

BORROWING THE BLUES
COPYRIGHT AND THE CONTEXTS OF ROBERT JOHNSON

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INTRODUCTION

In 2004, Eric Clapton released the DVD-CD *Sessions for Robert J*¹ and the CD *Me and Mr. Johnson*,² which paid homage to Robert Johnson, one of Clapton's greatest musical influences.³ Clapton is not alone in his reverence of Robert Johnson. The ascension of Robert Johnson to the status of preeminent representative of early recorded blues traditions reflects broader trends in the creation and reception of blues music in the twentieth century. Johnson's position decades after his death is a startling contrast to the circumstances of his short life and the contexts within which he lived and performed.

Robert Johnson was a poor African American itinerant blues musician who died in obscurity under mysterious circumstances in 1938 at a country crossroads near Greenwood, Mississippi. Johnson was one of a number of musicians who made their way through the Mississippi Delta during the time period of his life and death. The legend of Robert Johnson, however, surpasses that of his musical contemporaries: Robert Johnson is the most well known bluesman of his era today. From his humble beginning and obscure death, Robert Johnson later emerged to become one of the biggest influences on rock and roll music, particularly through musicians in Great Britain, many of whom like Eric Clapton, count Robert Johnson as one of their greatest influences. Robert Johnson was one of the first 12 members inducted into the Rock and Roll

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¹ Eric Clapton, *Sessions for Robert J.* (Reprise/Wea 2004).

² Eric Clapton, *Me and Mr. J.* (Reprise/Wea 2004).

³ Eric Clapton considers Robert Johnson to be "the most important blues musician that ever lived. See *infra* note 78.

Hall of Fame. Robert Johnson is far more famous in death than he could ever have envisaged during his lifetime. The story of Robert Johnson is thus an important one for the history of music, particularly in relation to the development of blues music traditions and the rock and roll traditions that emerged from blues.

The story of Robert Johnson is also an important one for copyright. Treatment of many blues musicians of Robert Johnson's era represent an early example of continuing tensions in the application of copyright to a broad range of living musical traditions. Copyright treatment of blues musicians also reflects the difficulties inherent in the application of copyright as a property rule to musical forms, including blues, which are characterized by pervasive borrowing. The reality of musical borrowing is often insufficiently acknowledged in discussions of copyright and music. The intersection of copyright, Robert Johnson's music and blues more generally can reveal something of how copyright law treats creative processes that reflect significant amounts of borrowing. Further, the contexts of application of copyright law to blues, as well as more generally, reflect the continuing influence of hierarchies of culture and power that have long shaped copyright law and its application.

The Robert Johnson story is also significant because of the importance of Robert Johnson as an influence not only on Eric Clapton but on a broad range of musicians. From an obscure death and largely unknown life, Robert Johnson emerged to become a significant influence on a broad range of artists, including The Rolling Stones, Cream, Fleetwood Mac, Bob Dylan, Led Zeppelin, The Allman Brothers Band, Robert "Junior" Lockwood, The Animals, The Who, Keb Mo', The Red Hot Chili Peppers, and Lynyrd Skynyrd.

I. CREATION AND CONTEXT: BLUES AND THE BIRTH OF ROCK AND ROLL

A. *Copyright and Creation: The Contexts of Blues*

Blues is a form of musical production that had emerged from African American communities in the American south by the early twentieth century.⁴ Blues music initially emerged as a popular music form distributed largely through sound recordings made by African American musicians for African American audiences. Although blues sound recordings were based on a continuing live blues performance tradition, the types of recordings that were distributed by companies that distributed so-called “race” records, of which blues formed an important segment, were significantly influenced by cultural assumptions about and hierarchies of race and music. The ways in which music industry representatives used copyright in their business dealings with early blues musicians reflected these hierarchical assumptions. The contexts of performance and reception of blues music have, however, not remained static. Blues genre has been reinvented in different times and contexts by a diverse range of performers for varied audiences. In the case of early recorded blues, later treatment of such music was also significantly influenced by blues collectors, who played an important role in shaping and preserving our legacy of recorded blues. The interaction of blues with copyright similarly reflects a complex story that has changed over time as different actors have made use of copyright in relation blues music. Blues music traditionally has reflected an aesthetic based on borrowing, which has contributed to the dynamism and widespread reach of blues as a musical form.⁵ Borrowing is thus an important element in blues innovation and is evident in both the sources from which blues derives as genre

⁴ RICHARD J. RIPANI, *THE NEW BLUE MUSIC: CHANGES IN RHYTHM & BLUES, 1950-1999*, at 4-9 (2006).

⁵ Bruno Nettl, *World Music in the Twentieth Century: A Survey of Research on Western Influence*, 58 *ACTA MUSICOLOGICA* 360, 361 (1986) (noting that cultural mixture is a major prevailing force in musical innovation).

as well as in the culture of borrowing that has frequently existed among blues musicians.⁶ The importance of borrowing is by no means exclusive or unique to blues as a musical form.⁷

At the same time, considering copyright and blues music presents valuable lessons about the importance of context in copyright. In the case of blues music, the context of pervasive borrowing must be considered within the context of a segregated society and music industry where music became increasingly categorized by race, particularly as recording technology diffused among the broader public. This milieu profoundly influenced the ways in which copyrights came to be applied to blues at different times to different producers of blues music targeted toward very different audiences. Treatment of blues music and blues musicians within copyright frameworks illustrates some ways in which copyright may actually operate in specific contexts that may reflect existing inequalities and the influence of factors such as race and fame. Such factors continue to shape the operation of copyright in practice in ways that are not always sufficiently analyzed in copyright discourse.

B. *The Origins of Blues: Legends, Romance and Authenticity*

Blues is a distinctively American musical form and one of the most important of such forms.⁸

Blues music is seen as an important element in a broad range of other musical forms, including jazz, country music, rhythm and blues and rock and roll.⁹ Blues music also has broader social

⁶ David Evans, *Musical Innovation in the Blues of Blind Lemon Jefferson*, 20 BLACK MUSIC RES. J. 83 (2000) (discussing Blind Lemon Jefferson's blues music innovations).

⁷ Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation and Context* 41 U.C. DAVIS L. REV. 477, ____ (2007).

⁸ RIPANI, *supra* note 4, at 3-5 (discussing the new blue music that originates in African American folk music in the mid-nineteenth century that was a blend of various combinations of inherited elements and that was "wholly new and totally American").

⁹ Robert Walser, *Rock and Roll*, in __ THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS __, __ (Stanley Sadie ed., 2001), available at <http://www.grovemusic.com> (noting the influence of blues on rock and roll); Paul Oliver, *Blues*, in __ THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS __, __ (Stanley Sadie ed., 2001),

significance that extends far beyond the musical arena.

Blues consists of a “definable body of musical elements or traits inherited from both African and European traditions, that forms the foundational language of much twentieth-century American musical style.”¹⁰ The musical characteristics of blues are typically identified as including syncopated 4/4 rhythmic structure or offbeat phrasing, a unique musical mode that may incorporate flatted thirds and sevenths and lyrics in a three line stanza in which the second line repeats the first (aab).¹¹ Blues music, however, represents far more than the specific musical characteristics that might distinguish it. Blues music has also been characterized as representing a view of experience.¹² Further, blues musical system, including its lyrical, harmonic and melodic conventions, “served as a trope in much of twentieth-century black music history in America.”¹³

The origins of blues remain steeped in mystery and shrouded in legend.¹⁴ Blues has roots in

available at <http://www.grovemusic.com> (noting the influence of blues on the Beatles, Rolling Stones, the Animals and the Who); SOUTHERN, *supra* note 376, at 361–65, 505 (noting the influence of blues on jazz and rock music); Peter Wicke, *Rock Music: A Musical-Aesthetic Study*, 2 POPULAR MUSIC 219, 222 (1982) (noting origin of rock and roll in various rhythm and blues playing styles as well as other musical genres).

¹⁰ RIPANI, *supra* note 4, at 16.

¹¹ *Id.* at 17-61; EILEEN SOUTHERN, *THE MUSIC OF BLACK AMERICANS: A HISTORY* 334-36 (3d ed. 1997) (noting three line stanzas, personal lyrics, duple rhythm with marked syncopated patterns, an entire song in twelve bars and an altered scale with the third, fifth, seventh and occasionally the sixth degrees being treated ambiguously and sometimes being lowered); JEFF TODD TITON, *EARLY DOWNHOME BLUES: A MUSICAL AND CULTURAL ANALYSIS* 137-174 (2d. ed. 1994) (describing the musical characteristics of traditional country blues).

¹² HOUSTON A. BAKER, JR., *BLUES, IDEOLOGY AND AFRO-AMERICAN LITERATURE: A VERNACULAR THEORY* 7 (1984) 7 (suggesting that blues be considered as a “forceful matrix in cultural understanding . . . [whose] performers offer interpretations of the experiencing of experience”).

¹³ GUTHRIE P. RAMSEY, JR., *RACE MUSIC: BLACK CULTURES FROM BEBOP TO HIP-HOP* 45 (Regents of the Univ. of Cal. 2003); *see also* LEROI JONES, *BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA* (1999); SAMUEL A. FLOYD, JR., *THE POWER OF BLACK MUSIC: INTERPRETING ITS HISTORY FROM AFRICA TO THE UNITED STATES* (1995).

¹⁴ PAUL OLIVER, *SONGSTERS & SAINTS: VOCAL TRADITIONS ON RACE RECORDS* 260 (1984) (“When, or indeed how, the blues emerged is a questions which has provoked much speculation but, not surprising, no incontestable evidence.”).

African music and African American folk and work songs.¹⁵ The first recognizable blues can be traced to the late nineteenth century to early twentieth century.¹⁶ Despite its widespread popularity over an extended period of time, blues has over time been a flexible category subject to many romanticized conceptions. Furthermore, what constitutes blues has meant different things to different people at different times.¹⁷

Although the origins of blues remain obscure,¹⁸ what many refer to as blues had emerged by the turn of the century as a form of African American vernacular music.¹⁹ Although blues music was produced throughout the American South,²⁰ the Mississippi Delta has produced a disproportionate share of great blues musicians and “was home to a unique strain of blues music, which has become extremely influential on the modern-day scene.”²¹ The world from which blues derived was far from romantic: “if there is one place and one time outside of slavery that black Americans have no romanticism or nostalgia about, it is Depression-era Mississippi.”²² Blues took root in the abject poverty of the Mississippi Delta region among players whose parents had in many instances been slaves or the children of slaves. The social conditions in

¹⁵ ROBERT PALMER, DEEP BLUES 25-37 (1982); William F. Danaher, *The Influence of Blues Queens, 1921 to 1929*, 48 AM. BEHAVIORAL SCI. 1453, 1454 (2005).

¹⁶ PALMER, *supra* note 15, at 44 (noting that blues was so firmly rooted in earlier African American folk music that identifying when it became blues is difficult to say with certainty); Danaher, *supra* note 15, at 1454.

¹⁷ ELIJAH WALD, ESCAPING THE DELTA: ROBERT JOHNSON AND THE INVENTION OF THE BLUES xiii-xvi (2004) (discussing different conceptions over time of what constitutes the blues).

¹⁸ Southern, *supra* note 11, at 332 (noting that less is known about the origin of the blues than the beginning of ragtime).

¹⁹ *Id.* at 332, 338 (noting that W.C. Handy, the first man to popularize the blues, published his first blues composition, the *Memphis Blues* in 1912 and first thought about using it in a composition after hearing a singer in a Mississippi train station and that Gertrude “Ma” Rainey, the earliest professional blues singer, remembered first hearing the blues in 1902); WALD, *supra* note 17, at xiii (noting that blues was “primarily black popular music” for the first fifty years of its existence).

²⁰ WALD, *supra* note 17, at 83.

²¹ WALD, *supra* note 17, at 83; Stephen A. King, *Blues Tourism in the Mississippi Delta: The Functions of Blues Festivals*, 27 POPULAR MUSIC & SOC’Y 455, 456 (2004) (noting that the Mississippi Delta has been called the “home of the blues”).

²² WALD, *supra* note 17, at 82.

