

WRITING RIGHTS
COPYRIGHT, SOUND RECORDING, AND THE PRIVILEGE OF SIGHT

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Abstract

Copyright was first applied to words and was initially visual in orientation. Since the earliest copyright laws, copyright subject matter has progressively expanded from granting rights to protect written expression to other artistic arenas. Copyright law has, however, consistently undervalued the art of performance while favoring the written expression of music, which has had a profound impact on African American based musical forms, now a dominant basis for popular music. This paper examines the privilege of sight in copyright and the numerous ways in which copyright law systematically disfavors performance and suggests two possible explanations. First, copyright law seems to exhibit a visual bias toward perceptible music notation such as written sheet music, which superficially resembles books, maps, and charts, the first objects of U.S. copyright protection. Second, the successful movement beginning in the nineteenth century to ‘sacralize’ older music forms and freeze in place canonical classical works has contributed to visual bias and reinforced an existing privilege of sight. Sacralization involved the identification original written texts that could serve as ‘authentic’ works, a process that came at the expense of alternative performance practices. The original emphasis of copyright law on writings and trend towards sacralization have disadvantaged creative practices based in performance, particularly in light of fixation requirement under current U.S. copyright law. This emphasis on writings has disfavored some plaintiffs who have sought greater protection for their own performance practice, while at the same time disfavored some defendants whose creative, non-notated performance practice should allow a greater scope for their borrowing. Copyright’s visual bias thus diminishes the important contributions of performers of music and hinders recognition of the full spectrum of activities that may be embedded in musical performance. This article suggests that courts in interpreting infringement must look beyond the visual. Contexts of creation should play a greater role in copyright infringement determinations, which should take a more holistic approach to music and other arts that incorporates both visual and nonvisual elements and greater understanding of musical perception as a basis for infringement.

INTRODUCTION

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INTRODUCTION

Copyright first protected words and other written expression, but with an overriding visual and textual emphasis. Copyright subsequently expanded to protect a broad range of things, including music compositions and performances, sound recordings, choreography, photographs, movies, and software. As it expanded to new arenas, however, copyright retained its dominant visual emphasis, which has significant implications for nonvisual aspects of creative activities. This pervading and largely unrecognized visual-textual bias has contributed to continuing problems in the application of copyright in a broad range of areas, including music, dance, theater, and Internet contexts. In the case of music, for example, copyright protection at first gave rights that protected written musical works—music and lyrics, which created a functional system until well into the twentieth century. However, music is a performance art in which oral and aural aspects are essential. Music also typically involves oral traditions that may supplement, modify, or even replace aspects of written traditions reflected in notation. Changing technology and changing musical practices increasingly challenge the existing music copyright privileging of written notation. Further, since the early to mid-twentieth century, a key aspect of changing musical practice, in the United States and elsewhere, has been the displacement of European based music by syncretic African based music as a dominant basis of popular music. This displacement is a factor in continuing contemporary challenges to music copyright. Further, the dominant role of African American based music in the United States music industry has significant implications for musical practice as well as dominant copyright assumptions about music that incorporate underlying visual-textual bias.

The emergence of African American music as a global force is inextricably linked to the development of sound recording technologies. African American based music has played an important role in the recording industry since its inception. For example, George W. Johnson, a street musician and early African American recording star, recorded a number of songs, including two best selling records in the 1890s, in the process becoming a prominent recording artist of his era.¹ Johnson was perhaps the first in a long line of African American recording artists who played a progressively more prominent role in the twentieth century popular music arena. Further, since the explosive entry of recorded music into the entertainment arena in the late nineteenth century, innovations in sound recording technology also came to play a key role in continuing music copyright challenges. Sound recording innovations, changing musical conventions, and the increasing dominance of African American music as a basis of popular music draw attention to contexts of musical creation that came to characterize twentieth century music practice. The interconnection among technological change, musical practice, and African American music also highlights gaps between music perception and music practice that are relevant to many genres of music, but that are particularly pertinent to many African American

¹ TIM BROOKS, *LOST SOUNDS: BLACKS AND THE BIRTH OF THE RECORDING INDUSTRY 1890-1919*, at 5, 28-30 (2005) (noting that two Johnson songs achieved particular prominence: “The Whistling Coon” and “Laughing Song”);

based musical forms.

A copyright focus on visual-textual elements of musical expression has led to a privileging of the seen over the heard in music, which is problematic in a number of ways. This article analyzes the origins and impact of the privilege of sight in music copyright. It examines implications of visual-textual bias and the composition-performance dichotomy in copyright with particular attention to the impact of the rise of African American popular music for music practice, as well as perceptions about music within copyright. Part I examines technology and musical variations, focusing on the role of sound recording technologies in musical practice, copyright perceptions about musical practices, and significant differences between music and literary works, highlighting relevant historical factors that have distinguished musical works from literary ones. Part II discusses implications of fixation for music copyright then considers the significance for copyright of the displacement in the popular music arena of European art music by African based music. Part III analyzes at the implications of sound recording technology for visual bias and examines how court approaches to music infringement cases reveal a pervasive visual bias. Part IV proposes modifications to copyright law that can ameliorate visual bias in music copyright and better address questions related to composition and performance.

I. COPYRIGHT, TECHNOLOGY, AND MUSICAL VARIATIONS

A. *Music Copyright, Music Publishing, and Visual Bias*

1. From Words to Notes: Expansion of Copyright to Music

The expansion of copyright from word to note underscores significant variations in the application of copyright to music, in part due to differences in the application of available technologies to music, first in the printing era and then later in the sound recording era. Copyright was first applied to literary works, which are by their nature primarily visual. Although literary works can be read aloud and consumed in other ways or presented as drama, the primary method of consumption of such works is reading, which has typically in the past involved visual interpretation of words.² The scope of copyright was later expanded to protect other artistic fields, including music. Copyright, however, has proven to be a less than exact fit for music.³ The application of copyright to music has raised a number of issues of continuing

² This visual relationship is not universally the case. Braille, for example, enables reading by touch rather than visual input. Similarly, recent innovations have made nonvisual reproduction of literary works increasingly available through products such as books on tape and technologies that convert text to speech, the latter of which have led to copyright disputes between book publishers and providers of text-to-speech technologies. See Kit Eaton, *Authors Guild Says Kindle 2's Text-to-Speech Violates Copyright*, FASTCOMPANY.COM, Feb. 11, 2009, <http://www.fastcompany.com/blog/kit-eaton/technomix/kindle-2s-text-speech-infringes-copyright-says-authors-guild>.

³ Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 555-57 (2006) (discussing the fit of copyright for music).

importance and at times dispute, particularly since the early twentieth century, in part as a consequence of the introduction of a series of technologies of sound reproduction and changing musical practices.

The application of copyright to music has been progressive and first applied to musical compositions, then musical performances,⁴ and later sound recordings and other technologies of sound reproduction.⁵ Early copyright statutes did not initially protect music. The Statute of Anne,⁶ for example, specifically refers to books and writings,⁷ but did not at first cover musical compositions.⁸ The 1790 U.S. Copyright Act did not protect written musical compositions,⁹ which became protected under the 1831 U.S. Copyright Act.¹⁰ In the United States, protection of performance rights for music was added in 1897 and sound recordings in 1971.¹¹

From its inception, music copyright has been concerned with giving rights to protect musical writings.¹² This writing-focused approach has led to a profound visual-textual bias that has become more apparent as copyright has expanded significantly over time from its initial core of protecting written expression. This visual bias is reinforced by legal practice, which is by its nature focused on writing and which frequently prioritizes the written over the oral. The prioritization of the written over the oral and aural in music is in part a consequence of the historical development of music technology and reflects the emergence of copyright during an era when available technologies meant that tangible reproduction of music necessarily took place in written form. Perceptions about writing in copyright also embed assumptions about writing and objectivity that reflect a privilege of sight deeply rooted in European post-Enlightenment thought:

⁴ See Act of January 6, 1897, 54th Cong., 2d Sess., 29 Stat. 694 (adding copyright protection for performances); Isabella Alexander, “Neither Bolt Nor Chain, Iron Safe Nor Private Watchman, Can Prevent the Theft of Words”: *The Birth of the Performing Right in Britain*, in PRIVILEGE AND PROPERTY: ESSAYS IN THE HISTORY OF COPYRIGHT ____ (2009).

⁵ 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).

⁶ An Act for the Encouragement of Learning, 1709–10, 8 & 9 Ann., c. 19.

⁷ Although the preamble of Statute of Anne refers to books and writings, the remainder of the statute refers only to books.

⁸ Martin Kretschmer & Friedemann Kawohl, *The History and Philosophy of Copyright*, in MUSIC AND COPYRIGHT 21, 27 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (noting that “[m]usic was not thought to be protected under the Statute of Anne”).

⁹ Copyright Act of 1790, ch. 15, §§ 1-7, 1 Stat. 124 (1790) (current version in scattered sections of 17 U.S.C.) (providing copyright protection to books, maps and charts).

¹⁰ Copyright Act of 1831, ch. 16, §§ 1-16, 4 Stat. 436, 436-37 (1831) (current version in scattered sections of 17 U.S.C.) (providing copyright protection to musical compositions, prints, cuts and engravings to the list of copyright protected materials).

¹¹ Act of January 6, 1897, 54th Cong., 2d Sess., 29 Stat. 694; Sound Recording Act, Pub. L. No. 140, 85 Stat. 39 (1971).

¹² See *infra* notes ____ to ____ and accompanying text.

There is no doubt that the philosophical literature of the Enlightenment—as well as many people’s everyday language—is littered with light and sight metaphors for truth and understanding . . . sight is in some ways the privileged sense in European philosophical discourse since the Enlightenment.¹³

This privilege of sight is an important underlying source of tension in copyright. Copyright’s expansion to nonvisual forms of expression such as sound recordings has contributed to continuing problems in the application of copyright, particularly with respect to nonvisual aspects of music. For example, current copyright approaches typically place oral expressions of music in sound recordings under the rubric of performance. These oral expressions are then assumed to derive from some type of written composition that is assumed to be fully capable of being reflected in written notation.

This composition-performance distinction is inconsistent with musical practice in a number of music genres and does not adequately take account of the full spectrum of past or present compositional practices. Moreover, variations in compositional practices have assumed an even greater significance since the advent of the sound recording era in the late nineteenth century. As a result of sound recordings and other technologies of nonvisual musical reproduction, music may now be composed, performed, and distributed without ever being written. Technology now enables the creation and replication of music in varied ways, and even permits the creation of synthetic music, which may be created using computers and other technologies.¹⁴ These new technologies and methods of music generation are likely to pose yet greater challenges to music copyright in the future. These new technologies also highlight inadequacies of approaches to music that reflect an unquestioned privileging of sight.¹⁵

The historical application of copyright to music is an important starting point for understanding the origins of the music copyright visual bias and the operation of the composition-performance dichotomy in copyright. The expansion of copyright from words to notes has not always been a smooth one. Moreover, because music is a performance art that is typically received in significant part by hearing, technologies of sound reproduction have periodically challenged the application of copyright to music in ways that are not always as relevant to creative forms in other artistic fields.

¹³ JONATHAN STERNE, *THE AUDIBLE PAST: CULTURAL ORIGINS OF SOUND REPRODUCTION* 3 (2003) (citations omitted).

¹⁴ Edward Rothstein, *Is It Live ... or Yamaha? Channeling Glenn Gould*, N.Y. TIMES, March 12, 2007, <http://www.nytimes.com/2007/03/12/arts/music/12conn.html> (describing technologies developed by Zenph Studios, which extracted the musical information from mono recordings by Glenn Gould of Bach’s Goldberg Variations, replayed the music using a digital file on a Yamaha Disklavier Pro, a computerized player piano, thus recreating the original performance without the hissing and noise and creating a new digital recording that is effectively a reperformance Gould’s playing); Hugh Le Corbin, *Electronic Music*, 44 PROC. INST. RADIO ENGINEERS 456 (1957); F. Richard Moore, *Dreams of Computer Music: Then and Now*, 20 COMP. MUSIC J. 25 (1996).

¹⁵ See *infra* notes ___ to ___ and accompanying text.

The progressive application of copyright law to music over time represents one strand of a more complex story. Understanding the operation of the visual bias in music copyright requires that the expansion of copyright to music be considered in light of significant differences in the nature of the literary and musical arts. These differences were apparent long before the development of sound recording technology and are evident both in terms of the essential core features of the literary and musical arts concerning factors such as creation and performance, as well as in the business models that emerged in Europe with the collapse of the patronage system and rise of music publishing industry.¹⁶ The impact of copyright in music came later in part due to significant variations in the nature of music and literature, critical divergences in business contexts of book and music publishing, as well as differences in technologies involved in printing words and notes.

Music is first and foremost a performance art, which distinguishes it from literary works, which are not typically performed, but which are rather read, often silently.¹⁷ Music notes are often less representational than words,¹⁸ which makes interpretations of infringement in music copyright contexts potentially fraught with complexities and uncertainties. An obvious difference between words and notes is a quantitative one: the number of available words for expressive activities far exceeds the number of available notes. The number of characters in the English alphabet is 26, while the number of words in the English language is estimated at one to two million.¹⁹ The average educated person has an estimated vocabulary of 35,000 to 75,000 words.²⁰ Literary works in English may thus be constructed from among the tens of thousands of words a typical author might know, the close to 300,000 words in entries in the *Oxford English Dictionary* or similar works, or even the one million or more words in the English language.²¹

In contrast, the Western musical scale includes twelve tones from which musical works may be

¹⁶ William Weber, *Mass Culture and the Reshaping of European Musical Taste, 1770–1870*, 25 INT'L REV. AESTHETICS & SOC. MUSIC 175, 186 (1994).

¹⁷ See 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”).

¹⁸ 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).

¹⁹ Caroline Gall, *The Words in the Mental Cupboard*, BBC NEWS MAG., Apr. 29, 2009, http://news.bbc.co.uk/2/hi/uk_news/magazine/8013859.stm; OXFORD ENGLISH DICTIONARY ____ (2d ed. 1989), available at <http://dictionary.oed.com>.

²⁰ Gall, *supra* note 19; DAVID CRYSTAL, CAMBRIDGE ENCYCLOPEDIA OF THE ENGLISH LANGUAGE ____ (1997); David Crystal, *How Many Words?*, ENG. TODAY, No. 12 11, 11 (Oct. 1987), www.davidcrystal.com/DC_articles/English83.pdf.

²¹ OXFORD ENGLISH DICTIONARY, *supra* note 19, at ____ (noting that the second edition of the Oxford English Dictionary includes 291,500 words)

constructed.²² The drastic difference in essential building blocks in literary and musical works has significant implications for repetition in music as compared with works of literature.²³ Further, although words in literary works are certainly not cobbled together randomly and may have some predictability in order and progression, music is often characterized to a significant degree by particular configurations of notes that may depend, for example, on harmonic progressions or other musical factors. As a consequence, each of the twelve tones in the musical scale is not equally likely to be utilized in particular configurations of musical expression. The twelve tones of the music scale are combined in musical expression with harmonic and other structures that constrain compositional choices in important ways that are not a factor to the same extent in literary expression. Within particular musical traditions, for example, certain harmonic chord progressions are typical, which enables practitioners and listeners of such traditions to anticipate future sequences of notes and harmonic elements based on prior notes and knowledge of expectations within the particular tradition.²⁴ Twelve-bar blues music, for example, follows a chord progression (in the key of C) of: C7 C7 C7 C7 F7 F7 C7 C7 G7 F7 C7 C7.²⁵

Chord progressions and harmonic structure underscore the inherently relational construction of music. Further, the meaning of musical notes is highly context dependent. The relational nature of music means that the harmonic meaning of a particular note or series of notes depends on the context of those notes.²⁶ For example, the C7 chord (C, E, G, B \flat) in the twelve-bar blues chord progression discussed above, functions as a tonic in blues chord progression but cannot, for example, function as tonic chord in conventional Western art music.²⁷ Musical factors such as the nature of the musical scale, cultural and musical conventions that limit musical choices, and the existence of music as a performance art that uses notes that are nonrepresentational, make a translation from literary copyright to music copyright far from an easy process.²⁸

In addition to musical factors, business and technological factors have also differentiated music copyright from literary copyright, even prior to the sound recording era. The advent of the printing press quickly led to a revolution in the production of books: in 1455 books in Europe were produced by hand and numbered in the thousands; by 1500, millions of individual volumes

²² GEORGE THADDEUS JONES, *MUSIC THEORY 10* (1974) (noting the European musical system divides sounds into seven white keys and five black keys of the piano).

²³ See *infra* notes ___ to ___ and accompanying text.

²⁴ See, e.g., FRANK ZAPPA WITH PETER OCCHIOGROSSO, *THE REAL FRANK ZAPPA BOOK 187* (1989) (noting that Tin Pan Alley and jazz music often involve a II-V-I chord progression).

²⁵ RICHARD J. RIPANI, *THE NEW BLUE MUSIC: CHANGES IN RHYTHM & BLUES, 1950-1999*, at 37 (2006).

²⁶ See V. KOFI AGAWU, *PLAYING WITH SIGNS: A SEMIOTIC INTERPRETATION OF CLASSIC MUSIC 15* (1991) (discussing music as a relational system and noting that “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.”)

²⁷ RIPANI, *supra* note 25, at 37-38.

