

459. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-83 (1994) (discussing satire and parody with respect to an allegedly infringing 2 Live Crew song, and focusing on the use of language in the song).

460. See Walser, *supra* note 1, at 204 ("The music is not an accompaniment to textual delivery; rather, voice and instrumental tracks are placed in a more dynamic relationship in hip hop, as the rapper interacts with the rest of the music.").

461. This copyright law tradition reflects a significant degree of decontextualization with respect to aesthetic choices and the potential diversity of aesthetic traditions within

decontextualization is most evident in copyright law's vision of individual, autonomous authors who are largely independent of historical or any other context.<sup>462</sup> Recontextualizing hip hop within copyright law would entail looking at hip hop in its totality rather than dissecting specific, individual features, such as melody.

In addition, the contexts of performance in the classical tradition have changed significantly since the time when the classical tradition was a living tradition and was not so divorced from social context.<sup>463</sup> Prior to the development of the classical museum tradition, music performance was associated with specific events in peoples' lives: marriages, funerals, namedays and saints' days, for example.<sup>464</sup>

Context in musical performance often implicates meaning. The classical music milieu in which borrowing was a core feature had significance for the meaning that audiences derived from performances. Similarly, in the hip hop context, audiences often derive meaning both from the rapped lyrics as well as the sampled and other elements of the music. Hip hop in many respects exemplifies characteristics of other living music traditions: musical borrowing, improvisation and connection to a broader context of other activities, such as dancing.<sup>465</sup> The significant social meaning that attends hip hop extends far beyond what is typically considered by courts, who often give hip hop music scant consideration, largely because of its status within hierarchies of taste and assumptions about the value and validity of hip hop aesthetic practices.

### III. COPYRIGHT, LIABILITY RULES AND HIP HOP MUSIC

Existing copyright structures should be modified to reflect the commonplace nature of musical borrowing and other collaborative practices in the production of musical works. Short-term solutions in the hip hop case could involve implementing structures based on the existing copyright frameworks and would involve some type of hip hop licensing system. In the longer run, however, frameworks should be developed that better accommodate varying aesthetics of artistic production, including those that base their creations on existing materials. This would entail, for example, developing judicial

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which new works might be developed.

462. See *supra* notes 79–87, 206–09 and accompanying text.

463. See Dimitriadis, *supra* note 46, at 182 (noting that post-renaissance classical music has claimed autonomy from social context).

464. Weber, *supra* note 14, at 177.

465. See Dimitriadis, *supra* note 46, at 180 (noting that the “connection between dance and music is intrinsic to understanding African and African-inspired musics”).

doctrine, crafting legislative solutions, and establishing commercial practices that are based on accurate representations of musical creation.<sup>466</sup> Such representations would need to acknowledge the importance of musical borrowing more effectively than existing copyright frameworks. One part of this process would be creating copyright doctrine and practices based to a greater extent on liability rule rather than property rule structures.<sup>467</sup> This would mean, for example, adopting the assumption that borrowing is a norm in musical practice. The practical implications of this would mean that in assessing instances of borrowing, rather than starting from the assumption of a property rule and asking whether fair use was involved, copyright doctrine should start with liability rule-derived assumptions. In contrast to existing doctrine, starting with such assumptions would mean that borrowings would be permitted other than when such borrowings constitute unfair use.<sup>468</sup> The key determination from a policy perspective would then be what uses would constitute unfair uses.

#### A. *Sampling as an Important Feature of Hip Hop*

Cultural judgments about borrowing, repetition and originality are central to understanding legal evaluations of both sampling and hip hop.<sup>469</sup> Repetition expressed through sampling and looping has been, for much of the history of hip hop, an inherent part of what makes hip hop music identifiably hip hop.<sup>470</sup> Consequently, the question of whether and how sampling should be permitted is in some measure an inquiry about how and to what extent hip hop can and should continue to exist as a musical form. Copyright standards, particularly in the music area, must have greater flexibility to accommodate varying styles and types of musical production, whether based on an African American aesthetic of repetition and revision, a postmodern style, transformative imitation and borrowing in the manner of Handel, allusion as practiced by Brahms or another aesthetic that fails to conform to the Romantic author ideal that has to this point been integral to copyright.

Musical borrowing is not necessarily antithetical to originality or

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466. See Arewa, *supra* note 318, at 62–75 (discussing unfair use as a concept that can help delineate the scope of acceptable borrowing of existing material).

467. *Id.*

468. Arewa, *supra* note 318, at 68–75.

469. See *supra* notes 430–60 and accompanying text.

470. See ROSE, *supra* note 45, at 73 (discussing importance of sampling in hip hop music).

creativity. The conceptions of creativity and originality that pervade copyright discussions are incomplete or inaccurate models of actual musical production, particularly the collaborative aspects of musical practice evident in borrowing. Similarly, views of past musical composition should be tempered with a recognition of the operation of invented traditions and cultural ideals that play a powerful role in shaping both representations and contemporary beliefs and attitudes.

