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Writing Rights: Copyright’s Visual Bias and African American Music

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COPYRIGHT’S VISUAL BIAS AND AFRICAN AMERICAN MUSIC

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Abstract

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

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INTRODUCTION

“She [Whitney Houston] was broke -- her label gave her advances,” a record company insider told me. “And unlike Michael, you have to remember that Whitney didn’t write any of those massive hits. They were songs that Clive Davis told her to sing and she did.” One of Houston's biggest hits, “I Will Always Love You,” was actually written by Dolly Parton, who will receive the writer’s and publisher’s rates when the song undoubtedly gets a boost in radio and television performances. “**Whitney is only the singer**.”

Copyright first protected words and other written expression, but with an overriding visual and textual emphasis. Copyright subsequently expanded to protect a broad range of things, including music compositions and performances, sound recordings, choreography, photographs, movies, and software. As it expanded to new arenas, however, copyright retained its dominant visual-textual emphasis, which has significant implications for both nonvisual and nontextual aspects of creative activities and treatment of performers within copyright. This pervading and largely unrecognized visual-textual bias has contributed to continuing problems in the application of copyright in a broad range of areas, including music, dance, theater, and Internet contexts.

In the case of music, for example, copyright at first gave rights that protected written musical works—music and lyrics, which created a functional system until well into the twentieth century. However, music is a performance art in which oral and aural aspects are essential. Music also typically involves oral traditions that may supplement, modify, or even replace aspects of written traditions reflected in notation. Changing technology and musical practices increasingly challenge the privilege granted to written notation in music copyright. Since the early twentieth century, the displacement of European based music by syncretic African based music as a dominant basis for popular music has been a key aspect of changing musical practice in the United States and elsewhere. This displacement is an important and largely unrecognized factor in continuing contemporary challenges to music copyright. Further, the dominant role of African American based music in the United States music industry has significant implications for musical practice as well as dominant copyright assumptions about music that incorporate underlying visual-textual biases.

The emergence of African American music as a global force is inextricably linked to the development of sound recording technologies. African American based music has played an

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2 See, e.g., Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 HARV. L. REV. 683 (2012) (discussing the ungovernability of images in copyright law and dichotomous copyright treatment of images as either being transparent or opaque); Jacqueline D. Lipton, *Digital Multi-Media and the Limits of Privacy Law*, 42 CASE W. J. INT’L L. 551, 551-552 (2010) (noting the limitations of the European Union Data Protection Directive, which focused on regulating textual information, but did not adequately address the application of their regulatory model to sound and images, despite being aware that problems might arise in these alternative formats);
important role in the recording industry since its inception. George W. Johnson, an early African American recording star, recorded a number of songs, including two best selling records in the 1890s. Johnson was among the first in a long line of African American recording artists who played a progressively more prominent role in the twentieth century popular music arena. Further, since the entry of recorded music into the entertainment arena in the late nineteenth century, innovations in sound recording technology also came to play a key role in continuing music copyright challenges. Sound recording innovations, changing musical conventions, and the increasing prominence of African American music as a basis of popular music draw attention to contexts of musical creation that came to characterize twentieth century music practice. This interconnection among technological change, musical practice, and African American music also highlights gaps between music perception, as construed by copyright law, and music cognition as reflected in neuroscience studies.

A copyright focus on notation has contributed to a privileging of the seen over the heard in music, which is problematic in a number of ways. The assumptions underlying the privilege of sight and treatment of music evidence in copyright infringement cases may be inconsistent with neuroscience findings about human cognition and perception of visual and auditory stimuli in music, which raises fundamental questions of how evidence is presented and interpreted in copyright infringement cases. A failure to appropriately contextualize the visual and oral in music has led to confusing bases for determinations of infringement and haphazard analysis in music copyright cases. Visual-textual bias has also led to a level of disregard for the contributions of performers in copyright. This article analyzes the origins and impact of the privilege of sight in music copyright. It examines implications of visual-textual bias and the composition-performance dichotomy in copyright with particular attention to the impact of the rise of African American popular music for music practice, as well as assumptions about music perception within copyright doctrine. Part I examines technology, musical variations, and music

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6 M. Fletcher Reynolds, Music Analysis for Expert Testimony in Copyright Infringement Litigation xiv (Ph.D. Dissertation, Music Theory, University of Kansas, 1991) (discussing musical analysis in music copyright infringement cases, noting haphazard analyses in infringement cases and that “the musically relevant issues were never presented or properly explained by the expert witnesses”).

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perception, focusing on the role of sound recording technologies in musical practice, copyright
treatment of musical practices, and significant differences between music and literary works.
Part II discusses implications of fixation for music copyright then considers the significance for
copyright of the displacement in the popular music arena of European art music by African based
music. Part III analyzes implications of sound recording technology for visual bias and
examines how court approaches to music infringement cases reveal a pervasive visual bias. Part
IV proposes modifications to copyright law that can ameliorate visual bias in music copyright
and better address questions related to composition and performance.

I. COPYRIGHT, TECHNOLOGY, AND MUSICAL VARIATIONS

A. Music Copyright, Music Publishing, and Visual-Textual Bias

1. Sources of Visual-Textual Bias

Visual-textual bias derives from a number of sources, including historical, linguistic/semiotic
and cognitive ones. Sacralization is a major historical source of visual bias in copyright. A core
aspect of sacralization was an increasing tendency during the course of the nineteenth century for
certain types of musical works to be treated as sacred untouchable works. The processes and
consequences of sacralization have not been read as such within copyright discussions of
authorship in music. Rather, conceptions about creation and creativity that had become pervasive
in the European art music tradition as a result of sacralization are often taken as norms of
creation within dominant copyright discourse. This is both historically inaccurate and
particularly problematic due to the ascendancy of African American based music as popular
music in the twentieth century. A number of copyright scholars have highlighted limitations in
dominant copyright visions of creativity. Despite these alternative perspectives, treatment of
music creation by courts and others has tended to reflect visions of musical creation strongly
influenced by the privilege of sight. This privilege accorded to the visual senses is typically
accompanied by assumptions about creativity that are imbibed with sacralized assumptions that
are inconsistent with actual musical practices in many genres.

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7 I am indebted to Paul Heald for his suggestions concerning the typology of sources of visual bias.
8 See infra notes ___ to ___ and accompanying text.
9 See infra notes ___ to ___ and accompanying text.
10 Rebecca Tushnet, Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children, 86 NOTRE DAME L. REV.
   2133, 2134 (2011). (“Human creativity, like human reproduction, always makes new out of old in ways that
copyright law has not fully recognized.”); Peter Jaszi, Contemporary Copyright and Collective Creativity, in THE
   CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29, 40 (Martha Woodmansee
   & Peter Jaszi eds., 1994) (“Copyright law, with its emphasis on rewarding and safeguarding ‘originality,’ has lost
   sight of the cultural value of what might be called ‘serial collaborations’—works resulting from successive
   elaborations of an idea or text by a series of creative workers, occurring perhaps over years or decades.”); Jessica
   Litman, Copyright as Myth, 53 U. PITT. L. REV. 235, 246 (1991) (noting that models of authorship in copyright law
   assume two extremes, one the romantic model, which depicts each work as unique, and the other the rational author,
   who can plan the authoring process with sufficient precision so as to acquire the necessary permissions in advance).
Visual bias is also reflects linguistic and semiotic factors related to notation and the problems of representation. Notation by its nature constitutes a reduced and often incomplete version of musical expression. The incomplete nature of notation has significant implications, particularly for aspects of musical expression that are not easily notated. Further, even when musical sounds are taken into account in legal cases, considerations of music may reflect confusion about nonvisual aspects of music and the implications of musical variations for legal outcomes.\(^\text{11}\)

Rather than being an objective indication of some underlying musical reality, the meaning of notation may vary depending on various factors, including context and musical genre. This means that courts should take account of the adequacy and sufficiency of notation in context in analyses of both originality and infringement. Tension presently exists in how courts approach notation in contexts where notation may be incomplete. The court’s discussion of composition and performance in the *Newton v. Diamond* case highlights this tension.\(^\text{12}\)

Visual bias also has significant cognitive aspects related to music perception and the senses. A focus on the visual in music assumes that visual and textual images give us understanding about the essence of music itself. Although this is no doubt at least partially the case in some instances, how much knowledge one can gain from notation alone is highly dependent on musical context and genre. Copyright law gives priority to visual sensation as the primary mechanism by which to gain insight about music, which is unnecessarily limiting. Privileging visual aspects of music presents problems for nonvisual aspects of music, including factors such as timbre and rhythm, which may be difficult to represent visually in notation.\(^\text{13}\) Timbre refers to the quality of sound that enables listeners, for example, to distinguish among different instruments in an orchestra.\(^\text{14}\) Timbre is an auditory feature of music that plays an important role in music perception.\(^\text{15}\)

Perceptions about writing in copyright embed assumptions about writing and objectivity that reflect a privilege of sight deeply rooted in European post-Enlightenment thought:

There is no doubt that the philosophical literature of the Enlightenment—as well as many people’s everyday language—is littered with light and sight metaphors for truth and understanding . . . sight is in some ways the privileged sense in European philosophical discourse since the Enlightenment.\(^\text{16}\)

This privilege of sight is an important underlying source of tension in copyright. The privilege of

\(^{11}\) See infra notes ___ to ___ and accompanying text.

\(^{12}\) See infra notes ___ to ___ and accompanying text.

\(^{13}\) Jean-Charles François, *Writing without Representation, and Unreadable Notation*, 30 Perspectives New Music 6, 15 (1992) ("Timbre cannot be easily notated.").


\(^{15}\) See infra notes ___ to ___ and accompanying text.

sight may also be inconsistent with how music is actually perceived by listeners.\textsuperscript{17} Neuroscience studies of music cognition and perception may suggest avenues by which treatment of music in copyright infringement cases might be reconceptualized.\textsuperscript{18}

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

Examining music copyright history can shed light on the origins and operation of visual-textual bias and the privilege of sight in music copyright. The expansion of copyright from word to note underscores significant musical variations, in part due to differences in available technologies for music reproduction, first in the printing era and then later in the sound recording era. Copyright was first applied to literary works, which are by their nature primarily visual. Although literary works can be read aloud and consumed in other ways or presented as drama, the primary method of consumption of such works is reading, which has typically involved visual interpretation of words.\textsuperscript{19} The scope of copyright was later expanded to protect other artistic fields, including music. Copyright, however, has proven to be a less than exact fit for music.\textsuperscript{20} The application of copyright to music has raised a number of issues of continuing importance and at times dispute, particularly since the early twentieth century. These challenges are a consequence of the introduction of a series of technologies of sound reproduction and changing musical practices.

The application of copyright to music has been progressive and first applied to musical compositions, then musical performances,\textsuperscript{21} and later sound recordings and other technologies of sound reproduction.\textsuperscript{22} Early copyright statutes did not initially protect music. The Statute of

\textsuperscript{17} Arewa, \textit{supra} note 5, at ____.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} This visual relationship is not universally the case. Braille, for example, enables reading by touch rather than visual input. Similarly, recent innovations have made nonvisual reproduction of literary works increasingly available through products such as books on tape and applications that convert text to speech, the latter of which have led to copyright disputes between book publishers and providers of text-to-speech technologies. \textit{See} Kit Eaton, \textit{Authors Guild Says Kindle 2’s Text-to-Speech Violates Copyright}, FASTCOMPANY.COM, Feb. 11, 2009, http://www.fastcompany.com/blog/kit-eaton/technomix/kindle-2s-text-speech-infringes-copyright-says-authors-guild.
\textsuperscript{21} Isabella Alexander, \textit{“Neither Bolt Nor Chain, Iron Safe Nor Private Watchman, Can Prevent the Theft of Words”: The Birth of the Performing Right in Britain, in Privilege and Property: Essays in the History of Copyright}, 321, 336-342 (Ronan Deazley, Martin Kretschmer & Lionel Bently eds. 2010) (discussing the 1842 extension of the Dramatic Copyright Act to music in Britain).
\textsuperscript{22} Audio Home Recording Act of 1992 (AHRA), 17 U.S.C. §§1001-1010 (1994) (requiring manufacturers of digital audiotape (DAT) machines and tapes to pay a royalty to copyright owners); 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); Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1080-81 (1909) (current version at 17 U.S.C. § 115 (2006)) (providing that copyright owners acquiescing to the use of a copyrighted work on instruments serving to
Anne, for example, specifically refers to books and writings, but did not at first cover musical compositions. The 1790 U.S. Copyright Act did not protect written musical compositions, which became protected under the 1831 U.S. Copyright Act. In the United States, statutory protection of music performance rights was added in 1897 and sound recordings in 1971.

A writing-focused approach to music has led to a profound visual-textual bias that has become more apparent as copyright has expanded significantly over time from its initial core of protecting purely written expression. This visual bias is reinforced by legal practice, which is by its nature focused on writing and which frequently prioritizes the written over the oral. The prioritization of the written over the oral and aural in music reflects the emergence of copyright during an era when available technologies meant that tangible reproduction of music necessarily took place in written form.

Current copyright approaches typically place oral expressions of music in sound recordings under the rubric of performance. These oral expressions are then presumed to derive from some type of written composition that is assumed to be fully capable of being reflected in written notation. This composition-performance distinction is inconsistent with musical practice in a number of music genres and does not adequately take account of the full spectrum of past or present compositional practices. Moreover, variations in compositional practices have become even more significant since the advent of the sound recording era in the late nineteenth century. As a result of sound recordings and other technologies of nonvisual musical reproduction, music may be composed, performed, reproduced, and distributed without ever being written. Technology now enables the creation and replication of music in varied ways, and even permits the creation of synthetic music, which may be created using computers and other technologies.

mechanically reproduce the work must permit any other person to make similar use of the copyrighted work upon payment of a royalty of two cents).


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

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

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


Edward Rothstein, Is It Live ... or Yamaha? Channeling Glenn Gould, N.Y. TIMES, March 12, 2007, http://www.nytimes.com/2007/03/12/arts/music/12conn.html (describing technologies developed by Zenph Studios, which extracted the musical information from mono recordings by Glenn Gould of Bach’s Goldberg Variations, replayed the music using a digital file on a Yamaha Disklavier Pro, a computerized player piano, thus recreating the original performance without the hissing and noise, thus creating a new digital recording that is effectively a reperformance Gould’s playing); Hugh Le Corbin, Electronic Music, 44 PROC. INST. RADIO ENGINEERS 456 (1957);
New technologies and methods of music generation are likely to pose yet greater challenges to music copyright in the future and also highlight inadequacies of approaches to music that reflect an unquestioned privileging of sight.

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

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

Music is first and foremost a performance art, which distinguishes it from literary works, which are not typically performed, but which are rather read, often silently. Music notes are often less representational than words, which makes interpretations of infringement in music copyright


See John G. Cawelti, *Performance and Popular Culture*, 20 CINEMA J. 4, 4 (1980) (distinguishing performing arts such as music, drama and dance, which require the mediation of a performer, from other arts such as fiction, painting and poetry, and noting that most of the popular arts are centrally involved with performance); Kingsley Price, *The Performing and Non-Performing Arts*, 29 J. AESTHETICS & ART CRITICISM 53, 62 (1970) (discussing the distinction between the performing and non-performing arts and noting that the performing arts “must be understood by reference to certain performances”).

contexts potentially fraught with complexities and uncertainties. An obvious difference between words and notes is a quantitative one: the number of available words for expressive activities far exceeds the number of available notes. The number of characters in the English alphabet is 26, while the number of words in the English language is estimated at one to two million.\textsuperscript{33} The average educated person has an estimated vocabulary of 35,000 to 75,000 words.\textsuperscript{34} Literary works in English may thus be constructed from among the tens of thousands of words a typical author might know, the close to 300,000 words in entries in the \textit{Oxford English Dictionary} or similar works, or even the one million or more words in the English language.\textsuperscript{35}

In contrast, the Western musical scale includes twelve tones from which musical works may be constructed.\textsuperscript{36} The drastic difference in essential building blocks in literary and musical works has significant implications for repetition in music as compared with works of literature.\textsuperscript{37} Further, although words in literary works are certainly not cobbled together randomly and may have some predictability in order and progression, music is often characterized to a significant degree by particular configurations of notes that may depend, for example, on harmonic progressions or other musical factors. As a consequence, each of the twelve tones in the musical scale is often not equally likely to be utilized in particular configurations of musical expression in most musical genres. The twelve tones of the music scale are combined in musical expression with harmonic and other structures that constrain compositional choices in important ways that are often not a factor to the same extent in literary expression. Within particular musical traditions, for example, certain harmonic chord progressions are typical, which enables practitioners and listeners of such traditions to both construct and anticipate future sequences of notes and harmonic elements based on prior notes and knowledge of expectations within the particular tradition.\textsuperscript{38}

Chord progressions and harmonic structure underscore the inherently relational construction of music. The meaning of musical notes is highly context dependent. The relational nature of music means that the harmonic meaning of a particular note or series of notes depends on the


\textsuperscript{34} Gall, supra note 33; \textsc{David Crystal, Cambridge Encyclopedia of the English Language} \textsuperscript{(__)} (1997); \textsc{David Crystal, How Many Words?}, \textsc{Eng. Today}, No. 12 11, 11 (Oct. 1987), www.davidcrystal.com/DC\_articles\_English83.pdf.

