
UC DAVIS LAW REVIEW

VOL. 53, NO. 2



DECEMBER 2019

Copyright's One-Way Racial Appropriation Ratchet

Elizabeth L. Rosenblatt*

This Article explores the implicit hierarchies inherent in copyright law, with particular attention to ways in which U.S. copyright statutes and judicial opinions incorporate racial bias into those hierarchies. By devaluing the inherently dialogic and incremental nature of meaning-making, current copyright law tends to create and perpetuate a fiction of “pure originality” that disproportionately valorizes creators and innovators identified as original or inventive over those identified as derivative. Statutes and court opinions often make this distinction between the “original” and the “derivative” in ways that reflect and amplify racial bias. Frequently, appropriation of the traditions, identities, ideas, expressions, or bodies of people of color is treated as “original” and given full statutory

* Copyright © 2019 Elizabeth L. Rosenblatt. Visiting Professor of Law, University of California, Davis. In the spirit of this Article, I am particularly mindful of my status as a white scholar reiterating, amplifying, remixing, and building upon arguments previously made by intellectual property scholars of color. I recognize my intellectual debt to those scholars, whose work I cite throughout this Article and especially in footnote 71. I also wish to thank Bitá Amani, Dan Burk, Colleen Chien, Maggie Chon, Carys Craig, Michael Dorff, Chris Elmendorf, K.J. Greene, Cynthia Ho, Nancy Kim, Amanda Levendowski, Lateef Mtima, Yvette Joy Liebesman, Min-Ha Pham, Jennifer Rothman, Zahr Said, Pamela Samuelson, Cathay Smith, Mel Stanfill, Madhavi Sunder, Felix Wu, the participants at the 2018 WIPIP conference, the participants at the 2017 IPSC conference, and the organizers and participants of the 2017 Race + IP conference for their suggestions and insights.

protection and the dignitary respect that comes with it. In contrast, appropriation by those same peoples is labeled “unoriginal” and denied both statutory protection and respect by the dominant culture. At the same time, informal forces such as risk imbalance, uncertainty aversion, and contractual traditions tend to widen the disparate impact of rules that may appear facially neutral. The result is the gradual shifting and consolidation of copyright ownership away from racial minorities and toward those who appropriate from those minorities. This Article identifies examples of copyright law’s one-way racial appropriation ratchet, discusses its doctrinal sources, and suggests that stronger exclusivity provisions under current copyright law are likely to exacerbate, rather than combat, racial inequalities.

TABLE OF CONTENTS

INTRODUCTION	593
I. COPYRIGHT LAW AS HIERARCHICAL DISCOURSE ABOUT VALUE.....	600
II. COPYRIGHT’S DISCRIMINATORY DISCOURSE ABOUT	
APPROPRIATION.....	606
A. <i>Who Is an Author</i>	611
B. <i>Defining the Author’s “Work”</i>	617
C. <i>The Consequences of Incorporating Something Owned</i>	624
D. <i>Who Asserts and Who Defends</i>	634
III. DISRUPTIVE EXPRESSION AND TRANSFORMATIVE WORKS.....	639
IV. WHAT DO WE DO ABOUT IT?	649
CONCLUSION.....	660

INTRODUCTION

In 1997, a *Rolling Stone* reviewer described the music of Grammy-winning recording artist Beck as incorporating a “cross-pollination of styles — from hip-hop to country rock to funky seventies soul — [which] has shown him to be one of the most innovative and forward looking artists of the nineties.”¹ Beck’s award-winning song “Loser” samples prominently from blues guitarist Johnny Jenkins. Beck is, in fact, part of a long tradition of musicians who obtain copyright on works that build on “folk” sources, but threaten legal action when others use their work as the basis for similarly transformative art.² The art collective “Illegal Art” made a CD entitled “Deconstructing Beck” containing songs that provided, in the words of one reviewer, “witty commentaries on their source” and “a manic roller coaster ride through Beck’s unconscious.” But the only thing that saved them from copyright liability may have been the fact that Beck’s record label couldn’t identify them well enough to serve a complaint.³

While Beck gained acclaim and copyright power for his sampling activities, the Sixth Circuit sent a very different message to hip-hop musicians N.W.A.: “Get a license or do not sample. We do not see this as stifling creativity in any significant way When you sample a sound recording you know you are taking another’s work product.”⁴ Then, in 2016, the Ninth Circuit disagreed with the Sixth Circuit, holding that it is possible to engage in *de minimis* copying of a sound recording.⁵ But whereas in the Sixth Circuit, the (infringing) defendant was a vocally anti-authoritarian African American group, in the Ninth, the (non-infringing) marquee defendant was Madonna and the plaintiff was a group of African American soul musicians.⁶

¹ Mark Kemp, *Beck: The Rolling Stone Interview*, ROLLING STONE (Apr. 17, 1997, 4:00 AM), <https://www.rollingstone.com/music/music-news/beck-the-rolling-stone-interview-90514/> [<https://perma.cc/VAR8-U6WR>].

² See, e.g., *Wihitol v. Wells*, 231 F.2d 550 (7th Cir. 1956) (successful copyright suit by composer who had notated a Latvian “folk” melody).

³ See Steven Shaviro, *Illegal Art: Deconstructing Beck*, ARTBYTE (June-July 1998), <http://www.rtmark.com/legacy/more/artbytebeck.html> [<https://archive.is/20061020170815/http://www.rtmark.com/legacy/more/artbytebeck.html>] (reviewing *Deconstructing Beck* and discussing legal controversy). Then-Dartmouth professor Larry Polansky implied some connection between himself and the album’s production. See Larry Polansky, *Singing Together, Hacking Together, Plundering Together: Sonic Intellectual Property in Cybertimes*, HUMAN. RES. INST. 98 (1998), http://eamusic.dartmouth.edu/~larry/singing_together/index.html.

⁴ *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398-99 (6th Cir. 2004).

⁵ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016).

⁶ See *id.*

These contrasts demonstrate what I describe as “copyright law’s one-way racial appropriation ratchet”: dominant cultures appropriate from minorities with impunity, but when minorities appropriate from dominant culture, they find legal challenge and moral condemnation.

There are cases that go the other way, too.⁷ But while one might reasonably characterize these examples as anecdotal or pointillistic, this Article explores a phenomenon deeper and more complex than particular cases: the way in which copyright law, as currently constructed and construed, defines a discourse that privileges the creative works and practices of incumbents and dominant cultures, while devaluing the works and practices of newcomers and disadvantaged cultures. Copyright systemically assigns value to some expressions and creators over others, and that value disparity works particular harm on underrepresented creators and their ability to use the expressive tools of dominant culture to “talk back” to inequality.

To date, many scholars who have approached the relationship between race and copyright have done so with a particular eye to remedying past exploitation of racialized innovation,⁸ or to optimizing

⁷ See, e.g., *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (holding Robin Thicke and Pharrell Williams liable for copying from Marvin Gaye); *Batiste v. Lewis*, No. 17-4435, 2018 WL 2268173 (E.D. La. May 17, 2018) (declining to dismiss infringement claim made by jazz musician Paul Batiste against Macklemore and Ryan Lewis); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976) (finding George Harrison liable for copying a song written by Ronnie Mack and performed by the Chiffons).

⁸ See generally Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573 (2010) [hereinafter, *Blues Lives*]; Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 306-07 (2006); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331 (2004) [hereinafter *Romance*]; K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999) [hereinafter *Copyright, Culture & Black Music*]; K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL’Y & L. 365 (2008) [hereinafter *Intellectual Property at the Intersection*]; Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97 (2009); Yxta Maya Murray, *From Here I Saw What Happened and I Cried: Carrie Mae Weems’ Challenge to the Harvard Archive*, 8 UNBOUND: HARV. J. LEGAL LEFT 1 (2013); John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399 (2009) [hereinafter *The Emperor Has No Copyright*]; Neela Kartha, Comment, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218 (1997).

wealth distribution.⁹ Although each of these is important, they are not the central concerns of this Article. I am chiefly concerned with the messages that copyright law sends about the creative process and the expressive value of particular works and creators. As far as those messages are concerned, copyright law's narrative of value discourages cumulative creativity in ways that exacerbate racial inequalities and silence diverse voices. These messages are deeply ingrained in copyright's structure, particularly its lionization of perceived originators and its deep suspicion of derivation and derivers.

Copyright law, like all law, forms part of a discourse about value and the relationships between people.¹⁰ In copyright's case, that discourse assigns particular value to expressions it deems "original," and to those it identifies as having "authored" those expressions. That value rests on a fiction — that there is any such thing as a truly "original" expression. Of course, there is such a thing as a *new* expression. But inevitably, even the newest expression is part of a chain of communication: the expresser draws on creative resources with shared meanings, and the receiver combines what they hear with their own context and experience to give it meaning. The expression then becomes part of the creative resources on which receivers may draw as they engage in further expressive communication. In fact, as literary theorists have long explained, expression has meaning only because it draws on a framework of shared meaning — the systems, signs, works, and "speech genres" (stylistic conventions) with which listeners become familiar.¹¹ For this reason, all expressive creation is inherently "dialogic," i.e., part of an eternal dialogue in which creators of new expressions form meaning by likening those expressions to (and distinguishing them from) what came before.¹² Appropriation, i.e., using something

⁹ See generally Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2016) (arguing that copyright protection contributes positively to economic distributive justice and provides a unique opportunity for African Americans to achieve economic success).

¹⁰ See generally Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997) (discussing discursive nature of legal doctrine).

¹¹ See Mikhail Bakhtin, *Discourse in the Novel*, in LITERARY THEORY: AN ANTHOLOGY 674, 680-81 (Julie Rivkin & Michael Ryan eds., 2d ed. 2004); see also JULIA KRISTEVA, *DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART* 66 (Leon S. Roudiez ed., Thomas Gora et al. trans., Columbia Univ. Press 1980; KEMBREW MCLEOD, *OWNING CULTURE: AUTHORSHIP, OWNERSHIP, & INTELLECTUAL PROPERTY LAW* 16-17 (2001) [hereinafter *OWNING CULTURE*] (discussing importance of intertextuality in constructing concepts of authorship).

¹² There is a close relationship between dialogism and "intertextuality," the idea that every work "builds itself as a mosaic of quotations, every text is an absorption and

preexisting, and making it (metaphorically) one's own, is therefore a crucial and inevitable element all expressive creation.

In that sense, there is nothing inherently "bad" about appropriation. But the term "appropriation" often carries a connotation of wrongness — the implication that an appropriator possesses something not their own, unfairly or without authority or right.¹³ Etymologically, this connotation makes little sense; after all, "appropriation" shares its roots (Latin: "ad"-to; "propriare"-own) with "appropriate," i.e., proper.¹⁴ An *improper* taking would be a *misappropriation*. But as a practical matter, the term "appropriation" is at best a controversial one in the context of expressive works, associated with the critically polarizing genre of "appropriation art,"¹⁵ and the accusatory epithet "cultural appropriation."¹⁶

If appropriation is necessary for communication and expression, why cast it as negative? First, I suggest that we are wrong to do so. And second, I associate this linguistic mistake with copyright law: the legal system that connects making a communication "one's own" in the metaphorical sense and "owning" it in the proprietary sense. The core mechanism of copyright law — granting authors exclusive market power over their original works — stands at odds with the fundamental principle that all communication is dialogic.¹⁷ By its nature, copyright law rewards what it identifies as originality and condemns what it identifies as appropriation. In so doing, the law picks winners and losers, ignoring their place in the middle of a communicative structure. Once an expression is deemed "original," its antecedents, whose context and building blocks create the foundation of expression's meaning, are not its "authors." The recipients of expression, whose thoughts and

transformation of another text." See KRISTEVA, *supra* note 11, at 66 (defining intertextuality).

¹³ See *Appropriate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/appropriate> (last visited Nov. 19, 2019) (including definitions such as "to take or make use of without authority or right" and "to take or use (something) especially in a way that is illegal, unfair, etc.>").

¹⁴ See Laura A. Heymann, *Reasonable Appropriation and Reader Response*, 9 U.C. IRVINE L. REV. 343, 359 n.94 (2019) (noting lexical overlap).

¹⁵ See *Appropriation*, TATE, <https://www.tate.org.uk/art/art-terms/a/appropriation> (last visited Oct. 20, 2019) [<https://perma.cc/L9PN-92AJ>] (describing "appropriation art" as "rais[ing] questions of originality, authenticity, and authorship").

¹⁶ See generally Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002) (discussing the concept of cultural appropriation).

¹⁷ See Elizabeth L. Rosenblatt, *Fair Use as Resistance*, 9 U.C. IRVINE L. REV. 377, 383-84 (2019) [hereinafter *Fair Use*].

recreations build upon that expression to create richness and complexity of meaning are, somehow, not “original.”

There is nothing inherently racial about copyright's line-drawing exercises. But like many systems that manipulate value and power, copyright law contains structural elements that disproportionately reward the already-privileged and disproportionately burden the already-oppressed. Post-colonial literary theory provides some useful insights into the process by which copyright law reinforces racial hierarchies. Because their rules are written by the powerful, systems of property ownership have always worked in favor of colonizers over the colonized, and intellectual property law systems are no different.¹⁸ One might describe geopolitical colonialisms as involving a double domination: (1) gaining control over a colonized people's culture; and (2) elevating the colonizer's own language above that of the colonized.¹⁹ Although it is more conceptual than territorial, copyright law incorporates both aspects of this domination. First, it provides mechanisms for dominant-culture creators to gain ownership over the expressive creations of speakers of color; and second, it promotes a discourse that advances the values and contributions of those dominant-culture creators, while devaluing the creative practices and priorities of subaltern communities. And, like many colonial laws, copyright goes a step farther to entrench its discourse: because copyright inherently gives owners some control over the means of expression, it allows them to silence challenges to copyright's value hierarchy. In post-colonial theory terms, “to control a people's culture is to control their tools of self-definition in relationship to others.”²⁰ Thus, perhaps inadvertently, copyright law elevates the creations and creative practices of dominant cultures over those they dominate, and the rhetoric of copyright law — framed in terms of economic benefit and “deserving” authors — teaches that this hierarchy is somehow necessary or correct.²¹ In a Bordieuan sense, copyright law is thus a pedagogical action that “reproduce[s] the structure of the distribution

¹⁸ See EVA HEMMUNGS WIRTÉN, NO TRESPASSING: AUTHORSHIP, INTELLECTUAL PROPERTY RIGHTS, AND THE BOUNDARIES OF GLOBALIZATION 100-01 (2004) (discussing colonialism and intellectual property); Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 745 (2018) (“[I]ntellectual property's economic structure is ‘always already’ raced.”).

¹⁹ See Ngũgĩ wa Thiong'o, *Decolonising the Mind*, in LITERARY THEORY: AN ANTHOLOGY, *supra* note 11, at 1126, 1135.

²⁰ *Id.* at 1135.

²¹ See generally Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996) (identifying dominant rhetorics of copyright law and explaining why they tie tenuously to practical justifications and doctrinal realities).

of cultural capital” (where the cultural capital is copyright exclusivity and its message of value) and therefore reinforces racial inequalities.²²

Specifically, this Article argues that the copyright system favors a historically Eurocentric, male conception of authorship over more collective, cumulative, or improvisatory creative processes, and assigns ownership accordingly. It rewards appropriation of materials perceived as primitive, raw, or “folk” by purveyors of dominant culture, while punishing appropriation of materials that it associates with higher culture or views as already completed.²³ By granting ownership to majority appropriators, copyright law not only grants them superior status, but also gives them exclusive rights to control the tools of discourse.²⁴ As a result, the law permits majority appropriators to colonize the art forms of disadvantaged creators, but denies those disadvantaged creators the tools to talk back. The mechanisms of assigning ownership reinforce and feed on biases of lawmakers, judges, and juries about the cultural value of certain kinds of expression and creative practices. At the same time, copyright’s focus on exclusive ownership as the sole lever for promoting “progress” denigrates the norms and expectations of creators with collective, cumulative, improvisatory, or other non-exclusivity-based cultural foundations. Copyright law is, in that sense, the language of the colonizer, and its operation as law compels creators to make a choice: either “buy in” to its conceptions of creative incentives and processes, or step out of the power structure and economic opportunity it creates.²⁵

²² PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY, AND CULTURE* 11 (Richard Nice trans., Sage Publ’n Ltd. 2d ed. 1977).

²³ See generally Andrew Gilden, *Raw Materials and the Creative Process*, 104 *GEO. L.J.* 355 (2016) (discussing copyright’s biases in distinguishing between “raw” materials and completed works).

²⁴ Although this Article focuses on U.S. law, similar arguments no doubt apply to other national systems. Likewise, an exploration of non-copyright intellectual property doctrines is beyond the scope of this Article, but ample evidence supports similar appropriation ratchets in other areas of intellectual property law as well. For example, trademark law provides a system for owning the symbols of discourse, which not only gives markholders direct control over meaning-making, but also presupposes that such control is preferable to confusion or dilution. Patent law permits the ownership of data and techniques that can include the genetic data of test subjects, which can encourage testing on vulnerable populations.

²⁵ Although beyond the scope of this Article, the same reasoning forms a critique of some approaches to treating traditional knowledge and crafts as cultural property. Arguments to “protect” cultures by propertizing them may signal adoption of the values and rhetoric of the colonizer. See generally Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 *YALE L.J.* 1022 (2009) (offering a stewardship model as a refinement of the intellectual property model for governance of indigenous cultural property).

For some, social justice may seem far from copyright's constitutionally stated goal. But there are many definitions of "progress of science and the useful arts," and no reason why we could not embrace a definition that incorporates human flourishing and the promotion of social justice.²⁶ By identifying copyright's one-way racial appropriation ratchet, the doctrinal principles that drive it, and its impacts on discourses of value, this Article adopts such a definition, and urges others to consider copyright's impacts on social justice as a crucial aspect of when and whether copyright promotes "progress."

Despite the critique of copyright structures that runs throughout the Article, its analysis and conclusions are not anti-copyright. Copyright serves many important and socially beneficial purposes, including promoting the production of commercially valuable work. And copyright protection can, in a number of ways, promote social justice. Creators of color can use copyright to seek compensation when their creations are misappropriated by dominant copiers. More importantly, by providing a framework for publishers (etc.) to pay creators for their work in exchange for copyrights, copyright creates one framework for making creation professionalized, or at least directly remunerative. In this way, copyright is a mechanism for making creation available to people other than hobbyists or the independently wealthy.

But those benefits, while real, come with costs: to take advantage of copyright, one must be willing to engage in costly litigation or relinquish ownership (and often some degree of creative control) to others. And, to this Article's purposes, they also come with important costs to discourse about creativity. With that in mind, this Article identifies ways in which copyright law might inhibit "progress" in the social justice sense by articulating a narrative of value that devalues key

²⁶ There is considerable debate among intellectual property scholars concerning the definition of "progress." See, e.g., Dan L. Burk, *Diversity Levers*, 23 DUKE J. GENDER L. & POL'Y 25, 28-29 (2015) (discussing the debate and possible definitions of "progress," including wider dissemination of knowledge, generation of aesthetically pleasing works, generation of works that are less environmentally burdensome or more socially just, or other benefits to happiness or dignity). Empirical study indicates that "progress" for many creators and innovators "appears to resonate less with quantity and quality of work and more with equality and distributive justice regarding their practices and experiences of working." Jessica Silbey, *IP and Constitutional Equality*, BALKINIZATION (Mar. 17, 2015), <https://balkin.blogspot.com/2015/03/ip-and-constitutional-equality.html> [<https://perma.cc/8JNP-XBK2>]; see also William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001) (identifying one justification for intellectual property law as the promotion of a just vision of society).

techniques for “talking back” to inequality,²⁷ and by consolidating semiotic power in the hands of dominant incumbents. Part I of the Article discusses how copyright law functions as a hierarchical discourse about the value of certain expressions, speakers, and hearers. Part II explores the roots of this hierarchical discourse in particular copyright doctrines and historical and informal forces. Part III describes how copyright’s discourse of value can be particularly harmful to minorities’ ability to resist hegemony. Finally, although this Article is designed to be more descriptive than prescriptive, Part IV touches briefly on some normative implications. With that in mind, it concludes that stronger copyright protections of the sort that currently exist are likely to exacerbate, rather than combat, racial inequalities. The Article calls on readers to examine copyright’s (perhaps-unintended) narrative of value, its systemic biases, and the racially disparate consequences of its otherwise-reasonable doctrines.

I. COPYRIGHT LAW AS HIERARCHICAL DISCOURSE ABOUT VALUE

By defining the contours of civil and criminal prohibitions, law naturally governs behavior. But law also defines and shapes the values of those it governs. In that sense, law is not only an instrument that parties can use to obtain or reinforce power, but it also forms a discourse that wields power over behaviors and beliefs.²⁸ Law identifies some behaviors as admirable and others as shameful, and assigns legal value to some activities and not others.²⁹ As Rosemary Coombe explains, law provides the “official social text” that shapes activities and brands them as legitimate or illegitimate.³⁰ Law is part of a discourse on value — and law is a particularly powerful voice in that discourse, because it speaks with the force of the state.

²⁷ BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 5, 9 (1989) (defining “talking back” as “speaking as an equal to an authority figure” and as an act of “movement from object to subject”).