*B. Hip Hop and the Goals of Copyright: Control and Compensation in Musical Works*

Understanding the goals and purposes of copyright is a necessary step in considering how copyright might better engage with hip hop. Copyright reflects a constellation of rights that have been assembled over time, some of which were added as a result of particular problems in the application of copyright law or at the behest of specific industries.<sup>471</sup> Copyright law reflects an attempt to balance between granting private ownership rights intended to incentivize the production of creative works and maintaining public access to creative works.<sup>472</sup>

Discussions of copyright and its goals frequently conflate the compensatory and control aspects of copyright on the incentive side of the copyright balance.<sup>473</sup> Private control of access to existing material, which should be distinguished from compensation for uses of such material,<sup>474</sup> must be balanced against the public benefit of access to existing cultural production.<sup>475</sup> This is particularly true since the scope and duration of copyright has grown,<sup>476</sup> reflecting a lack of

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471. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 859–61 (1987).

472. H.R. REP. NO. 60-2222, at 7 (1909), *reprinted in* 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, at Part S (E. Fulton Brylawski ed., 1976); *see* Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421, 425 (1966); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright*, 18 J. LEGAL STUD. 325, 326 (1989). *But see* Eldred v. Ashcroft, 537 U.S. 186, 215–17 (2003) (noting that the quid pro quo for granting an intellectual property right in exchange for the benefit derived by the public is more exacting in the patent context than is the case with copyright).

473. *See* Arewa, *supra* note 318, at 62–75.

474. *See id.* (suggesting that the control and compensation aspects of copyright should be disaggregated such that compensation is given to the source of material accessed by others, regardless of the allocation of control rights).

475. *Id.*; *see also* H.R. REP. NO. 60-2222, at 7 (1909), *reprinted in* 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, at Part S (E. Fulton Brylawski ed., 1976) (noting that copyrights are given “[n]ot primarily for the benefit of the author, but primarily for the benefit of the public”).

476. *See* 17 U.S.C. §§ 302, 304 (2000); Arlen W. Langvardt & Kyle T. Langvardt,

congressional attention to the public benefit rationales underlying copyright law.<sup>477</sup>

The legislative history of early United States copyright statutes underscores the fact that copyright has historically been viewed primarily in terms of its compensatory features as an economic right that enables authors to receive compensation for their creations.<sup>478</sup> The use of copyright as a tool to secure the “fruits of intellectual labor” is a clear focus of the legislative report for the 1831 Copyright Act,<sup>479</sup> which clearly envisions such fruits in economic terms.<sup>480</sup> The 1909 House Report similarly notes that “[t]he main objective to be desired in expanding copyright protection accorded to music has been to give the composer an adequate return for the value of his composition.”<sup>481</sup> Although varied rationales for copyright protection have been asserted by courts and in legal discourse, including those based on Lockean theories as well as moral rights grounds, instrumentalist rationales have been dominant ones underlying the adoption of copyright law regimes in the United States.<sup>482</sup>

Discussions of copyright typically assume that current control structures in copyright, through which a copyright owner may exert control over most uses of the knowledge protected by such owner’s copyright, are necessary or appropriate for compensating creators.<sup>483</sup>

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*Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTELL. PROP. REV. 193, 196 (2004), available at <http://mipr.umn.edu/archive/v5n2/Langvardt.pdf> (discussing expansion in duration resulting from passage of CTEA); Netanel, *supra* note 24, at 290 (discussing expansion of copyright scope); Voegtli, *supra* note 69, at 1233–39 (discussing expansion in the scope of derivative rights).

477. See Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 437 (2004) (noting that passage of CTEA suggests that Congress did not give serious attention to public benefit rationale of copyright).

478. See Jimmy A. Frazier, Comment, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 335 (1995) (noting that copyright law in the United States has been traditionally viewed from the perspective of artists’ economic rights in contrast with the continental moral rights tradition).

479. H.R. REP. NO. 21-3, at 1 (1830).

480. See *id.* at 2 (noting that the question is whether the *author* or *bookseller* will reap the rewards from copyright).

481. H.R. REP. NO. 60-2222, at 7 (1909), reprinted in 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, at Part S (E. Fulton Brylawski ed., 1976).

482. See Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 439 (2003); Leval, *supra* note 136, at 1107. See generally William Patry, *Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907 (1997) (noting both instrumental and moral rights strains in historical United States copyright doctrine).

483. Arewa, *supra* note 318, at 62–75.

The vision of copyright in legislative and other discussions can thus be characterized as an economic right for which a monopoly right is seen as being given to ensure receipt of economic returns by the creator. This is typically discussed in relation to the monopoly right that copyright gives its holder and the need to balance between the rights of copyright holders and public access.<sup>484</sup> This conflation of compensation and control is by no means necessary or inevitable.<sup>485</sup> In addition, it is possible to structure a compensation system that does not involve control as the mechanism by which compensation is effectuated.<sup>486</sup> The current copyright structure of combining control and compensation imposes unnecessary transaction costs in that issues relating to allocation of economic returns are at times needlessly combined with issues relating to control over future uses of copyrighted works.