²⁸ Arewa, *supra* note 3, at ___.

were in print in Europe.²⁹ In contrast, music printing was complex and expensive in comparison, which influenced the rate of adoption of printing technologies for music. Although the period following *Bach v. Longman*, which clarified the application of the Statute of Frauds to music, is characterized as a revolutionary one for music printing and publishing,³⁰ early forms of printing technology, including engraving technologies, were inadequate for the reproduction of certain types of music, including keyboard music, which includes a rapid succession of short notes and dense chords.³¹ In addition to being ill-suited to printing technologies such as movable type, music notation required high-quality paper, which increased the expense of printing music.³²

As a consequence of the technological complexity and expense of printing music, vocal and instrumental music was circulated in manuscript form until at least the beginning of the nineteenth century:

During the latter part of the 15th century and the 16th printing became the accepted means by which works of literature, history, philosophy and scientific speculation were multiplied and disseminated in hundreds of copies – school primers by the thousand; but vocal and instrumental music was still circulated in handwritten form. Manuscripts were prepared for sale in this way at least until the beginning of the 19th century.³³

Italian opera, which became a dominant force in European musical tastes, was similarly rarely printed in the early eighteenth century, but rather distributed in manuscript form.³⁴ Advertisements in provincial newspapers in the eighteenth and nineteenth centuries “tell of men who made a living by copying music ‘cheaper and more accurately’ than printed editions.”³⁵ Music continued to be distributed in manuscript form far later than the printed word in part because printed music was difficult to read: [t]ype was harder to read than handwriting – short note values were particularly troublesome.³⁶ The difficult economics of music printing were exacerbated by low rates of music literacy, which limited markets for printed music.³⁷ The small size of music print runs thus distinguished music from literary works.³⁸ Further, because music printing was so expensive, the economics of music printing only made sense with large print runs.³⁹

²⁹ JOHN MAN, *THE GUTENBERG REVOLUTION: HOW PRINTING CHANGED THE COURSE OF HISTORY* 16 (2009).

³⁰ David Hunter, *The Printing of Opera and Song Books in England, 1703-1726*, 46 *NOTES* 328, 328 (1989) (noting that writers on music printing and publishing characterize the period from 1680 to 1720 as revolutionary).

³¹ MUSIC PRINTING AND PUBLISHING 40 (D.W. Krummel & Stanley Sadie eds., 1990).

³² Rebecca Herissone, *Playford, Purcell, and the Functions of Music Publishing in Restoration England*, 63 *J. AM. MUSICOLOGICAL SOC'Y* 243, 247 (2010).

³³ KRUMMEL & SADIE, *supra* note 31, at 3.

³⁴ *Id.* at 80.

³⁵ *Id.*

³⁶ *Id.* at 100.

³⁷ Herissone, *supra* note 32, at 247.

³⁸ MICHAEL TWYMAN, *THE BRITISH LIBRARY GUIDE TO PRINTING: HISTORY AND TECHNIQUES* 42-43 (1998).

³⁹ *Id.* at 45.

The technological differences between printing words and printing notes and the complexity and economics of music printing made receiving profits from music printing a “challenging risk.”⁴⁰ For example, the only profitable form of music printing in the seventeenth century was psalm books with music, which was also the only competitive music publishing arena.⁴¹ Further, not until the late seventeenth century did the unauthorized publication of music even become a potentially lucrative endeavor.⁴² The historical development of music copyright is relevant to visual bias because the origins of copyright in the literary arts and the state of early available technologies condition copyright, once it was applied to music, to be highly visual in orientation.

2. Sources of Visual Bias

Visual bias derives from a number of sources, including historical, linguistic/semiotic and cognitive ones. Sacralization is a major historical source of visual bias in copyright.⁴³ This is in part because the process and consequences of sacralization have not been read as such within copyright discussions of authorship in music. Rather, conceptions about creation and creativity that had become pervasive as a result of sacralization are often taken as norms of creation within copyright discourse. This is both historically inaccurate and particularly problematic due to the increasing dominance of African American based music as popular music in the twentieth century. Visual bias also reflects linguistic and semiotic factors related to notation and the problems of representation. Notation by its nature constitutes a reduced shorthand version of musical expression that is at best an incomplete representation of musical expression. The incomplete nature of notation as representation has significant implications, particularly for aspects of musical expression that are not easily notated.

Visual bias also has significant cognitive aspects related to music perception and the senses. A focus on the visual in music assumes that visual and textual images give us understanding about the essence of music itself. Although this is no doubt at least partially the case in some instances, how much knowledge one can gain from notation alone is highly dependent on musical context and genre. Copyright law gives priority to visual sensation as the primary mechanism by which to gain insight about music, which is unnecessarily limiting. The limitations of privileging visual input is a particular problem with respect to nonvisual aspects of music, including factors such as timbre and rhythm, which may be difficult or impossible to represent visually.

⁴⁰ Herissone, *supra* note 32, at 247.

⁴¹ David Hunter, *Music Copyright in Britain to 1800*, 67 *MUSIC & LETTERS* 269, 270 (1986).

⁴² *Id.*

⁴³ See *infra* notes ___ to ___ and accompanying text.

B. Sound Recording, Music Perception, and African American Based Music

1. From the Phonautograph to the Phonograph: Innovations in Sound Recording Technologies

The advent of sound recordings further distinguished technologies of musical reproduction. The privileging of sight was less problematic before the invention of sound recording technology. Prior to the widespread dissemination of sound recording technology, the privilege of sight operated in a world of sheet music and live performance. The advent of sound recording changed things as a result of two related factors. By enabling preservation of nonvisual aspects of music and dissemination of music in its aural form, sound recordings and other nonvisual technologies of sound reproduction have made the application of copyright in real world contexts complex and less certain. In addition, sound recordings became a launching pad for the emergence of African American based music as a dominant basis for popular music expression. African American based music may have embedded norms of creation that are inconsistent with assumptions underlying copyright. African American based music thus highlights divergent perspectives on music that reflect longstanding debates about the nature of the senses more generally.

The contrast of visual with auditory representations of music was evident in the earliest days of sound recording technologies. The earliest known preserved sound recording, created in France in 1860 by Léon Scott,⁴⁴ was based on the phonautograph (invented in 1856), which is a visual transcription of sound that turned audible vibrations from speech or music into written tracings.⁴⁵ Léon Scott's invention did not, however, have much of an impact, at least commercially,⁴⁶ and his phonautographs were soon lost in French archives until their recovery and reproduction as sound over a century after Scott created them.⁴⁷

The sound recording era was truly born with Thomas Alva Edison's development of tinfoil phonograph technology in 1877.⁴⁸ Although Edison initially conceived the phonograph primarily

⁴⁴ French inventor Édouard-Léon Scott de Martinville created a phonautograph of "Claire de Lune" in 1860. Phonautographs preserved sound and were meant to be read visually. Judy Rosen, *Researchers Play Tune Recorded Before Edison*, N.Y. TIMES, Mar. 27, 2008, <http://www.nytimes.com/2008/03/27/arts/27soun.html?pagewanted=1>.

⁴⁵ OLIVER READ & WALTER L. WELCH, FROM TIN FOIL TO STEREO: EVOLUTION OF THE PHONOGRAPH 5 (1976) (describing the phonautograph as tracing sound waves for the purpose of visual analysis and noting that "a great step in thinking was required" between the phonautograph and the phonograph); STERNE, *supra* note 13, at 31.

⁴⁶ DAVID L. MORTON, SOUND RECORDING: THE LIFE STORY OF A TECHNOLOGY 2 (2006) (noting that the phonautograph was copied and used in many laboratories and classrooms in the U.S.).

⁴⁷ Although Scott's creation was not intended to reproduce sound, a group of American audio historians recently found Scott phonautographs in archives in France and converted the visual images into sound recordings. Rosen, *supra* note 44.

⁴⁸ Although French inventor Charles Cros deposited a sealed packet disclosing a phonograph invention with the Académie des Sciences in Paris in April 1877 prior to Edison's disclosure of his invention, Cros never built a talking machine. Morton, *supra* note 46, at 9-10.

as a business device to enable stenography, he was aware of the potentially broad range of potential applications of the phonograph.⁴⁹ Following Edison's development of the phonograph,⁵⁰ he turned his attention to inventions relating to electricity, which gave space for other inventors to improve on phonograph technology. Alexander Graham Bell's activities in developing the graphophone, which replaced Edison's tinfoil cylinder with a wax cylinder, spurred Edison to improve his invention. Varieties of phonograph technology, as developed and improved by Edison, Bell, Emile Berliner, and others, eventually became the impetus for commercial development of sound recording technologies that soon revolutionized music. Technological innovation in sound recordings was closely related to technological developments in other areas, including the telegraph and telephone, and the phonograph was part of a broader communications revolution that had a profound impact on life in the United States and elsewhere.⁵¹

The transition from Scott to Edison and later inventors marks more than the passage of time. Rather, movement from the phonautograph to the tinfoil phonograph and later sound recording technologies marks a fundamental dividing line between music as visual image as compared with music as auditory message and an important starting point in the development of the era of recorded sound as commercial practice. As sound recording scholar Jonathan Sterne has noted: "[t]here is a yawning epistemic gap between us and Léon Scott, because he thought that the way one gets to the truth of sound is by looking at it."⁵² The assumptions underlying Scott's phonautograph parallel in important respects underlying copyright assumptions about the locus of true musical expression as being embodied in musical writings. Conceptions of music as visual image and music as auditory message also relate to assumptions about the role of the senses in perception that have broader significance in both time and space, the importance of which extend far beyond music. The era of recorded sound illuminates tensions between conceptions of how music is both received and perceived that have enormous implications for copyright that are not sufficiently recognized.

Commercial production of records for entertainment purposes only began to occur at the end of the nineteenth century.⁵³ During the twentieth century, sound recording technologies became widely disseminated and sound recordings became a pervasive aspect of music creation and

⁴⁹ Thomas A. Edison, *The Phonograph and Its Future*, 126 N. AM. REV. 527, 532-35 (May/June 1878) (listing dictation, books, and educational purposes above music in describing at least eleven potential applications of the phonograph); MARK COLEMAN, *PLAYBACK: FROM THE VICTROLA TO MP3*, at 9-10 (2003); STERNE, *supra* note 13, at 202.

⁵⁰ CHARLES BAZERMAN, *THE LANGUAGE OF EDISON'S LIGHT* 130 (2002) (noting that the phonograph, which was described in a letter sent by Edison's assistant to *Scientific American* magazine in December 1877, finally won Edison "a public reputation as a man of science").

⁵¹ ANDRE MILLARD, *AMERICA ON RECORD: A HISTORY OF RECORDED SOUND* 17-18 (2005) (noting Edison and Bell had inventions in the telegraph, telephone, and phonograph areas); MORTON, *supra* note 4, at 31, 34 (noting that prior to the gramophone, Berliner was known for an improved microphone for use in the telephone).

⁵² Rosen, *supra* note 44.

⁵³ See *infra* notes ___ to ___ and accompanying text.

consumption. The advent of sound recordings has had a significant impact on the music industry and music practice. From a business perspective, sound recording technologies eventually led to the rise of the recording industry, which replaced the formerly dominant sheet music industry.⁵⁴ Sound recordings and other twentieth century technologies have also facilitated changes in musical practice. Sound recordings enable permanent preservation of and repeated listening to a broad range of musical activities. Over time, sound recordings, which are a nonvisual form of musical reproduction, have increasingly come to replace sheet music in a number of musical arenas. Further, technologies of recording and the ability to store and retrieve recordings now give musicians unparalleled access to a wide range of music that can be mixed, manipulated, borrowed, and utilized in ways that were simply not possible even as recently as 25 years ago.⁵⁵ Late twentieth century technologies, however, also underscore the extent to which technology choices by commercial actors and businesses and the effective control engendered by such choices have played a role in the effective functioning of copyright.⁵⁶

The recording industry came to control the production and dissemination of phonograph records,⁵⁷ which were a dominant source of recorded music for much of the twentieth century. For most of the twentieth century, sound recordings were largely unprotected by copyright.⁵⁸ Sound recording companies also modified business models when confronted by new technologies and business conditions, including as a result of world wars, the advent of radio, improvements in recording technology, adoption of magnetic tape technologies, and other changing circumstances.⁵⁹ The application of technology to the content industries thus highlights a continual process in which new technologies challenge existing business models, which generally must adapt in the face of changing technological, business, and creative contexts.⁶⁰

During much of the twentieth century, recording companies and others in the content industry have often sought to address the challenges of a wide range of practices from piracy and bootlegging to the challenges of new technologies and business models through modification of copyright laws. For example, increasing concerns about unauthorized dissemination of records

⁵⁴ Reebee Garofalo, *From Music Publishing to MP3: Music and Industry in the Twentieth Century*, 17 AM. MUSIC 318, 336 (1999) (noting displacement of publishing houses by recording industry as records replaced live performers in radio programming).

⁵⁵ Alan Korn, *Issues Facing Legal Practitioners in Measuring Substantiality of Contemporary Musical Expression*, 6 JOHN MARSHALL REV. INTELL. PROP. 489, 490 (2007).

⁵⁶ Olufunmilayo B. Arewa, *YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431 (2010).

⁵⁷ This term is used in its broadest sense to include the phonograph (Edison), graphophone (Bell), gramophone (Berliner and Johnson) and related technologies. See MORTON, *supra* note 4, at 1-50.

⁵⁸ Although sound recordings did not receive copyright protection until 1971, any written musical composition embodied by the sound recording did receive copyright protection. See Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Music Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, ___ (2010).

⁵⁹ See generally MORTON, *supra* note 4.

⁶⁰ See e.g., Mark Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. TELECOMM. & HIGH TECH. L. 125 (2011).

and other factors led the recording industry to lobby successfully for sound recording copyright protection, which was adopted in the United States in the early 1970s.⁶¹ The copyright law path, particularly in the face of changing cultural practices and technologies is likely to be increasingly difficult in the digital era. Uses of copyright by the recording industry and other leading players in the content space also obscure other factors that may have played a role in past industry outcomes. For example, technology choices in the early twentieth century made it far more difficult to copy phonograph records than might otherwise have been the case, which meant that dominant business models and technologies of the time reinforced copyright restrictions on copying. The interaction of technology, copyright, and musical practice is thus continually changing.

The development of sound recording technologies and growth of the recording industry in the late nineteenth and early twentieth centuries highlights the potentially complex interaction of technology and music practice that has continuing relevance to contemporary copyright issues and debates. Although several competing sound recording technologies were developed in the late nineteenth and early twentieth centuries, the gramophone disc technology, initially developed by Emile Berliner in 1893, which contained a horizontal turntable, eventually became the dominant technology used for music recordings. After cylinder sound recording technology peaked commercially between 1900 and 1910, it was replaced by disc technology.⁶² Unlike cylinder technology, which was sold as a player/recorder, gramophone technology was based on discs stamped in factories, which meant that manufacturers rather than consumers made gramophones.⁶³ Gramophone technology introduced new techniques for duplication of records and involved scratching a record of sound on a solid zinc disc coated with wax.⁶⁴ The resulting disc was then placed in a chromic acid bath, resulting in a shallow groove in the zinc disc, which was then electroplated with a new layer of metal to create a copy for stamping records.⁶⁵ The gramophone manufacturing process made it a technology well-suited to mass production of records. This technology was not the only technology available at the time it became predominant. It was, however, the best of available technologies for mass reproduction of music, which became the most lucrative market for sound recording technology.

In contrast to the gramophone, duplication of music records using cylinder technology frequently involved performances repeated multiple times to create multiple masters to produce cylinders for sale.⁶⁶ Johnson, the first African American recording star, was said to have performed his hit

⁶¹ 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).

⁶² MORTON, *supra* note 4, at 31.

⁶³ *Id.* at 32.

⁶⁴ *Id.* at 34.

⁶⁵ *Id.* at 34-35.

⁶⁶ *Id.* at 27.

“The Laughing Song” 40,000 times.⁶⁷ Although record companies abandoned cylinder technology for music in the early twentieth century, this technology continued to be used for stenography applications of recording technology to dictation and other office applications,⁶⁸ which had been the first commercial market on Edison’s 1878 list of applications of phonograph technology. The Dictaphone and Ediphone dominated the market for stenography recording and were unchallenged in their dominance until the 1950s.⁶⁹ Although the earliest versions of these stenography devices were quite difficult to use, deployment of phonograph technologies in these office contexts were intended to foster users’ ability to make their own recordings. Cylinder technologies in the stenography area were used through the 1960s.

2. Sound Recording and the Rise of African American Music

Stenography recordings and phonograph records illustrate that potential range of technology choices that were available at the dawn of the recording era. They also underscore the divergent and varied role of technology in different contexts of use. In the case of recorded music, technological changes throughout the twentieth century, well before the digital age in music, including as a result of radio, the development of tape technology, the advent of mobile playback and recording devices, and other forces have given consumers of phonograph records greater ability to control how they use and consume musical content.⁷⁰

Some consumers of content use existing content to create new music. The advent of hip hop music in the late twentieth century underscores one way in which new creations use existing ones in ways that may not be consistent with dominant copyright assumptions.⁷¹ However, rather than reading hip hop music in isolation as late twentieth century musical form, hip hop must be considered as a recent example of a broader trend that has been evident since the early twentieth century. Hip hop exemplifies the flowering of African American music as a dominant basis of popular music. Hip hop and earlier forms of African American based popular music, including ragtime, blues, and jazz, fall along a significant fault line in musical perception between the visual-textual and the oral-aural. Further, contemporary music trends as evident in hip hop increasingly challenge music copyright law’s notation centered focus on allocating rights to musical writings as a “primary” source, which often comes with an accompanying assumption that performed music and other nonvisual expressions of music are both derivative and secondary.