Mississippi during that time period were characterized by segregation and pervasive oppression of African Americans.²³ The conditions in the Mississippi Delta today continue to echo these historical circumstances.²⁴

B. *Blues as Popular Music: Mining the Mississippi Delta*

Since blues has meant different things to different people at different times, much confusion exists about blues as musical phenomenon and blues as marketing phenomenon. Not much is known about the early origins of blues music that came to be recorded and distributed to larger audiences by the 1920s.²⁵ Although blues derives from forms of African American vernacular music, as is often the case, clear lines do not always exist between folk culture and popular culture.²⁶ The emergence of blues as popular music through recording industry advertising further confuses this distinction, particularly since the “primitive” appeal of such music was a key aspect of its marketing.²⁷ The marketing of blues music in turn had an influence on the production of the music itself, particularly since recording industry scouts only wanted to hear particularly kinds of music that they characterized as “authentic” rural music.²⁸ This gave professional African American musicians during that time period significant incentives to

²³ King, *supra* note 21, at 459 (describing the Mississippi Delta as the “lynching capital of the U.S.”); FRANTZ FANON, *Racism and Culture* (speech to the First Congress of Negro Writers and Artists in Paris), in *TOWARD THE AFRICAN REVOLUTION* 46f (Haakon Chevalier, trans.) (1967) (“Thus the blues—‘the black slave lament’—was offered up for the admiration of the oppressors. This modicum of stylized oppression is the exploiter’s and the racist’s rightful due. Without oppression and without racism you have no blues. The end of racism would sound the knell of great Negro music.”).

²⁴ King, *supra* note 21, at 460 (noting that the Mississippi Delta is still segregated and many of its citizens, particularly African Americans, live in abject poverty—“nearly 75 percent of the black households in the small Delta town of Shelby did not possess a car.”) (citations omitted).

²⁵ SOUTHERN, *supra* note 11, at 332.

²⁶ DOMINIC STRINATI, *AN INTRODUCTION TO THEORIES OF POPULAR CULTURE* 38 (2004) (discussing the differences between folk, elite and mass culture); JOHN STOREY, *AN INTRODUCTORY GUIDE TO CULTURAL THEORY AND POPULAR CULTURE* 17-18 (1993) (noting the definitional problems in distinguishing between popular culture and other forms of cultural production); HERBERT GANS, *POPULAR CULTURE AND HIGH CULTURE: AN ANALYSIS AND EVALUATION OF TASTE* 38 (1999) (discussing borrowings in high culture and popular culture from folk culture).

²⁷ WALD, *supra* note 17, at ____.

²⁸ *Id.* at ____.

produce the type of music that could give them the opportunity to be recorded.²⁹

As was the case with later musicians who borrowed from blues, the folklorists and record industry scouts who mined blues music from the Mississippi Delta were focused on finding “authentic” forms of musical production.³⁰ This focus on authenticity reflects a historic emphasis in the folklore discipline.³¹ The British musicians who were influenced by blues tradition in the 1950s and 1960s, however, also tended to view blues through a particular lens that reinforced existing emphases on authenticity.³² This focus on authenticity was also evident in the activities of the earliest critics and collectors of blues music,³³ who played an important role in constructing the blues canon.³⁴ This focus on authenticity by varied players in blues arena at different points in time has meant that the corpus of early blues recordings represents a biased sample.³⁵ The magnitude of this bias can only be estimated.³⁶ The other types of music

²⁹ *Id.* at 22 (“black performers were ghettoized, and their access to the recording world was dependent on their singing ‘black’ music”).

³⁰ BENJAMIN FILENE, *ROMANCING THE FOLK: PUBLIC MEMORY AND AMERICAN ROOTS MUSIC* (2000).

³¹ REGINA BENDIX, *IN SEARCH OF AUTHENTICITY: THE FORMATION OF FOLKLORE STUDIES* 198 (1997); Benjamin Filene, “*Our Singing Country*”: *John Lomax, Alan Lomax, Leadbelly and the Construction of an American Past*, 43 *AM. Q.* 602, 613 (1991) (noting that the Lomaxes worked hard to preserve Leadbelly’s authenticity and at times controlled his repertoire); Ron Eyerman & Scott Baretta, *From the 30s to the 60s: The Folk Music Revival in the United States*, 25 *THEORY & SOC’Y* 501, 512 (1996) (noting that Leadbelly was coached by the Lomaxes as to his repertoire).

³² WALD, *supra* note 17, at 46-48.

³³ Eyerman & Baretta, *supra* note 31, at 503, 508, 51 (noting that American folk music was invented in the 1930s by an urban intellectual elite with a left political orientation and that early recording undertaken under the Federal Arts Project of the WPA led to the creation of an archive or even canon of folk music for future generations and movements).

³⁴ John Dougan, *Objects of Desire: Canon Formation and Blues Record Collecting*, 18 *J. POPULAR MUSIC STUD.* 40, 40 (2006); Mike Daley, “*Why Do Whites Sing Black?*”: *The Blues, Whiteness, and Early Histories of Rock*, 26 *POPULAR MUSIC & SOC’Y* 161, 163 (2003) (noting that the idea of blues is a constructed one influenced by multiple sources, including collectors, critics and the musicians who reinterpreted the blues for a wider audience).

³⁵ WALD, *supra* note 17, at 57 (“[O]verall the recordings left to us by the folklorists and the commercial companies both tend to give a skewed view of the racial divide in the music of early rural performers, and reinforce the impression that such players were limited to a distinct ‘country’ repertoire.”); Dougan, *supra* note 34, at 41 (noting the role of recording in the transition of blues music to mass art and the relationship of mostly African American consumers of blues recordings in the 1920s and 1930s and white, male record collectors of the post-World War II era who became self-appointed keepers of the canon); Scott DeVaux, *Bebop and the Recording Industry: The 1942 AFM Recording Ban Reconsidered*, 41 *J. AM. MUSICOLOGICAL SOC’Y* 126, 127 (1988) (noting the role of the

that early blues recording artists could and did perform have consequently been largely lost.³⁷

This focus on authenticity in blues had two important consequences. It first of all made many think of blues as a primitive form of folk music, rather than as a form of music that like ballet was derived from folk forms but that also came to be performed by professional musicians.³⁸

Although the folk tradition existed alongside professional blues musicians, many of the rural blues musicians who were recorded in the 1920s were professional musicians.³⁹ In addition, the tendency to see blues music as a primitive form of collective folk production reflected widespread stereotypes about African Americans and was part of a conceptual framework of later borrowers that facilitated the free borrowing of such music, often without attribution, let alone compensation.

How blues musical production and creativity are conceptualized has significant copyright implications, particularly given the emphasis on independent creation by those deemed authors that copyright discourse about creation often emphasizes.⁴⁰ The ways in which Robert Johnson's contributions to blues music have been depicted by later musicians and musical commentators highlights the curious ways in which blues creativity may be conceptualized. Blues and other

recording industry in the selection process of the existing repertory of bebop recordings in the 1940s); Filene, *supra* note 31, at 618-19 (discussing an episode in which the Lomaxes, who operated closely with prison officials, attempted to get a recording from a prisoner who was brought to the room at gunpoint and noting that the "Lomaxes did not reflect on whether going to such lengths to ferret out songs created a skewed portrait of America's folk music."); H. Bruce Franklin, *Songs of an Imprisoned People*, 6 MELUS 6, 17 (1979) (noting that John Lomax collected ten versions of the work song "Go Down Old Hannah" from Texas convicts).

³⁶ WALD, *supra* note 17, at 47 (noting that record scouts discouraged black musicians from playing "hillbilly" music, which is why "all but a tiny sample of rural fiddle music" recorded during the 1920s come from white players); Dougan, *supra* note 34, at 43 (noting that talent scouts and label executives discouraged artists from recording popular non-blues songs that would have required that they pay mechanical royalties).

³⁷ WALD, *supra* note 17, at 57.

³⁸ WALD, *supra* note 17, at 43; PETER GURALNICK, *SEARCHING FOR ROBERT JOHNSON* 48 (1989) (noting that Robert Johnson was a professional musician).

³⁹ WALD, *supra* note 17, at 43 (noting that the purveyors of blues recorded in the 1920s were people who played music for a living, some of whom had other jobs as well).

⁴⁰ Arewa, *supra* note 7, at ____.

forms of African American musical production have involved creation through collaboration and repetition.⁴¹ The existence of borrowing in the blues tradition is evident in many ways, including through use of common lyrics, music and musical forms. When folklorist Alan Lomax first recorded Muddy Waters, Muddy Waters sang his version of a song that was well known in the Mississippi Delta.⁴² Muddy Waters called his version “Country Blues.”⁴³ This same song had been recorded by Son House as “My Black Mama” and Robert Johnson as “Walkin’ Blues,”⁴⁴ which reflects a creative tradition in blues composition of rearranging existing music and adding new verses.⁴⁵ The elevation of Robert Johnson as blues exemplar has involved significant diminution of the role of shared and collaborative aspects of blues creation and performance in Johnson’s works. Robert Johnson’s status has in turn been accompanied by more favorable outcomes for his estate from a copyright perspective. For this reason, copyright treatment of Robert Johnson and other blues musicians over time reveals something of copyright’s underlying assumptions about creation as well as the ways in which creators in living musical traditions are often not well served by such assumptions.

⁴¹ BAKER, *supra* note 12, at 172 (describing blues as involving “performers [who] offer interpretations of the experience of experience”); 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”).

⁴² PALMER, *supra* note 15, at 4 (discussing the first recordings of Muddy Waters).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ WALD, *supra* note 17, at xx (noting that introducing songs as one’s own composition meant that a performer had rearranged the compositions and added some new verses); John Cowley, *Really the ‘Walking Blues’: Son House, Muddy Waters, Robert Johnson and the Development of a Traditional Blues*, 1 *POPULAR MUSIC* 57, 58 (1981) (discussing the questions Alan Lomax asked Muddy Waters in August 1941 during interviews in which Muddy Waters noted that his song “Country Blues” used the same tune as Robert Johnson’s “Walkin’ Blues”).

C. *The Robert Johnson Puzzle: Uncovering a Musical Cipher*

Robert Johnson is the most influential blues musician from the early period of blues recording.⁴⁶ Robert Johnson died in 1938 under mysterious circumstances that remained unknown and uncertain for decades after his death;⁴⁷ Robert Johnson's death remains a subject of discussion among blues fans, even today some 70 years after he died.⁴⁸ Robert Johnson was not among the most popular blues musicians of his time,⁴⁹ however, at least based on record sales of his recordings at the time of their initial release.⁵⁰ Although Robert Johnson's music has been described as having emotional intensity and visceral appeal, as well as important aesthetic and musical qualities,⁵¹ later commentators have typically elevated Johnson far above those who played during the same era.⁵²

Commentators have so elevated Johnson by using classic language associated with Romantic author discourse that emphasizes the unique genius of Johnson's compositions. The Johnson corpus consists exclusively of two discs of 29 recordings made in two separate recording

⁴⁶ Charles Ford, *Robert Johnson's Rhythms*, 17 *POPULAR MUSIC* 71, 71 (1998) (noting that Robert Johnson provides one of the few pre-war influences on rock and attributing his influence to his pitch and timbre and irregular, syncopated rhythms).

⁴⁷ In the Matter of the Estate of Johnson, Harris and Anderson v. Johnson, 767 So.2d 181, 182 (Miss. S. Ct. 2000) (noting that Johnson died an apparent indigent).

⁴⁸ David Connell, *Retrospective Blues: Robert Johnson—An Open Letter to Eric Clapton*, 333 *BRIT. MED. J.* 489, 489 (2006) (responding to Eric Clapton's discussion about Robert Johnson and noting that Johnson's death may have been caused by Marfan's syndrome, which may be indicated by Johnson's unnaturally long fingers as evident in his photographs).

⁴⁹ WALD, *supra* note 17, at xv (noting that Johnson's music excited little interest among black blues fans of his time); Ford, *supra* note 46, at 78 (noting that "Terraplane Blues" was the only Johnson recording to achieve substantial sales).

⁵⁰ WALD, *supra* note 17, at xv (noting the lack of popularity of Johnson's music in the recordings released before his death).

⁵¹ James Bennighof, *Some Ramblings on Robert Johnson's Mind: Critical Analysis and Aesthetic Value in Delta Blues*, 15 *AM. MUSIC* 137, 138 (1997).