²⁸ See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* 135-40 (A.M. Sheridan Smith trans., 1972) (identifying discourse as structuring social relations through the collective acceptance of the discourse as social fact).

²⁹ See generally Baron & Epstein, *supra* note 10 (discussing discursive nature of legal doctrine).

³⁰ See ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 29 (1998); see also WIRTEN, *supra* note 18, at 13 (discussing law as discursive text).

The copyright system assigns value to particular speakers and creations by giving some creations exclusive access to markets.³¹ The narrative of value goes like this: copyright law exists, as a constitutional matter, to promote progress. To promote progress, copyright law incentivizes the creation of particular works by granting their creators exclusive rights over, and thus exclusive access to markets for, those works. Therefore, if a particular work is protected by copyright law, it falls into the broad category of works that the law values as promoting progress. Thus, law implies value when it grants protection. This implication carries both definitional vagueness and logical fallacy. “Progress” is a term with many meanings, and its value is subjective. And as a matter of logic, just because a work does not require exclusivity-based incentives to be created does not mean it lacks value to its creators, to its consumers, to society, to the market, or to the abstract ideal of “progress.” But copyright law’s narrative stands: copyright law implicitly announces that some creations and creators have enough value that they *should* be encouraged through the mechanism of market exclusivity. What’s more, when the law grants market exclusivity to those it deems authors of valued works, it gives those authors exclusive control over the tools of discourse and communication, therefore assigning actual value to what otherwise would qualify only as power-by-implication.

This discursive impact is compounded by the fact that copyright law grants property rights in some circumstances and not others. Because copyright controls the assignment of value to particular expressions, it creates a power dynamic among those who engage in expression and communication.³² This assignment attaches a value narrative to legal distinctions that might otherwise be simple practical limitations on copyright’s grant of exclusivity. For example, “ideas” are not protected.³³ “Expressions” are, but only when they are “fixed” in a tangible medium of expression and reflect the “original” personal stamp of an author.³⁴ Creations that the author derived from preexisting copyrighted work are not worthy of protection except as to the derivator’s “original” contributions.³⁵ Indeed, creations derived from others will

³¹ See CARYS J. CRAIG, *COPYRIGHT, COMMUNICATION, AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW* 41-42 (2011).

³² See *id.* at 42; JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* 58 (2011) (discussing copyright’s ability to “shape identity development through . . . regulation, propertization, and monopolization of cultural content”).

³³ 17 U.S.C. § 102(b) (2019); see also *Baker v. Selden*, 101 U.S. 99, 103-07 (1879).

³⁴ *Id.* § 102(a).

³⁵ See *id.* § 106(2).

infringe the copyright in the works from which they are derived, unless they fall into the category of valued “fair” uses.³⁶

Countless scholars have explored the economic, natural-rights, and practical reasons for these distinctions. But relatively few have addressed the way that these distinctions systematically empower and disempower actors in the copyright system. When divorced from an assignment-of-rights framework, the granting of property rights in works of authorship joins the larger universe of discourse regarding power relationships between people.³⁷ Copyright values only those speakers whose creations are sufficiently distinct from the ideas they are based on, and the more distinct their creations from their forbears, the more value copyright ascribes to them. Only those who want to and can afford to memorialize their work in fixed media obtain copyright’s value. And only those who act as creative “masterminds” are deemed worthy of copyright’s market incentive. These distinctions define a hierarchy of participants in expressive communication: at the top stands an “original” speaker (author, creator) whose expressions are deemed original and protectable. Below them sits a “derivative” speaker (copier, infringer, fair user) whose expressions are derived from an “original” speaker. At the bottom lies an “audience” (consumer) who passively receives expression. Creators and creative practices that explicitly rely on reuse of existing material become suspect and vulnerable to cultural biases.

Although it reflects certain practical policy interests and comports with long-standing Western/Romantic notions of the heroism of the individual “romantic author,”³⁸ this hierarchy of expressions, speakers,

³⁶ *Id.* § 107.

³⁷ See Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 653 (1988).

³⁸ See BOATEMA BOATENG, *THE COPYRIGHT THING DOESN’T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* 45 (2011) (“The conceptualization of creative work enshrined in intellectual property law is not a natural phenomenon but a historical construct. It fixes a shift from a communal to an individual view of creativity that occurred in Europe when a number of factors combined to make individual claims over creative work socially and economically profitable.”); Keith Aoki, *Intellectual Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1322-27 (1996) (describing “[t]he Romantic Author As an Amalgam of Property and Sovereignty”); Margaret Chon, *The Romantic Collective Author*, 14 VAND. J. ENT. & TECH. L. 829, 847-48 (2012) (“[T]he romantic author has a unique privilege to define what counts as legitimate knowledge through a larger-than-average vision and grasp, and thus can influence, if not define, cultural norms.”); R. Keith Sawyer, *The Western Cultural Model of Creativity: Its Influence on Intellectual Property Law*, 86 NOTRE DAME L. REV. 2027, 2033 (2011); Sterk, *supra* note 21, at 1248 (explaining how copyright rhetoric “reinforce[s] the premise that rewards in a market system mirror

and participants is entirely artificial, and does not reflect the reality of communication and meaning-making. Meaning is, necessarily, the result of an interaction between text and reader;³⁹ the making of meaning thus involves a complex mixture of influences from speaker, hearer, and cultural intermediaries.⁴⁰ Creative expression is, by its nature, part of a communicative web of discourse that connects speakers and hearers. All speakers have also been hearers, all hearers bring their own meanings to what they hear,⁴¹ and all expression responds to or gains context from preexisting expression.⁴² The process of authorship is thus always a dialogue, both derivative and original.⁴³ As Carys Craig has explained, the dialogic nature of authorship “reveals the cumulative nature of cultural creativity,”⁴⁴ which necessarily incorporates the speaker’s and hearer’s social and cultural contexts.⁴⁵

This dialogic framework reveals the artificiality of copyright’s hierarchy: one might just as easily say that an author creates something “original” by contextualizing or recontextualizing what came before, rather than by being independent from it.⁴⁶ For example, ethnographic

intelligence, education and effort”); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 291-92 (1992).

³⁹ See LOUISE M. ROSENBLATT, *THE READER, THE TEXT, THE POEM: THE TRANSACTIONAL THEORY OF THE LITERARY WORK* 23 (1978) (describing the transactional nature of meaning-making).

⁴⁰ I use these terms broadly; “text” includes any work that may be interpreted as having meaning; “speaker” includes creators of written material, visual art, music, or any other expressive medium; “hearer” includes anyone who reads, hears, sees, etc. the expression. A work is communicative even if its creator never shares it; a work that is created and then discarded or shoved in a drawer for eternity is no less part of the web of discourse (albeit a “dead end” of its communicative thread), because its creator used the tools of discourse to make it.

⁴¹ See Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, The Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC’Y REV. 393, 403 (1999) (“[T]hough a teller weaves a tale, she cannot control the interpretation her audience places on it; and though a listener in some sense becomes his own author, creating meaning from the story he hears, he cannot be said to produce that meaning out of whole cloth.”).

⁴² See SIMON DENTITH, *BAKHTINIAN THOUGHT: AN INTRODUCTORY READER* 3 (1995).

⁴³ See Jennifer Nedelsky, *Citizenship and Relational Feminism*, in *CANADIAN POLITICAL PHILOSOPHY: CONTEMPORARY REFLECTIONS* 131, 133 (Ronald Beiner & Wayne Norman eds., 2001).

⁴⁴ CRAIG, *supra* note 31, at 54.

⁴⁵ See Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151, 1178-80 (2007) [hereinafter *Creativity and Culture*].

⁴⁶ See CRAIG, *supra* note 31, at 40; see also Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969 (1990) (highlighting the arbitrary nature of copyright’s “originality” analysis: “If we eschewed [an examination process that separated authors’ works from preexisting works] but nonetheless adhered unswervingly to the concept of

study of Jamaican musicians and DJs indicates that they use the word “original” to denote something that is “original” to the musical tradition rather than to an individual composer. “Originality, in the Jamaican context, depend[s] on subverting technology intended for transmission-only into an interpretative and creative tool, making creative decisions about how one interacts with recordings, and about how one engages with an audience.”⁴⁷ Sounds that are invented, as opposed to being linked to traditional origins, are therefore criticized as being un-“original.”⁴⁸

Likewise, the dialogic framework reveals the falsehood of the creator/user dichotomy, an artificial line divorcing the author and her work from much of what gives her work meaning.⁴⁹ Relying on these false dichotomies between “original” and “derivative” and between “speaker” and “hearer,” the law creates a power dynamic by which some can “own” and therefore control access to the tools of meaning-making.⁵⁰ It does not need to do so. One could easily envision a system that proactively rewards and values speakers for building upon what came before,⁵¹ and that encourages an audience to use the works it consumes as springboards for creation.

The mere fact that copyright law is created by those in power and serves their interests does not mean that it is itself a colonizing undertaking, or a bad one. Just as the English language helped create a more “literate” class of subjects across the British Empire (to the extent

originality, we would have to allow the author of almost any work to be enjoined by the owner of the copyright in another”).

⁴⁷ Larisa K. Mann, *Decolonizing Copyright Law: Learning from the Jamaican Street Dance* 60 (Fall 2012) (unpublished Ph.D. dissertation, University of California, Berkeley), <https://escholarship.org/content/qt7h8449q6/qt7h8449q6.pdf>.

⁴⁸ *Id.* at 110-11.

⁴⁹ See Cohen, *Creativity and Culture*, *supra* note 45, at 1179.

⁵⁰ See Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 *CARDOZO ARTS & ENT. L.J.* 215, 234 (1996) (noting that law “reflects disparities of power among social agents depending on their ability to control access to sources of signification and dissemination”); see also Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 *TEX. L. REV.* 1853, 1866 (1991) (explaining that by “freezing the connotations of signs and symbols and fencing off fields of cultural meaning with ‘no trespassing’ signs — intellectual property laws may enable certain forms of political practice and constrain others”).

⁵¹ Certain norms-based systems do precisely that. For example, scholars assiduously incorporate and attribute the work of others into our own work, and tend to show more respect for work that incorporates and credits more sources, rather than fewer. Failure to incorporate the work of others is a sign of, at best, inadequate scholarly rigor. Or, as is often attributed to Wilson Mizner, “when you take stuff from one writer it’s plagiarism, but when you take from many writers it’s called research.”

that “literacy” involves reading and critiquing English literature),⁵² copyright law does much to promote the creation of commercially viable works. But just as a colonizer’s insistence on English as the “only” or “best” language promotes inequality and works harm on the culture of the colonized,⁵³ insistence on copyright values as the “only” or “best” promotes inequality and works harm on creative cultures that embrace different values. Copyright’s hierarchy of value purports to be unrelated to the racial, gender, or other personal identity of the speakers or the artistic merit of their creations, but its results tend to disadvantage certain speakers. Copyright disadvantages those whose backgrounds and cultural forms embrace cumulative creation and oral transmission of creative techniques. It disadvantages those who lack the financial resources to create “from scratch” but can rely on technologies that allow them to transform preexisting material into new works. And it disadvantages those who want to use the works of dominant culture to “talk back” to inequality.

Although these preferences are not explicitly racialized, they are implicitly so, and they generate a discourse with a two-fold colonizing impact. First, this discourse assigns greater value to creations and creators that embrace the fiction of originality than to those that are explicitly cumulative or communal. Second, it gives ownership over the very tools of communication that would resist the value-structure it defines. Thus, it denies the existence of merit in culture or history outside the colonizer’s frame, resulting in what postcolonial theorist Frantz Fanon would call “a systematic negation of the other person.”⁵⁴

We cannot blame a single doctrine for these inequities. A combination of factors conspires to create this effect. Other scholars have discussed the racial impact of specific copyright doctrines.⁵⁵ Rather than rehash descriptions of how those doctrines have promoted racial inequalities, this Article endeavors to describe how they, together with historical and informal forces, shape discourse about the value of minorities’ authorial work and make minority speakers less likely than their majority counterparts to reap the legal and discursive benefits

⁵² See Julie Rivkin and Michael Ryan, *Introduction: English Without Shadows: Literature on a World Scale*, in *LITERARY THEORY: AN ANTHOLOGY*, *supra* note 11, at 1071-72.

⁵³ See *id.*

⁵⁴ FRANTZ FANON, *THE WRETCHED OF THE EARTH* 250 (Constance Farrington trans., Grove Press 1963).

⁵⁵ See Greene, *Intellectual Property at the Intersection*, *supra* note 8, at 370-73 (identifying idea/expression dichotomy, fixation requirement, originality threshold, formalities, and absence of moral rights as doctrinal factors promoting racial inequality in copyright law).

given to “original” innovators, even in equivalent or comparable situations.

II. COPYRIGHT’S DISCRIMINATORY DISCOURSE ABOUT APPROPRIATION

Copyright law talks a big game about nondiscrimination. It is facially neutral when it comes to creators’ identities and the genre of their work. Its incentives and protections are purely economic, and explicitly unconcerned with the identities of creators and the quality or genre of their work. The formative case of *Bleistein v. Donaldson Lithographing Co.* set out what has become known as copyright’s “nondiscrimination principle,” namely that copyright law should not base protection on judges’ aesthetic judgments regarding the worth of particular works.⁵⁶ At a time when copyright protection for pictorial illustrations was reserved for those “connected with the fine arts,” the Supreme Court determined that advertising posters were no less worthy of protection than works of better-known fine artists:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value — it would be bold to say that they have not an aesthetic and educational value — and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.⁵⁷

Although it enshrined a formal policy against basing copyright protection on judicial aesthetic judgment, the Court tipped its hand at the end, revealing its own low opinion of the advertising poster’s artistic

⁵⁶ See Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 249 (1998) (“[T]he general irrelevance of aesthetics has become a cornerstone of copyright jurisprudence.”).

⁵⁷ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

merit along with its “hopes for a change.”⁵⁸ And, the Supreme Court’s admonition aside, courts cannot avoid making aesthetic and interpretive judgments in copyright cases.⁵⁹ As a result, Alfred Yen explains, “aesthetic bias becomes inherent in copyright decisionmaking because an aesthetic perspective must necessarily be chosen.”⁶⁰

It should be no surprise when those aesthetic judgments reinforce existing racial and cultural hierarchies.⁶¹ Copyright law exists, in significant part, “to protect companies that control the means of production” against the profit-threatening possibilities of competing production technologies and those who may use them creatively.⁶² The 1976 Copyright Act reflects direct responses to the new practicalities of the photocopy machine.⁶³ Congress “frantically” adopted the 1992 Audio Home Recording Act amendment to the Copyright Act in light of fears that high-quality private recording technologies would harm copyright owners.⁶⁴ The 1995 Digital Performance Right in Sound Recordings Act, rather than simply incorporating sound recordings into copyright, responded to the rise of digital audio transmission with a labyrinthine set of requirements that was “crafted to apply only to the oligopoly of the companies who lobbied for its passage . . . [and] ensured maximum revenue” for them.⁶⁵ The Digital Millennium Copyright Act of 1998 was, effectively, a set of “compromises reached after mammoth negotiations among record companies, motion picture studios, telephone providers, equipment manufacturers, and others”⁶⁶ — that is, those who control the means of production.

⁵⁸ See *id.* at 252.

⁵⁹ See John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. Rev. 1233, 1278-81 (2012) [hereinafter *Towards a Critical IP Theory*] (discussing aesthetic judgment in judicial copyright analyses); Yen, *supra* note 56, at 250-51 (discussing the inevitability of aesthetic judgment in copyright analysis). See generally Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 178 (1990); Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. 469 (2015) (describing complexity of interpretive methods inherent in copyright analysis).

⁶⁰ Yen, *supra* note 56, at 251.

⁶¹ See Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. 88, 89-93 (2013) (describing how aesthetic bias for famous artist over unknown author led to different results in comparable cases).

⁶² See MCLEOD, OWNING CULTURE, *supra* note 11, at 98.

⁶³ See David Nimmer, *Codifying Copyright Comprehensively*, 51 UCLA L. REV. 1233, 1250-56 (2004).

⁶⁴ See *id.* at 1331-34.

⁶⁵ *Id.* at 1336-39.

⁶⁶ *Id.* at 1342.

Each of these changes maintained the primacy of existing profit models by tightening restrictions on copying and derivation. At the same time, each maintained the mystique surrounding a definition of “authorship” that distinguishes new works from preexisting material. Under this definition, original authors do not copy, but they do alter primitive or raw material in ways that can be seen as cultural elevation or expert curation. This conception of originality maintains the primacy of Western, Eurocentric models of production as well as cultural and legal reverence for what Walter Benjamin would call the “aura” of purportedly original works as distinct from reproduced or derived ones.⁶⁷ As Anjali Vats and Deidré Keller explain, this conception of originality enacts racial oppression, because

whites have historically constructed information regimes in ways which devalue the knowledge and practices of non-whites; whites have historically held the power and authority to determine the legal structures which govern intellectual property rights; whites have historically crafted legal doctrines which favor the protection of Western understandings of creativity; and whites largely continue to manage domestic and international intellectual property rights regimes.⁶⁸

The system thus permits dominant (i.e., white) culture to colonize the expression of those it can define as primitive or raw. It consolidates expressive power in the hands of colonizers. It tells those who benefit from copyright’s market exclusivity that they are superior (in education, intelligence, or effort) to those who do not, and that their exclusive ownership is beneficial for society.⁶⁹ Furthermore, the system reflexively protects itself. It encumbers — both through discursive denigration and legal impediment — the upturning of this expressive hierarchy.

The Court’s hint of judgment in *Bleistein* presaged numerous subtle and not-so-subtle ways in which copyright doctrine has disproportionately disadvantaged racialized creators and cultures

⁶⁷ See WIRTÉN, *supra* note 18, at 66-68 (discussing the relationship between copyright policy and Benjamin’s “aura” of authorship). See generally WALTER BENJAMIN, *THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION* (2010).

⁶⁸ Vats & Keller, *supra* note 18, at 758-59.

⁶⁹ See Sterk, *supra* note 21, at 1248 (arguing that those in power have “reason to support legal rules that reinforce the premise that rewards in a market system mirror intelligence, education, and effort. Not only does such a premise increase self-esteem among the wealthy and powerful; it also increases public acceptance of disparities in wealth and power.”).

despite its facially neutral exterior.⁷⁰ A number of scholars have addressed these disparate impacts, especially in the context of music copyright.⁷¹ This Article adds to those scholars' work to demonstrate how copyright law, despite its outward neutrality, creates a discursive hierarchy with overtly discriminatory impacts. Specifically, copyright law incorporates these hierarchies into doctrines that define what qualifies as a work of authorship worthy of protection, which elements of a work of authorship are protected, and who qualifies as an author. Copyright law's mechanisms for determining what can and cannot be appropriated, when improper appropriation has occurred, and how appropriation influences the value of works have a disparately negative impact on creators of color. This disparate impact is exacerbated by biased application of the law, historical discrimination, and informal forces.

Through these biased systems, electronic-pop musicians Beck and Moby are hailed as innovators for building on multicultural musical foundations and historical recordings,⁷² while judges quoted the biblical

⁷⁰ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903).

⁷¹ See, e.g., JAMES BOYLE & JENNIFER JENKINS, *THEFT: A HISTORY OF MUSIC* (2017); KEMBREW MCLEOD & PETER DiCOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* (2011); TEHRANIAN, *supra* note 32; SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 117-31, 141-44 (2001); Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency, and Development)*, 40 UC DAVIS L. REV. 717 (2007) [hereinafter *Distributive and Syncretic Motives*]; Olufunmilayo B. Arewa, *A Musical Work is a Set of Instructions*, 52 HOUS. L. REV. 467 (2014) [hereinafter *A Musical Work*]; Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829 (2011); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006) [hereinafter *From J.C. Bach to Hip Hop*]; Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213 (2010); Tuneen E. Chisolm, *Whose Song is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. & TECH. 274 (2017); Tonya M. Evans, *Reverse Engineering IP*, 17 MARQ. INTELL. PROP. L. REV. 61, 66-71 (2013); Greene, *Intellectual Property at the Intersection*, *supra* note 8; Kartha, *supra* note 8; Mtima, *supra* note 8; Murray, *supra* note 8; Trevor Reed, *Who Owns Our Ancestors' Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 COLUM. J.L. & ARTS 275 (2016); Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005); Mel Stanfill, *Sounds About White: Differential Racialization and Differential Legality in Sampling and Mashup* (unpublished manuscript) (on file with author); Tehranian, *Towards a Critical IP Theory*, *supra* note 59.

