
The Freedom to Copy: Copyright, Creation, and Context

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Although much separates them musically, George Harrison and Michael Bolton share a common legal fate. Both have been held liable in copyright infringement cases in which a court articulated theories of liability based on subconscious infringement. This Article discusses how decisions in the Bolton, Harrison, and other copyright infringement cases reflect a common failing. Such decisions highlight the incomplete nature of the theories of creativity and creation processes in copyright doctrine.

After discussing current approaches to questions of creation, this Article suggests ways in which copyright theory can better incorporate a contextualized understanding of creativity and creation processes. Creativity in copyright is frequently characterized as not involving copying, which is typically thought to be antithetical to both originality and creativity. This stigmatization of copying, however, means that copyright theory cannot adequately account for the reality of not infrequent similarities between works that are a result of copying both ideas and expression in the creation of new works. This missing theoretical link has significant implications for copyright in practice. The lack of legal analysis of the full range of creativity and processes of creation is also a major reason why copyright theory often has such difficulty delineating what constitutes appropriate and inappropriate copying of existing works.

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In contrast to law, analyses in the cultural studies arena have examined the ways in which new works are created, devoting attention to the ways in which new works may derive from existing expression. Examination of theories of creation in such disciplines can lend insight into ways in which copyright theory can better conceptualize both copying and creation within copyright frameworks. Through the incorporation of more fully conceived notions about copying, copyright theory can better recognize both the fundamental importance of the freedom to copy as well as its limitations. Focusing on literary criticism and musicology, where processes of creativity are often central, this Article offers a more useful theoretical framework. It proposes broad recognition of a freedom to copy as an integral part of the creative process.

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INTRODUCTION

*Others are free to copy the original. They are not free to copy the copy.*¹

*In the contemporary world, though, the act of “copying” is in no meaningful sense equivalent to an infringement.*²

George Harrison and Michael Bolton are notably different in musical styles but share commonalities in their encounters with copyright law. Both were found liable in copyright infringement cases in which a court articulated theories of liability based on subconscious infringement. Theories of liability based on subconscious infringement reflect an important missing link in copyright theory. Copyright doctrine contains incomplete theories of creativity and

¹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

² Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER'S MAG., Feb. 2007, at 63.

processes of creation. Consequently, copyright doctrine does not adequately accommodate the varied ways in which many artists actually create works.³ Dominant assumptions in copyright theory do not take sufficient account of the ways in which copying is often an inherent part of processes of creation in a wide range of artistic fields. Instead, copyright theory typically reflects an assumption that copying is antithetical to originality and creativity. As a result, copyright analysis in infringement cases is often based on restricted and outdated assumptions about creativity and processes of creation.

On one level, legal analysis in copyright infringement cases reflects a simple inquiry about whether a copyrighted work has been illegally copied. In many areas, however, the application of copyright is far more complex in practice. Underlying this complexity is the linguistic reality of the use of the term “copying” in law in myriad contexts to describe behaviors that are in many respects highly distinctive.⁴ Further, determining what constitutes a “copy” is not always an easy task. The difficulties in making such determinations are evident, for example, in legal cases involving new technologies.⁵ Such difficulties stem in part from the multiple uses of the term copying in law. The term copying is often taken to be the equivalent of infringement, but it may also be used to describe practices connected to the creation of new works, including borrowing practices in varied creative fields.⁶ At the same time, the term copying may include use in connection with

³ The terms “work,” “text,” and “cultural text” are used herein to describe types of creations that may be protected by copyright, including musical, literary, and other creations. The term “text” is derived from usage in the cultural studies arena and is used here to include both oral and written creations. The term “work,” although not defined in the Copyright Act, is often used in legal discussions of copyright and is used herein in a similar fashion to text. See, e.g., Justin Hughes, *Market Regulation and Innovation: Size Matters (Or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575, 576 (2005) (“American copyright law is an enormous legal structure, full of defined terms, all built on one completely undefined term: the ‘work.’”).

⁴ See *infra* notes 5-10 and accompanying text.

⁵ See, e.g., *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (holding that new technology of perforated player piano music rolls are not copies of musical compositions within meaning of applicable copyright statute); *Mai Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (discussing whether “‘copying’ for purposes of copyright law occurs when computer program is transferred from permanent storage device to computer’s RAM”).

⁶ *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946) (discussing, in context of new work that allegedly copied existing work in its creation, how “the trier of the facts must determine whether the similarities [between two works] are sufficient to prove copying”).

the unauthorized distribution of copies of existing works, at times for commercial benefit.⁷

At least partially as a result of the diverse uses and meanings of the term copying in copyright law, copying to create new works is often stigmatized as contrary to true creativity.⁸ Creativity, in turn, is often taken to involve the autonomous creation of “original” works.⁹ This emphasis on originality is evident in interpretations of the Intellectual Property Clause of the U.S. Constitution and is deeply rooted in copyright doctrine.¹⁰ As the *Bleistein* court discussion of originality suggests, copyright law infringement analysis delimits and defines the parameters of the freedom to copy.¹¹ As a result of the stigmatization of copying, legal analysis of copyright, copying, and creation does not sufficiently recognize the importance of the freedom to copy as an integral part of processes of creation. Copyright law thus needs to better define the scope of acceptable copying in the creation of new works in a predictable way that extends beyond current conceptions of fair use.¹²

Legal discussions of copyright have addressed constitutional and freedom of speech issues, as well as issues relating to a democratic civil society that arise from restrictions on copying.¹³ However, less

⁷ See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 946 (2005) (noting that peer-to-peer networks permit copies of copyright-protected files to be available on many users' computers).

⁸ Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 564-68 (2006) (discussing conceptions of originality in copyright).

⁹ *Id.*

¹⁰ U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . 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.”); 17 U.S.C. §102(a) (2000) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.”); see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (“Originality is a constitutional requirement.”); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249-50 (1903) (“Others are free to copy the original. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone.” (citations omitted)); *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (“We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.”).

¹¹ *Bleistein*, 188 U.S. at 249.

¹² See *infra* notes 27-31, 79-89 and accompanying text.

¹³ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE

consideration has been given to the importance of copying in the creative process. As a result, the importance of copying in the creative process remains under-appreciated and under-theorized in copyright doctrine,¹⁴ particularly as compared with fields such as literary criticism and musicology, in which considerations of creators and creation processes are often central.¹⁵ Further, in legal discourse, the creative significance of copying and uses of existing works is often ignored.¹⁶ The pervasive use of the term copying in the legal context thus fails to accommodate adequately the cultural reality of copying that plays a significant role in many creative undertakings.

Uses of the term copying in the legal context also reveal inconsistencies in the extent of incorporation of broader contexts of creation in infringement analysis. Copyright analysis often disregards the cultural context of creation of artistic works, but incorporates greater analysis of context in cases involving utilitarian works.¹⁷ Fair use doctrine permits copying in certain instances but does not fundamentally alter such assumptions about copying and context.

Recognition of the full spectrum of processes of creation has significant implications for copyright doctrine, particularly with respect to the operation of copyright as a property or liability rule.

L.J. 283, 288 (1996) (discussing democratic paradigm framework for copyright that “emphasizes that copyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society”); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 3 (2002) (“Copyright law is a kind of giant First Amendment duty-free zone. It flouts basic free speech obligations and standards of review. It routinely produces results that, outside copyright’s domain, would be viewed as gross First Amendment violations.” (citations omitted)); Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537, 562-82 (2004) (noting that conflict between “protecting copyright owners’ rights and allowing freedom of speech” may be impossible to solve and discussing value of copying and ways in which copying is valuable to audience and speakers).

¹⁴ See Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151, 1152 (2007) (discussing lack of consideration of creativity in dominant theories of copyright); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1946 (2006) (noting incomplete understanding of creativity evident in law governing authors’ rights in United States).

¹⁵ See *infra* notes 213-25 and accompanying text.

¹⁶ Paul Théberge, *Technology, Creative Practice and Copyright*, in MUSIC AND COPYRIGHT 139, 147 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (discussing licensing of hip-hop samples and noting that current frameworks unduly emphasize isolated fragments of sound and “virtually ignore the significance of the creative uses to which [such fragments] are put”).

¹⁷ See *infra* notes 44-77 and accompanying text.

The reality of copying in the creation of new works suggests that greater consideration should be given to the use of liability rules in the copyright context. Broader applications of liability rules in the copyright context may, at least in some instances, promote the creation of new works that is the ultimate goal of copyright. Furthermore, the application of copyright as a property rule may at times be antithetical to the goals of copyright as a result of the inability of property rules to circumscribe property ownership rights properly.¹⁸ Because borrowing, copying, and other uses of existing works are pervasive aspects of creation processes, copyright frameworks as a property rule may be used to restrict access in a manner that may hinder the creation of new works.¹⁹

This Article addresses some implications of actual creation processes of cultural texts for copyright theory. Part I notes the curious relationship between dominant copyright doctrine, conceptions of originality, and treatment of cultural context. Part II focuses on the copyright narratives that are often used to illustrate the need for particular configurations of copyright. These narratives often reveal assumptions about copyright incentives and the operation of copyright that have played an important role in shaping copyright theory and public policy choices. Part III discusses the implications of dominant copyright narratives for the actual production of cultural texts, looking specifically at discourse about the production of cultural texts in musicology, literary criticism, folklore, and other fields. Part III also discusses ways that copyright doctrine can incorporate narratives that reflect to a greater extent than present the importance of the freedom to copy. Part IV assesses the extent to which existing copyright doctrine, including fair use, can effectively take account of intertextual and formulaic cultural texts. Part IV also suggests ways in which liability rules and conceptions of unfair use may be better suited to the reality of processes of creation.

¹⁸ See Mark A. Lemley & Phil Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 784 (2007) (“In short, where injunctions cannot be well tailored to the scope of the property right at issue but necessarily restrain the use of property not owned by the plaintiff, those consequences can overwhelm the benefits of property rules in enforcing legal rights.”).

¹⁹ *Id.* at 785 (“Stated simply, where property rules have pernicious consequences, liability rules look better by comparison.”); Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 789 (2004) (noting that economic justifications for copyright prohibitions against unauthorized copying may not be necessary to stimulate optimal level of new creations and, in fact, appears to have net negative effect on creative output).

I. TWO PUZZLES IN COPYRIGHT LAW: SUBSTANTIAL SIMILARITY,
CULTURAL CONTEXT, AND FAIR USES

*The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author.*²⁰

*[I]t becomes apparent that appropriation, mimicry, quotation, allusion, and sublimated collaboration consist of a kind of sine qua non of the creative act, cutting across all forms and genres in the realm of cultural production.*²¹

A. Copying, Similarity, and Infringement in Copyright Theory

Copyright infringement cases typically involve some evaluation of the degree of similarity between two works using tests of substantial similarity.²² Once a plaintiff proves ownership of a copyrighted work, this evaluation of similarity becomes a predominant inquiry in determining infringement. Courts use varied terminology and formulations in copyright infringement cases. In assessing the similarity between works, the fact finder typically considers evidence of whether the allegedly infringing defendant had access to the work that the defendant may have copied, the extent to which the two works are similar, and the extent to which any copying constitutes an unlawful appropriation.

The universe within which courts evaluate the similarity of works is often a circumscribed one that may even be limited to consideration of the two works. As a result, in assessing the ownership, derivation, and degree of similarity between two works, courts may use a limited cultural gaze that reflects this circumscribed vision of creation. This tendency is particularly notable in cases involving artistic works. This limited cultural gaze reflects in part the influence of conceptions of cultural texts as being created autonomously.²³

However, assessments of the similarity of works in the copyright arena take place in a broader cultural context within which cultural texts such as literary works, musical works, and other creations are

²⁰ Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (citations omitted).

²¹ Lethem, *supra* note 2, at 61.

²² See *infra* notes 27-36 and accompanying text.

²³ Arewa, *supra* note 8, at 550-51; 565-67.

not infrequently quite similar.²⁴ These similarities reflect the myriad ways in which new creations may involve borrowing, other types of copying and uses of existing texts, use of broader cultural conventions that might inform varied texts, and interaction with formulaic aspects of texts. The reality of the varied ways in which texts are created presents significant problems for copyright doctrine, which tends to conceptualize creation in a far more circumscribed way.

It also presents potential problems for notions of ownership of cultural texts. At least partially as a result of the ways in which copyright doctrine analyzes copying, two puzzles pervade contemporary copyright theory.²⁵ Both of these puzzles emanate from the particular and at times peculiar ways in which both borrowing and cultural context are incorporated (and in some instances not incorporated) into considerations of copyright infringement. These puzzles also unfold in a broader milieu in which explicit and implicit sociocultural hierarchies play a profound and pervasive role in how we conceptualize cultural production. Such hierarchies have historically influenced both the creation and application of copyright doctrine.²⁶

B. Creation, Originality, and Context: Substantial Similarity and Cultural Gaze

A core of copyright law rests in its protection of copyrighted works from copying.²⁷ The degree of similarity required to establish that a challenged work is a “copy” is evaluated using tests of substantial similarity.²⁸ Tests of similarity are used to both establish that copying has occurred and evaluate whether such copying constitutes an

²⁴ Malcolm Gladwell, *Something Borrowed*, NEW YORKER, Nov. 22, 2004, at 40 (discussing striking similarity between artistic works).

²⁵ I am indebted to Paul Heald for his comments and suggestions in relation to this issue.

²⁶ See generally Olufunmilayo B. Arewa, *Culture as Property: Intellectual Property, Local Norms and Global Rights* (Northwestern Pub. Law Research Paper No. 07-13, 2007), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=371001 (discussing implications of cultural hierarchies in intellectual property frameworks).

²⁷ *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (noting that finding of copyright infringement rests on two distinct elements: copyright ownership and copying of constituent elements of work that are original); see also *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (discussing elements of copying and unlawful appropriation); 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 13.01, 13.03[B][2][b] (2007).

²⁸ *SAS Inst., Inc. v. S & H Computer Sys., Inc.*, 605 F. Supp. 816, 829 (M.D. Tenn. 1985).

unlawful appropriation or infringement.²⁹ Because a plaintiff often cannot directly prove copying by an alleged defendant, copying is typically established by circumstantial evidence demonstrating copying.³⁰ Such circumstantial evidence typically involves two aspects. The first involves demonstrating that the defendant had access to the work that was allegedly infringed.³¹ Establishing copying also involves assessment of the degree of substantial or probative similarity between the two works, which constitutes the second aspect of the copying element.³² Establishment of the copying element is sometimes referred to as involving extrinsic substantial similarity.³³

Once copying is established, tests of substantial similarity are also used to determine whether a defendant unlawfully copied plaintiff's work. Unlawful appropriation is determined based on tests of

²⁹ *Arnstein*, 154 F.2d at 468 (discussing elements of copying and unlawful appropriation)

³⁰ *Tuff N' Rumble Mgmt. Inc. v. Profile Records Inc.*, No. 95 Civ. 0246 (SHS) 1997 WL 158364 at *12 (S.D.N.Y. Apr. 2, 1997) ("As proof of access, a plaintiff may show that '(1) the infringed work has been widely disseminated or (2) a particular chain of events exists by which the defendant might have gained access to the work.'" (citations omitted)); 4-13 *NIMMER & NIMMER*, *supra* note 27, § 13.01[B] (noting that copying as factual matter typically depends on proof of access and probative similarity); Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 *DUKE L.J.* 683, 684-86 (2003) (noting evidentiary aspects of copyright and noting that requirement of creativity in copyright cases is in part evidentiary because "courts would be overwhelmed by difficult evidentiary disputes" if "copyright system were to recognize rights in uncreative work").

³¹ *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 941-42 (8th Cir. 1992) ("Typically, however, the latter element cannot be proven directly. Therefore, copying can be established by demonstration of access (by the alleged infringer) and substantial similarity (between the works at issue)."); *Boone v. Jackson*, No. 03 Civ. 8661(GBD), 2005 WL 1560511, at *2 (S.D.N.Y. July 1, 2005) (noting that to establish actual copying circumstantially, plaintiff must show that defendant had access to work and that substantial similarities exist and that proof of copying may also include weighing expert testimony).

³² *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 775 F. Supp. 544, 557-58 (E.D.N.Y. 1991) (describing that court must consider both access and substantial similarity, which are two factors that would enable court to infer copying by defendant).