The global prominence of African American based music was by no means predictable or inevitable. In the late nineteenth and early twentieth centuries, recording companies needed to create markets for sound recordings. Acoustic recording technologies of the time, however,

⁶⁷ MILLARD, *supra* note 51, at 87.

⁶⁸ MORTON, *supra* note 4, at 43-54.

⁶⁹ *Id.* at 50.

⁷⁰ See generally MORTON, *supra* note 4.

⁷¹ See generally Arewa, *supra* note 3.

imposed significant limitations on what could be recorded. For example, although Enrico Caruso, a tenor, became a global star in large part as a result of his recordings,⁷² many classical voices could not be recorded. The tenor voice fell within the range of the horn used to capture sound for recordings.⁷³ Bass and soprano voices did not fare as well with early recording technology.⁷⁴ As a result, although opera was quite popular in the 1890s, opera stars refused to be recorded for fear that the resulting recordings would not appropriately reflect their voices.⁷⁵ Similarly, live music performances and certain instruments simply did not record well, and the violin, cello, and piano presented problems for sound recordings.⁷⁶ Early recordings tended to include whistling, the banjo, xylophone, trumpet, tuba, and trombone.⁷⁷ Recording engineers thus faced significant limitations on what could be recorded and needed new sources of content. Recording companies found this content in music halls and band stands rather than in opera houses and concert halls.⁷⁸ This search thus led directly to military brass bands, minstrelsy and coon songs, and vaudeville, which were dominant in the popular music scene.⁷⁹ As a result of the search for content, new sound recording technologies began an engagement with an emerging body of African American popular music in a terrible period in American race relations.⁸⁰

3. African American Music and the Privilege of Sight

The engagement of sound recording with African American based music was, however, to have unexpected consequences that are relevant for copyright. The distinctiveness of African American based music was more marked in the late nineteenth century than is certainly the case today. This is due to a number of factors. Because notation tends to be biased towards forms of musical expression that can be encompassed through the visual sense, aspects of musical expression that are nonvisual may be minimized or even excluded. This may mean that notational representations may level musical differences and potentially make different types of music appear to be more similar than might otherwise be the case. This is a significant issue for copyright analysis of both originality and infringement. Further, perception of music aurally changed radically over the course of the twentieth century. African American based music had become commonplace in the popular music scene by the end of the twentieth century:

Narrative accounts of music in the twentieth century ought to (but rarely do) find at their core

⁷² MARK COLEMAN, *PLAYBACK: FROM THE VICTROLA TO MP3, 100 YEARS OF MUSIC, MACHINES, AND MONEY* xviii (2003) (noting that Caruso's 1907 recording of "Vesti la Giubba" from Ruggero Leoncavallo's opera *Pagliacci* is "a leading candidate for the elusive title of the first million selling disc").

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ MILLARD, *supra* note 51, at 82.

⁷⁶ *Id.* at 80.

⁷⁷ *Id.* at 81.

⁷⁸ *Id.* at 82.

⁷⁹ *Id.* at 83-85.

⁸⁰ LYNN ABBOTT & DOUG SEROFF, *OUT OF SIGHT: THE RISE OF AFRICAN AMERICAN POPULAR MUSIC, 1889-1895* xi (2002) (noting the "rise of black popular music in the midst of an American racial cataclysm").

the succession of Black genres that stamped themselves indelibly on the lives of generation after generation: ragtime, blues, jazz, R&B, gospel, doowop, soul, rock, reggae, funk, disco, rap. This, I would argue, is the most important tributary flowing into today's music . . . Yet my time-traveler from 1900 would no doubt profess astonishment that this displacement of European by African-based musics in Western culture could have occurred.⁸¹

As musicologist Susan McClary notes, the rise of African based musics reflects a reversal that would have been likely impossible to predict 100 years ago. Thus, the African American based music of the late twentieth century would likely have been quite alien to the ears of listeners from a century before that time. The displacement of European art music resulted in a profound shift in musical taste and dominant forms of musical expression. This displacement has significant copyright implications because the music replacing art music as popular music to a large extent incorporates fundamentally different assumptions about composition and performance and the roles of oral and written traditions. African American musical forms had played an important role in the American popular music scene throughout much of the twentieth century. By the late 1990s, African American and other African based musical forms were increasingly coming to dominate global music markets.⁸²

African American based musical forms draw attention to the privilege of sight in copyright because they “have strongly conventionalized song structures that allow for improvisation, subtle variation, and an emphasis on rhythm and timbre.”⁸³ These musical features that have been conventionalized by African American music have serious implications for notation because they reflect characteristics of music that are difficult, if not impossible to notate. As a result, they cannot be adequately encompassed by visual representations of music. Although the inadequacy of notation as a tool of musical representation is a potential issue with virtually all genres of music,⁸⁴ it is particularly problematic for music African American and African based music. The tension between oral and written forms of music was evident in the first written publications of slave songs in the United States.

One early collection of slave songs notes:

The best we can do, however, with paper and types, or even with voices will convey but a faint shadow of the original. The voices of the colored people have a peculiar quality that nothing can imitate; and the intonations and delicate variations of even one singer cannot be reproduced on paper. And I despair of conveying any notion of the effect of a number

⁸¹ Susan McClary, *Rap, Minimalism, and Structures of Time in Late Twentieth-Century Culture*, in AUDIO CULTURE: READINGS IN MODERN MUSIC 289, 294 (Christoph Cox & Daniel Warner 2004).

⁸² Joan Anderman, *Hip-Hop Setting the Beat in First, Black Artists Hold Billboard's Top 10*, BOSTON GLOBE, Oct. 4, 2003, at A1; Gary Graff, *Vanilla Ice: Red-Hot Rapper Hits It Big and Keeps His Cool*, ORLANDO SENTINEL TRIB., Nov. 2, 1990, at 20; Steve Morse, *Setting the New Market in Sampling: Sellers Are Looking To Make a Deal, But Buyers Are Wary*, BOSTON GLOBE, Mar. 3, 2002, at L1.

⁸³ STERNE, *supra* note 13, at 158.

⁸⁴ Arewa, , *supra* note 3, at ____.

singing together . . . There is no singing in *parts*, as we understand it, and yet no two appear to be singing the same thing—the leading singer starts the words of each verse, often improvising . . . “It is difficult,” writes Miss McKim, “to express the entire character of these negro ballads by mere musical notes and signs.”⁸⁵

The reaction of early collectors of slave songs underscores how alien the music they heard sounded to them. As a result of displacement and musical takeover, the sound of African based music became decreasingly alien to a broader range of listeners. This passage illustrates the difficulties early collectors of slave songs encountered in attempting to notate slave music. Descriptions of slave music give evidence of how the collectors found slave music to be alien to their ears. The difficulties of early collectors point out how music genre can have a significant impact on the role of notation in musical practice. Many contemporary musical practices continue to expose the inherent limitations of the notation based focus in music copyright. Further, notated music in dominant oral music traditions such as blues may be in the form of lead sheets that reflect compositional practices that might include improvisation, for example. Such forms of notation may also merely sketch out a potential basis for performances or alternatively reflect a transcription of orally composed music that may not fully reflect a musical composition or musical work as actually performed. Varied music genres underscore the inherently incomplete nature of notation.⁸⁶

Copyright assumptions that privilege the visual over the aural reflect a pervading visual bias have significant implications for how courts treat allocations of rights. Interpretations of copyright that implicitly assume that copyright protects primarily writing rights may fail to take sufficient account of nonvisual aspects of music. For example, courts typically interpret discrepancies between written compositions and oral expressions of music reflected in sound recordings by assuming that the “true” composition is evident in the written notation. Courts may also assume that oral musical expressions necessarily derive from a written composition and give this written composition heightened copyright protection. This emphasis on rights in writings and the related composition-performance dichotomy are incompatible with the actual creation of music in many instances and reflects a privileging of sight that results in a continuing visual bias in music copyright that should be changed.

C. *Newton v. Diamond, White-Smith*, and the Privilege of Sight: The Performance-Composition Dichotomy in Music Copyright

The distinctions courts may make between visual and nonvisual aspects of music are evident in

⁸⁵ WILLIAM FRANCIS ALLEN, CHARLES PICKARD WARE & LUCY MCKIM GARRISON, *SLAVE SONGS OF THE UNITED STATES* iv-vi (1867).

⁸⁶ Charles Seeger, *Prescriptive and Descriptive Music-Writing*, 44 *THE MUSICAL QJLY* 184, 184-95 (1958) (discussing limitations of conventional notation, noting that the assumption that the full auditory parameter of music is or can be represented by a partial visual parameter is one hazard inherent in music writing practices).

the Ninth Circuit's consideration of *Newton v. Diamond*.⁸⁷ The *Newton* case involved a suit by jazz flautist James Newton against the Beastie Boys, whose song, "Pass the Mic,"⁸⁸ had sampled a sound recording of Newton's composition, "Choir."⁸⁹ Although the Beastie Boys had obtained a license for use of the sound recording from Newton's recording company, they did not obtain a license from Newton for the underlying musical composition.⁹⁰ As is typically the case in music copyright, Newton had retained copyright in the musical composition, but had granted ECM Records copyright ownership of the sound recording.⁹¹ The *Newton* District Court found in favor of the Beastie Boys, holding that the three-note segment that the Beastie Boys sampled from the Newton composition lacked originality and was consequently not copyrightable, and that the use by the Beastie Boys was in any case de minimis.⁹² The Ninth Circuit *Newton* opinion affirmed the lower court holding of de minimis use.⁹³

In its discussion of the musical composition and sound recording, the *Newton* appeals court notes:

⁸⁷ 349 F.3d 591 (9th Cir. 2003); Teresa Wiltz, *The Flute Case That Fell Apart*, WASH. POST, Aug. 22, 2002, at C1.

⁸⁸ BEASTIE BOYS, *Pass the Mic*, CHECK YOUR HEAD (Capitol Records 1992).

⁸⁹ *Newton*, 349 F.3d at 593-94; JAMES NEWTON, *Choir*, AXUM (ECM 1982).

⁹⁰ The presence of two copyright holders is not uncommon in musical copyright where copyrights may be split between the composer, who may retain rights in the underlying written composition (notes and lyrics), and recording companies, who typically own the sound recording copyright. See *T.B. Harms Co. v. Jem Records, Inc.*, 655 F. Supp. 1575, 1576 n.1 (D.N.J. 1987) (noting presence of two separate copyrights when a sound recording is made of a musical composition); *Ulloa v. Universal Music and Video Distribution Corp.*, 303 F. Supp. 2d 409, 412 (S.D.N.Y. 2004) (noting that copyright protection extends to two separate 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. 2d 57, 61 (D.D.C. 1999))); *Newton*, 349 F.3d at 592 ("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)).

⁹¹ *Newton v. Diamond*, First Amended Complaint, Case No. CV 00-04909-NM (MANx) (C.D. Cal. Feb. 22, 2001), ¶ 26.

⁹² *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1253, 1256 (2002) ("In the instant case, Plaintiff's three-note sequence (C -- D-flat -- C) with one background note (C), segregated from the entire piece, cannot be protected, as it is not original as a matter of law.").

⁹³ *Newton*, 204 F. Supp. 2d at 1256 ("Even if Plaintiff could establish that this three-note sequence is subject to copyright protection, *Pass the Mic* and *Choir* are not substantially similar as a matter of law, as Defendants' alleged infringement was de minimis."); *Newton*, 349 F.3d at 598 (affirming district court holding of de minimis use). De minimis use is a doctrine, accepted only in some circuits, that excuses copyright infringements. *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986) (noting that a taking is de minimis if the average audience would not recognize the misappropriation); The scope and parameters of de minimis use doctrine are uncertain and unpredictable. 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 lack of a clear standard for de minimis use, including in relation to the de minimis use standard, burden of proof and relationship to the fair use defense); David S. Blessing, *Note: Who Speaks Latin Anymore? Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM AND MARY L. REV. 2399, 2408-2420 (2004) (discussing different approaches to de minimis use).

His (Newton's) experts reveal the extent to which the sound recording of "Choir" is the *product of Newton's highly developed performance techniques, rather than the result of a generic rendition of the composition*. As a general matter, according to Newton's expert Dr. Christopher Dobrian, "the contribution of the performer is often so great that s/he in fact provides as much musical content as the composer." This is particularly true with works like "Choir," given the nature of jazz performance and the minimal scoring of the composition . . . And it is clear that Newton goes beyond the score in his performance. For example, Dr. Dobrian declared that "Mr. Newton blows and sings in such a way as to emphasize the upper partials of the flute's complex harmonic tone, [although] such a modification of tone color is not explicitly requested in the score" . . . ***Once we have isolated the basis of Newton's infringement action – the "Choir" composition, devoid of the unique performance elements found only in the sound recording*** – we turn to the nub of our inquiry: whether Beastie Boys' unauthorized use of the composition, as opposed to their authorized use of the sound recording, was substantial enough to sustain an infringement action (emphasis added).⁹⁴

Although the appeals court's finding of noninfringement is the correct outcome from a copyright perspective, the court's reasoning reflects the privilege of sight and an underlying visual bias. In its discussion of Newton's performance techniques, the court assumes that the written score is both the authoritative and complete source of musical expression upon which copyright protection should be based. This emphasis on the visual is too restrictive given the inherent limitations of notation. This is particularly important because music in many genres is defined to a far greater extent by performance than by notation. Although notation plays a significant role in music performance in many genres, notation often cannot truly serve as a proxy for music performance. The divergence between notated music and performed music has in the past been particularly true in genres such as the blues and jazz that have traditionally retained strong oral music elements. In addition, even in genres in which notation is treated as an authoritative musical source, including the post-nineteenth century European art music tradition, notation at best serves as an incomplete representation of music. Some aspects of musical expression, including rhythm for example, often cannot be adequately representation by written notation alone. This means that a notation focused approach is inherently biased towards aspects and types of musical expression that are more easily capable of being encapsulated by written notation. Further, this visual bias fails to sufficiently recognize how oral traditions are intertwined with written ones in music practice, even in notation centered music practice.

The *Newton* decision reflects two levels of analysis by the court, one explicit and the other implicit. On one level, the court's decision rests on Newton's written composition, which was registered with the U.S. Copyright Office.⁹⁵ However, on a deeper level, the *Newton* appeals court determination reflects an underlying structure and approach to music copyright that is

⁹⁴ *Newton*, 349 F.3d at 595-96.

⁹⁵ *Newton v. Diamond*, First Amended Complaint, *supra* note 91, at ¶ 22 (noting that Newton's copyright Registration Certificate No. PAU-36-947 was issued by the Register of Copyrights on August 4, 1978).

fundamentally flawed. By focusing on the written notated version of Newton's musical expression, the court essentially engages in a reductionist exercise that is highly problematic because the notation on which the legal claim is based is necessarily incomplete and biased. Further, the structure of analysis underlying the Newton court's decision is increasingly problematic given trends in popular music and technology since the early twentieth century.

The visual emphasis evident in *Newton* has been evident in music from earliest days of twentieth century music technology revolution and is based on a longer standing privilege of sight more generally. Visual bias in copyright is largely unrecognized because legal training and processes are heavily oriented towards writings, which are given precedence in varied legal contexts. As a consequence, legal practitioners are trained to accept written evidence as dispositive with oral evidence being secondary and typically used in contexts where ambiguities exist with respect to written evidence.⁹⁶ The primacy of writing in varied legal contexts is closely connected to evidentiary considerations relating to questions of proof. In such circumstances, oral evidence may be excluded, which is consistent with the overall policy objectives of ensuring the integrity of information presented by disputing parties in courts and other legal contexts.⁹⁷ In contract law, the parol evidence rule, a substantive common law rule, limits a party's ability to introduce oral and other extrinsic evidence that contradicts or adds to the written contract.⁹⁸ Oral and other extrinsic evidence are thus treated as secondary in a legal regime that sanctifies written documentary evidence.⁹⁹

Although the parol evidence rule is not always easily applied in practice, the four corners of the document emphasis that comes with the rule disfavors oral and other nonwritten evidence. This emphasis on written types of proof in the law is not limited to contracts. In patent law, the scope of claims in a patent is determined by the contents of the written patent document rather than by

⁹⁶ See, e.g., *Segovia v. Equities First Holdings, LLC*, 65 U.C.C. Rep. Serv. 2d (Callaghan) 969, at *28 (Del. Super. Ct. May 30, 2008) (“If, after careful consideration, the court determines that the contract is an accurate reflection of the parties’ agreement, the interpretation is limited to the four corners of the contract.”).

⁹⁷ Paolo Torzilli, *The Aftermath of MCC-Marble: Is this the Death Knell for the Parol Evidence Rule?*, 4 St. John’s L. Rev. 843, 844 (2000) (“Generally, the parol evidence rule seeks to exclude testimony of negotiations occurring prior to, or contemporaneous with, the execution of a written instrument. Numerous reasons for the parol evidence rule have been set forth. Two of these policy reasons are universally accepted. First, jurors are generally considered to be extremely impressionable. Second, there is a need for the integrity of a writing to be preserved.” (citations omitted); *American Underwriting Corp. v. Rhode Island Hosp. Trust Co.*, 303 A.2d 121, 126 n.2 (1973) (stating that the parol evidence rule came into being out of fear of invention by witnesses and to allow courts to prevent juries from making determinations of fact based on their sympathies).

