Copyright and Borrowing

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Borrowing is a norm in much cultural production that should be better incorporated into copyright doctrine. Copyright doctrine governs both the creation and distribution of cultural works, such as literary texts and musical works. Consideration of borrowing and copyright largely relates to the creation side of copyright. A number of terms may be used to illustrate the ways in which new cultural texts relate to existing cultural texts. Further, a significant commentary exists in fields such as literary theory and musicology that discusses and analyzes the significance of such relationships. Terms such as borrowing, self-borrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, recomposition, influence, paraphrase, and indebtedness are used to discuss relationships between musical texts. In literature, a number of terms are used, including intertextuality, allusion, quotation, and influence. These terms are enfolded within the concept of borrowing as discussed in this chapter.

In contrast to areas such as musicology and literary theory, copyright doctrine does not adequately contemplate the entire range of ways in which cultural texts may be interrelated. Consequently, Copyright doctrine is typically based on notions of creation that do not take full account of the ways in which creation of cultural texts actually occurs. Discussions of copyright doctrine also typically assume that new cultural texts are largely autonomous creations that are copyrightable by virtue of their originality. Copyright discourse, thus, often fails to consider sufficiently the ways in which cultural production is in many cases collaborative, as well as the ways in which cultural texts may interrelate. Examination of borrowing in varied fields of cultural production underscores the frequent divergence between copyright assumptions about cultural production and the myriad of ways in which cultural production may actually occur.

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BORROWING AND MUSIC

Borrowing is a pervasive aspect of musical creation in all genres and time periods.\(^{12}\) The reality of such borrowing in music is often discussed in legal discussions of postmodern forms and other contemporary forms of musical production such as hip hop music.\(^{13}\) Such discussions, however, often do not adequately take account of the widespread nature of musical borrowing in all time periods and genres.\(^{14}\) This tendency to inadequately represent musical borrowing is integrally connected to notions of copyright and originality that were increasingly predominant by the time of adoption of modern copyright frameworks in the nineteenth century.\(^{15}\)

Borrowing and Classical Music

Considering of musical borrowing should start with assessment of musical borrowing in the classical tradition. This is particularly true since conceptions of classical music creation are often at least implicit benchmarks by which other forms of musical production may be measured.\(^{16}\)

As is the case with other musical genres, musical borrowing is a characteristic feature of classical music composition.\(^{17}\) The nature of such borrowings is often obscured today by the fact that the classical music tradition is an invented tradition that was constructed in the nineteenth century based on notions of societal hierarchies.\(^{18}\) This constructed tradition is also a museum tradition today to which new works have been added only to a limited extent since its formation.\(^{19}\) The existence of classical music as a museum tradition has facilitated Romantic author-based visions of musical authorship that focus on originality and autonomous production.\(^{20}\) These notions of authorship do not adequately reflect how classical music was actually produced during the musical periods now considered to fall within the classical tradition.\(^{21}\)

Some composers in the classical tradition borrowed more extensively than others.\(^{22}\) George Friedrich Handel, for example, made extensive use of existing music.\(^{23}\) His methods of musical production were, in fact, caught in shifting standards for how music should be produced.\(^{24}\) As a result, by the nineteenth century, commentators discussed Handel’s use of existing music as plagiarism.\(^{25}\) Although Handel is likely at one end of the borrowing spectrum in the classical tradition, other classical composers made use of existing music in their creations.\(^{26}\)

Johann Sebastian Bach, for example, borrowed from composers such as Telemann, Frescobaldi, Albinoni, and Vivaldi.\(^{27}\) Bach thus altered, arranged, and developed his own work and works of other composers.\(^{28}\) Similarly, Haydn used melodic source material from various sources.\(^{29}\) In addition to borrowing melodies from other composers, Mozart both borrowed from and was influenced by other composers, including Haydn and Bach.\(^{30}\)

Beethoven reworked his existing music in more than a third of his compositions.\(^{31}\) Beethoven also borrowed from existing music and other
composers, including works by Cherubini and Clementi. Other prominent classical composers also borrowed from existing music, including Debussy, whose opera *Pelleas and Melisande* was strongly influenced by Wagner’s opera, *Tristan and Isolde*. In addition to being borrowed from a great deal, Wagner borrowed extensively from other composers. Rossini was frequently parodied by other composers. Schubert borrowed from Beethoven and Mozart. Brahms composed pieces that demonstrate an influence from Haydn, Beethoven, and Chopin. Mendelssohn borrowed from Beethoven.

In the twentieth century, Charles Ives borrowed extensively. Other twentieth-century composers who borrowed include Bartok, Grieg, Glinka, Kodály, Vaughan Williams, Falla, and Moussorgsky, who were all influenced by folk music. Gershwin was influenced by and borrowed from blues and other African American-derived musical forms. Villa-Lobos borrowed from Brazilian popular music and Schoenberg and Bernstein from Jewish scales and motifs. Schoenberg, Stravinsky, and Webern created recompositions of existing works based on a new, posttonal music structure. Berg, Wuorinen, Respighi, Mahler, Copland, Shostakovitch, Copland, Rachmaninoff, and Puccini also borrowed from existing works.