⁷² See, e.g., Robert Hilburn, *What Do You See, Moby?*, L.A. TIMES (May 12, 2002, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2002-may-12-ca-hilburn12-story.html> (describing Moby's award-winning 1999 album as "a liberating merger of classic blues, gospel and rock elements with the forward-thinking electronica world of

admonition against stealing when Biz Markie and N.W.A. used sampled sound recordings in their hip-hop and rap music.⁷³ Shakespeare and Mozart are artistic geniuses for their reworkings of standard and folk sources, while Alice Randall's *The Wind Done Gone* and 2 Live Crew's "Pretty Woman" faced litigation to defend their rights to reframe the works of white authors.⁷⁴ African American jazz vocalist Maxine Sullivan faced controversy for performing "swung" versions of familiar Scottish songs,⁷⁵ while white musicians of the same era routinely climbed to the top of the charts with "smoother," "less raw" versions of songs written by and for African Americans.⁷⁶

These distinctions create and reinforce cultural stereotypes about the value of certain kinds of works and speakers, and they are rooted in a complex web of copyright laws that define copyrightability, authorship, and copying, and the way those laws shape discourse about the relationship between appropriation and creation. Each law conceals a latent judgment by lawmakers favoring a particular artificial, Eurocentric, traditionally male concept of who an "author" is and how a creator's process works. It affords greater respect to the mythical individual genius who uplifts or preserves primitive sources, and comparatively little respect to those who engage in collective, cumulative, or dialogic expression to build upon or challenge dominant culture. These laws work in tandem with judicial aesthetic judgment and pressures from informal forces such as uncertainty aversion to exacerbate historical unfairness and to shape popular conceptions of authorial identity and artistic legitimacy.

samplers and computers. It's music that seems to incorporate the best of decades of pop emotion into tracks that are fresh and affecting"); Kemp, *supra* note 1 (describing Beck's Grammy-winning style as a "cross-pollination of styles — from hip-hop to country rock to funky seventies soul — [which] has shown him to be one of the most innovative and forward looking artists of the nineties").

⁷³ See *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 395, 398-99 (6th Cir. 2004) (N.W.A.); *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 n.2 (S.D.N.Y. 1991) (Biz Markie).

⁷⁴ See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (2 Live Crew); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (*The Wind Done Gone*).

⁷⁵ See Heymann, *supra* note 14, at 361-62.

⁷⁶ See *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 912 (S.D. Cal. 1950) (holding that African American performer owned no rights in performance style); Robert Brauneis, *Copyright, Music and Race: The Case of Cover Recordings* 4-5, 12 (2019) (unpublished manuscript) (on file with author) (describing practice of white artists covering "race" records).

A. *Who Is an Author*

Under U.S. copyright law, ownership vests initially in the “author” of a work.⁷⁷ The law defines three varieties of author: sole author, joint author, and author of a work for hire.⁷⁸ To qualify as a sole author, one must be the “mastermind” of a work, the one who causes the work to be produced and superintends its production, even if others do the work.⁷⁹ To qualify as joint authors, each author must contribute something independently copyrightable to the work, all authors must agree and intend to be joint authors, and the authors’ respective contributions must form an inseparable or interdependent whole.⁸⁰ To qualify as the author of a work made for hire, one must either employ someone who makes the work in the course of their employment, or must specially commission the work and satisfy additional conditions.⁸¹

These definitions assign full ownership, and hence paramount value, to “masterminds” whose contributions — while undoubtedly significant — represent only part of the creative picture. The fundamentally cumulative, collective, and dialogic nature of authorship makes this assignment of complete value a mismatch even when a work is the project of a solo author who works alone. Its impacts are even more dramatic when works are created collectively, as is common in most creative industries such as film, television, and music. Although in many cases non-author contributors receive financial compensation, credit, or other rewards for their contributions, the system symbolically overvalues the contributions of “masterminds” and project funders, and symbolically devalues the contributions of other participants in meaning-making.⁸²

⁷⁷ See 17 U.S.C. § 102 (2019).

⁷⁸ See *id.* § 101.

⁷⁹ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884) (holding that photographer, not photographic subject, is copyright owner); see also *Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248(HB), 1999 WL 816163, at *5 (S.D.N.Y. Oct. 13, 1999) (holding that creating storyboards and designing filming techniques were sufficient to make a film director a sole author although he did not literally perform the filming).

⁸⁰ See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231-33 (9th Cir. 2000) (holding that a consultant who contributed substantial material to a film was not a joint author).

⁸¹ See 17 U.S.C. § 101 (2019) (defining work made for hire).

⁸² See McLEOD, *OWNING CULTURE*, *supra* note 11, at 26 (discussing alienation of creative labor). As Michel Foucault has pointed out, the designation of “author” or “author-function” is not necessary for discourse: “[W]e can easily imagine a culture where discourse would circulate without any need for an author.” MICHEL FOUCAULT, *WHAT IS AN AUTHOR?* 314 (1969). However, this Article does not argue for an authorless world, or even one in which authenticity and originality are irrelevant. Rather, it argues

The result is a discourse in which the label of “creative genius” flows toward incumbents who fund projects, organize the fixation of creative output, or are sophisticated and well-resourced enough to satisfy the work-for-hire requirements. By identifying the masterminds of dominant culture as value-creators, copyright shifts the narrative of value away from others, such as performers, consultants, idea-contributors, and laborers, who remain in copyright’s background. Copyright law grants complete ownership of photographic images to the photographer (as opposed to models or film developers), hailing the role of the photographer as more valuable than the others.⁸³ It is hard to overlook that cases concerning copyright in photographs often involve images of minority models who are uninvolved in the litigation.⁸⁴ This assignment of authorship to masterminds can compound inequalities, giving authors control not only of their work process, but also over the elements of that work that consist of, represent, or were contributed by others. By incorporating previously-unowned negro spiritual music into *Porgy and Bess*, for example, Gershwin effectively gained power over how African Americans were portrayed by their own music, and chose to do so in a stereotyped way.⁸⁵ Copyright law thus gives authors the practical power to exploit and misrepresent their subjects, as well as a higher position in the metaphorical hierarchy of value.⁸⁶

for a conception of “authorship” that does not privilege authenticity or originality over derivation, and recognizes the dialogic nature of participation in meaning-making.

⁸³ See 17 U.S.C. § 102(a)(5).

⁸⁴ See generally *Burrow-Giles Lithographic*, 111 U.S. at 53 (regarding photograph of Oscar Wilde); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (regarding photographs of Rastafarian community); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (regarding photographs of female bodies); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (regarding photograph of women’s legs and feet); *Agence France Presse v. Morel*, 934 F. Supp. 2d 584 (S.D.N.Y. 2013) (regarding photographs of Haitian earthquake victims); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005) (regarding photo of Kevin Garnett); *Gilden*, *supra* note 23, at 380 (“Amidst ‘anonymous’ women’s bodies and ‘generic’ black men, it is important to note just how racially and gender-imbalanced the outcomes are in the raw-material cases.”); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U.J. GENDER SOC. POL’Y & L. 273 (2007) (regarding objectification of women in fair use jurisprudence).

⁸⁵ See MCLEOD, OWNING CULTURE, *supra* note 11, at 60-61 (discussing *Porgy and Bess*).

⁸⁶ See *Garcia v. Google, Inc.*, 786 F.3d 733, 736, 740-41 (9th Cir. 2015) (holding that because filmmaker, not actor, was the sole author of film, copyright afforded actor no relief when filmmaker transformed actor’s performance into an inflammatory product without actor’s consent); MCLEOD, OWNING CULTURE, *supra* note 11, at 60-61;

These definitions of authorship not only create a hierarchy among contributors, but also create a hierarchy among works. Works that are not created by a legally defined author — that is, those for whom there is no single mastermind, no group of like-minded joint authors, and no employer — are simply unauthored in the eyes of the law, and thus the law does not acknowledge them as “works” of value. They are just things that *exist* without having been created in the copyright sense. This is particularly true for “folk” and “traditional” works such as textile patterns, folk epics, and indigenous music, which are often the product of long-term accretive creation by multiple community participants.⁸⁷ It is also true for works, such as urban legends and specialty products, that develop in emergent or subaltern communities before becoming widely available.⁸⁸ Individual contributors participate in the *process* of the work, but none of them can (or should) claim ownership in any particular iteration of it.

To the extent that copyright law exists to create market incentives, there is a reason for this approach:⁸⁹ it is clear that legally generated, exclusivity based access to markets is important in facilitating the creation of some kinds of works (such as major motion pictures), but is not necessary to incentivize creation of folk, traditional, and other collective works. But this otherwise-reasonable approach is a tool of oppression when it incentivizes dominant culture to appropriate collectively generated works away from the ether of existence into the hierarchy of ownership, and then labels that appropriation as value-creation. As a result, “folk” and “traditional” works float free until a “mastermind” appropriates them and claims them as their own.⁹⁰ It is

Murray, *supra* note 8, at 6-7 (describing exploitation of enslaved photographic subjects).

⁸⁷ See MCLEOD, *OWNING CULTURE*, *supra* note 11, at 39-41 (discussing folk music and folk epics); Riley, *supra* note 71, at 79-80 (discussing inter-generational nature of Native American music, dance, and ceremonial performance; and their inconsistency with copyright's authorship standard).

⁸⁸ See Susan Scafidi, *Who Owns Culture?: Appropriation and Authenticity in American Law*, in *RUTGERS SERIES ON THE PUBLIC LIFE OF THE ARTS* 1, 21 (Ruth Ann Stewart et al. eds., 2005) (“[D]istinctive cultural dress may be an Indian woman's sari or a sadomasochist's leather harness; folklore may involve the appearance of Coyote in a Native American myth or kidney thieves in an urban legend on a website.”).

⁸⁹ See U.S. CONST. art. 1, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

⁹⁰ See *Wihtol v. Wells*, 231 F.2d 550, 553-54 (7th Cir. 1956) (holding that composer owned copyright in song that showed “distinguishable variation” from Russian/Latvian folk song, and that later song incorporating the Russian/Latvian melody infringed: “it was original work on plaintiff's part when, some thirty years later [hearing

this phenomenon that, improbably, resulted in folk recordist Alan Lomax receiving a songwriting credit on (and presumably a royalty stream from) Jay-Z's 2001 album "The Blueprint": Lomax received a copyright for collecting the nineteenth-century African American prisoners' song "Rosie,"⁹¹ which was rerecorded by British rock band The Animals,⁹² which was sampled by Grand Funk Railroad,⁹³ which was in turn sampled by Jay-Z.⁹⁴ This genealogy is less remarkable than the fact that Lomax and other "song catchers" often obtained copyright for folk and traditional music they found and recorded.⁹⁵

To gain copyright over folk or traditional works, the mastermind need only create something more than trivially different from what existed before.⁹⁶ At that point the mastermind's creations gain value from their status as "works" associated with an identifiable author, but in a way that erases their dialogic nature, erases the work of those who made them, and compromises their historical context. Sometimes this ownership redounds to a single individual in a community (as it did, for example, when blues musician W.C. Handy published remembered songs from his own community under his own name);⁹⁷ at least as often, it redounds to the benefit of corporations and cultural outsiders.⁹⁸ In the field of music, for example, scholars have amply documented the process by which white authors claimed ownership over generations of cumulative African American blues traditions and were lauded as having created value.⁹⁹ Sometimes there is no financial benefit, but still

a folk tune in his boyhood], he devised a calculated melody score thus putting it in shape for all to read"); Riley, *supra* note 71, at 79-80.

⁹¹ See ALAN LOMAX, *O Rosie*, on PRISON SONGS: HISTORICAL RECORDINGS FROM PARCHMAN FARM 1947-48 VOLUME 2: DON'TCHA HEAR POOR MOTHER CALLING? (Rounder Records 1997).

⁹² See THE ANIMALS, *Inside Looking Out*, on ANIMALIZATION (MGM Records 1966).

⁹³ See GRAND FUNK RAILROAD, *Inside Looking Out*, on GRAND FUNK (Capitol Records 1969).

⁹⁴ See MCLEOD & DICOLA, *supra* note 71, at 95-98.

⁹⁵ See *id.*

⁹⁶ See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) ("All that is needed . . . is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"). See generally 17 U.S.C. § 102 (2019) (identifying copyright's "originality" requirement).

⁹⁷ See MCLEOD, OWNING CULTURE, *supra* note 11, at 45 (describing W.C. Handy's process of obtaining copyright for music he learned and remembered from fellow blues musicians).

⁹⁸ See Sherylle Mills, *Indigenous Music and the Law: An Analysis of National and International Legislation*, 28 Y.B. FOR TRADITIONAL MUSIC 57, 59-60 (1996).

⁹⁹ See VAIDHYANATHAN, *supra* note 71, at 117-31 (tracing the appropriation of blues by rock and roll artists over time); Greene, *Copyright, Culture & Black Music*, *supra* note

a form of exploitation: many pre-1972 ethnographic recordings of Native American ceremonies and religious events have been held non-commercially by museums and universities; under the Music Modernization Act, those works are now available for non-commercial use unless an “author” objects to their use, but because their authors are unknown (or because ethnographers are deemed to be their authors), tribes may be unable to prevent the dissemination of materials they deem spiritually valuable and confidential.¹⁰⁰

This process not only marginalizes cumulative and collective creations, but also marginalizes participants in collective creation as primitive. Incorporated materials lend “exoticism” to the appropriators’ products and allow appropriators to demonstrate their reach, without providing similar honors to those whose work is incorporated. Indeed, while out-of-court settlements often include attribution provisions, copyright law does not require that creators of underlying works be credited when their works are infringed — only compensated. Even when masterminds credit their folk or traditional sources, as some composers do,¹⁰¹ copyright’s narrative of value places the composers’ masterminded, appropriative works above the collective creations they incorporate, which remain primitive, valuable only as source material. Cultures that create collectively are thus marginalized in the copyright narrative as valuable only inasmuch as they generate the clay from which more “sophisticated” cultures can mold value.

8, at 358, 358 n.89; Greene, *Intellectual Property at the Intersection*, *supra* note 8, at 370-73; Kartha, *supra* note 8, at 219-23 (providing a concise history); Tehranian, *The Emperor Has No Copyright*, *supra* note 8, at 1453.

¹⁰⁰ See 17 U.S.C. § 1401 (“Noncommercial use of a sound recording fixed before February 15, 1972, that is not being commercially exploited . . . shall not violate subsection (a) if . . . (A) the person engaging in the noncommercial use . . . makes a good faith, reasonable search for, but does not find, the [copyright owner].”); Graham Lee Brewer, *Is a New Copyright Law a ‘Colonization of Knowledge’?*, HIGH COUNTRY NEWS (Mar. 5, 2019), <https://www.hcn.org/issues/51.5/tribal-affairs-is-a-new-copyright-law-a-colonization-of-knowledge?>

¹⁰¹ Examples are too numerous to list. In the classical music realm, see, for example, AARON COPLAND, *EL SALON MEXICO* (1937) (incorporating Mexican folk music from sheet music Copland purchased in Mexico); THURLOW LIEURANCE, *MEDICINE DANCE* (1939) (incorporating traditional Menominee Indian melodies Lieurance recorded, “adapted and arranged”). In the popular music realm, see ENIGMA, *RETURN TO INNOCENCE* (1994) (incorporating an Amis chant and crediting Amis vocalists Kuo Ying-nan and Kuo Hsiu-chu, whose vocals were recorded in a cultural exchange concert that Enigma sampled). It is notable that some of these pop-music credits are the result of little-publicized litigation settlements. See, e.g., JOANNA DEMERS, *STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY* 101 (2006) [hereinafter *STEAL THIS MUSIC*] (discussing sampling of folk works).

Furthermore, the dominance of the copyright system and narrative disrupts the norms and expectations of the communities and cultures that produce cumulative creativity and devalues participants in those communities. It condemns as “plagiarists” members of cumulative-creation cultures who follow their own community norms — like Dr. Martin Luther King, Jr., whose early writings borrowed from others in violation of academic norms, but in compliance with the Black folk-preaching traditions from which he learned.¹⁰² It denigrates or doubts the motives of those who expect their works to be reused or remixed, or who create without expectation of market exclusivity.¹⁰³ Likewise, it dismisses as primitive or superstitious the norms of cultures that believe works with spiritual, mystical, or physical powers must only be used by certain people in certain circumstances.¹⁰⁴ Members of communities that value cumulative creativity who do not wish to see their culture disrupted or “claimed” by outsiders must abandon their communitarian or intertextual principles and “buy in” (or “sell out?”) to copyright’s (Eurocentric, individualist) conceptions of authorship and ownership.¹⁰⁵

By that token, proposals to address inequalities by propertizing collective creations — like World Intellectual Property Organization (“WIPO”)/United Nations Educational, Scientific and Cultural Organization (“UNESCO”) proposals to develop intellectual property regimes for ownership of folklore and cultural production — are

¹⁰² See MCLEOD, OWNING CULTURE, *supra* note 11, at 73-77 (discussing accusations of plagiarism against Dr. King).

¹⁰³ For example, although I have personally participated in a lifetime of activities with media fans who devote time and money to creating and sharing works about the books, shows, films, and games they love, I have had countless conversations with people (including many scholars) who question these fans’ motives, the quality of their output, their willingness to have their own works distributed for free and remixed by others, or the “gift economy” they participate in as a labor of love. Might fans secretly hope that they somehow gain fame, fortune, exclusive ownership, or professional advancement from their fanworks? Some probably do; many earnestly profess not to and I believe them. But the presumptions of many outside this community — that anyone who professes to create without hope of remuneration is lying or their work is not worth respecting — is part of the copyright discourse I critique herein.

¹⁰⁴ See MCLEOD & DICOLA, *supra* note 71, at 104-06 (discussing cultural issues inherent in incorporating music from cultures that ascribe non-economic power to music); MCLEOD, OWNING CULTURE, *supra* note 11, at 45 (discussing disruptive impact of copyright ownership on blues cultures); Mills, *supra* note 98, at 57; Scafidi, *supra* note 88, at 103-07.

¹⁰⁵ See MCLEOD, OWNING CULTURE, *supra* note 11, at 46 (discussing disruptive impact of copyright ownership on blues cultures).

problematic.¹⁰⁶ While they may, for example, provide underprivileged craftspeople with protections against competition much the way they provide publishers and entertainment corporations with protections against copying,¹⁰⁷ they involve imposing Eurocentric conceptions of authorship and ownership on systems of creative production and use for which they are a poor fit.¹⁰⁸ They also involve a quid pro quo: in exchange for offering communities “ownership” of their own culture, they require those same communities to abide by the strong intellectual property regime of the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) treaty, making access to others’ cultures and technologies more expensive (or risky) as a practical matter.¹⁰⁹

B. *Defining the Author’s “Work”*

Just as a work without a legally defined author is considered unauthored and thus uncopyrighted, certain kinds of work are not ownable under the law regardless of who has created them. In order to be protected, a work must be original to the author in a way that is minimally different from what existed before (discussed above), must be fixed in a tangible medium of expression, and must be an “expression” rather than a mere “idea.”¹¹⁰ Just as the requirement that work must be originated by a legally defined author generates an artificial hierarchy among creators, the fixation and expressiveness requirements create an artificial hierarchy by elevating works deemed fixed expressions over those deemed unfixed or “mere” ideas. An orally transmitted work is not (yet) a “work.”

Here, as above, there are reasons for these requirements, ranging from the practical to the lofty. As a practical matter, how would one analyze whether an ephemeral, unmemorialized work was infringed? As a philosophical one, what profound damage would the system do to the

¹⁰⁶ See WIRTÉN, *supra* note 18, at 109-12 (discussing approaches to “cultural property” ownership).

¹⁰⁷ See *id.* at 114-16 (discussing competition in craft markets).

¹⁰⁸ See Riley, *supra* note 71, at 86-90 (identifying and discussing problems with proposals that would import Western intellectual property regimes into indigenous communities).

¹⁰⁹ See WIRTÉN, *supra* note 18, at 112 (“WIPO’s mission was twofold: to ensure and secure developing countries’ compliance with TRIPS, [and] to investigate the possibility of traditional knowledge holders’ assets being brought into the orbit of trade-related intellectual property rights.”); Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 614 (1996) (describing TRIPS as “one of the most effective vehicles of Western imperialism in history”).

¹¹⁰ See 17 U.S.C. § 102 (2019); see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Baker v. Selden*, 101 U.S. 99, 100-01 (1879).

very progress it is meant to promote if it gave some speakers exclusive ownership over facts and ideas needed for basic communication? Proprietary ownership of traditional creative processes can hardly be said to promote “progress.” Without question, these are important reasons and restrictions. But they come at a conceptual cost. When considered apart from these justifications, copyright’s basic ownability standards set up a discriminatory hierarchy that creates and reinforces a Eurocentric conception of what kinds of work (and works) qualify, and don’t qualify, as valuable. And like the authorship rules, they also permit dominant appropriators to lay claim to the work of their sources.

Works do not become copyrightable until they are “fixed in a tangible medium of expression.”¹¹¹ The requirement of fixation means that works are not assigned copyright value unless and until they are memorialized in writing or otherwise recorded. As discussed above, the person who conducts the fixation is the “author.” Therefore, expressive innovations incorporated into performances are owned by the person who records the performance; unrecorded performances are unprotected unless and until they are recorded. The impacts of the fixation requirement cut across all areas of creation, including dance, storytelling, and other physical and oral traditions,¹¹² but may be most easily observed in the field of music. Musical compositions were not capable of being fixed in any way other than notation until sound recording was possible and until copyright law began to recognize sound recordings as fixations of musical compositions.¹¹³ Notation is a particularly European development, so non-European musical traditions historically received less protection.¹¹⁴ This developed what Keith Aoki termed a “dual economy” of music.¹¹⁵ Notated music received copyright, generally owned by upper middle class educated whites, while un-notated musical compositions, including those created by or within folk collectives, did not receive copyright protection.¹¹⁶ Many works that arose within the collective experiences of slavery, the struggle for freedom, and post-Reconstruction subordination, for

¹¹¹ 17 U.S.C. § 102.