⁹⁸ 5-24 CORBIN ON CONTRACTS § 24.7 (“Among such [common law] rules are those stating that words must have one, and only one, true and correct meaning, that this meaning must be sought only by poring over the words within the four corners of the paper, that extrinsic evidence of intention will not be heard, or that evidence of surrounding circumstances is admissible only in instances of ambiguity.”).

⁹⁹ George I. Wallach, *The Declining “Sanctity” of Written Contracts -- Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 Mo. L. Rev. 651, 653 (1979) (noting that the parol evidence rule “sanctifies the writing”).

any device or process described in the patent.¹⁰⁰ Legal treatment of writings in contracts, patents, and other legal areas have surely shaped legal approaches in other arenas that emphasize writing, particularly in the face of oral and other nonvisual evidence. Although treatment of written compositions in copyright is seemingly similar to these other contexts, the visual bias in copyright is not truly analogous in practice and has profound consequences worth examining.

Music, unlike a patent or contract, is not a legal document, although sound recordings and original written compositions may be protected by copyright. As a result, rather than serving as a means of determining what information can serve to define a legal relationship or some aspect of legal rights, the visual bias in music copyright contexts often reduces a nonlegal and to a significant extent nonvisual object (music) to its written representation. This representation is then used to make infringement determinations. Although seemingly objective and based on written documentation of music, this process of reduction is inherently interpretive but is often not recognized as such. Further, this reduction process is problematic given the fact that music has significant extra legal presence and meaning that is often not adequately considered in infringement cases. The visual bias causes law to place music and interpretations of infringement in cases involving music into a category analogous to legal documents. Visually biased copyright approaches may thus inappropriately apply a four corners of the document approach to musical compositions and uses of sound recordings. As a result, the visual bias in copyright has potential to do significant damage in nonlegal realms within which music is created, shared, distributed, consumed, and enjoyed. Although questions of proof of authorship and fixation are factors that may cause courts to focus on visual, written aspects of musical and other creations, current approaches may hinder comprehensive understanding and equitable legal treatment of questions of authorship of artistic works that are performed and that include both visual and nonvisual elements.

Treatment of writings in other legal contexts helps explain why the visual bias in copyright may not be recognized as such. *Newton* and other music copyright infringement cases must be considered within the general context of legal treatment of writings. The *Newton* case reflects the ways in which courts often perceive visual and nonvisual aspects of music and the distinction between composition and performance. The court's distinction between composition and performance reflects a false dichotomy based on questionable assumptions about music performance and composition, as well as the role of oral and written traditions in music. Moreover, the vision of music underlying the court's opinion demonstrates how visual assumptions of literary copyright have carried over to a visual focus on written notation in music copyright in ways that should be reconsidered by courts.

Recognizing the operation of the visual bias in copyright can enhance understanding of areas of

¹⁰⁰ CRAIG NARD, *THE LAW OF PATENT* 39 (2009) (“The claims are considered to be the most important part of the patent document because the claims delineate the patent owner’s property right. To borrow real property terminology, the claims set forth the metes and bounds of the patentee’s proprietary interest.”).

doctrinal difficulty and uncertainty. Music is one such area. Visual bias is, however, by no means limited to music cases, but is also evident, for example, in cases involving theater productions.¹⁰¹ More particularly, theater and film production co-authorship cases can be reread in light of the privilege of sight and visual bias. Reading these cases through the lens of the visual bias demonstrates important commonalities with the visual bias in music cases. In theater cases, courts make determinations about who is an author by reference to the written text of the play, which is necessarily a reduction of the entirety of theater as performed. Courts in such cases tend to define authorship in largely visual terms that emphasize the final written script. Courts then categorize contributions such as stage direction, scene construction, and character development, which may be critical to the theater production but which are not necessarily visible in the written script, as advice or something else other than authorship.¹⁰² In addition to and perhaps because of the presence of visual bias, allocations of authorship rights in contexts that involve production, performance, and arrangements continue to challenge copyright frameworks.¹⁰³ Consideration of authorship in contexts of music and theater productions also highlights the fact that authorship credit may, in at least some cases, reflect industry power dynamics rather than any generally accepted notions of authorial attribution (even if such notions are shaped by a strong visual bias).¹⁰⁴ In film contexts, however, Writers Guild of America arbiters make determinations concerning screen credit for writers that may incorporate both visual and nonvisual elements.¹⁰⁵

Approaches that reflect visual bias may also relegate performers to the status of uncreative mouthpieces of authorial intention, which is in many cases not accurate. The visual focus of the *Newton* court diminishes the importance of performance and key contributions of performers in contemporary music contexts. This dismissal of performer contributions is most clearly reflected

¹⁰¹ I am indebted to Jessica Litman for this observation.

¹⁰² *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991) (“Taylor also made some incidental suggestions, contributing ideas about the presentation of the play’s subject and possibly some minor bits of expression. But there is no evidence that these aspects of Taylor’s role ever evolved into more than the helpful advice that might come from the cast, the directors, or the producers of any play. A playwright does not so easily acquire a co-author.”); *Thompson v. Larson*, 147 F.3d 195, 196-99 (2d Cir. 1998) (holding in that a dramaturg who collaborated with the author of the Broadway musical *Rent* in making major revisions to the script and narrative structure was not a co-author).

¹⁰³ *Calculating the Credits Behind Songwriting*, June 24, 2008, Guardian.co.uk, <http://www.guardian.co.uk/music/musicblog/2008/jun/24/calculatingthecreditsbehind>.

¹⁰⁴ Kevin Canfield, *Simply Simpson*, Slate.com, March 30, 2004, <http://www.slate.com/id/2097974/> (discussing the rise of artists as auteurs in the music industry, with an increasing trend towards performers claiming songwriting credits, in some instances under circumstances that suggest that they did not actually make a significant artistic contribution, in contrast to the past when professional songwriters wrote popular songs); *Beyonce ‘Bossing Up, Stealing’ Songwriting Credit Claims Producer*, July 12, 2010, <http://www.singersroom.com/news/6039/Beyonce-Bossing-Up-Stealing-Songwriting-Credit-Claims-Producer>.

¹⁰⁵ Catherine L. Fisk, *Screen Credit and the Writers Guild of America, 1938-2000: A Study in Labor Market and Idea Market Intermediation* 27, 34 (2010), http://works.bepress.com/catherine_fisk/1 (noting that WGA arbiters make screen credit determinations using the following elements: dramatic construction, original and different scenes, characterization or character relationships, and dialogue).

in the concept of performing rights. The terms performing and performance rights are in some ways misleading because they are actually rights that accrue to authors that result in royalties begin paid to composers when their works are performed. Since their inception in the nineteenth century, performing rights have given copyright protection to music composers and authors for performances of their works.¹⁰⁶ Performing rights by their nature assume that composers, but not performers, merit compensation on account of performance of an underlying writing. Although limited performance rights have been granted to owners of sound recording copyrights in the U.S.,¹⁰⁷ current U.S. copyright structures do not sufficiently acknowledge the important contributions made by performers of music. The performing right as currently constituted in the United States may thus be seen as another layer of copyright structure that reflects visual bias, reinforces the performance-composition dichotomy, and reiterates the derivative and secondary nature of performance within copyright. In contrast to the U.S., some jurisdictions have adopted the Rome Convention,¹⁰⁸ which provides that performers and others may be granted neighboring rights, or rights related to copyright.¹⁰⁹ The justification for granting performers neighboring rights rather than a copyright interest rests on an assumption that performers just execute written compositions, and that such written compositions are the true locus of creativity in music.¹¹⁰

II. SACRALIZATION, NOTATION, AND THE RISE OF AFRICAN BASED POPULAR MUSIC

A. *Musical Variations and Fixation: Notated Music as Product and Process*

In addition to pervasive perceptions of music through sight, copyright fixation requirements are relevant to consideration of visual bias. Fixation is a basic requirement for copyright protection in the United States. Under Section 102 of the Copyright Act, copyright attaches when an

¹⁰⁶ 17 U.S.C. § 106(4) (granting copyright owners exclusive rights with respect to public performances of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works).

¹⁰⁷ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (current version at 17 U.S.C. § 106(6) (2006)) (giving a limited performance right for digital audio transmissions of sound recordings, but exempting broadcast radio from the performance right); Steven J. D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV. 168, 168 (1981).

¹⁰⁸ *Toward Better Protection of Performers in the United States: A Comparative Look at Performers' Rights in the United States, Under the Rome Convention and in France*, 28 COLUM. J. TRANSNAT'L L. 775, 775 (1990).

¹⁰⁹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961 (Rome 1961) 496 U.N.T.S. 43 (hereinafter Rome Convention (1961)) at art. 2 (granting protection in performance to performers, producers, and broadcasters); RICHARD SCHULENBERG, *LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW* 369 (1999) (noting that although the scope of rights varies from country to country, neighboring rights grant performers, producers, and broadcasters rights in the product of their creative activities).

¹¹⁰ Ruth Towse, *Copyright and Artists: A View from Cultural Economics*, 20 J. ECON. SURVEYS 567, 573 (2006) ("Performers do not have copyright proper but property rights related to copyright or neighbouring rights. The conventional justification given in law books and the like is that copyright and authors' rights are the reward and stimulus for creativity but performers do not create works, they just 'execute' the performance of existing works and that does not merit the grant of the exclusive right as for the author.").

original work of authorship is “fixed in a tangible medium of expression.”¹¹¹ The fixation requirement reveals a visual emphasis at its core because fixation necessarily focuses on written musical texts as end products of creative processes. Fixation may also be read as an attempt to address nonvisual elements of creative endeavors. The addition of a formal fixation requirement to the 1976 Copyright Act was itself a reaction to greater inclusion of nonvisual creative activities.¹¹² In music, the fixation requirement unfolds in contexts in which written musical texts may be as reflect of a musical process as they are of an ending musical product (e.g., a score). This is a subtle yet important factor that is particularly relevant to living musical traditions, including those that involve extensive improvisation.¹¹³

Fixation occurs in musical milieus that have significant musical variations in practice and style. This suggests that the meaning of fixation of written music or a sound recording may vary by context. Although we tend today to think of classical works as having a fixed form reflected in the written notation, the reality of composition of many classical works was messier than many might assume. For example, in the living classical music tradition prior to the late nineteenth century, it was common for composers to create multiple versions of works and continually revise works, at times with significant musical or textual variation, or both. For example, the composition process of Giuseppe Verdi’s opera *Otello*, was flexible and collaborative. *Otello* involved collaborations with multiple other artists, including his librettist Arrigo Boito and the artist who sketched the character Iago in a manner that apparently gave Verdi better insight into Iago’s character.¹¹⁴ After completing the first vocal score for *Otello* in January 1887, Verdi made definitive changes in the months after the premiere, and in 1894 authorized a French vocal score that included many alterations from the 1887 published version.¹¹⁵

Flexibility and collaboration are key aspects of creative practices in a range of music traditions.¹¹⁶ Improvisation plays an important role in a number of twentieth century musical forms. The fixation requirement may prevent improvisatory works from obtaining copyright protection.¹¹⁷ Understanding music as a process may be at tension with the fixation requirement. Although this does not mean that fixation should be eliminated, it does indicate that fixation in music should be considered in light of the context of a broader musical process, which does not

¹¹¹ Copyright Act, *supra* note ____, at §102(a).

¹¹² Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 845 (2009) (“The introduction of the fixation requirement appears to have been a reaction to efforts to include choreographic works, pantomimes, and sound recordings among the list of copyright-eligible work.”).

¹¹³ Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363 (1997).

¹¹⁴ JAMES A. HEPOKOSKI, GIUSEPPE VERDI: OTELLO 100 (1987)

¹¹⁵ *Id.* at 76-82.

¹¹⁶ See generally R. KEITH SAWYER, GROUP CREATIVITY: MUSIC, THEATER, COLLABORATION (2003).

¹¹⁷ Donat, *supra* note 113; see also Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is Galoob A Mirage, Or Does The Form(Gen) Of The Alleged Derivative Work Matter?* 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 991(2004).

necessarily mean that unfixed works should be protected.¹¹⁸ However, the effective meaning of what is fixed may vary depending on genre and context. Evaluations of copyright protection and infringement that involve considerations of fixation should take potential musical variations into better account.

B. *The Invention of Classical Music: The Decline of the Oral Tradition in European Art Music*

The visual notational bias and privilege of sight in music copyright is consistent with dominant and at least partially inaccurate assumptions about creation in the European art music tradition.¹¹⁹ Although some associate musical genres with dominant oral expression with particular twentieth century musical forms, such practices are actually quite old. For example, early Renaissance music included compositional practices similar to those associated in the twentieth century with musical forms such as jazz and blues. Renaissance music used notation as a form of shorthand. In later eras, however, notation became a dominant source of musical authority, at least in the European art music tradition, reflecting in part an increasing degree of sacralization with the rise of the classical music canon. Because of sacralization in the European art music tradition, by the late nineteenth century, written musical notation had become an authoritative source that could not be changed, while performance norms increasingly required strict adherence to notated music.¹²⁰

Notation, however, often does not completely embody music. Rather, notation is a form of shorthand that communicates limited visual information about music.¹²¹ Notation alone, however, simply cannot adequately convey nonvisual aspects of music in many music genres. Music as a performance art is also defined in important respects by performance rather than exclusively by writing. The performance and nonvisual aspects of music have significant implications for approaches that emphasize writing rights. Performance of music may include visual and nonvisual elements, but is not itself a writing, at least of the type that copyright was originally created to protect.

¹¹⁸ Larisa Mann, *If It Ain't Broke . . . Copyright's Fixation Requirement and Cultural Citizenship*, 34 COL. J. L. & ARTS 201 (2011) (examining costs of applying copyright to unfixed works).

¹¹⁹ See *infra* notes ___ to ___ and accompanying text.

¹²⁰ THEODOR W. ADORNO, TOWARDS A THEORY OF MUSICAL REPRODUCTION 8-9 (2006) (“Sketchy as the old score may seem to the modern performer, it fulfilled its function by offering the necessary information in its own day, when the composer and the interpreter were so often one and the same person . . . Today, the interpreter of contemporary works frequently has little or no personal choice, as he is forced to follow the very strict directions of the composer.”).

¹²¹ *Id.* at 8 (“Of course, great composers have superbly transformed their ideas into scores, making the best possible use of music notation. But it is this very notation that is imperfect and may remain so forever, notwithstanding remarkable contributions to its improvement. There are certain intangibles that cannot be expressed by our method of writing music – vital musical elements incapable of being fixed by the marks and symbols of notation. Consequently, score scripts are incomplete in representing the composers’ intentions. No score, as written in manuscript and published in print, can offer complete information for its interpreter.”).

Visual bias in copyright leads to an inordinate focus on notation. Although this notation focus in copyright has paralleled developments in European art music, it presents a number of problems because of assumptions typically made about oral traditions in music. Oral traditions exist in all musical traditions, even those with a strong notation focus. The relationship between oral and written traditions in music may be complex and varied. Consequently, even in notation centered traditions, a focus on notation leaves out significant aspects of musical practice. In addition, the African based music that European art music in the popular music arena during the twentieth century has traditionally not reflected the notational focus of the sacralized European art music tradition. Most importantly, from a cultural perspective, the notation focus in the classical tradition came with a decline in that tradition as a living tradition. To the extent that a notation focused model is embedded in copyright, copyright should tread with care in creating frameworks in which a sacralized and notation centered view of music becomes a dominant assumption. This is particularly true given significant evidence of creativity in communities that follow nonsacralized approaches to music, for surely one goal of copyright is to promote the progress of science and the useful arts, which means fostering creativity regardless of its form.¹²²

The application of copyright to music in the late eighteenth and early nineteenth century came in a context of major cultural and business transitions.¹²³ Musicians, who formerly operated under a patronage system, were experiencing the realities of an emerging music publishing industry that by the nineteenth century significantly influenced the creation and dissemination of music.¹²⁴ The music published by music publishers contributed to the rise of a culture of notation that soon came to dominate the music that became categorized as classical music in the nineteenth century.¹²⁵ The prominence of notation reflects the rise of classical music as an invented tradition increasingly mediated by notation during the course of the nineteenth century.¹²⁶ The increasing emphasis on notation reflects some of the benefits that notation may offer musicians. For example, notation provided a way of recording performance nuances prior to invention of technologies of sound recording, as well as a means for disseminating music in time and space.¹²⁷ Music notation can also enhance music learning.¹²⁸

1. Sacralization, Notation, and European Art Music

The notation focus that became so dominant was reinforced by copyright, which in the nineteenth century largely applied to music in its written visual form. The notational emphasis

¹²² Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829 (2011).

¹²³ See generally Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005).

¹²⁴ Weber, *supra* note 16, at 186.

¹²⁵ Arewa, *supra* note 71, at 590-96 (discussing the invention of the classical music tradition).

¹²⁶ McClary, *supra* note 81, at 295.

¹²⁷ Estelle R. Jorgensen, *Western Classical Music and General Education*, 11 PHIL. MUSIC EDUC. REV. 130, 135 (2003).