**Borrowing and Popular and Contemporary Music**

Although much of the consideration of musical borrowing in musicology has focused on borrowing in the classical genre, extensive borrowing has also occurred in popular music genres. In the seventeenth and eighteenth centuries, for example, genres such as vaudeville, broadside ballad, and ballad opera reused popular tunes and famous airs.

Nineteenth-century popular music composers borrowed extensively, reflecting a shared musical culture. In this shared culture, existing works were treated as belonging to the user rather than the composer for far longer than in the art-music tradition. Nineteenth century American popular music borrowings from opera reflect this shared musical tradition. During the nineteenth century, opera remained within the sphere of popular music. As a result, sheet music anthologies placed Bellini side by side with Stephen Foster and other nonclassical popular composers. Further reflecting the broad popularity of opera, Stephen Foster arranged popular songs and Italian opera excerpts, while John Philip Sousa created pieces based on melodies from *Carmen*. Stephen Foster also borrowed extensively from folk song.

African American musical traditions of the nineteenth and twentieth centuries reflected the influence of varied existing traditions. Ragtime, which emerged in the late nineteenth century, incorporated African elements and was the first popular African-derived musical style. Ragtime’s popularity set an important stage for the development of other African American-derived musical forms in the twentieth century, including jazz and blues. Both jazz and blues have incorporated elements from various sources, including existing
Other musical traditions reflect the influence of jazz and blues, including zydeco, Cajun music, and Rockabilly, which have absorbed different influences, including elements from French and African roots in the case of zydeco and Cajun music, and Habanera rhythms in the case of Rockabilly. Rhythm and blues reflects influences from a number of sources, including Black gospel music, boogie-woogie, jump blues, and electric instruments.

Rock and roll music reflects extensive use of existing musical works, particularly from the blues tradition, but also from other traditions, including rockabilly. Such borrowings are also reflected in the work of rock and roll artists such as the Beatles, the Rolling Stones, and Led Zeppelin, who incorporated general elements from existing musical traditions as well as from specific works and specific artists.

Other artists influenced by the blues tradition include Elvis Presley, who borrowed extensively from the blues tradition for both musical works and performance styles. Other early rock and roll artists, including Little Richard, Buddy Holly, Jerry Lee Lewis, and Eddie Cochran, were also immersed in blues culture. The Beatles made a number of cover recordings of Chuck Berry and Little Richard and soft rock and roll, rhythm and blues, and soul covers. The Beatles were also influenced by the style of a number of existing artists, particularly Little Richard, as well other artists and musical traditions, including Bob Dylan and Asian musical traditions.

Other twentieth-century artists have also used existing music to create new works. Duke Ellington, for example, adapted Tchaikovsky and Grieg for jazz band, while Emerson, Lake, and Palmer reworked Moussorgsky and Copland works. The Barry Manilow song “Could It Be Magic” was inspired by and incorporates portions of Chopin’s Prelude in C minor. Paul Simon’s album Graceland reflects a musical collaboration that incorporates musical styles from three Black South African genres. Jimi Hendrix’s cover recording of the Bob Dylan song “All Along the Watchtower,” is so good that even Bob Dylan is said to prefer it. Extensive use of existing works is also evident in the film arena in the twentieth century. Through collaboration, influence, and other types of borrowing, including cover recordings, nineteenth- and twentieth-century musicians in the popular arena reflect the pervasiveness of musical borrowing.

**Copyright and Musical Borrowing**

The widespread presence and importance of borrowing in music is often obscured in legal commentary by the pervasiveness of the contemporary visions of authorship and originality. Looking at the classical tradition reveals that contemporary views of originality, creativity, and musical authorship are historically specific and do not always reflect how compositional practice has actually occurred. Even the classical music tradition, which served as a model for autonomous musical production, does not accord with the standards imposed by contemporary visions of authorship. Looking at actual classical music practices underscores
the fact that borrowing can be a source of innovation,79 which raises serious questions about legal discussions of copyright that assume a dichotomy between copying and originality and that copying may be antithetical to innovation.80

BORROWING, LITERATURE, AND FILM

Intertextuality and Literature

Music is not the only area of cultural production in which borrowing plays an important role. Discussions of intertextuality in literary theory highlight the importance of assessing relationships between literary texts and ways in which new literary texts derive from and relate to existing ones.81 The work of Julia Kristeva and other post-structuralist authors has focused attention on considerations of the relationships between texts in literature.82 A number of such studies have concentrated on the varied and multifarious relationships that may exist between different texts.83 Intertextuality has been explored in varied contexts, including oral and written texts in antiquity and Christianity, Shakespeare’s writing, and other texts.84