¹¹² See Riley, *supra* note 71, at 79-80 (discussing how secretly-recorded Indian dances or ceremonies would be placed in the public domain).

¹¹³ See Arewa, *A Musical Work*, *supra* note 71, at 487-93 (describing relationship between development of copyright protection for musical compositions and privilege granted to notated works).

¹¹⁴ See *id.* at 525-26; DEMERS, *STEAL THIS MUSIC*, *supra* note 101, at 33-34 (discussing shift from pre-Romantic European performance-focused culture and post-Romantic European notation-focused musical culture).

¹¹⁵ See Aoki, *Distributive and Syncretic Motives*, *supra* note 71, at 760.

¹¹⁶ See *id.*

example, were denied copyright protection because they were created through “intertemporal, intergenerational, anonymous, communal, or improvisational” processes.¹¹⁷

Just as copyright’s elevation of masterminds’ roles devalues participants in collective creation, copyright’s fixation requirement devalues participants in creative cultures that value performance excellence or distinctiveness over originality of content. This impact can be seen in devaluation or misreading of certain African American performance-focused traditions. As Zora Neale Hurston wrote:

It has been said so often that the Negro is lacking in originality that it has almost become a gospel. Outward signs seem to bear this out. But if one looks closely its falsity is immediately evident. It is obvious that to get back to original sources is much too difficult for any group to claim very much as a certainty. What we really mean by originality is the modification of ideas . . . the Negro, the world over, is famous as a mimic. But this in no way damages his standing as an original When sculpture, painting, dancing, literature neither reflect nor suggest anything in nature of human experience we turn away with a dull wonder in our hearts at why the thing was done.¹¹⁸

By devaluing performance and valuing the role of mastermind “fixers,” copyright law can not only undervalue the contributions of performers in creative discourse, but also can exploit performers, such as women of color, whose musical innovations have long been claimed by impresarios.¹¹⁹ Likewise, musical performers who develop avant-garde performance techniques have suffered, as their techniques are neither amenable to European musical notation nor, even when recorded, considered part of a musical composition.¹²⁰

One need not look to the avant-garde to find a one-way racial appropriation ratchet in the fixation requirement, however. In the early days of music industries, record companies segregated markets into “race” music recorded by and for African Americans, and “popular” genres, recorded by predominantly white musicians and marketed to

¹¹⁷ *Id.*

¹¹⁸ Zora Neale Hurston, *Characteristics of Negro Expression*, in SIGNIFYIN(G), SANCTIFYIN’, & SLAM DUNKING: A READER IN AFRICAN AMERICAN EXPRESSIVE CULTURE 300-01 (Gena Dagele Caponi ed., 1999).

¹¹⁹ See Greene, *Intellectual Property at the Intersection*, *supra* note 8, at 381.

¹²⁰ See *Newton v. Diamond*, 388 F.3d 1189, 1191 (9th Cir. 2004); Arewa, *A Musical Work*, *supra* note 71, at 502-04 (describing lack of protection for innovative performances).

everyone else.¹²¹ It was common for white musicians to rerecord songs that were popular on the “race” charts, copying not only the song, but also the African American artists’ musical choices.¹²² This practice, which was explicitly permitted by statutory compulsory license for “cover” versions of musical compositions,¹²³ ratcheted musical control into the hands of dominant appropriators. When African American artists and record companies looked to the courts to address this problem, the Southern District of California held that that artists’ stylistic contributions (as opposed to sheet music) were not copyrightable,¹²⁴ so white artists were free to copy arrangements without compensating African American performers or arrangers. White artists became famous for their recreations of African American music, and record companies became rich by mining African American sources.

The end result of the fixation requirement, therefore, is a discourse of value that reinforces a solitary and static Eurocentric form of creation over non-Western forms that embrace and recognize cumulative and improvisatory creativity,¹²⁵ and creates a false dichotomy and artificial hierarchy between “creator” (as composer, producer, choreographer, creator of value) and “performer” (as passive direction-follower). In so doing, the fixation requirement devalues improvisatory and performance-based art forms often associated with racialized cultures,

¹²¹ Brauneis, *supra* note 76, at 4-5.

¹²² *See id.*

¹²³ *See id.* at 3.

¹²⁴ *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 909 (S.D. Cal. 1950) (“[I]t is evident from a study of the copyright law . . . that the Congress did not intend to give recognition to the right of arrangement, dissociated from the work itself, to which the author claims the right.”).

¹²⁵ *See* Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29, 29-30 (Martha Woodmansee & Peter Jaszi eds., 1994); *see also* Arewa, *From J.C. Bach to Hip Hop*, *supra* note 71, at 550-51 (“Copyright legal structures and the classical music canon have thus relied on a common vision of musical authorship that embeds Romantic author assumptions. Such assumptions are based on a vision of musical production as autonomous, independent and in some cases even reflecting genius.”).

such as DJing and record scratching;¹²⁶ break dancing, folk dancing, and voguing;¹²⁷ and storytelling.¹²⁸

The blues tradition particularly illustrates the problematic nature of assigning ownership to a particular creator upon fixation: for generations of blues musicians, creation has involved often-subtle alterations of preexisting works, with an emphasis on distinctive performance of common elements. Under contemporary copyright standards, Robert Johnson (the first to record “Walking Blues” in 1937) could successfully have sued Muddy Waters (who recorded the similar “Country Blues” in 1941), although the two share a common ancestor in Son House’s “My Black Mama” (released in 1931, but often credited to earlier Blues musician James McCoy) and each is foundational for later blues and rock musicians.¹²⁹ Led Zeppelin is one of many white bands that made careers by building on the iterative (and thus difficult-to-attribute) nature of blues music. But by fixing their versions, Zeppelin received copyright’s imprimatur of value in ways that many blues musicians did not. When rapper Schoolly D sampled Led Zeppelin’s “Kashmir” under a quotation from the African American folk poem “Signifying Monkey” in his song “Signifying Rapper,” he implicitly critiqued Zeppelin’s uncredited reliance on blues music and tropes.¹³⁰ And yet YouTube comments for “Signifying Rapper” include no shortage of comments accusing Schoolly D of “stealing.”¹³¹

The fixation requirement, combined with the construct of the “mastermind” author, thus results in a gradual flow of material from floating free in minority cultures to being owned by individual dominant-culture authors or corporations. Consider the song “This Land is Your Land” by Woody Guthrie, which combines Guthrie’s socialist labor-movement lyrics with a melody that he heard from folk

¹²⁶ See Mann, *supra* note 47, at 60.

¹²⁷ See Caroline Joan S. Picart, *Rethinking Resistance: Reflections on the Cultural Lives of Property, Collective Identity, and Intellectual Property*, 47 J. MARSHALL L. REV. 1349, 1358-68 (2014).

¹²⁸ See Stephanie Spangler, *When Indigenous Communities Go Digital: Protecting Traditional Cultural Expressions Through Integration of IP and Customary Law*, 27 CARDOZO ARTS & ENT. L. J. 709, 725-26 (2010).

¹²⁹ See SON HOUSE, MY BLACK MAMA (Paramount Records 1931); VAIDHYANATHAN, *supra* note 71, at 119-26 (2001) (discussing the songs and their place in blues tradition).

¹³⁰ See VAIDHYANATHAN, *supra* note 71, at 132 (discussing *Signifying Rapper*).

¹³¹ See, e.g., Schoolly D, *Signifying Rapper*, YOUTUBE (Jul. 10, 2008), <http://archive.org/details/schoollysignifyingrapperyoutube> (Frank M: “Let’s be fair ppl.if u don’t own it and NO permission. Respect The ARTISTS ☺”; Jon Knight: “Another ignorant rapper stealing from Zep.”) A number of comments also try to foreground Schoolly D’s subtext by pointing out Zeppelin’s reliance on blues.

group The Carter Family.¹³² The Carter Family derived the melody from an African American folk song called “When the World’s on Fire,” as a result of A.P. Carter’s collaboration with African American blues guitarist Lesley Riddle, with whom he traveled the American South learning folk and blues songs.¹³³ Yet Woody Guthrie’s estate, which has asserted copyright over the song, routinely denies recording artists permission to use it and its lyrics, and has requested that parodists cease and desist.¹³⁴ The problem here is not that Guthrie was able to create the work: his combination of melody and lyrics resonated to form one of the most enduring songs of all time. The problem is that copyright allowed Guthrie and his estate to halt the course of the song’s development.

Thus, in addition to devaluing oral- and performance-tradition creators and works, the fixation requirement also contributes to a process of “sacralization” that elevates the fixed versions of works over their unfixed versions. When someone like Guthrie “claims” a previously unfixed work as their own, they claim it in a particular form. From an authorship standpoint, the selection of form represents the fixer’s particular contribution to the work.¹³⁵ And the fixer’s selection of form may in fact be (as it surely was for Guthrie) among the key factors that make the work popular. But from the work’s standpoint, the selection of form also represents a developmental endpoint of sorts: further development requires permission, either from the fixer or from fair use law. Fixation turns works of authorship into sacralized objects.¹³⁶ At the same time, sacralization generates a sort of artistic amnesia, creating an illusion that the fixed works were “original” to those to whom they are attributed, rather than being flexible, collective,

¹³² See KEMBREW MCLEOD, FREEDOM OF EXPRESSION® 23-28 (2005) [hereinafter FREEDOM OF EXPRESSION] (discussing “This Land is Your Land”).

¹³³ See *Lesley Riddle*, THE WINDING STREAM, <http://thewindingstream.com/tag/lesley-riddle/> (last visited Nov. 19, 2019) [<https://perma.cc/CS8B-2QZ2>] (briefly discussing Carter’s collaboration with Riddle).

¹³⁴ See MCLEOD, FREEDOM OF EXPRESSION, *supra* note 132, at 25-26 (discussing “This Land is Your Land”).

¹³⁵ See *Wihtol v. Wells*, 231 F.2d 550, 553-54 (7th Cir. 1956) (“[I]t was original work on plaintiff’s part when, some thirty years after [hearing a folk tune in his boyhood], he devised a calculated melody score thus putting it in shape for all to read.”).

¹³⁶ See Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 829-30 (2009) (explaining that fixation “works to bound the fruits of creative effort, engendering distance between the author and audience. Fixation thus causes a kind of death in creativity even as it births new legal rights”); Tehranian, *Towards a Critical IP Theory*, *supra* note 59, at 1254-58 (2012).

and cumulative creations.¹³⁷ Works that become “fixed” in the copyright sense — that is, memorialized in a written snapshot — become “fixed” in the metaphorical sense. They become frozen in time, and their status as “work” changes from verb (I work, you work, she works) to noun (a work).

As a result, copyright’s value narrative incorporates a notion of “authenticity” that favors dominant culture. For forms that arose in non-fixed traditions, such as blues music, the concern with authenticity is particularly oppressive. As musician and legal scholar Olufunmilayo Arewa has demonstrated,¹³⁸ although blues music has never been a static form, blues recordings made early in the recording era were deemed by dominant culture to represent “authentic” blues music.¹³⁹ Racial bias in the perception of artists has tended to lionize African American artists who continue to create “authentic” blues, while opening the door for white artists not only to build upon blues forms (as African American artists had done before), but also to be seen as innovative for doing so. In this sense, cultural property and intellectual property regimes that police “authenticity” can exacerbate racial hierarchies of value and power.¹⁴⁰

Copyright’s focus on “expression” rather than “idea” overlaps with its focus on mastermind creators and their fixed products, with similar results. One might say that as a conceptual matter, copyright law prohibits ownership of ideas not because they have too little value, but because they have too much value as the building blocks of creativity. And yet, copyright discourse celebrates the mastermind who transforms idea into expression — it is the mastermind who has created something of value. History, traditional images, collectively-developed craft techniques, “folk” narratives that are told, retold, and developed over generations — these are but a few examples of “ideas” that cannot be protected by copyright. Even if they are fixed in tangible media of

¹³⁷ See Arewa, *From J.C. Bach to Hip Hop*, *supra* note 71, at 589-91; see also MCLEOD, *FREEDOM OF EXPRESSION*, *supra* note 132, at 75 (discussing influence in classical music).

¹³⁸ Arewa, *Blues Lives*, *supra* note 8, at 581-82.

¹³⁹ See Clander, *#116 Black Music That Black People Don’t Listen to Anymore*, STUFF WHITE PEOPLE LIKE (Nov. 18, 2008), <https://stuffwhitepeoplelike.com/2008/11/18/116-black-music-that-black-people-dont-listen-to-anymore/> (“Along with Jazz, white people have also taken quite a shine to The Blues, an art form that captured the pain of the black experience in America. Then, in the 1960s, a bunch of British bands started to play their own version of the music and white people have been loving it ever since. It makes sense considering that the British were the ones who created The Blues in the 17th Century.”).

¹⁴⁰ See Alan Lawson, *The Anxious Proximities of Settler (Post)Colonial Relations*, in *LITERARY THEORY: AN ANTHOLOGY*, *supra* note 11, at 1221.

expression, they are common-pool resources in the public domain from which anyone can draw.

The uncopyrightability of ideas makes a great deal of sense as a practical matter — it would be counterproductive to make the building blocks of expression unavailable to others, particularly when those building blocks represent familiar, shared concepts. But like the fixation and authorship rules, the idea/expression distinction shapes a discourse in which the histories and practices of oppressed cultures are often characterized as unprotected ideas when used by those cultures, but as “authored” expressions when adopted by dominant appropriators. Drawing on the common-pool resources of other cultures is a low-cost, low-risk way for dominant-culture creators to generate material. There is no owner of those resources. Yet when fashion designers copy native designs onto textiles, for example, they gain copyright in the textile patterns.¹⁴¹ When dominant culture authors retell histories and legends, they gain copyright in their retellings.¹⁴² They thus place themselves higher on the ladder of appropriation than those from whom they draw, and higher than those who derive their work from already-owned sources.

Once a mastermind fixes their work, copyright grants them not only the exclusive right to reproduce the work they created, but also the exclusive right to create derivative works from it. For this reason, the creator of a work deemed “original” gains only benefits, without limitations. In contrast, the creator of a work based on something owned by another may gain some ownership in their original contributions, but also takes on risks and limitations of rights. The following Section describes the impact of this distinction.

C. *The Consequences of Incorporating Something Owned*

Because all creation is dialogic, all expression inevitably incorporates owned elements in one way or another, even if they are only intermingled with the work in the listener’s mind. If I cannot help but think of the television show *Battlestar Galactica* while listening to Nicki Minaj’s song “Starships,” each contributes some meaning to the other,

¹⁴¹ See, e.g., *Copyright Information*, PENDLETON, <https://www.pendleton-usa.com/copyright-information.html> (last visited Nov. 19, 2019) [<https://perma.cc/2HKT-2ZPF>]; *Pendleton Heritage*, PENDLETON, <https://www.pendleton-usa.com/pendleton-heritage.html> (last visited Nov. 19, 2019) [<https://perma.cc/9HWJ-VEZ4>].

¹⁴² See, e.g., ROGER D. ABRAHAMS, *AFRICAN FOLKTALES (THE PANTHEON FAIRY TALE AND FOLKLORE LIBRARY)* (1983).

for me, in some way.¹⁴³ Yet I am not an infringer because of it. That surely is not the sort of appropriation that copyright law is concerned with, and I daresay even the staunchest of copyright-exclusivity maximalists would be horrified if it did. But how is the (copyright-permitted) meaning-making of my mind's eye different from other (copyright-prohibited) dialogic meaning-making? Copyright law asks whether and how much an ordinary observer would perceive that one work appropriates the other,¹⁴⁴ and if so, whether there is a socially or economically acceptable reason for the relationship.¹⁴⁵

Because copyright law gives copyright owners exclusive rights not only to their own “original” creations, but also to derivative works based on those creations,¹⁴⁶ copyright law concerns itself with the extent to which it is acceptable for creativity to be cumulative. It was not always thus. Appropriation-based creativity has long been governed by moral and ethical norms rather than law. Classical music greats improvised and borrowed.¹⁴⁷ Shakespeare and his contemporaries freely appropriated from a wide variety of sources.¹⁴⁸ Somewhere along the way, however, stories about creativity lost sight of how cumulative and improvisatory historical works often were, and although creativity remained cumulative, law changed. Between 1831 and 1976, U.S. law increasingly granted copyright owners exclusive rights to authorize derivative works, culminating in the 1976 Act's complete prohibition on the creation of derivative works without authorization.¹⁴⁹ Although copyright's prohibition on derivation may be hard to justify on utilitarian grounds,¹⁵⁰ it comports closely with advancing a vision of creativity that values a certain kind of originality over cumulative advancement.

Current U.S. copyright law as interpreted by courts distinguishes between derivation, which is a right reserved exclusively for copyright

¹⁴³ See NICKI MINAJ, *STARSHIPS* (Young Money, Cash Money & Republic Records 2012).

¹⁴⁴ See, e.g., *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2003) (articulating substantial similarity and *de minimis* standards).

¹⁴⁵ See 17 U.S.C. § 107 (2019).

¹⁴⁶ See *id.* § 106(2).

¹⁴⁷ See MCLEOD, *OWNING CULTURE*, *supra* note 11, at 23-24 (discussing borrowing in classical and romantic music); MCLEOD & DICOLA, *supra* note 71, at 45-46 (same); Arewa, *From J.C. Bach to Hip Hop*, *supra* note 71, at 593-600.

¹⁴⁸ See Aoki, *supra* note 71, at 757-58; Tehranian, *Towards a Critical IP Theory*, *supra* note 59, at 1249-54.

¹⁴⁹ See Tehranian, *Towards a Critical IP Theory*, *supra* note 59, at 1249-50 (explaining progression).

¹⁵⁰ See, e.g., Sterk, *supra* note 21, at 1215-17.

owners, and transformation, which is sometimes permitted as fair use.¹⁵¹ The distinction between impermissible derivation and permissible transformation is a hazy but crucial one. Unauthorized derivers are infringers, who obtain no rights to their creations.¹⁵² Unauthorized transformers whose work qualifies as fair use are not infringers, but they still sit lower on the creative hierarchy than those whose works they have transformed, both because they are entitled to ownership only over the “original” elements they contribute,¹⁵³ and because the uncertainty of the fair use analysis means they risk liability for infringement.¹⁵⁴ This distinction creates a practical hierarchy of ownership: “originators” own rights over everything they create. In some circumstances, copyright owners may even manage to extend the duration of their copyright by making their own derivative works that add elements to works they already own.¹⁵⁵ In contrast, “derivders” own significantly less, possibly nothing. As a result, those who rely on copyrighted works to “talk back” to inequality thus obtain less ownership over their works than those who choose not to make such statements.

These considerations are probably pretty far from creators’ minds as they undertake the work of creating. As Jessica Silbey’s interviews of creators revealed, “whether permission is required or whether new [intellectual property] results from borrowing” is rarely a focus for creators. Rather, “[t]hey care about doing the work, and they emphasize the inevitability of their work’s relationship to its predecessors and how inspiration is a combination of both new and old.”¹⁵⁶ Creators may be critical of particular creative borrowings while recognizing the inescapability of borrowings more generally; but their paramount

¹⁵¹ See 17 U.S.C. § 101 (2019) (defining “derivative work”); *id.* § 102 (providing copyright owner exclusive right to create derivative works); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994) (outlining relevance of transformation to fair use); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 602-06 (2008) (identifying empirical importance of transformativeness for courts’ analysis of fair use).

¹⁵² See, e.g., *Pickett v. Prince*, 207 F.3d 402, 407 (7th Cir. 2000) (holding that creator of guitar based on Prince symbol owned no copyright in guitar configuration); *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *11 (C.D. Cal. Apr. 25, 1989) (holding that creator of script based on “Rocky” films owned no copyright in original portions).

¹⁵³ See 17 U.S.C. § 101.

¹⁵⁴ See *infra* note 247 and accompanying text.

¹⁵⁵ For a more thorough discussion of this possibility, see Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 U. COLO. L. REV. 561, 578-84 (2015).

¹⁵⁶ JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 52 (2015).

concern is having the freedom to pursue their own creative directions, which include both influence and novelty.¹⁵⁷ But while creative autonomy is paramount to creators, relatively subtle and un-intuitive creative decisions will influence both how much of their work they own and whether they are infringers.

By giving copyright holders the sole right to authorize derivative works, the law not only creates a false “originator”/“transformer”/“deriver” hierarchy that ignores the dialogic nature of even “original” creation, but it also gives so-called originators an immense amount of discursive power that goes well beyond mere access to markets for their works. Exclusive rights give copyright owners a significant measure of creative control over what is done with their works. They also give copyright owners the right to charge money for derivative uses, which perpetuates existing economic hierarchies by making cumulative creativity more expensive and therefore less available to poorly-resourced creators.¹⁵⁸ And crucially, it gives copyright owners the ability to shape narratives about who is a (devalued) appropriator and who is a (valued) originator. For example, hip-hop pioneers Public Enemy created elaborate collages of recognizable and unrecognizable fragments from copyrighted music into their songs before courts began to punish sampling. Public Enemy used these as the backdrop for commentary about racially relevant topics such as racial identity, racism, violence, and police brutality.¹⁵⁹ When law stepped in and labeled their style of music infringement, it did more than just make it more expensive to produce hip-hop (although it did that).¹⁶⁰ It also gave copyright owners the ability to decide whether they wanted their music associated with hip-hop productions, which not only inhibits hip-hop artists’ creative freedom but also creates opportunities for decisions based on (intentional or subconscious) racism.¹⁶¹ More broadly, it labeled hip-hop artists as unoriginal, which in copyright’s discourse of value is a condemnation.¹⁶² The irony of this effect is particularly palpable in the rock and roll/hip-hop context, in which owners of copyright in rock and roll music, who owe an enormous creative debt to African American musical forms, have gained control over the musical descendants of those they should be thanking.