¹²⁸ *Id.*

that came to characterize the European art music tradition is particularly important in terms of its interactions with oral traditions within the classical music context. European art music has historically relied on both oral and written traditions.¹²⁹ The use of written music also changed over time. In contrast to later periods, the early Renaissance music tradition was to a significant extent an oral or “unwritten tradition”, in some ways resembling jazz and related popular genres . . . [l]ike popular music, it generally did without musical notation, relying instead on memory, improvisation, and stock formulas.”¹³⁰ In this tradition, notation was a shorthand guide for accomplished performers or a “mnemonic device in written symbols.”¹³¹ Although the classical tradition in the late nineteenth century became increasingly “sacralized” with a focus on faithful replication of written music, the classical tradition as actually practiced throughout its history has reflected oral musical traditions to varying degrees. By the late nineteenth century, a pervading focus on notation is associated with formalization of classical music as a category and the eventual decline of classical music as a living musical tradition.¹³² Prior to this time, the classical tradition reflected combined oral and written traditions in which varied participants changed and modified existing works.

The increasing focus on written notation in European art music involved a process of sacralization, which was part of a broader societal trajectory in the United States in the nineteenth century in which hierarchical cultural categories began to emerge.¹³³ Sacralization involved a decline participation, lessening of a rich shared public culture,¹³⁴ and creation of hierarchies of cultural forms.¹³⁵ As a result of these processes, forms of cultural production such as Shakespeare, Dickens and opera and places such as museums became increasingly separated from the broader world of everyday culture.¹³⁶

¹²⁹ STANLEY SADIE & VLADIMIR ASHKENAZY, *THE BILLBOARD ENCYCLOPEDIA OF CLASSICAL MUSIC* 8 (2004) (noting that Western classical music relies on both oral and written traditions).

¹³⁰ PETER VAN DER MERWE, *ROOTS OF THE CLASSICAL: THE POPULAR ORIGINS OF WESTERN MUSIC* 73 (2004).

¹³¹ DEREK BAILEY, *IMPROVISATION: ITS NATURE AND PRACTICE IN MUSIC* 59 (1992).

¹³² Arewa, *supra* note 3, at 591-96.

¹³³ LAWRENCE W. LEVINE, *HIGH BROW, LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* 224 (1988) (discussing hierarchical categories as a set of categories with continuing resonance to the presence that defined and distinguished culture vertically).

¹³⁴ *Id.* at 9; RUSSEL NYE, *THE UNEMBARRASSED MUSE: THE POPULAR ARTS IN AMERICA* 245 (1970) (noting that nineteenth century theater managers had to please a broad range of tastes and thus might present Shakespeare one night, a farce the next, followed by an equestrian acrobatic troupe).

¹³⁵ LEVINE, *supra* note 133, at 207 (connecting the development of cultural hierarchies to a broader American social climate of increasing fragmentation reflected in subgroups within the culture to set themselves apart, as was evident in the rise of professional specialization, residential patterns in which separation was occurring based on social, economic and ethnic factors and new immigration and an increasingly heterogeneous society as a result of such immigration).

¹³⁶ *Id.* at 33; Robert R. Roberts, *Gilt, Gingerbread, and Realism: The Public and Its Taste*, in *THE GILDED AGE: A REAPPRAISAL* 169, 172 (H. Wayne Morgan ed., 1963) (“Dickens belonged to the world of art and also to the popular culture of the America of the middle and late nineteenth century.”); Steven Conn, *From South Kensington to the Louvre: Art Museums and the Creation of Fine Art*, in *MUSEUMS AND AMERICAN INTELLECTUAL LIFE, 1876-*

This segregation was accomplished through a process in which audiences, actors and styles of performance became increasingly separated.¹³⁷ An important part of this sacralization process related to conceptions of authorship and contributed to an almost fetishization of notation.¹³⁸ For much of the nineteenth century, for example, operatic works were performed as parlor music and sheet music anthologies placed Bellini side by side with Stephen Foster and other nonclassical popular composers.¹³⁹ During the course of the nineteenth century, however, it became increasingly unacceptable to alter what were perceived to be high culture aesthetic forms.¹⁴⁰ In addition, forms of entertainment such as Shakespeare and serious opera (i.e., performed in a language other than English) could no longer be sullied by being commingled with other popular forms of entertainment.¹⁴¹ This meant that Shakespeare and serious opera, as forms of entertainment entering the high culture category, needed to be performed in accordance with their original notation in isolation before largely homogenous audiences.¹⁴² In the musical arena, “sacralization endowed the music it focused upon with unique aesthetic and spiritual properties that rendered it inviolate, exclusive, and eternal.”¹⁴³ This sacralization process gave composers more prestige.¹⁴⁴ In contrast, prior to the nineteenth century, concert programs often omitted composers’ names.¹⁴⁵

2. Cinderella: A Nineteenth Century Pastiche Opera

The opera *Cinderella* is a *pasticcio* (pastiche) opera that exemplifies nonsacralized treatment of operatic works that was common until the well into the nineteenth century. This opera had its

1926 at 192, 193-194 (1998) (noting that process of defining the art museum in late nineteenth and early twentieth centuries helped solidify the “cultural hierarchy” noted by Lawrence Levine with which we live today).

¹³⁷ LEVINE, *supra* note 133, at 57; Roberts, *supra* note 136, at 173 (“These years saw the rise of magazines and newspapers of mass appeal and of transformation in the theater and other forms of entertainment that produced an increasingly wide gap between popular culture and higher standards of art.”).

¹³⁸ LEVINE, *supra* note 133, at 69 (noting that by the end of the century the sacred Shakespeare emerged triumphant); Roberts, *supra* note 136, at 173-174 (noting that the “familiar schism” between traditional and popular culture “had yet to appear significantly in America in the Gilded Age.”).

¹³⁹ Charles Hamm, “*Hear Me, Norma*”; or *Bel Canto Comes to America—Italian Opera as Popular Song*, in *YESTERDAYS: POPULAR SONG IN AMERICA* 62, 76 (1983).

¹⁴⁰ LEVINE, *supra* note 133, at 43.

¹⁴¹ *Id.* at 70.

¹⁴² LEVINE, *supra* note 133, at 101; ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* 144 (1982) (“In a mere decade, an entire apparatus appeared, an infrastructure which monumentalized the presence of culture, of high art and learning, within the society: The Metropolitan Museum of Art in New York and the Boston Museum of Fine Arts in 1870, the Philadelphia Museum of Art in 1876, the Art Institute of Chicago in 1879. Open to the public, such institutions seemed to their advocates and supporters democratic enterprises, serving to diffuse knowledge, taste and refinement. What they in fact diffused, however, was a set of corollaries to the idea of culture.”).

¹⁴³ LEVINE, *supra* note 133, at 101.

¹⁴⁴ *Id.* at 137.

¹⁴⁵ *Id.*

first American performance in 1831,¹⁴⁶ just one year after its London premiere, and became one of the “most popular works of musical theater in the history of the American stage.”¹⁴⁷ An English language version of Gioachino Rossini’s opera *La Cenerentola*,¹⁴⁸ *Cinderella* was created by an Irishman named Rophino Lacy, who retained some of Rossini’s music,¹⁴⁹ but who also made “‘copious additions’ of music from other operas by the same composer.”¹⁵⁰ Reflecting the dominance of the sheet music industry in music of the time, the success of the Rossini-Lacy *Cinderella* led to “a rash of publications of favorite songs from this opera.”¹⁵¹ Lacy’s adaptation of *Cinderella* was highly influential: the Disney plot of *Cinderella* follows the Lacy version rather than other versions in circulation in the nineteenth century.¹⁵² Lacy’s adaptation changes the names of characters and simplifies more the ornate coloratura of Rossini’s piece.¹⁵³ The Lacy piece was enormously popular over multiple decades.¹⁵⁴

Vincenzo Bellini’s opera *Norma*, which premiered in the U.S. in 1836 following an 1831 Milan debut, has been described as one of the central musical events of the nineteenth century.¹⁵⁵ Many sheet music versions were made of songs from *Norma*,¹⁵⁶ and the first sheet music versions were still in print in 1870, more than 30 years after their first publication.¹⁵⁷ Further, many popular songs borrowed from *Norma*,¹⁵⁸ reflecting both a nonsacralized and participatory view of musical authorship and the widespread popularity of opera as a musical form.

Toward the latter part of the nineteenth century, as was the case with Shakespeare and other cultural forms, opera became increasingly sacralized.¹⁵⁹ This sacralization and increased emphasis on music authorship significantly influenced the performance of musical texts in that performers “were obliged increasingly to stick to the sacred text of the great masters.”¹⁶⁰ In addition, the practice of abridgement, once common in the nineteenth century and which had:

not disturbed such composers as Mozart and Chopin, was not consistent with the growing aura of sanctity that surrounded symphonic compositions or the sense that a true work of

¹⁴⁶ Cenerentola original premiere was in 1817 in Rome, 1820 in London, and 1826 in New York.

¹⁴⁷ Ham, *supra* note 141, at 71.

¹⁴⁸ *Id.*

¹⁴⁹ JOHN GRAZIANO, ED. ITALIAN OPERA IN ENGLISH: CINDERELLA xvi (1994).

¹⁵⁰ Ham, *supra* note 141, at 71.

¹⁵¹ *Id.* at 74, 76 (noting that operatic sheet music (in English) also became quite popular, with operatic songs becoming part of the American popular song repertory as parlor music that was sung inside the home).

¹⁵² GRAZIANO, *supra* note 149, at xi.

¹⁵³ *Id.* at xviii

¹⁵⁴ *Id.* at xxiv.

¹⁵⁵ Ham, *supra* note 141, at 79.

¹⁵⁶ *Id.* at 79-81.

¹⁵⁷ *Id.* at 82.

¹⁵⁸ *Id.* at 81-83.

¹⁵⁹ *Id.* at 87 (noting that opera “became class entertainment, produced chiefly for the cultural and social aristocracy of America”).

¹⁶⁰ LEVINE, *supra* note 133, at 138.

art had an integrity which must not be interfered with by anyone, be it audience, soloist, or conductor, and was increasingly relegated to such manifestly less “serious” occasions as concerts of the Boston Pops Orchestra.¹⁶¹

The new practice, as evinced by conductor Arturo Toscanini, involved fidelity to the score and authorial intention as primary aspects of a generalized respect for purity or authenticity.¹⁶² Although an unrealized ideal, the sacralization of cultural forms became a significant cultural force.¹⁶³ Sacralization was also connected to the conversion of audiences “into a collection of people reacting individually rather than collectively, [which] was increasingly realized by the twentieth century.”¹⁶⁴

3. Aria Insertion and the Power of Nineteenth Century Performers

Sacralization further contributed to the increasing dominance of written notation in the European art music tradition.¹⁶⁵ Notation was important for multiple audiences and actors. The widespread use of notation and increasing focus on performing classical music as written bolstered music publishers by giving them an audience that needed the authentic written version of the piece, typically in the form of sheet music. New audiences for sheet music emerged in the nineteenth century, including home audiences and music scholars. In the nineteenth century United States, for example, the piano became an important marker of middle class status and purchases of sheet music by owners of pianos helped expand markets for sheet music.¹⁶⁶ Demand for printed music also increased as a result of public concerts, which contributed to the popularity of miniature scores. Further, the growth of the academic study of music and rise of musicology created demand for critical and historical printed music editions.¹⁶⁷

For much of the nineteenth century because technologies of sound reproduction were either nonexistent or not widely available, reproduction of music in any significant scale necessarily involved the written music composition. The presence of music notation thus became a key

¹⁶¹ *Id.* at 139.

¹⁶² *Id.* at 167 (noting emphasis of Toscanini as symbol of sacralized culture who nonetheless interpreted, rescored and adjusted the musical texts he performed).

¹⁶³ *Id.* at 168.

¹⁶⁴ *Id.* at 195.

¹⁶⁵ Philip Tagg, *Open Letter: ‘Black Music’, ‘Afro-American Music’ and ‘European Music’*, 8 *POPULAR MUSIC* 285, 290 (1989) (noting the notation fetish in Western art music).

¹⁶⁶ Stephanie Dunson, *The Minstrel in the Parlor: Nineteenth-Century Sheet Music and the Domestication of Blackface Minstrelsy*, 16 *AM. TRANSCENDENTAL QTLY* 241, 243 (2002) (“The parlor—a lavishly furnished living room used solely for entertaining and special occasions—was a new kind of space in many American homes and in nineteenth-century America came to be recognized as the central domestic marker of middle-class status. The piano stood as one of the defining features of any well-appointed parlor, which suggests that sheet music serves as a material article that performed (literally and figuratively) a variety of roles”).

¹⁶⁷ KRUMMEL & SADIE, *supra* note 31, at 117 (“Music designed for study purposes first appeared in the late 19th century”); JOSEPH KERMAN, *CONTEMPLATING MUSIC: CHALLENGES TO MUSICOLOGY* 26-41 (discussing the development of musicology as a field of academic study).

defining criteria for copyrightability. In the nineteenth century, prior to widespread deployment of sound recordings, this emphasis on written notation was a necessary element for copyrightability because available technologies effectively limited the scope of copyright to the written note. However, since the twentieth century, when sound recordings have become broadly disseminated, copyright treatment of written notation raises significant questions.¹⁶⁸ A focus on written musical notation evident in both the later classical music tradition and continuing copyright assumptions may also obscure the importance of oral traditions in music.

Although the written notated music became a key aspect of European art music, oral traditions continue to play a role in classical music that is not always recognized, particularly by those who assume that the music requires a written score to be performed.¹⁶⁹ Contemporary discussions of European art music may not sufficiently contextualize the importance of oral traditions and how the role of such traditions in European art music has changed over time. Even in the contemporary era, some prominent musicians within the European art music tradition have engaged in music primarily orally. The 2009 winner of the Van Cliburn competition was Nobuyuki Tsujii, a blind pianist who learns his music by listening and who takes cues from the conductor's breathing.¹⁷⁰ Other talented musicians have also engaged with music primarily orally. For example, operatic tenor Luciano Pavarotti could not read music, pianist Arthur Rubinstein was a poor reader, and operatic soprano Kiri Te Kanawa is a poor music reader.¹⁷¹

The changing role of improvisation, which by the early twentieth century had ceased to play a significant role in most genres of European art music, reflects the interaction between oral and written traditions in European classical music.¹⁷² Improvisation is one aspect of a range of oral musical traditions that once existed in European art music and that pervade a number of musical genres that became prominent after the early twentieth century. Prior to 1850, practices such as aria insertion were pervasive in opera. Aria insertion gave performers the power to override

¹⁶⁸ See *infra* notes ___ to ___ and accompanying text.

¹⁶⁹ F.M. SCHERER, QUARTER NOTES AND BANK NOTES 33 (2004) (“To perform it [music] requires training, instruments, and musical scores.”).

¹⁷⁰ Juliet Chung & Miho Inada, *Blazing a New Path in Classical Music*, WALL ST. J., June 12, 2009, <http://online.wsj.com/article/SB10001424052970204482304574220150779764622.html> (“He learns new pieces through listening and memorization, rather than reading the notes. The 20-year-old Japanese musician last weekend became the first blind pianist to win the prestigious Van Cliburn International Piano Competition.”).

¹⁷¹ HERBERT H. BRESLIN & ANNE MIDGETTE, THE KING AND I: THE UNCENSORED TALE OF LUCIANO PAVAROTTI'S RISE TO FAME 116 (2005) (“But when it comes to things like sight-reading, or counting time so he knows when to come in, or any of the other technical things that make up the craft of musicianship, Luciano is a little bit challenged. It doesn't help that he can't read music.”); Andrew J. Walters, Ellen Townsend & Geoffrey Underwood, *Expertise In Musical Sight Reading: A Study of Pianists*, 89 BRIT. J. PSYCH. 123, 124 (1998) (noting the weak relationship between performance ability and sight-reading ability and talented performing musicians who are poor readers, citing Kiri Te Kanawa and Artur Rubinstein as examples).

¹⁷² Robin Moore, *The Decline of Improvisation in Western Art Music: An Interpretation of Change*, 23 INT'L REV. AESTHETICS & SOC. MUSIC 61, 63 (1992) (noting that the decline in improvisation was a “radical shift in performance aesthetic” that “occurred without incident and virtually without documentation”).

written scores and substitute or add arias of their choosing, were pervasive in opera prior to 1850:

aria insertion ... allowed singers to introduce arias of their own choice into opera productions . . . insertion arias might replace a portion of an opera (substitutions), or they might dislodge none of the original music (interpolations); they may have been authored by the composer of the opera, or they may have been written by someone else . . . Singers planned these insertions in advance, and everyone involved in the production . . . Was aware of when and where they would occur.¹⁷³

The presence of oral and written traditions in music suggests a topography of music practice that diverges from assumptions many courts implicitly make about music. Music copyright may also not take sufficient account of variations in musical practice both among and within genres. Uses of oral and written traditions in music may vary significantly among various musical genres and composers. Similarly, compositional practices may vary to a far greater extent than courts may assume.¹⁷⁴

4. Living Music and Oral and Written Traditions

Further, discussions of the role of oral and written traditions in different music genres may assume the dominance of one strand without appropriately taking account of the other. Consequently, discussions of European art music, particularly in the legal arena, often focus on written traditions and do not sufficiently consider the role or importance of oral traditions in European art music. Similarly, discussions of other genres, including African based musics such as jazz and blues, may focus primarily on oral traditions within such genres, without appropriate attention to the role of written traditions and relationships between oral and written traditions in such genres. How one views oral and written traditions, and the extent to which each may be embodied in the compositional process plays a critical but unrecognized role that continues to be played out in copyright discussions. Some, for example, assume that notation is necessarily connected to originality,¹⁷⁵ which, even if true in specific historical contexts, cannot be generalized across music genres and time periods.