A focus on the intertextual nature of cultural texts highlights how texts are situated with respect to other cultural texts as well as the broader social and cultural context.85 Transformative uses are also important aspects of cultural production, although actual uses of existing texts typically extend far beyond notions of transformative use in legal dialogue.86 Ignoring the broader aspects of cultural production may privilege certain forms of cultural production.87 As a result, forms of cultural production that are improvisatory or that rely to a greater extent on uses of existing cultural elements may be disfavored by copyright doctrine.88 Assumptions, for example, about cultural production evident in Rogers v. Koons “discourage artists whose methods entail reworking preexisting materials, while rewarding those whose dedication to ‘originality’ qualifies them as true ‘authors’ in the Romantic sense.”89

Thus, current conceptions of copyright do not fully appreciate forms of production of certain types of cultural production derived from an African American cultural aesthetic.90 This lack of appreciation reflects the fact that certain African American cultural forms are based on an aesthetic of repetition and revision.91 These African American forms of cultural production have been widely studied from the perspective of a number of fields, including linguistics, folklore, music, and literary theory.92

These varied approaches to understanding cultural production in such fields highlight that expressive culture draws from many resources, a significant portion of which are common pools from which we all sip. Cultural texts that use elements from this common pool are then also used and reconstituted for varied acts of signification or meaning.93 This process by which cultural meanings are generated is a fundamental aspect of human culture.94 Intellectual property
rules and frameworks should better accommodate a diversity of uses and consequent multiplicity of meanings by ensuring access to building blocks of cultural meaning and expression, which include existing works.

Consideration of intertextuality in copyright doctrine has significance for conceptions of access to an existing work. Intertextuality draws attention to the varied and multifarious relationships that may exist among texts and authors. In addition to providing that the plaintiff owns a work that has been infringed, one of the core aspects of proving copyright infringement is determining whether an allegedly infringing defendant had access to the existing work. An intertextual understanding of cultural production potentially complicates the question of what constitutes access to an existing work. This is partially a result of the fact that it focuses attention on the potential existence of multiple connections between the existing work and the work accused of infringing it and other texts that exist outside of these two works.

**Formulaic Cultural Production**

The denial of borrowing and collaboration also causes legal consideration of cultural production to fail to consider adequately the extent to which certain works may reflect formulaic aspects. Formulaic aspects of cultural production have been assessed in a number of contexts in the folklore and popular culture areas. In his studies of Russian folktales, folklorist Vladimir Propp suggested that “the tremendous diversity of details in Russian wondertales is reducible to one single plot, and that the elements of this plot (third one in number) are always the same and always follow one another in the same order, and, finally, that only seven different characters should be taken into consideration.”

The syntagmatic structuralist approach of Propp is by no means limited to oral narratives and has been applied, for example, to popular culture, including Western films and Tarzan pulp fiction novels. The existence of potentially significant formulaic aspects of popular culture in particular has significant implications for the ways in which copyright ownership rights are represented and allocated. This issue also remains underexamined from the perspective of copyright scholarship and doctrine.

Propp’s work focused on the assembly of elements in folktale narratives and the fact that Russian fairy tales are distinguished by certain structural elements that occur in a particular order. Although not all elements occur in all fairy tales, when these elements do occur, they occur in a set order. Wright identifies four underlying narrative structures of Western films that subsume a broad array of productions.

The first underlying narrative structure identified by Wright is the classical Western film structure, which includes the sixteen functions. Some of these functions are optional and may not occur in each classical Western film. These functions, do, however, describe common actions and situations that occur in classical Western films.
Unlike Propp’s functions, the functions in Wright’s Western narratives do not necessarily occur in the order listed. The classical Western narrative structure as outlined by Wright includes a range of films, including *Cimarron, The Plainsman, Wells Fargo, Dodge City, Union Pacific, Destry Rides Again, North-west Mounted Police, Canyon Passage, San Antonio, Duel in the Sun, California, Whispering Smith, Yellow Sky, Bend of the River, Shane, Saskatchewan, The Far Country, Vera Cruz, How the West Was Won, and Hombre.*

In addition to the sequential or syntagmatic narrative structure of Westerns, Wright also identifies what he terms the oppositional structures in Westerns that include inside/outside, good/bad, strong/weak, and wilderness/civilization. In addition to the classical Western, Wright identifies three other formulaic structures in Western films, including the vengeance plot, which includes films such as *Stagecoach, The Man from Laramie, One-Eyed Jacks,* and *Nevada Smith.*

The vengeance narrative structure includes thirteen functions, while the third narrative structure, the transitional plot, is characterized as representing a reorganization of images and narrative structure vis-à-vis the classical Western narrative structure and constituting a direct inversion of the classical Western structure. The transitional narrative structure includes films such as *High Noon, Broken Arrow,* and *Johnny Guitar.* The fourth and final narrative structure is the professional plot, which is similar to the classical Western one, but in which the hero is a professional fighter. Films included within the professional narrative structure are *Rio Bravo, The Professionals, True Grit, The Wild Bunch,* and *Butch Cassidy and the Sundance Kid.*

Wright’s work suggests that a large number of films can be reduced to a group of shared functions. This means that certain formulaic types of cultural production may be quite similar with regard to plot and underlying functions. This type of similarity has significant implications for copyright analysis of substantial similarity.