¹⁵⁷ *See id.*

¹⁵⁸ *See* 17 U.S.C. § 106(2).

¹⁵⁹ *See* Evans, *supra* note 71, at 62-63 (discussing Public Enemy).

¹⁶⁰ *See* MCLEOD & DICOLA, *supra* note 71, at 26-29.

¹⁶¹ *See id.* at 118-21.

¹⁶² And, I note, it is a condemnation starkly at odds with Public Enemy’s masterful and complex productions.

When a copyright owner's work is deemed wholly "original" (that is, not derived from other copyrighted work), the copyright owner gains control over the very tools of expression and communication, and is free to make decisions about those tools in (consciously or subconsciously) biased ways.¹⁶³ John Tehranian highlighted the difference between copyright owners' respective reactions to works based on The Beatles' music catalog in the form of Cirque du Soleil's "Love," which they authorized and celebrated, and Danger Mouse's "The Grey Album," which they sued for copyright infringement.¹⁶⁴ What is the difference between these works, both of which remix and recontextualize The Beatles' catalog? One difference, to be sure, is that Cirque du Soleil undoubtedly paid a large sum of money for the privilege. Another difference, hard to overlook, is that Cirque du Soleil is viewed as "highbrow" majority culture willing to submit to the creative control of copyright owners, and Danger Mouse is a producer of hip-hop music whose mixing of The Beatles' "White Album" and Jay-Z's "Black Album" was inherently a sociopolitical commentary on race and progress.

In this way, copyright law not only permits majority voices to police cultural reproduction, but also gives copyright owners the ability to define which acts of cultural reproduction constitute, to use Sonia Katyal's term, "semiotic disobedience."¹⁶⁵ By categorizing some acts of cultural reproduction as disobedient and others as promoting the progress of culture, the system implies that disobedience and progress are at odds with each other. This disobedience/progress false dichotomy defines the cultural value of particular expressions and the cultures that surround them, reinforces highbrow/lowbrow distinctions, and in so doing, reinforces racial hierarchies.¹⁶⁶

This system also works an even deeper harm on culture's ability to address issues of race. Many of the most effective expressions about race and race-related issues are sure to respond to or incorporate expressions that came before, not only because of the inherently dialogic nature of communication, but also because using the tools of popular culture

¹⁶³ See Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1884 (2000) (discussing "speech hierarchy" enabling corporate entities to hold inventories of expressive works).

¹⁶⁴ See Tehranian, *Towards a Critical IP Theory*, *supra* note 59, at 1252-56.

¹⁶⁵ Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 493 (2006); see also Tehranian, *Towards a Critical IP Theory*, *supra* note 59, at 1240.

¹⁶⁶ See Clander, #108 *Appearing to Enjoy Classical Music*, STUFF WHITE PEOPLE LIKE (Sept. 1, 2008), <https://stuffwhitepeoplelike.com/2008/09/01/108-appearing-to-enjoy-classical-music/>.

makes communication more effective and accessible. And yet, to the extent these expressions appropriate copyrighted expression, copyright's discourse about value not only undermines their perceived value as serious expression, but also creates a risk of converting conversations that should be about race into conversations about copying. For example, Yxta Maya Murray's exploration of the copyright ownership of certain daguerreotypes of slaves revealed how artist Carrie Mae Weems' attempt to reveal the violence of slavery became a debate about the artist's legal right to reproduce the daguerreotypes.¹⁶⁷

Courts have performed this process in a way that both relies on and reinforces preexisting cultural biases about race and creativity. This is perhaps most obvious in the way courts have approached the practice of sampling in hip-hop music. Hip-hop music uses samples, copied and often heavily modified from preexisting recordings, as musical settings for lyrics that often comment on the challenges of modern African American life. Judicial opinions on sound-recording sampling in racially charged hip-hop music, framed largely in the rhetoric of reaping where one has not sown, reflect a derision that is difficult to separate from the defendants' race. In *Grand Upright Music, Ltd. v. Warner Brothers Records Inc.*, Judge Duffy of the Southern District of New York found hip-hop artist Biz Markie liable for sampling when Markie used a sample of Gilbert O'Sullivan's song "Alone Again, Naturally" to highlight Markie's lyrics about the struggle for success as a musician from humble beginnings ("My sneakers was old, and my coat was thin/But my determination kept me goin' within/I had nobody to help me, as you can see/I'm alone again, naturally").¹⁶⁸ Whether or not the result was legally correct, the opinion was devoid of analysis regarding infringement. It used scare quotes around the term "rap music" and opened with the biblical admonition "Thou Shalt Not Steal."¹⁶⁹

Over a decade later, the Sixth Circuit had no more respect for the genre. In *Bridgeport Music, Inc. v. Dimension Films*, the court found that the rap group N.W.A. had infringed a work by funk musicians George Clinton Jr. & the Funkadelics in N.W.A.'s song "100 Miles and Runnin'," a work about the epidemic of police violence against black

¹⁶⁷ See generally Murray, *supra* note 8.

¹⁶⁸ *Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991); BIZ MARKIE, *Alone Again, on I NEED A HAIRCUT* (Cold Chillin' & Warner Bros. Records 1991).

¹⁶⁹ *Grand Upright Music*, 780 F. Supp. at 183, 185 n.2.

men.¹⁷⁰ Although the court eschewed the scare quotes around “rap music,” it admonished hip-hop artists to “get a license or do not sample,” even when, as the district court had found, “no reasonable juror, even one familiar with the works of [the underlying author], would recognize the source of the sample without having been told of its source.”¹⁷¹ Thus, the court found that although in every other context, copying is considered “*de minimis*” and not infringement if an ordinary observer would not discern the copied material in the resulting work, there is no such thing as *de minimis* copying of a sound recording.¹⁷²

In 2016, the Ninth Circuit disagreed with *Bridgeport*. The case of *VMG Salsoul, LLC v. Ciccone* involved Madonna’s song “Vogue,” which included a sample of a “horn hit” from the Salsoul Orchestra’s song “Love Break.”¹⁷³ The court applied the *de minimis* standard used in other contexts — whether the use is “so meager and fragmentary that the average audience would not recognize the appropriation” — and held that a reasonable listener would not discern the horn hit in “Vogue” as originating from the Salsoul Orchestra’s music composition or sound recording.¹⁷⁴ The process of creating “Vogue” had involved transforming the sound of the underlying recording, much as the sample in *Bridgeport* had been modified in production. The central difference between the cases, therefore, was the rule applied by the court.¹⁷⁵

The circuit split between *Bridgeport* and *VMG Salsoul* has yet to be resolved, but it is impossible to ignore the difference between the parties in the cases: whereas in *Bridgeport*, the (infringing) defendant was a vocally anti-authoritarian African American group, in *VMG Salsoul*, the (non-infringing) marquee defendant was Madonna and the plaintiff was a group of African American soul musicians called the Salsoul Orchestra. In fact, the accused Madonna song “Vogue,” incorporates not only a few fragmentary notes of a sound recording, but also adopts the cachet of an entire subculture not her own, namely the

¹⁷⁰ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005); see N.W.A., *100 Miles and Runnin’*, on 100 MILES AND RUNNIN’ (Ruthless Records & Priority Records 1990).

¹⁷¹ *Bridgeport Music, Inc.*, 383 F.3d at 395-98.

¹⁷² See *id.* at 398-99.

¹⁷³ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 880-87 (9th Cir. 2016).

¹⁷⁴ *Id.* at 878 (quoting *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986)).

¹⁷⁵ *Id.* at 874 (“[W]e find *Bridgeport’s* reasoning unpersuasive. We hold that the ‘*de minimis*’ exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions.”).

predominantly African American, gay male “ballroom” scene, which originated the “voguing” style of dance.¹⁷⁶ By mainstreaming voguing, Madonna served as a communicative intermediary (if a controversial one) between the ballroom scene and the vast music-consuming public. Madonna and her team engaged in transformative expression concerning both their cultural influences and their musical sources — just as Biz Markie and N.W.A. had. The Ninth Circuit’s opinion emphasized, among other things, the contributions of the producer of “Vogue,” Shep Pettibone, who “truncated the [sampled] horn hit, transposed it to a different key, and added other sounds and effects to the horn hit itself. The horn hit then was added to Vogue along with many other instrument tracks.”¹⁷⁷

The racial contrast between the two cases may just be a coincidence, but the racial dynamics of *Bridgeport* and *VMG Salsoul*, respectively, show how easy it is for a dominant culture’s appropriation to be treated differently from an oppressed culture’s appropriation. On the facts (and setting aside individual taste, which surely varies from listener to listener), Madonna’s work, which incorporates appropriated material, seems no more or less worthy of receiving copyright’s value than N.W.A.’s work that does the same. Yet since *Bridgeport*, hip-hop musicians have borne the stigma of copyright devaluation. This feeds a narrative under which dominant culture’s appropriation of minority and indigenous cultures is portrayed as groundbreaking, edifying, or

¹⁷⁶ See GEORGES-CLAUDE GUILBERT, MADONNA AS POSTMODERN MYTH: HOW ONE STAR’S SELF-CONSTRUCTION REWRITES SEX, GENDER, HOLLYWOOD AND THE AMERICAN DREAM 124-25 (2002) (discussing Madonna’s relationship with voguing culture).

¹⁷⁷ *VMG Salsoul*, 824 F.3d at 880. In an odd twist, Pettibone, who is white, was also responsible for the production of the underlying (copied) recording. The former (white) owners of VMG Salsoul had hired Pettibone (on a work for hire basis) to remix “master tracks” created by the Salsoul Orchestra, a group of musicians assembled by the (white) owners of VMG Salsoul to provide backing music for disco recordings. To create “Vogue,” Pettibone remixed his own remix of the underlying work. In other words, as discussed below, while the appropriated sounds were made by black musicians, they were owned by white businesspeople. See *VMG Salsoul, LLC v. Ciccone*, No. CV 12-05967 BRO (CWx), 2013 WL 8600435, at *1-3 (C.D. Cal. Nov. 18, 2013); Curt Frasca, LINKEDIN, <https://www.linkedin.com/in/curtfrasca/> (last visited Sept. 3, 2019); *About Tony Shimkin*, NOBLE MUSIC, <http://noble-music.com/about/index.html> (last visited Sept. 3, 2019); *Shep’s News*, SHEP PETTIBONE, <https://www.sheppettibone.com/news> (last visited Sept. 3, 2019).

archivally valuable,¹⁷⁸ and minority artists' appropriation of dominant culture is portrayed as lazy or uncreative.¹⁷⁹

Before the hip-hop movement, however, incorporating preexisting sound recordings into music was generally received as artistically innovative.¹⁸⁰ In the 1940s and '50s, the composers of the Musique Concrete movement created collages of sound and music that explicitly challenged listeners to consider the difference between music and noise; and pop collage artists told stories by combining musical and spoken word recordings.¹⁸¹ Perhaps the first mass-market sound collage was The Beatles' "Revolution 9," released in 1968.¹⁸² For those early sound-collage creators, music copyright posed little challenge, largely because the sound recordings they reproduced (as distinct from the underlying musical compositions) enjoyed no copyright protection until 1972.¹⁸³ It is, perhaps, coincidence that Congress' decision to grant copyright protection to sound recordings occurred just as DJs in soul, disco, and nascent hip-hop communities were starting to mix, fade, and quick-cut music into new genres that evoked and remixed civil rights causes.¹⁸⁴ And granting protection to sound recordings was certainly not all bad for creators of color, as it tended to counteract some of the prejudices

¹⁷⁸ See Jude Rogers, *One Man and His Microphone*, GUARDIAN (Jan. 31, 2008 7:13 PM), <https://www.theguardian.com/music/2008/feb/01/folk> (describing folk recordist Alan Lomax as "a Robin Hood figure who stood up for the music of poor people and passed it on to the world through his radio programmes and LPs [and] gave a voice to the voiceless"); see also MCLEOD, OWNING CULTURE, *supra* note 11, at 47 (discussing Deep Forest's claims that its work was supported by UNESCO and musicologists).

¹⁷⁹ See MCLEOD & DICOLA, *supra* note 71, at 63 (describing accusations that hip-hop sampling is "uncreative"); see also, e.g., Will Byers, *School of Rock: Swotting Up on Sampling*, GUARDIAN (Aug. 20, 2008, 10:30 AM), <https://www.theguardian.com/music/musicblog/2008/aug/20/schoolofrockstudyingsampli> [<https://perma.cc/42GZ-G9NH>] ("[M]any well-established classics, from De La So'l's Me, Myself and I to Eminem's My Name Is, are revealed to suffer from a distinct lack of creativity once you've heard Funkadelic's (Not Just) Knee Deep and Labi Siffre's I Got the."); Tom Cox, *Every Breath They Take...*, GUARDIAN (June 2, 2000), https://www.theguardian.com/friday_review/story/0,3605,327038,00.html [<https://perma.cc/EL25-N5R5>] ("Sampling could have been a radical musical tool. But instead it's been used by lazy musicians to create asinine chart fodder.").

¹⁸⁰ See MCLEOD & DICOLA, *supra* note 71, at 37-44 (discussing history of pre-hip-hop sampling).

¹⁸¹ See DEMERS, STEAL THIS MUSIC, *supra* note 101, at 73-79 (discussing sound collage movements); MCLEOD, OWNING CULTURE, *supra* note 11, at 109-12 (same).

¹⁸² See DEMERS, STEAL THIS MUSIC, *supra* note 101, at 79.

¹⁸³ See HOWARD B. ABRAMS & TYLER T. OCHOA, 1 THE LAW OF COPYRIGHT § 2:44 1 (2018).

¹⁸⁴ See DEMERS, STEAL THIS MUSIC, *supra* note 101, at 81 (discussing long tradition of "signifyin'" in African American art).

against non-notable works discussed above. However, sound recording protection came at a cost: just as sound sampling became culturally widespread and potentially profitable for underprivileged creators, it also became subject to legal condemnation.

Even the success stories have come at a significant cost. The foundational case regarding fair use, *Campbell v. Acuff-Rose*,¹⁸⁵ represents a victory for a rap musician whose work appropriated portions of a rock ballad.¹⁸⁶ And yet, *Campbell's* legacy still demonstrates the high cost of walking the line between deriver and transformer. Defendant 2 Live Crew endured years of litigation over its song "Pretty Woman," and finally succeeded after reaching the Supreme Court. Even there, 2 Live Crew's success relied on characterizing its work as a "parody," and the work faced what might be described as aesthetic skepticism, as courts repeatedly questioned its parodic *bona fides*. In concurring, Justice Kennedy warned against "mak[ing] it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original."¹⁸⁷

Campbell demonstrated that the fair use analysis not only demands aesthetic judgment, but also necessarily shapes aesthetic choices in ways likely to disadvantage non-dominant speakers.¹⁸⁸ The *Campbell* court told us that perceived meaning matters: while parody, commentary, and critique of the underlying work may qualify as transformative uses, the same is less likely to be true for satire and works that do not comment on the underlying work. In the court's words, if an alleged infringer does not comment on the "substance or style" of the underlying work, the use is "merely . . . to get attention or to avoid the drudgery in working up something fresh, [and] the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger."¹⁸⁹ In this one sentence, the Supreme Court made it harder for oppressed creators to harness the power of dominant culture to garner attention for their works, and subjected non-dominant speakers to accusations of lazily wanting to "avoid the drudgery in working up

¹⁸⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571 (1994).

¹⁸⁶ *See id.* at 569-71.

¹⁸⁷ *See id.* at 599.

¹⁸⁸ *See* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1559 n.137 (2004) (arguing that fair use's focus on transformativeness and productivity "threatens to trap courts and litigants into making the kinds of aesthetic judgments that the copyright system expressly disclaims").

¹⁸⁹ *Campbell*, 510 U.S. at 580.

something fresh” when they did so.¹⁹⁰ There is certainly no inherent harm in seeking attention or seeking to avoid drudgery. A majority artist can incorporate folk or traditional elements in a work to do so. Madonna can recontextualize Harlem ballroom culture to do so. But when a speaker from a non-dominant culture incorporates dominant culture in a work, it takes on a meaning independent of attention or drudgery: it makes a statement in dialogue with, and leaves a mark upon, dominant society. *Campbell* tells us that that dialogic meaning is not necessarily part of the fair use analysis.

Furthermore, even transformations that clearly comment directly on the underlying work are not safe from copyright’s value judgment. In another fair use victory, the Eleventh Circuit relied on aesthetic judgment to rule that Alice Randall’s literary retelling of *Gone With the Wind* from the slaves’ standpoint, *The Wind Done Gone*, was social commentary that transformed the meaning of the original and constituted fair use.¹⁹¹ Like *Campbell*, however, the case highlighted the underlying hierarchies of copyright law’s discourse about value. The law began from the position that the estate of author Margaret Mitchell owned not only Mitchell’s own work (deemed “original”) but also owned a penumbra around that work consisting of all conceivable works derived from it. From there, the law carves a fuzzy zone of transformation. As a work that the court deemed a “parody,”¹⁹² Randall’s *The Wind Done Gone* happened to fall into that fuzzy transformational zone, but even so, creating it entailed risk and expense that would not have existed for works that did not rely on the classic. And yet, Randall could not have made as effective a commentary on how American culture has painted a romanticized portrait of the antebellum American South without relying on the romanticized portrait itself. Copyright law’s decision to assign such a high value to originality that original authors own not only their own works but also works derived from them, therefore threatens and devalues the act of “talking back.”

D. Who Asserts and Who Defends

Copyright’s hierarchy of values does not exist in a doctrinal vacuum. Legal discourse arises both from doctrine and litigation, and patterns of assertion and defense form a crucial part of the picture. As we have seen above, the disparate impact of facially neutral rules emerges in patterns

¹⁹⁰ See *id.*

¹⁹¹ See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1273-76 (11th Cir. 2001).

¹⁹² See *id.* at 1268-69.

of litigation (such as litigation over photographer ownership of images of bodies of color). And litigation, in turn, is a function of doctrine, history, and informal forces such as resource allocation, risk and uncertainty aversion, and public messaging. So in examining how copyright values play out, we must examine assertion and defense. Who brings lawsuits? Who benefits from lawsuits? Who defends, and who folds? How do these outcomes influence future production?

First, in order to assert a claim for copyright infringement, a copyright owner (author or assignee) must own a valid copyright, must have registered that copyright with the U.S. Copyright Office, and must have the resources and wherewithal to litigate a case.¹⁹³ Each of these requirements is fraught with discrimination, starting with ownership. As Kembrew McLeod has stated, copyright law “has existed primarily to protect companies that control the means of production, and in most cases copyright law facilitates a transferal of artistic property from artists to larger entities.”¹⁹⁴ There is nothing inherently racially biased about corporate control, of course, and as participants of color gain prominence and wealth in creative industries, there are more and more opportunities for corporate control of those industries to be more racially balanced. But contractual arrangements concerning ownership of copyrights have systematically worked in favor of dominant culture and against oppressed minorities. And even if the racial bias of corporate control changes, the discourse of corporate copyright will, by its nature, undoubtedly remain one of exclusive ownership rather than cumulative dialogue. Corporate control obscures the collaborative nature of creation: it may take thousands of individuals' contributions to make one summer blockbuster movie, but there is only one copyright holder.

The dynamics of copyright contracts strongly disfavor underrepresented artists. Examples abound, but the background of the *Bridgeport* case discussed above provides a typical, and complicated, story of copyright alienation. Although the case concerns two works authored by African American artists (funk legend George Clinton and N.W.A., respectively), Clinton is not the plaintiff. The plaintiff is Bridgeport Music, a company founded and operated by music producer Armen Boladian.¹⁹⁵ Bridgeport owns Clinton's copyright catalog,

¹⁹³ See 17 U.S.C. § 106(1) (2019); *Arnstein v. Porter*, 154 F.2d 464, 474 (2d. Cir. 1946); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120 (2d. Cir. 1930).

¹⁹⁴ MCLEOD, *OWNING CULTURE*, *supra* note 11, at 98.