\textsuperscript{35} \textit{Oxford English Dictionary}, \textsc{supra} note 33, at \textsuperscript{(__)}(noting that the second edition of the Oxford English Dictionary includes 291,500 words).

\textsuperscript{36} \textsc{George Thaddeus Jones, Music Theory} 10 (1974) (noting the European musical system divides sounds into seven white keys and five black keys of the piano).

\textsuperscript{37} \textit{See infra} notes \textsuperscript{(__)} to \textsuperscript{(__)} and accompanying text.

\textsuperscript{38} \textit{See, e.g., Frank Zappa with Peter Occhiarosso, The Real Frank Zappa Book} 187 (1989) (noting that Tin Pan Alley and jazz music often involve a II-V-I chord progression); \textsc{Richard J. Ripani, The New Blue Music: Changes in Rhythm & Blues, 1950-1999}, at 37 (2006) (noting that twelve-bar blues music follows a chord progression (in the key of C) of: C7 C7 C7 F7 F7 C7 G7 F7 C7).
context of those notes. Varied musical factors, including the nature of the musical scale, cultural and musical conventions that limit musical choices, and the existence of music as a performance art that uses nonrepresentational notes, make a translation from literary copyright to music copyright a far from easy process.

In addition to musical factors, business and technological factors have also differentiated music from literary works. The advent of the movable type printing press quickly led to a revolution in the production of books in Europe. In 1450 books in Europe were produced by hand and numbered in the thousands. A revolution in book printing quickly ensued: by 1500, millions of individual volumes of books were in print in Europe. Music printing was complex and expensive in comparison, which influenced the rate of adoption of printing technologies for music. The period following Bach v. Longman, which clarified the application of the Statute of Anne to music, has been characterized as a revolutionary one for music printing and publishing. However, early forms of printing technology, such as engraving technologies, were inadequate for the reproduction of certain types of music, including keyboard music, which includes a rapid succession of short notes and dense chords. In addition to being ill-suited to printing technologies such as movable type, music notation required high-quality paper, which increased the expense of printing music.

As a consequence of the technological complexity and expense of printing music, vocal and instrumental music was still widely circulated in handwritten manuscript form until at least the beginning of the nineteenth century. Italian opera, which became a dominant force in European musical tastes, was similarly rarely printed in the early eighteenth century, but rather distributed

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39 See V. Kofi Agawu, Playing with Signs: A Semiotic Interpretation of Classic Music 15 (1991) (discussing music as a relational system and noting that “a given note can take on different meanings depending on the key in which it occurs, and, within that key, the actual chord within which it functions.”); Ripani, supra note 38, at 37-38 (noting that the C7 chord (C, E, G, B♭) in the twelve-bar blues chord progression functions as a tonic in blues chord progression but cannot, for example, function as tonic chord in conventional Western art music). A tonic note is the first note in a scale that is the key note from which the scale takes its name. The Oxford Dictionary of Music (2d ed. Michael Kennedy ed. 2006).
40 Arewa, supra note 20, at ___.
43 David Hunter, The Printing of Opera and Song Books in England, 1703-1726, 46 Notes 328, 328 (1989) (noting that writers on music printing and publishing characterize the period from 1680 to 1720 as revolutionary).
46 Krummel & Sadie, supra note 44, at 3 (“During the latter part of the 15th century and the 16th printing became the accepted means by which works of literature, history, philosophy and scientific speculation were multiplied and disseminated in hundreds of copies – school primers by the thousand; but vocal and instrumental music was still circulated in handwritten form. Manuscripts were prepared for sale in this way at least until the beginning of the 19th century.”).
Music continued to be distributed in manuscript form far later than the printed word in part because printed music was difficult to read: “type was harder to read than handwriting – short note values were particularly troublesome.” The difficult economics of music printing were exacerbated by low rates of music literacy, which limited markets for printed music. The small size of music print runs thus distinguished music from literary works. Further, because music printing was so expensive, the economics of music printing only made sense with large print runs.

The technological differences between printing words and printing notes and the complexity and economics of music printing made receiving profits from music printing a “challenging risk.” The only profitable form of music printing in the seventeenth century was psalm books with music, which was also the only competitive music publishing arena. Further, not until the late seventeenth century did the unauthorized publication of music even become a potentially lucrative endeavor.

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

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

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

47 Id. at 80.
48 Id. at 100.
49 Herissone, supra note 45, at 247.
51 Id. at 45.
52 Herissone, supra note 45, at 247.
53 David Hunter, Music Copyright in Britain to 1800, 67 MUSIC & LETTERS 269, 270 (1986).
54 Id.
The contrast of visual with auditory representations of music was evident in the earliest days of sound recording technologies. The earliest known preserved sound recording, created in France in 1860 by Léon Scott, was based on the phonautograph, which was invented in the mid-1850s. A phonautograph is a visual transcription of sound that turns audible vibrations from speech or music into written tracings. Léon Scott’s invention did not, however, have much of an impact, at least commercially, and his phonautographs were soon lost in French archives until their recovery and reproduction as sound over a century after Scott created them.

The sound recording era was truly born with Thomas Alva Edison’s development of tinfoil phonograph technology in 1877. Although Edison initially conceived the phonograph primarily as a business device to enable stenography, he was aware of the potentially broad range of potential applications of the phonograph. Following Edison’s development of the phonograph, he turned his attention to inventions relating to electricity, which gave space for other inventors to improve on phonograph technology. Alexander Graham Bell’s activities in developing the graphophone, which replaced Edison’s tinfoil cylinder with a wax cylinder, spurred Edison to improve his invention. Various sound recording technologies, as developed and improved by Edison, Bell, Emile Berliner, and others, eventually became the impetus for commercial development of sound recording technologies that soon revolutionized music.

Technological innovation in sound recordings was closely related to technological developments

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56 Oliver Read & Walter L. Welch, FROM TIN FOIL TO STEREO: EVOLUTION OF THE PHONOGRAPH 5 (1976) (describing the phonautograph as tracing sound waves for the purpose of visual analysis and noting that “a great step in thinking was required” between the phonautograph and the phonograph); Sterne, supra note 16, at 31.

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

58 Although Scott’s creation was not intended to reproduce sound, a group of American audio historians recently found Scott phonautographs in archives in France and converted the visual images into sound recordings. Rosen, supra note 55.

59 Improvement in Phonograph or Speaking Machines, U.S. Patent number: 200521 (issued Feb. 19, 1878). Although French inventor Charles Cros deposited a sealed packet disclosing a phonograph invention with the Académie des Sciences in Paris in April 1877 prior to Edison’s disclosure of his invention in December 1877, Cros never built a prototype. Morton, supra note 57, at 9-10; see also Michael Chanan, REPEATED TAKES: A SHORT HISTORY OF RECORDING AND ITS EFFECTS ON MUSIC 23-24 (1995) (noting that it is unlikely that Edison knew of the work of Cros and that Edison was the first to develop a working prototype sound recording).

60 Chanan, supra note 59, at 24 (noting that F.B. Fenby of Worcester, Massachusetts was granted a patent in 1863 for a “complicated electro-magnetic device which also was never built but about which . . . Edison must have known, for it was Fenby who coined the word ‘phonograph.’”)


in other areas, including the telegraph and telephone, and the phonograph was part of a broader communications revolution in the late nineteenth century that had a profound impact on life in the United States and elsewhere.\textsuperscript{63}

The transition from Scott to Edison and later inventors marks more than the passage of time. Rather, movement from the phonautograph to the tinfoil phonograph and later sound recording technologies marks a fundamental dividing line between music as visual image as compared with music as auditory message and an important starting point in the development of the era of recorded sound as commercial practice. As sound recording scholar Jonathan Sterne has noted: “[t]here is a yawning epistemic gap between us and Léon Scott, because he thought that the way one gets to the truth of sound is by looking at it.”\textsuperscript{64} The assumptions underlying Scott’s phonautograph parallel in important respects underlying copyright assumptions about the locus of musical expression as being embodied in musical writings. Conceptions of music as visual image and music as auditory message also relate to assumptions about the role of the senses in perception that have broader significance in both time and space, the importance of which extend far beyond music. The era of recorded sound illuminates tensions between conceptions of how music is both received and perceived that have enormous implications for copyright that are not sufficiently recognized.

Commercial production of records for entertainment purposes only began to occur in larger volume at the end of the nineteenth century.\textsuperscript{65} During the twentieth century, sound recording technologies became widely disseminated and sound recordings became a pervasive aspect of music creation and consumption. The advent of sound recordings has had a significant impact on the music industry and music practice. From a business perspective, sound recording technologies eventually led to the rise of the recording industry, which replaced the formerly dominant sheet music industry.\textsuperscript{66} Sound recordings and other twentieth century technologies have also facilitated changes in musical practice. Sound recordings enable permanent preservation of and repeated listening to a broad range of musical activities. Over time, sound recordings, which are a nonvisual form of musical reproduction, have increasingly come to replace sheet music in a number of musical arenas. Further, technologies of recording and the ability to store and retrieve recordings now give musicians unparalleled access to a wide range of music that can be mixed, manipulated, borrowed, and utilized in ways that were simply not

\textsuperscript{63} ANDRE MILLARD, AMERICA ON RECORD: A HISTORY OF RECORDED SOUND 17-18 (2005) (noting Edison and Bell had inventions in the telegraph, telephone, and phonograph areas); MORTON, supra note 4, at 31, 34 (noting that prior to the gramophone, Berliner was known for an improved microphone for use in the telephone).

\textsuperscript{64} Rosen, supra note 55.

\textsuperscript{65} See infra notes ___ to ___ and accompanying text.

possible even as recently as 25 years ago. Late twentieth century technologies, however, also underscore the extent to which technology choices by commercial actors and businesses and the effective control engendered by such choices have long played a role in the effective functioning of copyright.

The recording industry came to control the production and dissemination of phonograph records, which were a dominant source of recorded music for much of the twentieth century. For most of the twentieth century, sound recordings were largely unprotected by copyright. The sound recording industry and other music industry actors have also modified business models when confronted by new technologies and business conditions. The application of technology to the content industries thus highlights a continual process in which new technologies challenge existing business models, which generally must adapt in the face of changing technological, business, and creative contexts.

During much of the twentieth century, recording companies and others in the content industry have often sought to address the challenges of a wide range of practices from unauthorized private uses to piracy and bootlegging to the challenges of new technologies and business models through modification of copyright laws. For example, continuing concerns about unauthorized dissemination of records and other factors led the recording industry to lobby successfully for sound recording copyright protection, which was adopted in the United States in the early 1970s. The copyright law path, particularly in the face of changing cultural practices and

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69 This term is used in its broadest sense to include the phonograph (Edison), graphophone (Bell), gramophone (Berliner and Johnson), and related technologies. See MORTON, supra note 4, at 1-50.
70 Although sound recordings did not receive copyright protection until 1971, any written musical composition embodied by the sound recording did receive copyright protection. See Olufunmilayo B. Arewa, Blues Lives: Promise and Perils of Music Copyright, 27 CARDOZO ARTS & ENT. L.J. 573, ___ (2010).
71 See generally MORTON, supra note 4.
72 See e.g., Mark Lemley, Is the Sky Falling on the Content Industries?, 9 J. TELECOMM. & HIGH TECH. L. 125 (2011) (discussing technology shifts and the content industry); Lisa Gitelman, Reading Music, Reading Records, Reading Race: Musical Copyright and the U.S. Copyright Act of 1909, 81 MUSICAL Q. 265, 274–75 (1997) (noting that the introduction of the player piano and phonograph seriously damaged the sheet music industry).
73 Industry sound recording lobbying efforts began in the early twentieth century at the dawn of the sound recording era. See Barbara A. Ringer, Study No. 26: The Unauthorized Duplication of Sound Recording, Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, at 3, 37-38 (Feb. 1957) (noting that legislative attempts to copyright sound recordings go back to 1906 and describing the roles of varied industry players).
74 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). The extent to which a sound recording constitutes a “writing” within the meaning of the Intellectual Property Clause of the U.S. Constitution was considered in a House Report discussing the sound
technologies is likely to be increasingly difficult in the digital era. Uses of copyright by the recording industry and other leading players in the content space also obscure other factors that may have played a role in past industry outcomes. For example, technology choices in the early twentieth century made it far more difficult to copy phonograph records than might otherwise have been the case, which meant that dominant business models and technologies of the time reinforced copyright restrictions on copying. However, events in both the nineteenth century and now illustrate that the interaction of technology, copyright, and musical practice that is continually changing.

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

In contrast to the gramophone, duplication of music using cylinder disc technology frequently involved performances repeated multiple times to create multiple masters to produce cylinders for sale. Johnson, the early African American recording star, was said to have performed his hit “The Laughing Song” 40,000 times. Although record companies abandoned cylinder

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75 MORTON, supra note 4, at 31.
76 Id. at 32.
77 Id. at 34.
78 Id. at 34-35.
79 CHANAN, supra note 59, at 5 (noting that cylinder disc technology was unable to satisfy demand and that the gramophone disc enables mass production).
80 MORTON, supra note 4, at 27.
81 MILLARD, supra note 63, at 87.
technology for music in the early twentieth century, this technology continued to be used for stenography applications of recording technology to dictation.\textsuperscript{82} Stenography was the first commercial market on Edison’s 1878 list of applications of phonograph technology.\textsuperscript{83} The Dictaphone and Ediphone dominated the market for stenography recording, were used through the 1960s, and were unchallenged in their dominance until the 1950s.\textsuperscript{84} Although the earliest versions of these stenography devices were quite difficult to use, deployment of phonograph technologies in these office contexts were intended to foster users’ ability to make their own recordings.

2. Sound Recordings and the Rise of African American Music

Stenography recordings and phonograph records illustrate the potential range of technology choices that were available at the dawn of the recording era. They also underscore the divergent and varied role of technology in different contexts of use. In the case of recorded music, technological changes throughout the twentieth century, well before the digital age in music, including as a result of radio, the development of analog tape technology,\textsuperscript{85} the advent of playback and recording devices, digital audio technology,\textsuperscript{86} and other forces have given consumers of phonograph records greater ability to control how they use and consume musical content.\textsuperscript{87}

Some consumers of content use existing content to create new music. The advent of hip hop music in the twentieth century underscores one way in which new creations use existing ones in ways that may not be consistent with dominant copyright assumptions.\textsuperscript{88} However, rather than reading hip hop music in isolation as late twentieth century musical form, hip hop must be considered as a recent example of a broader trend that has been evident since the early twentieth century. Hip hop exemplifies the flowering of African American music as a dominant basis of popular music. Hip hop and earlier forms of African American based or influenced popular music genres, including ragtime, blues, jazz, country, and rock and roll, may fall along a significant fault line in musical perception between the visual-textual and the oral-aural. Further, contemporary music trends as evident in hip hop increasingly challenge music copyright law’s notation centered focus on allocating rights to musical writings as a “primary” source, which often comes with an accompanying assumption that performed music and other nonvisual and nontextual expressions of music are both derivative and secondary.