³³ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (noting that extrinsic test of substantial similarity requires that plaintiff "identify concrete elements based on objective criteria"); *Arnstein*, 154 F.2d at 468 (noting that trier of fact makes determinations concerning substantial similarity); 4-13 *NIMMER & NIMMER*, *supra* note 27, § 13.01[C] (noting that copying as factual matter typically depends on proof of access and probative similarity); Alan Latman, "Probative Similarity" as Proof of Copying: *Toward Dispelling Some Myths in Copyright Infringement*, 90 *COLUM. L. REV.* 1187, 1206 (1990) (noting that "proof of copying may have nothing to do with the substantiality of the protected material taken" and suggesting test of probative similarity be used in copyright infringement cases).

intrinsic substantial similarity, a subjective test based upon a reasonable person standard.³⁴ However, determining what constitutes inappropriate copying is potentially problematic in the creation context, at least in part because copyright doctrine does not appropriately recognize and contextualize the copying often involved in creation processes.³⁵ Further, the meaning of copying within the copyright context has changed significantly over time, particularly as copyright became increasingly a law protecting the rights of authors as opposed to publishers.³⁶

As a publisher's right, copyright was quite literally a right to copy written texts and arose in England within the context of the publishing monopoly of the Stationers' Company, a guild of scribes, bookbinders, and booksellers.³⁷ Copyright as a publisher's right necessarily involved conceptions of originality in that a publisher could not claim a copyright with respect to unoriginal ancient texts, for example.³⁸ The dissemination of unauthorized copies was of significant concern to holders of Stationers' rights in the era prior to and following the adoption of the Statute of Anne.³⁹ Although U.S. copyright law followed the development of copyright in England, the adoption of copyright law in the United States was led by writers rather than booksellers.⁴⁰ This shift in locus from publishers to

³⁴ *Three Boys*, 212 F.3d at 485 (noting that intrinsic test of substantial similarity is subjective and based on ordinary, reasonable person standard).

³⁵ Arewa, *supra* note 8, at 576-79.

³⁶ LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 8 (1968) (noting that copyright began as publisher's right and after more than century was changed into author's right).

³⁷ PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 32-41 (2003) (discussing Stationers' Company and its role under Licensing Act, in adoption of Statute of Anne, and in judicial and legislative arenas more generally); PATTERSON, *supra* note 36, at 9; LYMAN RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 19-22 (1991) (discussing Stationers' copyright).

³⁸ Simon Frith & Lee Marshall, *Making Sense of Copyright*, in MUSIC AND COPYRIGHT, *supra* note 16, at 1, 11 (noting that requirement for originality was initially imposed to prevent publishers from copying ancient texts and claiming copyrights with respect to such texts).

³⁹ GOLDSTEIN, *supra* note 37, at 33 (noting that Licensing Act, which expired in 1694, was "the principal sanction behind the Stationers' monopoly" and that under printing patent, "the Stationers suppressed trade not only in unauthorized copies of licensed works, but in unlicensed works as well" and also noting publishers' strategies with respect to unauthorized copies).

⁴⁰ *Id.* at 40.

authors was also evident in England after the Statute of Anne became effective in 1710.⁴¹

In contrast to copyright as a publisher's right, copyright restrictions as an author's right on copying became more complex in application, particularly given that the exclusive rights of copyright owners encompass rights relating to both the creation and dissemination of a broad range of cultural works.⁴² Further, the enforcement of copyright as an author's right necessitates consideration of creation processes. Copyright as an author's right is also intertwined with notions of authorship and originality that often emphasize the genius, originality, or labor of creators of copyrighted works.⁴³

Notions of authorship and originality have created particular problems for copyright theory. These problems arise from the reality of borrowing and other techniques that involve some degree of copying as important elements in the creation of new works. Consequently, a conception of the creative process that imagines that new works are original and autonomous may often be at odds with actual acts of creation that in many instances involve copying, collaboration, and other uses of existing works.⁴⁴ Originality is both a constitutional and statutory requirement for copyrighting a work,⁴⁵ although what constitutes an original work is often contested and difficult to determine with precision.⁴⁶

Questions about originality in the creation of new works can be seen at least in part as ways of interpreting and representing the creative process as well as the sociocultural context within which such works

⁴¹ *Id.* at 34 ("The Statute dramatically changed the allocation of entitlements among authors, publishers, and readers. Severing the enforcement of literary property rights from the Stationers' monopoly, the Statute unleashed a free market for literature and for ideas.").

⁴² 17 U.S.C. § 106 (2000); H.R. REP. NO. 94-1476, at 51-52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664-65 (noting historic expansion of copyright from time of first copyright statute in 1790 to present day); Jessica Litman, *Copyright in the Twenty-First Century: The Exclusive Right To Read*, 13 *CARDOZO ARTS & ENT. L.J.* 29, 34 (1994) (noting that copyright is now applicable to broader range of things).

⁴³ Professors Martha Woodmansee and Peter Jaszi have, for example, elucidated much about the importance of "Romantic" author conceptions in copyright. *See, e.g.,* Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 15, 21 (Martha Woodmansee & Peter Jaszi eds., 1994) (discussing "modern myth that genuine authorship consists in individual acts of origination").

⁴⁴ *See generally* Arewa, *supra* note 8 (discussing musical borrowing).

⁴⁵ *See id.*

⁴⁶ *Id.* at 567 (noting contested nature of conceptions of originality).

are created.⁴⁷ Perspectives that emphasize the originality and autonomy of new creations are often decontextualized.⁴⁸ Taking account of the broader context within which new works are created makes assumptions of autonomy more difficult.⁴⁹ By their nature, depictions of creative processes that include greater consideration of the context within which new works are created eschew assumptions of autonomy in creation. Consequently, the breadth of the lens through which we consider acts of creation plays a critical role in defining the acceptable processes by which new works are created.

This cultural gaze on creative processes plays an important role in seemingly divergent tests of substantial similarity, which is the primary legal tool by which determinations of copying and illegal appropriation constituting infringement are made. As Professor Jaszi has noted, considerations of authorship in legal discourse generally have reflected permutations in which notions of authorship have been used strategically in different ways at different times.⁵⁰ This shifting landscape in copyright discourse reflects tensions between divergent and at times contradictory ideologies about who constitutes an author and how new works are created.⁵¹

Determinations of substantial similarity are often difficult and may be subsumed within two broad categories of cultural gaze.⁵² The first category utilizes a narrow cultural gaze that focuses attention on the allegedly infringed and infringing works, while the second takes

⁴⁷ *Id.* at 566 (“Questions about originality are thus in large part questions about how to represent the process of music production that forms the basis upon which copyright rules operate.”); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 374 (2005) (“Copyright should recognize the situated, context-dependent character of both consumption and creativity . . .”).

⁴⁸ Janet Wolff, *The Ideology of Autonomous Art*, in *MUSIC AND SOCIETY: THE POLITICS OF COMPOSITION, PERFORMANCE, AND RECEPTION* 1, 2 (Richard Leppert & Susan McClary eds., 1987).

⁴⁹ Arewa, *supra* note 8, at 591, 598-99.

⁵⁰ Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 *DUKE L.J.* 455, 462-63 (noting role of hierarchy in copyright consideration of different types of artistic production).

⁵¹ *Id.* at 502 (“[A]uthorship contains within itself the contradiction at the base of all copyright doctrine. The conflict is not the familiar opposition between ownership and access, but the more fundamental, generative tension between the collectivism of the marketplace and the prerogatives of the autonomous individual.”).

⁵² *Jarvis v. A&M Records*, 827 F. Supp. 282, 290 (D.N.J. 1993) (noting that courts and commentators have found substantial similarity “difficult to define and vague to apply”); 4-13 *NIMMER & NIMMER*, *supra* note 27, § 13.03[A] (“The determination of the extent of similarity that will constitute a *substantial*, and hence infringing, similarity presents one of the most difficult questions in copyright law.”).

greater account of the context within which both works are created. This first category of the narrow cultural gaze would include tests of substantial similarity as typically applied to artistic works, which include the abstractions test,⁵³ the patterns test,⁵⁴ and the look and feel test.⁵⁵ All of these tests are used to focus largely on the two works at hand, often with little attention paid to the broader context within which such works were created. This narrow cultural gaze reflects the assumption that ideas rather than expression are the vehicle by which existing works inform new works.⁵⁶

Assessments of copyright infringement reflect the intersection of conceptions of substantial similarity and the idea-expression dichotomy.⁵⁷ The idea-expression dichotomy is based upon the

⁵³ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.”).

⁵⁴ 4-13 NIMMER & NIMMER, *supra* note 27, § 13.03[A][1][b].

⁵⁵ *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (noting that total concept and feel of United greeting cards were same as Roth’s copyrighted cards).

⁵⁶ See Cohen, *supra* note 14, at 1171 (noting that copyright theory assumes that cultural transmission function in cultural texts rests in “‘ideas’ conveyed by such works rather than in the particular form of their expression”); see also 17 U.S.C. § 102(b) (2000) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *Baker v. Selden*, 101 U.S. 99, 103 (1879); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (“[T]here can be no copyright in the ‘ideas’ disclosed but only in their ‘expression.’”); *Nichols*, 45 F.2d at 121; H.R. REP. NO. 94-1476, at 56 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5670 (“Copyright does not preclude others from using ideas or information revealed by the author’s work.”); Arewa, *supra* note 8, at 626-41; Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaningless of Substantial Similarity*, 20 UC DAVIS L. REV. 719, 719 (1987) (arguing that substantial similarity tests fail to adequately distinguish copying from misappropriation or ideas from expression); Alan L. Durham, *Copyright and Information Theory: Toward an Alternative Model of “Authorship,”* 2004 BYU L. REV. 69, 95 (“One of the fundamental principles of copyright law is that an idea cannot be copyrighted; only an author’s original expression of an idea can be copyrighted.”); Russ VerSteeg, *Defining “Author” for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1345 (1996) (noting that idea-expression dichotomy is critical for defining who constitutes author under copyright law).

⁵⁷ 4-13 NIMMER & NIMMER, *supra* note 27, § 13.03[A][1] (noting that questions of substantial similarity are often reformulated in terms of “idea-expression” dichotomy);

assumption that the copying of expression is not or should not be a major vehicle by which new works are derived from existing ones.⁵⁸ This assumption contrasts markedly with views of creation evident in fields such as musicology and literary criticism.⁵⁹ Views of creation reflecting the narrow gaze are particularly evident in cases involving artistic, literary, and other creative works. The acknowledged difficulties in drawing distinctions between ideas and expressions in copyright doctrine are rooted in the ways that copyright theory views creative processes.⁶⁰

Cases involving computer programs, such as *Computer Associates International, Inc. v. Altai, Inc.*, reflect a broader cultural gaze and do not rely to the same extent on notions of autonomous artistic creation.⁶¹ This no doubt reflects the categorization of such works as utilitarian works that combine creative and technical expression.⁶² The processes of creation of such works are often acknowledged to involve less authorship and more borrowing than creative works,⁶³ an

Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 322 (1989).

⁵⁸ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991) (noting that works can resemble other works as long as resemblance is not consequence of copying); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977) ("The real task in a copyright infringement action, then, is to determine whether there has been copying of the expression of an idea rather than just the idea itself. . . . The difficulty comes in attempting to distill the unprotected idea from the protected expression.").

⁵⁹ See Arewa, *supra* note 8, at 586-88 (discussing views of musical creation in musicology).

⁶⁰ *Warner Bros. v. Am. Broad. Co.*, 720 F.2d 231, 240 (2d Cir. 1983) (noting that idea-expression dichotomy is imprecise, though useful as analytic tool in separating infringing from non-infringing works); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) ("The critical distinction between 'idea' and 'expression' is difficult to draw.").

⁶¹ *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 775 F. Supp. 544, 558-59 (E.D.N.Y. 1991) (distinguishing tests for substantial similarity for artistic and literary works as compared with utilitarian works such as software programs); 4-13 NIMMER & NIMMER, *supra* note 27, § 13.03[A][1][d] (noting that some courts view traditional tests of substantial similarity as inadequate in field of software infringement and have formulated new approaches to determine substantial similarity).

⁶² *Altai*, 775 F. Supp. at 558-59.

⁶³ *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236 (3d Cir. 1986) (noting in context of utilitarian works that purpose or function of work would constitute work's idea, while everything unnecessary to that purpose or function would reflect expression of that idea); Howard Root, Note, *Copyright Infringement of Computer Programs: A Modification of the Substantial Similarity Test*, 68 MINN. L. REV. 1264, 1291-93 (1984) (noting that reality of borrowing in computer field, which makes it unlike other fields, requires restricted application of copyright law).

assessment that makes significant assumptions about the creation processes of works that involve true (i.e., autonomous) authorship.⁶⁴ As a result, computer program cases tend to broaden their gaze and take account of creation processes of computer software programs in infringement determinations.⁶⁵

The distinctive analyses applied in computer programming cases are reflected in the *Altai* court's application of the abstraction-filtration test.⁶⁶ The abstraction-filtration test developed in *Altai* adapts the abstractions test for separating ideas from expression for use in questions of infringement of computer programs.⁶⁷ In cases involving copyright of computer programs, *Altai* and other courts may apply existing copyright doctrines such as the idea-expression dichotomy.⁶⁸ The expansion of the cultural gaze in computer program cases involves courts looking at questions of broader context, that is, the actual processes by which code is written and computer programs

⁶⁴ *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, No. 91-7893 & No. 91-7935, 1992 U.S. App. LEXIS 14305, at *29 (2d Cir. June 22, 1992) ("Thus, compared to aesthetic works, computer programs hover even more closely to the elusive boundary line described in § 102(b)."); Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 107-10 (1993) (discussing structure of court's analysis in *Altai*).

⁶⁵ Stacey L. Dogan & Joseph P. Liu, *Copyright Law and Subject Matter Specificity: The Case of Computer Software*, 61 N.Y.U. ANN. SURV. AM. L. 203, 203 (2005).

⁶⁶ *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706 (2d Cir. 1992) (discussing abstraction-filtration test); *Altai*, 1992 U.S. App. LEXIS 14305, at *37 (noting that filtration test breaks down allegedly infringing program into its constituent parts and then examines each of these parts for such things as "incorporated ideas, expression that is necessarily incidental to those ideas, and elements that are taken from the public domain," which enables court to sift out all non-protectible material).

⁶⁷ *Altai*, 1992 U.S. App. LEXIS 14305, at *38; Chon, *supra* note 64, at 107-10 (discussing *Altai* and *Whelan* cases).

⁶⁸ Such courts apply existing doctrines, including the idea-expression dichotomy, substantial similarity, merger, and *scènes à faire*. See *Altai*, 1992 U.S. App. LEXIS 14305, at *36-37; see also *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) ("Under the *scènes à faire* doctrine, when certain commonplace expressions are indispensable and naturally associated with the treatment of a given idea, those expressions are treated like ideas and therefore not protected by copyright." (citations omitted)); *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989) ("Where an idea and the expression 'merge,' or are 'inseparable,' the expression is not given copyright protection." (citation omitted)); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236 (3d Cir. 1986) ("Where there are various means of achieving the desired purpose, then the particular means chosen is not necessary to the purpose; hence, there is expression, not idea. . . . Consideration of copyright doctrines related to *scènes à faire* and fact-intensive works supports our formulation." (citations omitted)).

constructed, in determining whether infringement has occurred.⁶⁹ This broader gaze also reflects a close examination of external factors that might have bearing on the creation of the relevant works.⁷⁰

Discussions of substantial similarity of computer programs often include detailed descriptions of standard computer programming techniques.⁷¹ The techniques used to write computer programs are often at least implicitly contrasted with the techniques used to create traditional literary works, for example.⁷² Courts' discussion of the specific details of how computer programs are actually created reflects their recognition of venturing into "less than familiar waters" in such cases.⁷³

⁶⁹ *Altai*, 982 F.2d at 706, 708-09 (noting that abstraction-filtration test involves careful analysis of steps by which code in computer program is constructed).

⁷⁰ *Id.* (noting that copyright scope may be construed more narrowly in works with historical themes, where doctrines such as merger and *scènes à faire* might apply).

⁷¹ See Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045, 1050-57 (1989) (describing how computer programmers design and write application programs); Marc T. Kretschmer, Note, *Copyright Protection for Software Architecture: Just Say No!*, 1988 COLUM. BUS. L. REV. 823, 824-27 (discussing software development process); Peter G. Spivack, Comment, *Does Form Follow Function? The Idea/Expression Dichotomy in Copyright Protection of Computer Software*, 35 UCLA L. REV. 723, 726-31 (1988) (discussing basic computer science techniques and process of computer programming).

⁷² Legal doctrine in copyright is often based on assumptions about how artistic works are created:

The systematic method used to develop computer programs makes the abstractions test facially more applicable to computer software than to other types of works. *Traditional literary works are not created in such a consistently organized and orderly fashion.* In many cases, an author may produce portions of a work in nearly final form at one sitting, without extensive preparation or development. Thus, a court applying the abstractions test to a literary work needs to break the work down into decreasing levels of complexity, a task that can be difficult when the only material available is the finished piece itself. *In contrast, the development process of computer programs often provides natural divisions, that may correspond to the various levels of abstraction that the court seeks to identify and analyze.*

4-13 NIMMER & NIMMER, *supra* note 27, § 13.03[F][1] (emphasis added).