In the end, copyright requires balancing the promotion of incentives to encourage creation of new works with public access to copyright protected materials, which must be tempered by recognition that many forms of artistic production need such access to promote the creation of new works. Evaluating this balance is complicated somewhat by the fact that little evidence exists to support the notion that copyright actually encourages creativity.<sup>487</sup>

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484. See H.R. REP. NO. 60-2222, at 7 (1909), *reprinted in* 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, at Part S (E. Fulton Brylawski ed., 1976) (noting that granting exclusive rights in the form of copyright “confers a benefit upon the public that outweighs the evils of the temporary monopoly”).

485. Arewa, *supra* note 318, at 67–71.

486. See FISHER, *supra* note 451, at 202 (proposing a governmentally administered rewards system for copyright that raises taxes to compensate creators for their work and pays such creators a share of revenue based upon frequency of consumption of their works); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282 (1970) (noting that it would be possible without copyright to arrange for compensation of authors); Julio H. Cole, *Patents and Copyrights: Do the Benefits Outweigh the Costs?*, 15 J. LIBERTARIAN STUD. 79, 99–101 (2001) (discussing alternative structures for compensation of creators in absence of a copyright regime); Hurt & Schuchman, *supra* note 472, at 426 (pointing out that works that are expensive to create may never be created unless there is “some device to assist authors in receiving compensation for their services . . . . However, it does not necessarily follow that the grant of a copyright monopoly is the only such device possible, nor that it is the most desirable device”); Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525, 534 (2001) (discussing replacement of current intellectual property frameworks with a governmentally administered rewards system).

487. See RUTH TOWSE, *CREATIVITY, INCENTIVE AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE* 21 (2001) (“[W]e still cannot say with any conviction that intellectual property law in general, and copyright law in particular, stimulates creativity. That is no argument for not having it but it should sound loud notes of caution about increasing it. And we still know very little about its



Although it is not evident that copyright stimulates production, copyright can impose significant costs by considerably limiting the type and nature of cultural production that may occur by considering certain types of production to be infringement. The balancing of interests of future creators with current creators is often not fully considered in copyright discourse. In determining the appropriate balance between public and private interests and what type of access should be permitted for existing works, the cultural and historical specificity of models of musical production should be taken into account to a much greater extent than is currently the case. As part of this balancing process, the objections of creators of existing music to hip hop sampling should not be ignored.<sup>488</sup> Such objections, however, should not be the entire basis upon which production of music by hip hop artists or others who use existing works in their creations is denied. Instead, legal doctrines and practices should be crafted to help delineate the scope of acceptable uses of existing materials.<sup>489</sup>

### C. *Hip Hop, Music Industry Practices and Copyright: Musical Borrowing and Liability Rules*

#### 1. Music Industry Licensing Practices

A number of legal commentators have proposed compulsory or statutory licensing systems as the best way to address legal issues arising from hip hop.<sup>490</sup> A compulsory license is a license issued at a

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empirical effects.”); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462, 505 n.160 (1998) (noting that the role of copyright in inducing the production of cultural texts remains an “unanswered empirical question”).

488. See KOHN & KOHN, *supra* note 58, at 1495 (noting that suggestions for compulsory license systems for hip hop ignore the rights of creative artists to not have their work “perverted, distorted or travestied”).

489. See Arewa, *supra* note 318.

490. See, e.g., Baroni, *supra* note 68, at 93 (considering unauthorized digital sampling to be theft and proposing clarifying legislation to address dilemmas presented by sampling that current law and musical industry practices have failed to address adequately); Chris Johnstone, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 51 J. COPYRIGHT SOC’Y U.S.A. 569, 594 (2004) (advocating the limitation of a hip hop compulsory license system to transformative uses only); Percifull, *supra* note 63, at 1286–88 (proposing a Sampling Act that requires musicians who sample to give notice to authors of the original works and offer authors the option of receiving acknowledgment on the sampling artist’s album cover); Falstrom, *supra* note 68, at 380 (proposing a sampling statute patterned after the fair use provision that would more effectively balance artists’ rights and samplers’ rights); Kravis, *supra* note 68, at 273–75 (recommending that Congress institute a

prescribed statutory rate under the mechanical license provisions of the Copyright Act.<sup>491</sup> The compulsory license provisions of the Copyright Act compel copyright holders in certain instances to issue mechanical licenses, which involve permissions to make mechanical reproductions of music such as a recording of a copyrighted song on a record, tape or compact disc.<sup>492</sup> Mechanical licenses can be privately negotiated or issued pursuant to the compulsory licensing provisions of the Copyright Act.<sup>493</sup> These licenses were initially crafted to address the monopoly of a leading piano roll manufacturer and in response to the Supreme Court decision in *White-Smith Music v. Apollo*,<sup>494</sup> but are today used much more broadly. In addition to licenses for mechanical reproductions, compulsory license provisions are used for permission to make cover recordings, which are rerecordings of existing music.<sup>495</sup> Once the owner of a copyright has permitted public distribution of recordings of a musical composition in audio form, a compulsory license becomes available.<sup>496</sup>

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compulsory licensing provision for digital sampling); Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 742 (1992) (suggesting that Congress establish a compulsory licensing system similar to but more specific than the current system for covers).