⁵² WALD, *supra* note 17, at ____.

sessions in 1936 and 1937.⁵³ Romantic author discourse has played an important role in defining who constitutes an “author” for copyright purposes in part by emphasizing the unique and genius-like contributions of individual creators. Romantic author assumptions are a primary mechanism by which borrowing and collaboration in creation are minimized or even denied.⁵⁴ This vision of authorship has significant implications for the application of copyright to blues music. The collaborative nature of blues musical composition does not lend itself very well to Romantic author characterizations. In blues practice, the combination of individual performers crafting material from a collaborative tradition is a difficult one from the perspective of current assumptions about creation in copyright. Copyright discourse, which tends to reflect autonomous notions of cultural production, has difficulty in dealing with many collaborative forms of cultural production that involve borrowing.⁵⁵ Later romanticization of his musical creations aside, Robert Johnson falls firmly within a blues tradition characterized at least in part by repetition and reuse of existing music and lyrics as a core aesthetic.⁵⁶ The divergence between Robert Johnson’s actual musical practice and later characterizations of his musical genius is thus significant.

In addition, the conceptual positioning of Robert Johnson and his talents is important for understanding how he became so prominent as compared with his peers. Robert Johnson is

⁵³ WALD, *supra* note 17, at 126-89 (listing and assessing all of the recordings made by Johnson in his two recording sessions); *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 686 (9th Cir. 2000) (noting that Johnson recorded 29 songs before he was murdered in 1938 in two recording sessions in November 1936 and June 1937).

⁵⁴ See Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 15, 21 (Martha Woodmansee & Peter Jaszi eds., 1994) (discussing the “modern myth that genuine authorship consists in individual acts of origination”).

⁵⁵ Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006).

⁵⁶ Ford, *supra* note 46, at 88 (noting that Johnson borrowed and pasted-in materials much like his predecessors and shaped his pieces into unique and autonomous forms).

separated from the broader field of blues musicians by being characterized as a musical genius and creator of a unique corpus of music:

Robert Johnson became the personification of the existential blues singer, unencumbered by corporeality or history, a fiercely incandescent spirit who had escaped the bonds of tradition by the sheer thrust of genius . . . Like Shakespeare, though, the man remains the mystery. How was one individual, unschooled and seemingly undifferentiated from his fellows by background or preparation, able to create an *oeuvre* so original, or such sweeping scope and power, however slender the actual body of work may have been in Johnson's case. . . The sources of his art will likewise remain a mystery. The parallels to Shakespeare are in many ways striking. The towering achievement. The shadowy presence . . . I am not arguing that Robert Johnson's art has a Shakespearean scope . . . As a lyric poet, though, he occupies a unique position where he can very much stand on his own. His music remains equally unique. Not that it cannot be placed within a definable tradition.⁵⁷

The ability to characterize Johnson and his contributions in particular ways were facilitated by the mystery of Robert Johnson,⁵⁸ including his fairly obscure life, the lack of any visual representations or photos of him until some thirty-five years after his death,⁵⁹ Johnson's alleged connections to Satanism and mysterious death.⁶⁰ Given that an estimated 517 reported lynchings occurred in the Mississippi Delta (described as the "lynching capital of the U.S.") between 1892 and 1927,⁶¹ the mysterious death of a black male in the Mississippi Delta during this time period was likely neither unique nor unusual. However, the death of Johnson was to some extent extracted from the violent context of its occurrence and imbued with a mystery that only contributed to Johnson's mystique. As a result, Johnson's death became a factor that

⁵⁷ GURALNICK, *supra* note 38, at 2, 6, 55-56.

⁵⁸ SAMUEL CHARTERS, ROBERT JOHNSON 4 (1973) ("Until his sister was found recently in Washington, D.C. Robert Johnson's life was one of the elusive mysteries of the blues.").

⁵⁹ Anderson v. LaVere, 895 So. 2d 828, 831 (Miss. S. Ct. 2004) (noting that Robert Johnson's photographs were given to Steve LaVere, a music historian, in connection in a transaction in which Johnson's heirs assigned to LaVere the rights to photographs of Johnson and other memorabilia and copyright to Johnson's works in exchange for 50% of any royalties to be earned by LaVere for their use).

⁶⁰ WALD, *supra* note 17, at xvi-xvii (describing the 1991 dedication of Robert Johnson's grave marker and noting that the members of Mount Zion Missionary Baptist Church "had been a bit dubious, especially after learning that Robert Johnson was famous not only for his music but for being involved with satanic forces").

⁶¹ King, *supra* note 21, at 459 (noting that an estimated 517 reported lynchings occurred in the Mississippi Delta between 1882 and 1927).

distinguished him from other blues musicians: “Robert Johnson’s death in 1938 has spawned more questions and controversies than any other event in blues history.”⁶² The lack of knowledge about Johnson also contributed to Johnson’s status as a blues cultural icon and meant that many later fans could use Johnson as “a screen on which [to project their] dream movie of the blues life.”⁶³

Conceptions of Robert Johnson’s work highlight the context dependent nature of notions of originality. Originality is yet another characteristic of copyrightability that is not always easy to delineate in actual contexts of creation.⁶⁴ However, what might seem original to those in one context may not seem as original in other contexts. Consequently, within the context of African American audiences of the 1920s and 1930s, Johnson’s work probably did not seem startlingly original in the way that it did to British and other musicians and audiences listening to Johnson’s music in the 1950s and 1960s, who were largely removed from the original context of other music that was prevalent at the time Johnson produced his music or able to listen to a limited and likely biased sample of such music.⁶⁵ This points out the inherent subjectivity of conceptions of originality by virtue of the fact that originality is in part a question of context. For early African American blues listeners, what seemed original and interesting was very different that what seemed interesting and original to the largely white blues fans that were the major force behind

⁶² Gayle Dean Wardlow, *Robert Johnson: New Details on the Death of a Bluesman*, in CHASIN’ THAT DEVIL MUSIC: SEARCHING FOR THE BLUES 91, 91-93 (1998).

⁶³ WALD, *supra* note 17, at xvi; *see also* BARRY LEE PEARSON & BILL MCCULLOCH, ROBERT JOHNSON: LOST AND FOUND 1 (2003) (“Decades after his death this slightly built African American drifter named Robert Johnson rose from obscurity to become an all-American musical icon, the best-known although least understood exemplar of the Mississippi Delta blues tradition.”).

⁶⁴ Arewa, *supra* note 55, at ____.

⁶⁵ Ford, *supra* note 46, at 86 (discussing the author’s introduction to blues as a member of the British substantial minority who had an interest in blues as a declining form of “negro music” and noting that rural blues were at that time “mistakenly . . . valued for their pre-commercial authenticity, an attitude which quickly degenerated into an atavistic idealisation of ‘primitive spontaneity’.”).

the blues revival in the 1950s and 1960s.⁶⁶ For the latter, romantic conceptions about the blues were closely tied to notions of authenticity that are often unsuited to musical creation in living musical traditions.⁶⁷ As a result, what is perceived as original may depend in significant part on the contexts within which listeners hear music.⁶⁸ For this reason, assessments of originality, particularly with respect to older music, are potentially quite difficult, in part because of selection bias that results in contemporary listeners only being exposed to a portion of the broader music scene during the time such older music was produced.⁶⁹ This is an issue that is increasingly of concern today given the longer duration of copyright, which makes assessments of originality more difficult, particularly with respect to music of earlier generations.⁷⁰ The segmentation of the recording industry by race has further complicated such assessments in that music that may seem original in one context may be commonplace in another. Determinations of what is commonplace in one context as opposed to another may also be closely related to recording industry marketing practices and market segmentation. Industry practices may also shape determinations of what is considered original. In the early blues arena, concepts of originality derived from copyright did, however, influence the types of blues music that were recorded since record company scouts required that any recorded songs be original in part due to

⁶⁶ WALD, *supra* note 17, at xvi-xvii (noting the different reactions and responses to white and black audiences for blues).

⁶⁷ *See* Arewa, *supra* note 55, at ___ (discussing how notions of authenticity have contributed to the creation of the classical music canon since the nineteenth century).

⁶⁸ Arewa, *supra* note 55, at 304-05.

⁶⁹ WALD, *supra* note 17, at ___ (discussing the ways in which blues scouts selected musicians to record and helped determine what type of music such musicians performed).

⁷⁰ Arewa, *supra* note 55, at ___ (noting potential difficulties that may result from an expansion on copyright duration).

their desire to avoid paying mechanical licenses fees for.⁷¹

Treatment of Robert Johnson by later commentators highlights the inherent subjectivity of conceptions of originality.

D. *Blues and British Rock: The Diffusion of Blues and Reinvention of Blues Tradition*

The diffusion of blues music outside of its contexts of origin raises important questions about how copyright operates in an environment of cultural diffusion in a broader milieu characterized by significant inequalities and oppression. The diffusion of blues also militates consideration of the boundaries between diffusion and exploitation. The diffusion of blues thus raises the fundamental question of when uses of existing material may be inappropriate given the contexts of such usage.

A significant dichotomy exists between the audiences for blues music over the course of the twentieth century. In its earliest iterations at the beginning of the twentieth century, blues was a form of popular music that emerged from the African American tradition that had a close and interactive relationship with other African American vernacular and folk traditions.⁷² Blues in this time period was largely heard by an African American audience. The blues then diffused to from the southern U.S. northward with the migration of significant numbers of African Americans north in the early twentieth century.⁷³ In its later emergence in the 1950s and 1960s,

⁷¹ Dougan, *supra* note 34, at 43 (“Originality was an aesthetic designation partly defined by copyright law and, to all those involved in the race record business, meant that a song could not show the influence of anything previously recorded or published.”) (citations omitted).

⁷² Southern, *supra* note 11, at 332-33.

⁷³ CLYDE WOODS, DEVELOPMENT ARRESTED: THE BLUES AND PLANTATION POWER IN THE MISSISSIPPI DELTA 103-04, 115 (1998) (noting that in 1890 one in ten African Americans in the U.S. lived in Mississippi, that 60 percent of the Mississippi population or 743,000 people was African American and that more than 100,000 African Americans

blues was reinvented as a primal authentic form of African American expression whose primary audience was in some instances not African American and in many noteworthy instances, not American.

The diffusion of blues was accompanied by the invention of new narratives about the blues. Such narratives included a recalibration of the legacy of early blues artists by early jazz critics and others, including a reevaluation of the contributions of Robert Johnson, who did not have a big impact on audiences of his time relative to his peers. Foremost among those who have contributed to the deification of Robert Johnson are rock and roll musicians who came of age in Britain and who were significantly influenced by blues music in the 1950s and 1960s.⁷⁴ The names of those so influenced reads like a Who's Who of the early rock and roll era and include the Beatles, the Rolling Stones, Eric Clapton, Cream, Jeff Beck, Led Zeppelin, Fleetwood Mac, the Yardbirds, the Kinks and the Animals.⁷⁵ How such later musicians conceptualized blues music and blues creation has significant implications for the operation of copyright, particularly with respect to forms of musical production that are acknowledged to involve significant borrowing. Such artists and the reverence expressed for the blues by many of them had a tremendous impact on the reception of Robert Johnson during the rock era: “the language of Robert Johnson entered into the common vocabulary of rock . . . [p]rimarily through the Rolling Stones and Eric Clapton and their versions of Johnson’s “Love in Vain” and “Crossroads” in

left Mississippi between 1915 and 1920 for factory and domestic work in Memphis, St. Louis, Detroit and Chicago, with Chicago rapidly emerging as a Delta blues center).

⁷⁴ PEARSON & MCCULLOCH, *supra* note 63, at 108-09 (discussing why Johnson was singled out for special veneration)

⁷⁵ STEPHEN DAVIS, *HAMMER OF THE GODS: THE LED ZEPPELIN SAGA* 5 (1997) (“In fact all the young English musicians to flood America in the wake of the Beatles—the Rolling Stones, Animals, Yardbirds, and Kinks in the first wave; Cream, Fleetwood Mac, Jeff Beck, and Led Zeppelin in the second—considered themselves blues scholars.”); PALMER, *supra* note 42, at 235–36 (noting the influence of blues artists on musicians in Britain).

particular.”⁷⁶ Robert Johnson is thus different than many other early blues musicians in his status as a cultural icon of modern music: Johnson was one of the first 12 people inducted into the Rock and Roll Hall of Fame in 1986.⁷⁷ Johnson’s status is also reflected in the accolades accorded him by later rock musicians such as Eric Clapton: “Robert Johnson to me is the most important blues musician who ever lived . . . I have never found anything more deeply soulful than Robert Johnson. His music remains the most powerful cry that I think you can find in the human voice.”⁷⁸

The status of Robert Johnson today illustrates the fact that cultural icons and cultural branding are increasingly important aspects of the broader entertainment industry.⁷⁹ Cultural icons also represent exemplary “symbols that people accept as shorthand to represent important ideas.”⁸⁰ The increasing importance and value of such icons as images is likely an important factor in the increasing degree of legal tension over control of images, as is evident in the right of publicity context.⁸¹ The increasing importance of cultural icons has also accentuated the influence of

⁷⁶ GURALNICK, *supra* note 38, at 5.