⁷³ *Altai*, 982 F.2d at 698-700; *Altai*, 1992 U.S. App. LEXIS 14305, at *2 ("In recent years, the growth of computer science has spawned a number of challenging legal questions, particularly in the field of copyright law. As scientific knowledge advances, courts endeavor to keep pace, and sometimes — as in the area of computer technology — they are required to venture into less than familiar waters."); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 775 F. Supp. 544, 549-54 (E.D.N.Y. 1991); *Q-Co Indus., Inc. v. Hoffman*, 625 F. Supp. 608, 610 (S.D.N.Y. 1985) (noting that computer programming is "not readily comprehended by the uninitiated").

Although views of creativity in cases of artistic works are by no means uniform, they generally reflect far less attention to creation processes than do cases involving computer programs. In such cases, although borrowing is at times acknowledged as an inevitable part of the creation process,⁷⁴ the implications of borrowing for views of creation in copyright are rarely explored in any depth.⁷⁵ At the same time, views of creation in copyright frequently assert a minimal creative requirement for copyright protection, which merely prohibits actual copying.⁷⁶ How a prohibition on copying can be reconciled with the reality of borrowing and copying in the creation of new works remains a key point of tension in copyright theory. Further, underlying many discussions of creativity in copyright are notions of creation that can verge on the mystical.⁷⁷ Consequently, cases involving artistic works generally do not reflect detailed analysis of the creative process or context of creation of the works being considered. Rather such cases are more likely to be permeated with generalized and often unsupported assumptions about authorship, ideas, expression, and transmission that often do not sufficiently reflect the reality of how many works are actually created.

⁷⁴ *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436) (“In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1450 (1997) (noting that “new ideas are never wholly new” and often “use prior ideas as building blocks, whether by accepting them or rejecting them”).

⁷⁵ See generally Arewa, *supra* note 8 (discussing lack of attention to musical borrowing in copyright discourse).

⁷⁶ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (noting that originality “means little more than a prohibition of actual copying” (citing *Hoague-Sprague Corp. v. Frank C. Meyer, Inc.*, 31 F.2d 583, 586 (E.D.N.Y. 1929))).

⁷⁷ *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (“The musical compositions of some few set their composers apart from all others. Their works are distinctly characteristic and possess an individuality which mark the work of extraordinary genius.”); Keith Negus, *Cultural Production and the Corporation: Musical Genres and the Strategic Management of Creativity in the US Recording Industry*, 20 MEDIA, CULTURE & SOC’Y 359, 362 (1998) (discussing writings about creativity and noting that “creativity is often treated in a vague and mystical manner, with many writers assuming that we all know and recognize ‘creativity’ when we meet it”).

C. *Just Context?: Fairness and Fair Use Analysis*

As a judicial doctrine developed initially by courts and later codified, fair use recognizes that certain acts of copying are permissible.⁷⁸ The fair use defense is thus intended to limit the scope of copyright and help ensure that copyright does not stifle creativity.⁷⁹ However, application of the four fair use factors now contained in § 107 of the Copyright Act reveals many of the same limitations evident in copyright doctrine more generally.⁸⁰ Reflecting its origins in early copyright cases involving fair abridgment of literary works,⁸¹ fair use is typically more suited to analysis of commentary about existing literary works, including parody,⁸² rather than elucidating the appropriate scope of acceptable copying from existing expression in the creation of new works.⁸³ Fair use analysis mirrors copyright doctrine more generally in not taking sufficient account of the ways in which new works make use of existing ones, particularly in instances that involve borrowing from existing expression.⁸⁴ Lack of consideration of cultural contexts of creation similarly pervades fair use doctrine. Fair use doctrine thus incorporates significant consideration of commercial context without commensurate consideration of cultural contexts of creation.⁸⁵

⁷⁸ 17 U.S.C. § 107 (2000); 4-13 NIMMER & NIMMER, *supra* note 27, § 13.05.

⁷⁹ Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1089 (2007) (noting that fair use is limitation on scope of copyright owner's rights).

⁸⁰ Determinations of fair use focus on the four criteria outlined in § 107 of the Copyright Act:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2000).

⁸¹ See *infra* notes 327-37 and accompanying text.

⁸² Carroll, *supra* note 79, at 1092.

⁸³ Arewa, *supra* note 8, at 573-76 (noting potential problems that arise in applying fair use doctrine to musical borrowing and commenting that fair use doctrine is also not well-suited to analysis of musical notes, which are nonrepresentational, as contrasted with musical lyrics).

⁸⁴ *Id.* at 573-79 (noting that fair use analysis does consider transformative uses of existing work as factor and commenting that transformative use standard is subjective and potentially problematic in failing to encompass sufficient range of uses of existing works evident in musical arena).

⁸⁵ Carroll, *supra* note 79, at 1099-1106 (discussing consideration of commercial context in fair use analysis, particularly under first and fourth prongs of § 107 fair use

Fair use doctrine is intended to delineate the acceptable ways in which new works may use existing ones. As a result, the lack of consideration of the full range of creative possibilities of copying and cultural contexts of creation in fair use analysis has profound implications for treatment of different types of creative processes. Fair use analysis may also result in the subjective valorization of particular uses of existing works, while failing to take account of the many methods of creation that use existing works in their formulation.⁸⁶ In addition, the decontextualization in the application of fair use doctrine from applicable contexts of creation means that fair use doctrine is inherently limited in its reach. How determinations of fair use can be made in different contexts of creation thus remains questionable.

As a result, recent scholarship exploring distributive values and copyright suggests⁸⁷ that copyright theory would benefit from further consideration of what constitutes truly fair and equitable uses of existing expression in varied contexts.⁸⁸ Determinations of truly fair and equitable uses of existing works could be facilitated to a far greater extent by the development of copyright narratives that reflect the importance of the freedom to copy.⁸⁹

II. COPYRIGHT NARRATIVES: THE CONTESTED SCOPE OF COPYRIGHT LAW

*Current [copyright] stakeholders have controlled the playing board for nearly a century, and would doubtless prefer to keep it that way The 1990s saw an astonishing increase in copyright-related campaign contributions — making it increasingly unlikely that Congress would support a movement to divest copyright stakeholders of responsibility for drafting copyright legislation.*⁹⁰

[C]opyright is an ongoing social negotiation, tenuously forged, endlessly revised, and imperfect in its every incarnation The

criteria).

⁸⁶ Arewa, *supra* note 8, at 573-76.

⁸⁷ Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 UC DAVIS L. REV. 803, 806 (2007); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2831 (2006); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1540 (2005) (noting distributive aspects of copyright).

⁸⁸ See *infra* notes 359-60 and accompanying text.

⁸⁹ See *infra* notes 348-79 and accompanying text.

⁹⁰ JESSICA LITMAN, *DIGITAL COPYRIGHT* 62 (2001).

*distinctive feature of modern American copyright law is its almost limitless bloating — its expansion in both scope and duration.*⁹¹

A. *Copyright, Borrowing, and the Problems of Representation*

The ways in which doctrines such as substantial similarity and fair use deal with questions of creation reflect in part ongoing and unresolved tensions in copyright law. These tensions center around the appropriate scope of copyright, as well as the public policy choices embodied in current copyright frameworks. The appropriate scope of copyright is highly contested today. Copyright is thus a topic of considerable debate in artistic, legal, and business arenas.⁹² The ferment surrounding copyright reflects the participation of various business constituencies and interest groups, including the entertainment and content industries, heirs of prominent artists, and technology companies.⁹³ Other groups involved in this debate include

⁹¹ Lethem, *supra* note 2, at 63.

⁹² See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE, & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 18-20 (1996); LITMAN, *supra* note 90, at 111-21; KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW 1 (2001) (discussing how fabric of social life in Western countries and rest of world is becoming immersed in domain of intellectual property law); SETH SHULMAN, OWNING THE FUTURE 3-30 (1999) (discussing battles for control over intangible assets); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 4-12 (2001) (discussing implications of intellectual property frameworks for creative production); Michele Boldrin & David Levine, *The Case Against Intellectual Property*, 92 AM. ECON. REV. 209, 209 (2002); Julio H. Cole, *Patents and Copyrights: Do the Benefits Outweigh the Costs?*, 15 J. LIBERTARIAN STUD. 79, 80 (2001); Wayne Crews & Adam Thierer, *Introduction: The Great Intellectual Property Debate*, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE, at xv, xxi-xxv (Adam Thierer & Wayne Crews eds., Cato Inst. 2002) (discussing current disputes in copyright law); N. Stephan Kinsella, *Against Intellectual Property*, 15 J. LIBERTARIAN STUD. 1, 44 (2001); Lethem, *supra* note 2, at 59-71.

⁹³ See Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 286-90 (2006) (discussing arguments presented in briefs by proponents of Copyright Term Extension Act); Netanel, *supra* note 13, at 285-86 (“Fueled by digital technology’s destabilizing potential, an extraordinarily bitter battle is raging in Congress, the courts, law reviews, Internet discussion groups, and numerous international fora over the purpose and scope of copyright as we enter the digital age.” (citations omitted)); Ruth L. Okediji, *Africa and the Global Intellectual Property System: Beyond the Agency Model*, AFR. Y.B. INT’L L. 207, 207-08 (2006) (noting that the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) and its progeny “heralded a new era of international intellectual property lawmaking characterized by the activities of non-state actors including special interest groups”); Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT’L L. REV. 819, 830-

artists, academics, libraries and archives, and other users and creators of copyright-protected works.⁹⁴ Concerns about the overbroad scope of copyright unify a broad range of constituencies from diverse ideological orientations.⁹⁵ The current discord over copyright is by no means limited to the United States and has become an issue of global contention as well.⁹⁶

1. Copyright Narratives and Copyright Law

Copyright narratives play an important role in the cultural framing of copyright law. Such narratives are used to rationalize intellectual property frameworks and justify public policy choices made in the intellectual property arena. By their nature, copyright narratives are often selective in their depictions of cultural production. Copyright narratives may also be reductionist in that they may try to apply simple solutions to complex issues of cultural production and the allocation of ownership rights with respect to such production.

A number of narratives about copyright may be extracted from current discourse. Although these narratives are by no means the only ones evident in copyright discourse, they are important aspects of current copyright dialogue. Such narratives are also not exclusive and multiple strands from different narratives may be evident in copyright discussions. However, copyright narratives have distinguishing aspects and similarities that are important for understanding the contested scope of copyright today.

One dominant copyright narrative today focuses predominantly on copyright as a property right that should be enlarged and deepened.⁹⁷

31 (2003) (discussing role of interest groups in international intellectual property arena).

⁹⁴ Arewa, *supra* note 93, at 286-90.

⁹⁵ *Id.* at 287.

⁹⁶ Jerome H. Reichman, *The TRIPs Agreement Comes of Age: Conflict or Cooperation with the Developing Countries*, 32 CASE W. RES. J. INT'L L. 441, 443 (2000) (assessing TRIPs Agreement).

⁹⁷ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 173 (2004) (noting that free culture is casualty of war on piracy and that "[t]he property right that is copyright has become unbalanced, tilted toward an extreme"); VAIDHYANATHAN, *supra* note 92, at 11 (noting increased use of "property talk" in discussing intellectual but also noting that such propertization discourse is not new); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033-46 (2005) (noting increasing treatment of intellectual property from perspective of real property rights discourse); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895-905 (1997) (reviewing BOYLE, *supra* note 92 (discussing increasing use of

This propertization approach, which is certainly not new,⁹⁸ reflects long standing debates with respect to notions of authorship and literary property that became increasingly accepted after the eighteenth century.⁹⁹ Propertization approaches are a significant factor in increased intellectual property protection in recent years, with some arguing that intellectual property protection should be indefinite in some circumstances.¹⁰⁰ Proponents of propertization narratives often emphasize what one could term “narratives of piracy.”¹⁰¹ A type of copying that could be termed piracy clearly exists and is legitimately a concern to producers and disseminators of

propertization rhetoric in intellectual property dialogue)); Susan K. Sell, *Post-TRIPS Developments: The Tension Between Commercial and Social Agendas in the Context of Intellectual Property*, 14 FLA. J. INT'L L. 193, 193 (2002) (“TRIPS institutionalized a conception of IP based on protection and exclusion rather than competition and diffusion.”); Gladwell, *supra* note 24, at 41 (“Fighting piracy has become an obsession with Hollywood and the recording industry”); William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, § II.D (1999), <http://www.law.harvard.edu/faculty/ffisher/iphistory.html> (noting trend to propertization since nineteenth century and fact that term property has only recently been used to refer to patents, copyrights, and trademarks).

⁹⁸ Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1008-42 (2006) (discussing history of conceptions of “property” in intellectual property discourse).

⁹⁹ MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 1-9 (1993) (noting development of notions that authors could have intangible property right beyond manuscript); Peter Jaszi, *Contemporary Copyright and Collective Creativity, in THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 43, at 29, 40 (“Eighteenth-century theorists . . . minimized the element of craftsmanship in favor of the element of inspiration, and they internalized the source of that inspiration. . . . ‘Inspiration’ came to be explicated in terms of *original genius*, with the consequence that the inspired work was made peculiarly and distinctively the product — and the property — of the writer.” (citations omitted)); Meredith L. McGill, *The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law*, 9 AM. LITERARY HIST. 21, 24 (1997) (discussing literary property debate in United States and placing it within context of broader related societal transitions, including transition to market economy and shift from patronage system to market for books); Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 3, 6-10 (2002) (discussing historical origins of concept of book as real estate and copyright as protecting literary property in same manner as real property); Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 75 (2003) (discussing origins of conceptions of literary property).

¹⁰⁰ See, e.g., William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475 (2003) (arguing that indefinitely renewable copyright “need not starve the public domain”).

¹⁰¹ VAIDHYANATHAN, *supra* note 92, at 11 (noting that those in favor of enlarging and deepening copyright protection “have invoked the need to protect authors from ‘theft’” from middle of nineteenth century).

cultural texts.¹⁰² However, narratives of piracy may be applied to behavior that may in fact be permitted under existing copyright law frameworks and have been applied to an increasingly broad range of behaviors in recent years.¹⁰³ The types of discourse that support narratives of piracy may apply broadly, including to behaviors that encompass practices such as borrowing.¹⁰⁴ Further, proponents have used narratives of piracy to underscore the need for additional intellectual property protection and in particular as a prominent rationale for the adoption of the TRIPS Agreement.¹⁰⁵

A number of concurrent stories about copyright have arisen that are in many respects responses to narratives of piracy. These approaches typically focus on the threats that intellectual property propertization approaches pose to various constituencies, including creators who use existing works in their creations and users.¹⁰⁶ A number of strands of alternatives to propertization narratives can be discerned from existing copyright discourse. One strand, which reflects what might be termed “narratives of commercial dominance,” focuses on the negative implications of strong intellectual property rights, particularly as currently exercised by commercial interests.¹⁰⁷ Narratives of commercial dominance also draw attention to the behaviors associated with the enforcement of such rights, particularly by commercial

¹⁰² Sell, *supra* note 97, at 194-95.

¹⁰³ LITMAN, *supra* note 90, 85 (discussing expansion in uses of term piracy, which in past was applied to those who made and sold large numbers of counterfeit copies but which today is used to describe “any unlicensed activity”).

¹⁰⁴ LESSIG, *supra* note 97, at 17 (“Since the inception of the law regulating creative property, there has been a war against ‘piracy.’ The precise contours of this concept, ‘piracy,’ are hard to sketch, but the animating injustice is easy to capture. . . . Today we are in the middle of another ‘war’ against ‘piracy.’ The Internet has provoked this war.”); Arewa, *supra* note 8, at 576-79 (discussing characterizations of hip-hop music as involving theft or piracy).

¹⁰⁵ Sell, *supra* note 97, at 194-97, 200 (discussing role of allegations of piracy and American intellectual property industry lobbying groups that “played a major role in drafting and insuring the adoption of TRIPS”).

¹⁰⁶ PATTERSON & LINDBERG, *supra* note 37, at 191-223 (discussing copyright as law of users’ rights); Arewa, *supra* note 8, at 547 (discussing copyright and musical creation); Cohen, *supra* note 47, at 347-48 (noting implications of absence of user in copyright doctrine).