491. See KOHN & KOHN, *supra* note 58, at 682–83 (noting that the statutory rate increased from two cents in 1909 to 8.5 cents in 2004).

492. See Loren, *supra* note 21, at 681 (noting that compulsory licenses are sometimes called mechanicals and are applicable not only to piano rolls, “but also to CDs, cassettes, and any other ‘phonorecords’ that mechanically reproduces the musical work”).

493. Cf. KOHN & KOHN, *supra* note 58, at 677, 682–84 (noting that such compulsory licensing provisions for mechanical licenses under the Copyright Act impose a number of requirements, resulting in virtually all mechanical licenses being negotiated between the parties rather than fully conforming to statutory requirements, although the statutory rate is still a maximum price); Loren, *supra* note 21, at 682 (noting that virtually all mechanical licenses are obtained through the Harry Fox Agency).

494. 209 U.S. 1, 1 (1908) (finding that piano rolls are not copies within the meaning of the applicable copyright statute); KOHN & KOHN, *supra* note 58, at 682 (describing the Congressional effort to overturn the effect of *White-Smith* with the mechanical license provisions); Loren, *supra* note 21, at 680 (noting that the complexity of copyright statute increased significantly as a result of the mechanical license provisions).

495. See Cover, THE HARVARD DICTIONARY OF MUSIC, *supra* note 48, at 223 (noting that a cover is a recording or performance that remakes an earlier recording); Loren, *supra* note 21, at 681 (noting that compulsory licenses allow “recording artists to record what are commonly known in the industry as ‘covers’—musical works written by someone else and previously released on an album by a different recording artist”).

496. 17 U.S.C. § 115(a)(1) (2000); see also H.R. REP. NO. 94-1476, at 108 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5723 (“Under the clause, a compulsory license would be available to anyone as soon as ‘phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner.’ ”); Loren, *supra* note 21, at 681 (noting that § 115 requires that the musical work must have been previously distributed to the public, which distribution is embodied in a phonorecord created under the authority of the copyright owner).

Consequently, once a song has been commercially released, anyone can make a cover recording of that song without infringing on the original copyright, as long as the cover is recorded pursuant to a mechanical license issued by the copyright holder.<sup>497</sup>

Existing mechanical license provisions of the Copyright Act are complex and at times unwieldy.<sup>498</sup> Some commentators have even suggested that such provisions be eliminated from the Copyright Act.<sup>499</sup> The focus on compulsory license solutions in the hip hop space by a number of legal commentators reflects a solution for hip hop that is taken from the existing fabric of the copyright framework and music industry business and commercial practices, including compulsory and mechanical licenses. In many ways, music already represents a specialized application of copyright. Established types of agreements govern business relationships among those with potential claims to music copyrights. Through these types of commercial practices, copyright has thus effectively been customized in its application to musical composition and practice.<sup>500</sup> Such practices highlight the prominent role of standardized business and commercial practices within the copyright regulatory framework.<sup>501</sup> Such practices in music also underscore how a copyright model based on autonomous and individualistic notions of composition is melded in actual practice with extensive collaborative uses of existing materials.

As a result, current business structures and practices within music copyright are one starting point for considering how copyright can accommodate hip hop musical production, at least in the short term.<sup>502</sup> The use of existing music by creators of hip hop music suggests that the most feasible mechanism, within the confines of the

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497. See KOHN & KOHN, *supra* note 58, at 698 (noting that the compulsory license provision only applies to a composition after a recording has been made and copies distributed to the public); Loren, *supra* note 21, at 681–82 (noting that the § 115 compulsory license provisions allow “for a new arrangement of the work to conform it to the style of the recording artist, but does not allow for a change in the ‘basic melody or fundamental character of the work.’” (citations omitted)).

498. See Loren, *supra* note 21, at 697–98 (noting the need for multiple clearances with respect to downstream users who reproduce or distribute copies, make derivative works of, or publicly perform a sound recording, because authorization is required from both the musical work and sound recording copyright owners unless an applicable limitation to such owners’ rights applies).

499. *Id.* at 710–11.

500. These commercial practices may be viewed as one way of reducing transaction costs within existing copyright statutory and regulatory frameworks.

501. See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 91 (2004) (noting that copyright is increasingly becoming a regulatory system in which Congress is increasingly willing to intervene in the marketplace).