Copyright considerations of the elements of cultural texts tend to equate the formulaic aspects identified by Propp and Wright with plot, which is not entirely correct. In *Nichols v. Universal Pictures Corp.,* Judge Learned Hand considered the extent to which the elements of two works might indicate substantial similarity. In considering whether the play *Abie’s Irish Rose* was infringed by the film *The Cohens and the O’Kelleys,* the court examined the specific elements in both works and elaborated the pattern test for copyright infringement, which considers whether “a pattern as a sufficiently concrete expression of an idea so as to warrant a finding of substantial similarity.” The *Nichols* courts and other courts that consider the discernible elements of works, however, tend to equate such elements with plot. As such, they do not adequately consider the formulaic nature of many works and the implications of the fact that multiple works may exist with similar if not identical elements.

An analysis of cultural texts informed by Propp’s analysis might recognize the fact that cultural production is not infrequently quite formulaic. A Proppian perspective would also suggest that cultural texts are an assembly of elements that may
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tend to have certain structures that make them recognizable to recipients of such texts. Viewing cultural texts from the perspective of common cultural elements used in particular formulaic ways could have implications for how two similar texts might be viewed in a copyright infringement case, for example.\textsuperscript{117} A recognition of the implications of formulaic forms of cultural production combined with an emphasis on the communicative element of transmission of underlying knowledge would mean that a court should focus less on the apparent similarity of the actual cultural texts and more on direct or indirect evidence suggesting actual transmission of material to the alleged infringer.

Copyright, Intertextuality, and Formulaic Cultural Production

Focusing to a greater extent on borrowing and the intertextual and formulaic aspects of cultural production involves greater acceptance of variation and variant forms of works. The fact that many cultural elements used as building blocks in cultural texts have long been in existence in the form of folklore is often forgotten. Folklore forms are typically collaborative and exist in multiple forms or variants.\textsuperscript{118} The influence of folklore in the production of popular culture texts remains today often an unacknowledged factor. Recognizing the folkloristic influences in cultural production would aid recognition of the fact that multiplicities of meaning and diversity of usage are not at all atypical in the cultural arena.

CULTURAL BORROWING

Current intellectual property discussions, particularly in the international arena, increasingly address questions relating to intellectual property treatment of traditional or local knowledge.\textsuperscript{119} Such discussions bring needed attention to the types of knowledge protected by intellectual property frameworks.\textsuperscript{120} At the same time, however, consideration of intellectual property treatment of local knowledge also reflects a general lack of appreciation of the importance of borrowing in cultural systems.\textsuperscript{121} This is manifested, for example, in discussions today about the extent to which cultural elements should be protected by intellectual property frameworks.\textsuperscript{122}

The potential complexities involved in establishing cultural boundaries that would likely accompany such intellectual property protection are, however, often ignored in discourse about local knowledge.\textsuperscript{123} Cultural systems, though, are often not discrete and autonomous units that can be easily separated. Rather, cultural boundaries are often fluid and shifting.\textsuperscript{124}

This fluidity has significant implications for conceptions of cultural heritage frequently evident in discussions of local knowledge. Such discussions often fail to account for the fact that, as a result of borrowing, diffusion, and other factors, cultural elements are often shared among multiple cultural systems.\textsuperscript{125} Borrowing, creolization, and cultural mixture are typical aspects of the development of
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Borrowing and cultural mixture are thus characteristic of human history and are evident in a number of areas, including language, religion, diseases, agricultural practices and crops, folklore, and a myriad of other cultural elements. Cultural elements and aspects of local knowledge may thus be widely diffused among various groups. Borrowing and diffusion are, by no means, limited to expressive culture. In agriculture, for example, crop germ plasm may flow between different farming systems. These germ plasm flows reflect the ways in which crop cultivation diffused in human history.

CONCLUSION

Examining cultural production as it actually occurs and cultural elements in the contexts of their uses in many instances necessitates understanding the ways in which new works relate to and derive from existing works. Consequently, copyright must take greater account of the ways in which borrowing is an important and necessary aspect of the creation of new works. In doing so, copyright frameworks should recognize that creativity and innovation are often associated with borrowing. Copyright frameworks should thus be applied in such a way as to not inhibit such borrowing.