¹⁰⁷ See, e.g., VAIDHYANATHAN, *supra* note 92, at 12 (“[C]opyright issues are now more about large corporations limiting access to and use of their products. . . . Instead of trying to prevent ‘theft,’ we should try to generate a copyright policy that would encourage creative expression without limiting the prospects for future creators. We must seek a balance. . . . Instead of bolstering ‘intellectual property,’ we should be forging ‘intellectual policy.’”).

interests, and the extent to which such behaviors may create a chilling effect that hinders future creators.¹⁰⁸

Another related strand of copyright narrative focuses specifically on the implications of copyright frameworks for public domain knowledge.¹⁰⁹ In the international and indigenous rights arenas, such concerns may coalesce around questions relating to “biopiracy.”¹¹⁰ Discourse about biopiracy tends to focus on copying and related unauthorized uses of “poor people’s knowledge,”¹¹¹ which has been largely left in the public domain in today’s increasingly global intellectual property frameworks.¹¹² The public domain strand more

¹⁰⁸ DAVID BOLLIER, *SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH* 3-4 (Routledge 2002) (discussing commercialization of American culture and privatization of commons); MARJORIE HEINS & TRICIA BECKLES, *WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL* 4-5 (2005), <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf> (discussing chilling effects of commercial copyright practices, including use of cease and desist letters and Digital Millennium Copyright Act take down notices); LESSIG, *supra* note 97, at 183-207 (discussing some harms resulting from war on piracy); VAIDHYANATHAN, *supra* note 92, at 12 (suggesting that copyright policy should encourage creative expression without limiting prospects of future creators).

¹⁰⁹ *But see* R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 997 (2003) (arguing that intellectual property rights, even in their strong form, are likely to increase public domain). *See generally* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (discussing effects of enclosure on organization of information production); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003) (discussing negative effects of strong intellectual property rights on innovation and freedom); Anupam Chander & Madhavi Sunder, *Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004) (discussing conceptions of public domain in intellectual property discourse); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-67 (1990) (noting failure of copyright’s paradigm of authorship to account for raw materials that all authors use); A. Samuel Oddi, *The Tragicomedy of the Public Domain in Intellectual Property Law*, 25 HASTINGS COMM. & ENT. L.J. 1, 1-3 (2002) (noting that little attention is paid to public domain in intellectual property statutes, cases, and scholarly discourse).

¹¹⁰ Arewa, *supra* note 26, at 8-10.

¹¹¹ J. Michael Finger, *Introduction and Overview to POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES* 1, 4 (J. Michael Finger & Philip Schuler eds., 2004) (discussing poor people’s knowledge and ways for poor people to earn income from their knowledge as compared with just their labor); Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 L. & CONTEMP. PROB. 97, 100 (2007) (discussing treatment of “poor people’s knowledge” under global intellectual property frameworks).

¹¹² Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEG. STUD. 11, 26 (1998) (noting unidirectional drain of intellectual resources from Third World); Chander & Sunder, *supra* note at 109, at 1351 (noting traditional

generally reflects what might be termed “public domain narratives” with respect to public domain resources generally and narratives of biopiracy in terms of international discourse. The access to knowledge (“A2K”) movement represents another strand of anti-propertization narrative that has explicitly framed itself as a counter-narrative to propertization narratives in the international arena.¹¹³

These counter-narratives to propertization narratives point out that current copyright frameworks may have negative effects in a number of arenas. Public domain narratives focus on the negative implications of propertization narratives for the public domain and the ability of future creators to create new works.¹¹⁴ A2K narratives focus on access to knowledge as a fundamental principle related to justice, freedom, and economic development.¹¹⁵ In the international arena, the underlying logic of narratives of biopiracy intersects with narratives of piracy in that the existence of biopiracy is also often used to highlight the need for additional intellectual property protection for the knowledge that is subject to such copying, theft, appropriation, or biopiracy.¹¹⁶

The common focus in copyright narratives on what constitutes impermissible copying and inappropriate uses of existing knowledge highlights the need for more finely tuned legal analyses about the ways in which both ideas and expression may be transmitted and used in the creation of new works.¹¹⁷ This suggests that breaking down the term copying into smaller constituent parts within legal discourse may

knowledge has been left in global public domain while protecting developed country intellectual products); Paul J. Heald, *The Rhetoric of Biopiracy*, 11 *CARDOZO J. INT'L & COMP. L.* 519, 522-23 (2003) (noting that discussions concerning expansion of intellectual property protection to traditional knowledge occur in context where many believe that intellectual property protection is already too expansive); Sell, *supra* note 97, at 202-03 (“Biopiracy . . . is seen as a new form of Western imperialism in which global seed and pharmaceutical corporations plunder the biodiversity and traditional knowledge of the developing world. . . . This turns the discourse of piracy . . . upside down. A number of activists seek to demonstrate that, rhetoric to the contrary notwithstanding, America’s global corporations are the biggest pirates on the planet.” (citations omitted)). See generally VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* (1997) (giving overview of biopiracy issue and advocating much more aggressive control of uses of traditional knowledge internationally).

¹¹³ See Balkinization, <http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html> (Apr. 21, 2006, 19:05 PST) (noting that access to knowledge is demand for justice that reflects issues related to economic development and need for individual participation and human liberty).

¹¹⁴ See *supra* note 109 and accompanying text.

¹¹⁵ See Draft Treaty on Access to Knowledge, art. 2-3 (May 9, 2005), http://www.cptech.org/a2k/a2k_treaty_may9.pdf.

¹¹⁶ Arewa, *supra* note 26, at 10-14.

¹¹⁷ Cohen, *supra* note 14, at 1176-77.

be fruitful. Such subcategories may enable clearer delineation of what constitutes unauthorized copying in particular contexts of creation.

2. Copyright and Representation: Characterizing and Allocating Knowledge Ownership Rights

Copyright narratives unfold in a global intellectual property context increasingly dominated by the influence of commercial interests.¹¹⁸ The operation of commercial interests is by no means new in the copyright arena,¹¹⁹ and it is consistent with the roles played by private parties and vested interests historically.¹²⁰ Commercial interests have also played an important role in promoting particular interpretations of existing copyright frameworks.¹²¹ A specific form of narrative typically relies on highlighting specific consequences of copyright frameworks and using such representations to promote adoption of legal frameworks to prevent such consequences. The prevalence and prominence of narratives of piracy has meant that such narratives have been dominant aspects of copyright debates and have fostered influential representations of the manner of creation of cultural texts.¹²² These representations are an important aspect of the operation of copyright because they outline what are acceptable means of cultural production.¹²³ They also make certain assumptions about the nature and operation of copyright incentives.¹²⁴

Copyright narratives may reflect a partially accurate depiction of the reality of cultural production. At the same time, however, copyright narratives may also simplify the reality they depict. Such narratives

¹¹⁸ Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 862 (1987) (discussing role of copyright industries in adoption of 1976 Copyright Act).

¹¹⁹ LITMAN, *supra* note 90, at 62.

¹²⁰ *Id.* at 35 (noting that history of copyright is story about “private parties, vested interests, and the inexorable pace of technological change”).

¹²¹ PATTERSON & LINDBERG, *supra* note 37, at 10 (noting that copyright owners and others with vested interests have influenced and promulgated “guidelines that purport to implement [the] law but instead often constitute self-aggrandizement at the expense of the public interest”).

¹²² See Arewa, *supra* note 8, at 576-79 (discussing representations of manners of creation in discussions of hip-hop music).

¹²³ *Id.* at 581, 614, 626 (discussing how copyright discourse outlines types of acceptable cultural production).

¹²⁴ See LESSIG, *supra* note 97, at 225. *But cf.* Jane Ginsburg, *Putting Cars on the “Information Superhighway”: Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1468 (1995) (noting that primary goal of copyright law is fostering authorship).

are also advanced in a context permeated by interest groups.¹²⁵ The combination of reductionist depictions of reality and interest group framing of issues can significantly influence public policy choices. Consequently, narratives of piracy, for example, may reflect and advance the commercial interests of certain owners of intellectual property without commensurate attention to the broader public policy implications of copyright for other constituencies. Such representations are also an important factor in the increasing resources being devoted to the creation of knowledge that can then be protected by intellectual property.¹²⁶

The dominance of narratives of piracy has promoted representations of creative production that paint a particular picture of the nature of the problem (i.e., unauthorized copying) and the ways to eliminate that problem (i.e., stronger intellectual property rights). Through narratives of piracy, the intellectual property propertization approach thus emphasizes the threats posed by pirates and those who copy or steal others' creations.¹²⁷ The solution for dealing with such threats for the propertization perspective is greater power and control for owners of copyright.¹²⁸ Narratives of piracy have thus encouraged the development of counter-narratives that highlight the public policy implications of copyright law frameworks. These counter-narratives have outlined some ways in which recent public policy choices reflecting the role of vested interest groups may actually be contrary to the goals of copyright frameworks they are rationalized as supporting.

However, narratives of piracy have further exacerbated a tendency, which became more prominent in the nineteenth century, that minimized the importance of borrowing and other methods of copying in the production of cultural texts.¹²⁹ This tendency has also resulted in copyright discourse that is significantly author-centered. Such discourse often focuses on authorial intention or what can be inferred about such intention as a primary means of determining whether impermissible copying has occurred.¹³⁰

¹²⁵ See *supra* notes 93-96 and accompanying text.

¹²⁶ See Gladwell, *supra* note 24, at 41 (noting that society is directing increasing resources to creation of intellectual property).

¹²⁷ LESSIG, *supra* note 97, at 17; Arewa, *supra* note 8, at 576-79.

¹²⁸ Arewa, *supra* note 93, at 281-85.

¹²⁹ Arewa, *supra* note 8, at 588-95 (discussing importance of changing attitudes toward musical production and borrowing that became predominant in nineteenth century).

¹³⁰ Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights — Comment on Robert H. Rotstein*, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work," 68 CHI.-KENT L. REV. 805, 820 (1993) ("[T]he image of the

As a result of this author-centric orientation, a copyright infringement case can become a restricted inquiry into the relationship between two particular texts and the intentions of the authors of two texts.¹³¹ This inquiry is not necessarily wrong because clearly this is something of relevance to a court. The nature of this inquiry does, however, highlight the restricted nature of conceptions of authorship and text in copyright doctrine. This structure of inquiry reflects an insufficiently nuanced vision of creativity and processes of creation in copyright theory. Copyright doctrine also typically fails to take account of the complexities by which cultural texts may be created and the multifarious relationships that might exist between authors as well as between texts.¹³² Copyright discourse also does not adequately consider that relationships may exist between texts that may relate to the broader social and cultural context within which such texts are created.¹³³

This focus on authorial intention in copyright theory derives at least partly from the manner in which allocation of ownership rights are typically justified in copyright. In the process of allocating rights, the allocation of the right becomes at times intertwined with representations about how a work is produced. Consequently, the person who is allocated the right is deemed a deserving recipient of the ownership right by virtue of that person's acts of creation in producing a work.¹³⁴ This again represents a restricted representation of the nature of artistic creation. Such restricted and reductionist representations tend to value particular aesthetics of creation while potentially hindering others, particularly those that explicitly use existing works in their creation.¹³⁵

At least some of the problems associated with copyright with respect to the production of cultural texts arise from the inability of current copyright frameworks to represent and accommodate borrowing and other uses of existing material.¹³⁶ This is reflected in the contemporary music arena, for example, in the ways that courts and

Romantic author-genius who creates an original work is still a potent, but extremely problematic image in our intellectual property law”).

¹³¹ See *infra* notes 209-18 and accompanying text.

¹³² See *infra* notes 221-25 and accompanying text.

¹³³ See *infra* notes 247-48 and accompanying text.

¹³⁴ See *infra* notes 169-71 and accompanying text.

¹³⁵ Arewa, *supra* note 8, at 621 (noting that copyright frameworks fail to accommodate musical borrowing, which is pervasive aspect of music in all genres and time periods); Jaszi, *supra* note 99, at 40 (noting that copyright has lost sight of creation of works that entail serial collaboration).

¹³⁶ Jaszi, *supra* note 99, at 48 (noting that assumptions about cultural production in case such as *Rogers v. Koons* discourage artists who use existing materials).

legal commentators grapple with hip-hop music, mash-ups, and other forms of cultural production that are explicitly based on borrowing, copying, and other uses of existing material.¹³⁷ The questionable ways in which copyright doctrine addresses such material reflects views of cultural production that derive from Romantic author conceptions in some instances.¹³⁸

In other instances, legal discourse about cultural texts reflects the need to allocate clear ownership rights with respect to cultural production that is in most cases acknowledged to be collaborative.¹³⁹ In the process of delineating such ownership rights, however, representations of cultural production may become distorted in a way that supports determinations made about allocating rights, but which may misrepresent the nature of the underlying cultural production, as well as creation more generally.¹⁴⁰

Questions about allocation of rights with respect to cultural production and the representations upon which such allocations are based involve determination of the appropriate scope of copyright, which remains highly contested today.¹⁴¹ Considerations of allocations of rights also involve assumptions about the nature of copyright incentives. Different narratives make different assumptions about the role and operation of incentives in copyright.

B. *Borrowing as Piracy or Biopiracy: Copyright, Copying, and Incentives*

1. Representations of Uses of Existing Material as Theft

The arguments of many copyright owners, including entertainment and media companies, reflect a tendency to characterize copying and other uses of existing material as a form of theft.¹⁴² In narratives of

¹³⁷ Arewa, *supra* note 8, at 569; Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 303-10 (2006) (discussing mashups).

¹³⁸ MARTHA WOODMANSEE, *Genius and the Copyright*, in THE AUTHOR, ART, AND THE MARKET 35, 35-39, 52-53 (1994) (discussing origins of Romantic author concepts in literature); Jaszi, *supra* note 99, at 40 (noting emphasis on original ideas rather than successive elaborations of idea or text in Romantic authorship concepts).

¹³⁹ See generally Arewa, *supra* note 8, at 565 (noting how conceptions of authorship serve to bolster decisions made about allocations of ownership rights in copyright arena).

¹⁴⁰ Arewa, *supra* note 8, at 613-14, 621-22.

¹⁴¹ See *supra* notes 90-96 and accompanying text.

¹⁴² LESSIG, *supra* note 97, at 17-79 (discussing wars against piracy).

biopiracy, multinational corporations based in the North are frequently cast as villains.¹⁴³ The ideal intellectual property solution from the perspective of some who emphasize narratives of biopiracy may be the extension of existing or sui generis intellectual property protection to knowledge being appropriated.¹⁴⁴

The tendency of narratives of piracy and biopiracy to characterize certain uses as a form of theft highlights the different assumptions about incentives that are made in each narrative.¹⁴⁵ This in turn points out that the nature and operation of incentives in copyright are not really all that well understood.¹⁴⁶ The lack of empirical studies with respect to copyright incentives is a contrast to the patent area where a number of empirical studies have been conducted.¹⁴⁷ In addition, little consideration is given in copyright discourse to the operation of copyright other than with respect to incentives to create.¹⁴⁸ This means that a range of other potential uses of copyright are largely ignored, including how creation may relate to broader contexts of

¹⁴³ *Id.*

¹⁴⁴ Thomas Cottier & Marion Panizzon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protections*, 7 J. INT'L ECON. L. 371, 372 (2004) (“[C]arefully designed IPRs in traditional knowledge could help developing countries become full players in global agricultural markets while equitably rewarding indigenous peoples for their contributions to international well-being.”).

¹⁴⁵ See *infra* notes 146-49 and accompanying text.

¹⁴⁶ See RUTH TOWSE, CREATIVITY, INCENTIVE AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE 21 (2001) (“[W]e still cannot say with any conviction that intellectual property law in general, and copyright law in particular, stimulates creativity. That is no argument for not having it but it should sound loud notes of caution about increasing it. And we still know very little about its empirical effects.”); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 505 n.160 (1998) (noting that role of copyright in inducing production of cultural texts remains “unanswered empirical question”).

¹⁴⁷ See, e.g., C. T. TAYLOR & Z. A. SILBERSTON, THE ECONOMIC IMPACT OF THE PATENT SYSTEM: A STUDY OF THE BRITISH EXPERIENCE, at xi (1973); Richard C. Levin et al., *Appropriating the Returns from Industrial Research and Development*, 1987 BROOKINGS PAPERS ON ECON. ACTIVITY 783, 785; Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT. SCI. 173, 173 (1986); Wesley M. Cohen, Richard R. Nelson & John P. Walsh, *Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (Or Not)* 1-2 (Nat'l Bureau of Econ. Research, Working Paper No. 7552, 2000).