\textsuperscript{82} MORTON, supra note 4, at 43-54.
\textsuperscript{83} See supra notes ___ to ____ and accompanying text.
\textsuperscript{84} MORTON, supra note 4, at 50.
\textsuperscript{85} DAVID MILES HUBER & ROBERT E. RUNSTEIN, MODERN RECORDING TECHNIQUES 181-197 (7th ed. 2010) (describing analog tape technology).
\textsuperscript{86} Id. at 199-233 (describing digital audio technology).
\textsuperscript{87} See generally MORTON, supra note 4.
\textsuperscript{88} See generally Arewa, supra note 20.
The global prominence of African American based music was by no means predictable or inevitable. In the late nineteenth and early twentieth centuries, recording companies needed to create markets for sound recordings. Acoustic recording technologies of the time, however, imposed significant limitations on what could be recorded. For example, although Enrico Caruso, a tenor, became a star in large part as a result of his recordings, some voices could not easily be recorded. The tenor voice fell within the range of the horn used to capture sound for recordings. Operatic voices played a special role in the early gramophone business, particularly in the marketing of premium gramophone recordings. Although trained operatic voices were the first to benefit from improvements in sound recording technology, all voices did not fare equally well with early recording technology, and the results of the recording process during this time period “were pretty much a gamble.” As a result, although opera was quite popular in the 1890s, some opera stars refused to be recorded for fear that the resulting recordings would not appropriately reflect their voices. Similarly, live music performances and certain instruments simply did not always record well, and the violin, cello, and piano presented problems for sound recordings. Early recordings tended to include whistling, the banjo, xylophone, trumpet, tuba, and trombone. Recording engineers thus faced significant limitations on what could be recorded and sought additional sources of content. Recording companies found this content in music halls and band stands rather than exclusively in opera houses and concert halls, which represents a key expansion in the cultural realm outside of the prior pattern of music and other culture in the U.S. being imported from Europe. The recording industry’s search for content for mass consumption thus led directly to military brass bands, minstrelsy and coon songs, and vaudeville, which were dominant in the popular music scene. As a result of the search for content, new sound recording technologies began an engagement with an emerging body of

89 CHANAN, supra note 59, at 50 (noting the limited dynamic range of the early gramophone).
90 MARK COLEMAN, PLAYBACK: FROM THE VICTROLA TO MP3, 100 YEARS OF MUSIC, MACHINES, AND MONEY xvi (2003) (noting that Caruso’s 1907 recording of the aria “Vesti la Giubba” from Ruggero Leoncavallo’s opera Pagliacci is “a leading candidate for the elusive title of the first million selling disc”).
91 CHANAN, supra note 59, at 30 (noting that singers were the first to benefit from Berliner’s improvements in sound recording technology and that Caruso’s “strong tenor voice (with its baritone quality) helped to drown out the surface noise, so that even on the inadequate apparatus of the time, his records sounded rich and vibrant.”).
92 COLEMAN, supra note 90, at xviii.
93 CHANAN, supra note 59, at 30.
94 Id.
95 Id. at 80.
96 Id. at 81.
97 Id. at 82.
98 Id. at 83-85; CHANAN, supra note 59, at 6 (noting that the recording industry soon learned to develop its own repertoire and that part of their formula involved transforming “raw” urban and ethnic music into popular culture commodities for mass consumption).
African American popular music.101

3. African American Music, Notation, and the Privilege of Sight

The engagement of sound recording with African American based music was, however, to have unexpected consequences that are relevant for copyright. The distinctiveness of African American based music was more marked in the late nineteenth century than is certainly the case today. This is due to a number of factors. Popular expectations about music changed radically over the course of the twentieth century. African American based music had become commonplace in the popular music scene by the end of the twentieth century:

Narrative accounts of music in the twentieth century ought to (but rarely do) find at their core the succession of Black genres that stamped themselves indelibly on the lives of generation after generation: ragtime, blues, jazz, R&B, gospel, doowop, soul, rock, reggae, funk, disco, rap. This, I would argue, is the most important tributary flowing into today’s music . . . Yet my time-traveler from 1900 would no doubt profess astonishment that this displacement of European by African-based musics in Western culture could have occurred.102

As musicologist Susan McClary notes, the rise of African based musics reflects a reversal that would have been likely impossible to predict 100 years ago. The African American based music of the late twentieth century would likely have been quite alien to the ears of average listeners from a century before that time. The displacement of European art music resulted in a profound and often insufficiently recognized shift in musical tastes and dominant forms of musical expression. This displacement has significant copyright implications because the music replacing European art music as popular music to a large extent came to incorporate fundamentally different assumptions about composition and performance and the roles of oral and written traditions. From the first emergence of African American musical forms to the broader American population after the end of slavery, African American musical forms came to play an important role in the American popular music scene from the twentieth century onwards. By the late 1990s, African American and other African based musical forms were increasingly coming to dominate global music markets.103

African American based musical forms draw attention to the privilege of sight in copyright because they “have strongly conventionalized song structures that allow for improvisation, subtle

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102 Susan McClary, Rap, Minimalism, and Structures of Time in Late Twentieth-Century Culture, in AUDIO CULTURE: READINGS IN MODERN MUSIC 289, 294 (Christoph Cox & Daniel Warner 2004).
variation, and an emphasis on rhythm and timbre.”104 These conventionalized African American musical features have serious implications for notation because they reflect characteristics of music that are difficult to notate. As a result, they cannot be adequately encompassed by visual representations of music. Although the inadequacy of notation as a tool of musical representation is a potential issue with virtually all genres of music,105 it is particularly problematic for music African American and other African based music.

The tension between oral and written forms of music was evident in the first collection of slave songs in the United States. The editors of Slave Songs of the United States, which was published in 1867, grappled with the fact that conventional notation could not adequately represent slave music, particularly features such as timbre that the collectors perceived to be highly distinctive yet difficult to notate:

The best we can do, however, with paper and types, or even with voices will convey but a faint shadow of the original. The voices of the colored people have a peculiar quality that nothing can imitate; and the intonations and delicate variations of even one singer cannot be reproduced on paper. And I despair of conveying any notion of the effect of a number singing together . . . There is no singing in parts, as we understand it, and yet no two appear to be singing the same thing—the leading singer starts the words of each verse, often improvising . . . “It is difficult,” writes Miss McKim, “to express the entire character of these negro ballads by mere musical notes and signs.”106

The reactions of early collectors of slave songs underscores how alien the music they heard sounded to them. As a result of displacement and musical takeover, the sound of African based music became decreasingly alien to a broader range of listeners over the course of the twentieth century. The difficulties of early collectors in notating slave music point out how music genre can have a significant impact on the role of notation in musical practice. Many contemporary musical practices continue to expose the inherent limitations of the notation-based focus in music copyright. Further, notated music in dominant oral music traditions such as blues may be in the form of lead sheets that reflect compositional practices that might include improvisation, for example. Such forms of notation may also merely sketch out a potential basis for performances or alternatively reflect a transcription of orally composed music that may not fully reflect a musical composition or musical work as actually performed. Varied music genres underscore the inherently incomplete and highly variable nature of notation.107

Interpretations of copyright that implicitly assume that copyright protects primarily writing rights

104 S T E R N E, supra note 16, at 158.
105 Arewa, supra note 20, at____.
107 Charles Seeger, Prescriptive and Descriptive Music-Writing, 44 THE MUSICAL Q T LY 184, 184-95 (1958) (discussing limitations of conventional notation, noting that the assumption that the full auditory parameter of music is or can be represented by a partial visual parameter is one hazard inherent in music writing practices).
may fail to take sufficient account of nonvisual aspects of music. For example, courts may interpret discrepancies between written compositions and oral expressions of music reflected in sound recordings by assuming that the “true” composition is evident in the written notation. Courts may also assume that oral musical expressions necessarily derive from a written composition and give this written composition heightened copyright protection. Visual bias may also mean that the most distinctive and original aspects of certain genres of music remain unprotected simply because they were not historically musical features that were notated within dominant systems of notation or simply because such features may be difficult to notate. The copyright emphasis on rights in writings and the related composition-performance dichotomy are incompatible with the actual creation of music in many instances and reflect a privileging of sight that results in a continuing visual bias in music copyright that should be changed.

C. Newton v. Diamond and the Privilege of Sight: Copyright and Music Cognition

Copyright assumptions that privilege the visual over the aural have significant implications for how courts treat allocations of rights. Because notation tends to be biased towards forms of musical expression that can be encompassed through the visual sense, aspects of musical expression that are nonvisual may be minimized or even excluded. This may mean that notational representations may level musical differences and potentially make different types of music appear to be more similar than might otherwise be the case. This is a significant issue for copyright analysis of both originality and infringement.

The presence of two copyright holders is not uncommon in musical copyright where copyrights may be split between the composer, who may retain rights in the underlying written composition (notes and lyrics), and recording companies, who typically own the sound recording copyright.\(^\text{108}\) The music composition copyright is broader and in theory at least separate from the sound recording copyright.\(^\text{109}\) The owner of the music composition copyright has the exclusive right to reproduce the composition, create derivative works, publicly perform, and publicly display the composition. In contrast, the sound recording copyright owner can protect against literal reproduction of the sound recording, but does not have a display right and has a only a limited performance right for performances of the sound recording by digital audio transmission.\(^\text{110}\) In a copyright infringement case, the trier of fact determines whether two works are substantially similar. Although substantial similarity doctrine is far from uniform in application and is murky


in many respects, substantial similarity tests typically involve two separate inquiries, one that determines whether defendant copied plaintiff’s work, while the second focuses on whether defendant’s copying was an unlawful appropriation or infringement. Because the first aspect of substantial similarity (i.e., copying) is often determined by circumstantial evidence, the inquiry for this first prong of the substantially similarity test generally focuses on whether the defendant had access to the work that was allegedly infringed and whether substantial or probative similarity exists between the two works. Probative similarity is thus the second aspect of the copying element. This copying element is sometimes referred to as an extrinsic test of substantial similarity. Once copying is established, tests of substantial similarity are also used to determine whether a defendant unlawfully copied plaintiff’s work. Unlawful appropriation is determined based on tests of intrinsic substantial similarity, a subjective test based upon a reasonable person standard. Courts in some circuits may exclude expert testimony concerning substantial similarity.

In analyzing the music composition copyright, consideration of infringement tends to be limited to three principal notated musical features, melody, which is typically given primary consideration, and to a lesser extent harmony and rhythm. The reasonable person standard used in court cases does not tend to take sufficient account of how music is perceived, which is a significant oversight. Although music composition copyright cases are based on infringement of the written musical composition, nonvisual aspects of music are not entirely ignored. Rather, music sounds, when presented, are treated in ways that do not fundamentally alter underlying visual bias. Courts in music composition cases may rely on the jury lay listener test for copyright infringement, which asks juries to draw conclusions about written musical compositions by listening to sound recordings. In written composition cases, the jury lay listener test is problematic in that it mingles elements of written and oral expression in potentially confusing...

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111 See infra notes ___ to ___ and accompanying text.

112 Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (discussing elements of copying and unlawful appropriation).

113 Tuff N’ Rumble Mgmt. Inc. v. Profile Records Inc., No. 95 Civ. 0246 (SHS) 1997 WL 158364 at *12 (S.D.N.Y. Apr. 2, 1997) (“As proof of access, a plaintiff may show that ‘(1) the infringed work has been widely disseminated or (2) a particular chain of events exists by which the defendant might have gained access to the work.’” (citations omitted)); 4-13 M E L V I L L E B. N I M M E R & D A V I D N I M M E R, N I M M E R O N C O P Y R I G H T § 13.01[B] (2007) (noting that copying as factual matter typically depends on proof of access and probative similarity).

114 Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (noting that extrinsic test of substantial similarity requires that plaintiff “identify concrete elements based on objective criteria”).

115 Three Boys, 212 F.3d at 485 (noting that intrinsic test of substantial similarity is subjective and based on ordinary, reasonable person standard).

116 Jamie Lund, An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement, ___ VA. SPORTS & ENT. L. J. ___ (forthcoming 2012) (manuscript on file with author); Reynolds, supra note 4, at ___.

117 Arewa, supra note 20, at 618-620 (noting the limited and at times questionable court treatment of rhythm).

118 Arewa, supra note 5, at ___.

119 Lund, supra note 116, at ___.

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ways.\textsuperscript{120} Use of the jury lay listener sense is more credible in sound recording infringement cases.\textsuperscript{121} However, uses of sound recordings in both written composition and sound recording infringement cases highlight the unsystematic nature of factual inquiry with respect to fundamental features of music in music infringement cases, even in instances where expert testimony is not excluded.\textsuperscript{122}

Uses of visual and auditory evidence in music copyright infringement cases also raise issues concerning human cognition of music that should be taken into account in music copyright infringement cases. Many of the tests for music copyright infringement were established during a time period when studies of music cognition were minimal or nonexistent. The insights of music cognition could significantly enhance analyses of infringement in music copyright cases.\textsuperscript{123} More specifically, how the finder of fact perceives visual and auditory aspects of music in music copyright infringement litigation implicates assumptions about human sensation and cognition that merit further scrutiny. Music copyright infringement cases tend to assume that melody, harmony, and rhythm are separate phenomena. These aspects of music may, however, be perceived in fundamentally different ways than might be assumed in copyright infringement cases. Courts may also combine visual and auditory evidence in relation to music, assuming that jurors can appropriately distinguish and interpret the implications of varied types of evidence.\textsuperscript{124} However, visual and auditory perceptions of musical features are not identical and may not be easily substitutable. For example, experimental studies suggest that perception of rhythm is generally more accurate when rhythms are heard rather than seen, which may have significant implications for how evidence concerning rhythm should be presented in music copyright infringement cases.\textsuperscript{125} To the extent that the fact finder considers rhythm in an analysis of infringement, studies of music cognition suggest that perceptions of one musical feature may influence others. Rhythmic organization can, for example, influence perceptions of pitch, while rhythmic accent can influence memory for melodies.\textsuperscript{126} Perceptions of musical features such as rhythm may vary depending on native language.\textsuperscript{127} Music listeners do not necessarily perceive the same thing, and experimental studies suggest, for example, that nonmusicians may be more

\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Reynolds, supra note 4, at ___.
\textsuperscript{123} Arewa, supra note 5, at ___.
\textsuperscript{124} Reynolds, supra note 4, at ___.
\textsuperscript{125} Katri Kosonen & Roope Raisamo, Rhythm Perception Through Different Modalities, PROC. EUROHAPTICS, 365, 370 (2006), http://lsc.univ-evry.fr/~eurohaptics/upload/ed/papers/f32.pdf (finding the visual modality to be the least accurate in rhythm perception, as compared with the auditory (the most accurate) and tactile modalities).
\textsuperscript{126} Carol L. Krumhansl, Rhythm and Pitch in Music Cognition, 126 PSYCH. BULL. 159, 164 (2000).
\textsuperscript{127} The Neurosciences Institute, Annual Report (December 2005), at 15, http://www.nsi.edu/uploads/pdf/ScientificReport.pdf ("In a large study population, we found that native speakers of English and Japanese perceive a simple rhythm of alternating long and short notes in very different ways: English speakers hear it as composed of repeating groups of short-long notes, while Japanese speakers hear it in the opposite way, as groups of long-short notes.").
confused by changes in timbre than musicians.\textsuperscript{128}

Human perception of visual and auditory sensations related to music is complex, both at the level of practical understanding and the fundamental operation of the human cognition in perceiving different types of stimuli.\textsuperscript{129} Different musical activities involve different regions of the brain, and music perception is complex and interactive. Reading music involves the visual cortex, while listening to or recalling lyrics involves the brain’s language centers.\textsuperscript{130} Listening to music involves the subcortical structures of the brain (e.g., the cochlear nuclei, brain stem and cerebellum), while trying to follow music that one knows or that is stylistically familiar, involves additional regions of the brain, including the hippocampus and portions of the frontal lobe.\textsuperscript{131} Tapping one’s foot to music using the body or the mind, involves the timing circuits of the cerebellum.\textsuperscript{132} Playing music involves both the frontal lobes of the brain, including the motor cortex and sensory cortex.\textsuperscript{133} Although music is seemingly accessible to all, it is understood by few: “[o]f all the arts, music is perhaps the most widely enjoyed and the least understood.”\textsuperscript{134}

The complexities of music perception have implications for treatment of music in copyright cases.\textsuperscript{135} The treatment of the visual and aural in music copyright infringement cases may be based on assumptions about the fact finder’s ability to perceive music that are questionable in light of studies of music cognition. Taking better account of auditory aspects of music perception and reception would necessarily entail acknowledgment of complexities of music cognition. Although much remains to be understood about music and the brain, the complexities underlying perception of music are largely disregarded in copyright considerations of infringement. Although a focus on notation may seemingly level out auditory variations in performed music evident in sound recordings, this effect may ultimately be deceptive, particularly because auditory aspects of music may play an integral role in determinations of infringement, even determinations that appear to be based on analysis of the written musical composition.

Visual-textual bias results in a significant degree of confusion in music copyright. This confusion is present at the outset of music copyright cases. Decisions to pursue copyright infringement

\textsuperscript{128} Mark A. Pitt, \textit{Perception of Pitch and Timbre by Musically Trained and Untrained Listeners}, 20 J. EXPERIMENTAL PSYCH. 976, 984 (1994) (“Nonmusicians had difficulty hearing what happened to pitch when timbre varied, regardless of whether pitch changed or stayed the same. Musicians, in contrast, exhibited no such confusion.”).