NOTES


3. See Arewa, Hip Hop, supra note 1, at 551–552.

5. See Arewa, *Hip Hop*, supra note 1, at 600.

6. See Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* 5 (2d ed. 1997) (outlining a theory of poetry through a “description of poetic influence, or the story of intra-poetic relationships ... to de-idealize our accepted accounts of how one poet helps to form another”); Udo J. Hebel, *Intertextuality, Allusion and Quotation: An International Bibliography of Critical Studies*, at ix, 3–4 (1989) (compiling more than 2,000 critical studies dealing with the relatively young concept of intertextuality, as well as older concepts of allusion and quotation and noting that quotation and allusion had been used as analytical tools by scholars to trace how one text led to another); Jay Clayton & Eric Rothstein, *Figures in the Corpus: Theories of Influence and Intertextuality*, in *Influence and Intertextuality in Literary History* 3, 10 (Jay Clayton & Eric Rothstein eds., 1991) [hereinafter Influence and Intertextuality] (noting that notions of influence in literary theory from the eighteenth century onward “remained committed to an author-centered criticism, concerned with issues of originality and genius, an evaluative rhetoric, and an emphasis on literary history”).

7. See Arewa, *Unfair Use*, supra note 1, at 19.


9. See 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.”); see also *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) (“Nor is the creativity in the underlying work of art of the same order of magnitude as in the case of the ‘Hand of God.’ Rodin’s sculpture is, furthermore, so unique and rare ... that a significant public benefit accrues from its precise artistic reproduction.”); *Grove Press, Inc. v. Collectors Publ’n, Inc.*, 264 F. Supp. 603, 605 (C.D. Cal. 1967) (“These changes required no skill beyond that of a high school English student and displayed no originality.”); *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (“The musical compositions of some few set their composers apart from all others. Their works are distinctly characteristic and possess an individuality which mark [sic] the work of extraordinary genius. Such in popular music are the productions among others of Victor Herbert, George Gershwin, Jerome Kern and Cole Porter.”); *Jollie v. Jaques*, 13 F. Cas. 910, 913–914 (C.C.S.D.N.Y. 1850) (No. 7437));

The original air requires genius for its construction; but a mere mechanic in music, it is said, can make the adaptation or accompaniment ... The right secured is the property in the piece of music, the production of the mind and genius of the author, and not in the mere name given to the work.

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Catalda Fine Arts, 191 F.2d 99, 103 (2d Cir. 1951) (noting that originality “means little more than a prohibition of actual copying”); West Pub’g Co. v. Mead Data Cent., 799 F.2d 1219, 1223 (8th Cir. 1986) (noting that standard for originality is minimal and only requires that work originate with author and be independently created).

10. See Jaszi, supra note 9, at 40 (stating that the concept of Romantic authorship emphasized original ideas rather than “successive elaborations of an idea or text by a series of creative workers”).


14. Id. at 578–580.

15. Id. at 564–568; Brad Sherman & Lionel Bently, The Making of Modern Intellectual Property Law 61 (1999) (discussing the development of modern intellectual property frameworks); Martin Scherzinger, Music, Spirit Possession and the Copyright Law: Cross-Cultural Comparisons and Strategic Speculations, 31 Y.B. Traditional Music 102, 103 (1999) (noting that the “invention of copyright protection for music in the nineteenth century was logically implicated in notions of originality beholden to the quasi-divine nature of inspiration that ravished the composer”).

16. Arewa, Hip Hop, supra note 1, at 584–586 (noting implicit comparison of hip hop to other forms of musical production and the operation of Romantic author conceptions in such comparisons).

17. Id. at 551, 599–605.

18. Id. at 592–594; J. Peter Burkholder, Museum Pieces: The Historicist Mainstream in Music of the Last Hundred Years, 2 J. Musicology 115, 117 (1983) [hereinafter Burkholder, Museum Pieces] (noting that in response to the increased mass appeal of music, serious musicians “turned back to Beethoven, Mozart and Haydn, creating the concept of the ‘master’ and the ‘masterpiece’ in music and deifying these three (and to a lesser extent Bach) as the geniuses of a great musical art”).


20. Id.; Arewa, Hip Hop, supra note 1, at 592–599.

21. Arewa, Hip Hop, supra note 1, at 599.

22. Id. at 577–578, 599–605 (discussing the long tradition of musical borrowing in classical music); Burkholder, Uses of Existing Music, supra note 12, at 851.

23. Arewa, Hip Hop, supra note 1, at 599.

24. Id.

25. Id.


31. See Burkholder, *Borrowing*, supra note 12, at 28 (noting that Beethoven reworked his existing music in more than a third of his compositions); A. Hyatt King, *Mountains, Music, and Musicians*, 31 Musical Q. 395, 397, 403 (1945) (discussing Beethoven’s use in the opening of the last movement of the Pastoral Symphony of Ranz, a melody sung and played for centuries in Switzerland on an alphorn to summon cows from the pastures); Hugh Arthur Scott, *Indebtedness in Music*, 13 Musical Q. 497, 501 (1927) (noting the use of one favorite theme no fewer than four times by Beethoven).