⁷⁷ See *Robert Johnson—Early Influence*, Rock and Roll Hall of Fame website, at <http://www.rockhall.com/hof/inductee.asp?id=134>.

⁷⁸ *Id.* (statement by Eric Clapton).

⁷⁹ DOUGLAS B. HOLT, HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING 1-2 (2004) (noting that cultural icons “dominate our world” and that the use of cultural icons has changed in modern times in that the circulation of cultural icons has become a central economic activity, including through cultural icons such as James Dean “take on intensive and pervasive meaning”); OXFORD ENGLISH DICTIONARY ____ (2d ed. 1989), available at <http://dictionary.oed.com> (defining a cultural icon as “[a] person or thing regarded as a representative symbol, esp. of a culture or movement; a person, institution, etc., considered worthy of admiration or respect.”).

⁸⁰ Holt, *supra* note 79, at 1.

⁸¹ Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J. L. & ARTS 123, 136 (1996) (noting that the move toward protecting images continues unabated); George M. Armstrong, Jr., *The Reification of Celebrity: Persons as Property*, 51 LA. L. REV. 443, 444 (1991) (“Clearly the law affords more protection to the commercial value of celebrity status now than at any previous time.”); Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 367 (1992) (noting the significant expansion of the right of publicity in the twentieth century); Lee Goldman, *Elvis is Alive, But He Shouldn’t Be: The Right of Publicity Revisited*, 1992 B.Y.U. L. REV. 597, 597 (1992) (noting that use of a celebrity’s name of likeness can generate millions of dollars in revenue in today’s marketplace); Michael Madow,

models of copyright exploitation based on valuable asset conceptions of culture.⁸² Such valuable asset models have contributed to the rise of industries based on cultural icons,⁸³ and have significant implications for the application of intellectual property to living musical traditions.

The emergence of Robert Johnson as blues cultural icon marks an important transition in conceptions of blues as an innovative living tradition and conceptions of blues as an important source of proceeds for eminent blues artists. Valuable asset models have cultural implications that merit greater scrutiny. The implications of valuable asset models are all the more pertinent given that copyright frameworks have to date not sufficiently grappled with the reality of borrowing as a norm and the ways in which sharing and collaboration are inherent aspects of many living cultural traditions.⁸⁴ Rather, in parallel with the increasing importance of cultural icons, copyright has increasingly come to accept models based on cultural production as a valuable asset to be used only by true creators and authorized users.⁸⁵ This view of copyright has tremendous implications for later creators who use existing works in their creations that is magnified in the context of living cultural traditions.

In large part due to his status as a cultural icon and influence on British rock and roll artists, Robert Johnson has come to symbolize early and authentic blues. Robert Johnson is thus

private ownership of Public Image: Popular Culture and Publicity Rights, 81 CAL. L. REV. 127, 128 (1993) (noting that the images entertainment and sports celebrities are “a familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.”).

⁸² Olufunmilayo B. Arewa, *All Work and No Play . . . : The Cultural Industries and the Professionalization of Intellectual Property* (2008) (manuscript on file with author).

⁸³ David Wall, *Reconstructing the Soul of Elvis: The Social Development and Legal Maintenance of Elvis Presley as Intellectual Property*, 24 INT’L J. SOC. L. 117, 119 (1996) (noting the development of the Elvis industry within hours of his death).

⁸⁴ Arewa, *supra* note 82, at ____.

⁸⁵ *Id.*; Michael J. Madison, *IP and Americana, or Why Intellectual Property Gets the Blues* 18 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 677, ____ (2008) (noting ways in which copyright law may have maintained or enabled changes in blues musical practice).

distinguished in many respects in the blues arena by the ways in which later blues fans identify with his persona and music. The mystery and enigma that have for many years surrounded both his life and death have made his appeal no doubt all the more intense for his fans. Although Robert Johnson represents an earlier artist who became eminent in a later era, his status as cultural icon reflects general trends in the entertainment industry. Cultural icons have become an inseparable part of the music industry. This in part reflects the fact that the “commercial imperatives of the music industry necessarily leads to the promotion of a star system.”⁸⁶ The existence of such icons may also have implications for copyright as well as other legal doctrines such as right of publicity that may accompany and supplement copyright and other intellectual property protection. Cultural icons have copyright implications because such icons are often imbued with characteristics that are parallel to features used to describe artistic production within Romantic author conceptions.

As has been the case with later rock and roll icons, part of Robert Johnson’s allure rests in his position as a cultural icon of the early blues era, particularly for certain groups of listeners. Johnson’s status as a cultural icon was facilitated by the lack of information about him. Johnson became an icon partly by virtue of his early and mysterious death. Not much was known about him, and he has been described as a cipher.⁸⁷ Since he died quite young at the age of 26, he also remained forever young and fresh and new in the eyes of his listeners, unlike many of his peers, who had aged and changed musically in ways that made them seem perhaps less “authentic.” The allure and mystery of Johnson was increased by the absence of knowledge about important

⁸⁶ Garofalo, *supra* note 135, at 81.

⁸⁷ WALD, *supra* note 17, at ____.

details of his life, including where and when he died.⁸⁸ His death certificate was found by blues researcher and collector Gayle Dean Wardlow after years of rumors about where, when and how he died. Wardlow searched from 1965 to 1968 in Mississippi, Arkansas and Texas and eventually found Johnson's death certificate.⁸⁹

The expansion of audiences for Robert Johnson and other early blues musicians was part of the broader diffusion of blues in the U.S. and internationally. This diffusion highlights ways in which experiences of blues musicians have been significantly shaped by hierarchies of race and culture. Such hierarchies shaped blues in both its early years as well as the latter diffusion of blues in the rock and roll context. The diffusion of blues during the early rock era, for example, took place in the context of an American recording industry that had long been shaped along racial lines. This focus on racial categories as an essential part of the structure of the U.S. recording industry had significant implications for performance opportunities as well as copyright treatment of a wide range of musicians, including blues artists

II. RACE MUSIC: BLUES AND THE RECORDING INDUSTRY

A. *Race Music: Music, Genre, and American Racial Categories*

Music and musical genre are often conceptualized today in racial terms.⁹⁰ As a result, certain types of music are frequently categorized as connected to particular racial or ethnic groups.

Contemporary genre categories reflect in part the historical legacy of racial categories that were

⁸⁸ GURALNICK, *supra* note 38, at 2, 6, 55-56.

⁸⁹ Gayle Dean Wardlow, *Searching for the Robert Johnson Death Certificate (1965-1968)*, in CHASIN' THAT DEVIL MUSIC: SEARCHING FOR THE BLUES 86, 86-90 (1998); Wardlow, *supra* note 62, at 91.

⁹⁰ WALD, *supra* note 17, at 28 (noting that views of music history are steeped in race); William G. Roy, "Race Records" and "Hillbilly Music": Institutional Origins of Racial Categories in the American Commercial Recording Industry, 32 POETICS 265, 277 (2004) (noting that recording industry marketing categories eventually became musical genres, which served as aesthetic guides to performance).

an integral part of the marketing of records since the earliest days of the recording industry.⁹¹

Although genres are frequently taken for granted, we often do not appreciate the ways in which the recording industry has shaped not only genres but also the types of music that different musicians could record.⁹² Consequently, the fact that black hillbilly singers existed in significant number and that musicians often classified within the blues genre could create and play a broad range of music from hoe down music to hillbilly music have been written out of or minimized in much music history.⁹³

What is also often forgotten is the fact that genres and categories of music were in large part invented as a means of filing and marketing records.⁹⁴ Prior to the advent and dissemination of records and recording technology, entertainment was largely live, much more diverse and less amenable to classifications and hierarchies of musical production, although such hierarchies were increasingly evident even in live performance traditions of the nineteenth century.⁹⁵

Further, prior to the dissemination of records, musicians had to be versatile performers who

⁹¹ Roy, *supra* note 90, at 266 (noting that in the 1920s recording firms adopted blatantly racial categorical schemes for their catalogs and marketing that consisted of the category of “race records” to describe African American music and “hillbilly” or “old time” music to describe the music of rural whites).

⁹² Damon J. Phillips & David A. Owens, *Incumbents, Innovation and Competence: The Emergence of Recorded Jazz, 1920 to 1929*, 32 *POETICS* 281, 292-93 (2004) (discussing the ways in which recording industry behaviors, including with respect to the race, shaped musical innovation in jazz in the 1920s); Keith Negus, *Cultural Production and the Corporation: Musical Genres and the Strategic Management of Creativity in the US Recording Industry*, 20 *MEDIA, CULT & SOC’Y* 359, 360 (1998) (considering the ways in which recording companies divide operations according to social-cultural identity labels and the ways in which this industry organization can be used as a “direct intervention into and contribution towards the way in which social life is rationalized and fragmented and through which different experiences are separated and treated unequally.”); CHRISTOPHER SMALL, *MUSIC OF THE COMMON TONGUE: SURVIVAL AND CELEBRATION IN AFRICAN AMERICAN MUSIC* 395 (1987) (noting the profound influence of records and the recording industry on Western musical performance in the twentieth century).

⁹³ WALD, *supra* note 17, at 44; Rebecca Thomas, *There’s a Whole Lot O’Color in the “White Man’s” Blues: Country Music’s Selective Memory and the Challenge of Identity*, 96 *MIDWEST Q.* 73, 81 (1996) (noting that DeFord Bailey, an African American country music artist, performed in the Grand Ole Opry on radio shows but was fired as new technology brought the Opry into people’s homes).

⁹⁴ WALD, *supra* note 17, at 28.

⁹⁵ *Id.*; LAWRENCE W. LEVINE, *HIGH BROW, LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* (1988) (describing sacralization in the establishment of hierarchies of forms of cultural production in nineteenth century U.S. expressive culture and the diversity of types of works performed in single performance settings).

could play a broad variety of music.⁹⁶ Genre distinctions were thus not part of the musical lives of most people prior to the advent of recorded music.⁹⁷ Consequently, prior to the recording age, African American musicians, for example, typically played a broad range of music. In colonial America, for example, “black musicians provided much of the dance music for the colonists of all classes” in the North and South and played for country dances, balls, and dancing schools.⁹⁸ The contribution of such musicians were evident in a broad range of musical traditions: “the most sophisticated American guitarist of the nineteenth century was a black man from Virginia, Justin Holland, who introduced the European techniques of Sor and Carcassi to the United States.”⁹⁹

The varied musical contexts in which African American musicians played meant that such musicians were often comfortable playing a diverse range of music of many genres and styles. Accomplished black banjo and fiddle players were, for example, not at all atypical in the era before the recording age. Recording industry business and marketing practices created incentives that tended to diminish this diversity of musical styles: “[the choices of recording industry scouts] left black string bands in a double bind: They were banned from the hillbilly catalogs because they were black, and from the Race catalogs because they played hillbilly music.”¹⁰⁰ Similarly, a significant African American hoedown tradition profoundly influenced country music.¹⁰¹

⁹⁶ WALD, *supra* note 17, at 44.

⁹⁷ *Id.* at 56.

⁹⁸ SOUTHERN, *supra* note 11, at 43-44.

⁹⁹ WALD, *supra* note 17, at 46.

¹⁰⁰ *Id.* at 52; *see also* SOUTHERN, *supra* note 11, at 43 (noting that one of the best known fiddle players in New England was a slave named Samson, owned by Colonel Archelaus Moore).

¹⁰¹ WALD, *supra* note 17, at 47 (noting that most experts agree that between one third and one half of the standard Southern fiddle repertoire is drawn from the black tradition); Thomas, *supra* note 93.