¹⁴⁸ Stan J. Liebowitz & Stephen E. Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects* 20 (Dec. 2003) (unpublished manuscript, on file with author), available at <http://ssrn.com/abstract=488085> (noting lack of consideration of “the responsiveness of creative efforts to marginal incentives and the function of ownership of intellectual property beyond the incentive to create”).

creation, or strategic uses that may have little to do with the creation of new works and that may in some instances even impede the creation of new works.¹⁴⁹

2. Copyright Incentives and Rationales: The Double Intangible and Copyright Narratives

Courts, legal commentators, and others have historically struggled with questions related to allocations of rights in the copyright sphere.¹⁵⁰ Copyright frameworks are most often justified or rationalized in the United States on utilitarian grounds as a right whose benefit in incentivizing creation merits the costs that ensue from the exclusion rights and consequent market power given the holder of the right.¹⁵¹ As Professors Brett Frischmann and Mark Lemley have highlighted, innovation spillovers play an important and positive role in the intellectual property arena.¹⁵² Borrowing, copying, and uses of existing work are critical aspects of creation and require that intellectual property frameworks permit some degree of spillover. Such spillovers in the creation context may be seen as constituting “uncompensated benefits that one person’s activity provides to another.”¹⁵³ The importance of such spillovers highlights the inherent tensions between exclusive property rights and nonexclusive knowledge. Spillovers also underscore the importance of liability

¹⁴⁹ Arewa, *supra* note 93, at 292-98 (discussing strategic uses of copyright); Olufunmilayo B. Arewa, *Intangibles and Intellectual Property: Value and Behavior in the Digital Era* (Nov. 1, 2007) (unpublished manuscript, on file with author) (discussing strategic uses of intellectual property).

¹⁵⁰ William Patry, *Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 907 (1997) (“Since the inception of American copyright law at the end of the eighteenth century, legislators and scholars have struggled with two fundamental, related issues. First, what is the purpose of copyright? Second, to whom should benefits be granted?”).

¹⁵¹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); DIGITAL CONNECTIONS COUNSEL OF THE COMM. FOR ECON. DEV., *PROMOTING INNOVATION AND ECONOMIC GROWTH: THE SPECIAL PROBLEM OF DIGITAL INTELLECTUAL PROPERTY* 7 (2004) (“[I]ncentives provided by copyright protection are designed to encourage innovation by creators.”); Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1801-04 (2000) (discussing costs associated with deadweight loss that results from copyright monopoly); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993 (1997) (noting that intellectual property is about incentives to invent and create).

¹⁵² Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 258 (2007) (discussing role of spillovers).

¹⁵³ *Id.*

rules in appropriate contexts where exclusive property rights might have a deleterious impact on the social benefits of transmissions of knowledge for a variety of purposes and users, and in relation to questions of access to knowledge.

The tension between exclusive private rights and nonexclusive knowledge is often apparent in discussions that emphasize utilitarian rationale for copyright. The utilitarian case for copyright generally characterizes copyright as an appropriate mechanism for dealing with the public goods characteristics of knowledge. Because knowledge is nonexclusive and nonrivalrous, copyright is often depicted as a mechanism that incentivizes the creation of works that might otherwise be under-produced.¹⁵⁴ The exclusion rights given copyright holders permit such holders to control future uses of their copyrighted works.¹⁵⁵ Copyright exclusion rights create acknowledged dangers.¹⁵⁶ Exclusion rights may also present problems in that they limit the freedom to copy, which is problematic given the nonexclusive nature of underlying knowledge and the importance of copying in creation.¹⁵⁷

Instead of recognizing and confronting the complexity of collaborativity, copyright theory typically uses narratives of authorship based upon Romantic author, natural rights, or moral rights theories of authorship to simplify characterizations of acts of creation, and to enable such acts to be viewed as autonomous in nature.¹⁵⁸ Such characterizations in turn are used to ignore the collaborative nature of underlying knowledge, thus permitting treatment of an intellectual property right as justifiably enabling a copyright owner to prevent others from borrowing from or otherwise copying the owner's creation. Although narratives of authorship are not necessarily always incorrect, they again simplify the potentially complex nature of

¹⁵⁴ Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 112 (1997); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421, 425-26 (1966); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 190-91 (1934).

¹⁵⁵ Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 414-16 (2003) (noting that exclusionary aspect of intellectual property rights is formal rather than substantive element).

¹⁵⁶ Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 44-51 (2004) (discussing three dangers created by right to exclude in intellectual property law: (1) monopoly loss, (2) innovation bottlenecks, and (3) impoverishment of public domain, speech, and democracy).

¹⁵⁷ See *infra* notes 177-81 and accompanying text.

¹⁵⁸ Arewa, *supra* note 8, at 564-68 (discussing notions of autonomous production of musical works).

creation in potentially problematic ways. Consideration of nonexclusivity and exclusion rights suggests that the application of copyright must be tempered to more appropriately recognize how copyright frameworks should treat copying in the creation of new works in varied contexts.

Utilitarian and incentive-based rationales for copyright are in many respects compelling. A significant part of the appeal of such rationales rests in their simplicity and seeming explanatory power. Further, utilitarian models likely reflect at least in part the reality of cultural production in at least some contexts of creation. At the same time, however, utilitarian rationales with respect to creation are often incomplete and can at times be reductionist in not sufficiently considering the varied economic and noneconomic motives that may underlie acts of creation.¹⁵⁹ Consequently, such rationales often cannot sufficiently explain the reality of cultural production in its entirety. Creators produce new works for varied reasons, some of which may be consistent with utilitarian rationales, some of which are likely not.¹⁶⁰ Although utilitarian rationales are often used to justify copyright, copyright narratives and court cases often mix utilitarian grounds with other rationales that may represent acts of creation in incomplete ways.¹⁶¹ Further, as is the case with copyright doctrine more generally, discussions of utilitarian rationales typically make assumptions about the appropriate role of copying in the creation of new works that do not adequately consider the importance of copying in creation.

Utilitarian discourse in copyright is often mixed with narratives of authorship that emphasize the potential plight of authors and artists who do not receive compensation for their works.¹⁶² Multiple levels of

¹⁵⁹ *Id.* at 591 (noting that conceptions of creativity in copyright discourse provide incomplete model for musical production).

¹⁶⁰ *Cf.* Arewa, *supra* note 93, at 298-301 (discussing varied economic and noneconomic reasons underlying George Gershwin's creation of new works); Frank H. Knight, *Some Notes on the Economic Interpretation of History*, in *FREEDOM AND REFORM: ESSAYS IN ECONOMICS AND SOCIAL PHILOSOPHY* 293, 303 (1982) ("All economic activity is affected by the creative and explorative interests, which have much in common with play, and by numerous social and individual motives which do not enter into the make-up of the hypothetical 'economic man.' In short, the economic interest is an aspect of conduct in general, varying widely in importance relative to other aspects.").

¹⁶¹ See *supra* notes 171-85 and accompanying text.

¹⁶² Arewa, *supra* note 93, at 338-42; Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197-98 (1996) (noting instrumental rationale for copyright as incentive and Locke labor desert theories are both based on imagery of expanding copyright protection to relieve author's plight).

discourse facilitate the interaction of the utilitarian rationales with narratives of authorship in copyright discourse: each type of discourse in many ways addresses specific aspects of the copyright construction, which actually involves two levels of intangibility.¹⁶³

One can conceptualize an intellectual property right as involving two distinguishable levels of intangibility: the underlying knowledge and the intellectual property right itself (e.g., patent, copyright, or trademark).¹⁶⁴ An intellectual property right can thus be conceived as representing a certificate of ownership for knowledge that is in many respects analogous to a title for physical property.¹⁶⁵ However, in the case of intellectual property, the certificate relates to an intangible asset or resource (e.g., knowledge) rather than a tangible asset (e.g., a building).¹⁶⁶ This means that intellectual property rights reflect a double layer of intangibility in that they combine an intangible right with an intangible object with which the right is associated. This double layer of intangibility often makes determinations of intellectual property boundaries more difficult than is the case with tangible assets,¹⁶⁷ where exclusivity and physical essence make allocations of ownership easier.¹⁶⁸ These intellectual property boundary marking questions arise from the nonexclusive features of underlying intangible knowledge as well as the ways in which cultural knowledge is transmitted and copied in the creation of new works.

Distinguishing between these two levels of intangibility is important for understanding the structure and content of copyright narratives. Narratives of piracy in many instances tend to conflate the two levels of intangibility and assume that the scope of rights with respect to each should be equivalent. This has significant implications for other uses of underlying knowledge. Such underlying knowledge involves collaborative elements, which is typically minimized in determinations of how to allocate ownerships rights with respect to such underlying knowledge.¹⁶⁹

¹⁶³ Olufunmilayo B. Arewa, *Intellectual Property as Boundary: Intangibles and the Knowledge Economy* 4-9 (Nov. 1, 2007) (unpublished manuscript, on file with author).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Olufunmilayo B. Arewa, *Measuring and Representing the Knowledge Economy: Accounting for Economic Reality under the Intangibles Paradigm*, 54 *BUFF. L. REV.* 1, 2 (2006).

¹⁶⁷ Frischmann & Lemley, *supra* note 152, at 271-75 (discussing greater difficulties in drawing boundaries with respect to intellectual property rights).

¹⁶⁸ Arewa, *supra* note 163, at 5-6.

¹⁶⁹ *Id.*

a. *Underlying Knowledge in the Double Intangible: Narratives of Authorship*

Narratives of authorship demonstrate that a particular creator deserves ownership rights with respect to a particular configuration of knowledge by virtue of that creator's authorship. They may reflect Romantic author and natural rights conceptions of authorship, although elements of moral rights conceptions may also be evident.¹⁷⁰ Narratives of authorship may thus emphasize the genius, contribution, or labor involved in an author's creation of a work. The language of court cases concerning the nature of underlying knowledge resources is heavily tinged with narratives of authorship in a way that is not always entirely consistent with the utilitarian rationales used to support intellectual property frameworks generally. In some instances, courts use narratives of authorship to justify the designation of an individual as an author and a person to whom an intellectual property right grant is deserved. Such cases often justify giving an intellectual property right to a particular author by focusing on the notion of originality and the importance of the labor or personality of the author in creating the work; such cases may also characterize the author as a genius or gifted person who independently arrived at the creation.¹⁷¹

¹⁷⁰ A number of authors have discussed the varied rationales for copyright protection. See, e.g., William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 173-76 (Stephen R. Munzer ed., 2001); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 297, 332-33 (1988); Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, *supra*, at 138, 138-67.

¹⁷¹ See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59-60 (1884) ("It is therefore much more important that when the supposed author sues for a violation of his copyright, the existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author should be proved than in the case of a patent-right."); *Weissmann v. Freeman*, 868 F.2d 1313, 1321 (2d Cir. 1989) ("Originality is and always has been rightly prized. Dostoevsky, for example, insisted that the measure of a person's worth in pre-Revolutionary Russia did not depend so much on money or position, as it did on one's originality. Mill wrote that 'nothing was ever yet done which someone was not the first to do, and . . . all good things which exist are the fruits of originality.' In the law of copyright only an unmistakable dash of originality need be demonstrated, high standards of uniqueness in creativity are dispensed with." (citation omitted)); *King Features Syndicate v. Fleischer*, 299 F. 533, 535-36, 538 (2d Cir. 1924) ("Doing this is omitting the work of the artisan, but appropriating the genius of the artist. . . . The Copyright Act protects the conception of humor which a cartoonist may produce, as well as the conception of genius which an artist or sculptor may use . . . the fruits of the cartoonist's genius which consisted in his capacity to entertain and amuse." (citations omitted)); *Frankel v. Irwin*, 34 F.2d 142,

However, courts and legal commentators do not always discuss what it means to be an author. When courts choose to discuss conceptions of authorship, the discourse is typically based on narratives of authorship. This suggests that implicit understandings may exist within the realm of legal discourse as to what these terms mean and the narratives of authorship on which they may be based. The separation of the underlying knowledge and attributions of originality with regard to this knowledge to a specific holder, notwithstanding collaborative aspects or sources of such knowledge, is an important part of the process through which the intellectual property right actually attaches to the underlying knowledge.¹⁷² Recognition of borrowing and other collaborative elements in creation should thus trigger greater scrutiny of the nature of this attachment process and further assessment of the meaning of ownership in a world of acknowledged collaborativity.

Narratives of authorship are most apparent in both copyright cases where the author is implicitly framed as an autonomous actor and described as a genius, a person who has made a unique and, most importantly, individual contribution, or as a person who shows originality or a capacity or skill beyond the mere ordinary, all of which confirm the decision to grant an intellectual property right to that person.¹⁷³ As part of the Romantic author discourse, great artists of

144 (S.D.N.Y. 1918) (discussing “those matters as to which copyright protects — that is, the spirit or soul infusing the creatures of the author’s imagination”).

¹⁷² See Arewa, *supra* note 163, at 5-6.

¹⁷³ See, e.g., *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 668 n.6 (7th Cir. 1986) (“Although the requirements of independent creation and intellectual labor both flow from the constitutional prerequisite of authorship and the statutory reference to original works of authorship, courts often engender confusion by referring to both concepts by the term ‘originality.’ For the sake of clarity, we shall use ‘originality’ to mean independent authorship and ‘creativity’ to denote intellectual labor.”); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) (“Nor is the creativity in the underlying work of art of the same order of magnitude as in the case of the ‘Hand of God.’ Rodin’s sculpture is, furthermore, so unique and rare . . . that a significant public benefit accrues from its precise artistic reproduction.”); *Guthrie v. Curlett*, 36 F.2d 694, 696 (2d Cir. 1929) (“The thought, arrangement, and style was original, and by them he made a useful contribution to the subject treated.”); *Grove Press, Inc. v. Collectors Publ’n, Inc.*, 264 F. Supp. 603, 605 (C.D. Cal. 1967) (“These changes required no skill beyond that of a high school English student and displayed no originality.”); *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (“The musical compositions of some few set their composers apart from all others. Their works are distinctly characteristic and possess an individuality which mark the work of extraordinary genius. Such in popular music are the productions among others of Victor Herbert, George Gershwin, Jerome Kern and Cole Porter.”).

the past are at times mentioned in discussions of creation, originality, or authorship.¹⁷⁴ These references to great artists helps underscore conceptions of Romantic authorship by bringing readers' attention to the inspired nature of great art, which is seen as the product of genius of the type that intellectual property laws are designed to protect.¹⁷⁵ Narratives of authorship often occur in the midst of other language where courts discuss the minimum level of creativity required to be an author.¹⁷⁶ This view is not always entirely consistent with the discourse surrounding originality and authorship but reflects on at least an aspirational level what is meant when the term author is used.¹⁷⁷ Such discourse is also combined with notions of aesthetic value that at least implicitly makes copyright determinations based on the assumed positions of works within aesthetic hierarchies.¹⁷⁸

Such notions of authorship present problems in the realm of commercially produced consumer goods. As a result, conceptions of authorship were transformed and used to secure protection for "modestly aesthetic productions" that had commercial value.¹⁷⁹ This transformation led to a doctrinal dissociation of authorship from genius in the late nineteenth century,¹⁸⁰ but it did not eliminate use of the conceptions of Romantic authorship in copyright cases, even as copyright increasingly came to focus more explicitly on works rather than authors.¹⁸¹

¹⁷⁴ Arewa, *supra* note 8, at 587.

¹⁷⁵ See Jaszi, *supra* note 99, at 40.

¹⁷⁶ West Publ'g Co. v. Mead Data Cent., 799 F.2d 1219, 1223 (8th Cir. 1986) (noting that standard for originality is minimal and only requires that work originate with author and be independently created); Alfred Bell v. Catalda Fine Arts, 191 F.2d 99, 103 (2d Cir. 1951) (noting that originality "means little more than a prohibition of actual copying")

¹⁷⁷ Fisher, *supra* note 97, § II.B (noting that Romantic author concepts, combined with general labor-desert theory "helped support the notion that an artist deserves to own his creations").

¹⁷⁸ Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 743-44 (1993) ("On the one hand, *Burrow-Giles* reflects a decidedly Romantic approach to the text, focusing on whether an author, in effect, spawned a work that was 'entirely' his or her own. Originality, in this sense, emphasizes the work's position in the aesthetic hierarchy. So viewed, the originality inquiry looks outside the work, making Romantic originality the predicate of copyright protection. On the other hand, *Burrow-Giles* contains the seeds of copyright's later repudiation of author in favor of the self-contained work. . . . In other words, because characteristics in the work had aesthetic worth, the Court could find that the author had exhibited the requisite originality.").

¹⁷⁹ See Jaszi, *supra* note 50, at 484.

¹⁸⁰ *Id.* at 483-84.

¹⁸¹ *Id.* at 501 ("[A]uthorship' has a way of appearing and disappearing

The role of narratives of authorship in copyright frameworks has been increasingly problematic with the increased scope and duration of copyright. Increased duration means that decisions about issues such as originality and creativity may be increasingly made in a context significantly removed in space and time from the initial context of creation.¹⁸² The broader scope of copyright today also means that copyright frameworks encompass a far wider range of creative works. As a result of such changes in scope and duration, greater scrutiny needs to be given to allocations of ownership rights in the copyright arena. The implications of such allocation choices for the production of new works that is a goal of copyright should also be examined more closely.