502. See *supra* notes 498–501 and accompanying text.

current system, would include some type of licensing. Licenses are used extensively in the music industry today.<sup>503</sup> Many of these licenses are not individually negotiated by virtue of the sheer volume of licensing transactions sought: thousands of record companies seek licenses for potentially hundreds of thousands of copyright-protected compositions.<sup>504</sup> As a result of the magnitude of potential transactions, copyright owners generally do not individually negotiate potential licenses, but appoint special representatives to license compositions to be used in sound recordings.<sup>505</sup>

However, current hip hop industry practices require individually negotiated licenses.<sup>506</sup> As has been suggested by other commentators, a sampling framework for hip hop could be based on existing mechanical and compulsory licensing practices.<sup>507</sup> The commercial practices that have developed in the music recording industry for such licenses attempt to streamline the permission process as much as possible and could be successfully applied in a hip hop context. Such licensing procedures should be seen as a short term way to accommodate hip hop production practices within the existing copyright doctrine and practice. In the long run, however, copyright frameworks need to provide more comprehensive recognition to the reality and pervasiveness of borrowing and collaborative activities in the creation of new hip hop and other works.<sup>508</sup>

The existing compulsory licensing provisions of copyright law reflect a balancing of the rights of owners of copyrights with the rights of those who need access to copyrighted works for various purposes,

503. See KOHN & KOHN, *supra* note 58, at 444–48 (noting that many types of music licenses exist: print licenses, mechanical licenses, electrical transcription licenses, synchronization licenses, videogram licenses, musical production licenses, multimedia licenses, digital transmission and reproduction licenses, performance licenses, dramatic performance and grand performance licenses, and dramatic adaptation licenses).

504. *Id.* at 702–03 (“Thousands of recording companies seek licenses to record potentially hundreds of thousands of copyrighted compositions.”).

505. *Id.* (“Because it would be economically prohibitive for copyright owners to negotiate with the great number of potential licensees, many copyright owners and music publishers engage the services of a special representative for the purpose of licensing their compositions to be used in sound recordings.”).

506. See *id.* at 1477–1548 (discussing sampling legal and licensing issues); Brown, *supra* note 64, at 1953–55 (noting that sampling was continuing to grow despite lack of clear judicial guidance on sampling and that record companies had established commercial practices with respect to sampling permissions that involve negotiation on a case-by-case basis).

507. A number of commentators have suggested compulsory licensing solutions for digital sampling. See Baroni, *supra* note 68, at 93–104; Johnstone, *supra* note 490, at 594; Percifull, *supra* note 63, at 1286–88; Falstrom, *supra* note 68, at 380; Kravis, *supra* note 68, at 273–75.

508. See Arewa, *supra* note 318, at 62–69.

including making cover recordings.<sup>509</sup> Congress has explicitly limited the scope of compulsory licenses by preventing uses that might be considered "perverted, distorted, or travestied."<sup>510</sup> Consequently, both compulsory license and mechanical license provisions typically incorporate statutory language preventing changes in the melody or fundamental character of a work.<sup>511</sup> This existing framework of commercial practices developed around a statutory framework and represents a potential model for treatment of hip hop under the Copyright Act in the short run.

## 2. Liability Rule Frameworks for Hip Hop

A clear need exists for an approach that will facilitate access to copyrighted works for those whose aesthetic style incorporates use of existing works while retaining the economic rights of copyright owners to receive compensation for uses of their creations. A liability rule framework can strike this balance. Further, moving in the direction of a liability rule, as opposed to a property rule, could also help reduce transaction costs for hip hop sampling.<sup>512</sup>

In most respects, the current copyright system operates under a property rule theory, in which nonconsensual takings are discouraged.<sup>513</sup> In music copyright, such nonconsensual takings are conceived of as copyright infringement and are only permissible if the copyright owner consents to such use, most often through the granting of some type of license.<sup>514</sup> Actual musical practice, however, has always entailed borrowing. This reality makes treatment of

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509. See Brown, *supra* note 64, at 1951 (noting that copyright law permits recording of new renditions, or covers, of previously recorded works that imitate the original performance through payment of a license fee under the compulsory license provisions of the Copyright Act).

510. KOHN & KOHN, *supra* note 58, at 697; see also 17 U.S.C. § 115(a)(2) (2000) (requiring that the compulsory licensing arrangement cannot change the basic melody or fundamental character of the work).

511. KOHN & KOHN, *supra* note 58, at 697.

512. See Johnstone, *supra* note 490, at 592 (noting that a hip hop licensing framework with a liability rule reduces transaction costs). See generally Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 705 (1996) ("Property rules are liability rules with an exercise price so high that the option is almost never taken."); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972) (articulating a concept of "entitlements" protected by property, liability or inalienability rules).