\textsuperscript{129} Arewa, \textit{supra} note 5, at ___.


\textsuperscript{131} Id.

\textsuperscript{132} Id.; Jessica A. Grahn and Matthew Brett, \textit{Rhythm and Beat Perception in Motor Areas of the Brain}, 19 J. COGNITIVE NEUROSCIENCE 893 (2007) (examining responses of the brain motor areas to rhythm).

\textsuperscript{133} LEVITIN, \textit{supra} note 130, at 86; OLIVER SACKS, \textit{Musicophilia} 262 (2008) (noting that listening to music or imagining it, even without overt movement or keeping time, activitates the motor cortex and subcortical motor systems).

\textsuperscript{134} Reynolds, \textit{supra} note 6, at 113.

\textsuperscript{135} Arewa, \textit{supra} note 5, at ___.

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cases are typically based on a plaintiff hearing an allegedly infringing song, even in the case of claims based on infringement of a written composition. Court determinations of musical infringement in written composition cases are in theory based on the written composition. In practice, however, court treatment of infringement and jury determinations of infringement may reflect a continuing confusion between the written and oral and composition and performance aspects of music.

Confusion exists in part because the oral and written are necessarily intertwined in both the decision to bring an infringement case and analysis of whether two works are substantially similar. The rationale for playing sound recordings for jurors in written composition cases highlights the conceptual confusion surrounding presentation of music evidence in infringement cases. Further, recordings are played for jurors in music infringement cases as a “vehicle for presenting evidence of the underlying musical composition” with jurors “being asked to look beyond the performance as expressed in the recording, and focus on the underlying musical ideas embodied in the recording.” How juries might effectively undertake this activity is not entirely clear. Consideration of evidence in music copyright infringement cases should be interpreted in light of neuroscience understandings about music cognition. Existing approaches mean that oral expressions of music, when considered, are simply not handled in a sensible way that takes account of existing understandings about music cognition and likely add to existing confusion in music copyright. Better approaches would distinguish visual and auditory musical features that contribute to a finding of infringement in a systematic and informed manner. Considerations of music are also not sufficiently comprehensive in considering the interplay of oral and written in music, as well as the extent to which different musical features are amenable to notation.

The distinctions courts may make between visual and nonvisual aspects of music are evident in the Ninth Circuit’s consideration of Newton v. Diamond. This case demonstrates how the privilege of sight can lead courts to have difficulty in dealing with oral musical expressions and performance aspects of music. The Newton case involved a suit by jazz flautist James Newton against the Beastie Boys, whose song, “Pass the Mic,” had sampled a sound recording of Newton’s composition, “Choir.” Although the Beastie Boys had obtained a license for use of the sound recording from Newton’s recording company, they did not obtain a license from Newton for the underlying musical composition. As is typically the case in music copyright, Newton had retained copyright in the musical composition, but had granted ECM Records copyright ownership of the sound recording. The Newton District Court found in favor of the

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136 Lund, supra note 116, at ___.
139 Newton, 349 F.3d at 593-94; JAMES NEWTON, Choir, AXUM (ECM 1982).
140 Newton v. Diamond, First Amended Complaint, Case No. CV 00-04909-NM (MANx) (C.D. Cal. Feb. 22, 2001), ¶ 26; Newton, 349 F.3d at 592 (“In 1981, Newton performed and recorded ‘Choir’ and licensed all rights in the sound recording to ECM Records for $5000. The license covered only the sound recording, and it is undisputed that Newton retained all rights to the composition of ‘Choir.’” (citations omitted)).
Beastie Boys, holding that the three-note segment that the Beastie Boys sampled from the Newton composition lacked originality and was consequently not copyrightable, and that the use by the Beastie Boys was in any case de minimis. 141 The Ninth Circuit Newton opinion affirmed the lower court holding of de minimis use. 142

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

His (Newton’s) experts reveal the extent to which the sound recording of “Choir” is the product of Newton’s highly developed performance techniques, rather than the result of a generic rendition of the composition. As a general matter, according to Newton’s expert Dr. Christopher Dobrian, “the contribution of the performer is often so great that s/he in fact provides as much musical content as the composer.” This is particularly true with works like “Choir,” given the nature of jazz performance and the minimal scoring of the composition . . . And it is clear that Newton goes beyond the score in his performance. For example, Dr. Dobrian declared that “Mr. Newton blows and sings in such a way as to emphasize the upper partials of the flute’s complex harmonic tone, [although] such a modification of tone color is not explicitly requested in the score” . . . Once we have isolated the basis of Newton’s infringement action – the “Choir” composition, devoid of the unique performance elements found only in the sound recording – we turn to the nub of our inquiry: whether Beastie Boys' unauthorized use of the composition, as opposed to their authorized use of the sound recording, was substantial enough to sustain an infringement action. 143

Although the appeals court’s finding of noninfringement is the correct outcome from a copyright perspective, the court’s reasoning is infused with assumptions arising from the privilege of sight and an underlying visual-textual bias. In its discussion of Newton’s performance techniques, the court assumes that the written score is both the authoritative and complete source of musical expression upon which copyright protection should be based. This emphasis on the visual is too

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141 Newton v. Diamond, 204 F. Supp. 2d 1244, 1253, 1256 (2002) (“In the instant case, Plaintiff's three-note sequence (C -- D-flat -- C) with one background note (C), segregated from the entire piece, cannot be protected, as it is not original as a matter of law.”).
142 Newton, 204 F. Supp. 2d at 1256 (“Even if Plaintiff could establish that this three-note sequence is subject to copyright protection, Pass the Mic and Choir are not substantially similar as a matter of law, as Defendants' alleged infringement was de minimis.”); Newton, 349 F.3d at 598 (affirming district court holding of de minimis use). De minimis use is a doctrine, accepted only in some circuits, that excuses copyright infringements. Fisher v. Dees, 794 F.2d 432, 435 n.2 (9th Cir. 1986) (noting that a taking is de minimis if the average audience would not recognize the misappropriation); The scope and parameters of de minimis use doctrine are uncertain and unpredictable. Susan J. Latham, Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured, 26 HASTINGS COMM. & ENT. L.J. 119, 139–44 (2003) (noting lack of a clear standard for de minimis use, including in relation to the de minimis use standard, burden of proof and relationship to the fair use defense); David S. Blessing. Note: Who Speaks Latin Anymore? Translating De Minimis Use for Application to Music Copyright Infringement and Sampling, 45 WM AND MARY L. REV. 2399, 2408-2420 (2004) (discussing different approaches to de minimis use).
143 Newton, 349 F.3d at 595-96 (emphasis added).
restrictive given the inherent limitations of notation. This is particularly important because music in many genres is defined to a far greater extent by performance than by notation. Although notation plays a significant role in music performance in many genres, a written musical composition in many genres may not effectively serve as a proxy for the entirety of a piece of music.

The divergence between notated music and performed music is thought by many to be particularly evident in genres such as the blues and jazz that have traditionally retained strong oral music elements. However, even in genres in which notation is treated as an authoritative musical source, including the post-nineteenth century European art music tradition, notation at best serves as an incomplete representation of music. Some aspects of musical expression, including rhythm for example, often cannot be adequately represented by written notation alone. This means that a notation-focused approach is inherently biased towards aspects and types of musical expression that are more easily capable of being encapsulated by written notation. Further, this visual bias fails to sufficiently recognize how oral traditions are intertwined with written ones in music practice, even in notation centered music practice.

The *Newton* decision reflects two levels of analysis by the court, one explicit and the other implicit. On one level, the court’s decision rests on Newton’s written composition, which was registered with the U.S. Copyright Office. However, on a deeper level, the *Newton* appeals court determination reflects an underlying structure and approach to music copyright that is fundamentally flawed. By focusing on the written notated version of Newton’s musical expression, the court essentially engages in a reductionist exercise that is highly problematic because the notation on which the legal claim is based is necessarily incomplete and biased. Further, the structure of analysis underlying the Newton court’s decision is increasingly problematic given trends in popular music and technology since the early twentieth century.

The visual-textual emphasis evident in *Newton* has been evident in music from earliest days of the twentieth century music technology revolution and is based on a longer standing privilege of sight more generally. Visual bias in copyright is largely unrecognized because legal training and processes are heavily oriented towards writings, which are given precedence in varied legal contexts. As a consequence, legal practitioners are trained to accept written evidence as dispositive with oral evidence being secondary and typically used in contexts where ambiguities exist with respect to written evidence. The primacy of writing in varied legal contexts is closely connected to evidentiary considerations relating to questions of proof. In such circumstances, oral evidence may be excluded, which is consistent with the overall policy

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144 Newton v. Diamond, First Amended Complaint, *supra* note 140, at ¶ 22 (noting that Newton’s copyright Registration Certificate No. PAU-36-947 was issued by the Register of Copyrights on August 4, 1978).

145 See, e.g., Segovia v. Equities First Holdings, LLC, 65 U.C.C. Rep. Serv. 2d (Callaghan) 969, at *28 (Del. Super. Ct. May 30, 2008) (“If, after careful consideration, the court determines that the contract is an accurate reflection of the parties’ agreement, the interpretation is limited to the four corners of the contract.”).
objectives of ensuring the integrity of information presented by disputing parties in courts and other legal contexts.\textsuperscript{146} In contract law, the parol evidence rule, a substantive common law rule, limits a party’s ability to introduce oral and other extrinsic evidence that contradicts or adds to the written contract.\textsuperscript{147} Oral and other extrinsic evidence are thus treated as secondary in a legal regime that sanctifies written documentary evidence.\textsuperscript{148}

Although the parol evidence rule is not always easily applied in practice, the four corners of the document emphasis that comes with the rule disfavors oral and other unwritten evidence. This emphasis on written types of proof in the law is not limited to contracts. In patent law, the scope of claims in a patent is determined by the contents of the written patent document rather than by any device or process described in the patent.\textsuperscript{149} Legal treatment of writings in contracts, patents, and other legal areas have surely shaped legal approaches in other arenas that emphasize writing, particularly in the face of oral and other nonvisual evidence. Although treatment of written compositions in copyright may be seemingly similar to these other contexts, the visual bias in copyright is not truly analogous in practice and has profound consequences worth examining.

Music, unlike a patent or contract, is not a legal document, although sound recordings and written compositions may be protected by copyright. As a result, rather than serving as a means of determining what information can serve to define a legal relationship or some aspect of legal rights, the visual-textual bias in music copyright contexts often reduces a nonlegal and to a significant extent nonvisual object (music) to its written representation. This representation is then used to make infringement determinations that may be based in part on impressions garnered from listening to the relevant pieces. Although seemingly objective and based on written documentation of music, this process of reduction is inherently interpretive but is often not recognized as such. Further, this reduction process is problematic given the fact that music

\textsuperscript{146} Paolo Torzilli, \textit{The Aftermath of MCC-Marble: Is this the Death Knell for the Parol Evidence Rule?}, 4 St. John’s L. Rev. 843, 844 (2000) (“Generally, the parol evidence rule seeks to exclude testimony of negotiations occurring prior to, or contemporaneous with, the execution of a written instrument. Numerous reasons for the parol evidence rule have been set forth. Two of these policy reasons are universally accepted. First, jurors are generally considered to be extremely impressionable. Second, there is a need for the integrity of a writing to be preserved.” (citations omitted); American Underwriting Corp. v. Rhode Island Hosp. Trust Co., 303 A.2d 121, 126 n.2 (1973) (stating that the parol evidence rule came into being out of fear of invention by witnesses and to allow courts to prevent juries from making determinations of fact based on their sympathies).

\textsuperscript{147} 5-24 CORBIN ON CONTRACTS § 24.7 (“Among such [common law] rules are those stating that words must have one, and only one, true and correct meaning, that this meaning must be sought only by poring over the words within the four corners of the paper, that extrinsic evidence of intention will not be heard, or that evidence of surrounding circumstances is admissible only in instances of ambiguity.”).

\textsuperscript{148} George I. Wallach, \textit{The Declining “Sanctity” of Written Contracts -- Impact of the Uniform Commercial Code on the Parol Evidence Rule}, 44 Mo. L. Rev. 651, 653 (1979) (noting that the parol evidence rule “sanctifies the writing”).

\textsuperscript{149} CRAIG NARD, \textit{THE LAW OF PATENT} 39 (2009) (“The claims are considered to be the most important part of the patent document because the claims delineate the patent owner’s property right. To borrow real property terminology, the claims set forth the metes and bounds of the patentee’s proprietary interest.”).
has significant extra legal presence and meaning that is often not adequately considered in infringement cases. This visual-textual bias causes law to place music and interpretations of infringement in cases involving music into a category analogous to legal documents. Visually biased copyright approaches may thus inappropriately apply a four corners of the document approach to musical compositions and uses of sound recordings. As a result, the visual-textual bias in copyright has potential to do significant damage in nonlegal realms within which music is created, shared, distributed, consumed, and enjoyed. Although questions of proof of authorship and fixation are factors that may cause courts to focus on visual, written aspects of musical and other creations, current approaches may hinder comprehensive understanding and equitable legal treatment of questions of authorship of artistic works that are performed and that include both visual and nonvisual elements.

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

Recognizing the operation of the visual bias in copyright can enhance understanding of areas of doctrinal difficulty and uncertainty. Music is one such area. Visual bias is, however, by no means limited to music cases, but is also evident, for example, in cases involving theater productions. More particularly, theater and film production co-authorship cases can be reread in light of the privilege of sight and visual-textual bias. Reading these cases through the lens of the visual bias demonstrates important commonalities with the visual bias in music cases. In theater cases, courts make determinations about who is an author by reference to the written text of the play, which is necessarily a reduction of the entirety of a theatrical work as performed. Courts in such cases tend to define authorship in largely visual terms that emphasize the final written script. Courts then categorize contributions such as stage direction, scene construction, and character development, which may be critical to the theater production but which are not necessarily visible in the written script, as advice or something else other than authorship. In

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150 I am indebted to Jessica Litman for this observation.
151 Childress v. Taylor, 945 F.2d 500, 509 (2d Cir. 1991) (“Taylor also made some incidental suggestions, contributing ideas about the presentation of the play’s subject and possibly some minor bits of expression. But there is no evidence that these aspects of Taylor’s role ever evolved into more than the helpful advice that might come from the cast, the directors, or the producers of any play. A playwright does not so easily acquire a co-author.”); Thompson v. Larson, 147 F.3d 195, 196-99 (2d Cir. 1998) (holding in that a dramaturg who collaborated with the
addition to and perhaps because of the presence of visual bias, allocations of authorship rights in contexts that involve production, performance, and arrangements continue to challenge copyright frameworks. Consideration of authorship in contexts of music and theater productions also highlights the fact that authorship credit may, in at least some cases, reflect industry power dynamics rather than any generally accepted notions of authorial attribution (even if such notions are shaped by a strong visual bias). In film contexts, however, Writers Guild of America arbiters make determinations concerning screen credit for writers that may incorporate both visual and nonvisual elements.

Approaches that reflect visual bias may also relegate performers to the status of uncreative mouthpieces of authorial intention, which is in many cases not accurate. The visual focus of the *Newton* court diminishes the importance of performance and key contributions of performers, and producers in contemporary music contexts. This dismissal of performer contributions is most clearly reflected in the concept of performing rights. The terms performing and performance rights are in some ways misleading because they are actually rights that accrue to authors that result in royalties begin paid to composers when their works are performed. Since their inception in the late nineteenth century, performing rights have given copyright protection to music composers and authors for performances of their works. Performing rights by their nature assume that composers, but not performers, merit compensation on account of performance of an underlying writing. Although limited performance rights have been granted to

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155 See supra note 1 and accompanying text.

156 Gabriel Jacob Fleet, *What’s in A Song? Copyright’s Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1257 (2008) (“Viewing the producer as an artist is the norm today, and “independent record producers,” as distinguished from in-house producers employed directly by the record label, are significant power brokers and creative forces in the music industry, commanding handsome fees and royalties as a result.”); Ringer, *supra* note 73, at 1 (noting that authors, performers, and record producers make distinct contributions to sound recordings).

157 17 U.S.C. § 106(4) (granting copyright owners exclusive rights with respect to public performances of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works).
owners of sound recording copyrights in the U.S., current U.S. copyright structures do not sufficiently acknowledge the important contributions made by performers of music. The performing right as currently constituted in the United States may thus be seen as another layer of copyright structure that reflects the privilege of sight and visual-textual bias, reinforces the performance-composition dichotomy, and reiterates the derivative and secondary nature of performance within copyright. In contrast to the U.S., some jurisdictions have adopted the Rome Convention, which provides that performers and others may be granted neighboring rights, or rights related to copyright. However, the justification for granting performers neighboring rights rather than a copyright interest also rests on an assumption that performers just execute written compositions, and that such written compositions are the true locus of creativity in music.