32. See Alexander L. Ringer, *Clementi and the “Eroica,”* 47 Musical Q. 454, 455 (1961) (noting that “thematic foundations of the *Eroica* were further obscured by a romantic cult of the originality, which refused to acknowledge the often decidedly humble sources of Beethoven’s inspiration”); Scott, *supra* note 31, at 503–504 (noting that Beethoven’s Pathetic Sonata bears a striking resemblance to Cherubini’s Medea that “could hardly have been accidental”).


35. *Id.*

36. See Edward Cone, *Schubert’s Beethoven*, 56 Musical Q. 779, 779–780 (1970) (discussing resemblances in Schubert’s works to Beethoven); David Humphreys,
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37. See Borrowing, supra note 12, at 27 (discussing the Brahms composition “Variations on a Theme from Haydn,” which borrowed from a theme attributed to Haydn); J. Peter Burkholder, Brahms and Twentieth-Century Classical Music, 8 19th-Century Music 75, 77–78 (1984) (discussing Brahms’s borrowings); Rosen, supra note 30, at 91 (discussing similarities between the finale of Brahms’s Piano Concerto No. 1 in D Minor and the last movement of Beethoven’s Piano Concerto No. 3 in C Minor and noting references to Chopin’s Scherzo in B-flat Minor in Brahms’s Piano Sonata in C Major); Scott, supra note 31, at 505 (noting resemblance between Brahms’s opening theme of the Finale of his C Minor Symphony and the subject of Beethoven’s Ninth Symphony).


39. See Dennis Marshall, Charles Ives’s Quotations: Manner or Substance?, 6 Persp. New Music 45, 45–46 (1968) (noting that Ives’s use of borrowed materials); see also J. Peter Burkholder, All Made of Tunes: Charles Ives and the Uses of Musical Borrowing 1 (1995) (discussing the types of borrowings that Charles made); J. Peter Burkholder, “Quotation” and Emulation: Charles Ives’s Uses of His Models, 71 Musical Q. 1, 19 (1985) (discussing the pervasive use of existing music by Ives).

40. Burkholder, Borrowing, supra note 12, at 29–30; Scott, note 31, at 498.

41. Arewa, Catfish Row, supra note 1.

42. Burkholder, Borrowing, supra note 12, at 30.


44. Arewa, Hip Hop, supra note 1, at 604–605.

45. See Burkholder, Borrowing, supra note 12, at 33 (noting that borrowing plays a major role in American and European popular music whose role has only recently begun to be studied).

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

47. Id.

48. Id.

49. Id.

50. Arewa, Hip Hop, supra note 1, at 610–611.


52. Burkholder, Borrowing, supra note 12, at 33–34.

53. Id.

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55. See Burkholder, Borrowing, supra note 12, at 34 (distinguishing the concept of musical borrowing developed in the study of European written repertories from the sharing of common traditions said to characterize West African musical traditions). Both types of uses of existing materials are treated as types of borrowing in this Article. See also Samuel A. Floyd, Jr. & Marsha Reisser, The Sources and Resources of Classic Ragtime Music, 4 Black Music Res. J. 22, 22 (1984) (noting that classic ragtime emerged from two sources—Euro-American social dance music and Afro-American folk dance movement); Mead Hunter, Interculturalism and American Music, 11 Perf. Arts J. 186, 186 (1989) (noting that American music has been intercultural from its earliest days, reflecting a heritage of European and African forms).


57. See Eileen Southern, The Music of Black Americans: A History 308–330 (2d ed. 1983) (discussing the development of ragtime); Charters, supra note 56, at 179 (noting African American folk idiom of mixed pentatonic, major, and minor scales in ragtime); Floyd & Reisser, supra note 55, at 22 (noting pentatonic scales, large leaps in melodic lines, use of short phrases in melodic construction, variation of melodic materials, prominent position of percussion and use of polymeters as reflecting the association of ragtime use with African music); Barbara B. Heyman, Stravinsky and Ragtime, 68 Musical Q. 543, 544 (1982) (noting that ragtime and its predecessor, the cake walk, “were the first examples of Black music to achieve widespread international popularity and commercial distribution”); Hunter, supra note 55, at 187.

58. See Southern, supra note 57, at 330–336 (discussing the origin and characteristics of the blues); Hunter, supra note 55, at 187 (describing jazz as ragtime’s godchild with respect to its appropriation by white capital).