513. Ayres & Balkin, *supra* note 512, at 704.

514. See Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655 (1994) ("[A] property rule is a legal entitlement that can only be infringed after bargaining with the entitlement holder.").

musical forms such as hip hop that are based on extensive borrowing far better suited to a liability rule, which would permit infringement of the legal entitlement with ex post determination of appropriate compensation.<sup>515</sup> This would mean, for example, that certain types of borrowing would be permitted under copyright frameworks. In the event that a borrowing constituted an unfair use, the copyright owner would be entitled to compensation for the unfair use or could in certain cases prospectively enjoin proposed borrowings that constitute unfair uses. By minimizing the exercise of control by copyright owners and emphasizing the need to compensate copyright owners for uses of their works, this liability rule structure will potentially foster innovation. This potential for innovation arises because future creators would be relatively freer to use existing material creatively and deal with issues of liability and compensation ex post. If incentives and compensation are appropriately structured and commercial practices develop in line with such incentives, a liability rule system has significant potential to increase creativity and achieve a better balance between the private and public benefits of copyright.

The current copyright system may arguably be classified as a property rule with an administrative structure that effectively functions as a statutory liability rule giving the benefits of lower transaction costs.<sup>516</sup> Such a system, however, entails other costs in the form of a potentially distorting effect on the creation of music by virtue of the fact that borrowing is more difficult under a property rule. A property rule implicitly assumes that borrowing is not the norm and requires consent to borrowing. In contrast, a liability rule treats borrowing as the norm, does not require consent to borrow and makes a separate determination as to compensation for borrowings. Further, under a property rule regime, initial allocations of rights often can play an important role in determining what types of cultural production may occur.<sup>517</sup> In the copyright context this highlights the importance of the effective control rights given to initial holders, who may by virtue of such control rights block future borrowings or uses of their works, despite the fact that they may have themselves relied

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515. See *id.* (noting that liability rules permit ex post determination of liability).

516. Merges, *supra* note 514, at 2655.

517. See Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 112 (2002) (“[T]he initial allocation seems to create an endowment effect. When the endowment effect is at work, those who initially receive a legal right value it more than they would if the initial allocation had given the right to someone else. There is a great deal of evidence to this effect.” (citations omitted)).

on existing works as a basis for their creations.<sup>518</sup> The application of a property rule in the music area has the effect of privileging existing creators over future users by giving creators strong ownership rights over their creations, even though their creations may also be based on borrowing.<sup>519</sup> In contrast, later creators may be limited in their ability to use borrowing in the same fashion without infringing on existing property rights. Even if legal standards do not impose absolute restrictions on borrowing, the current property rule standard has potential to create a chilling effect because many will be hesitant to borrow from existing material.<sup>520</sup> Any such chilling effect is magnified by current practices of copyright holders that often focus on the strategic use of copyright to expand the scope of such rights.<sup>521</sup> Such strategic uses often involve the use of threats of legal action or actual lawsuits, which may further intensify any chilling effect.<sup>522</sup>

The ideology of Romantic authorship bolsters and provides a rationale for earlier creators to exclude others from creating future works based on such creators' productions. This ability to exclude has potentially significant negative long term implications for the continuation of vibrant and creative musical traditions. An overt liability rule structure can help focus on regulating transmissions of existing works rather than concentrating on delineating ownership status and allocating ownership rights with respect to such work.<sup>523</sup> As a result, a liability rule structure may avoid some of these negative effects by removing factors that substantially impede future creations, while providing the requisite compensation to creators for uses of their works by others.

Compulsory licensing solutions in the hip hop area should thus reflect a liability rule structure, albeit at least initially in the context of a broader property rule framework. Such a solution would be both like and unlike existing compulsory licensing structures for mechanical licenses.<sup>524</sup> In the short run, a hip hop compulsory license

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518. See, e.g., Arewa, *supra* note 318, at 50–52 (discussing the creation of works by George Gershwin through extensive use of borrowing and the control exercised by Gershwin heirs with respect to uses of Gershwin's works).

519. *Id.*

520. Gordon, *supra* note 25, at 1030 n.78.

521. See Arewa, *supra* note 318, at 15–20; Olufunmilayo B. Arewa, *Strategic Behavior and Sources of Value: Some Implications of the Intangibles Paradigm*, in NEW DIRECTIONS IN COPYRIGHT (2005) [hereinafter Arewa, *Strategic Behavior*]; Arewa, *supra* note 25, at 77.

522. Arewa, *supra* note 25, at 77; Arewa, *supra* note 318, at 15–20; Arewa, *Strategic Behavior*, *supra* note 521.

523. Arewa, *supra* note 318, at 72–75.

524. A number of specific compulsory licensing proposals have been advanced. See,

should be as much like existing licensing structures as is possible so as to minimize additional transaction costs.<sup>525</sup> At the same time, the hip hop solution needs to be tailored to the particular aesthetics of a tradition explicitly based on use of existing materials. Unlike existing compulsory licensing statutory requirements, however, the proposed uses by hip hop samplers would change the melody or fundamental character of a work. Consequently, the existing statutory provisions providing that a work created under a statutory license should not change the melody or fundamental character of the work are not transferable to hip hop.

### 3. Potential Approaches to a Hip Hop Sampling Copyright Framework

Although the specific features of a hip hop sampling framework are not addressed in detail in this paper, this Section sketches out some general approaches that could be the basis for a new copyright framework for hip hop sampling. One important aspect of establishing a copyright framework for hip hop would be to distinguish different types of sampling and attempt to integrate these varieties of sampling within the context of existing copyright frameworks.