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

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

Copyright fixation requirements are also relevant to consideration of visual-textual bias. Copyright attaches when an original work of authorship is “fixed in a tangible medium of expression.” Fixation, as generally understood, focuses on end products of creative processes. Fixation may also be read as an attempt to address nonvisual elements of creative endeavors. The addition of a formal fixation requirement to the 1976 Copyright Act was itself a reaction to greater inclusion of nonvisual creative activities within copyright statutory subject matter.

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


163 Laura A. Heymann, How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide, 51 WM. & MARY L. REV. 825, 845 (2009) (“The introduction of the fixation requirement appears to have been a reaction to efforts to include choreographic works, pantomimes, and sound recordings among the list of copyright-eligible work.”).
music, the fixation requirement unfolds in contexts in which written musical texts may be as reflective of musical processes as they are of a musical end product (e.g., a score). This is a subtle yet important factor that is particularly relevant to living musical traditions, including those that involve extensive improvisation. Dominant aesthetics, in at least some African American cultural traditions, draw attention to the distinction between artistic product and artistic process. The privilege of sight both reflects and reinforces the assumptions of sacralization that have led to a focus on product rather than process in music. Such assumptions pervade music copyright. Rather than assume that notation reflects a particular state in relation to a musical end product, better approaches would start with context and then determine the appropriate copyright treatment of a particular piece of music fixed in a tangible medium of expression.

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

Flexibility and collaboration are key aspects of creative practices in a range of music traditions. Improvisation plays an important role in a number of twentieth century musical forms. The fixation requirement may prevent improvisatory works from obtaining copyright protection. Understanding music as a process may be at tension with the fixation requirement.

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165 BRENDA DIXON GOTTSCILD, DIGGING THE AFRICANIST PRESENCE IN AMERICAN PERFORMANCE: DANCE AND OTHER CONTEXTS 17-18 (1996) (discussing African American dance and noting the contrast between “the Europeanist post-Renaissance ‘high’ art perspective that privileges product (the dance) over process (dancing).”).
168 Id. at 76-82.
Although this does not mean that fixation should be eliminated, it does indicate that fixation in music should be considered in light of the broader context of musical processes. The effective meaning of what is fixed may vary depending on genre and context. Evaluations of copyright protection and infringement that involve considerations of fixation should take potential musical variations into better account.

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

Visual-textual bias and the privilege of sight in music copyright are consistent with dominant and at least partially inaccurate assumptions about creation in the European art music tradition. Notation systems that developed in the West can be distinguished from those that developed elsewhere in the world. Early systems of music notation functioned as performance models rather than as blueprints for performance. Although some associate musical genres with dominant oral expression with particular twentieth century musical forms, such practices are actually quite old. For example, in its earliest centuries, the Gregorian chant tradition was an oral one. This oral tradition began to be translated after the ninth century into writing, a process that took centuries and which involved multiple systems of notation. Western notation systems have not had several centuries to absorb the impact of African American and other musical traditions that may relate to and derive meaning from notation in ways other than what came to be dominant in the Western art music tradition of the late nineteenth century.

As a result of sacralization, by the late nineteenth century, written musical notation had become an authoritative source in the European art music tradition that could not be changed, while performance norms increasingly required strict adherence to notated music. Notation,

171 Larisa Mann, If It Ain't Broke . . . Copyright’s Fixation Requirement and Cultural Citizenship, 34 COL. J. L. & ARTS 201 (2011) (examining costs of applying copyright to unfixed works).
172 See infra notes ___ to ___ and accompanying text.
173 HUGO COLE, SOUND AND SIGNS: ASPECTS OF MUSICAL NOTATION 7 (1974) (noting that notation systems in the East from their origin to present day, have been used to provide an outline or set out rules for performance, leaving details to improvising performers, while Western notations “have increasingly reflected a view of music as a closely planned activity”).
175 Id.; Helmut Hucke, Toward a New Historical View of Gregorian Chant, 30 J. AM. MUSICOLOGICAL SOC’Y 437, 450-467 (1980).
176 RICHARD RASTALL, THE NOTATION OF WESTERN MUSIC 2 (1982) (“in the West alone many quite different (and not easily-classifiable) [notation] systems have been in operation”).
177 Treitler, supra note 174, at 240-243 (discussing the versatility of pitch notation and its potential uses as a symbolic or iconic representational system).
178 THEODOR W. ADORNO, TOWARDS A THEORY OF MUSICAL REPRODUCTION 8-9 (2006) (“Sketchy as the old score may seem to the modern performer, it fulfilled its function by offering the necessary information in its own day, when the composer and the interpreter were so often one and the same person . . . Today, the interpreter of contemporary works frequently has little or no personal choice, as he is forced to follow the very strict directions of the composer.”).
however, often does not completely embody music. Rather, notation is a form of shorthand that communicates limited visual and textual information about music.\textsuperscript{179} Notation alone, however, simply cannot adequately convey nonvisual aspects of music in many music genres. Further, notation by itself does not answer fundamental questions about meaning. This means that courts interpreting notated forms of music cannot and should not make assumptions about what notation signifies to either writers or readers of or those hearing music.\textsuperscript{180} The meanings embodied by notation may change depending on context, genre, and performer. Further, music as a performance art is also defined in important respects by performance rather than exclusively by writing. The performance and nonvisual aspects of music have significant implications for approaches that emphasize writing rights.

Visual-textual bias in copyright leads to an inordinate focus on notation. Although this notation focus in copyright has paralleled developments in European art music, it presents a number of problems because of assumptions typically made about oral traditions in music. Oral traditions exist in all musical traditions, even those with a strong notation focus. The relationship between oral and written traditions in music may be complex and varied.\textsuperscript{181} Consequently, even in notation centered traditions, a focus on notation leaves out significant aspects of musical practice. Most importantly, from a cultural perspective, the notation focus in the classical tradition came with a decline in that tradition as a living tradition. To the extent that a notation focused model is embedded in copyright, copyright should tread with care in creating frameworks in which a sacralized and notation centered view of music becomes a dominant assumption. This is particularly true given significant evidence of creativity in communities that follow nonsacralized approaches to music, for surely one goal of copyright is to promote the progress of science and the useful arts, which means fostering creativity regardless of its form.\textsuperscript{182}

1. Sacralization, Notation, and European Art Music

The application of copyright to music in the late eighteenth and early nineteenth century came in a context of major cultural and business transitions.\textsuperscript{183} Musicians, who formerly operated under a patronage system, were experiencing the realities of an emerging music publishing industry

\textsuperscript{179} Id. at 8 (“Of course, great composers have superbly transformed their ideas into scores, making the best possible use of music notation. But it is this very notation that is imperfect and may remain so forever, notwithstanding remarkable contributions to its improvement. There are certain intangibles that cannot be expressed by our method of writing music – vital musical elements incapable of being fixed by the marks and symbols of notation. Consequently, score scripts are incomplete in representing the composers’ intentions. No score, as written in manuscript and published in print, can offer complete information for its interpreter.”).

\textsuperscript{180} Treitler, supra note 175, at 243 (discussing how early writers and readers of music conceived of what their notations signified).


\textsuperscript{182} Olufunmilayo B. Arewa, Creativity, Improvisation, and Risk: Copyright and Musical Innovation, 86 NOTRE DAME L. REV. 1829 (2011).

that by the nineteenth century significantly influenced the creation and dissemination of
music.\footnote{Weber, supra note 30, at 186.} The music published by music publishers contributed to the rise of a culture of
notation that soon came to dominate the music that became categorized as classical music in the
nineteenth century.\footnote{Arewa, supra note 88, at 590-96 (discussing the invention of the classical music tradition).}
The prominence of notation reflects the rise of classical music as an
invented tradition increasingly mediated by notation during the course of the nineteenth
century.\footnote{McClary, supra note 102, at 295.} The increasing emphasis on notation reflects some of the benefits that notation may
offer musicians. For example, notation provided a way of recording performance nuances prior
to invention of technologies of sound recording, as well as a means for disseminating music in
time and space.\footnote{Estelle R. Jorgensen, \textit{Western Classical Music and General Education}, 11 \textit{PHIL. MUSIC EDUC. REV.} 130, 135 (2003).}
Music notation can also enhance music learning.\footnote{Id.}

The notation focus that became so dominant in European art music was reinforced by copyright,
which in the nineteenth century largely applied to music in its written visual form. The
notational emphasis that came to characterize the European art music tradition is particularly
important in terms of its interactions with oral traditions within the classical music context.
European art music has historically relied on both oral and written traditions.\footnote{Stanley Sadie \& Vladimir Ashkenazy, \textit{The Billboard Encyclopedia of Classical Music} 8 (2004) (noting that Western classical music relies on both oral and written traditions).}
The use of written music also changed over time. In contrast to later periods, as was the case with
Gregorian Chant, the early Renaissance music tradition was to a significant extent an oral or
"unwritten tradition", in some ways resembling jazz and related popular genres . . . [l]ike
popular music, it generally did without musical notation, relying instead on memory,
improvisation, and stock formulas."\footnote{Peter Van Der Merwe, \textit{Roots of the Classical: The Popular Origins of Western Music} 73 (2004).}
In this tradition, notation was a guide for accomplished performers or a "mnemonic device in written symbols."\footnote{Derek Bailey, \textit{Improvisation: Its Nature and Practice in Music} 59 (1992).} By the late nineteenth century, a
pervading focus on notation is associated with formalization of classical music as a category
through the identification of canonical classical music works.\footnote{Arewa, supra note 20, at 591-96.}
Prior to this time, the classical tradition reflected combined oral and written traditions in which varied participants changed and
modified existing works.

The increasing focus on written notation in European art music involved a process of
sacralization, which was part of a broader societal trajectory in the United States in the
nineteenth century in which hierarchical cultural categories began to emerge.\footnote{Lawrence W. Levine, \textit{High Brow, Low Brow: The Emergence of Cultural Hierarchy in America} 224 (1988) (discussing hierarchical categories as a set of categories with continuing resonance to the presence that defined and distinguished culture vertically).} Sacralization

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\bibitem{Weber} Weber, supra note 30, at 186.
\bibitem{Arewa} Arewa, supra note 88, at 590-96 (discussing the invention of the classical music tradition).
\bibitem{McClary} McClary, supra note 102, at 295.
\bibitem{Sadie} Id.
\bibitem{Van Der Merwe} Stanely Sadie \& Vladimir Ashkenazy, \textit{The Billboard Encyclopedia of Classical Music} 8 (2004) (noting that Western classical music relies on both oral and written traditions).
\bibitem{Arewa} Arewa, supra note 20, at 591-96.
\bibitem{Levine} Lawrence W. Levine, \textit{High Brow, Low Brow: The Emergence of Cultural Hierarchy in America} 224 (1988) (discussing hierarchical categories as a set of categories with continuing resonance to the presence that defined and distinguished culture vertically).
involved a decline participation, lessening of a rich shared public culture, and creation of hierarchies of cultural forms. As a result of these processes, forms of cultural production such as Shakespeare, Dickens and opera and places such as museums became increasingly separated from the broader world of everyday culture.

This segregation was accomplished through a process in which audiences, actors and styles of performance became increasingly separated. An important part of this sacralization process related to conceptions of authorship and contributed to an almost fetishization of notation. For much of the nineteenth century, for example, operatic works were performed as parlor music and sheet music anthologies placed Bellini side by side with Stephen Foster and other nonclassical popular composers. A complex and interactive relationship existed between written music traditions and oral ones, reflecting practices became decreasingly acceptable over time. During the course of the nineteenth century, it became increasingly unacceptable to alter what were perceived to be high culture aesthetic forms.

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

195 LEVINE, supra note 193, at 207 (connecting the development of cultural hierarchies to a broader American social climate of increasing fragmentation reflected in subgroups within the culture to set themselves apart, as was evident in the rise of professional specialization, residential patterns in which separation was occurring based on social, economic and ethnic factors and new immigration and an increasingly heterogeneous society as a result of such immigration).

196 Id. at 33; Robert R. Roberts, Gilt, Gingerbread, and Realism: The Public and Its Taste, in THE GILDED AGE: A REAPPRAISAL 169, 172 (H. Wayne Morgan ed., 1963) (“Dickens belonged to the world of art and also to the popular culture of the America of the middle and late nineteenth century.”); Steven Conn, From South Kensington to the Louvre: Art Museums and the Creation of Fine Art, in MUSEUMS AND AMERICAN INTELLECTUAL LIFE, 1876-1926 at 192, 193-194 (1998) (noting that process of defining the art museum in late nineteenth and early twentieth centuries helped solidify the “cultural hierarchy” noted by Lawrence Levine with which we live today).

197 LEVINE, supra note 193, at 57; Roberts, supra note 196, at 173 (“These years saw the rise of magazines and newspapers of mass appeal and of transformation in the theater and other forms of entertainment that produced an increasingly wide gap between popular culture and higher standards of art.”).

198 LEVINE, supra note 193, at 69 (noting that by the end of the century the sacred Shakespeare emerged triumphant); Roberts, supra note 196, at 173-174 (noting that the “familiar schism” between traditional and popular culture “had yet to appear significantly in America in the Gilded Age.”).

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

200 Treitler, supra note 181, at 473(discussing the relationship between written and oral traditions in the nineteenth century, noting that an “original composition, circulated through print and through performance, was transformed by way of ‘oral’ process into a new version perhaps gradually, perhaps all at once. The new version then entered its own written and oral channels. These two channels were not sharply distinct, nor were the traditions of the two versions, which seem to have crossed at least once. Each new edition or performance arose as a realization of a model that would be difficult or impossible to specify exactly.”).

201 LEVINE, supra note 193, at 43.
Writing Rights

2. Cinderella: A Nineteenth Century Pastiche Opera

The opera Cinderella is a pasticcio (pastiche) opera that exemplifies nonsacralized treatment of operatic works that was common well into the nineteenth century. This opera had its first American performance in 1831, just one year after its London premiere, and became one of the “most popular works of musical theater in the history of the American stage.” An English language version of Gioachino Rossini’s opera La Cenerentola, Cinderella was created by an Irishman named Rophino Lacy, who retained some of Rossini’s music, but who also made “copious additions of music from other operas by the same composer.” The success of the Rossini-Lacy Cinderella led to “a rash of publications of favorite songs from this opera.” Lacy’s adaptation of Cinderella was highly influential: the Disney plot of Cinderella follows the Lacy version rather than other versions in circulation in the nineteenth century. Lacy’s adaptation, which was enormously popular over multiple decades, changes the names of characters and simplifies the coloratura in Rossini’s piece.

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

Toward the latter part of the nineteenth century, as was the case with Shakespeare and other cultural forms, opera became increasingly sacralized. In the musical arena, “sacralization endowed the music it focused upon with unique aesthetic and spiritual properties that rendered it inviolate, exclusive, and eternal.” This sacralization process gave composers more prestige.

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202 The dates of the original premiere of La Cenerentola were 1817 in Rome, 1820 in London, and 1826 in New York.
203 Ham, supra note 199, at 71.
204 Id.
205 JOHN GRAZIANO, ED. ITALIAN OPERA IN ENGLISH: CINDERELLA xvi (1994).
206 Ham, supra note 199, at 71.
207 Id. at 74, 76 (noting that operatic sheet music (in English) also became quite popular, with operatic songs becoming part of the American popular song repertory as parlor music that was sung inside the home).
208 GRAZIANO, supra note 205, at xi.
209 Id. at xxiv.
210 Id. at xviii.
211 Ham, supra note 199, at 79.
212 Id. at 79-81.
213 Id. at 82.
214 Id. at 81-83.
215 Id. at 87 (noting that opera “became class entertainment, produced chiefly for the cultural and social aristocracy of America”).
216 LEVINE, supra note 193, at 101.
In contrast, prior to the nineteenth century, concert programs often omitted composers' names. This sacralization and increased emphasis on music authorship significantly influenced the performance of musical texts in that performers "were obliged increasingly to stick to the sacred text of the great masters." The new practices involved fidelity to the score and authorial intention as primary aspects of a generalized respect for purity or authenticity. Although an unrealized ideal, the sacralization of cultural forms became a significant cultural force.