Understanding the fate of oral traditions in European art music has implications for copyright given the focus on written musical traditions that has characterized both European art music and copyright discourse in the twentieth century. Improvisation was an indispensable ability for professional musicians well into the nineteenth century.¹⁷⁶ In addition to being an important part

¹⁷³ HILARY PORISS, *CHANGING THE SCORE: ARIAS, PRIMA DONNAS, AND THE AUTHORITY OF PERFORMANCE* 5 (2009).

¹⁷⁴ Arewa, *supra* note 3, at ____.

¹⁷⁵ Jason Toynbee, *Copyright, the Work and Phonographic Orality in Music*, 15 *SOC. LEG. STUD.* 77, 81 (2006) (“In other words, notation promoted originality.”); Arewa, *supra* note 122.

¹⁷⁶ BAILEY, *supra* note 131, at 27–28 (noting that “improvisation was an automatically accepted part of performing music” in the Baroque era); Moore, *supra* note 172, at 79 (noting that Brahms, Paganini, Chopin, Clara and Robert

of many compositional practices,¹⁷⁷ improvisation was a highly valued skill among classical musicians until that point in time. Early operas such as Monteverdi's *L'incoronazione di Poppea* were performed using scores that consisted of figured bass and vocal parts.¹⁷⁸ During performance, singers would add ornamentation, while instrumentalists playing the bass line would turn a single bass line with numbers into a "full harmonic foundation."¹⁷⁹

Many now characterized as great composers were also highly accomplished performers who were most renowned for their skills in performance.¹⁸⁰ An accomplished musician in Johann Sebastian Bach's time would be expected to be able to improvise a complete accompaniment.¹⁸¹ Johann Sebastian Bach is said to have been an exceptionally fluid and accomplished improviser.¹⁸² Similarly, Beethoven was an accomplished improviser whose improvised works were thought by some to be equal, if not superior to his formal compositions.¹⁸³ When J.S. Bach visited his son C.P.E. Bach in 1747 in Berlin, Frederick the Great (Frederick II),¹⁸⁴ asked Bach to improvise a fugue on a theme chosen by Frederick, who was himself a flautist and accomplished musician.¹⁸⁵ Frederick then asked Bach to improvise a 6-part fugue, which Bach did based on a Bach chosen theme.¹⁸⁶ The following evening, Bach improvised a second 6 part fugue based on a theme chosen by King Frederick.¹⁸⁷ After masterfully demonstrating his improvisation skills, J.S. Bach used the King's theme as a basis for his last completed major work, *The Musical Offering*, which included two fugues, a trio sonata, and more than five canons.¹⁸⁸

In addition to aria insertion, opera singers would incorporate extended embellishments and

Schumann, Mendelssohn, Hummel, Cramer, Ries, Spohr, Joachim, and Schubert, among others, were all accomplished improvisers).

¹⁷⁷ Lewis Porter, *John Coltrane's "A Love Supreme": Jazz Improvisation as Composition*, 38 J. AM.

MUSICOLOGICAL SOC'Y 593, ___ (1985).

¹⁷⁸ Carol S. Gould & Kenneth Keaton, *The Essential Role of Improvisation in Musical Performance*, 58 J.

AESTHETICS & ART CRITICISM 143, 143 (2000).

¹⁷⁹ *Id.*

¹⁸⁰ Robert Levin, *Improvising Mozart*, in MUSICAL IMPROVISATION: ART, EDUCATION, AND SOCIETY, 143, 143 (Gabriel Solis and Bruno Nettl ed. 2009) ("In the 18th century all composers were performers, and virtually all performers composed"); see also Olufunmilayo B. Arewa, *Making Music: Copyright and Creative Processes*, in THE BLACKWELL COMPANION TO MEDIA AUTHORSHIP (Jonathan Gray and Derek Johnson eds. forthcoming 2012).

¹⁸¹ ARTHUR MENDEL, CHRISTOPH WOLFF & HANS T. DAVID, EDs., THE NEW BACH READER: A LIFE OF JOHANN SEBASTIAN BACH IN LETTERS AND DOCUMENTS 8 (1999).

¹⁸² *Id.* at 375, 406,

¹⁸³ OSCAR GEORGE THEODORE SONNECK, BEETHOVEN: IMPRESSIONS BY HIS CONTEMPORARIES 15, 22, 28, 30-31, 72 (1927); PAUL F. BERLINER, THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION 774 (1994).

¹⁸⁴ Humphrey F. Sassoon, *JS Bach's Musical Offering and the Source of Its Theme: Royal Peculiar*, 144 MUS. TIMES 38, 38 (2003).

¹⁸⁵ Gould & Keaton, *supra* note 178, at 143.

¹⁸⁶ Sassoon, *supra* note 184, at 38.

¹⁸⁷ *Id.*

¹⁸⁸ Gould & Keaton, *supra* note 178, at 143; Sassoon, *supra* note 184, at 38.

improvisations in their performances.¹⁸⁹ Pianists lacking skill in improvisation would actually play memorized preludes that so that they could appear to be improvising.¹⁹⁰ Improvisation was largely eliminated from the European classical tradition by 1910,¹⁹¹ other than in organ music and cadenzas, a decline that is closely connected to sacralization and the notation fetish that made it increasingly difficult to modify existing music. The elimination of improvisation from the classical tradition was thus a consequence of sacralization and the reverence given past music of the canonized classical tradition.¹⁹² Some attribute the decline in the classical tradition as a living musical tradition in which new works are being actively created to the notation fetish and sacralization that made changing existing music and improvisation increasingly disfavored.¹⁹³ These patterns eventually led to European art music ceasing to be mainstream popular music, replaced in the twentieth century by music influenced by both Asian and African music.¹⁹⁴

The development of the European art music canon was also connected to attitudes that post-canon composers brought to the composition process itself. Young composers came to focus on autonomous composition practices and developing distinctive personal styles that could match the assumed (and actually invented) traditions of their predecessors, but who modeled their creations on their predecessors in an elusive and esoteric fashion.¹⁹⁵ In the case of some composers such as Arnold Schoenberg, the post-canon composition process involved a battle against repetition.¹⁹⁶ These post-canon trends had significant implications for the decline in the European classical oral tradition as evinced in the elimination of improvisation. In particular, attitudes that view repetition with disfavor may have implications for the potential degree of embeddedness of oral aspects of musical traditions. This is particularly true since many examples exist in literature and music of creative and compositional processes that embed significant

¹⁸⁹ Gould & Keaton, *supra* note 178, at 144.

¹⁹⁰ 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 (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)).

¹⁹¹ Tagg, *supra* note 165, at 290 (noting that improvisation was virtually eliminated from the European classical tradition by 1910).

¹⁹² See Moore, *supra* note 172, 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.”).

¹⁹³ Tagg, *supra* note 201, 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”).

¹⁹⁴ McClary, *supra* note 81, at 292 (noting that the “European classical tradition has ceased to occupy the mainstream” and “no longer qualifies as the protagonist in the history of music—not even in the West”).

¹⁹⁵ J. Peter Burkholder, *Museum Pieces: The Historicist Mainstream in Music of the Last Hundred Years*, 2 J. MUSICOLOGY 115, 120 (1983).

¹⁹⁶ McClary, *supra* note 81, at 291.

aspects of oral traditions, many of which may involve formulaic structures and repetition.¹⁹⁷

Perhaps of most significance to copyright, sacralization and the notation fetish contributed to the decline of classical music as a living vibrant musical space, which has interestingly led in the twentieth century to attempts to return to past practice in order to bring life to the classical tradition. For example, attitudes toward improvisation in European art music have changed significantly since the latter half of the twentieth century. Recognizing some of the implications of the elimination of improvisation from the classical tradition for this tradition as a living tradition, after a gap of a century and a half, some twentieth century performers have reintroduced improvisation into the classical tradition.¹⁹⁸ More recently, music schools and a range of performers within the European art music arena have sought to return improvisation to classical music, in part to bring back life into this tradition.¹⁹⁹ Music schools are now training classical musicians in improvisation.²⁰⁰ One musicology scholar has even suggested that people today hoping to reinvigorate opera should look to nineteenth century practices like aria insertion as a means of bringing new life to opera.²⁰¹

The decline of improvisation in the classical tradition and emphasis on autonomous authorial composition have served to both minimize innovation in live performance of existing music in the classical tradition and separate musical composition, which should not involve repetition, from performance, which should involve perfect repetition of the written composition.²⁰² This

¹⁹⁷ See, e.g., Bennison Gray, *Repetition in Oral Literature*, 84 J. AM. FOLKLORE 289, 291 (1971) (describing repetition as a servant of oral improvisation and aural memory); ALBERT B. LORD, *THE SINGER OF TALES* 5, 46, 53, 103, 198 (2d ed. 2000) (describing processes by which oral poets compose and noting use of repetition in composition process); Vaira Vikis-Freibergs, *Creativity and Tradition in Oral Folklore or the Balance of Innovation and Repetition in the Oral Poet's Art*, in COGNITIVE PROCESSES IN THE PERCEPTION OF ART 325, ___ (W.R. Crozier & A.J. Chapman eds. 1984); WALTER ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD* 26, 64 (2d ed. 2002) (suggesting that formulaic style marks all thought and expression in primary oral cultures and discussing the spectrum of potential formulaic uses); Ian MacKenzie, *Improvisation, Creativity, and Formulaic Language*, 58 J. AESTHETICS & ART CRITICISM 173, 173 (2000).

¹⁹⁸ 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).

¹⁹⁹ See Alexandra Alter, *Making Up the Classics*, WALL ST. J., Nov. 28, 2008, at W1, online.wsj.com/article/SB122781195665062021.html (“It’s not like these are museum pieces under glass,” says Benjamin Zander, conductor of the 29-year-old Boston Philharmonic and an advocate of reviving improvisation. “These are living, breathing pieces, and our job is to bring them to life.”); 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>.

²⁰⁰ Alter, *supra* note 199.

²⁰¹ PORISS, *supra* note 173, at ___

²⁰² Alter, *supra* note 199 (“Many of the problems facing modern musicians derive from a discrepancy between their

typology separating composition from performance remains a dominant assumption in copyright, which has significant implications for living music traditions that do not incorporate the separation that came to dominate classical music by the end of the nineteenth century. Even in the classical tradition, however, the reintroduction of improvisation into the classical repertoire reflects some level of resistance to this dichotomous formulation.

C. *The Displacement of Classical Music by African Based Musics: Written Traditions in Blues and Jazz*

The ascension of African based music to the apogee of popular music during the course of a century has had significant social, cultural, economic, business, and legal consequences.²⁰³ The African American popular entertainment industry emerged in the last decades of the nineteenth century “in the midst of an American racial cataclysm.”²⁰⁴ In its earliest stages, this industry incorporated significant elements of blackface minstrelsy, which had exploded as a genre in the U.S. and elsewhere in the world following the success of the Virginia Minstrels in 1843.²⁰⁵ Early minstrel shows were a mixture of popular music, dance, and comedy, and often involved white male performers in burnt cork makeup (blackface), who engaged in performance of songs, often in dialect, that included depictions of African Americans as cheerful and simpleminded.²⁰⁶ Although this earlier form of classic minstrelsy did not disappear, minstrelsy evolved into variety shows and medicine shows and influenced vaudeville.²⁰⁷ The music of minstrelsy was sold and preserved in sheet music.²⁰⁸ Minstrel music thus became a key factor in emerging American popular culture, and was an important basis for coon songs that were a popular Tin Pan Alley product in the late nineteenth and early twentieth centuries.²⁰⁹ Both white and black performers participated in minstrel shows and wrote and performed coon songs.²¹⁰

The rise of the Tin Pan Alley music publishing industry in New York marked an important turning point in American music industry attitudes to copyright. Popular music, based to an increasing degree over time on African American based music, transformed the United States into a net exporter of culture. Prior to the late nineteenth century, the flow of culture to the

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).

²⁰³ Olufunmilayo B. Arewa, *Blackface, Black Music: How the Music of Slaves Transformed the World* (2012) (manuscript on file with author).

²⁰⁴ ABBOTT & SEROFF, *supra* note 80, at xi.

²⁰⁵ *Id.* at ___; Chris Goertzen, *Mrs. Joe Person's Popular Airs. Early Blackface Minstrel Tunes in Oral Tradition*, 35 *ETHNOMUSICOLOGY* 31, 31 (1991).

²⁰⁶ Goertzen, *supra* note 205, at 32; John Springhall, ‘On with the Show’: *American Popular Entertainment as Cultural and Social History*, 2 *HISTORY COMPASS* 1, 2 (2004).

²⁰⁷ Goertzen, *supra* note 205, at 32.

²⁰⁸ *Id.* at 33.

²⁰⁹ Dunson, *supra* note 166, at 241; DAVID A. JASEN, *TIN PAN ALLEY: AN ENCYCLOPEDIA OF THE GOLDEN AGE OF AMERICAN SONG* 91 (2003).

²¹⁰ KAREN SOTIROPOULOS, *STAGING RACE: BLACK PERFORMERS IN TURN OF THE CENTURY AMERICA* 22, 96 (2006).

United States came from Europe. By the early twentieth century, the United States had become a net exporter of both popular music content and sound recording technologies. As a result, publishers in the United States, who had operated for much of the nineteenth century at a net loss with respect to the import and export of cultural products, did not “embrace reciprocal arrangements with foreign publishers” at the time of the Berne Convention in 1886.²¹¹ The birth of Tin Pan Alley in New York City in the 1880s was the beginning of American dominance of mainstream popular music.²¹² As American popular music became more dominant globally, American music publishers began to focus to a greater extent on legal protection for their products.²¹³

Minstrelsy and coon songs were distinctively American popular culture forms that had significant implications for the development of African American popular music forms that were more authentic.²¹⁴ Some notable coon songs were among the first songs to be referred to as ragtime songs.²¹⁵ The ragtime craze, which had taken hold by the first decade twentieth century, offered significant opportunities for African American performers. Ragtime was the first of a series of twentieth century American popular music forms based to a significant degree in African American culture. African American composers and performers made use of emerging recording technologies in ways that facilitated the spread of ragtime and later popular African American based musical forms. The first African American recording artist, George W. Johnson, whose hits included “The Whistling Darkie” and “The Laughing Song,” made his first recording in 1890, just one year after the formation of Columbia Phonograph Company (now CBS/Sony) in 1889.²¹⁶

The African American based popular music forms that emerged in the twentieth century were disseminated to a significant extent through sound recordings. Consequently, the rise of African American popular music has paralleled the rise of the recording industry. By the 1930s, for

²¹¹ Garofalo, *supra* note 54, at 322.

²¹² *Id.* (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, 285-286 (1983) (discussing birth of Tin Pan Alley in New York City in 1880s, which by 1900 controlled the popular song industry); 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.”).

²¹³ Garofalo, *supra* note 54, at 322.

²¹⁴ LYNN ABBOTT & DOUG SEROFF, *RAGGED BUT RIGHT: BLACK TRAVELING SHOWS, “COON SONGS,” AND THE DARK PATHWAY TO BLUES AND JAZZ* 4 (2007) (noting that commercial coon song spilled over into African American popular music, and in the case of ragtime, “paved the way for greater authenticity”).

²¹⁵ EDWARD A. BERLIN, *RAGTIME: A MUSICAL AND CULTURAL HISTORY* 111 (2002).

²¹⁶ BROOKS, *supra* note 1, at 5, 15-71 (2005).

example, jazz had become synonymous with America's popular music.²¹⁷ A number of African American musical forms that became increasingly dominant forces in the popular music arena in the twentieth century reflect an aesthetic of composition based on repetition and revision.²¹⁸ Many of these African American based musical forms include oral musical traditions to a far greater extent than post turn-of-the-century European art music. Further, many African based musical traditions may have significant rhythmic complexity,²¹⁹ which is difficult to notate in all genres of music, not just African based ones.²²⁰

Although some commentators emphasize the use of oral traditions in African American based music, as is the case with oral traditions in classical music, the actual picture on the ground is more complex, and written traditions have also played a role in African American based musical traditions in which oral traditions have been predominant. Early blues music, which emerged prior to the advent of the era of widespread dissemination of sound recordings, was initially distributed in sheet music form.²²¹ Early blues pioneer, W.C. Handy, founded a music publishing business that in 2000 remained among the oldest significantly black family owned businesses in the U.S.²²² The first blues sound recording, recorded in 1914, was a version of Handy's *Memphis Blues*.²²³

In early jazz music in the 1920s, a written tradition existed that supported the dominant jazz oral tradition.²²⁴ Considerable variation existed in the musical literacy and technical competence of jazz musicians.²²⁵ Early jazz bands included both reading players, who could read music, and

²¹⁷ GUNTHER SCHULLER, *THE SWING ERA: THE DEVELOPMENT OF JAZZ, 1930-1945*, at 4, 6 (1989) (describing the swing era as a time when jazz became synonymous with America's popular music, social dances, and musical entertainment).

²¹⁸ Henry LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM* xxiv (1988) ("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").

²¹⁹ Alan P. Merriam, *Characteristics of African Music*, 11, *J. INT'L FOLK MUSIC COUNCIL* 13, 13 (1959).

²²⁰ See KOFI AGAWU, *REPRESENTING AFRICAN MUSIC: POSTCOLONIAL NOTES, QUERIES, POSITIONS* 64 (2003) (noting that problems of notation with respect to rhythm are universal and equally problematic for African music and Western music).