Any such potential framework would require amendment of the Copyright Act. A hip hop sampling framework could, for example, distinguish between three types of sampling: sampling in which the original source is not recognizable, sampling in which the original source is recognizable but *de minimis*, and sampling in which the original source is recognizable and not *de minimis*. Identification of the type of sample that exists should be made by the person proposing to use the sample, who would bear the burden of showing that a basis existed for the identification in the event that the hip hop license is later challenged. Whether a sample is recognizable should be based on the average listener of a work.<sup>526</sup>

In instances when the original source is not recognizable, the hip hop compulsory licensing system should be patterned as much as possible after the existing compulsory licensing system, except that

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*e.g.*, Baroni, *supra* note 68, at 93–104 (proposing a compulsory license framework for hip hop sampling).

525. In addition to transaction costs for hip hop sampling, transaction costs in the music industry as a whole should also be considered in crafting a compulsory licensing solution for hip hop.

526. *Cf.* *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (noting that an ordinary lay person is the standard used to determine substantial similarity).



the § 115(a)(2) limitation on changing the melody or fundamental character of the work should be eliminated and the structure of payment reworked.<sup>527</sup> Recognizing that the interests of the creator of a sampled work may be heightened in instances when the sample is recognizable, two categories of recognizable sampling should also be considered: recognizable *de minimis* samples and recognizable samples that are not *de minimis*. This distinction parallels and would codify existing judicial standards with respect to *de minimis* uses.<sup>528</sup> The standards used to determine what is *de minimis* in this existing court doctrine should be a starting point for determining what is *de minimis* in the hip hop licensing system. This doctrine would need to be supplemented with an understanding of hip hop production practices that would take account of the effect of both sampling and looping in determining what constitutes a *de minimis* use. For example, the statutory language permitting a hip hop licensing system should make clear that looping does not necessarily diminish a *de minimis* claim as long as the original piece sampled would be considered *de minimis*.

Courts have generally found either quantitatively trivial portions or unrecognizable uses of existing musical works to constitute *de minimis* use.<sup>529</sup> *De minimis* recognizable samples should not constitute copyright infringement.<sup>530</sup> Recognizable samples that are not *de minimis* should only constitute infringement in specific circumstances. One potential way to deal with the concerns of sampled artists would be to permit copyright owners to deny hip hop compulsory licenses for recognizable samples that are not *de minimis* and that may significantly impact the existing market for the sampled work. When such a market impact exists, a standard based on the 1976 House Report relating to uses that might pervert, distort or travesty the original protected work could be useful.<sup>531</sup> This standard would then reflect the application of an existing standard to a potentially much smaller portion of works that borrow than is currently the case.

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527. 17 U.S.C. § 115(a)(2) (2000). The standard for nonrecognizable samples makes sense because the source of the sample is not recognizable to the average listener in the work created through sampling. As a result, a hip hop licensing system would ensure that the creator of the sampled work received compensation for use of such creator's work.

528. See *supra* Part I.B.3.e.(1).

529. See Latham, *supra* note 121, at 140–41 (noting that *Fisher* and *Ringgold* suggest that *de minimis* uses may include either quantitatively trivial portions of or unrecognizable uses of an existing work).

530. This incorporates the essence of the majority judicial view on *de minimis* uses.

531. H.R. REP. NO. 94-1476, at 109 (1976), *reprinted in* 1976 U.S.C.A.N. 5659, 5724.

In addition to establishing a framework for identifying and determining the proper treatment for different types of sampling, any proposed hip hop copyright framework would need to address payment structures for sampling licenses. A number of approaches might be feasible such as, for example, a rewards-like payment structure.<sup>532</sup> Rewards systems permit compensation of creators without creating rights of control with respect to intellectual property rights.<sup>533</sup> Under such a system, rather than compensating copyright owners directly, sampling artists could pay a flat fee based on the type of sampling that they propose to undertake. Payments could then be allocated among holders of musical composition and sound recording copyrights based on the frequency of sampling. Determination of appropriate fees would be an important aspect of such a system. Sampling fees could, for example, be graduated based on the nature of the sampling involved.

Other than with respect to proposed uses of the copyrighted work and payment structure, the hip hop compulsory license could incorporate existing compulsory licensing provisions, including the mandatory issuance of compulsory licenses following the first public distribution of recordings of the composition in audio form. To the extent that statutory licensing provisions are too burdensome for copyright owners, as is the case with statutory licenses and mechanical licenses, hip hop statutory license provisions could serve as a guideline for privately negotiated hip hop licenses.

Although in the end a substantial revision of copyright toward a rewards system may be desirable,<sup>534</sup> in the short term, commercial practices through licensing are a potentially effective tool for dealing with hip hop within existing copyright structures. In the long term, however, in addition to general legal changes to accommodate artists who use existing work, commercial processes will need to be developed to facilitate hip hop sampling, keep transaction costs low and protect the interests of copyright owners, particularly their right to receive compensation for uses of their copyrighted work.