*b. The Intellectual Property Right and the Double Intangible:
Utilitarian Rationales for Intellectual Property Protection*

In conceptualizing intellectual property rights, courts tend to use a utilitarian calculus in which costs and benefits are weighed. Utilitarian discourse is thus mixed with narratives of authorship that help courts define who constitutes an author.¹⁸³ In contrast to narratives of authorship, which are used to define who is an author deserving of an intellectual property grant, the utilitarian calculus tends to focus on the individual incentives copyright gives authors as well as the intellectual property system's collective benefits to society. This utilitarian calculus typically entails discussion of the overall rationales of the intellectual property system to give incentives to engage in socially beneficial creative activities to persons who are identified as creators through narratives of authorship.¹⁸⁴ Such

inconveniently, at times and in places where it is difficult to relate its manifestations to commercial interests.”).

¹⁸² Arewa, *supra* note 93, at 333.

¹⁸³ Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 439 (2003) (noting dominance of instrumentalist rationales for copyright protection); Patry, *supra* note 150, at 903 (noting both instrumental and moral rights strains in historical United States copyright doctrine); Fisher, *supra* note 97, § II.B (noting continued ideological strength of Romantic author doctrine).

¹⁸⁴ See, e.g., *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) (“The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); *CCC Info. Servs., Inc. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 69 (2d Cir. 1994) (“The financial incentives to authors consist of exclusive rights to their writings, that may be sold or licensed for money, so

activities are seen as contributing to overall social welfare. In this manner, rationales based on narratives of authorship with regard to the underlying knowledge level of the double intangible coexist with utilitarian analysis at the level of the intellectual property right aspect of the double intangible.

Narratives of authorship are particularly useful in explaining the first in time elements of intellectual property rights systems. Such systems grant rewards to certain deserving creators based upon justifications contained in narratives of authorship where utilitarian explanations might be strained. We do not grant intellectual property rights to the most socially beneficial uses, but rather to the first use deemed to include sufficient originality, creativity, or invention to qualify for intellectual property protection. A utilitarian response might be to say that initial entitlements of intellectual property rights do not matter and that the intellectual property right will end up in the hands of the holder who values it most. This response, however, does not take full account of the rationales that courts use in determining that a holder has done something to merit giving this holder an intellectual property right or the implications of the endowment effect.¹⁸⁵ Another utilitarian argument might focus on low transaction costs associated with a first in time rule, which, even if true, does not fully explain such first in time characteristics.

C. *Creating New Copyright Narratives: Incorporating the Freedom to Copy*

Existing narratives of authorship and utilitarian rationales provide an inexact fit for the contextualized reality of many creation processes. Some elements of such discourse may, however, be useful in identifying alternate copyright narratives that better encompass varied manners of creativity and creation processes. A focus on delineating inappropriate uses of intellectual property rights or public domain

that authors may earn a living from the creations that benefit[ted] the public.”); *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n.*, 805 F.2d 663, 678 (7th Cir. 1986) (“The purpose of federal copyright protection is to benefit the public by encouraging works in which it is interested. To induce individuals to undertake the personal sacrifices necessary to create such works, federal copyright law extends to the authors of such works a limited monopoly to reap the rewards of their endeavors.”); *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 23 (2d Cir. 1976) (“[C]opyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public.”).

¹⁸⁵ See Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 112 (2002) (discussing endowment effect).

knowledge unites otherwise disparate copyright narratives. This suggests that copyright doctrine might benefit from the creation of additional narratives that focus specifically on the scope of permissible copying in different contexts. In contrast to current copyright theory, the explicit starting point for such narratives should be acknowledgment of the reality and importance of copying in the creation of new works. Such recognition would permit copyright doctrine to take account of the importance of the freedom to copy. The freedom to copy as a doctrine thus emerges from the reality of creation and the role of copying in many creations. Recognition of the freedom to copy also advances the core goals of copyright of promoting the progress of science and the useful arts.¹⁸⁶ The importance of the freedom to copy should thus not be ignored, particularly since copying is a core aspect of creation for a varied range of creators.

The conceptualization of the freedom to copy also draws upon the capabilities approach as elucidated by economist Amartya Sen and philosopher Martha Nussbaum. Sen's capabilities approach emphasizes the conception of development as freedom, in which development "requires the removal of major sources of unfreedom."¹⁸⁷ Sen's conception of freedom involves delineation of both its constitutive and instrumental role in development.¹⁸⁸ Sen identifies diverse aspects of freedom that relate to a variety of activities and institutions.¹⁸⁹ He thus draws attention to the importance of freedom and participation in the development process generally.¹⁹⁰ Sen also places significant emphasis on the fundamental importance of freedom and participatory processes.¹⁹¹ Nussbaum's version of the capabilities approach similarly emphasizes the integration of considerations of justice, equality, and liberty in the public policy arena.¹⁹² Nussbaum also notes the

¹⁸⁶ U.S. CONST. art. I, § 8, cl. 8.

¹⁸⁷ See AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999).

¹⁸⁸ *Id.* at 36-37.

¹⁸⁹ *Id.* at 297 ("It is a characteristic of freedom that it has diverse aspects that relate to a variety of activities and institutions.").

¹⁹⁰ *Id.* at 36-40.

¹⁹¹ *Id.* at 291 (noting that freedom is concerned with "*processes of decisions making as well as opportunities to achieve valued outcomes*").

¹⁹² MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 144 (2000) (discussing her version of Sen's capabilities approach and noting need for "a theory of human capability that includes accounts of equality and liberty — to provide the normative basis that desire fails reliably to provide us").

importance of the senses, imagination, and thought, including the production of self-expressive works, as a central human capability.¹⁹³

Sen and Nussbaum's analyses have significant implications for copyright. By focusing on the importance of human capability as a basis for the creation of opportunities to achieve desired outcomes,¹⁹⁴ a capabilities approach draws attention to the important role of values, norms, and participation in the development and other contexts.¹⁹⁵ This analysis is important for copyright in that the ways in which norms and values are elucidated in the copyright context play a critical role in intellectual property discourse as well as the development of copyright doctrine. For example, as the A2K movement clearly reflects, viewing access as a valued goal in the copyright context results in fundamentally different discourse that may promote different copyright legal configurations.¹⁹⁶ Consequently, an approach to copyright that incorporates a capabilities approach should recognize that access to knowledge and the ability to participate in creative processes reflect fundamental elements of self-expression that should be taken into account in intellectual property discourse and doctrine.¹⁹⁷

A conception of intellectual property that focuses on participation and access to knowledge reflects ideas evident in considerations of intellectual property frameworks in the United States from their inception.¹⁹⁸ Further, perspectives that incorporate recognition of access to knowledge, participation, and self-expression as fundamentally important in the development of human capabilities are in many respects antithetical to dominant strains in propertization narratives that focus on market mechanisms, exclusionary rights, and means by which to control access to existing works.¹⁹⁹ The prevention of copying

¹⁹³ *Id.* at 77-79.

¹⁹⁴ *Id.* at 144.

¹⁹⁵ *See id.* at 93 (discussing barriers to full participation that may be created by virtue of persistent inequalities or hierarchies); *see also* SEN, *supra* note 187, at 269.

¹⁹⁶ *Cf.* NUSSBAUM, *supra* note 192, at 70-75, 298-300 (discussing importance of basic political principals and establishing political goals that promote capabilities of each person).

¹⁹⁷ *See* Wendy J. Gordon & Daniel Bahls, *Fair Use, 'Fared Use,' and the Rights of the Public: Amending Section 107*, 2007 UTAH L. REV. (forthcoming 2007) (noting benefits of conceptualizing fair use as right).

¹⁹⁸ Chon, *supra* note 64, at 135 ("In light of the Enlightenment emphasis on the capacity of the intellect in general, and the utility of facts and scientific observation in particular, both Madison's and Jefferson's ideas on property indicate that access to knowledge might be a fundamental civil right, and freedom to apply that knowledge to a specific task a fundamental civil liberty.").

¹⁹⁹ Arewa, *supra* note 93, 323-37 (discussing control mechanisms in copyright frameworks); Chon, *supra* note 64, at 129 ("In the highly industrialized countries like

is a key aspect of propertization narratives that bolsters the normative assumptions contained within such narratives. Discussions of copying in such narratives, however, often lack a nuanced reading of creativity and processes of creation. Consequently, a disjunction exists between dominant copyright propertization narratives and alternative narratives that focus on elements of intellectual property rights other than rights relating to exclusion and control. This divergence in part reflects conflicting readings of the norms and values associated with intellectual property frameworks as measured on a number of axes,²⁰⁰ including in relation to the public and private and the global and local.²⁰¹

How we conceptualize the rights, liberties, and goals associated with copyright is thus of fundamental importance in the creation of legal institutions as well as the behavioral norms that develop around such legal configurations. Consequently, rather than denying the reality of copying and its importance in processes of creation, narratives incorporating the freedom to copy would begin with recognition of the importance of copying in creation. With such recognition, attention could be given to the scope and limitations of the freedom to copy within copyright frameworks. Such recognition would likely entail, at a minimum, greater incorporation of liability rule frameworks in copyright. As Professors Lemley and Philip Weiser

the United States, a relatively small number of giant private entities control imagery through intellectual property laws. Criticism, mockery, or the construction of countervailing images have become increasingly difficult endeavors, even if performed by other corporate entities, much less individuals.” (citations omitted)); Amy Benfer, *Writing in the Free World*, SALON.COM, Mar. 25, 2007, http://www.salon.com/books/feature/2007/03/25/lethem_interview (quoting Jonathan Lethem interview) (“The first thing I want to say is that it’s entirely a fiction of what I’ll call, for the sake of this argument, the opposition — corporate, copyright absolutists — that to question the present privatization craze in any way is to vote for some anarchic abolition of copyright. . . . What I’m seeking to explore is that incredibly fertile middle ground where people control some rights and gain meaningful benefits from those controls, and yet contribute to a healthy public domain and systematically relinquish, or have relinquished for them, meaningless controls on culture that impoverish the public domain.”).

²⁰⁰ SEN, *supra* note 187, at 129 (“The ‘public goods’ argument for going beyond the market mechanism supplements the case for social provisioning that arises from the need of basic capabilities Efficiency considerations thus supplement the argument for equity in supporting public assistance in providing basic education, health facilities and other public (or semipublic) goods.”); Chon, *supra* note 64, at 144 (“Progress of Science and useful Arts’, as I have argued, was essential to the Enlightenment-influenced optimism in progress. I have sketched how this view necessarily relied on the creative and intellectual faculties of individuals, and ergo access to a commons of ideas. This vision of knowledge within our political, economic, and social structure has been largely obscured.”).

²⁰¹ See Arewa, *supra* note 26, at 58-61.

highlight in their discussion of liability rules in the technology law context, determinations about the extent and manner of incorporation of limitations embodied in such liability rules should be based on benchmarks and better empirical understanding about the contexts within which copyright operates, as well as the normative goals of copyright in its broader contexts of operation.²⁰²

Legal discussions of creativity and processes of creation would thus benefit from a more nuanced understanding of copying and creation. Since conceptions of copying and creation remain under-developed in legal doctrine, copyright law can benefit from consideration of copying and creation in other disciplines, including musicology and literary criticism. In addition to providing examples of discussions of creation that take account of the relationships between texts, such disciplines can also help copyright doctrine develop a more nuanced vocabulary about copying.

III. INTERTEXTUALITY, FORMULAIC TEXTS, AND THE LIMITED CULTURAL GAZE IN COPYRIGHT

*[A] work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.*²⁰³

*Next to the originator of a good sentence is the first quoter of it Then there are great ways of borrowing. Genius borrows nobly.*²⁰⁴

*Immature poets imitate; mature poets steal.*²⁰⁵

*[M]ost Authors steal their Works, or buy.*²⁰⁶

*Creativity is selective copying.*²⁰⁷

²⁰² Lemley & Weiser, *supra* note 18, at 834-40.

²⁰³ Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

²⁰⁴ RALPH WALDO EMERSON, COMPLETE WORKS VOL. VIII: LETTERS AND SOCIAL AIMS 197 (1876).

²⁰⁵ T.S. Eliot, *Philip Massinger*, in THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM 123, 125 (3d ed. 1932).

²⁰⁶ Alexander Pope, *An Essay on Criticism* in THE POEMS OF ALEXANDER POPE 143, 163 (John Butt ed., 1963).

²⁰⁷ JOHN DUFRESNE, THE LIE THAT TELLS A TRUTH: A GUIDE TO WRITING FICTION 59 n.*** (2003) (quoting Philip Johnson).

*My purpose in reading has ever secretly been not to come and judge, but to come and steal.*²⁰⁸

*Literature has been in a plundered, fragmentary state for a long time.*²⁰⁹

A. *Art and Autonomy: Law and Representations of Artistic Creation*

The first quote above from the 1991 *Feist Publications, Inc., v. Rural Telephone Service Co.*, Supreme Court case reflects common assumptions made about copying in the legal arena. This view diverges significantly from the views of copying in the subsequent quotes from a varied range of artists. The *Feist* language above reflects the powerful and continuing presence in law of representations of artistic, musical, and literary creation that bear strong influences of fundamentally incomplete, if not misguided, narratives of authorship. Such narratives often lead legal commentators to dismiss or stigmatize the role of copying in the creative process. Such conceptions also reflect an ethos, which became more predominant by the end of the nineteenth century, that views artistic processes as resulting from acts of autonomous creation.²¹⁰ This ethos reflected an increasing focus on authorship and authorial intention that was also apparent at that time in fields such as literature and music.²¹¹ More recently, however,

²⁰⁸ *Id.* quoting JOHN UPDIKE, *ODD JOBS: ESSAYS AND CRITICISM* xxi (1991).

²⁰⁹ Lethem, *supra* note 2, at 60.

²¹⁰ Arewa, *supra* note 8, at 551, 565, 579; Andrew D. Weiner, *Sidney / Spenser / Shakespeare: Influence / Intertextuality / Intention*, in *INFLUENCE AND INTERTEXTUALITY IN LITERARY HISTORY* 245, 248 (Jay Clayton & Eric Rothstein eds., 1991) (noting that conceptions of invention were more complex during Renaissance than in contemporary usage and included possibility of creating something new out of something already existing as well as creating something first); John T. Winemiller, *Recontextualizing Handel's Borrowing*, 15 *J. MUSICOLOGY* 444, 445-46 (1997) (noting that disquiet about Handel's borrowing practices reflects more general discomfort with creative efforts that incorporate existing ideas or materials); Wolff, *supra* note 48, at 2 (noting that Romantic notion of autonomy of art, still dominant in late twentieth century, is product of nineteenth century ideology and social structure).

²¹¹ Rotstein, *supra* note 178, at 725 ("Copyright law, rather, embraces the notion of the 'work' — purportedly an autonomous entity akin to an object. According to copyright law, the 'work' supposedly has immutable characteristics that allow judges and juries to determine originality, scope of protection, substantial similarity, and fair use merely by interpreting the words on the page (or the pictures on the screen or the sounds on the recording)."); see Arewa, *supra* note 8, at 581-96 (discussing Romantic author conceptions in music and construction of classical music canon in nineteenth century); Jay Clayton & Eric Rothstein, *Figures in the Corpus: Theories of Influence and Intertextuality*, in *INFLUENCE AND INTERTEXTUALITY IN LITERARY HISTORY*, *supra* note 210, at 3, 10 (noting that notions of influence in literary theory from eighteenth century

fields such as musicology and literary criticism have increasingly recognized the implications of borrowing, intertextuality, and other ways in which new creations might relate to and make use of existing works. In contrast, author-centric conceptions remain dominant in copyright theory.²¹²

This focus on the author and authorial intention in law has significant implications for views of creation processes and the manner and extent of relationships between cultural texts. As commentary in other fields suggests, consideration of the actual production of cultural texts must take account of the relationships between texts and contexts.²¹³ As a result, consideration of issues such as influence, intertextuality, formulaic cultural production, and borrowing are

onwards “remained committed to an author-centered criticism, concerned with issues of originality and genius, an evaluative rhetoric, and an emphasis on literary history”); Hans Lenneberg, *The Myth of the Unappreciated (Musical) Genius*, 66 *MUSICAL Q.* 219, 221 (1980) (“In the Romantic tradition, great composers are usually depicted as not only destined to be gifted, but also innovative or radical and of extraordinary integrity [This] idea of the artist as an inevitably misunderstood genius is a myth, or at least an over-simplification.”); Edward E. Lowinsky, *Musical Genius — Evolution and Origins of a Concept*, 50 *MUSICAL Q.* 321, 338 (1964) (noting that classical formulation that dominated musical thinking was “the contrast between counterpoint as a craft and dramatic music as the creation of genius”).

²¹² Aoki, *supra* note 130, at 816 (noting “[t]he persistent judicial reliance on author-reasoning as a method of resolving ambiguity and suppressing the complexity of the world”).