²²¹ ELIJAH WALD, *ESCAPING THE DELTA: ROBERT JOHNSON AND THE INVENTION OF THE BLUES* 15-16 (2004) (noting early blues became popular when recording was still in its infancy and was thus distributed largely in print form with the first published blues song appearing in New Orleans in 1908, composed by an Italian American named Antonio Maggio).

²²² Elliott S. Hurwitz, *W.C. Handy as Music Publisher: Career and Reputation 2* (Ph.D. Dissertation, Music, City Univ. N.Y., 2000).

²²³ WALD, *supra* note 221, at 17-18 (noting the first recording of a blues composition in 1914 by the Victor Military Band, which cut a version of W.C. Handy's "Memphis Blues" and the first sung blues on record in 1915 by Morton Harvey).

²²⁴ David Chevan, *Written Music in Early Jazz 2* (Ph.D. Dissertation, Music, City Univ. N.Y., 1997).

²²⁵ *Id.* at 63.

“fakers”, who could not read music.²²⁶ Trained musicians who sought to play in bands at times pretended to be “fakers” to obtain positions with bands, while most faking bands “had at least one reader to teach the other musicians the written parts.”²²⁷ Those pretending to be fakers who could actually read music may have been responding to broader societal expectations about African American musicians. For example, one orchestra, all the members of which were readers, did not use written music in performances at white dances:

Once the arrangement was worked over, however, it would be memorized and the music would not be brought to the job. Mr. Blake stated that this was to avoid breaking the white stereotype that blacks were too stupid to read music and that their musical ability was a wondrous gift and not the result of hard work. To maintain this illusion . . . when taking requests [, he] would ask the patrons to sing a few bars of the melody and ask for a few minutes to “work it out with the boys”. Then he would have the orchestra play the tune exactly as it had been rehearsed, to the accompaniment of amazed remarks by the audience about the natural talent of these Negroes.”²²⁸

In certain contexts such as steamboats in the 1920s, players were expected to read music.²²⁹ The dominant oral tradition in jazz influenced use of written music by jazz musicians. Even when basing works on a published score, early jazz musicians would “doctor” the score, which involved altering the written music to add riffs, improve, and play out the choruses.²³⁰ The practices of modifying music parallels in important respects the way written music was treated in European art music prior to sacralization trends.²³¹ Jazz musicians also relied on stock arrangements when making recordings, which typically involved modifying and supplementing simplified arrangements of the music performed.²³²

Blues and early jazz reflect varied approaches to and uses of notation that do not fit well within underlying copyright assumptions. In addition, blues and jazz developed during an era in which sound recording technology became widely available. As a result, the impact of copyright on such music can only be understood in light of the impact of technologies of sound reproduction that continue to challenge copyright in the digital era.²³³

²²⁶ *Id.* at 74.

²²⁷ *Id.* at 75-76, 81-82.

²²⁸ *Id.* at 82 (quoting interview with Eubie Blake).

²²⁹ *Id.* at 120-35.

²³⁰ *Id.* at 178-94.

²³¹ See *supra* notes ___ to ___ and accompanying text.

²³² Chevan, *supra* note 224, at 236-37.

²³³ 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.”).

III. TECHNOLOGY AND VISUAL BIAS

A. *Law and Sound Reproduction Technologies: Oral Traditions, Written Traditions, and Music*

Twentieth century technological innovation has laid bare potential areas of tension underlying copyright assumptions about music. The privilege of sight and resulting visual bias is evident in music copyright discourse, which typically do not encompass much complexity in considerations of musical notation. In contrast, consideration of oral traditions in classical music and written traditions in jazz and blues reveals the range and potential complexity of interactions between oral and written musical traditions. Discussions of copyright tend to connect oral traditions to performance of an underlying written composition, which is then considered to have musical primacy. The creation of music in varied genres suggests that this view of creation, notation, and orality is far too restrictive. Instead, oral and written traditions lie along a spectrum. Performance may thus embody performance of an underlying written composition but may also reflect a composition based in the norms and assumptions of an oral rather than a written tradition.

The restrictive view of the role of oral traditions in music is made yet more complicated by the introduction of a range of twentieth century technologies that have enabled the capture and dissemination of performance through sound recordings. From a copyright perspective, the advent of recording technology has to a significant extent been conceptualized as a new mechanism for dissemination of written musical compositions. Less attention has been paid to the copyright implications of changing musical practices enabled by recording technologies. In addition to facilitating the emergence of genres such as the blues, which, after its initial emergence, was largely based on dissemination of records rather than sheet music,²³⁴ recording and other sound capture technologies that became widely disseminated in the twentieth century have fundamentally changed music performance and composition practices, as well as audience expectations about music.²³⁵ In the case of classical music recordings, for example, the ability of composers, performers, and audiences to listen repeatedly to performances has led composers and performers to decrease deviations and rhythmic and other eccentricities, as well as modify performances to achieve a desired sound.²³⁶ The characteristic of repeatability in sound recordings should also be considered in light of an ethos of repetition and revision that characterizes some prominent forms of African American culture.²³⁷

²³⁴ Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 574, ____ (2010).

²³⁵ MARK KATZ, CAPTURING SOUND: HOW TECHNOLOGY HAS CHANGED MUSIC 14-17; 28-37 (2004) (contrasting recorded music with live performance, noting that recorded music is portable and severable from its original setting, and repeatable).

²³⁶ *Id.*

²³⁷ See *supra* note 218 and accompanying text; Arewa, *supra* note 3, at ____.

Copyright law responded to the advent of sound recordings and other technologies of sound reproduction by adding a layer of copyright protection to capture cultural products made using such new technologies. Thus, in addition to a copyright in the written musical composition, which was the first type of music creativity protected by copyright historically, compulsory license provisions were added to the 1909 copyright act that required compensation for those making mechanical copies of music compositions in forms such as sound recordings and pianola rolls.²³⁸ These mechanical license provisions came to be used for “cover” recordings, which during some segments of the twentieth century were a primary means by which white musicians, who had access to broad consumer markets, copied African American performers, who were limited by recording industry business practices to the smaller “race” records market segment.²³⁹ The displacement of European art music by African based musics in the popular music arena has significant and often unrecognized implications for copyright. Late nineteenth century European art music, particularly as it increasingly became a sacralized musical museum tradition, was a good fit for underlying copyright assumptions because compositional norms increasingly disfavored repetition, while performance norms restricted the ability of musical participants to change existing works. However, the displacement of European art music by African based musics has significantly challenged copyright, in part because compositional practices in many African based musical genres do not reflect compositional practices assumed in copyright, particularly as they relate to oral and written expressions of music.

The dominance of African based musics came at the same time as a series of technological innovations in music that facilitated oral compositional practices. Consequently, copyright treatment of these new technologies is a critical factor that should be considered within the context of a shifting terrain of musical preferences. Copyright treatment of new technologies has been significantly influenced by the 1908 case *White-Smith Music v. Apollo*, where the Supreme Court found that player piano perforated rolls were not copies within the meaning of the Copyright Act of 1870, as amended.²⁴⁰ The *White-Smith* case illustrates some of the problems that courts have faced in trying to apply copyright frameworks to new nonvisual technologies of

²³⁸ Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1080-81 (1909) (current version at 17 U.S.C. § 115 (2006)) (providing that copyright owners acquiescing to the use of a copyrighted work on instruments serving to mechanically reproduce the work must permit any other person to make similar use of the copyrighted work upon payment of a royalty of two cents); PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 51-53 (2003).

²³⁹ Reebee Garofalo, *Crossing Over: From Rhythm & Blues to Rock 'n' Roll*, in *RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC* 116, 128-29 (Norman Kelley ed., 2005); Arewa, *supra* note 234, at ____.

²⁴⁰ *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); Copyright Act of 1870, ch. ___, §§ ___, 16 Stat. 198, ____ (1870) (current version in scattered sections of 17 U.S.C.), as amended by Act of March 3, 1891, 51st Cong., 2d Sess., 26 Stat. 1106 (International Copyright Act) and Act of January 6, 1897, 54th Cong., 2d Sess., 29 Stat. 694.

musical creation and dissemination.²⁴¹ The *White-Smith* case has played a significant role in shaping legal responses to dissemination of later nonvisual technologies of musical reproduction. The legal analysis in *White-Smith* strongly reflects the privilege of sight and is relentlessly visual in its discussion of the nature of music and what it means for something to be a copy:

When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. ***These musical tones are not a copy which appeals to the eye.*** In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. ***It is not susceptible of being copied until it has been put in a form which others can see and read.*** The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.²⁴²

The strong visual focus of the court appears to be largely driven from implicit assumptions made about musical creation and the nature of musical composition. Congress responded to *White-Smith* by adding a mechanical (compulsory) license provision to the 1909 Copyright Act.²⁴³ Some six decades after *White-Smith*, Congress added limited copyright protection for sound recordings.²⁴⁴ The sound recording copyright initially protected against dubbing but not against imitation.²⁴⁵ Following adoption of copyright protection for sound recordings, a copyright may exist for the musical composition, including lyrics and musical notes, and any sound recordings.²⁴⁶

B. *Oral and Written Traditions and Law: Rereading Music Copyright Cases Through a Visual Bias Lens*

Copyright treatment of sound recordings reflects the limitations of perceptions of music that see but fail to truly hear and incorporate the implications of nonvisual aspects of music. A series of copyright cases have applied copyright to instances of borrowings involving or relating to sound

²⁴¹ Lisa Gitelman, *Reading Music, Reading Records, Reading Race: Music Copyright and the U.S. Copyright Act of 1909*, 81 MUSICAL Q. 265, 274–75 (discussing issues that arose as copyright confronted new technologies of musical creation and dissemination).

²⁴² *White-Smith*, 209 U.S. at 29-30 (emphasis added).

²⁴³ See *supra* notes ___ to ___ and accompanying text.

²⁴⁴ See *infra* notes ___ to ___ and accompanying text.

²⁴⁵ 1-4 NIMMER ON COPYRIGHT (2008), at §4.05[B][5] (“Under the 1909 Act, as expanded by the Sound Recording Amendment, however, if a phonorecording were published bearing the prescribed notice, the sound recording contained therein thereby acquired a statutory copyright . . . It is arguable that the underlying material recorded therein also acquired a statutory copyright, subject only to a limitation of remedies. That is, the sound recording copyright per se only protected against dubbing (or “recapture”) of the original sounds contained on the recording, not against imitation.”) (citations omitted).

²⁴⁶ Arewa, *supra* note 3, at 555-557 (discussing the application of copyright to music).

recordings in a potentially problematic way for those who create music that may bear similarities to or use existing sound recordings. These reflect pervasive assumptions that reflect the privilege of sight and the fundamental assumption that visual perception is the basis for musical knowledge. As a result, these cases also highlight the continuing difficulty courts experience in attempting to grapple with nonvisual forms of musical reproduction. *Bright Tunes Music Corp. v. Harrison's Music, Ltd.*²⁴⁷ found that the George Harrison song “My Sweet Lord” infringed the Chiffon’s song “He’s So Fine” based on theories of subconscious copyright infringement.²⁴⁸ In its discussion of Harrison’s infringement, the court focused exclusively on the visual representation of individual musical notes, with little or no reference to any nonvisual elements. For example, the court describes the two songs at issue as follows:

He's So Fine, recorded in 1962, is a catchy tune consisting essentially of four repetitions of a very short basic musical phrase, “sol-mi-re,” (hereinafter motif A), altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, “sol-la-do-la-do,” (hereinafter motif B). While neither motif is novel, the four repetitions of A, followed by four repetitions of B, is a highly unique pattern. In addition, in the second use of the motif B series, there is a grace note inserted making the phrase go “sol-la-do-la-re-do.” My Sweet Lord, recorded first in 1970, also uses the same motif A (modified to suit the words) four times, followed by motif B, repeated three times, not four. In place of He's So Fine's fourth repetition of motif B, My Sweet Lord has a transitional passage of musical attractiveness of the same approximate length, with the identical grace note in the identical second repetition. The harmonies of both songs are identical.²⁴⁹

The court’s discussion of these two songs is highly visual and does not discuss other musical features of the two works, particularly nonvisual features such as rhythm and timbre that are less visual or amenable to notation.²⁵⁰ A similar theory of infringement was used to find Michael Bolton liable for infringement of an Isley Brothers song.²⁵¹ The Ninth Circuit’s discussion of the jury verdict in this case (*Three Boys Music Corp. v. Bolton*) is also instructive. In discussing the evidence of substantial similarity at trial, which included testimony from the appellant Bolton’s expert witness regarding the combination of unprotectible elements in the Bolton work, the court notes: “On the contrary, Eskelin [Bolton expert] testified that the two songs shared a combination of five unprotectible elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending.”²⁵² A number of these unprotectible elements, including cadence, the

²⁴⁷ 420 F. Supp. 177, 178 (S.D.N.Y. 1976).

²⁴⁸ *Bright Tunes*, 420 F. Supp. at 181 (holding that Harrison committed subconscious infringement in copying He’s So Fine)

²⁴⁹ *Bright Tunes*, 420 F. Supp. at 178.

²⁵⁰ Arewa, *supra* note 3, at 536-37; Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation and Context*, 41 U.C. DAVIS L. REV. 477, ____ (2007).

²⁵¹ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 480 (9th Cir. 2000).

²⁵² *Three Boys*, 212 F.3d at ____.

verse/chorus relationship, and the fade ending, involve nonvisual characteristics of the relevant songs.

The outcome in the *Three Boys* case reflects some failings of current legal approaches to striking similarity in cases involving musical works.²⁵³ Further, the *Three Boys* outcome underscores the confusion of current legal approaches in parsing out and interpreting the significance of nonvisual aspects of musical works,²⁵⁴ as is clearly reflected in the *Three Boys* court's analysis of the Bolton work tape, which demonstrates Bolton's compositional practice in creating his work.²⁵⁵ The use of the work tape is ironic because the court implicitly takes the tape, a nonvisual form of reproduction, to reveal something about Bolton's compositional practice, while at the same time relying on highly visual concepts in affirming the jury finding of infringement.

The *Bright Tunes* and *Three Boys* cases, taken together, reflect assumptions about musical composition and practice that fail to take adequate account of the collaborative nature of composition in many popular musical areas,²⁵⁶ as well as the significance of nonvisual musical features. Although distorted views of musical creation have long been a part of copyright considerations of music, changing musical practices with respect to uses of sound recordings, which are nonvisual and which today form an important aspect of musical creation, challenge copyright assumptions about contemporary musical creation.

Music is now often created in the sound recording studio or with use of methods and technologies that do not involve written compositions.²⁵⁷ Further, the most visual aspect of a musical work, the musical composition, may in fact be derived from the nonvisual medium of the sound recording.²⁵⁸ The movement from the nonvisual to the visual contrasts significantly with dominant assumptions about musical creation in copyright. Copyright discussions of musical creation tend to remain focused on written compositions (i.e., music and lyrics), particularly with respect to their visual aspects, as reflective of musical composition and sound recordings as evidence of musical performance of an underlying written musical composition. This means that written music is often taken as a true indication of compositional practice, an assumption that may be not entirely reflective of actual musical creation today in many musical genres. The emphasis on written musical forms reflects the privilege of sight and a continuing

²⁵³ Arewa, *supra* note 3, at ____.

²⁵⁴ *Id.* at ____.

²⁵⁵ *Three Boys*, 212 F.3d at 485.

²⁵⁶ Arewa, *supra* note 3, at ____.

²⁵⁷ Paul Théberge, *Technology, Creative Practice and Copyright*, in MUSIC AND COPYRIGHT 139, 141 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (“With the introduction in the 1960s of multitrack recording technology and the recording practices associated with it, popular musicians began to explore the possibilities offered by the recording medium, to regard sound recording not simply as a means of reproducing music but as an integral part of musical creation.”).

²⁵⁸ Arewa, *supra* note 234, at ____.

emphasis on visual forms of musical reproduction as authoritative representations of musical composition and intent. This visual/nonvisual distinction parallels the distinction frequently made between composition and performance evident in the discussion of the *Newton v. Diamond*.²⁵⁹

Newton v. Diamond reflects the false dichotomy between composition and performance evident in a number of copyright cases. Further, the *Newton v. Diamond* court does not sufficiently consider the aesthetics of compositional practices in jazz and other African based musical forms. The improvisatory practices noted by the *Newton* court do not take sufficient account of the musicality embedded in jazz composition practices. This reflects an emphasis on written notation that is linked to assumptions derived from a sacralized European art music tradition, as well as the notation focus of copyright on the written composition as authoritative musical source. This notation focus tends to diminish the learning inherent in improvisation and the forms of oral and nonvisual forms of representation embedded in improvisatory practices.²⁶⁰ For example, jazz improvisers must learn stock musical figures and phrases in order to be able to construct their own solos, as well as be able to perform a wide range of musical forms, including meters, and chord progressions.²⁶¹ Such musical forms provide a framework for the direction of improvised solos.²⁶²

In the case of jazz and other dynamic, living musical forms, improvisatory practices present a challenge to copyright assumptions and raise questions about the best means of achieving copyright's core goals of promoting the progress of science and the useful arts.²⁶³ Improvisation practices are risky for musicians but potentially an important source of musical creativity and transformation.²⁶⁴ Jazz musicians improvise, “embellish and rhythmically displace notes within a melody.”²⁶⁵ The copyright emphasis on written notation discourages important creativity in improvisatory forms such as jazz.²⁶⁶ Further, contrary to the discussion of the *Newton* court,

²⁵⁹ See *infra* notes ___ to ___ and accompanying text.