B. *Race Music and Recording Industry Marketing Practices*

With the recording industry came the establishment of categories such as “race” music, “plantation music” or “coon songs,”¹⁰² which meant that the vast majority of African American musicians were marketed playing music that was deemed to be appropriate for the limited African American consumer market rather than the broader public.¹⁰³ The establishment of recording industry and recording industry marketing practices helped define the types of music that were thought to constitute “black music”: “The record companies not only prevented black bands from playing what was perceived as “white” music, but limited both white and black musicians in all sorts of ways.”¹⁰⁴ The term race music came to be used by the recording industry to describe music performed by African American musicians and marketed to an African American audience.¹⁰⁵ The U.S. recording industry began targeting this market in the 1920s.¹⁰⁶ This market was targeted at least in part as a result of the emergence of new, smaller

¹⁰² Thomas, *supra* note 93, at 74 (noting that prior to the 1940s, the recording industry categorized certain forms of African American music as “race music,” “plantation music” or “coon songs.”).

¹⁰³ Perry A. Hall, *African-American Music: Dynamics of Appropriation and Innovation*, in BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 31, 38 (Bruce Ziff & Pratima V. Rao eds., 1997) (“Under the precepts of the recording industry’s segmented marketing systems, however, recordings of their [i.e., cornetist Louis Armstrong and pianist Ferdinand “Jelly Roll” Morton] music were distributed on ‘race record’ labels geared specifically to Blacks and remained invisible to most whites. By that time music recorded by white dance bands, led by Paul Whiteman’s, was being introduced to mainstream as ‘jazz’ through record labels and performance venues specifically marketed to them.” (footnote omitted)).

¹⁰⁴ WALD, *supra* note 17, at 52.

¹⁰⁵ RAMSEY, *supra* note 13, at 113 (noting that a recording by blues singer Mamie Smith in 1920 helped to establish the race records institution); David Brackett, *What a Difference a Name Makes: Two Instances of African-American Popular Music*, in THE CULTURAL STUDY OF MUSIC: A CRITICAL INTRODUCTION 238, 241 (Martin Clayton, Trevor Herbert & Richard Middleton eds., 2003) (noting that in the 1920s the recording industry organized the popular music fields around the divisions of “popular,” “race,” and “hillbilly”); Stephen Calt, *The Anatomy of a “Race” Music Label: Mayo Williams and Paramount Records*, in RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC 86, 87 (Norman Kelley ed., 2002) (explaining that race music “became a fixture” of the 1920s “because recording policies . . . were increasingly dictated by a new breed of salesmen who were willing to set aside their own musical tastes in the interests of commerce that ‘race’ music became a fixture of the decade”); OLIVER, *supra* note 14, at 1-17 (noting that Race records were marketed primarily for a black audience).

¹⁰⁶ Timothy J. Dowd, *Production Perspectives in the Sociology of Music*, 32 POETICS 235, 242-43 (2004) (discussing the ways in which legal struggles in the recording performance rights and radio industries contributed to marketing of “race” music by the recording industry).

independent companies.¹⁰⁷ The commercial success of initial “race” records led to the release of numerous other “race” recordings by both smaller and large recording companies.¹⁰⁸ The selection of material to be recorded and the marketing of such recordings had in many cases a discernible impact on the popularization of recorded music.¹⁰⁹ In 1949, the “race music” category was changed by the recording industry to R&B or rhythm and blues.¹¹⁰ The term rhythm & blues then became a marketing term that was applied to a broad range of music whose most significant commonality was the race of its performers and targeted market.¹¹¹ Rhythm & blues thus encompassed blues shouting, jump blues, blues ballads, country blues, vocal groups and gospel music.¹¹² The context of “race” record and recording industry marketing and business practices are important background factors in considering copyright treatment of the blues.

¹⁰⁷ Peter J. Alexander, *New Technology and Market Structure: Evidence from the Music Recording Industry*, 18 J. CULTURAL ECON. 113, 118 (1994) (noting that Swan Records, a small, independent company, signed the first popular black female singer to be recorded in 1920); RICK KENNEDY & RANDY MCNUTT, *LITTLE LABELS—BIG SOUND: SMALL RECORD COMPANIES AND THE RISE OF AMERICAN MUSIC* xiv (1999) (noting that in the early 1920s, increased competition made possibly by the expiration of key recording technology patents permitted smaller to pursue rural and black urban audiences that were neglected by major record companies); David Davis & Ivo De Loo, *Black Swan Records – 1921-1924: From Swanky Swan to a Dead Duck*, ___ ACCOUNTING HIST. ___ (2003) (discussing the rise and fall of Black Swan Records, a small independent record label that was at one time the most successful African American owned business of its time).

¹⁰⁸ Alexander, *supra* note 107, at 118.

¹⁰⁹ Tim Brooks, “*Might Take One Disk of this Trash as a Novelty*”: *Early Recordings by the Fisk Jubilee Singers and the Popularization of “Negro Folk Music*,” 18 AM. MUSIC 278 (2000) (discussing the impact of recordings of the Fisk Jubilee singers on the popularization of “Negro Folk Music”).

¹¹⁰ Brackett, *supra* note 105, at 242; RIPANI, *supra* note 4, at 5 (noting that the term “rhythm & blues” was first used by *Billboard* magazine in its June 25, 1949 issue when the company switched its terms of reference from “best Selling Race Records” to “Best Selling Retail Rhythm & Blues Records”).

¹¹¹ RIPANI, *supra* note 4, at 5-6 (noting that rhythm and blues “is a conglomerate of many different musical styles”).

¹¹² Thomas, *supra* note 101, at 74; RIPANI, *supra* note 4, at 6 (noting that acceptance of the characterization of rhythm & blues as a trade category makes explanation of the songs included within the category easier).

III. COPYRIGHT, BLUES AND BORROWING

A. *Copying, Creativity, and Creation in Blues*

Borrowing is an inherent aspect of the creation and performance of blues music.¹¹³ Early pre-war blues performers frequently swapped tunes and lyrics: Willie Dixon's "Hoochie Coochie Man" has the same melody as John Brim's "Tough Times;" Chuck Berry took the talking verse of Bo Diddley's "I'm a Man" for his own piece "No Money Down."¹¹⁴ The two Robert Johnson recording sessions, which have been discussed and analyzed in detail,¹¹⁵ reflect borrowing from a number of sources, including Leroy Carr,¹¹⁶ Kokomo Arnold,¹¹⁷ Skip James¹¹⁸ and Son House.¹¹⁹

Rock and roll artists in the post-war era also borrowed significantly from the blues tradition. Chuck Berry had deep roots in the blues: "Berry introduced a level of lyrical and analysis to rock'n'roll that was firmly rooted in the blues tradition."¹²⁰ As was the case with Chuck Berry, British rock and roll artists, including the Beatles, Rolling Stones, Led Zeppelin, Cream, Eric Clapton, Fleetwood Mac and others, borrowed extensively from the blues tradition.¹²¹ Given the sociocultural context within which blues arose in the U.S. and the role of racial categories in the

¹¹³ J. Peter Burkholder, *Borrowing*, in 4 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 1, ___ (Stanley Sadie ed., 2001), available at <http://www.grovemusic.com> [hereinafter NEW GROVE DICTIONARY] (noting that blues and jazz involved improvisation and composition based on existing harmonies, melodies and bass patterns, and similar practices continued into popular music derived from black American traditions, including rhythm and blues and rock and roll).

¹¹⁴ Paul H. Fryer, "Brown-Eyed Handsome Man": *Chuck Berry and the Blues Tradition*, 42 PHYLON 60, 63 (1981).

¹¹⁵ See, e.g., WALD, *supra* note 17, at 126-189; CHARTERS, *supra* note 58, at 25-87.

¹¹⁶ WALD, *supra* note 17, at 131.

¹¹⁷ *Id.* at 133.

¹¹⁸ *Id.* at 142.

¹¹⁹ *Id.* at 150.

¹²⁰ Fryer, *supra* note 114, at 62, 71.

¹²¹ Peter Wicke, *Rock Music: A Musical-Aesthetic Study*, 2 POPULAR MUSIC 219, 222 (1982) (noting that rhythm and blues playing styles were based in part on rhythm and blues playing styles); Bruce Tucker, "Tell Tchaikovsky the News": *Postmodernism, Popular Culture, and the Emergence of Rock 'N' Roll*, 9 BLACK MUSIC RES. J. 271, 282 (1989); Charles Gower Price, *Sources of American Styles in the Music of the Beatles*, 15 AM. MUSIC 208, 210 (1997); PALMER, *supra* note 42, at 235-36.

recording industry, it is not terribly surprising that borrowings from blues music from musicians outside of the communities in which blues music was originally created and performed were so dominated by British musicians. British musicians were likely more removed from American racial hierarchies and likely more open to overt use of a musical form that ranked at the bottom of American cultural hierarchies.¹²²

How later artists borrowed from existing blues works reflects important issues connected to copyright and borrowing. In the blues, as is the case with other musical forms based on certain African American aesthetic practices, repetition, revision and synthesis of varied musical influences is a core aspect of creation and innovation.¹²³ The varied ways in which new works may be created is often in significant tension with copyright assumptions about the mechanisms and means of transmission used to create new works. Varied aesthetics of creation evident in music and other fields demonstrate that musical innovation and creativity may occur in a broad range of ways.¹²⁴

As legal scholar Julie Cohen has suggested, the failure of copyright theory to address issues related to culture more generally can be attributed to the way in which transmission of knowledge is conceptualized with respect to the idea-expression dichotomy.¹²⁵ Copyright theory thus assumes that the cultural transmission function in cultural texts rests in the “‘ideas’

¹²² BAKER, *supra* note 12, at 11 (noting that “Afro-Americans [are] at the bottom even of the vernacular ladder in America”); SMALL, *supra* note 92, at 350 (discussing the attitude of classical musicians towards the Afro-American tradition as ranging from at best incomprehension and condescension to at worst violent antagonism).

¹²³ Evans, *supra* note 6, at 98 (noting that Blind Lemon Jefferson’s musical innovation was based on synthesis of existing works and styles).

¹²⁴ See Arewa, *supra* note 55, at ____ (discussing the existence of varied aesthetics of creation in the musical arena).

¹²⁵ Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. ____ (2007).

conveyed by such works rather than in the particular form of their expression.”¹²⁶ These assumptions about transmission by copyright theorists of various orientations are contrary to the assumptions of cultural theorists, who view texts as having context-dependent rather than invariant meanings.¹²⁷ These views of text and transmission evident in copyright theory a key reason for the lack of attention to the importance of borrowing of texts themselves in cultural transmission and the significance of context in determining textual meaning.¹²⁸ This presents particular problems for musical and other works, particularly since borrowing of existing works is a pervasive aspect of the creation of new cultural texts, not only in the blues tradition, but in music more generally.¹²⁹

Prevailing views of borrowing in copyright discourse are closely connected to at times vague and mystical representations of creativity that assume that copying of existing texts reflects a lack of creativity or originality.¹³⁰ The structure of copyright as a property rule and the notion of derivative works are closely tied to such assumptions about the ways in which new works should be created.¹³¹ These assumptions about creation are often quite contrary to how creation actually occurs, which presents tremendous problems for a broad range of cultural texts, including many that reflect an African American aesthetic of repetition and revision.¹³²

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Arewa, *supra* note 55, at ____.

¹²⁹ Arewa, *supra* note 55, at ____; Arewa, *supra* note 7, at ____.

¹³⁰ Arewa, *supra* note 55, at ____ (discussing the problematic application of generally accepted conceptions about creativity in copyright to hip hop music); Negus, *supra* note 92, at 362 (discussing writings about creativity and noting that “creativity is often treated in a vague and mystical manner, with many writers assuming that we all know and recognize ‘creativity’ when we meet it.”).

¹³¹ Arewa, *supra* note 55, at ____.

¹³² Arewa, *supra* note 55, at ____.