¹⁹⁵ See generally Nat Freedland, *Four Persons Boost Disk Take to \$4 Mil*, *BILLBOARD*, Nov. 9, 1974, at 6. Boladian is Armenian-American, a group that has itself experienced

despite Clinton's claims that Bridgeport obtained those copyrights fraudulently.¹⁹⁶ As a result, although funk is a genre with strongly African American roots, proceeds from the sampling in the *Bridgeport* case would not flow toward the African American artist who created the copied recording. In fact, many sample licensing fees are extracted from a sampling artist's royalties in order to flow from one department at a corporation to another department in the same corporation, essentially consolidating profit for the corporation at the expense of the sampler, with small portions eventually flowing to the artists whose works were sampled (if their contracts provide for sampling royalties).¹⁹⁷

It is not only music, of course. Take, for example, the film *Malcolm X*. In the case of *Aalmuhammed v. Lee*, consultant Jefri Aalmuhammed sued to be named a joint author of the film. Although the court asked whether Aalmuhammed shared authorship responsibilities with Spike Lee, Lee himself did not own (and, regardless of the outcome of the case, would not own) any copyright interest at all in the film. The legal author of the film was Warner Brothers, for whom Lee cowrote, directed, and coproduced the film as a work made for hire.¹⁹⁸ By granting rights specifically to owners over individual creators, copyright law provides discursive control and value to those owners. The "heads I win, tails you lose" nature of copyright alienation echoes systems of colonial trade, in which colonizers exported slaves, indentured labor, and raw materials from colonies, and sold manufactured goods to colonies, so that in whatever direction people and goods traveled, the profits always flowed back to the colonizer.¹⁹⁹

As John Tehranian has discussed at length, copyright's registration requirement also disadvantages already-disadvantaged speakers, by making litigation more available to sophisticated incumbents than newcomers and the poorly resourced.²⁰⁰ Although U.S. copyright attaches upon creation, a copyright owner can neither sue nor obtain

no shortage of oppression. The point stands, however, that his company has alienated copyright's litigation value away from the African American author.

¹⁹⁶ See Tim Wu, *Jay-Z Versus the Sample Troll*, SLATE (Nov. 16, 2006, 1:50 PM), http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html (describing Bridgeport's dispute with Clinton); see also DEMERS, STEAL THIS MUSIC, *supra* note 101, at 122 (same).

¹⁹⁷ See MCLEOD, FREEDOM OF EXPRESSION, *supra* note 132, at 98 (discussing sampling royalties).

¹⁹⁸ See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1230-36 (9th Cir. 2000).

¹⁹⁹ See Ania Loomba, *Situating Colonial and Postcolonial Studies*, in LITERARY THEORY: AN ANTHOLOGY, *supra* note 11, at 1100, 1101-02 (defining colonialism in historical context).

²⁰⁰ See Tehranian, *Towards a Critical IP Theory*, *supra* note 59, at 1273-77.

statutory damages without copyright registration, and forfeits any opportunity to recover attorney's fees without timely registration.²⁰¹ Sophisticated repeat players register works as a matter of course, and can afford to register anything and everything. In contrast, less sophisticated, less wealthy, or less empowered creators will not register works until they deem registration necessary for suit, if ever. As a result of this disparity, incumbents obtain relatively inviolable protection when they want to oppose appropriation, but when incumbents are the ones doing the appropriation, they seldom face meaningful liability or penalties.²⁰²

While copyright ownership favors incumbents, the realities of copyright litigation may do even more to generate racially disparate impacts. Corporate copyright owners are in the business of acquiring and asserting copyrights, and equip themselves accordingly. In contrast, individuals who might assert copyright claims are much less likely to have the resources and will to pursue and bankroll litigation. The same dynamics operate for litigation defendants, as well. Mounting a litigation defense requires resources, legal representation, and confidence in the predictability of the legal system, each of which may be in shorter supply for underrepresented creators than for dominant creators or corporate owners. In many cases, backing down in the face of a copyright threat, even a spurious one, may seem a superior — or the only — option. Folklore about litigation odds and outcomes will discourage disadvantaged creators from pursuing claims even when they seem strong.²⁰³ Thus, those who have already been silenced by the system will back away, silenced again by copyright claims. This silencing further broadens the gap between dominant-culture owners, often well-resourced incumbents, and underrepresented creators, who are often poorly resourced or are newcomers.

When cases do see litigation, they turn only on arguments made by the (comparatively) rich and powerful — whose priorities surely differ from less-advantaged litigants. For example, as scholar Edward Lee points out, fair use arguments are rare in litigation concerning popular

²⁰¹ See 17 U.S.C. § 412 (2019); see also Tehranian, *The Emperor Has No Copyright*, *supra* note 8, at 1410-12.

²⁰² See TEHRANIAN, *supra* note 32, at 95, 116-17; Tehranian, *The Emperor Has No Copyright*, *supra* note 8.

²⁰³ See Gary Alan Fine & Patricia Turner, *Contemporary Legends and Claims of Corporate Malfeasance: Race, Fried Chicken, and the Marketplace*, 50 DEPAUL L. REV. 635, 638-44 (2000) (contrasting consumer claims pursued by African American victims with intellectual property claims not pursued by African American inventors); Stephen C. Yeazell, *Meeting the Enemy*, 50 DEPAUL L. REV. 667, 670-71 (2000) (discussing Fine & Turner's research).

music, even though the facts of popular music cases might be well-suited to fair use arguments. Lee suggests this may be strategic, “due to concerns of opening the floodgates to similar defenses raised by amateur songwriters and musicians who attempt to borrow the artists’ copyrighted music.”²⁰⁴ Those with fewer resources and those who wish to engage in transformative expression might want to establish beneficial fair use precedent, but established artists, major labels, and music publishers are the ones who litigate — and they might avoid fair use arguments precisely because they “prefer receiving royalties for any borrowings of their own works, even ones that might be considered fair uses.”²⁰⁵

Cases do not necessarily see litigation. Claims against incumbents often result in quiet settlements that reassign credit or royalties to individual artists of color or their heirs. Such quiet settlements may generate some individual economic distributive justice, but they do nothing to shift the discourse of value. In 2017, for example, Ed Sheeran quietly shifted a portion of songwriting credit to songwriters Kandi Burruss, Temeka “Tiny” Cottle, and Kevin “She’kspere” Briggs of pop group TLC based on similarities between Sheeran’s hit song “Shape of You” and TLC’s hit “No Scrubs.” News reports trace Sheeran’s decision to online fans’ complaints, and they credit Sheeran for unilaterally doing “the right thing” by sharing credit and proceeds after “the Internet noticed” similarities between the songs.²⁰⁶ They say nothing about whether the “No Scrubs” writers sent a demand to Sheeran, or why Sheeran decided to share credit with them and not other artists (including singer-songwriters Tracy Chapman and Sia) whose works are also similar to Sheeran’s song.²⁰⁷ These news reports reinforce a presumption that appropriation is something shameful to be paid off and hidden away, rather than a natural part of the creative process. They rely on preexisting notions of moral condemnation to equate influence with copying, muddying the waters with terms like “plagiarism.”²⁰⁸

²⁰⁴ Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873, 1914-15 (2018).

²⁰⁵ *Id.*

²⁰⁶ See, e.g., Kara Nesvig, *Ed Sheeran Adds the Writers of TLC’s “No Scrubs” to the Credits for “Shape of You,”* TEENVOGUE (Mar. 24, 2017), <https://www.teenvogue.com/story/ed-sheeran-adds-tlcs-no-scrubs-to-shape-of-you/>.

²⁰⁷ See David Canfield, *Amid Plagiarism Controversy, the Writers of TLC’s “No Scrubs” Have Received Credit on Ed Sheeran’s “Shape of You,”* SLATE (Mar. 21, 2017, 2:16 PM), http://www.slate.com/blogs/browbeat/2017/03/21/the_writers_of_tlc_s_no_scrubs_have_received_credit_on_ed_sheeran_s_shape.html.

²⁰⁸ *Id.*

Perhaps most troublingly from a copyright-discourse standpoint, these settlements frame popular music as something that is capable of complete and proper attribution, overlooking the fact that as a genre, it depends on small deviations from familiar forms.²⁰⁹ In reality, as many have observed, music has been a deeply cumulative form of expression throughout its long history.²¹⁰ Of course, music is only one of countless fields in which litigation-power disparities influence the discourse of creativity — one could surely tell comparable stories about creative fields from fashion to fiction to video games. But as Rosemary Coombe put it, “perhaps no area of human creativity relies more heavily upon appropriation and allusion, borrowing and imitation, sampling and intertextual commentary than music, nor any area where the mythic figure of the creative genius composing in the absence of all external influence is more absurd.”²¹¹

III. DISRUPTIVE EXPRESSION AND TRANSFORMATIVE WORKS

While intertextuality is an inevitable aspect of expressive creation, there are some forms of creation for which appropriation must be particularly overt to be effective. This is most obviously true, for example, of critiques, commentaries, parodies, elaborations, reimaginings, and works that seek to challenge the nature of art or originality by highlighting their derivation. (I do not pretend that this is an exhaustive list; imagining every example of works that depend on overt intertextuality would keep us here all day.) To be effective, these works must add meaning to preexisting works, and must trigger the receiver’s perception of “substantial similarity” with a preexisting source of meaning. In other words, they not only inherently subvert copyright’s narrative of value, but also are inherently suspect as a matter of copyright law.

²⁰⁹ See Lee, *supra* note 204, at 1894-95; see also, e.g., The Axis of Awesome, *4 Chords | Music Videos | The Axis of Awesome*, YOUTUBE (July 20, 2011), <https://www.youtube.com/watch?v=oOIdewpCfZQ> (performing medley of pop songs based on same chord structure). Standard songwriting advice reflects this. See, e.g., *Writing Effective Songs*, https://en.wikibooks.org/wiki/Writing_Effective_Songs (last updated Apr. 7, 2019) [<https://perma.cc/2ZGQ-YHCK>] (“As songwriters, we don’t have to re-invent the wheel; we just need to spin it our own way.”).

²¹⁰ For a discussion of one such cumulative process, see the discussion of The Legendary K.O.’s “George Bush Doesn’t Care About Black People” in BOYLE & JENKINS, *supra* note 71, at 204-19.

²¹¹ Rosemary Coombe, *Making Music in the Soundscapes of the Law*, in STEAL THIS MUSIC, *supra* note 101, at vii, ix; see also Lee, *supra* note 204, at 1890-97 (discussing and collecting scholarship regarding musical borrowing, influence, and similarity).

Despite their vulnerability to copyright power, these same works may be the most expressively valuable for promoting social justice. Parody and mimicry are subversive acts when undertaken by the colonized,²¹² because they unsettle hierarchies. By recontextualizing or adulterating the work of the authority, the oppressed person may question that authority. Hybrid creation unsettles colonialism's demand that its "reality [be] *coincident* with the emergence of an imperialist narrative and history, its discourse *nondialogic*, its enunciation *unitary*, unmarked by the trace of difference."²¹³ It may be rational, therefore, that that same threatening of hierarchies is more likely to meet resistance and challenge from dominant culture.²¹⁴ As philosopher Frantz Fanon observed, the colonial mentality insists that the only language of value is the colonizer's, and yet when the colonized uses that language, particularly in a hybridized form that makes it the colonized's own (such as Creole), the use is demeaned.²¹⁵ Or in Lewis Gordon's characterization: "instead of being a transformer of words, the black is considered to be a 'predator' of words, and even where the black has 'mastered' the language, the black discovers in those cases that he or she becomes linguistically dangerous."²¹⁶

Although both majority and minority speakers each have valuable reasons to incorporate overt appropriation into their communication, it is therefore particularly important for minority speakers to be able to use the speech and speech genres of dominant culture to resist hegemony. "Talking back" to dominant culture may include using the expressions of dominant culture to recontextualize, resist, or say things that make majority hearers uncomfortable. When African American remix artist DJ Spooky remixed and rescored the racist 1915 film *Birth of a Nation* to create the film *Rebirth of a Nation* in 2004, he used the film to highlight contradictions and show viewers that "another world

²¹² See Julie Rivkin & Michael Ryan, *Introduction: English Without Shadows: Literature on a World Scale*, in *LITERARY THEORY: AN ANTHOLOGY*, *supra* note 11, at 1071, 1072-73 (discussing subversive power of parody and mimicry).

²¹³ Homi K. Bhabha, *Signs Taken for Wonders*, in *LITERARY THEORY: AN ANTHOLOGY*, *supra* note 11, at 1174, 1178.

²¹⁴ As, for example, when the church forbade the creation of an Indianized gospel. *See id.* at 1180.

²¹⁵ See FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 11 (Richard Philcox trans., Grove Press 2008).

²¹⁶ LEWIS R. GORDON, *WHAT FANON SAID: A PHILOSOPHICAL INTRODUCTION TO HIS LIFE AND THOUGHT* 26 (Drucilla Cornell & Roger Berkowitz eds., 2015) (describing Fanon's observation).

is possible.”²¹⁷ Works that incorporate the expressive speech genres of dominant culture can upturn the authority of that culture not only through their expression, but also through the form of that expression.²¹⁸ For example, N.W.A. incorporated the speech genre of the courtroom oath in its song “Fuck tha Police,” to highlight the unjust treatment of African Americans in the War on Drugs, and Jay-Z sampled the musical *Annie* in his song “Hard Knock Life (Ghetto Anthem)” to articulate an idea about race and society very different from the message of the musical.²¹⁹ Frank Chin’s play *The Chickencoop Chinaman* and the anthologies *Aiiiiieee!* and *Charlie Chan is Dead* use African American and popular American literature speech genres, respectively, to highlight issues of emasculation, orientalism, and ghettoization in Asian-American culture.

Similarly, minority creators often find their voices writing fanworks — “remix” works based on existing media sources such as film, television, books, or video games — to respond to a dominant media culture that does not adequately represent them.²²⁰ Fanworks “raid mass culture, claiming its materials for their own use, reworking them as the basis for their own cultural creations and social interactions.”²²¹ Fanwork creators often belong to marginalized or subordinated social groups, and use their works to explore issues such as race, disability, gender roles, sexuality and mental health.²²² Through appropriation and reframing, remix creation has unique power to fight back against stereotyped, discriminatory, or non-inclusive portrayals, both for those who create remix and those who consume it. “Rewriting the popular narrative becomes an act of not only trying to change popular understandings, but also an act of self-empowerment.”²²³ As Jack Balkin

²¹⁷ Susan Froyd, *DJ Spooky on How Rebirth of a Nation Connects Hip-Hop and Film Editing*, WESTWORD (Mar. 9, 2016, 5:09 AM), <http://www.westword.com/arts/dj-spooky-on-how-rebirth-of-a-nation-connects-hip-hop-and-film-editing-7681849>.

²¹⁸ See RICHARD L. SCHUR, PARODIES OF OWNERSHIP: HIP-HOP AESTHETICS AND INTELLECTUAL PROPERTY LAW 65 (2009).

²¹⁹ See *id.* at 58-59, 65.

²²⁰ See REBECCA TUSHNET, ORG. FOR TRANSFORMATIVE WORKS, COMMENTS OF THE ORGANIZATION FOR TRANSFORMATIVE WORKS 29-38 (Nov. 13, 2013), https://www.uspto.gov/sites/default/files/documents/Organization_for_Transformative_Works_Comments.pdf [hereinafter COMMENTS].

²²¹ HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE 18 (1992).

²²² See TUSHNET, COMMENTS, *supra* note 220, at 29-38. See generally Betsy Rosenblatt & Rebecca Tushnet, *Transformative Works: Young Women’s Voices on Fandom and Fair Use*, in *eGIRLS, eCITIZENS* 385, 393-96 (Jane Bailey & Valerie Steeves eds., 2015).

²²³ Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597, 619-20 (2007).

explained, when people make new works from preexisting ones, they “exercise and perform their freedom and become the sort of people who are free. That freedom is something more than just choosing which cultural products to purchase and consume; the freedom to create is an active engagement with the world.”²²⁴ By promoting self-expression and building communities for remixers, customization and remix foster the personhood of consumer-creators, just as copyright exclusivity may foster the personhood of underlying authors.²²⁵

For example, one particularly popular remix genre, “racebending,” “replaces white heroes with nonwhite casts, envisioning how the story would change if white people were no longer the default.”²²⁶ Alice Randall explained how youthful creative experiences set her on the path to writing *The Wind Done Gone*:

The Wind Done Gone is a story of reading, writing, and redemption, the story of a woman, a black woman, who reads her way into writing and writes her way into redemption. It is in some sense my story. When I was a girl of six or seven I fell in love with the television series Batman. And like many loves, there was something I hated in it too: I hated the fact that no one who looked like me was in the story. For two weeks after that awareness I was frustrated. The third week I wrote myself in. I literally began to write out Batman scripts and write a part for me into them, a Bat Girl part. My Bat Girl wasn’t a sidekick; she was a catalyst; every time I wrote her into a story, she changed its ending.²²⁷

Randall’s story demonstrates the empowering potential of transformative, dialogic expression. Randall is not alone. Many authors have used existing works to critique racism and colonialism, including many versions of Shakespeare’s *The Tempest*, multiple retellings of *Jane Eyre* (including Jean Rhys’ *Wide Sargasso Sea*), rewritings of *Robinson Crusoe*, David Henry Hwang’s *M. Butterfly* (retelling Puccini’s opera), Sena Jeter Naslund’s *Ahab’s Wife* (retelling *Moby Dick*), and Nancy

²²⁴ Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004).

²²⁵ See TEHRANIAN, *supra* note 32, at 58-61. See generally Elizabeth L. Rosenblatt, *User-Generated Transformation: IP, Social Justice, and Fanworks*, in HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE (Cambridge University Press, forthcoming 2020) (on file with author).

²²⁶ See TUSHNET, COMMENTS, *supra* note 220, at 35.

²²⁷ *A Conversation with Alice Randall*, HOUGHTON MIFFLIN HARCOURT, http://www.houghtonmifflinbooks.com/readers_guides/wind_done_gone/index2.shtml#conversation (last visited Nov. 19, 2019) [<https://perma.cc/S98H-RSDF>].

Rawles' *My Jim* (retelling *Huckleberry Finn* from the perspective of the slave Jim and his wife).²²⁸

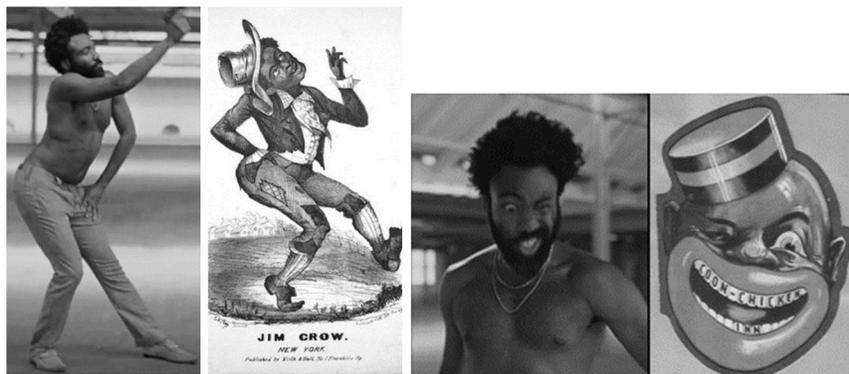
The expressive value of semiotic disobedience may be particularly powerful when creators use works appropriated from their own cultures. Take, for example *My Jim*, in which Nancy Rawles retells Mark Twain's *Huckleberry Finn* from the perspective of Sadie Watson, the wife of the slave Jim. One of the key elements of Twain's success was his ability to render stories in African American dialect, a skill he honed by imitating (possibly verbatim) stories from African American storytellers.²²⁹ Recasting *Huckleberry Finn* — the first story many American readers encounter about African American chattel slavery — to re-center its African American characters therefore provides a particularly powerful critique. Yet such re-appropriative critiques may be the ones that copyright holders are the most prone to object to. For example, Marc Gershwin, co-trustee of the Gershwin Family Trust, has argued for copyright term extension by complaining that without it, "[s]omeone could turn *Porgy and Bess* into rap music."²³⁰ But considering the racial dynamics of *Porgy and Bess*, a rap adaptation of *Porgy and Bess* may be just what the world needs. The impact of such recontextualizing is undeniable. For example, when Childish Gambino (Donald Glover) uses recognizable popular and African dance moves over a background of violence in his video for "This Is America," he highlights both the way in which dominant culture has focused on pop culture over racial politics, and the way African dance and minstrelsy have been incorporated into American mainstream culture and even used in anti-Black propaganda.²³¹

²²⁸ See Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* 61, 67 (Karen Hellekson & Kristina Busse eds., 2006).

²²⁹ See VAIDHYANATHAN, *supra* note 71, at 65-68 (discussing Twain's writing and his staunch support of copyright law).

²³⁰ MCLEOD, *OWNING CULTURE*, *supra* note 11, at 59-62 (discussing *Porgy and Bess*).

²³¹ Donald Glover, *Childish Gambino - This is America (Official Video)*, YouTube (May 5, 2018), <https://www.youtube.com/watch?v=VYQjWnS4cMY>; Sheet Music Cover Image, E.V. Craig, *Jim Crow* (Firth & Hall 1990) (available at <https://www.alamy.com/stock-photo-sheet-music-cover-image-of-the-song-jim-crow-with-original-authorship-135228612.html>); Logo: Coon Chicken Inn (available at <https://sova.si.edu/record/NMAH.AC.1153>).



Transformative expression need not refer directly to dominant culture to resist it. The centuries-old African American art tradition of “signifyin” on older expression (as Henry Louis Gates describes it) involves referring to preexisting material, imitating or repeating it with difference, recontextualizing it and drawing attention to new connotations for it.²³² Signifyin’ works build explicitly upon works that come before, and empower their audiences to create meaning and community. Signifyin’ can be particularly powerful for resisting sociocultural hierarchies, because it allows creators to claim or critique the speech genres of the more-powerful. For example, by signifyin’ on the courtroom oath, N.W.A. highlighted contrasts between its meaning for accusers and its meaning for the accused, which provided a unifying message for a community all-too-likely to be on the wrong side of a false accusation. The practice may have originated as a form of African American resistance to slavery — by reconfiguring materials at hand, slaves could resist without overt opposition.