3. Aria Insertion and the Power of Nineteenth Century Performers

Sacralization further contributed to the increasing dominance of written notation in the European art music tradition. Sacralization came not long after improvements in printing technology that made widespread dissemination of printed music increasingly common. The widespread use of notation and increasing focus on performing classical music as written bolstered music publishers by giving them an audience that needed the authentic written version of the piece, typically in the form of sheet music. Notation was important for multiple audiences and actors. Prior to the widespread dissemination of printed versions of music in the late nineteenth century, student musicians learned to play by ear. Initially, students would imitate passages and thematic patterns played by their teachers, with notation being introduced only as students’ musical expression was extended to “musical ‘sentences.’” Nineteenth century printing technologies enabled amateur musicians to have access to scores, which increasingly replaced musicians’ ear training of prior years. In instrumental musical training, printed scores increasingly replaced musical ‘sentences’ played by ear and the focus of training “changed from musical development to technical progress.”

Amateur home musicians also emerged as a new audience for sheet music. The piano became an important marker of middle class status in the United States in the nineteenth century; purchases of sheet music by owners of pianos helped expand markets for sheet music. Demand for

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217 Id. at 137.
218 Id.
219 LEVINE, supra note 193, at 138.
220 Id. at 167 (noting emphasis of Toscanini as symbol of sacralized culture who nonetheless interpreted, rescored and adjusted the musical texts he performed).
221 Id. at 168.
223 Cecilia Hultberg, Approaches to Music Notation: The Printed Source as a Mediator of Meaning in Western Tonal Tradition, 4 MUSIC ED. RES. 185, 187 (2002)
224 Id.
225 Id.
226 Id.
227 Stephanie Dunson, The Minstrel in the Parlor: Nineteenth-Century Sheet Music and the Domestication of Blackface Minstrelsy, 16 AM. TRANSCENDENTAL QTLY 241, 243 (2002) (“The parlor . . . was a new kind of space in many American homes and in nineteenth-century America came to be recognized as the central domestic marker of
printed music also increased as a result of public concerts, which contributed to the popularity of miniature scores. The growth of the academic study of music and rise of musicology created demand for critical and historical printed music editions.\textsuperscript{228} The widespread use of notation and increasing focus on performing classical music as written bolstered music publishers by giving them an audience that needed the authentic written version of the piece, typically in the form of sheet music.

For much of the nineteenth century because technologies of sound reproduction were either nonexistent or not widely available, reproduction of music in any significant scale necessarily involved the written music composition. The presence of music notation thus became a key defining criteria for copyrightability. In the nineteenth century, prior to widespread deployment of sound recordings, this emphasis on written notation was a necessary element for copyrightability because available technologies effectively limited the scope of copyright to the written note. However, since the twentieth century, when sound recordings have become broadly disseminated, copyright treatment of written notation raises significant questions.\textsuperscript{229} A focus on written musical notation evident in both the later classical music tradition and continuing copyright assumptions may also obscure the importance of oral traditions in music.

Although written notated music became the key aspect of European art music, oral traditions continue to play a role in classical music that is not always recognized, particularly by those who assume that the music requires a written score to be performed.\textsuperscript{230} Contemporary discussions of European art music may not sufficiently contextualize the importance of oral traditions and how the role of such traditions in European art music has changed over time. Even in the contemporary era, some prominent musicians within the European art music tradition have engaged in music primarily orally. The 2009 winner of the Van Cliburn competition was Nobuyuki Tsujii, a blind pianist who learns his music by listening and who takes cues from the conductor’s breathing.\textsuperscript{231} Other talented musicians have also engaged with music primarily orally. For example, operatic tenor Luciano Pavarotti could not read music, pianist Arthur Rubinstein was a poor reader, and operatic soprano Kiri Te Kanawa is a poor music reader.\textsuperscript{232}
The role of performers has changed profoundly since the early nineteenth century in European art music. Aria insertion, which gave performers the power to override written scores and substitute or add arias of their choosing, was pervasive in opera prior to 1850:

aria insertion ... allowed singers to introduce arias of their own choice into opera productions . . . insertion arias might replace a portion of an opera (substitutions), or they might dislodge none of the original music (interpolations); they may have been authored by the composer of the opera, or they may have been written by someone else . . . Singers planned these insertions in advance, and everyone involved in the production . . . was aware of when and where they would occur.\textsuperscript{233}

The presence of oral and written traditions in European art music suggests a topography of music practice that diverges from assumptions many courts implicitly make about music. Music copyright may also not take sufficient account of variations in musical practice both within and among genres. Uses of oral and written traditions in music may vary significantly among various musical genres and composers. Similarly, compositional practices may vary to a far greater extent than courts may assume.\textsuperscript{234}

4. Living Music and Oral and Written Traditions: Changing Views on Improvisation

Discussions of the role of oral and written traditions in different music genres may assume the dominance of one strand without appropriately taking account of the other. Consequently, discussions of European art music, particularly in the legal arena, often focus on written traditions and do not sufficiently consider the role or importance of oral traditions in European art music. Similarly, discussions of other genres, including African based musics such as jazz and blues, may focus primarily on oral traditions within such genres, without appropriate attention to the role of written traditions and relationships between oral and written traditions in such genres. How one views oral and written traditions, and the extent to which each may be embodied in the compositional process plays a critical but unrecognized role that continues to be played out in copyright discussions. Some, for example, assume that notation is necessarily connected to originality,\textsuperscript{235} which, even if true in specific historical contexts, cannot be generalized across music genres and time periods.

\begin{itemize}
\item come in, or any of the other technical things that make up the craft of musicianship, Luciano is a little bit challenged. It doesn’t help that he can’t read music.”); Andrew J. Walters, Ellen Townsend & Geoffrey Underwood, \textit{Expertise In Musical Sight Reading: A Study of Pianists}, 89 BRIT. J. PSYCH. 123, 124 (1998) (noting the weak relationship between performance ability and sight-reading ability and talented performing musicians who are poor readers, citing Kiri Te Kanawa and Artur Rubinstein as examples).
\item Arewa, \textit{supra} note 20, at ____.
\item Jason Toynbee, \textit{Copyright, the Work and Phonographic Orality in Music}, 15 SOC. LEG. STUD. 77, 81 (2006) (“In other words, notation promoted originality.”); Arewa, \textit{supra} note 182.
\end{itemize}
Understanding the fate of oral traditions in European art music has implications for copyright given the focus on written musical traditions that has characterized both European art music and copyright discourse in the twentieth century. The changing role of improvisation, which by the early twentieth century had ceased to play a significant role in most genres of European art music, reflects a fundamental alteration in the interaction between oral and written traditions in European classical music. Improvisation is one aspect of a range of oral musical traditions that once existed in European art music and that pervades a number of musical genres that have become prominent since the early twentieth century. Improvisation was an indispensable ability for professional musicians well into the nineteenth century. In addition to being an important part of many compositional practices, improvisation was a highly valued skill among classical musicians until that point in time. Early operas such as Monteverdi’s L’incoronazione di Poppea were performed using scores that consisted of figured bass and vocal parts. During performance, singers would add ornamentation, while instrumentalists playing the bass line would turn a single bass line with numbers into a “full harmonic foundation.”

Many now characterized as great composers were also highly accomplished performers who were most renowned for their skills in performance. An accomplished musician in Johann Sebastian Bach’s time would be expected to be able to improvise a complete accompaniment. Johann Sebastian Bach is said to have been an exceptionally fluid and accomplished improviser. Similarly, Beethoven was an accomplished improviser whose improvised works were thought by some to be equal, if not superior to his formal compositions. Mozart also excelled at improvisation, and his “performances were designed to display his talents as

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

237 BAILEY, supra note 191, at 27–28 (noting that “improvisation was an automatically accepted part of performing music” in the Baroque era); Moore, supra note 236, at 79 (noting that Brahms, Paganini, Chopin, Clara and Robert Schumann, Mendelssohn, Hummel, Cramer, Ries, Spohr, Joachim, and Schubert, among others, were all accomplished improvisers).

238 Lewis Porter, John Coltrane’s “A Love Supreme”: Jazz Improvisation as Composition, 38 J. AM. MUSICOLOGICAL SOC’y 593, ___ (1985).


240 Id.

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


243 Id. at 375, 406.

244 OSCAR GEORGE THEODORE SONNECK, BEETHOVEN: IMPRESSIONS BY HIS CONTEMPORARIES 15, 22, 28, 30-31, 72 (1927); PAUL F. BERLINER, THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION 774 (1994).
improviser, pianist, and composer (that is the order his contemporaries assigned to his gifts).”

When J.S. Bach visited his son C.P.E. Bach in 1747 in Berlin, Frederick the Great (Frederick II), asked Bach to improvise a fugue on a theme chosen by Frederick, who was himself a flautist and accomplished musician. Frederick then asked Bach to improvise a 6-part fugue, which Bach did based on a Bach chosen theme. The following evening, Bach improvised a second 6 part fugue based on a theme chosen by King Frederick. After masterfully demonstrating his improvisation skills, J.S. Bach used the King’s theme as a basis for his last completed major work, *The Musical Offering*, which included two fugues, a trio sonata, and more than five canons.

In addition to aria insertion, opera singers would incorporate extended embellishments and improvisations in their performances. Pianists lacking skill in improvisation would actually play memorized preludes that so that they could appear to be improvising. Improvisation was largely eliminated from the European classical tradition by 1910, other than in limited areas such as organ music, a decline that is closely connected to sacralization and the notation fetish that made it increasingly difficult to modify existing music. The elimination of improvisation from the classical tradition was thus a consequence of sacralization and the reverence given past music of the canonized classical tradition. Some attribute the decline in the classical tradition as a living musical tradition in which new works are being actively created to the notation fetish and sacralization that made changing existing music and improvisation increasingly

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245 Levin, *supra* note 241, at 143-44.
247 Gould & Keaton, *supra* note 239, at 143.
248 Sassoon, *supra* note 246, at 38.
249 *Id.*
251 Gould & Keaton, *supra* note 239, at 144.
252 Valerie Woodring Goertzen, *Setting the Stage: Clara Schumann’s Preludes*, in IN THE COURSE OF PERFORMANCE: STUDIES IN THE WORLD OF MUSICAL IMPROVISATION 237, 239–40 (Bruno Nettl with Melinda Russell eds., 1998) (“Improvisation was so highly regarded that pianists who lacked training in the art resorted to memorizing preludes in instruction manuals and published sets; they could pretend to supply these ‘off the cuff,’ in imitation of the gestures of accomplished artists.” (citations omitted)).
253 Tagg, *supra* note 222, at 290 (noting that improvisation was virtually eliminated from the European classical tradition by 1910).
254 *Bailey, supra* note 191, at 19, 29–38 (noting that improvisation is still an active force in the French school of organ performance).
255 See Moore, *supra* note 236, at 79 (“Reverence for the music of past eras is in itself an impediment to improvisation. Spontaneous innovations cannot occur in music which is intended to be more a replication from 1790 than a musical event of today.”).
These patterns eventually led to European art music ceasing to be mainstream popular music, replaced in the twentieth century by music influenced by both Asian and African music. The development of the European art music cannon was also connected to attitudes that post-canon composers brought to the composition process itself. Young composers came to focus on autonomous composition practices and developing distinctive personal styles that could match the assumed (and actually invented) traditions of their predecessors, but who modeled their creations on their predecessors in an elusive and esoteric fashion. In the case of some composers such as Arnold Schoenberg, the post-canon composition process involved a battle against repetition. These post-canon trends had significant implications for the decline in the European classical oral tradition as evidenced in the elimination of improvisation. In particular, attitudes that view repetition with disfavor may have implications for the potential degree of embeddedness of oral aspects of musical traditions. This is particularly true since many examples exist in literature and music of creative and compositional processes that embed significant aspects of oral traditions, many of which may involve formulaic structures and repetition.

Perhaps of most significance to copyright, sacralization and the notation fetish contributed to the decline of classical music as a living vibrant cultural space, which has interestingly led in the twentieth century to attempts to return to past practice in order to bring life to the classical tradition. Attitudes toward improvisation in European art music have changed significantly in recent years. Recognizing some of the implications of the elimination of improvisation from the classical tradition for this tradition as a living tradition, after a gap of a century and a half, some twentieth century performers have reintroduced improvisation into the classical tradition.

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256 Tagg, supra note 264, at 290 (“The ideological aim of this notation fetish . . . was to forestall sacrilege upon the ‘eternal values’ of immutable Masterworks . . . . This strategy was so successful that it finally managed to suffocate the living tradition it claimed to hold so dear . . . .”).

257 McClary, supra note 102, at 292 (noting that the “European classical tradition has ceased to occupy the mainstream” and “no longer qualifies as the protagonist in the history of music—not even in the West”).


259 McClary, supra note 102, at 291.


261 See George E. Lewis, Improvised Music After 1950: Afrological and Eurological Perspectives, 16 BLACK MUSIC RES. J. 91, 102, 110 (1996) (noting reemergence of improvisation after 150 year gap in twentieth century among composers of experimental, new and avant-garde music such as John Cage and among practitioners of improvised
More recently, music schools and a range of performers within the European art music arena have sought to return improvisation to classical music, in part to bring back life into this tradition.\textsuperscript{262} Music schools are now training classical musicians in improvisation.\textsuperscript{263} One music scholar has even suggested that people today hoping to reinvigorate opera should look to nineteenth century practices like aria insertion as a means of bringing new life to opera.\textsuperscript{264}

The decline of improvisation in the classical tradition and emphasis on autonomous authorial composition have served to both minimize innovation in live performance of existing music in the classical tradition and separate musical composition, which should not involve repetition, from performance, which should involve perfect repetition of the written composition.\textsuperscript{265} This typology separating composition from performance remains a dominant assumption in copyright, which has significant implications for living music traditions that do not incorporate the presumptions of sacralization that came to dominate European art music by the end of the nineteenth century. Even in the classical tradition, however, the reintroduction of improvisation into the classical repertoire reflects some level of resistance to this dichotomous formulation.

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

The ascension of African based music over the course of a century has had significant social, cultural, economic, business, and legal consequences.\textsuperscript{266} African American music traditions are among a series of African based musics that developed in the New World among communities of slaves from Africa.\textsuperscript{267} African American music traditions emerged from the interaction of slaves from a variety of African cultural traditions with the Euro-American world into which such

music since 1970).

\textsuperscript{262} See Alexandra Alter, \textit{Making Up the Classics}, WALL ST. J., Nov. 28, 2008, at W1, online.wsj.com/article/SB12278119566506201.html (“‘It’s not like these are museum pieces under glass,’ says Benjamin Zander, conductor of the 29-year-old Boston Philharmonic and an advocate of reviving improvisation. ‘These are living, breathing pieces, and our job is to bring them to life.’”); Daniel Delgado, \textit{Lost Art}, HARV. MAG., May-June 2000, at 36 (discussing Harvard music professor Robert Levin, who is attempting to revive the lost art of improvisation in classical music); \textit{Improvisation} with Robert Levin, NAT’L PUB. RADIO, NPR Performance Today, Nov. 24, 1999 (noting that classical music today rarely involves improvisation and discussing the fact that “many great composers were masters at improvisation”), http://www.npr.org/programs/specials/milestones/991124.motm.improv.html.

\textsuperscript{263} Alter, \textit{supra} note 262.

\textsuperscript{264} PORISS, \textit{supra} note 233, at 12.

\textsuperscript{265} Alter, \textit{supra} note 262 ("Many of the problems facing modern musicians derive from a discrepancy between their own intuitive understandings of music, derived from cultural experience, and the aesthetic expectations they have of the music they create and play vocationally.") (emphasis added).


\textsuperscript{267} \textit{DENA J. EPSTEIN, SINFUL TUNES AND SPIRITUALS: BLACK FOLK MUSIC TO THE CIVIL WAR} 3-17 (2003) (discussing African music and the Middle Passage by which slaves were brought from Africa to the New World).
slaves were forcibly delivered. As is often the case with culture, African American music traditions are intercultural and demonstrate influences of a number of sources, including African, Euro-American, and other elements. African American strands of African based musics have become particularly prominent because of the connection of African American music with an increasingly ascendant twentieth century American sound recording industry.

During the slave era in the United States, slaves and slave music often existed within a tightly circumscribed plantation world. After the Emancipation Proclamation in 1863 and the end of the Civil War in 1865, a social revolution occurred that brought large numbers of ex-slaves into broader contact with the world outside of the plantation. This in turn led to greater public knowledge about the music of slaves, particularly spirituals, leading in 1867 to the first published collection of slaves songs, Slave Songs of the United States.