B. *Copyright, Borrowing and Hierarchies*

In addition to assumptions about the nature of creation and the use of existing works in new creation, hierarchies of culture, taste and power have played an important role in shaping both copyright and musical industry structures through which copyright is often applied. In the blues context, hierarchies relating to race were inextricably intertwined with copyright treatment of blues artists. Such hierarchies were by no means limited to race; hierarchies relating to gender were evident, for example, in treatment of blues queens, whose role in the early commercial successes of blues was diminished as a consequence of their gender.¹³³ Similarly, sociocultural hierarchies and hierarchies of socioeconomic status contributed to the treatment of musicians categorized within the “hillbilly” music genre, which was a corresponding category to “race” records for rural white performers.¹³⁴

Varied sociocultural hierarchies played out in the ways in which performers categorized within certain areas were treated by the music industry. For example, music publishers allied with the radio and film business were the dominant power in the music industry prior to the rock and roll era.¹³⁵ Prior to the Second World War, songs were a primary source of revenues in a market dominative by writers and publishers who exercised collective power through collective rights organizations such as the American Society of Authors, Composers and Publishers (ASCAP).¹³⁶ ASCAP, however, reflected societal hierarchies in excluding black and country western

¹³³ K.J. Greene, *Blues Women of the 1920s* (2008) manuscript on file with author; Danaher, *supra* note 15.

¹³⁴ Roy, *supra* note 90, at 266 (noting use of the terms “hillbilly” or “old time” music to describe the music of rural whites).

¹³⁵ Reebee Garofalo, *How Autonomous is Relative: Popular Music, the Social Formation and Cultural Struggle*, 6 *POPULAR MUSIC* 77, 77 (1987); Frank Geels, *Reconfiguring the American Music Industry and the Breakthrough of Rock ‘n’ Roll (1930-1970): A Multi-Level Analysis of the Production, Distribution and Consumption of Music* 6, Paper for the Fourth European Meeting on Applied Evolutionary Economics, May 21, 2005 (connecting the power of music publishers to the Copyright Act of 1909).

¹³⁶ Garofalo, *supra* note 135, at 77.

writers.¹³⁷ Broadcast Music Incorporated (BMI) was formed in 1939 in part as a result of problems with ASCAP.¹³⁸ BMI resulted in extension of the “protection of copyright to ‘bluesmen’ and ‘hillbillies’.”¹³⁹

The power of music publishers declined as the recording industry became more powerful.¹⁴⁰ In the early 1950s, records had replaced sheet music as the primary source of music industry revenue.¹⁴¹ The shift to recordings as a dominant source of revenue reinforced existing hierarchies, particularly as they relate to race. Under the recording industry’s race-based genre categorization system, although the names of the categories have shifted over time from “race” to “rhythm and blues” to “soul” and later “black” music, a performer whose music is classified as “black” must first be successful on the “black” market before being able to crossover to the pop charts.¹⁴² Even today, performers whose music is not classified as “black” music, such as Bruce Springsteen, either has a successful pop hit or not.¹⁴³ These types of race-based genre distinctions continue to pervade the music industry and influence choices about marketing, booking and other aspects of the music industry.¹⁴⁴

These types of categorizations have influenced the ways in which blues music was borrowed, in large part because the original performers of blues and other music categorized as “black” were

¹³⁷ *Id.*

¹³⁸ Lucia S. Schultz, *Performing-Rights Societies in the United States*, 35 NOTES 511, 516–22 (1979) (noting that radio broadcasters formed BMI in response to alleged excessive pricing, price-fixing and other practices by ASCAP).

¹³⁹ Garofalo, *supra* note 135, at 77.

¹⁴⁰ Reebee Garofalo, *From Music Publishing to MP3: Music and Industry in the Twentieth Century*, 17 AM. MUSIC 318, 336 (1999) (noting that publishing houses became displaced as records became a staple of radio programming instead of performances by live performers).

¹⁴¹ Garofalo, *supra* note 135, at 77.

¹⁴² Garofalo, *supra* note 135, at 81.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

often not permitted to record music they may have recorded as “race” music for “pop” and other market segments that were categorized as “white.”¹⁴⁵ In addition, normative conventions existed that resulted in African American artists being excluded from various arenas at different points in time, including live radio: “In the music system, there was a normative convention, shared by radio stations, not to broadcast black performers.”¹⁴⁶

Similarly, copyright law provisions that permit cover recordings have, particularly in the past, been used in a way that reinforces existing racial hierarchies: songs recording by African American rhythm and blues artists were typically rerecorded in “cover versions” “by another artist in a style thought to be more appropriate for the mainstream market . . . Most of the performers whose songs were covered were black.”¹⁴⁷ Consequently, the sources of such material were often seen as readily appropriable for uses in “white” markets.¹⁴⁸ The industry structures within which blues was created and marketed were shaped by existing sociocultural hierarchies that in turn influenced the application of copyright to the blues and other musical traditions that involved significant numbers of African American performers.

¹⁴⁵ *Id.*

¹⁴⁶ Geels, *supra* note 135, at 9; William Barlow, *Black Music on Radio During the Jazz Age*, 29 AFRICAN AM. REV. 325, 326 (1995) (noting that African American dance bands were seldom heard on radio in the 1920s; instead, “it was the commercial successful white dance bands of the era . . . that were regularly featured on the airways, giving their popularity an added boost.”); Derek W. Vaillant, *Sounds of Whiteness: Local Radio, Racial Formation, and Public Culture in Chicago, 1921-1935*, 54 AM. Q. 25, 29 (2002) (noting total exclusion of African Americans from Chicago radio airwaves in the 1920s and early 1930s with the exception of one radio program).

¹⁴⁷ 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); *see also* Hall, *supra* note 103, at 44 (noting Little Richard’s recounting in a Home Box Office television special that a version of his rock anthem *Tutti Frutti* that reached number one on the pop charts in a version recorded by Pat Boone).

¹⁴⁸ Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 Rutgers L.J. 277 (2006).

C. *Copyright and Blues*

1. Copyright and Music Industry Structure

As a result of the structure of the music industry, the application of copyright to music categorized as “black,” which includes but is by no means limited to the blues, has been historically problematic, contested and criticized as exploitative.¹⁴⁹ Consideration of the treatment of blues under copyright frameworks also raises significant questions related to context. The experience of many blues musicians also highlights a fundamental tension in the application of copyright in varied contexts.

Pervasive borrowing is an inherent part of creation processes for many musicians. At the same time, however, borrowing may have different significance depending upon the sociocultural context within which acts of borrowing occur. In the contexts of the blues, borrowing within blues traditions in the Mississippi Delta in the 1930s and 1940s may have a fundamentally different meaning than the borrowing that occurred from blues traditions to rock and roll traditions in later eras. The potentially divergent meanings of similar acts of appropriation reflect nuances of context and the ways in which sociocultural hierarchies may play out in different circumstances. Consequently, copyright treatment of musical traditions that incorporate extensive borrowing within the tradition may have different implications when new practitioners from outside of the first context of borrowing in time or space or both also begin to use such forms. These later uses may be particularly sensitive in instances where new practitioners derive significant commercial returns from such uses. In the case of blues, many such new practitioners

¹⁴⁹ SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 117-48 (2001) (discussing copyright and African-American music); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 361-83 (1999) (commenting on the use of copyright to appropriate African-American music); Hall, *supra* note 103, at 37-58.

by the 1960s were white while the original practitioners were primarily black. Although many of the new practitioners were not American, their borrowings played out in an American context that was highly racialized. Further, pervasive recording industry racial distinctions operated in the context of a broader sociocultural environment characterized by significant racial inequalities that raise questions of fairness and distributive values of fundamental importance for copyright.¹⁵⁰

The questions that arose in the U.S. context of use of blues music are not unique but rather reflect continuing issues of concern in the copyright arena more generally. Similar questions arise today, for example, in the context of debates about traditional knowledge, which has typically been treated as public domain knowledge that is free to be appropriated in the international intellectual property arena.¹⁵¹ How copyright frameworks should treat borrowing in such contexts is not at all clear. It does, however, militate in favor of giving greater consideration in adjudications about copyright to questions of equity and fairness.¹⁵²

2. Blues and Borrowing: The Inexact Fit of Copyright

Copyright has in many respects provided an inexact fit for musical creations.¹⁵³ This reflects in part the formation of copyright originally in relation to literary works.¹⁵⁴ As copyright came to

¹⁵⁰ Kevin J. Greene, "Copynorms," *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008).

¹⁵¹ Anupam Chander & Madhavi Sunder, *Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1351 (2004) (noting that TRIPs has left traditional knowledge in the global commons while protecting intellectual products of the developed world).

¹⁵² Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, ___ (2006) (discussing the application of doctrines of substantive equality to intellectual property considerations in the global arena).

¹⁵³ Arewa, *supra* note 55, at ___ (discussing the inexact fit of copyright for music).

¹⁵⁴ *Id.* at ___.

be applied to other types of cultural production such as music,¹⁵⁵ the application of existing copyright doctrine to music has not surprisingly at times been easier in questions relating to musical texts or lyrics.¹⁵⁶ The application of copyright to music is further complicated by the fact that following passage of the Sound Recording Act of 1971,¹⁵⁷ a separate copyright may exist for the musical composition, including lyrics and musical notes, and any sound recordings,¹⁵⁸ which are implicitly assumed to derive from some underlying musical composition.

The sound recording copyright adds a layer of complexity to copyright determinations in the music context. Further, a series of copyright cases have applied copyright to instances of borrowings involving or relating to sound recordings in a potentially problematic way for those who create music that may bear similarities to or use existing sound recordings. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*,¹⁵⁹ 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.¹⁶⁰ A similar theory of infringement was used to find Michael Bolton liable for infringement of a song originally released by the Isley Brothers.¹⁶¹ These cases, taken together, reflect assumptions about musical composition and practice in both blues and popular music that

¹⁵⁵ *Id.* at ___ (noting that *Bach v. Longman* (1777) clearly established that the Statute of Anne applied to music and that U.S. copyright law was applied to music with the 1831 Copyright Act).

¹⁵⁶ *Id.* at ___ (discussing the use of fair use doctrine as applied to musical text as compared with the difficulty of applying fair use doctrine to musical notes, which are nonrepresentational).

¹⁵⁷ 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).

¹⁵⁸ Arewa, *supra* note 55, at ___ (discussing the application of copyright to music).

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

¹⁶⁰ *Bright Tunes*, 420 F. Supp. at 181 (holding that Harrison committed subconscious infringement in copying He’s So Fine)

¹⁶¹ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 480 (9th Cir. 2000).

fail to take adequate account of the collaborative nature of composition in both musical areas.¹⁶²

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 today form an important aspect of musical creation, challenge copyright assumptions about contemporary musical creation. Music today is often created in the sound recording studio,¹⁶³ and the musical composition then derived from the sound recording, which contrasts significantly with assumptions about the mechanics of musical creation evident in copyright discussions of music. Such discussions tend to remain focused on written compositions (i.e., music and lyrics) 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 some musical genres.

Another line of cases involving hip hop music add 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 resort to the Seventh Commandment of the Bible ("Thou Shalt Not Steal") as the primary source of legal authority for the decision.¹⁶⁴ The more recent ruling in *Bridgeport Music, Inc. v. Dimension Films* suggests that sound recordings may not be used without

¹⁶² Arewa, *supra* note 7, at ____.

¹⁶³ 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.").

¹⁶⁴ 780 F. Supp. 182 (S.D.N.Y. 1991).

authorization of the copyright owner.¹⁶⁵ 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* holding is based on outdated assumptions about the nature of musical composition 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.¹⁶⁶

The assumptions about composition and performance evident in such cases involving sound recordings highlight the inability of current dominant assumptions to encompass musical practice in living musical traditions such as the blues that are rife with borrowing and improvisatory practices. The application of copyright to blues music is thus complicated both by questions in relation to the nature of blues composition as well as copyright treatment of recordings, particularly since blues as a genre came to commercial prominence with the advent of the recording industry. As has been noted by a number of commentators in relation to cultural production generally, forms of cultural production that explicitly make use of existing works are generally disfavored by copyright law.¹⁶⁷ Blues and other forms of cultural production thus provide an uneasy fit for copyright.

¹⁶⁵ *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).

¹⁶⁶ Arewa, *supra* note 7, at ____.

¹⁶⁷ Peter Jaszi, *Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29, 40, 48 (Martha Woodmansee & Peter Jaszi eds., 1994) (noting that assumptions about cultural production in existing legal cases discourage artists who use existing materials).