²¹³ ROLAND BARTHES, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142, 147-48 (1977) (noting that author is modern figure whose presence imposes limit on text and furnishes it with final signified rather than understanding that text is made of multiple writings whose multiplicity is focused on reader).

[T]he ‘author-function’ is not “formed spontaneously through the simple attribution of a discourse to an individual. It results from a complex operation whose purpose is to construct the rational entity we call an author. . . . [T]hese aspects of an individual, which we designate as an author . . . are projections in terms always more or less psychological, of our way of handling texts In literary criticism, for example, the traditional methods for defining an author — or, rather, for determining the configuration of the author from existing texts — derive in large part from those used in the Christian tradition to authenticate . . . the particular texts in its possession.

MICHEL FOUCAULT, *What Is an Author?*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE* 113, 127 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977); JULIA KRISTEVA, *REVOLUTION IN POETIC LANGUAGE* 91 (Margaret Walker trans., Columbia Univ. Press 1984) (noting that “*matrix of enunciation*” in narrative “tends to center on an axial position that is explicitly or implicitly called ‘I’ or ‘author’” and that this position is mobile and axial position “presupposes an addressee who is required to recognize himself in the multiple “I”s of author”).

important parts of discourse in a number of fields of study. The terminology used may depend on the type of artistic production being considered and the time period of consideration. In musicology, for example, terms used to discuss relationships between musical texts include borrowing, self-borrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, recomposition, influence, paraphrase, and indebtedness.²¹⁴ In literary criticism, terms such as intertextuality, allusion, quotation, and influence are used.²¹⁵

Discussions of relationships between texts in other disciplines are quite nuanced in comparison with copyright discourse. Discussions in literary criticism, for example, address the distinction between considerations of influence and intertextuality; both terms have been used to discuss relationships between texts.²¹⁶ A similar discourse has not developed to the same extent in the legal arena, where considerations of copyright infringement largely assume a fairly black

²¹⁴ See, e.g., Howard Mayer Brown, *Emulation, Competition, and Homage: Imitation and Theories of Imitation in the Renaissance*, 35 J. AM. MUSICOLOGICAL SOC'Y 1, 1 (1982) (using terms emulation and homage in discussing imitation practices in Renaissance); J. Peter Burkholder, *Borrowing*, in 4 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 1, 4 (Stanley Sadie & John Tyrrell eds., 2001), available at <http://www.grovemusic.com> (using terms borrowing, quotation, modeling, and allusion); J. Peter Burkholder, "Quotation" and Emulation: Charles Ives's Uses of His Models, 71 MUSICAL Q. 1, 3 (1985) (using term paraphrase in discussing music of Charles Ives); James Ladewig, *Bach and the Prima Prattica: The Influence of Frescobaldi on a Fugue from the Well-Tempered Clavier*, 9 J. MUSICOLOGY 358, 358 (1991) (using term influence in discussing relationship between J.S. Bach and Frescobaldi); Charles Rosen, *Influence: Plagiarism and Inspiration*, 4 19TH-CENTURY MUSIC 87, 87 (1980) (using term influence); Hugh Arthur Scott, *Indebtedness in Music*, 13 MUSICAL Q. 497, 497, 501 (1927) (using term indebtedness and discussing composer's borrowing from his own material (self-borrowing)); Joseph N. Straus, *Recompositions by Schoenberg, Stravinsky, and Webern*, 72 MUSICAL Q. 301, 301 (1986) (using term recomposition in discussion of pieces composed by Schoenberg, Stravinsky, and Webern); Winemiller, *supra* note 210, at 448, 454-55 (using terms transformative imitation and discussing Handel's use of musical figures he had previously used (self-borrowing)).

²¹⁵ See *infra* note 216 and accompanying text.

²¹⁶ See HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* 5 (2d ed. 1997) (outlining theory of poetry through "description of poetic influence, or the story of intra-poetic relationships . . . to de-idealize our accepted accounts of how one poet helps to form another"); UDO J. HEBEL, *INTERTEXTUALITY, ALLUSION AND QUOTATION: AN INTERNATIONAL BIBLIOGRAPHY OF CRITICAL STUDIES*, at ix, 3-4 (1989) (compiling more than 2000 critical studies dealing with relatively young concept of intertextuality, as well as older concepts of allusion and quotation and noting that quotation and allusion had been used as analytical tools by scholars to trace how one text led to another); Clayton & Rothstein, *supra* note 211, at 3-36 (discussing influence and intertextuality).

and white dichotomy between copying and creation and author and reader.²¹⁷

Considerations of the relationship between texts in varied areas of artistic production suggest that the reality of cultural production does not fit well within the dichotomy typically assumed in copyright discourse. As a result, a more nuanced vocabulary and greater consideration of the varieties of cultural production would greatly enrich copyright consideration of creation processes. On the surface, an emphasis on autonomous acts of creation makes the delineation of ownership rights easier. Such an approach has, however, exacerbated persistent problems with respect to the delineation of the appropriate scope of copyright.²¹⁸

B. Creation and Context: Intertextuality, Borrowing, and Formulaic Cultural Production

Copyright doctrine has thus failed to take advantage of the insights of other fields concerning relationships between texts and authors and the ways in which creators copy as part of the creation of new works. This inattention in legal discourse to the full implications of borrowing, copying, and collaboration in cultural production is evident in many areas of artistic activity.²¹⁹ The creation of cultural texts may be characterized as collaborative, formulaic, intertextual, transformative, or produced by other mechanisms or means. The processes by which and the context within which cultural texts are formed and copied have received attention from a wide range of disciplinary fields, including musicology and literary criticism, among others. A number of these disciplines have focused on the

²¹⁷ See, e.g., 4-13 NIMMER & NIMMER, *supra* note 27, §§ 13.01, 13.02, 13.03; Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 265 (1996) (“The binary structure of copyright law, dependent as it is upon a strict division between author and reader, or original artist and copyist, is being corroded by networked digital information.”).

²¹⁸ BOYLE, *supra* note 92, at 19 (noting routine breakdown of simplifying assumptions in copyright discourse); BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911*, at 55, 61 (1999) (noting need for copyright to work out conflicts between demands of replication (or abstraction) and identification in new contexts); Martin Kretschmer & Friedemann Kawohl, *The History and Philosophy of Copyright*, in *MUSIC AND COPYRIGHT*, *supra* note 16, at 21, 35 (noting that use of new concept of abstract authored work in copyright that relates all acts of exploitation).

²¹⁹ See Rotstein, *supra* note 178, at 725 (noting that copyright doctrine has “largely ignored the insights of contemporary literary criticism — the branch of scholarly investigation that is concerned with how ‘works of authorship’” are created).

complexities of creation and the dynamics of formation of cultural texts. Such considerations often underscore the richness and multiplicities of meaning inherent in the formation of such texts.

1. Copyright and Urtexts: Some Implications of Intertextuality

The work of post-structuralist authors has led to a renaissance in considerations of the relationships between texts in critical studies.²²⁰ A number of studies have focused on intertextuality or the varied and multifarious relationships that may exist between different texts in a number of contexts.²²¹ Studies have examined intertextuality in varied circumstances, including oral and written texts in antiquity and Christianity, Shakespeare's writing, and other texts.²²² An intertextual focus highlights how texts are situated with respect to other cultural

²²⁰ HEBEL, *supra* note 216, at ix (noting that concepts of allusion and quotation "have seen a remarkable renaissance in the wake of the intertextual enthusiasm").

²²¹ ROLAND BARTHES, *From Work to Text*, in *IMAGE, MUSIC, TEXT*, *supra* note 213, at 155, 160 ("The intertextual in which every text is held, it itself being the text-between of another text, is not to be confused with some origin of the text: to try to find the 'sources,' the 'influences' of a work, is to fall in with the myth of filiation . . .").

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

KRISTEVA, *supra* note 213, at 59-60; Rotstein, *supra* note 178, at 737 ("Much post-structuralist criticism, moreover, emphasizes the inevitable interrelationship — termed 'intertextuality' — among all texts. Post-structuralist thought posits that intertextuality arises out of both the reading and the writing process. Texts do not exist independently of someone reading them, and the text is never a separate 'work,' but is always permeated by other texts that the reader brings to the process of reading.").

²²² See generally RICHARD BAUMAN, *A WORLD OF OTHERS' WORDS: CROSS-CULTURAL PERSPECTIVES ON INTERTEXTUALITY* (2004) (discussing intertextuality as communicative practice in oral and literary texts); HEBEL, *supra* note 216 (identifying more than 2000 studies that deal with intertextuality, allusion and quotation); *INFLUENCE AND INTERTEXTUALITY IN LITERARY HISTORY*, *supra* note 210 (exploring and clarifying conceptions of influence and intertextuality in literary history); STEPHEN J. LYNCH, *SHAKESPEAREAN INTERTEXTUALITY: STUDIES IN SELECTED SOURCES AND PLAYS* (1998) (discussing sources of Shakespeare's plays as well as Shakespeare's revisionary practices); *MIMESIS AND INTERTEXTUALITY IN ANTIQUITY AND CHRISTIANITY* (Dennis R. MacDonald ed., 2001) (examining ways in which early Christian writers practiced mimesis of literary models from Greco-Roman world).

texts as well as the broader social and cultural context within which such texts are produced and received.²²³ With an intertextual understanding of texts, originality takes on a different connotation and may even assume less importance since all texts are intertextual.²²⁴ In contrast, copyright doctrine largely ignores the insights of an intertextual understanding of cultural works in its search to identify one work as an urtext for infringement analysis.²²⁵

Legal discussions of relationships between texts focus to an inordinate degree on questions of transformative use as a basis for determining the acceptability of uses of existing works, as is often reflected in considerations of fair use.²²⁶ What constitutes a

²²³ BARTHES, *supra* note 213, at 146 (“[A] text is . . . multi-dimensional space in which a variety of writings, none of them original, blend and clash.”); BLOOM, *supra* note 216, at xxiii (“‘Influence’ is a metaphor, one that implicates a matrix of relationships — imagistic, temporal, spiritual, psychological — all of them ultimately defensive in their nature. . . . [T]he anxiety of influence *comes out of* a complex act of strong misreading, a creative interpretation Without Keats’s reading of Shakespeare, Milton, and Wordsworth, we could not have Keats’s odes and sonnets and his two *Hyperions*. Without Tennyson’s reading of Keats, we would have almost no Tennyson.”).

²²⁴ BLOOM, *supra* note 216, at 7 (“But poetic influence need not make poets less original; as often it makes them more original, though not therefore necessarily better.”); TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 119 (2d ed. 1997) (“There is no such thing as literary ‘originality,’ no such thing as the ‘first’ literary work: all literature is ‘intertextual.’”); Rotstein, *supra* note 178, at 751 (discussing approach to originality that focuses on “how the text modulates or varies code and convention”).

²²⁵ Cf. J.R.R. TOLKIEN, *On Fairy Stories*, in *THE TOLKIEN READER* 3, 21 (1966) (discussing origins of fairy stories and noting that independent invention, diffusion and inheritance have played role in shaping fairy stories and commenting that “[w]hile if we believe that sometimes there occurred the independent striking out of similar ideas and themes or devices, we simply multiply the ancestral inventor but do not in that way the more clearly understand his gift”); see also OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at http://dictionary.oed.com/cgi/entry/50273837?single=1&query_type=word&queryword=urtext&first=1&max_to_show=10 (last visited Nov. 7, 2007) (defining urtext as “[a]n original text; the earliest version”).

²²⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994) (holding that “a parody’s commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying” in copyright infringement action about parody of Roy Orbison’s song, *Pretty Woman*); *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006) (finding fair use in case involving transformative use of photograph by artist Jeff Koons); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (finding that defendant is entitled to fair use defense for novel, *The Wind Done Gone*, parody based on Margaret Mitchell’s novel, *Gone with the Wind*, and remanding case for further proceedings); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (describing transformative standard for fair use and identifying socially beneficial contributions for different purpose or manner as being core elements of

transformative use is potentially highly subjective. Transformative uses are also important aspects of cultural production, although actual uses of existing texts in the creation of new works extend far beyond notions contained within legal discussions of transformative use.²²⁷ Further, legal discussions of transformativity often reflect an implicit assumption of a single authoritative reading of a particular text that may be determined by the court characterizing the work as transformative or not.²²⁸ Legal readings of cultural texts may thus demonstrate a tendency toward unitary interpretations and the suppression of complexities of both creation and reception.

Ignoring the potential complexities of cultural production in legal discourse may privilege certain forms of cultural production at the expense of forms of cultural production that are improvisatory or that rely to a greater extent on uses of existing cultural elements.²²⁹ Notions of infringement may thus be based on assumptions about what constitutes an act of creation which may be culturally biased in discounting forms of cultural production based upon other aesthetics of creation.²³⁰ Assumptions about cultural production evident in *Rogers v. Koons*, a case involving a sculpture by Jeff Koons that copied a photograph of puppies taken by photographer Art Rogers, “discourage artists whose methods entail reworking preexisting materials, while rewarding those whose dedication to ‘originality’ qualifies them as true ‘authors’ in the Romantic sense.”²³¹

Further, current conceptions of copyright also do not fully appreciate production forms of certain types of music derived from an African American cultural aesthetic.²³² This lack of appreciation arises

transformative uses); Netanel, *supra* note 13, at 296 (noting that social harm from silencing transformative expression tied to robust public debate, spread of knowledge, and questioning of cultural hierarchy is of paramount importance to democratic society). See generally David Lange & Jennifer Lange Anderson, Copyright, Fair Use and Transformative Critical Appropriation (Nov. 9-11, 2001) (unpublished essay, on file with Conference on the Public Domain), available at <http://www.law.duke.edu/pd/papers/langeand.pdf>.

²²⁷ See, e.g., Arewa, *supra* note 8, at 574-76 (discussing potential limitations to legal conceptions of transformative fair use).

²²⁸ Rotstein, *supra* note 178, at 728 (“[A]s to each aspect of copyright law, the concept of ‘work’ can lead to highly problematic techniques of decisionmaking. In particular, the concept of ‘work’ fosters the illusion that a judge or jury can find a single valid interpretation of a work in a copyright case and on that basis make sound decisions.”).

²²⁹ Arewa, *supra* note 8, at 569-76.

²³⁰ *Id.* at 569-74.

²³¹ Jaszi, *supra* note 99, at 48.

²³² VAIDHYANATHAN, *supra* note 92, at 117-48; Arewa, *supra* note 8, at 612-22;

from certain African American cultural forms being based on an aesthetic of repetition and revision.²³³ These African American forms of cultural production have been studied from the perspective of a number of fields, including linguistics, anthropology, folklore, music, and literary criticism.²³⁴ The lack of appreciation of such forms is evident in legal treatment of blues and hip-hop music.²³⁵

The varied approaches to understanding cultural production in other disciplines highlight that expressive culture draws from many resources, a significant portion of which are common pools from which we all sip.²³⁶ Cultural texts that use elements from this common pool are then also used and reconstituted for acts of signification or meaning in varied spatial and temporal contexts. The processes by which cultural meanings are generated and cultural texts created are fundamental aspects of human culture. Self-expression and the creation of cultural texts also involve fundamental human capabilities whose value is not always fully appreciated in copyright discourse.²³⁷

Olufunmilayo B. Arewa, *Borrowing the Blues: Robert Johnson, The Rolling Stones, and Copyright* (Nov. 1, 2007) (unpublished manuscript, on file with author).

²³³ HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM* 110 (1988) (“The texts in the Afro-American canon can be said to configure into relationships based on the sorts of repetition and revision inherent in parody and pastiche.”); James A. Snead, *On Repetition in Black Culture*, 15 *BLACK AM. LITERATURE* F. 146, 149-50 (1981) (noting that “[b]lack culture highlights the observance of . . . repetition” and “[r]epetition in black culture finds its most characteristic shape in performance: rhythm in music and dance and language”).

²³⁴ See, e.g., GRAHAM ALLEN, *INTERTEXTUALITY* 165-73 (2000) (discussing intertextuality in reference to *The Signifying Monkey*); HOUSTON A. BAKER, JR., *BLUES, IDEOLOGY, AND AFRO-AMERICAN LITERATURE* 7 (1984) (suggesting that blues be considered as “forceful matrix in cultural understanding . . . [whose] performers offer interpretations of the experiencing of experience”); GATES, *supra* note 233, at xxiv (discussing nature of signifying, which is based on repetition and revision, as being fundamental to African American artistic forms, including painting, sculpture, music, and language use); Arewa, *supra* note 8, at 612-22 (discussing African American aesthetic forms and music). See generally ROGER D. ABRAHAMS, *DEEP DOWN IN THE JUNGLE* (1970) (discussing toasts, form of African American folklore that involves verbal contests in performance of certain narratives, including *The Signifying Monkey*); WILLIAM LABOV, *LANGUAGE IN THE INNER CITY* (1972) (studying form, rules, and usage of Black English Vernacular).