A range of commercial processes should also develop that acknowledge and accommodate borrowing from existing works. One example is music distributed under a Creative Commons license. Creative Commons is a nonprofit company founded in 2001 that

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532. See Johnstone, *supra* note 490, at 593 (noting that current payment structures under § 115 would be difficult to implement in the sampling context).

533. FISHER, *supra* note 451, at 241; Shavell & Ypersele, *supra* note 486, at 525.

534. Shavell & Ypersele, *supra* note 486, at 545; see also FISHER, *supra* note 451, at 236 (discussing the positive and negative aspects of a rewards system).

seeks to use private rights to create public goods by building a “layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.”<sup>535</sup> In connection with this goal, Creative Commons is distributing compact discs and making content available on the Internet that is intended to be sampled.<sup>536</sup> For example, a compact disc was also distributed with the November 2004 issue of the magazine *Wired* featuring the work of artists such as the Beastie Boys, Chuck D with Fine Arts Militia, David Byrne, Gilberto Gil and The Rapture, among others.<sup>537</sup> Such commercial practices, along with a hip hop compulsory license framework, may help restore the access side of the copyright balance and promote the continued development of musical works based on an aesthetic of using existing works.

### CONCLUSION

Historical and cultural context shapes analyses of hip hop on two levels. The first relates to the assumed historical development of music generally and locates hip hop in relation to this history. Assessments of hip hop from this perspective are distorted by the fact that the tradition against which hip hop is at least implicitly measured, the European classical tradition, is itself an invented tradition. The assumed characteristics and musical composition practices of the European classical tradition, essentially with respect to musical borrowing, do not reflect actual practice within this tradition, particularly during the time that it was an active, living tradition. The second level concerns the broader contemporary cultural contexts within which hip hop musical creation occurs. Musical creations in this environment can be significantly affected by copyright standards that negate or disallow particular musical practices.

In mediating between these historical and sociocultural factors, courts play an important role in helping to determine the shape and nature of acceptable cultural production. This role should not be undertaken without fully understanding and considering the broader

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535. Creative Commons, “Some Rights Reserved”: Building a Layer of Reasonable Copyright, <http://www.creativecommons.org/about/history> (last visited Nov. 13, 2005).

536. See Creative Commons, *The WIRED CD: Rip. Sample. Mosh. Share.*, <http://www.creativecommons.org/wired> (noting that the musicians permitting the distribution of this music believe that “true creativity needs to be open, fluid, and alive”) (last visited Dec. 5, 2005).

537. The Beastie Boys, *My Morning Jacket*, and Chuck D with Fine Arts Militia selections permit noncommercial sharing and noncommercial sampling only. The remaining works permit noncommercial sharing and commercial sampling, but limit advertising uses. Thomas Goetz, *Sample the Future*, *WIRED*, Nov. 2004, at 182.

contexts within which musical production occurs. Although recontextualization of hip hop within these broader aspects is necessary, in the end, better standards must be developed to determine what constitutes acceptable and unacceptable sampling practices. Understanding hip hop and other forms of cultural production based upon use of existing works represents a step in the right direction towards fully appreciating the contributions of varied traditions, styles and methods of artistic production.

As musicologist Susan McClary has noted, a succession of African American musical genres, including ragtime, blues, jazz, rhythm and blues, gospel, Doo-Wop, Soul, rock, reggae, funk, disco and rap, have “stamped themselves indelibly on the lives of generation after generation . . . [as] the most important tributary flowing into today’s music,” which is a function of “the exceptional vitality, creativity, and power of musicians working within these idioms.”<sup>538</sup> Legal considerations of music need to incorporate far greater understanding of music and its broader history and context into analyses of music under copyright law.<sup>539</sup> Further, the legal standards applied in music infringement cases need to reflect current and past actual music practice rather than be based upon idealized and inaccurate notions of music creation that emanate from an invented classical music tradition. Such notions of music creation are often not conducive to the development of vibrant and living music traditions.<sup>540</sup> As we apply such legal standards, we should be careful and be alert to the implications of such actions, as well as to the fact that musical production may in the end come to mirror the conceptions contained in the copyright standards applied to it.

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538. Susan McClary, *Rap, Minimalism, and Structures of Time in Late Twentieth-Century Culture* 20–21 (1998), The Geske Lectures, College of Fine and Performing Arts, The University of Nebraska-Lincoln.

539. See Keyt, *supra* note 444, at 463 (“Music plagiarism litigation has suffered from often poor legal and musical analysis. Concepts originating in cases involving movies, books, and cartoons have been applied reflexively in cases involving musical works.”).

540. See Tagg, *supra* note 351, at 290 (“The ideological aim of this notation fetish . . . was to forestall sacrilege upon the ‘eternal values’ of immutable Masterworks . . . . This strategy was so successful that it finally managed to suffocate the living tradition it claimed to hold so dear . . . .”).