IV. CONTEXTS OF THE BLUES: LESSONS FOR COPYRIGHT

A. *Robert Johnson and Copyright*

1. Copyright and the Business of Blues

Robert Johnson is a seminal figure among pre-war blues musicians, both by virtue of his transcendent popularity as well as due to the ways in which his estate has exploited copyrights in his work. Additionally, by distinguishing Johnson's musical practice in many respects from those of his temporal peers, commentators about Johnson have laid the groundwork for exceptionalism in the application of copyright to Johnson's works. The world in which Robert Johnson came of age was one in which his identity as an African American had significant implications for his likely ability to have and exploit copyrights. As was the case with most country blues players who cut records in the pre-war era, Robert Johnson did not hold copyrights in his compositions; rather blues musicians were typically bound by "race" recording contracts that were in many instances exploitative: "Most artists were paid according to the custom of the day, receiving a flat recording fee and waiving the rights to their compositions . . . The chief means by which dishonest recording officials of the era cheated artists was by filching composer credits for their songs in order to draw a publishing royalty."¹⁶⁸ Very few blues singers received much compensation for their work.¹⁶⁹ In the 1920s and 1930s, many African American musicians thus assigned their copyrights to recording companies.¹⁷⁰ In exchange for such assignments, black artists were generally paid less money than white musicians.¹⁷¹

¹⁶⁸ Calt, *supra* note 105, at 103.

¹⁶⁹ Greene, *supra* note 150 (discussing the generally inequitable contractual terms and lack of compensation of African American blues artists).

¹⁷⁰ Candace Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 480 (2005).

¹⁷¹ *Id.*; Greene, *supra* note 150, at 1204-07 (discussing the fact that Bessie Smith received little compensation during her life and the failure of a court case seeking remedies for this lack of compensation).

Unlike many blues musicians, however, Robert Johnson's estate has taken advantage of and profited from Johnson's continuing popularity. Johnson's continuing popularity and exalted artistic reputation are in turn closely related to his status as a cultural icon among early blues performers: "An arresting voice, virtuoso guitar playing, indecipherable words, suggestions of psychic anguish, death at an early age, the touching anecdotes promulgated as part of the initial liner-note mythology—it all seemed to support the Faustian tragedy that was eventually constructed to explain Johnson's art."¹⁷²

Johnson's continuing popularity has also meant that he is one of the few pre-war blues musicians to have earned significant royalties from his work. The royalties earned by the Johnson estate from Johnson's recordings also reflect the ways in which blues music may interact with copyright frameworks. A number of commentators highlight borrowings from blues music by later artists and point out that the broader context of such uses reflected societal conditions in which African Americans were exploited in artistic production and other circumstances.¹⁷³ The exploitation of African American artists, which is fairly well documented, occurred in a complex environment in which African American businesses also developed and African American businessmen prospered based on uses of African American cultural production.¹⁷⁴ Further, in some instances, certain "renowned" blues artists or their representatives, including the Robert Johnson estate and bluesman Willie Dixon, have been able to sue and receive compensation for

¹⁷² PEARSON & MCCULLOCH, *supra* note 63, at 109

¹⁷³ Greene, *supra* note 150, at ___; VAIDHYANATHAN, *supra* note 149, at 117-48; Greene, *supra* note 149, at ___; Hall, *supra* note 103, at 37-58; Hines, *supra* note 170, at ___.

¹⁷⁴ Davis & Loo, *supra* note 107, at ___ (noting that Black Swan Records a small independent race record label that was at one time the most successful African American owned business of its time); Calt, *supra* note 105 (discussing the activities of Mayo Williams, an African American, who played an important role in the Paramount race record business).

uses of their works.¹⁷⁵ The Willie Dixon case, which involved a suit by blues great Willie Dixon against Led Zeppelin, settled out of court, while the Robert Johnson case ended with a decision in favor of Johnson's representatives.¹⁷⁶ The Johnson and Dixon cases suggest that certain renowned blues artists can and did receive compensation for uses of their works. This success does not, however, substantially alter or improve circumstances that led to a general lack of compensation for blues artists more generally, both at the hands of "race" record companies as well as later users of blues material, including rock and roll musicians.

The existence of cases in which blues artists received compensation should also not obscure the difficulties inherent in making copyright infringement claims in blues cases. Current copyright assumptions about creation make it difficult to allocate copyright ownership rights to musical compositions in forms such as the blues that use extensive borrowing.¹⁷⁷ However, few blues artists had and renewed copyrights for blues musical compositions.¹⁷⁸ As a result, under the 1909 copyright law, which prior to adoption of the Copyright Act of 1976, provided for a term of 28 years, plus 28 more with renewal,¹⁷⁹ blues standards that might have appeared in sheet music form would typically no longer protected today.¹⁸⁰ However, since much blues music appeared

¹⁷⁵ *Willie Dixon v. Atlantic Recording Corporation*, 1985 U.S. Dist LEXIS 15291 (S.D.N.Y. 1985) (denying the licensing agent's motion for summary judgment in a suit by Willie Dixon, the renowned blues artists, against member of the legendary rock group Led Zeppelin alleging that the Led Zeppelin composition "Whole Lotta Love" infringed on Dixon's composition "I Need Love.").

¹⁷⁶ VAIDHYANATHAN, *supra* note 149, at ___ (noting that the Dixon case ended in a settlement).

¹⁷⁷ Jennifer L. Hall, *Blues and the Public Domain—No More Dues to Pay?*, 42 J. COPYRIGHT SOC'Y U.S.A. 215, 215 (1995) (quoting an archivist from the Smithsonian Institution as stating that "[f]olk and blues are really problematic because you have these verses and classical instrumental licks that float all over the place and appear again and again.").

¹⁷⁸ *Id.* at 224 (noting that early blues musicians such as Robert Johnson did not register for copyrights and were paid upfront, not in royalties); Hines, *supra* note 170, at 480-81.

¹⁷⁹ See An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 24, 35 Stat. 1075, 1080-81 (1909), *superseded by* the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

¹⁸⁰ Hall, *supra* note 177, at 216.

in sound recordings, the copyright status of sound recordings under the 1909 Act in many cases will depend upon whether the distribution of the sound recording is deemed a “publication” under the 1909 Act. Under the 1909 Act, “an unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the federal copyright scheme.”¹⁸¹

2. Copyright and Blues Recordings

Many blues works appeared only on phonorecords, which has potentially significant copyright implications. As has been the case with other technologies, the advent of sound recordings led to the (much later) adoption of copyright statutes intended to extend copyright protection to the sound recording medium. Copyright treatment of new technologies have 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.¹⁸² The *White-Smith* case illustrates some of the problems that courts have faced in trying to apply copyright frameworks to new technologies of musical creation and dissemination.¹⁸³ The adoption of copyright protection for sound recordings led to a legal framework that added a level of complexity to existing copyright frameworks that initially covered only musical compositions, which became protected under the 1831 Copyright Act.¹⁸⁴ The addition of a sound recording

¹⁸¹ *Id.*

¹⁸² *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).

¹⁸³ Lisa Gitelman, *Reading Music, Reading Records, Reading Race: Musical 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).

¹⁸⁴ See An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times therein Mentioned, ch. __, §§ __, 1 Stat. 124 (1790) (covering books, maps and charts); An Act to Amend the Several Acts Respecting Copy Rights, ch. 16, §§ 1, 4 Stat. 436, 436-37 (1831) (adding musical compositions, prints, cuts and engravings to the list of copyright protected

copyright in the 1970s has also resulted in a potentially complex and at times ambiguous copyright status for pre-1978 sound recordings.

The 1971 Sound Recording Act, which was later superseded by the Copyright Act of 1976, established a separate copyright for sound recording that exists in addition to any copyrights for any underlying musical compositions. Section 303 of the Copyright Act provides a statutory framework for pre-1978 phonorecordings.¹⁸⁵ Under Section 303, copyrights in works created before 1978 but not theretofore in the public domain or copyrighted began on January 1, 1978 and had a duration for the term provided in Section 302 of the Copyright Act, provided that in no event can such term expire before December 31, 2001.¹⁸⁶ Further, the term of works published on or before December 31, 2002 shall not expire before December 31, 2047.¹⁸⁷ Under Section 303(b), which was amended in 1997,¹⁸⁸ however, the distribution of phonorecords prior to January 1, 1978 does not constitute a publication of the musical work embodied in the phonorecord.¹⁸⁹ When a work was published, it lost state common law protection; if the owner did not wish for the work to enter the public domain, the owner could obtain federal protection by complying with the 1909 Act's requirements.¹⁹⁰ Recent court cases have interpreted the implications of Section 303(b) for blues recordings. These recent blues cases are instructive in outlining the business terms to which blues musicians have been subject and the ways in which courts have treated claims of copyright infringement in the blues context.

materials); LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 201 (1968) (noting that musical compositions became protected under the 1831 Copyright Act).

¹⁸⁵ 17 U.S.C. § 303 (2003).

¹⁸⁶ 17 U.S.C. § 303(a) (2003).

¹⁸⁷ 17 U.S.C. § 303(a) (2003).

¹⁸⁸ Jonathan C. Stewart & Daniel E. Wanat, *Section 303 of the Copyright Act is Amended and a Pre-78 Phonorecord Distribution of a Musical Work is Not a Divestitive Publication*, 19 LOY. L.A. ENT. L.J. 23 (1998)

¹⁸⁹ 17 U.S.C. § 303(b) (2003).

¹⁹⁰ *La Cienega Music Co., v. ZZ Top*, 53 F.3d 950, 952-53 (9th Cir. 1995).

La Cienega v. ZZ Top involved a claim by blues legend John Lee Hooker and Bernard Besman, to whom Hooker's copyrights in his musical composition "Boogie Chillen" had been assigned.¹⁹¹ Hooker and Besman became aware that the ZZ Top song "La Grange" was similar to the three versions of "Boogie Chillen" that had been written by Hooker and Besman in 1948, 1950 and 1970.¹⁹² All versions of "Boogie Chillen" had been registered by Besman in the Copyright Office.¹⁹³ After realizing the similarity, Hooker and Besman notified the publisher of "La Grange", alleged that the ZZ Top song "La Grange" was similar to "Boogie Chillen."¹⁹⁴ Hamstein Music Company, the publisher of "La Grange" filed a declaratory judgment action in Texas to resolve the dispute; Besman filed suit in the Central District of California on behalf of La Cienega, in which Besman was the sole proprietor.¹⁹⁵ In *La Cienega*, the Ninth Circuit assessed whether the sale of an unregistered recording constituted a "publication" for copyright purposes,¹⁹⁶ finding that the sale of recordings constituted a "publication" under the Copyright Act of 1909 and that the Hooker/Besman publications were published in 1948, 1950 and 1970, respectively.¹⁹⁷ Whether a distribution of a recording constitutes a "publication" is a significant question that can determine whether the copyright for a sound recording is still valid. In the "Boogie Chillen" case, the court finding that the sale of the recording constituted a "publication" led to the court remanding claims with respect to the 1970 "Boogie Chillen" version but finding that the earlier "Boogie Chillen" compositions entered the public domain in 1976 and 1978,

¹⁹¹ *La Cienega*, 53 F.3d at 952-53.

¹⁹² *La Cienega*, 53 F.3d at 952.

¹⁹³ *La Cienega*, 53 F.3d at 952.

¹⁹⁴ *La Cienega*, 53 F.3d at 952.

¹⁹⁵ *La Cienega*, 53 F.3d at 952.

¹⁹⁶ *La Cienega*, 53 F.3d at 952.

¹⁹⁷ *La Cienega*, 53 F.3d at 953 (noting that the court is adopting the majority rule, which is contrary to the minority rule evident in the Second Circuit case *Rosette v. Rainbo Record Mfg. Corp.*).

when the statutory copyrights expired without renewal.¹⁹⁸

The case involving Robert Johnson's works reached a different outcome than *La Cienega*. Eleven of the songs recorded by Robert Johnson were released with a year of their being recorded.¹⁹⁹ Twenty-two of the 29 songs recorded by Robert Johnson were rereleased well after his death.²⁰⁰ Columbia Records re-released Johnson's recordings in the early 1960s and later released a two-CD boxed set of Johnson's recordings in 1990.²⁰¹ Two songs recorded by Johnson, "Stop Breakin' Down" and "Love in Vain," were later recorded by the Rolling Stones.²⁰² The Rolling Stone albums on which the Johnson songs were included have both been ranked by *Rolling Stone Magazine* as among the "greatest albums of all time."²⁰³ Copyright registrations for the Rolling Stone adaptations were filed in May 1970 for "Love in Vain" and 1972 for "Stop Breakin' Down."²⁰⁴ Unlike Columbia Records and others who adapted Johnson's work, ABKCO did not recognize Johnson's common law copyrights.²⁰⁵ Steve LaVere had reached an agreement in 1974 with Johnson's then sole surviving heir, Carrie Thompson, in which he received fifty percent of all royalties in exchange for her assignment to him of all of her copyright interests in Johnson's works.²⁰⁶ LaVere filed copyright registrations for the 1991 Columbia release and demanded that ABKCO cease and desist from unlicensed uses of the

¹⁹⁸ *La Cienega*, 53 F.3d at 953.