Signifyin’ may not take the form of critique; it may involve recontextualizing works to situate the re-creator within a particular community. This, too, is a form of “talking back”: situating oneself as an equal to one a discriminatory system would hold out as an authority.²³³ For example, when Boogie Down Productions’ song “South Bronx” (1986) incorporated James Brown’s self-congratulatory vocals, it seemed almost as if Brown was congratulating the new work; the result invited audiences familiar with Brown to experience a new variety

²³² See DEMERS, *STEAL THIS MUSIC*, *supra* note 101, at 81 (describing signifyin’ in music); HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM* 52, 88 (1988).

²³³ See HOOKS, *supra* note 27.

of funk.²³⁴ Dr. Dre's "Let Me Ride" and Ice Cube's "The Product" incorporate samples of Parliament Funkadelic and Sly and the Family Stone in ways that critique the optimistic outlook that 1960s-70s' funk took to race relations.²³⁵ In these examples, the meaning of the quoted text is entirely transformed by context, but because this form of signifyin' often relies on juxtaposition rather than overt commentary, it may not seem particularly transformative to outsiders.²³⁶ Because the copyright fair use analysis often depends on a finding that a particular use is transformative, copyright law is hostile to signifyin' practices. In essence, copyright law therefore reinforces the hierarchies that signifyin' could upturn.²³⁷

Social equality requires shared communicative tools and the ability for people to express themselves in dialogue with each other and with history. For example, as Siva Vaidhyanathan explains, "[s]ampling helps forge a 'discursive community' among music fans."²³⁸ And yet, copyright law punishes creators for their relationships with what came before, prevents them from communicating in dialogue with adjacent cultures, and encourages a version of cultural segregation that will continue to subjugate already-disadvantaged creators. Indeed, even intertextuality that quotes out of artistic interest rather than any particular critical impulse can upturn hierarchy by stripping ostensibly-highbrow art of its meaning and highlighting its absurdity; or can promote equality by situating one work within the milieu of another. For example, by incorporating the Aerosmith song "Walk This Way" into their own work, rap group Run-DMC placed their own work adjacent to Aerosmith's.²³⁹ Likewise, mashups of "feminine" pop and "masculine" rock blur the "elitist pop-cultural hierarchy that rock critics and music-collecting snobs perpetuate."²⁴⁰ Artistically, therefore, samples and mashups make works siblings. But as a matter of copyright discourse, the works remain in hierarchies.

Whether they explicitly "talk back" to dominant culture or situate themselves in relation to it, remix works can therefore pose particularly powerful challenges to cultural hierarchies. Remix blurs the boundaries between creator and consumer, and upturns the presumed hierarchy among them, putting the lie to Jürgen Habermas' assertion that mass

²³⁴ See DEMERS, STEAL THIS MUSIC, *supra* note 101, at 81 (discussing "South Bronx").

²³⁵ See *id.* at 82-85 (discussing "Let Me Ride" and "The Product").

²³⁶ See *id.* at 85.

²³⁷ See Rosenblatt, *Fair Use*, *supra* note 17, at 378.

²³⁸ See VAIDHYANATHAN, *supra* note 71, at 138.

²³⁹ See *id.*

²⁴⁰ See MCLEOD, FREEDOM OF EXPRESSION, *supra* note 132, at 160.

media has split the public “into minorities of specialists who put their reason to use nonpublicly and the great mass of consumers whose receptiveness is public but uncritical.”²⁴¹ Nevertheless, such works are bounded by copyright’s hierarchical treatment of derivation and transformation. Although N.W.A.’s “Fuck tha Police” and Jay-Z’s “Hard Knock Life (Ghetto Anthem)” employ similar expressive techniques, they look different as a matter of copyright law. The N.W.A. song copied only the “idea” of the courtroom oath, while the Jay-Z song copied the “expression” of the Broadway composition and sound recording. In a post-*Bridgeport* and post-*Campbell* world, hip-hop artists generally seek licenses or rely on fair use.

Even when semiotic disobedience may qualify as non-infringing fair use, its vulnerability to suit places it lower on the copyright ladder than less-overtly derivative expression. That same vulnerability restricts what creators are willing and able to do. In the wake of sampling-related copyright litigation, the use of samples in rap and hip-hop music underwent marked decrease,²⁴² and the use of rerecorded sound-alike imitators to avoid paying sound recording royalties for samples rose,²⁴³ further devaluing and de-emphasizing performers’ roles in musical progress. Unsurprisingly, the practice of unpermitted signifyin’ declined at the same time.²⁴⁴ Whereas sampling in the 1980s often took a political bent, sampling that followed the *Grand Upright Music* ruling (in which Biz Markie was found liable for sampling) was more likely to tell a story about what the sampler could afford to license.²⁴⁵ Because some owners simply refuse to license their works for uses that will involve controversial topics,²⁴⁶ incorporating preexisting works for political purposes is riskier than doing so commercially.

In those situations, creators who want to signify on a work — and, more importantly, their risk-averse insurance companies — have to be prepared to face possible fair use litigation if they want to move forward. Because the fair use analysis depends on weighing several often-subjective factors, its outcome is notoriously uncertain and

²⁴¹ JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 175 (Thomas Burger trans., 1989).

²⁴² See MCLEOD, *FREEDOM OF EXPRESSION*, *supra* note 132, at 68 (discussing transformation in Public Enemy’s music).

²⁴³ See *id.* at 87-89 (discussing use of sound-alikes to reduce sound recording costs).

²⁴⁴ See VAIDHYANATHAN, *supra* note 71, at 140-45 (discussing history of rap and hip-hop in context of copyright litigation).

²⁴⁵ See DEMERS, *STEAL THIS MUSIC*, *supra* note 101, at 90.

²⁴⁶ See *id.*

expensive.²⁴⁷ Thus, creators of works that depend on fair use take on higher levels of risk and uncertainty than those who can claim “originality.”²⁴⁸ Creators who wish to create transformative expression may retreat from those risks behind anonymity and underground work-sharing networks.²⁴⁹ In the shadow of a Lucasfilm statement that “duplication and distribution of our materials is an infringement,” the fan who remixed *Star Wars Episode 1 — The Phantom Menace* to turn the racially problematic character Jar Jar Binks into a sage Jedi in the fanwork *Star Wars Episode 1.1 — The Phantom Re-edit* worked anonymously.²⁵⁰ But this safety comes at a cost: anonymous remixers cannot spread their messages as effectively, and they and their work risk being branded in the larger copyright discourse as cowardly, illegitimate, or shameful.

This is not to say that the fair use doctrine, or copyright law in general, silences all semiotic disobedience. Far from it: there is certainly no shortage of transformative expression happening under the auspices of fair use, and the impact of transformative expression as a medium for social justice is hard to overstate.²⁵¹ Creative communities and countercultures have relied on fair use rhetoric to come together and create new forms of fair-use-compliant expression,²⁵² and some might

²⁴⁷ Some scholars have identified predictable patterns in fair use litigation, but predictability and certainty are very different, and the prospect of litigation defense is expensive, which may discourage many potential fair users. See generally Beebe, *supra* note 151 (identifying predictable patterns in fair use jurisprudence); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012) (assessing the predictability of fair use outcomes in litigation); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (identifying policy-based clusters in fair use jurisprudence).

²⁴⁸ See McLEOD, FREEDOM OF EXPRESSION, *supra* note 132, at 87-88 (discussing prices for sampling).

²⁴⁹ As fanwork creators and sound-collage artists often do.

²⁵⁰ See Daniel Kraus, “*The Phantom Edit*,” SALON (Nov. 6, 2001, 1:00 AM), https://www.salon.com/2001/11/05/phantom_edit/. The editor was later revealed to be Mike J. Nichols of Santa Clarita, Calif. See Daniel Greenberg, *Thumbs Down? Re-Edit the Flick Yourself*, WASH. POST (Sept. 7, 2001), https://www.washingtonpost.com/archive/business/2001/09/07/thumbs-down-re-edit-the-flick-yourself/52f04549-d8b9-41b1-8791-1ca271f9b5e6/?noredirect=on&utm_term=.13c73388039d.

²⁵¹ See generally TUSHNET, COMMENTS, *supra* note 220 (discussing social justice benefits of engaging in fair-use creation).

²⁵² See DEMERS, STEAL THIS MUSIC, *supra* note 101, at 9-10 (noting variation in responses to legal constraint); see, e.g., What We Believe, ORG. FOR TRANSFORMATIVE WORKS, http://www.transformativeworks.org/what_we_believe/ [https://perma.cc/Z7H6-JLR7] (last visited Sept. 11, 2019) (describing “a nonprofit organization established by fans to serve the interests of fans by providing access to and preserving the history of fanworks and fan culture in its myriad forms” which believes “that fanworks are transformative and that transformative works are legitimate”).

argue that through self-identification as transgressors, they have built confidence and a sense of belonging. Artists have developed techniques like “flipping,” “chopping,” and otherwise altering music samples and video clips to make them unrecognizable, reflecting what fair use (and the algorithms that awkwardly attempt to apply copyright law to the Internet) will allow.²⁵³ But neither does the fair use doctrine overcome the racially disparate overtones of copyright’s narrative of value. Not only are fair uses legally and practically vulnerable, they also reside lower on copyright’s hierarchy of value than “original” creations. While the fair use doctrine makes commentary, criticism, and other fair uses non-infringing, it also frames them as requiring justification.²⁵⁴

In addition, fair use favors particular kinds of expression — a fact that shapes the ways in which creators are permitted to engage in fair use to resist inequality. For example, fair use favors expression that criticizes or comments upon the original work.²⁵⁵ This pressures creators into engaging in more overt critique rather than the subtler signifyin’ discussed above. Fair use favors expression that uses small rather than large amounts of the original, and expression that incorporates factual rather than fictional works.²⁵⁶ This means that fair users do not have the

²⁵³ See McLEOD & DiCOLA, *supra* note 71, at 195; DEMERS, STEAL THIS MUSIC, *supra* note 101, at 138; SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP 106 (2014) (describing “flipping” and “chopping”); ARAM SINNREICH, MASHED UP: MUSIC, TECHNOLOGY, AND THE RISE OF CONFIGURABLE CULTURE, 129-130 (2010); Tony Zhou, *Postmortem: Every Frame a Painting*, MEDIUM (Dec. 2, 2017), <https://medium.com/@tonyzhou/postmortem-1b338537fabc> [<https://perma.cc/TXH8-ZX2J>] (describing how the distinctive style of a film analysis channel was derived through “reverse-engineer[ing]” YouTube’s algorithmic copyright constraint in order to stay within the algorithm’s fair use exception).

²⁵⁴ For a more thorough discussion of fair use’s reinforcement of copyright hierarchies, see generally Rosenblatt, *Fair Use*, *supra* note 17.

²⁵⁵ Although some courts have held satire (i.e., works that commenting not on the original, but on some other aspect of society) to be fair use, some courts still value parody over satire. Thus, as Rebecca Tushnet has explained, “[i]f a work has an intelligible meaning and a creative re-use simply borrows the original to get attention, there is no favored parody, only satire [which courts are less likely to find to be fair use]. By contrast, if a work has multiple meanings, only some of which the copyright owner endorses, a re-use that exposes disfavored meanings is transformative and fair.” Tushnet, *supra* note 84, at 275-76. This is true even though from the standpoint of intertextual discourse, satire and parody operate in virtually the same way.

²⁵⁶ See 17 U.S.C. § 107 (2019). This impact is even greater in jurisdictions with fair dealing statutes rather than fair use, as fair dealing requires that the use in question fit within an enumerated list of “fair” purposes such as (to use Canada’s list) research, private study, education, parody, satire, criticism, review, or news reporting. See Copyright Act, R.S.C. 1985, c. C-42, ss. 29-29.2 (Can.); see also *id.* at s. 29.21 (defining additional “non-commercial user-generated content” exception to copyright infringement).

free range of intertextual tools at their disposal. And fair use favors noncommercial uses over commercial ones, which shapes not only what fair users may say, but who engages in fair use at all. The privileged may have the luxury of creating expression without expecting to benefit commercially from their work, but the less privileged may not be able to, which heightens the gap between advantaged and disadvantaged. Those who do not rely on their expression to make a living are better equipped to invert the “speaker/listener” hierarchy than those who must sell their expression.

In sum, copyright law’s narrative of value implies that there is something ethically questionable about incorporating one work into another, and that derived works — even if non-infringing — are less valuable than original ones.²⁵⁷ This hierarchical narrative disadvantages creators who would use copyrighted works to disrupt hegemony and promote social and political justice. At the same time, as discussed above, copyright law grants ownership to creators who appropriate “un-owned” material. Those creators gain not only the respect of the copyright narrative, but also practical control over the works they appropriate. These disparities allow dominant appropriators to gain power over the works of oppressed peoples, while constraining the oppressed people’s ability to resist. The following Part suggests how we might reconceptualize copyright to address these problems.

IV. WHAT DO WE DO ABOUT IT?

This Article is principally concerned with uncovering the implicit messages that copyright law sends about the creative process and the expressive value of particular works and creators. Although my primary objective is therefore to describe the world as it is, rather than suggest how it should be, it is hard to escape the conclusion that more of the same is unlikely to help. In many respects, copyright’s narrative of value is deeply ingrained in its doctrinal structure, particularly its lionization of perceived originators and its deep suspicion of derivation and derivators. The first step toward improving copyright law is to include considerations of copyright’s discourse of value, and its racial overtones, in the conception of “progress” that copyright might promote.

²⁵⁷ Edward Lee speculates that this may be one reason why popular music disputes seldom involve fair use arguments, even though they may otherwise be well-suited to fair use analysis. See Lee, *supra* note 204, at 1914 (“[P]erhaps it sounds better professionally for a songwriter, especially one just breaking into the music industry, to say that he is writing all original music without copying even a small portion of the style or work of another songwriter.”).

Punishing appropriation has done little to help garner respect for underrepresented creators in copyright's narrative of value. Quite the contrary: it has created a one-way appropriation ratchet that celebrates dominant appropriators while condemning appropriators of color. Granting greater protection to collective, oral-tradition, or other works now deemed un-authored or un-fixed comes with a host of problems, not only practical (e.g., who would be assigned authorship, and when?) but also as a matter of copyright discourse, as it would mean erasing the iterative, participatory nature of such works. Nor is punishing appropriation likely to benefit underrepresented groups in the future, both because copyright's narrative of value is subject to manipulation by bias and because underrepresented groups benefit from appropriative creation that disrupts and transforms dominant discourse.

At the same time, it would be foolish to abandon copyright in principle simply because its current formulation incorporates potentially discriminatory discourse. Copyright law provides many practical benefits, including allowing creators to professionalize without depending on direct patronage. Copyright provides a mechanism for creators to capture the market value of their works, which in turn means that less-privileged creators can afford to create — as long as their works have sufficient commercial appeal. Copyright also carries meaningful potential for social justice. For example, many have hailed an increase in cases in which copyright owners of color (or their estates) have successfully sued or settled with popular music stars.²⁵⁸ Perhaps the most visible of these cases ended in 2018 when the estate of Marvin Gaye prevailed in litigation against Pharrell Williams and Robin Thicke over similarities between Gaye's song "Got to Give it Up" and Williams & Thicke's "Blurred Lines." The case earned a financial victory for the Gaye estate.²⁵⁹

But the "Blurred Lines" case also demonstrates why the social justice story of copyright is more complicated than it may appear. It was not

²⁵⁸ See, e.g., *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (holding Robin Thicke and Pharrell Williams liable for copying from Marvin Gaye); *Batiste v. Lewis*, No. 17-4435, 2018 WL 2268173 (E.D. La. May 17, 2018) (declining to dismiss infringement claim made by jazz musician Paul Batiste against Macklemore and Ryan Lewis); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976) (finding George Harrison liable for copying a song written by Ronnie Mack and performed by the Chiffons); Canfield, *supra* note 207.

²⁵⁹ See Althea Legaspi, 'Blurred Lines' Copyright Suit Against Robin Thicke, Pharrell Ends in \$5M Judgment, *ROLLING STONE* (Dec. 13, 2018, 12:47 AM), <https://www.rollingstone.com/music/music-news/robin-thicke-pharrell-williams-blurred-lines-copyright-suit-final-5-million-dollar-judgment-768508/>.

merely a clear-cut transfer of funds and respect from a dominant appropriator (Thicke) to an innovator of color (Gaye). Gaye himself was heavily influenced by doo-wop musicians, jazz musicians, pop musicians, and other soul musicians, and the song “Got to Give It Up” was directly influenced by a number of prior songs, including one well-documented influence, Johnnie Taylor’s “Disco Lady.”²⁶⁰ Indeed, the case could also easily be characterized as a dispute between two appropriators.²⁶¹ And because Williams and Thicke shared credit for “Blurred Lines,” it could just as easily be characterized as a dispute between two innovators of color (Gaye and Williams). Both the litigation and the conversation surrounding it quickly devolved into debate over the extent to which a musical style, as opposed to a particular manifestation of that style, could be copyrighted. Moreover, although the Gaye estate prevailed in the case, as Judge Nguyen pointed out in dissent, the Gayes — and similarly situated artists, especially artists of color — are at least as likely to be defendants in future litigation as they are to be plaintiffs.²⁶² Viewed in that light, the “Blurred Lines” story is one in which expensive litigation created a discourse of shame and condemnation surrounding age-old traditions of musical influence.²⁶³

Moreover, even if litigation (or the threat of it) occasionally yields equality promoting financial transfers, it does so at great expense. Corporate interests such as publishers are more likely to own copyrights and pursue and prevail in legal claims than individual creators are,²⁶⁴ and the benefit to individual innovators of color is indirect (at best). Furthermore, because risk aversion and judicial aesthetic biases make majority copyright owners more likely to pursue and prevail in legal claims than minority copyright owners,²⁶⁵ the tools of copyright law are more likely to harm minority creators than help them. Perhaps more dramatically, these transfers also come at the conceptual expense of condemning cumulative creativity. The underlying lesson — that there is something shameful about building upon preexisting works —

²⁶⁰ See SimonA, *Blurred Minds: What's Going On?*, LOST IN MUSIC (Oct. 7, 2017), <https://www.lostinmusic.org/Blog/Detail/10-blurred-minds-whats-going-on> [<https://perma.cc/H9VB-5SX9>] (using extracts from several songs to “illustrate that Marvin Gaye far from invented the disco funk genre, but instead drew on pre-existing elements of the genre to craft his classic song”).

²⁶¹ See DAVID RITZ, *DIVIDED SOUL: THE LIFE OF MARVIN GAYE* 28-30 (Da Capo Press, 1991).

²⁶² See *Gaye*, 895 F.3d at 1152 (Nguyen, J., dissenting).

²⁶³ See BOYLE & JENKINS, *supra* note 71, at 193-200.

²⁶⁴ See *supra* Part II.D.

²⁶⁵ See *id.*

undermines the inherently dialogic nature of creation and the equality-promoting benefits of shared vocabulary.

This discourse has far-reaching effects, even outside the copyright litigation realm. Consider fashion, for example. The ethics of fashion design exist largely outside intellectual property law, and fashion development depends on trends, influence, imitation, and homage.²⁶⁶ Recent years have seen an increase in shaming discourse surrounding copying in fashion. It may be coincidental that an explosion of condemnation for designers who base their designs on preexisting work came at around the same time that the Supreme Court's decision in *Star Athletica, LLC v. Varsity Brands, Inc.* extended copyright law farther into the protection of wearable design than it had previously gone.²⁶⁷ And in many cases, the discourse surrounding fashion imitation has been generally social-justice-promoting: calling out major houses that appropriate Native American designs and underrepresented designers, for example. At the same time, however, that same discourse threatens the very fabric of fashion philosophy (forgive the pun), when it fails to recognize that fashion is intensely dialogic.²⁶⁸ The same critiques leveled against Forever 21 for cross-cultural appropriation were leveled against "fashion outlaw" designers of color like Dapper Dan who imitated and recontextualized designs that had previously been exclusively associated with wealth and whiteness.²⁶⁹ Dapper Dan's boutique was driven out of business by legal actions over his designs — including a trademark-based lawsuit from Gucci.²⁷⁰ And yet, when Gucci reciprocated years later by making designs inspired by Dapper Dan, critics' responses included praise for its "clear and uplifting" "letter of acknowledgement" to black culture in general and Dapper Dan in particular.²⁷¹ This example demonstrates how the one-way appropriation ratchet functions based on copyright's narrative of value,

²⁶⁶ See generally Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

²⁶⁷ See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1016 (2017).

²⁶⁸ See *A Much-Needed Reflection on Fashion and Inspiration*, FASHION L. (Dec. 12, 2017), <http://www.thefashionlaw.com/home/a-reflection-on-fashion-and-inspiration-in-2017> [<https://perma.cc/WD7U-98HL>] (discussing the conflict between calling out imitators and the intensely influence-driven fashion process).

²⁶⁹ See *Dapper Dan: A Fashion Legend and a Fashion Outlaw*, FASHION L. (May 29, 2017), <http://www.thefashionlaw.com/home/dapper-dan-fashion-legend-fashion-outlaw> [<https://perma.cc/Y35F-NA53>].