The African American popular entertainment industry emerged in the last decades of the nineteenth century “in the midst of an American racial cataclysm.” In its earliest stages, this industry incorporated significant elements of blackface minstrelsy, which had exploded as a genre in the U.S. and elsewhere in the world following the success of the Virginia Minstrels in 1843. Early minstrel shows were a mixture of popular music, dance, and comedy, and often involved white male performers in burnt cork makeup (blackface), who engaged in performance of songs, often in dialect, that included depictions of African Americans as cheerful and simpleminded. Although this earlier form of classic minstrelsy did not disappear, minstrelsy

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270 ID. at ___.
271 ID.
272 ALLEN, PICKARD & MCKIM, eds., supra note 106.
273 ABBOTT & SEROFF, supra note 101, at xi.
274 ID. at ___.
275 Goertzen, supra note 274, at 32; John Springhall, ‘On with the Show’: American Popular Entertainment as Cultural and Social History, 2 HIST. COMPASS 1, 2 (2004).
evolved into variety shows and medicine shows and influenced vaudeville. The music of minstrelsy was sold and preserved in sheet music. Minstrel music thus became a key factor in emerging American popular culture, and was an important basis for coon songs that were a popular Tin Pan Alley product in the late nineteenth and early twentieth centuries. Both white and black performers participated in minstrel shows and wrote and performed coon songs. Popular dances such as the Cakewalk, which had achieved significant popularity by the late nineteenth century, reflected the significant impact of African American culture on popular dance, which has historically been closely connected to music.

The rise of the Tin Pan Alley music publishing industry in New York marked an important turning point in American music industry attitudes to copyright. Popular music, based to an increasing degree over time on African American based music, transformed the United States into a net exporter of culture. Prior to the late nineteenth century, the flow of culture to the United States came from Europe. As a result, publishers in the United States, who had operated for much of the nineteenth century at a net loss with respect to the import and export of cultural products, did not “embrace reciprocal arrangements with foreign publishers” at the time of the Berne Convention in 1886. By the early twentieth century, the United States had become a net exporter of both popular music content and sound recording technologies. The birth of Tin Pan Alley in New York City in the 1880s was the beginning of American dominance of mainstream popular music. As American popular music became more dominant globally, American music publishers began to focus to a greater extent on legal protection for their products.

Minstrelsy and coon songs were distinctively American popular culture forms that had significant implications for the development of African American popular music forms that were

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276 Goertzen, supra note 274, at 32.
277 Id. at 33.
280 Gottschild, supra note 165, at 26 (noting that the Cakewalk, which was “created by enslaved blacks who stole and mockingly imitated the high-falutin’ mannerisms of whites at plantation balls” later became a “popular white social dance” and an example of “whites copying blacks copying whites”).
281 Garofalo, supra note 66, at 322.
283 Garofalo, supra note 66, at 322.
Some notable coon songs were among the first songs to be referred to as ragtime songs. The ragtime craze, which had taken hold by the first decade twentieth century, offered significant opportunities for African American performers. Ragtime was the first of a series of twentieth century American popular music forms based to a significant degree in African American culture. African American composers and performers made use of emerging recording technologies in ways that facilitated the spread of ragtime and later popular African American based musical forms. The first African American recording artist, George W. Johnson, made his first recording in 1890, just one year after the formation of Columbia Phonograph Company (now CBS/Sony) in 1889.

The African American based popular music forms that emerged in the twentieth century were disseminated to a significant extent through sound recordings. Consequently, the rise of African American popular music has paralleled the rise of the recording industry. By the 1930s, for example, jazz had become synonymous with America’s popular music. A number of African American musical forms that became increasingly dominant forces in the popular music arena in the twentieth century reflect an aesthetic of composition based on repetition and revision. Many of these African American based musical forms include oral musical traditions to a far greater extent than twentieth century European art music. Further, many African based musical traditions may have significant rhythmic complexity, which is difficult to notate in all genres of music, not just African based ones.

Although some commentators emphasize the use of oral traditions in African American based music, as is the case with oral traditions in classical music, the actual picture on the ground is more complex, and written traditions have also played a role in African American based musical traditions in which oral traditions have been predominant. Early blues music, which emerged prior to the advent of the era of widespread dissemination of sound recordings, was initially

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287  Gunther Schuller, The Swing Era: The Development of Jazz, 1930-1945, at 4, 6 (1989) (describing the swing era as a time when jazz became synonymous with America’s popular music, social dances, and musical entertainment).
290  See Kofi Agawu, Representing African Music: Postcolonial Notes, Queries, Positions 64 (2003) (noting that problems of notation with respect to rhythm are universal and equally problematic for African music and Western music).
distributed in sheet music form. Blues pioneer W.C. Handy founded a music publishing business that in 2000 remained among the oldest significantly black family owned businesses in the U.S. The first blues sound recording, recorded in 1914, was a version of Handy’s *Memphis Blues*.

In early jazz music in the 1920s, a written tradition existed that supported the dominant jazz oral tradition. Considerable variation existed in the musical literacy and technical competence of jazz musicians. Early jazz bands included both reading players, who could read music, and “fakers”, who could not read music. Trained musicians who sought to play in bands at times pretended to be “fakers” to obtain positions with bands, while most faking bands “had at least one reader to teach the other musicians the written parts.” Those pretending to be fakers who could actually read music may have been responding to broader societal expectations about African American musicians. For example, one orchestra, all the members of which were readers, did not use written music in performances at white dances:

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

In certain contexts such as steamboats in the 1920s, players were expected to read music. The dominant oral tradition in jazz influenced use of written music by jazz musicians. Even when basing works on a published score, early jazz musicians would “doctor” the score, which involved altering the written music to add riffs, improve, and play out the choruses.

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


293 WALD, *supra* note 291, at 17-18 (noting the first recording of a blues composition in 1914 by the Victor Military Band, which cut a version of W.C. Handy’s “Memphis Blues” and the first sung blues on record in 1915 by Morton Harvey).


295 *Id.* at 63.

296 *Id.* at 74.

297 *Id.* at 75-76, 81-82.

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

299 *Id.* at 120-35.

300 *Id.* at 178-94.
practices of modifying music parallels in important respects the way written music was treated in European art music prior to sacralization trends.\textsuperscript{301} Jazz musicians also relied on stock arrangements when making recordings, which typically involved modifying and supplementing simplified arrangements of the music performed.\textsuperscript{302}

Jazz copyright deposits have generally been in the form of lead sheets that sketched out a basic melody rather than complete transcriptions of the recorded piece.\textsuperscript{303} Some songs were copyrighted on multiple occasions as they were modified.\textsuperscript{304} As is the case in a number of twentieth century music traditions, the notated music in copyright deposits of jazz music do not fit very well with a broad range of modern performance traditions.\textsuperscript{305} A number of jazz musicians, including Louis Armstrong and Duke Ellington, made a significant number of copyright deposits.\textsuperscript{306} Jazz music copyright deposits of written musical notation, however, are often “simplistic representations” of jazz musicality,\textsuperscript{307} while deposits of sound recordings do not fundamentally address the problem of how copyright should best promote the development of living, evolving cultural forms.\textsuperscript{308}

Blues and early jazz reflect varied approaches to and uses of notation that do not fit well within underlying copyright assumptions. In addition, blues and jazz emerged during an era in which sound recording technology had become widely available. As a result, the impact of copyright on such music can only be understood in light of the impact of technologies of sound reproduction that continue to challenge copyright in the digital era.\textsuperscript{309}

\textsuperscript{301} Levin, \textit{supra} note 241, at 145 (“It is revealing that we do not have cadenzas for his [Mozart’s] wind and violin concertos, for which he evidently trusted the soloists to improvise . . . Mozart’s piano sonatas reveals that his manuscript versions contain a paucity of dynamics and eschew notation of the returns of principal themes.”).

\textsuperscript{302} Chevan, \textit{supra} note 294, at 236-37.

\textsuperscript{303} \textit{Id.} at 242.

\textsuperscript{304} \textit{Id.} at 249-50.

\textsuperscript{305} JOCELYN R. NEAL, THE SONGS OF JIMMIE RODGERS: A LEGACY IN COUNTRY MUSIC 156 (2009) (noting the “incompatibility between [Jimmie] Rodgers’s performance tradition and the established conventions of musical notation and publication”).

\textsuperscript{306} Chevan, \textit{supra} note 294, at 251-52 (noting that Louis Armstrong made more than 70 copyright deposits)


\textsuperscript{308} Sound recordings may be deposited and registered with the Copyright Office. See U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS, Copyright Circular 56A (2009), www.copyright.gov/circs/circ56a.pdf.

\textsuperscript{309} TIMOTHY D. TAYLOR, STRANGE SOUNDS: MUSIC, TECHNOLOGY AND CULTURE 3 (2001) (“The advent of digital technology in the early 1980s marks the beginning of what may be the most fundamental change in the history of Western music since the invention of music notation in the ninth century.”).
III. TECHNOLOGY AND VISUAL-TEXTUAL BIAS

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

Twentieth century technological innovations have laid bare potential areas of tension underlying copyright assumptions about music. The role of oral and written traditions in music is particularly contested and unresolved. Discussions of copyright tend to connect oral traditions to performance of an underlying written composition, which is then considered to have musical primacy. The creation of music in varied genres suggests that this view of creation, notation, and orality is far too restrictive. Instead, oral and written traditions lie along a spectrum. Performance may thus embody performance of an underlying written composition but may also reflect a composition based in the norms and assumptions of an oral rather than a written tradition.

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

Copyright law responded to the advent of sound recordings and other technologies of sound reproduction by adding layers of copyright protection to capture cultural products made using such new technologies. Thus, in addition to a copyright in the written musical composition, which was the first type of music creativity protected by copyright historically, mechanical

311 Mark Katz, Capturing Sound: How Technology Has Changed Music 14-17; 28-37 (2004) (contrasting recorded music with live performance, noting that recorded music is portable and severable from its original setting, and repeatable); Levin, supra note 241, at 144 (noting that contemporary performers and listeners of classical music have “experienced the standard repertoire hundreds, even thousands of times more than the composers who wrote these works, making it ever harder to bring to them the daring of the works’ initial effect.”).
312 Id.
license provisions were added to the 1909 Copyright Act that required compensation for those making mechanical copies of music compositions in forms such as sound recordings and pianola rolls.\footnote{Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1080-81 (1909) (current version at 17 U.S.C. § 115 (2006)) (providing that copyright owners acquiescing to the use of a copyrighted work on instruments serving to mechanically reproduce the work must permit any other person to make similar use of the copyrighted work upon payment of a royalty of two cents); P\textsc{aul} G\textsc{oldstein}, Crypt\textsc{right’s} H\textsc{ighway}: F\textsc{rom} G\textsc{utenberg To The C\textsc{elestial} J\textsc{ukebox} 51-53 (2003).} These mechanical license provisions came to be used for “cover” recordings, which during some segments of the twentieth century were a primary means by which white musicians, who had access to broad consumer markets, copied African American performers, who were limited by recording industry business practices to the smaller “race” records market segment.\footnote{Reebee Garofalo, Crossing Over: From Rhythm & Blues to Rock ‘n’ Roll, in R\textsc{hythm And B\textsc{usiness}: T\textsc{he P\textsc{olitical E\textsc{conomy Of B\textsc{lack M\textsc{usic}}} 116, 128-29 (Norman Kelley ed., 2005); Arewa, \textit{supra} note 310, at ___.} Because copyright often rewards the written composition to a far greater extent than performance, holders of copyrights in written compositions are often able to enforce their rights even in instances where such rights were acquired under questionable circumstances.\footnote{Arewa, \textit{supra} note 70, at 582.} In addition to be segregated in the “race” records category, a number of African American performers were victims of fraud relating unknowing copyright assignments given to recording industry insiders and folklore collectors.\footnote{The court in the Bridgeport case, for example, assumes that plaintiff will be able to prove ownership of the copyrights (“Bridgeport and Westbound claim to own the musical composition and sound recording copyrights in ‘Get Off Your Ass and Jam’ by George Clinton, Jr. and the Funkadelics. We assume, as did the district court, that plaintiffs would be able to establish ownership in the copyrights they claim.”). \textit{Bridgeport}, 647 F.3d 647, 652 (6th Cir. 2006). However, the acquisition of George Clinton’s copyrights by Bridgeport remains murky and in dispute. George Clinton has claimed that the acquisition documents giving Bridgeport ownership of the copyrights were forged. \textit{See George Clinton Takes on Sample Troll Bridgeport Music Again: The DNA of Hip Hop Has Been Hijacked}, June 13, 2011, http://www.techdirt.com/articles/20110613/01234014665/george-clinton-takes-sample-troll-bridgeport-music-again-dna-hip-hop-has-been-hijacked.shtml} The displacement of European art music by African based musics in the popular music arena has significant and often unrecognized implications for copyright. Late nineteenth century European art music, particularly as it increasingly became a sacralized musical museum tradition, was a good fit for underlying copyright assumptions because compositional norms increasingly disfavored repetition, while performance norms emphasized repetition and restricted the ability of performers and others to change existing works. However, the displacement of European art music by African based musics has significantly challenged copyright, in part because compositional practices in many African based musical genres may diverge from those assumed in copyright, particularly as they relate to oral and written expressions of music.

The dominance of African based musics came at the same time as a series of technological innovations in music that facilitated oral compositional practices. Consequently, copyright treatment of these new technologies is a critical factor that should be considered within the
context of a shifting terrain of twentieth century musical preferences. Copyright treatment of new technologies has been significantly influenced by the 1908 case *White-Smith Music v. Apollo*, where the Supreme Court found that player piano perforated rolls were not copies within the meaning of the Copyright Act of 1870, as amended. The *White-Smith* case illustrates some of the problems that courts have faced in trying to apply copyright frameworks to new nonvisual technologies of musical creation and dissemination. The legal analysis in *White-Smith* strongly reflects the privilege of sight and is relentlessly visual in its discussion of the nature of music and what it means for something to be a copy:

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

The strong visual focus of the court appears to be largely driven from implicit assumptions made about musical creation and the nature of musical composition. Congress responded to *White-Smith* by adding a mechanical license provision to the 1909 Copyright Act. Some six decades after *White-Smith*, Congress added limited copyright protection for sound recordings.

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

Copyright treatment of sound recordings reflects the limitations of perceptions of music that see but fail to truly hear and incorporate the implications of nonvisual aspects of music. Problems in copyright treatment of sound recordings reflect broader difficulties in applying substantial

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

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

320 See supra notes ___ to ___ and accompanying text.

321 See infra notes ___ to ___ and accompanying text.

The substantial similarity test is problematic in a wide range of contexts.\footnote{Tushnet, \textit{supra} note 2, at 716-738; Mark A. Lemley, Our Bizarre System for Proving Copyright Infringement (Stanford Public Law & Legal Theory Working Paper Series, Research Paper No. 1661434, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661434.} Music copyright cases thus may reflect significant problems resulting from substantial similarity doctrine, as well as the consequences of the privilege of sight and the fundamental assumption that visual perception is the basis for musical knowledge. Music copyright cases highlight the continuing difficulty courts experience in grappling with nonvisual forms of musical reproduction. \textit{Bright Tunes Music Corp. v. Harrisons Music, Ltd.}\footnote{420 F. Supp. 177, 178 (S.D.N.Y. 1976).} 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.\footnote{\textit{Bright Tunes}, 420 F. Supp. at 181 (holding that Harrison committed subconscious infringement in copying He’s So Fine)} In its discussion of Harrison’s infringement, the court’s analysis focused on the visual representation of individual musical notes, with little or no reference to any nonvisual elements. For example, the court describes the two songs at issue as follows:

He's So Fine, recorded in 1962, is a catchy tune consisting essentially of four repetitions of a very short basic musical phrase, “sol-mi-re,” (hereinafter motif A), altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, “sol-la-do-la-do,” (hereinafter motif B). While neither motif is novel, the four repetitions of A, followed by four repetitions of B, is a highly unique pattern. In addition, in the second use of the motif B series, there is a grace note inserted making the phrase go “sol-la-do-la-re-do.” My Sweet Lord, recorded first in 1970, also uses the same motif A (modified to suit the words) four times, followed by motif B, repeated three times, not four. In place of He's So Fine's fourth repetition of motif B, My Sweet Lord has a transitional passage of musical attractiveness of the same approximate length, with the identical grace note in the identical second repetition. The harmonies of both songs are identical.\footnote{Arewa, \textit{supra} note 20, at 536-37.}

The court’s discussion of these two songs is highly visual and does not discuss other musical features of the two works, particularly features such as rhythm and timbre that are less visual or amenable to notation.\footnote{\textit{Bright Tunes}, 420 F. Supp. at 181 (holding that Harrison committed subconscious infringement in copying He’s So Fine)} The court’s analysis is thus not focused at the relevant music in its fullest iteration, but rather at a written reduction of both pieces that does not fully or fairly represent either piece.