¹⁹⁹ *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, ___ (9th Cir. 2000)

²⁰⁰ See *Robert Johnson—Early Influence*, Rock and Roll Hall of Fame website, at <http://www.rockhall.com/hof/inductee.asp?id=134> (noting that 22 of Johnson's 29 recordings appeared on 78 rpm singles released on the Vocalion label).

²⁰¹ *ABKCO*, 217 F.3d at 686.

²⁰² *ABKCO*, 217 F.3d at 686 (noting that an adapted version of "Love in Vain" was included on the Rolling Stones album *Let It Bleed*, while "Stop Breaking Down" was included on the album *Exile on Main Street*).

²⁰³ W. Russell Taber, Note: *Copyright Déjà vu: A New Definition of "Publication" under the Copyright Act of 1909*, 58 VAND. L. REV. 857, 895 (2005).

²⁰⁴ *ABKCO*, 217 F.3d at 686.

²⁰⁵ *ABKCO*, 217 F.3d at 686.

²⁰⁶ *ABKCO*, 217 F.3d at 686.

Johnson song.²⁰⁷ After unsuccessful negotiations, ABKCO filed an action for declaratory relief.²⁰⁸

In analyzing the application of Section 303(b) of the Copyright Act to *ABKCO*, the Ninth Circuit noted that under *White-Smith*, the piano rolls at issue constituted a performance rather than a publication of a musical composition. The publication-performance distinction noted by the *ABKCO* court again highlights the difficulty many legal commentators have in grappling with a musical universe where sound recordings may have taken on attributes with respect to musical creation, particularly in certain musical genres, formerly ascribed to written musical composition. At issue in *ABKCO* was the retroactive application of Section 303(b) of the Copyright Act.²⁰⁹ More specifically, the court considered whether the Johnson songs were published in 1938 and 1939 when they were released on phonorecord, as *La Cienega* would dictate. This would mean that the Johnson copyrights would have expired in 1967-68, 28 years after their initial publication,²¹⁰ since the copyrights were not renewed prior to the expiration of the initial copyright term. In contrast, if Section 303(b), as amended in 1997 were to apply, the Johnson songs would not have been published until the 1990 Columbia release was copyrighted because under Section 303(b) distribution must occur before 1978 to not constitute a publication.²¹¹

In contrast to *La Cienega*, the *ABKCO* court held that Section 303(b) controlled and interpreted the 1997 amendment as simply clarified the meaning of the 1909 Act, thus correcting the

²⁰⁷ *ABKCO*, 217 F.3d at 686.

²⁰⁸ *ABKCO*, 217 F.3d at 686.

²⁰⁹ *ABKCO*, 217 F.3d at 689.

²¹⁰ *ABKCO*, 217 F.3d at 689.

²¹¹ *ABKCO*, 217 F.3d at 690-92.

outcome in *La Cienega*.²¹² As a result of *ABKCO*, the Johnson songs recorded by the Rolling Stones “had not entered the public domain and were thus not freely available for use by the Rolling Stones in the late 1960s and early 1970s.”²¹³ As a result of *ABKCO*, Johnson’s works will effectively receive more than 100 years of protection, since the copyrights will not expire until 2047 under the provisions of Section 303(b).²¹⁴ Section 303(b) reflects an expansion in the rights of copyright owners that in this particular instance has benefited a class of potential owners who have typically not benefited from copyright frameworks. *ABKCO* does, however, reflect the continuing confusion connected to questions of what constitutes a “publication” of underlying works.²¹⁵

3. Copyright Royalties and the Johnson Estate

In addition to and likely in part as a consequence of his status as blues cultural icon, Robert Johnson’s estate has profited significantly from the exploitation of copyrights in Johnson’s works. Although the *ABKCO* case has enabled Robert Johnson’s estate to collect additional royalties, blues copyright cases have not addressed questions of equity and fairness for blues artists or similarly positioned musicians more generally. For select blues artists such as Robert Johnson, however, effective copyright enforcement have enabled a seemingly fairy tale ending for Robert Johnson’s son and recently identified heir.

The use of copyright by Steve LaVere, who received an assignment in 1974 of Johnson’s

²¹² *ABKCO*, 217 F.3d at 686.

²¹³ Benjamin Gemperle, *Note: Can’t Get No Satisfaction: How ABKCO v. LaVere Bowed to Pressure from the Music Industry*, 22 *LOY. L.A. ENT. L. REV.* 85, 97 (2001).

²¹⁴ *Id.*

²¹⁵ Michael Landau, “*Publication, Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years*,” 2 *VAND. J. ENT. L. & PRAC.* 29, ___ (2000).

copyrights from Johnson's then last known surviving heir, his sister Carrie Thompson, contributed to the accumulation of significant royalties in the Johnson estate and Steve LaVere's wallet. After a series of cases spanning some 15 years in Mississippi state courts, Claude L. Johnson, a gravel truck driver from Crystal Springs, Mississippi,²¹⁶ was found to be the illegitimate son of Robert Johnson.²¹⁷ The recognition of Claude L. Johnson entitled him to receive an estate worth more than \$1 million.²¹⁸ The size of the Johnson estate reflects a translation of his cultural icon status to the economic and business arena and thus underscores in financial terms ways in which Robert Johnson can be distinguished from his peers.

B. *Copyright and Fairness*

Copyright operates with a default property rule in which nonconsensual takings are discouraged.²¹⁹ This property rule accompanies narratives and representations about creation and creativity that discount or even ignore the importance of uses of existing texts in the creation of new ones. Further, even if doctrines intended to enable future uses such as fair use are taken into account, such property rules have thus far not facilitated clear delineation between the scope of acceptable and unacceptable uses of existing material. Doctrines such as fair use are often insufficient to make such delineations in the context of living music traditions.

²¹⁶ Reed Branson, *Robert Johnson's Blues – Property Rights Law Suit Starts*, BLUES NEWS, Oct 13, 1998, at <http://www.blues.co.nz/news/article.php?%20id=55>.

²¹⁷ In the Matter of the Estate of Robert L. Johnson, Harris & Anderson v. Johnson, 767 So.2d 828 (Miss. S. Ct. 2004) (discussing the status of pictures of Robert Johnson with respect to his estate); In the Matter of the Estate of Robert L. Johnson, Harris & Anderson v. Johnson, 767 So.2d 181, 186 (Miss. S. Ct. 2000) (affirming the judgment of Leflore County Chancery Court in finding Claude L. Johnson to be the biological son of Robert Johnson); In the Matter of the Estate of Robert L. Johnson, Harris & Anderson v. Johnson, 767 So.2d 828 (Miss. S. Ct. 1997) (reversing and remanding dismissal of claim of Claude L. Johnson as being time barred).

²¹⁸ Branson, *supra* note 216.

²¹⁹ See Arewa, *supra* note 55, at 638-41 (discussing property and liability rules in intellectual property); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655 (1994) (noting that a property rule can be infringed only after bargaining with the entitlement holder).

Historical consideration of popular music in the American context suggests that the operation of copyright as a property rule can also lead to outcomes that are manifestly unfair. Although this is recognized to some extent in discussions of distributive values in copyright, the ways in which copyright has influenced African American artists in particular are often largely ignored other than in specific discussions of copyright and African American artists.²²⁰ One of several notable exceptions is the work of Keith Aoki, who has drawn attention to distributive implications in copyright generally and blues music specifically.²²¹ General discussions of copyright largely assume a uniform application of copyright law without attending to the implications of various sociocultural hierarchies that might influence and differentiate the operation of copyright.²²² Such hierarchies have significantly influenced the operation of copyright in ways that need to be better appreciated in current discussions of copyright and recommendations for copyright reform.

The ways in which hierarchy has shaped copyright are many. In some instances, for example, incumbent creators have been permitted to borrow from certain traditions, particularly traditions from groups such as African Americans, who historically have been at the bottom of most societal hierarchies of status and power.²²³ Many of these incumbents may then be able to use copyright to block borrowings from their works, despite the fact that such works borrow extensively.²²⁴ The operation of copyright as a property rule also disfavors certain aesthetics of cultural production, including those that use extensive borrowing, particularly when borrowing is

²²⁰ VAIDHYANATHAN, *supra* note 149, at 117-48; Greene, *supra* note 149, at ____; Hall, *supra* note 103, at 37-58; Hines, *supra* note 170, at ____.

²²¹ Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, ____ (2007).

²²² See, e.g., Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1538 (2005) (“Thus copyright seems, historically at least, to have benefited poorly financed creators more than it has burdened them.”).

²²³ See Arewa, *supra* note 148, at ____ (discussing borrowings from African American music by George Gershwin).

²²⁴ *Id.* at ____.

undertaken by those with relatively low status, limited resources or less power relative to those from whom they borrow.²²⁵ In the international context, hierarchies of status and power have influenced the structure of international intellectual property frameworks and the types of knowledge that may be used without compensation within such frameworks.²²⁶ These contexts point out ways in which copyright may be underinclusive and fail to adequately protect forms of cultural production that perhaps should be protected. The assumptions underlying current copyright frameworks thus point out the need for better delineation of the scope of acceptable copying.

While copyright has been characterized as underinclusive, inadequate protection for some types of cultural production exists in a broader cultural milieu where many assert that copyright is overinclusive. The key to resolving this seemingly paradoxical simultaneous overinclusive and underinclusive situation rests in better identification of the scope of acceptable copying in varied contexts with simultaneous reassessment of the assumptions about cultural production that have led to the current state of affairs. The need for better demarcation of the zone of acceptable copying is further underscored by the existence of varied models of cultural production, including valuable asset models that are one important reason that some assert that copyright is overinclusive and that may also impede the diffusion and dissemination that are important aspects of living cultural traditions.

The need to both encourage and police diffusion suggests that music in the end may be better

²²⁵ See Arewa, *supra* note 55, at ___ (discussing how notions of authenticity have contributed to the creation of the classical music canon since the nineteenth century).

²²⁶ Madhavi Sunder, *The Invention of Traditional Knowledge* (Feb. 2004), UC Davis Legal Studies Research Paper No. 75, at <http://ssrn.com/abstract=890657> (discussing treatment of “poor people’s knowledge” under global intellectual property frameworks).

suited to the operation of liability rules, which would begin with an assumption of borrowing as a norm and require compensation when works are borrowed. Such liability rule frameworks have the potential to address the ways that copyright's operation in particular context may reflect and even magnify existing inequalities. Liability rules will also underscore the reality of borrowing as an important aspect of the aesthetics of many artists, from classical composers to blues and hip hop artists.²²⁷ Such rules have the potential to promote vibrant forms of cultural production such as the blues, while ameliorating some of the more negative aspects of the operation of copyright.

CONCLUSION

A contextual understanding of copyright should use the lessons of the past to help shape the structure and operation of copyright in the future. Examination of the operation of copyright in specific instances such as Robert Johnson and the blues can point out complexities that underlie the operation of copyright. Allocations of rights in the copyright context take place in a broader sociocultural context permeated with hierarchies that may influence the effective operation of copyright frameworks. Copyright discourse needs to be based on better understanding of the actual operation of copyright. The role and power of copyright expanded significantly during the course of the twentieth century and is likely to become yet more magnified in today's knowledge intensive society.

In crafting copyright frameworks, in addition to attending to the potential significance of hierarchies, from a policy perspective, greater recognition needs to be given to the importance of

²²⁷ Arewa, *supra* note 55, at ____.

copying in the creation of new works. The blues offers an excellent vehicle by which to consider issues of copying, creation, and context in copyright. The lessons of the blues suggest the potential benefits of frameworks that enable copying, as well as the potential limitations and inequities that may arise from copying in certain contexts. This suggests that better refinement of the freedom to copy can be beneficial in attaining copyright frameworks that balance between the needs of current creators as well as future users and creators of copyrighted works.