62. See Southern, supra note 57, at 504; Siva Vaidhyanathan, Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity 117–148 (2001) (discussing appropriation of Blues music by rock and roll artists generally); Carl I. Belz,
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63. See Southern, supra note 57, at 505 (noting that rock and roll was a fusion of rhythm and blues, pop, country, and western elements); Brewer, supra note 60, at 300 (defining rockabilly as a “hybrid of blues and country that became rock & roll”); Peter Wicke, Rock Music: A Musical-Aesthetic Study, 2 Popular Music 219, 222 (1982) (noting origin of rock and roll in western swing, boogie, and various rhythm and blues playing styles).


65. See Shaw, supra note 61, at 72 (noting that Elvis Presley’s hit “Hound Dog” was recorded three years earlier by blues artist, Big Mama Thornton).


68. Price, supra note 67, at 219, 228 (noting influence of Little Richard and the fact that the Beatles’ style remained “fundamentally derived from African American-inspired popular music”).

69. See id. at 226–227 (noting the influence of Bob Dylan’s lyrics on John Lennon’s compositions); Gerry Farrell, Reflecting Surfaces: The Use of Elements from Indian Music in Popular Music and Jazz, 7 Popular Music 189, 189 (1988) (noting use of Indian music in pop, rock, and jazz since the 1960s with a focus on the music of the Beatles); David R. Reck, Beatles Orientalis: Influences from Asia in a Popular Song Tradition, 16 Asian Music 83, 83 (1985) (noting that in the mid-1960s the Beatles began utilizing elements and influences from Asia in their songs).

70. Burkholder, Borrowing, supra note 12, at 35.

71. See id.

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


75. Burkholder, Borrowing, supra note 12, at 35–36.


77. Arewa, Hip Hop, supra note 1, at 609.

78. See John T. Winemiller, Recontextualizing Handel’s Borrowing, 15 J. Musicology 444, 469 (1997) (noting that recontextualizing Handel’s borrowing challenges ideas about “the nature of originality, creativity, and musical authorship in the eighteenth century.”).

79. Arewa, Hip Hop, supra note 1, at 609.

80. Id. at 581–584.

81. See Arewa, Unfair Use, supra note 1, at 31.

82. Hebel, supra note 6, at ix (noting that the concepts of allusion and quotation “have seen a remarkable renaissance in the wake of the intertextual enthusiasm”).

83. See Julia Kristeva, Revolution in Poetic Language 59–60 (Margaret Walker trans., 1984):

[The term inter-textuality denotes the] transposition of one (or several) sign systems into another . . . If one grants that every signifying practice is a field of transpositions of various signifying systems (an inter-textuality), one then understands that its “place” of enunciation and its denoted “object” are never single, complete, and identical to themselves, but always plural, shattered, capable of being tabulated. In this way polysemy can also be seen as the result of semiotic polyvalence—an adherence to different sign systems.

Roland Barthes, From Work to Text, in Image-Music-Text 155, 160 (1978) (“The intertextual in which every text is held, it itself being the text-between of another text, is not to be confused with some origin of the text: to try to find the ‘sources’, the ‘influences’ of a work, is to fall in with the myth of filiation”).

84. See generally Richard Bauman, A World of Others’ Words: Cross-Cultural Perspectives on Intertextuality (2004) (discussing intertextuality as communicative practice in oral and literary texts); Hebel, supra note 6 (identifying more than 2,000 studies that deal with intertextuality, allusion, and quotation); Influence and Intertextuality, supra note 6 (exploring and clarifying conceptions of influence and intertextuality in literary theory); Stephen J. Lynch, Shakespearean Intertextuality: Studies in Selected Sources and Plays (1998) (discussing the sources of Shakespeare’s plays as well as Shakespeare’s revisionary practices); Mimesis and Intertextuality in Antiquity and Christianity (Dennis R. MacDonald ed., 2001) (examining the ways in which early Christian writers practiced mimesis of literary models from the Greco-Roman world).
85. Barthes, supra note 83, at 160.

86. Transformative uses is an area where legal dialogue exists. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (finding fair use in copyright infringement action about parody of Roy Orbison’s song “Pretty Woman”); SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276 (11th Cir. 2001) (finding that defendant is entitled to a fair use defense for the novel The Wind Done Gone, a parody based on Margaret Mitchell’s novel Gone with the Wind and remanding the case for further proceedings); Arewa, Hip Hop, supra note 1, at 574–576; Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990) (describing a transformative standard for fair use and identifying socially beneficial contributions for a different purpose or manner as being core elements of transformative uses).

87. Arewa, Hip Hop, supra note 1, at 576.

88. Id.


90. Vaidhyanathan, supra note 62, at 117–148 (discussing the lack of fit between copyright doctrine and African American musical forms); Arewa, Hip Hop, supra note 1, at 616–626 (discussing treatment of African American aesthetic styles by copyright doctrine).