A similar theory of subconscious infringement was used to find Michael Bolton liable for
infringement of an Isley Brothers song. The Ninth Circuit’s discussion of the jury verdict in this case (Three Boys Music Corp. v. Bolton) is also instructive. In discussing the evidence of substantial similarity at trial, which included testimony from the appellant Bolton’s expert witness regarding the combination of unprotectible elements in the Bolton work, the court notes: “On the contrary, Eskelin [Bolton expert] testified that the two songs shared a combination of five unprotectible elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending.” A number of these unprotectible elements, including cadence, the verse/chorus relationship, and the fade ending, involve nonvisual characteristics of the relevant songs. This outcome reflects the assumptions of visual-textual bias, particularly as they relate to nonvisual elements of the songs.

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

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

Music is now often created in the sound recording studio or with use of methods and technologies that do not involve written compositions. Further, the most visual-textual aspect

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328 Three Boys Music Corp. v. Bolton, 212 F.3d 477, 480 (9th Cir. 2000).
329 Three Boys, 212 F.3d at ___.
330 Arewa, supra note 20, at ___.
331 Id. at ___.
332 Three Boys, 212 F.3d at 485.
333 Arewa, supra note 20, at ___.
334 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.”).
of a musical work, the musical composition, may in fact be derived from the nonvisual medium of the sound recording.\footnote{Arewa, supra note 310, at ___.} In \textit{Selle v. Gibb}, the court notes that the Bee Gees do not read or write music.\footnote{Selle v. Gibb, 741 F.2d 896, 899 (1984); see also M. Fletcher Reynolds, “\textit{Selle v. Gibb}” and the Forensic Analysis of Plagiarism, 32 \textit{College Music Symposium} 55 (1992).} They composed their songs in the recording studio; a staff member then transcribed their songs into a written musical composition.\footnote{\textit{Selle}, 741 F.2d at 899.} The Bee Gees creation processes are characteristic of contemporary popular music creation.

The movement from the sound recording to written composition or the nonvisual to the visual in contemporary music contrasts significantly with dominant copyright assumptions. Copyright discussions of music creation tend to remain focused on written compositions (i.e., music and lyrics), particularly with respect to their visual aspects, as reflective of musical composition and sound recordings as evidence of musical performance of an underlying written musical composition. This means that written music is often taken as a true indication of compositional practice, an assumption that may be not entirely reflective of actual music creation today in many musical genres. The emphasis on written musical forms reflects the privilege of sight and a continuing emphasis on visual forms of musical reproduction as authoritative representations of musical composition and intent. This visual/nonvisual distinction parallels the distinction frequently made between composition and performance evident in the court’s analysis in \textit{Newton v. Diamond}.\footnote{See supra notes ___ to ___ and accompanying text.}

\section*{C. Improvisation, Living Music, and Copyright’s Goals}

\textit{Newton v. Diamond} reflects the false dichotomy between composition and performance evident in a number of copyright cases. Further, the \textit{Newton v. Diamond} court does not sufficiently consider the aesthetics of compositional practices in jazz and other African based musical forms. Although the court acknowledges Newton’s improvisatory practices, it does not take sufficient account of the musicality embedded in jazz composition practices. The notation focus in \textit{Newton} and other cases tends to diminish the learning inherent in improvisation and the forms of oral and nonvisual forms of representation embedded in improvisatory practices.\footnote{\textit{BERLINER}, supra note 244, at 774 (“The emphasis that the Western art music community places on formalized education and the written symbols of musical knowledge—from notation systems to music degrees—has made it difficult for members to recognize and appreciate, as a learned system, the knowledge that improvisers transmit through alternative education system and alternative forms of representation, some oral, some altogether nonverbal.”).} For example, jazz improvisers must learn stock musical figures and phrases in order to be able to construct their own solos, as well as be able to perform a wide range of musical forms, including meters, and chord progressions.\footnote{Lee B. Brown, “\textit{Feeling My Way}”: \textit{Jazz: Improvisation and Its Vicissitudes—A Plea for Imperfection}, 58 \textit{J. Aesthetics & Art Criticism} 113, 115 (2000).} Such musical forms provide a framework for the direction of improvised
solos. In the case of jazz and other dynamic, living musical forms, improvisatory practices present a challenge to copyright assumptions and raise questions about the best means of achieving copyright’s core goals of promoting the progress of science and the useful arts. Improvisation practices are risky for musicians but potentially an important source of musical creativity and transformation. Jazz musicians improvise, “embellish and rhythmically displace notes within a melody.” The copyright emphasis on written notation may discourage important creativity in improvisatory forms such as jazz. This has fundamental implications for music itself that should not be ignored. As music scholar and pianist Robert Levin notes:

Apart from organists, few classical performers improvise any more, even though the information that would enable them to learn to do so is available. Today’s performers, shaped in the crucible of competitions and recordings, learn early to avoid risk as a threat to consistency and accuracy. There is nothing more risky than improvisation, but there is nothing more devastating to music’s dramatic and emotional message than avoidance of risk.

Further, contrary to the discussion of the Newton court, improvisation cannot merely be characterized as a product of “highly developed performance techniques,” “unique performance elements,” or reduced to a mere performance quirk. Rather, improvisation is fundamental to music itself and is potentially a critical factor in music risk-taking and creativity.

Another line of cases involving hip hop music adds complexity to copyright considerations of uses of sound recordings themselves as parts of new creations. In Grand Upright v. Warner Bros. Records, hip hop artist Biz Markie was found liable for infringement of the Gilbert O’Sullivan song “Alone Again Naturally,” without any analysis concerning the nature or basis of infringement and use of the Seventh Commandment of the Bible (“Thou Shalt Not Steal”) as a primary source of legal authority for the decision. The reuses of music in the case of Biz

341 Id.
342 U.S. CONST. art. I, § 8, cl. 8.
343 Brown, supra note 340, at 115.
344 Chevan, supra note 294, at 239.
345 Stephen R. Wilson, Rewarding Creativity: Transformative Use in the Jazz Idiom, 6 PGH J. TECH. L. & POL’Y 1, 3–5 (2003), available at http://tlp.law.pitt.edu/articles/Vol6Wilson.pdf (noting problems of current copyright frameworks for jazz artists who create “cover” versions of existing works, noting that such jazz versions are derivative works that need the original copyright owner’s permission, and that without such permission, the creators of the jazz version of the work cannot receive any copyright protection for their artistic contributions); see also Note, Jazz Has Got Copyright Law and That Ain’t Good, 118 HARV. L. REV. 1940, 1941 (2005) (noting that copyright law provides little protection for improvised material and thus “discourages vital reinterpretation” in musical forms such as jazz).
346 Levin, supra note 241, at 147.
347 See generally Arewa, supra note 182.
Markie and other hip hop artists are highly nonvisual in nature and often involve significant repetition and borrowing through practices that include sampling and looping. The undertone and low opinion of hip hop as a form of musical expression in the *Grand Upright* opinion reflects perspective on hip hop that is strongly influenced by visual bias. The *Grand Upright* court likely has reservations about hip hop musicality and the extent to which this particular form of creativity constitutes theft or a valid cultural product. The nonvisual aspects of hip hop creation and performance, which is based on reuse of sound recordings, challenges copyright both by virtue of its extensive borrowing and use of nonvisual aspects of music as embodied in sound recordings.

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

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

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

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349 *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).

350 *Arewa*, supra note 20, at ___.

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Where only recordings had been sold, the Office would suggest registration of the musical composition as an unpublished work.\(^{351}\)

This visual emphasis, combined with conceptions of authorship deeply embedded in copyright, give primacy to written musical traditions. This means that compositional practices in genres such as jazz that involve improvisation and other aspects of oral musical traditions are disfavored by copyright. Further, the conception of derivative work in copyright gives owners of copyrighted works exclusive rights with respect to improvisations derived from copyrighted works they own. The derivative work concept may hinder the creation works based on improvisation in part because the musicians in jazz and other genres that create such works may not be able to receive effective copyright protection for their creations.\(^{352}\) Conceptions of authorship and the notion of a derivative work in copyright make incorporation of oral compositional practices an issue of continuing tension in music copyright.\(^{353}\)

IV. COPYRIGHT, COGNITION, AND PERFORMANCE

A. Copyright and Cognition: Interpreting Infringement in Music Cases

The privilege of sight and visual bias highlight ways in which determinations of infringement involve acts of interpretation. Copyright treatment of music cases would benefit from analyses that incorporate understanding of a broader range of musical approaches to composition and that take account of the significant variations in types of musical creativity. As a result, analysis of notation in music infringement cases should be supplemented by greater consideration of a broader range of musical features, as well as a better understanding of musical contexts. For example, courts could take more account of musical genre and dominant musical practices within musical genres and the role of oral and written traditions in music. Copyright analysis would also benefit from approaches that embrace the complexity of music as both a written and oral artistic endeavor. Doing so would require interpretations that take greater account of nonvisual musical features such as timbre, as well as musical features that are more difficult to notate, including rhythm. Such approaches should also incorporate greater understanding of musical cognition in infringement cases.\(^{354}\)

\(^{351}\) Testimony of Edward P. Murphy, Subcommittee on Courts and Intellectual Property of the House Judiciary Committee, Hearings on Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses, Serial No. 39 at 19 (June 27, 1997) (emphasis added).

\(^{352}\) Jazz Has Got Copyright Law, supra note 345, at 1941 (“The contributions and compositions created by jazz artists are not considered original because, technically, they occur within the parameters of an underlying work and are therefore considered ‘derivative.’”).

\(^{353}\) 17 U.S.C. § 101 (2000) (defining a derivative work as “a work based upon one or more preexisting works”); Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *2 (S.D.N.Y. 2001) ("[A] work is not derivative simply because it borrows from a pre-existing work . . . . When deciding whether a work is derivative [by § 101], courts have considered whether the work ‘would be considered an infringing work’ if the pre-existing material were used without permission.").

\(^{354}\) Arewa, supra note 129.
The need for music copyright approaches that incorporate perception based analysis is supported by studies in musicology of music perception that suggest that people listening to music rely to a far greater extent on timbre to recognize music than features such as melody or rhythm.\textsuperscript{355} Given this, current approaches to music infringement analysis must develop more consistent and systematic ways for considering music sounds and visual images of music in notation. Further, what constitutes infringement in our ears may be quite different than what constitutes infringement on paper. This potential divergence underscores the ways that visual bias has potential to skew outcomes in infringement cases, potentially in significant ways. Greater consideration of the nonvisual and oral could thus fundamentally reshape approaches to infringement in music cases. The insights of neuroscience may be useful in determining how understandings of music cognition in other fields could best inform considerations of oral and written music features in copyright infringement cases.\textsuperscript{356} At a minimum, greater clarification of the relationship between the written and oral is needed, as well as more systematic approaches for dealing with musical variations.

Shifting to approaches that incorporate better understanding of music cognition in music copyright requires reassessment of existing approaches and the biases embedded in such approaches. European art music, in its dominant post-canon iteration, reflects many of the attributes that copyright implicitly or explicitly assumes about music. As a result of sacralization, the European art music canon has moved from being a living musical tradition to being characterized by a museum tradition. The displacement of European art music by African based musics in popular music is a core element of tensions in the application of copyright to music. To the extent that African American and other African based musics embody significant elements of an oral tradition in music, how copyright treats oral aspects of musical tradition matters. For example, in traditions with dominant or significant oral aspects, the conceptualization of performance as the embodiment of a composition is unlikely to constitute an adequate depiction of how music is actually created within the tradition. Further, a performance, as might be fixed today in a recording, may actually reflect a continuum of music practices. One side of this continuum might reflect dominant copyright assumptions and would conceptualize performance as purely a repetition of an underlying musical composition. On the opposite side of this spectrum, a performance that might be embodied in a sound recording could be thought of as a composition to the same extent as a composition reflected in written notation.\textsuperscript{357}

Visions of performance and composition in copyright should be shaped by context and consideration of music genre. Embedding the full spectrum of performance activities into copyright requires that copyright discussions recognize that in some genres performance may be

\textsuperscript{355} \textit{Levittin, supra} note 130, at 155-57.
\textsuperscript{356} Arewa, \textit{supra} note 5, at ___.
\textsuperscript{357} Toynbee, \textit{supra} note 235, at 93 (“recording is a form of fixation too, and therefore could be said to embody the composition as much as a manuscript does”); Arewa, \textit{supra} note 28, at ___.

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merely duplicative of an underlying written composition but that other genres may have different norms with respect to performance and composition. This is particularly true given the core goals of copyright to stimulate creativity. A view of performance as duplicative and derivative of an underlying musical composition is not likely to promote greater creativity in many contemporary musical genres. Rather, as was the case with European art music in the late nineteenth century, such assumptions may in fact contribute to the dimming of living, vibrant creative forms.

A more comprehensive copyright vision of creativity should thus extend beyond the visual and be shaped to a far greater extent by actual contexts of creation, not assumed creative norms in museum traditions. This broader vision could also incorporate greater scrutiny of the topography of creativity, including in niche creative segments.

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

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

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

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

C. More Than Just Singers: Performers’ Contributions and the Performer’s Right

The commentary that followed the February 2012 death of Whitney Houston highlights conceptions about performers within the music industry that are reinforced by existing copyright frameworks. Although some have argued that Whitney was just a singer, this perspective does not adequately consider all sources of value in recorded music. In 1992, Whitney Houston recorded a cover version of “I’ll Always Love You,” a song written and released in earlier recordings by Dolly Parton. Although the Dolly Parton version was clearly a successful one by any measure, the Whitney Houston version of “I’ll Always Love You” became the iconic version, was much more successful commercially than the Dolly Parton recordings, and reached a far larger audience. The Whitney Houston recording is listed as number 68 on the Billboard Top 100 All-Time Songs. To see Whitney Houston as just a singer ignores the value that she and other performers bring to music.

Adoption of a performer’s rights is just one avenue by which to address the visual-textual bias in

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

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

360 The Dolly Parton recorded “I’ll Always Love You” three times. Two recordings reached the top of the Billboard Hot Country charts on separate occasions.

361 The Whitney Houston recorded version spent a record 14 weeks at the top of the Billboard Hot 100 when it was originally released. The Billboard Hot 100 All-Time Top Songs (70-61), http://www.billboard.com/bbcom/specials/hot100/charts/top100-titles-70.shtml.

362 Id.

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

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

364 See Towse, supra note 161, at 568 (noting that most standard economic literature on copyright assumes that the interests of creators and performers “are in perfect harmony with those of publishers, sound recording makers, broadcasters and all other businesses that process and distribute their work as if there were no contractual problems between them over property rights.”).
366 Arewa, supra note 68, at ___ (discussing the 2009 Verizon ringtone case in which the American Society of Composers, Authors and Publishers (ASCAP) sought to receive performance royalties on each occasion that a cellular phone ringtone is played, which ASCAP asserted constituted a performance under the Copyright Act, in addition to the mechanical royalties already being paid by Verizon to ASCAP members).
367 Id. at ___.
368 Id. at __ (noting differential treatment of broadcast radio and Internet and satellite radio, with the latter being required to pay performance royalties to owners of both sound recordings and the music composition, and the former not being require to pay performance royalties).
minimize the legal risks of creative activities.\textsuperscript{370}

\textbf{CONCLUSION}

Although the privilege of sight and visual-textual bias have been a potent force in music copyright since the time of its inception, visual-textual bias matters more today than at any time in the past. In the past, the deeply rooted assumptions of sacralization embedded in copyright existed in an artistic arena where significant creativity existed outside of this sacralized realm. Niche cultural and artistic movements such as hip hop and punk stated in noncommercial space and eventually came to become commercialized, often with significant initial criticism of those who sought to commercialize such movements.\textsuperscript{371} This meant that an effective accommodation existed that permitted the development of varied types of creativity, despite the sacralization assumptions that were dominant in copyright. In the digital era, collisions between formerly separate artistic spheres are increasingly evident.\textsuperscript{372} If not handled with care, legal responses to these colliding spaces could significantly harm creativity. Changing digital era contexts thus mandate recognition and reexamination of the role of the privilege of sight and visual-textual bias in copyright.

\textsuperscript{370} Arewa, \textit{supra} note 235, at ___.
\textsuperscript{371} Arewa, \textit{supra} note 68, at ___.
\textsuperscript{372} MATT MASON, \textbf{THE PIRATE’S DILEMMA: HOW YOUTH CULTURE IS REINVENTING CAPITALISM} 6 (2008) (noting that, unlike the past, in the digital era, “illegal pirates, legitimate companies, and law-abiding citizens are now all in the same space, working out how to share and control information in new ways”).

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