²⁶⁰ BERLINER, *supra* note 183, at 774 (“The emphasis that the Western art music community places on formalized education and the written symbols of musical knowledge—from notation systems to music degrees—has made it difficult for members to recognize and appreciate, as a learned system, the knowledge that improvisers transmit through alternative education system and alternative forms of representation, some oral, some altogether nonverbal.”).

²⁶¹ Lee B. Brown, “Feeling My Way”: Jazz: Improvisation and Its Vicissitudes—A Plea for Imperfection, 58 J. AESTHETICS & ART CRITICISM 113, 115 (2000).

²⁶² *Id.*

²⁶³ U.S. CONST. art. I, § 8, cl. 8.

²⁶⁴ Brown, *supra* note 261, at 115.

²⁶⁵ Chevan, *supra* note 224, at 239.

²⁶⁶ 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

improvisation cannot merely be characterized as a product of “highly developed performance techniques,” “unique performance elements,” or reduced to a mere performance quirk. Rather, copyright categories notwithstanding, the distinction between improvising music and performing music is a stark one.²⁶⁷ Jazz copyright deposits have generally been in the form of lead sheets that sketched out a basic melody rather than complete transcriptions of the recorded piece.²⁶⁸ Some songs were copyrighted on multiple occasions as they were modified.²⁶⁹ Some jazz musicians, including Louis Armstrong and Duke Ellington, made a significant number of copyright deposits.²⁷⁰ Jazz music copyright deposits of written musical notation, however, are often “simplistic representations” of jazz musicality,²⁷¹ while deposits of sound recordings do not fundamentally address the problem of how copyright should best promote the development of living, evolving cultural forms.²⁷²

Another line of cases involving hip hop music adds complexity to copyright considerations of uses of sound recordings themselves as parts of new creations. In *Grand Upright v. Warner Bros. Records*, hip hop artist Biz Markie was found liable for infringement of the Gilbert O’Sullivan song “Alone Again Naturally,” without any analysis concerning the nature or basis of infringement and use of the Seventh Commandment of the Bible (“Thou Shalt Not Steal”) as the primary source of legal authority for the decision.²⁷³ The reuses of music in the case of Biz Markie and other hip hop artists are highly nonvisual in nature and often involve significant repetition and borrowing through practices that include sampling and looping. The undertone and low opinion of hip hop as a form of musical expression in the *Grand Upright* opinion reflects perspective on hip hop that is strongly influenced by visual bias. The *Grand Upright* court likely has reservations about hip hop musicality and the extent to which this particular form of creativity constitutes theft or a valid cultural product. The nonvisual aspects of hip hop creation and performance, which is based on reuse of sound recordings, challenges copyright both by virtue of its extensive borrowing and use of nonvisual aspects of music as embodied in sound recordings.

In the more recent *Bridgeport Music, Inc. v. Dimension Films* case, the Sixth Circuit held that

copyright law provides little protection for improvised material and thus “discourages vital reinterpretation” in musical forms such as jazz).

²⁶⁷ Brown, *supra* note 261, at 115.

²⁶⁸ *Id.* at 242.

²⁶⁹ *Id.* at 249-50.

²⁷⁰ *Id.* at 251-52 (noting that Louis Armstrong made more than 70 copyright deposits)

²⁷¹ Lee B. Brown, *Musical Works, Improvisation, and the Principle of Continuity*, 54 J. AESTHETICS & ART CRITICISM 353, 362 (1996) (“jazz players pay little attention to the simplistic representations of them in published sheet music”).

²⁷² Sound recordings may be deposited and registered with the Copyright Office. See U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS, Copyright Circular 56A (2009), www.copyright.gov/circs/circ56a.pdf.

²⁷³ 780 F. Supp. 182 (S.D.N.Y. 1991).

sound recordings may not be used without authorization of the copyright owner.²⁷⁴ The *Bridgeport* case involved a two-second sample of an arpeggiated guitar chord from a song by George Clinton and the Funkadelics. The much criticized *Bridgeport* decision effectively applies a sacralized notion of authorship to a sound recording. This decision thus paradoxically takes a key defining feature of notational focused approaches that reflect a sacralized view of music composition and applies it to the nonvisual medium of a sound recording. *Bridgeport* ends up with an interpretation of infringement in the sound recording context that is even more stringent than interpretations applied in contexts involving written compositions. Visual bias may explain at least some aspects of the court's holding. Because sacralized visions of music assume that the written composition is the locus of musical creativity, the court appears to be unable to see any form of creativity in the use of sound recordings as an aspect of compositional practices. Taken from this perspective, *Bridgeport* is consistent with copyright frameworks that reflect a privilege of sight that embeds significant visual bias. As a result, the *Bridgeport* court conceptualizes its limitation on uses of a sound recording as preventing something akin to theft rather than a policy posture that might potentially block certain forms of creativity. The *Bridgeport* holding is based on outdated assumptions about the nature of musical composition and creativity that does not take sufficient account of the ways in which sound recordings have become reflective of composition practice and tools used to enable composition itself.²⁷⁵

Reflecting continuing problematic assumptions about nonvisual musical reproduction, at one time, even those who sought to register sound recording copyrights encountered problems with the Copyright Office because it:

consistently refused to *register copyright in a musical composition as a published work where the registration was sought based on a recording embodying the composition*. The Office, instead, would advise applicants that, to be registered as a published work, *visually perceptible copies of the work*--that is, sheet music copies--had to have been sold or offered to the public. Where only recordings had been sold, the Office would suggest registration of the musical composition as an unpublished work.²⁷⁶

This visual emphasis, combined with conceptions of authorship deeply embedded in copyright, give primacy to written musical traditions. This means that compositional practices in genres such as jazz that involve improvisation and other aspects of oral musical traditions are disfavored by copyright. Further, the conception of derivative work in copyright gives owners of copyrighted works exclusive rights with respect to improvisations derived from copyrighted works they own. The derivative work concept may hinder the creation works based on

²⁷⁴ *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).

²⁷⁵ Arewa, *supra* note 3, at ____.

²⁷⁶ Testimony of Edward P. Murphy, Subcommittee on Courts and Intellectual Property of the House Judiciary Committee, Hearings on Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses, Serial No. 39 at 19 (June 27, 1997) (emphasis added).

improvisation in part because the musicians in jazz and other genres that create such works may not be able to receive effective copyright protection for their creations.²⁷⁷ Conceptions of authorship and the notion of a derivative work in copyright make incorporation of oral compositional practices an issue of continuing tension in music copyright.²⁷⁸

IV. COPYRIGHT AND PERFORMANCE

A. *Copyright and Perception: Interpreting Infringement in Music Cases*

The privilege of sight and visual bias highlight ways in which determinations of infringement involve acts of interpretation. Copyright treatment of music cases would benefit from interpretations that incorporate understanding of a broader range of musical approaches to composition and that take account of the significant variations in types of musical creativity. As a result, analysis of notation in music infringement cases should be supplemented by greater consideration of a broader range of musical features, as well as a better understanding of musical context. For example, courts could take more account of musical genre and dominant musical practices within musical genres and the role of oral and written traditions in music. Copyright analysis would also benefit from approaches that embrace the complexity of music as both a written and oral artistic endeavor. Doing so would require interpretations that take greater account of nonvisual musical features such as timbre, as well as musical features that are more difficult to notate, including rhythm. Such approaches should also incorporate greater understanding of musical perception in infringement cases.²⁷⁹ The need for music copyright approaches that incorporate perception based analysis is supported by studies in musicology of music perception that suggest that people listening to music rely to a far greater extent on timbre to recognize music than features such melody or rhythm.²⁸⁰ This means that what constitutes infringement in our ears may be quite different than what constitutes infringement on paper. This potential divergence underscores the ways that visual bias has potential to skew outcomes in infringement cases, potentially in significant ways. Greater consideration of the nonvisual and oral could thus fundamentally reshape approaches to infringement in music cases.

Shifting to greater perception based approaches in music copyright requires reassessment of existing approaches and the biases embedded in such approaches. European art music, in its

²⁷⁷ *Jazz Has Got Copyright Law*, *supra* note 266, at 1941 (“The contributions and compositions created by jazz artists are not considered original because, technically, they occur within the parameters of an underlying work and are therefore considered ‘derivative.’”).

²⁷⁸ 17 U.S.C. § 101 (2000) (defining a derivative work as “a work based upon one or more preexisting works”); *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *2 (S.D.N.Y. 2001) (“[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.”).

²⁷⁹ Olufunmilayo B. Arewa, *Interpreting Infringement: Music, Perception, and Copyright* (2012) (manuscript on file with author).

²⁸⁰ DANIEL J. LEVITIN, *THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION* 155-57 (2006).

dominant post-canon iteration, reflects many of the attributes that copyright implicitly or explicitly assumes about music. As a result of sacralization, the European art music canon has moved from being a living musical tradition to being characterized by a museum tradition. The displacement of European art music by African based musics in popular music is a core element of tensions in the application of copyright to music. To the extent that African American and other African based musics embody significant elements of an oral tradition in music, how copyright treats oral aspects of musical tradition matters. For example, in traditions with dominant or significant oral aspects, the conceptualization of performance as the embodiment of a composition is unlikely to constitute an adequate depiction of how music is actually created within the tradition. Further, a performance, as might be fixed today in a recording, may actually reflect a continuum of music practices. One side of this continuum might reflect dominant copyright assumptions and would conceptualize performance as purely a repetition of an underlying musical composition. On the opposite side of this spectrum, a performance that might be embodied in a sound recording could be thought of as a composition to the same extent as a composition reflected in written notation.²⁸¹

Visions of performance and composition in copyright should be shaped by context and consideration of music genre. Embedding the full spectrum of performance activities into copyright requires that copyright discussions recognize that in some genres performance may be merely duplicative of an underlying written composition but that other genres may have different norms with respect to performance and composition. This is particularly true given the core goals of copyright to stimulate creativity. A view of performance as duplicative and derivative of an underlying musical composition is not likely to promote greater creativity in many contemporary musical genres. Rather, as was the case with European art music in the late nineteenth century, such assumptions may in fact contribute to the dimming of living, vibrant creative forms.

A more comprehensive copyright vision of creativity should thus extend beyond the visual and be shaped to a far greater extent by actual contexts of creation, not assumed creative norms in museum traditions. This broader vision could also incorporate greater scrutiny of the topography of creativity, including in niche creative segments. A number of prominent and vibrant twentieth century popular music forms, for example, have been based on creative norms that do not track current copyright assumptions about autonomous and independent creation.

B. *What the Newton v. Diamond Court Should Have Said: The Musical Performance Spectrum and Equalization of the Performance Activities*

Consideration of *Newton v. Diamond* in light of core copyright goals of stimulating creativity and actual creative norms in many musical genres suggests other avenues the *Newton v.*

²⁸¹ Toynbee, *supra* note 175, at 93 (“recording is a form of fixation too, and therefore could be said to embody the composition as much as a manuscript does”); Arewa, *supra* note 11, at ____.

Diamond district and appeals courts could have taken in reaching their decisions. For example, the *Newton v. Diamond* appeals court could have acknowledged the musical performance spectrum in its decision. The court could have done this by stating that the “Choir” performance reflects elements found only in the sound recording and not reflected in the written composition. The court could then have said that these performance elements reflect oral compositional practices that are characteristic of jazz. This could have been a basis for the court’s recognizing a performance spectrum that could range from a performance being an oral duplication of a written composition on one extreme to performance as composition on the other end of the spectrum. The court could then have indicated that it did not need to reach a decision as to where the *Newton* performance lay on this spectrum because the use by the Beastie Boys constituted a *de minimis* use.

Acknowledgment in copyright legal discussions of the full spectrum of potential activities embedded in the performance category should lead to more equal treatment of performance within music copyright. Equalization of performance should be based on copyright frameworks that take sufficient account of the importance of creative practices such as borrowing and the potentially broad range of activities that may be embedded in both composition and performance, presence of divergent interests, and existence of a range of creative norms within and among artistic fields.

Equalizing music performance first requires recognition of the ways that technology and changing artistic norms have shaped the spectrum of activities embedded in performance. Further, technologies of sound and video reproduction permit artists to study and replicate performance in ways that were simply not possible when copyright and the conception of performing rights were first introduced. Further, with the widespread dissemination of broadcasted performance, music videos and other visual representations of musical performance, performance style has become an essential defining feature of the contemporary music scene. This means the existing conceptions of performing rights, which gives compensation to authors and composers of music, may need to be supplemented with rights that recognize the important contribution of performers in the creation and success of music. For example, in many cases, the copying of performance styles and techniques was a key aspect of covers of African American music created by artists such as Elvis Presley.²⁸² In other instances, covers involved copying of musical material but not performance style, as was the case in Pat Boone’s cover of Little Richard’s song *Tutti Frutti*.²⁸³

²⁸² ALLAN F. MOORE, *THE CAMBRIDGE COMPANION TO BLUES AND GOSPEL MUSIC* 159-60 (2003) (noting that Elvis grew up amidst African American and other influences, going on to combine such sources in cover versions of existing songs, and that Elvis “combined the forbidden thrills associated with black expression and the rebellious image of white trash in a sexy musical package that proved immensely popular and influential”).

²⁸³ *Id.* at 161 (noting that Boone’s schoolboy presentation of *Tutti Frutti* reflects nothing of the original context of “bawdy lyrics full of gay sexual *double entendres*”).

C. *Copyright and Creativity: Performers' Contributions and the Performer's Right*

Adoption of a performer's rights is just one avenue by which to address the visual bias in copyright. Particularized application of a performer's right in music is consistent with music copyright frameworks, which already incorporate significantly different licensing and other transactional structures than is the case in other copyright artistic arenas. However, the potentially divergent interests of composers, performers, and publishers is likely to be a factor of concern in any attempt to fully engage copyright with the realities of contemporary music performance practices.²⁸⁴ This is particularly true with respect to performing and performance rights, which have long been a contested arena. Further, the harvesting of additional royalties from performance activities has been an increasing focus of music authors and composers in the digital era. For example, in recent years, performing rights organizations have sought to collect royalties for their author and composer members on account of performances they assert occur when phones ring with musical ringtones.²⁸⁵ They have also attempted to collect performance revenues for 30 second pre-purchase previews or samples of songs played by prospective purchasers of iTunes digital downloads.²⁸⁶ In both cases, the collective rights organizations wish to gain new sources of revenue from activities for which their members already receive mechanical royalties. Such activities have not been limited to music authors and composers. Sound recording copyright holders have sought to end the broadcast radio exemption from paying performance royalties to owners of sound recording copyrights.²⁸⁷ The existing contested music performance terrain, combined a scope of copyright that is many believe is already overly broad, make adoption of additional rights something to be undertaken only with great care.

A performer's right should be adopted within an approach that is weighted in favor of promoting musical creativity and innovation. Protection for performers could also be adopted in the context of compulsory license or other approaches to copyright that recognize the importance of borrowing, users' rights, and spillovers.²⁸⁸ Consistent with the goals of copyright, copyright frameworks, including any a performer's right, should seek to incentivize creative risk and

²⁸⁴ See Towse, *supra* note 110, at 568 (noting that most standard economic literature on copyright assumes that the interests of creators and performers "are in perfect harmony with those of publishers, sound recording makers, broadcasters and all other businesses that process and distribute their work as if there were no contractual problems between them over property rights.").

²⁸⁵ Arewa, *supra* note 56, at ___ (discussing the 2009 Verizon ringtone case in which the American Society of Composers, Authors and Publishers (ASCAP) sought to receive performance royalties on each occasion that a cellular phone ringtone is played, which ASCAP asserted constituted a performance under the Copyright Act, in addition to the mechanical royalties already being paid by Verizon to ASCAP members).

²⁸⁶ *Id.* at ___.

²⁸⁷ *Id.* at ___ (noting differential treatment of broadcast radio and Internet and satellite radio, with the latter being required to pay performance royalties to owners of both sound recordings and the music composition, and the former not being required to pay performance royalties).

²⁸⁸ See, e.g., Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 258 (2007) (discussing role of spillovers).

minimize the legal risks of creative activities.²⁸⁹

CONCLUSION

Although the privilege of sight and visual bias have been a potent force in music copyright since the time of its inception, visual bias matters more today than at any time in the past. In the past, the deeply rooted assumptions of sacralization embedded in copyright existed in an artistic arena where significant creativity existed outside of this sacralized realm. Niche cultural and artistic movements such as hip hop and punk started in noncommercial space and eventually came to become commercialized, often with significant initial criticism of those who sought to commercialize such movements.²⁹⁰ This meant that an effective accommodation existed that permitted the development of varied types of creativity, despite the sacralization assumptions that were dominant in copyright. In the digital era, collisions between formerly separate artistic spheres are increasingly evident.²⁹¹ If not handled with care, legal responses to these colliding spaces could significantly harm creativity. Changing digital era contexts thus mandate recognition and reexamination of the role of the privilege of sight and visual bias in copyright.

²⁸⁹ Arewa, *supra* note 175, at ____.

²⁹⁰ Arewa, *supra* note 56, at ____.

²⁹¹ MATT MASON, *THE PIRATE'S DILEMMA: HOW YOUTH CULTURE IS REINVENTING CAPITALISM* 6 (2008) (noting that, unlike the past, in the digital era, "illegal pirates, legitimate companies, and law-abiding citizens are now all in the same space, working out how to share and control information in new ways").