92. See, e.g., Roger Abrams, Deep Down in the Jungle (1970) (discussing toasts, a form of African American folklore that involves verbal contests in performance of certain narratives, including The Signifying Monkey); Graham Allen, Intertextuality 165–173 (2000) (discussing intertextuality in reference to Gate’s book, The Signifying Monkey); Houston Baker, Blues, Ideology and Afro-American Literature 7 (1984) (suggesting that blues be considered as a “forceful matrix in cultural understanding . . . [whose] performers offer interpretations of the experiencing of experience”); Gates, supra note 91, at xxiv (discussing the nature of Signifyin(g), which is based on repetition and revision, as being fundamental to African American artistic forms, including painting, sculpture, music, and language use); William Labov, Language in the Inner City (1972) (studying form, rules and usage of Black English Vernacular); Arewa, Hip Hop, supra note 1, at 616–626 (discussing African American aesthetic forms and music).

93. Arewa, Unfair Use, supra note 1, at 33.

94. Id.

95. See Clayton & Rothstein, supra note 6, at 5 (noting that the shift away from author-centered criticism in the literary area has led to a broadening of author-centered criticism “so as to take into account the multifarious relations that can exist among authors”).

Arnstein v. Porter, 154 F.2d 464, 468-69 (2d Cir. 1946) (discussing copying and unlawful appropriation); Stephanie J. Jones, Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity, 31 Duq. L. Rev. 277, 277 (1993) (noting that three elements of copyright ownership, access, and substantial similarity that must be proven to show infringement); Alan Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 Colum. L. Rev. 1187, 1206 (1990) (discussing use of a test of probative similarity in copyright infringement cases).

97. Clayton & Rothstein, supra note 6, at 5 (noting shift away from author-centered criticism in the literary area).


99. See Will Wright, Sixguns and Society 29–123 (Berkeley 1975) (discussing the narrative and symbolic structure of Western films); Olufunmilayo B. Arewa, Tarzan, Primus inter Primates: Difference and Hierarchy in Popular Culture 111–125 (May 1988) (Ph.D. Dissertation, University of California at Berkeley (discussing the narrative structure of Tarzan novels).

100. See Propp, supra note 98.

101. See Wright, supra note 99, at 29–123.

102. Id. at 40–49.

103. See id. at 46 (noting that functions 2, 8, 10, and 11 are optional).

104. Id. at 40.

105. Id.

106. Id. at 31–32.

107. Id.

108. Id. at 64–69.

109. Id. at 74.

110. Id. at 99–113.

111. Id. at 113.

112. Although Wright uses the term “plot” to refer to the narrative structures consisting of functions that he identifies, he clearly distinguishes between plot and narrative structure elsewhere. See Wright, supra note 99, at 33 (distinguishing plot summaries from the structural functions that characterize all Western films); see also John Storey, An Introductory Guide to Cultural Theory and Popular Culture 74 (1993) (distinguishing Wright’s approach from that of Claude Lévi-Strauss and noting that Wright insists that the social meaning of a myth must be analyzed with respect to both its binary structure and its narrative structure).

113. 45 F.2d 119 (2d Cir. 1930).

114. Id. at 121–122 (finding no infringement between the two works).


116. Id.; Nichols, 45 F.2d at 122.

117. Jaszi, supra note 9, at 47:

[The judge’s] opinion (in Rogers v. Koons) effectively embraces an approach to substantial similarity analysis that is structurally biased in favor of the claims of the
“author” whose work has temporal priority—a standard that cannot account fully for the possibility that “recognizable” borrowings incorporated from preexisting works into new ones may be of elements that are in the public domain.


118. Wolfgang Mieder, Tradition and Innovation in Folk Literature, at xi (1987) (“Such traditional texts, certainly oral texts, exist by repletion and therefore in numerous variants.”).

119. See generally Arewa, Biopiracy, supra note 1.

120. Id.

121. Id.

122. Id.


128. See, e.g., Jerry H. Bentley, Old World Encounters: Cross-Cultural Contacts and Exchanges in Pre-Modern Times (1993) (analyzing premodern encounters between people of different civilizations and cultural regions); Tyler Cowen, Creative Destruction: How Globalization is Changing the World’s Cultures (2002) (discussing the intersection between cultural exchange and trade); Jared Diamond, Guns, Germs and Steel: The Fates of Human Societies (1997); Nettl, supra note 127, at 361–362 (commenting that intercultural influences “were not invented by the Western missionaries or colonialists who first brought Western music to much of the world”).

129. See generally Sarah Harding, Value, Obligation and Cultural Heritage, 31 Ariz. St. L.J. 291, 297 (1999) (“Cultural heritage is broadly interpreted as anything that is of some cultural importance, whether it be art, literature, music, archaeological sites, sacred
artifacts, historical artifacts, natural formations, or ancient remedies.”); Arewa, *Biopiracy*, *supra* note 1.