²⁷⁰ See *id.*

²⁷¹ Osman Ahmed, *Why Fashion Needs Cultural Appropriation*, BUS. OF FASHION (June 1, 2017, 05:24 AM), <https://www.businessoffashion.com/articles/opinion/why-fashion-needs-cultural-appropriation> [<https://perma.cc/4YTB-LMB6>].

even without interventions by formal copyright law. As a normative matter, both Dapper Dan and Gucci have earned seats at the fashion table. For that reason, expanding copyright law to encompass influence in fashion — while it could provide some benefits — is not the answer.

There must be a way of providing innovators of color — including the Marvin Gayes, Dapper Dans, Public Enemies, and David Henry Hwangs of the world — with creative freedom, respect, appreciation, and profit that does not involve silencing or burdening the next participants in their communicative chain.

One might presume that such mechanisms are — or at least could be — baked in to the copyright system's existing fair use exception and protectability limitations, which ostensibly protect free expression. But although fair use and a robust public domain are beneficial for building shared vocabularies and permitting transformative expression, neither is a panacea. As discussed above, the public domain is currently formulated in a way that tends to disadvantage minority creators. And even if it weren't, Madhavi Sunder and Anupam Chander have explained why a robust public domain, in isolation, does not solve inequalities: giving someone legal access to materials does not necessarily give them an equal practical ability to obtain and use those materials to their fullest extent.²⁷² As for fair use, while it permits transformational expression, it also constrains that expression, and ultimately places the follow-on creator in a role that will forever be subservient to that of the "original" creator both legally and as a matter of moral discourse. As Carys Craig has observed, any examination of infringement that casts a copyright owner's work as "original" automatically places a defending party on "the wrong side of a moral equation: she is the would-be free rider, playing opposite the meritorious producer of value."²⁷³ Thus, even if a fair user is exercising a right, she is exercising it at the expense of someone who has been artificially crowned an "originator," leaving the fair creator open to moral critiques of free riding, unoriginality, or laziness.

One can envision a number of interventions that might counteract some of copyright's one-way appropriation ratchet. More comprehensible and available mechanisms for termination of copyright transfer, for example, would offset some of the imbalances between sophisticated copyright owners and poorly-resourced creators. Compulsory licensing schemes might reduce the risk and stigma of engaging in overtly cumulative creation and prevent copyright owners

²⁷² See Chander & Sunder, *Romance*, *supra* note 8, at 1340-44.

²⁷³ CRAIG, *supra* note 31, at 139.

from discriminating against semiotic disobedience, while allowing creators to reclaim the value of their works. But these are bandages, not cures. Because the problems I describe are as discursive as they are doctrinal, I suggest that addressing them involves something more universal: incorporating dialogism into the way we frame authorship and infringement. In the authorship context, such a reframing would not ask whether a work is original to an author, but rather *what aspects of a work are original to that author*. In the infringement context, such a reframing would focus less on what a copier *used*, and more on what the copier *added* to the public domain or to preexisting works.²⁷⁴ As a matter of copyright's discourse of value, such a re-framing would reflect the derivative nature of all works,²⁷⁵ acknowledging the valuable contributions of authors without requiring them to feign "originality" or allowing them to claim the innovations of their forbears.

Such a reframing would result in a "thinner" conceptualization of authorship: a greater proportion of every work would be understood as uncopyrighted, and any given copyright owner would own a thinner slice of copyright in their work.²⁷⁶ Otherwise, its impact on the copyrightability analysis in litigation would probably be slight. This is because, as a statutory matter, creators of derivative works already own only what they contribute to an underlying copyrighted work.²⁷⁷ The same is also, in a sense, true for works derived from the public domain,²⁷⁸ because courts "factor out" similarities based on public

²⁷⁴ I use the term "added to" here broadly, to include modifications and subtractions.

²⁷⁵ See Omri Rachum-Twaig, *Recreating Copyright: The Cognitive Process of Creation and Copyright Law*, 27 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 287, 291-92 (2017) (examining cognitive psychology research to conclude that "derivative works are the result of creative activity that is not qualitatively different from making an 'original' work").

²⁷⁶ The terms "thin" and "thick" are often used to describe whether a copyrighted work consists of predominantly copyrightable expressive aspects ("thick") or predominantly uncopyrightable aspects such as facts or ideas ("thin"). See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991); *Fleener v. Trinity Broad. Network*, 203 F. Supp. 2d 1142, 1149 (C.D. Cal. 2001).

²⁷⁷ See 17 U.S.C. § 103 (2019).

²⁷⁸ This copyrightability principle — that the maker of a derivative work should not be able to claim ownership over their public domain sources — is reflected in *L. Batlin & Son, Inc. v. Snyder*, where the court examined copyright in a replica of a sculpture that was in the public domain by virtue of copyright expiration. 536 F.2d 486 (2d Cir. 1976). The court held that the replica maker should own only those contributions that varied "significantly" from the public domain version; and that to hold otherwise would be "put a weapon for harassment in the hands of mischievous copiers" of materials from the public domain. *Snyder*, 536 F.2d at 492. The Second Circuit reached a similar result in *Silverman v. CBS Inc.* 870 F.2d 40, 49-50 (2d Cir. 1989) (extending radio producers' copyright only to the "increments of expression beyond what is contained" in earlier

domain elements when assessing infringement of works based on identified public domain sources.²⁷⁹ However, because copyright provides protection for the “total concept and feel” of original works that incorporate public domain aspects, the current formulation risks labeling works as “original” when they are merely exemplars of creative formats used in collective, cumulative, or oral-tradition creation. By giving appropriators ownership over their interpretations of public domain expressive tools, courts can give them practical control over the tools themselves. For example, in *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, the Second Circuit granted protection over a simplified version of a Tibetan rug design, preventing another rug-maker from making a similarly (but not identically) simplified rug based on the same Tibetan source.²⁸⁰ In *Wihtol v. Wells*, the Seventh Circuit held that a composer owned copyright in a folk song that he had remembered and notated, so that a similar song infringed.²⁸¹ In *Reyher v. Children's Television Workshop*, the Second Circuit reversed a trial court's holding that a children's book was a “derivative work” from a Russian folk tale, but held that although it was an original work, any similarities between it and a second children's book were based on *scènes à faire*.²⁸² The implication was that if the second book had been more similar to the first, it would have infringed despite the first author's admission that her book was essentially a translation of a public

scripts whose copyright had expired). That these cases apply principles of “thin” copyright to derivative works drawing the public domain of expired copyright, but not to those drawing on the public domain of folk or traditional works, appears to reflect (possibly unconscious) judicial cultural bias.

²⁷⁹ *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 135 (2d Cir. 2003); *see also* *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197 (D. Haw. 2006) (filtering traditional Hawai'ian dance forms from copyrighted photograph of dancer); *Russ Berrie & Co. v. Jerry Elsner Co.*, 482 F. Supp. 980 (S.D.N.Y. 1980) (filtering public domain Japanese stuffed gorilla from copyrighted stuffed gorilla); *Costello v. Loew's Inc.*, 159 F. Supp. 782 (D.D.C. 1958) (filtering aspects of King Arthur myth from King Arthur copyrighted drama).

²⁸⁰ *Tufenkian Imp./Exp. Ventures*, 338 F.3d at 129-31 (identifying similarities and differences). *But see* *Biosson v. Banian, Ltd.*, 273 F.3d 262, 269-76 (2d Cir. 2001) (holding that creator of alphabet-block quilt based on Amish designs was entitled to “thin” copyright such that quilt sharing substantially same layout and colors would infringe, but quilts with different layouts and colors would not). It is tempting, albeit perhaps coincidental, to observe that in these two textile cases, appropriators had greater success in obtaining ownership over traditional Tibetan forms than over traditional Amish ones.

²⁸¹ *See Wihtol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956).

²⁸² *See Reyher v. Children's Television Workshop*, 533 F.2d 87, 92-93 (2d Cir. 1976).

domain work.²⁸³ A reframing of copyright as applying only to original *aspects*, rather than original *works*, could shift these outcomes.

In assessing infringement, such a reframing could have a more dramatic effect. It would lead one to consider not whether a work is “substantially similar” to a copyrighted work, but whether it is “substantially different” from it.²⁸⁴ That should not be the end of the analysis, of course; making it so would eviscerate a copyright holder’s “derivative work” exclusivity. Some scholars have suggested doing just that,²⁸⁵ but from a social justice standpoint, entirely eliminating a copyright holder’s exclusive right to create derivative works would seem to cry out for abuse. To the extent that a “substantially different” derivative work competes with its source material, it would serve both the interests of social justice and copyright incentives to find it infringing. But it is one thing to create a derivative work that competes with the underlying work or does nothing more than trade on the appeal of the underlying work, and quite another to create a derivative work that creates its own distinct expression.²⁸⁶ I contend that it would promote social justice to promote the creation of follow-on creations of the latter sort by reducing their risk of copyright liability and granting (narrowly-tailored) copyright to the distinct expressions contributed by their creators.

I do not pretend that such a conceptual shift would be easy to operationalize. But there are a number of areas in copyright law in which we perform similar analytical moves with little controversy. Judges and juries are experienced in distinguishing a copier’s own contributions from what was contained in an underlying work: they already must do so to determine what the owner of copyright for a

²⁸³ See *id.* at 89-91.

²⁸⁴ Carys Craig has suggested a similar approach and explained its discursive and practical benefits in a context unrelated to race. See Washington College of Law - AV, - B- (9/28/18 11:20 AM) The 5th Global Congress on IP & the Public Interest, YOUTUBE (Sept. 28, 2018), <https://youtu.be/2Rdw8VfODoU?t=2982> (Carys Craig speaking at 50:00-1:05:00 on her work, *Substantial Transformative Taking: Holistic Comparison and the Non-Infringing ‘New Work’*).

²⁸⁵ See, e.g., Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345, 391-404 (2008) (arguing for elimination of derivative work right on economic grounds); Sterk, *supra* note 21, at 1217 (“[T]he broad protection copyright doctrine extends to derivative works . . . appears generally inconsistent with the incentive justification for copyright.”).

²⁸⁶ Glynn Lunney has proposed a similar approach to the derivative work right on economic-analysis grounds. See Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 650 (1996) (proposing limiting the derivative work right to “only those instances where an individual has exactly or nearly exactly reproduced a copyrighted work in a new language or medium of distribution”).

derivative work actually owns. Moreover, in assessing actual copyright damages, judges and juries do not simply award an infringer's gross profits to the holder of an underlying copyright; rather, they assess what profits are attributable to an infringer's own contributions, and subtract those from gross receipts.²⁸⁷ From this, one can infer that courts are capable of distinguishing a copier's contribution from underlying material and assessing the value (at least economically) of a copier's contribution to that underlying material.

On the infringement side, courts are also accustomed to analogous analyses. The fair use "transformativeness" analysis demands an answer to a similar set of questions: a derivative work is "transformative," and therefore more likely to constitute fair use, if it transforms the meaning, message, or purpose of the underlying work.²⁸⁸ A derivative work that competes in the market with its source material is more likely to infringe. Although a "substantial difference" analysis might tend to permit a wider range of uses than the "transformativeness" analysis does (for example, it could permit non-competitive sequels and supplemental reference works),²⁸⁹ it conducts an analogous inquiry. Reconceptualizing transformativeness and competition as aspects of the

²⁸⁷ 17 U.S.C. § 504(b) (2019) ("In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the *elements of profit attributable to factors other than the copyrighted work.*") (emphasis added); see also *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 121 (2d Cir. 1962) (deducting from damages non-infringing portion of book and holding that "[i]n cases such as this where an infringer's profits are not entirely due to the infringement, and the evidence suggests some division which may rationally be used as a springboard it is the duty of the court to make some apportionment").

²⁸⁸ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-80 (1994) (stating that the transformativeness analysis inquires whether a derivative work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message"); see also *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) ("[T]ransformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public knowledge."). Mary Wong argues for an approach to the transformative use doctrine that even more explicitly considers this question by asking "what the plaintiff's work has become as a result of the defendant's additions and changes . . . [r]equiring the court to also look at the result of the defendant's actions, and not just the substance and purpose of those actions." Mary W. S. Wong, "Transformative" User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1109 (2009).

²⁸⁹ *Salinger v. Colting*, 607 F.3d 68, 83-84 (2d Cir. 2010) (holding that substantial similarity precluded the transformative use defense); *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 553-54 (2008) (finding a lexicon or reference guide to be transformative in character despite ultimately ruling against the defendant).

prima facie infringement analysis, rather than as aspects of an exception to infringement, would serve as an overt signal that the law recognizes and values the dialogic nature of creation, and views transformation as progress-promoting activity.

Although this reframing would destigmatize cumulative creation, it would not entirely free the infringement analysis from the aesthetic biases of judges and juries. It could, however, do something to reduce the impact of those biases. As other scholars have noted, aesthetic and interpretive judgments are inevitable throughout copyright analyses; the harm of such judgments lies less in their existence than in the fact that they occur without acknowledgement or examination.²⁹⁰ Unlike the “substantial similarity” analysis, which permits fact-finders to stop thinking once they have identified and morally condemned “copying,” a “substantial difference” analysis forces the factfinder to examine what *else* a deriver has done, beyond copying. And whereas the transformativeness analysis in fair use may fall prey to “dominant or entrenched views” of dominant interpretive communities when determining the meaning of the underlying work,²⁹¹ a search for substantial difference need not entail a search for meaning — only a search for difference.

Because this reframing would diminish the stigma associated with cumulative creation, it would also probably encourage, or at least permit, more appropriation. One critique of this approach is that some of this appropriation would likely take the form of cultural appropriation that does not align with the norms of creators of color, or even disrespects their cultures and traditions. After all, semiotic disobedience is, in essence, appropriation that disrespects its sources; therefore, as a legal (rather than ethical or moral) matter, maintaining room for one may inevitably mean maintaining room for the other, however undesirable that result. This is a significant concern. “Racial plagiarism,” to use Minh-Ha Pham’s wording, “colludes in racial capitalist processes of value extraction in which racialized groups’ resources of knowledge, labor, and cultural heritage are exploited for the benefit of dominant groups and in ways that maintain dominant socioeconomic relationships Extraction and exploitation — not

²⁹⁰ See Heymann, *supra* note 14, at 361-62 (calling for humility and engagement with interpretive communities in conducting aesthetic analysis); Said, *supra* note 59, at 470-74 (describing complexity of interpretive methods inherent in copyright analysis); Yen, *supra* note 56, at 248-50.

²⁹¹ Heymann, *supra* note 14, at 360.

exchange — are at the core of this kind of copying.”²⁹² Moreover, cultural takings can work immeasurable harm on communities that place spiritual value on their cultural expressions; for example, a Hopi ceremonial song functions not only as music but as a mode of intervention between human ritual actors and environmental phenomena, and one simply cannot calculate the harm of distributing such a work.²⁹³ My reframing does little to address this concern, aside from demanding that appropriators add something significant to whatever they use. It would be naive to think that all such significant additions would be respectful of or acceptable to the creators of underlying works. But it is worth noting that copyright law’s colonialist structures do nothing to prevent such racial plagiarism now, and it does not serve the interests of progress to pretend that any symbol — including the symbols of disadvantaged peoples — can or should have only one meaning. Moreover, even taking into account the enormous harms of colonialism, it would be oversimplifying to say that even the most culturally-appropriative practices are wholly harmful. For example, although white “mainstreaming” of minority work can seem like unjust enrichment, that same mainstreaming process is responsible for opening up markets to R&B artists that would never have existed.²⁹⁴

I argue that the most problematic aspect of the current discourse is that it exacerbates inequality by treating dominant appropriation as uplifting and underprivileged appropriation as harmful.²⁹⁵ Consider, for example, different treatments of artists who adapted Beethoven. Wendy (then Walter) Carlos’ adaptation of Beethoven for synthesizer was hailed as groundbreaking, while contemporaneous Walter Murphy’s adaptation of the same work into the (more-racialized) disco genre, although popular, was criticized as being in poor taste.²⁹⁶ Here, because of its fundamentally discursive nature, law does have a role to play — and law’s contribution to the discourse can make an enormous difference. Defenders of racial plagiarism often characterize music sampling as “worse” than racial plagiarism because sampling is

²⁹² Minh-Ha T. Pham, *Racial Plagiarism and Fashion*, 4 QED: A JOURNAL IN GLBTQ WORLDMAKING 67, 73-74 (2017).

²⁹³ See Reed, *supra* note 71, at 307.

²⁹⁴ See DEMERS, STEAL THIS MUSIC, *supra* note 101, at 51.

²⁹⁵ See Pham, *supra* note 292, at 73-75 (highlighting such different treatments of fashion appropriations); Stanfill, *supra* note 71, at 10 (highlighting differences in critical reception of hip-hop, which is coded as African American, and mashup, which is coded as white, despite musical and legal equivalences).

²⁹⁶ See Stanfill, *supra* note 72, at 47-50.

infringing as a matter of law, whereas racial plagiarism is not.²⁹⁷ As we have seen in the above discussion, however, the characterization of music sampling as infringing is possible because of structural and sometimes overtly racist aspects of copyright law. A law that formally incorporated relationality would take the wind out of such arguments' sails.

Overall, therefore, I believe the benefits of such a conceptual shift would outweigh its downsides. It would permit and even encourage transformative appropriation and semiotic disobedience, protect the public domain, and prevent dominant appropriators from reaping undue ownership benefits for acts of non-transformative appropriation. At the same time, these changes would limit the appeal of engaging in "mere copying" of traditional or community-created works by making copyright protection for mere copiers so thin as to be non-existent. As a matter of copyright discourse, such a shift would legitimize transformative appropriation without de-stigmatizing mere copying, would provide formal recognition of works' forbears, and lessen the degree to which copyright law overvalues Eurocentric concepts of authorship.

CONCLUSION

It is tempting to look at the classic "nondiscrimination" principle of *Bleistein v. Donaldson Lithographing Co.* and presume that copyright law does not discriminate. But as the discussion above demonstrates, copyright law incorporates a combination of doctrinal, judicial, and informal biases to frame a discourse of value that reflects and reinforces racial hierarchies. Although copyright law can be a tool for social justice, its current configuration channels social understandings of "originality" and "authorship" in ways that consolidate expressive power in the hands of the already-powerful. It allows dominant appropriators to claim copyright's market benefits and inhibit the progress of cumulative creativity, while discouraging minority attempts to resist hegemony by recoding popular speech.

Much of this discrimination, I contend, is born of the law's implicit disrespect for cumulative and dialogic expression. For that reason, although there is an intuitive appeal to fairness in the idea that copyright might be used as a reparative/restorative measure to fill in for the disadvantages of racial oppression, I suggest that attempts to remedy social injustice through expanding copyright ownership are not only unlikely to succeed, but also likely to harm discourse and progress.

²⁹⁷ Pham, *supra* note 292, at 71.

Rather, I suggest we would do better to acknowledge that the nature of expressive creation is complicated and interdependent, and that meaning cannot be made by any one creator. Consider, for example, the story of Kayla Newman, who originated the term “on fleek” to describe well-styled eyebrows.²⁹⁸ After she used the word in a Vine, a short-form video shared through the phone application of the same name, it spread virally and its meaning morphed. In an interview, Newman expressed disappointment that she hadn’t received compensation for her contribution to the global lexicon.²⁹⁹ Indeed, it may seem unfair that Ariana Grande, who rerecorded Newman’s phrase, has surely profited more from it. But as a practical matter, Newman’s broader story is one of how meaning works, and giving her ownership over her coinage would serve only to halt progress. After all, in the same Vine in which she originated “on fleek,” Newman used the term “get crunk,” a coinage first widely popularized in the 1990s that plays on the past-participle of “crank” and loosely means “full of energy.” Who originated the term “crunk” before it became common parlance in the 1990s? Its origin is unclear. Some trace the term to a 1972 book by Dr. Seuss;³⁰⁰ others to Atlanta nightclubs, still others to Conan O’Brien.³⁰¹ It would hardly benefit progress if Dr. Seuss or Conan O’Brien — or even a particular 1980s Atlanta clubgoer — claimed ownership.

The lesson here is not that copyright is good or bad. It is that the current formulation of copyright law, like most systems developed by the powerful, was not designed to benefit racial minorities to the same extent as non-minorities. To the extent that our discourse adopts the values of copyright law, it incorporates the law’s prejudices about what creative products and processes are most valuable. By being mindful of that, we may find a path to a version of copyright law that more accurately reflects creative realities while promoting a just vision of society.

²⁹⁸ See Doreen St. Felix, *Black Teens are Breaking the Internet and Seeing None of the Profits*, FADER (Dec. 3, 2015), <http://www.thefader.com/2015/12/03/on-fleek-peaches-monroe-meechie-viral-vines>.

²⁹⁹ See *id.*

³⁰⁰ See DR. SEUSS, MARVIN K. MOONEY WILL YOU PLEASE GO NOW! (1972).

³⁰¹ See Steve Jones, *Get Crunk*, USA TODAY (July 25, 2003, 9:10 AM), https://usatoday30.usatoday.com/life/music/2003-07-24-crunk_x.htm; J.F. Sargent, *7 Ridiculous Origins of Everyday Words*, CRACKED (Dec. 22, 2011), http://www.cracked.com/article_19584_7-ridiculous-origins-everyday-words.html.