²³⁵ See generally Arewa, *supra* note 8 (discussing ways in which copyright doctrine does not appreciate creation aesthetics at core of much hip-hop music); Arewa, *supra* note 232 (noting that copyright treatment of blues music and blues artists is not unrelated to dominant conceptions of appropriate creation aesthetics).

²³⁶ Litman, *supra* note 109, at 1018 (discussing importance of commons in copyright).

²³⁷ Cf. NUSSBAUM, *supra* note 192, at 77-79 (discussing central human capabilities,

The creation and reception of cultural texts and meanings also may involve use of signifiers that may also serve as a basis for the development of knowledge that may be protected by intellectual property. This use of the term “signifier” derives from linguist Ferdinand de Saussure’s discussion of the signifier and the signified as components of a sign. In Saussure’s relational framework, a linguistic sign is arbitrary but has meaning by virtue of its relationships to other signs. A sign may be divided into two aspects, the signifier (sound-image) and the signified (concept).²³⁸ Thus, the signifier “tree” is associated with a certain concept. In Latin, a similar concept would be associated with the signifier “arbor.”²³⁹ The relational nature of meanings in language suggests that intellectual property frameworks, which govern access to critical cultural elements,²⁴⁰ should foster the development of fundamental human capabilities with respect to self-expression by better accommodating a diversity of uses and consequent multiplicity of meanings by ensuring access to building blocks of cultural meaning and expression, including existing works.

The Internet brings issues of production of cultural texts to the forefront because it is often unavoidably intertextual, collaborative, interconnected, and hypertextual in many respects.²⁴¹ The standard cultural production models used in copyright make assumptions about the nature of acceptable cultural production. These models also at least implicitly assume a certain type of reception of texts that often imposes a unitary meaning on potential users of cultural products as well.²⁴²

Considering copyright through an intertextual lens has significance for conceptions of access to an existing work. Intertextuality draws attention to the varied and multifarious relationships that may exist among texts and authors and the potential complexity of creation

including self-expression).

²³⁸ FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 66-67 (1959).

²³⁹ *See id.*; *see also* ALLEN, *supra* note 234, at 8-10 (“The meanings we produce and find within language, then, are relational; they depend upon processes of combination and association within the differential system of language itself.”).

²⁴⁰ PATTERSON & LINDBERG, *supra* note 37, at 5 (“[C]opyright law is the law governing access to the culture of our society in all its aspects — social, political, economic, educational, and artistic.”).

²⁴¹ ALLEN, *supra* note 234, at 205 (discussing how hypertextuality “fulfils the textual and intertextual vision of poststructuralists such as Barthes, Kristeva and Derrida”); GEORGE P. LANDOW, *HYPERTEXT 3.0: CRITICAL THEORY AND NEW MEDIA IN AN ERA OF GLOBALIZATION* 7 (2006) (discussing hypertextuality and World Wide Web).

²⁴² Arewa, *supra* note 93, at 327-33.

processes.²⁴³ In addition to proving that the plaintiff owns a copyright for a work that has been allegedly infringed, one of the core aspects of proving copyright infringement is determining whether an allegedly infringing defendant had access to and copied the existing work.²⁴⁴ An intertextual understanding of cultural production potentially complicates the question of what constitutes access to an existing work. This is partially because an intertextual understanding would focus attention on the potential existence of multiple connections between one work and another accused of infringing it and other texts that exist outside the limited universe of the two works.²⁴⁵ By underscoring the ways in which new creations are based on readings, interpretations, and various methods of copying existing texts, an intertextual understanding of cultural production also implicates the freedom to copy.

2. Copyright and the Limited Cultural Gaze

Copyright doctrine generally fails to recognize the importance of the freedom to copy. In determining whether infringement has occurred, copyright cases involving artistic works typically focus on the two works involved in a particular case. Infringement cases thus do not typically examine the broader contexts within which creation occurs or the norms of creation in different contexts, particularly in cases involving artistic works.²⁴⁶ This relative inattention to contexts of creation and texts that exist outside of the narrow gaze of the court's analysis can at times lead to questionable assumptions and

²⁴³ See LANDOW, *supra* note 241, at 6-9 (noting figure of reader as writer is characteristic of both ancient literature and popular culture and discussing ways in which new creations involve active reading of existing ones); Clayton & Rothstein, *supra* note 211, at 6 (noting that shift away from author-centered criticism in literary area has led to broadening of author-centered criticism so as "to take into account the multifarious relations that can exist among authors").

²⁴⁴ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (noting that two distinct elements in finding copyright infringement: copyright ownership and copying of original constituent elements of work); 4-13 NIMMER & NIMMER, *supra* note 27, §§ 13.01, 13.03[B][2][b]; see also Arnstein v. Porter, 154 F.2d 464, 468-69 (2d Cir. 1946) (discussing copying and unlawful appropriation as two elements of substantial similarity); Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 277 (1993) (noting that three elements of copyright ownership, access, and substantial similarity must be proven to show infringement); Latman, *supra* note 33, at 1206 (discussing use of test of probative similarity in copyright infringement cases).

²⁴⁵ See *supra* note 243; see also BLOOM, *supra* note 216, at xix ("[G]reat writing is always at work strongly (or weakly) misreading previous writing.").

²⁴⁶ See *supra* notes 57-73 and accompanying text.

rationalizations of decisions in copyright cases. This limited vision may also lead to failure to recognize the potential importance and creative significance of various methods that involve copying in the creation of new texts.²⁴⁷ This limited gaze leads courts to make connections between two works that rely on fairly contorted theories of access rather than the potential that both might arise from common sources or traditions in the broader cultural context. Courts' limited gaze is exacerbated by judicial tests applied in the copyright context, which may involve subjective determinations that reflect judges' personal values and backgrounds.²⁴⁸

a. *George Harrison and the Chiffons: Bright Tunes and Subconscious Infringement in Copyright*

This limited cultural gaze is evident in the fifteen years of copyright litigation relating to songs by the Chiffons and George Harrison. In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, the court found that Harrison's song *My Sweet Lord* infringed the song *He's So Fine*, originally recorded by the Chiffons.²⁴⁹ Although the original suit was filed in 1971 and the court held in 1976 that *My Sweet Lord* infringed *He's So Fine*,²⁵⁰ the litigation in this case continued through 1991.

The *Bright Tunes* litigation illustrates the ways in which courts compare two texts side-by-side with a limited cultural gaze or scope of analysis. The court in the first *Bright Tunes* litigation identified two virtually identical melodic motifs that appear in *He's So Fine* and *My Sweet Lord*. The first is Motif A, which is comprised of sol-mi-re

²⁴⁷ *Feist Publ'ns*, 499 U.S. at 345-46.

²⁴⁸ See Arewa, *supra* note 8, at 580-81 (arguing that social value judgments about hip-hop music and its producers have influenced legal treatment of hip-hop in infringement cases); 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, 231-32 (1990) (arguing that judges' assessment of artistic value of works, "subjective determination[s] that reflect[s] the personal values and background of the judge," are basis for infringement determinations, rather than often advanced objective labels of idea and expression).

²⁴⁹ *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 982 (2d Cir. 1991); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 841 F.2d 494, 496 (2d Cir. 1988) (per curiam); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 508 F. Supp. 798, 803 (S.D.N.Y. 1981), *aff'd with modification and remanded by* 722 F.2d 988 (2d Cir. 1983); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 178 (S.D.N.Y. 1976).

²⁵⁰ *Bright Tunes*, 420 F. Supp. at 181 (holding that Harrison committed subconscious infringement in copying *He's So Fine*).

(GED).²⁵¹ Motif B is identified as sol-la-do-la-do (GACAC), with a second use adding a grace note and thus resulting in sol-la-do-la-re-do (GACADC).

The *Bright Tunes* court noted that the harmonic structure in *My Sweet Lord* is based on an alternating Minor II chord and Major V chord,²⁵² but does not otherwise discuss in any serious way the harmonic, rhythmic, or other musical features of either work in its opinion.²⁵³ The court's emphasis on melody demonstrates the limited cultural gaze of copyright with respect to musical works.²⁵⁴ This emphasis on melody, which is evident in many music infringement cases,²⁵⁵ fails to take sufficient account of the implications of musical conventions, as well as the use of similar harmonic and melodic elements in multiple songs.²⁵⁶ In addition, similarities in musical work may arise at least in part from the limited amount of raw material available in the form of notes: the western musical scale contains a total of twelve tones from which musical works may be constructed.²⁵⁷ Harmonic and rhythmic dissimilarities are often ignored by courts, as is timbre, which has been recognized in studies of musical perception as an important feature by which listeners distinguish musical works.²⁵⁸

Musical conventions or styles within particular genres may mean that many musical works may utilize similar melodic, harmonic, and lyrical elements,²⁵⁹ some of which are not protected by copyright.²⁶⁰ What is

²⁵¹ *Id.* at 178.

²⁵² *Id.* at 179.

²⁵³ Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 431-33 (1988) (noting that elements other than melody, harmony, and rhythm should be considered in music infringement litigation, including timbre and spatial organization).

²⁵⁴ *See id.* at 431-32.

²⁵⁵ Arewa, *supra* note 8, at 623 (noting overemphasis of melody in music copyright cases); Keyt, *supra* note 253, at 431-32.

²⁵⁶ *See* Rob Paravonian, *Pachelbel Rant* (Nov. 21, 2006), <http://www.youtube.com/watch?v=JdxkVQy7QLM> (using Pachelbel's Canon to illustrate how multiple songs use similar chord structures and melodic elements).

²⁵⁷ GEORGE THADDEUS JONES, *MUSIC THEORY* 10 (1974) (noting 12 tones of Western European musical system); VAIDHYANATHAN, *supra* note 92, at 127 (noting that major musical scale includes only eight notes); Arewa, *supra* note 8, at 557 (noting limitations from limited number of musical tones and musical conventions).

²⁵⁸ DANIEL J. LEVITIN, *THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION* 50 (2006) (noting that timbre has become increasingly important over last 200 years in Western music); Keyt, *supra* note 253, at 431-32.

²⁵⁹ Such issues have been discussed in relation to blues music. *See, e.g.,* EILEEN SOUTHERN, *THE MUSIC OF BLACK AMERICANS: A HISTORY* 334-36 (3d ed. 1997) (noting

perhaps most remarkable about the *Bright Tunes* case is the extent to which the court focused its gaze largely on the two works involved. As a result, when the court could not find direct copying of *He's So Fine* by George Harrison and his collaborators, the court relied on a theory of subconscious infringement that emphasizes that Harrison and his collaborators must have known about the Chiffons' song because it was on the music charts in both Britain and the United States at the same time that the Beatles (of which George Harrison was a member) had hits high on the music charts.²⁶¹ This doctrine of subconscious infringement is also reflected in earlier copyright cases.²⁶²

Although the *Bright Tunes* case's outcome is not necessarily incorrect, the court made questionable assumptions in determining infringement. Subconscious infringement doctrine reflects the author-centric nature and limited gaze of much copyright doctrine. This approach is author-centric in that it assumes that conscious or subconscious authorship and copying are the only explanation for similarity between two works.

typical characteristics of blues music include three line stanzas, personal lyrics, duple rhythm with marked syncopated patterns, entire song in 12 bars, and altered scale with third, fifth, seventh, and occasionally sixth, degrees being treated ambiguously and sometimes being lowered); JEFF TODD TITON, *EARLY DOWNHOME BLUES: A MUSICAL AND CULTURAL ANALYSIS* 137-74 (2d. ed. 1994) (describing musical characteristics of traditional country blues).

²⁶⁰ *Vargas v. Transeau*, No. 04 Civ.9772 WHP, 2007 WL 1346618, at *6 (S.D.N.Y. May 9, 2007) (analyzing degree of similarity between drumbeats in two works using Fast Fourier Transform analysis and granting summary judgment for infringement in case where plaintiff asserted that striking similarity was sufficient to find infringement); VAIDHYANATHAN, *supra* note 92, at 118 (noting that I-IV-V chord progression is characteristic of blues tradition and is generally not considered protectible by copyright); Anthony Falzone's Blog, <http://cyberlaw.stanford.edu/node/5400> (May 9, 2007, 15:06 PST) ("This [*Vargas*] case is about much more than whether one artist copied a particular drumbeat from another. Basic drumbeats and r[h]ythm patterns should not be subject to copyright protection at all. If one musician can sue another and impose hundreds of thousands of dollars in legal costs just because one short drumbeat happens to sound a bit like another, that threatens creative freedom in a profound way. We hope this discourages Vargas and others from pursuing spurious claims like this.").

²⁶¹ *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 179 (S.D.N.Y. 1976) ("In the United States, [*He's So Fine*] was No. 1 on the billboard charts for five weeks; in England, Harrison's home country, it was No. 12 on the charts on June 1, 1963, a date upon which one of the Beatle songs was, in fact, in first position. For seven weeks in 1963, *He's So Fine* was one of the top hits in England.").

²⁶² See *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147-48 (S.D.N.Y. 1924). ("Everything registers somewhere in our memories, and no one can tell what may evoke it Once it appears that another has in fact used the copyright as the source of this production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick.").

This author-centric approach does not reflect current approaches to the production of cultural texts in other disciplines. Moreover, it fails to take adequate consideration of the possibility of other common cultural sources, derivations, or works that might be an alternative explanation for similarity between two works. The author-centered analysis typical in legal analysis also may potentially vitiate the potential defense to infringement of independent creation.²⁶³

To its credit, the *Bright Tunes* court spent a significant amount of time describing the process by which *My Sweet Lord* was composed.²⁶⁴ However, as is the case with many legal analyses of popular music, the *Bright Tunes* court failed to come to terms with the creative significance of any uses of existing works by Harrison.²⁶⁵ This reflects a common problem in copyright analysis of popular music in particular, which has become increasingly characterized by the use of sound recordings as an integral part of musical creation.²⁶⁶ The types of musical creation that occur in recording studios may thus challenge existing analyses of copyright infringement on two levels: they are both highly collaborative and may also reflect significant improvisation.²⁶⁷ The recording studio has thus become in many respects, “the primary site in which the creation of popular music takes place, [displacing] the musical score as a means of musical composition.”²⁶⁸ This manner of creation creates difficulties for analysis of copyright infringement of such works, as is evident in the *Bright Tunes* case. The *Bright Tunes* court thus essentially fails to come to terms with the creative significance of Harrison’s quasi-improvisatory performance.²⁶⁹

²⁶³ 3-12 NIMMER & NIMMER, *supra* note 27, § 12.10[B][2][b] (noting that independent creation can be used to negate allegations of copying but also noting that “[a]n example might arise when the similarities between plaintiff’s and defendant’s works are sufficiently overwhelming and pervasive (including perhaps unusual common errors) so that the similarities in themselves necessarily preclude the possibility of independent creation and thereby render the defendant’s denial of copying a non-genuine issue of fact” (citations omitted)).

²⁶⁴ *Bright Tunes*, 420 F. Supp at 179 (discussing circumstances of composition of *My Sweet Lord*).

²⁶⁵ See *supra* note 16 and accompanying text.

²⁶⁶ Théberge, *supra* note 16, at 141 (“With the introduction in the 1960s of multitrack recording technology and the recording practices associated with it, popular musicians began to explore the possibilities offered by the recording medium, to regard sound recording not simply as a means of reproducing music but as an integral part of musical creation.”).

²⁶⁷ *Id.* at 141-44.

²⁶⁸ *Id.* at 143.

²⁶⁹ The Comment to this case on the Columbia Law School Arthur W. Diamond

The language used by the *Bright Tunes* court in determining that subconscious infringement had occurred highlights the author-centric and limited nature of the scope of the court's cultural gaze in looking at cultural texts that share similar or even identical features:

I conclude that the composer, in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success. Did Harrison deliberately use the music of *He's So Fine*? I do not believe he did so deliberately. Nevertheless, it is clear that *My Sweet Lord* is the very same song as *He's So Fine* with different words, and Harrison had access to *He's So Fine*. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.²⁷⁰

The *Bright Tunes* court did not fully appreciate the actual processes by which music has typically been composed. Such methods of composition have included pervasive borrowing and other forms of copying in all musical periods and genres.²⁷¹ The court's discussion of the two works does not reflect sufficient recognition of the implications of borrowing and copying for copyright frameworks or the need for a more clearly defined scope of freedom to copy as an integral part of the creation process. This discussion is also entirely removed from any cultural context of creation. As a result, the court does not appear to make any significant inquiry as to the origin of the song *He's So Fine* or reasons other than copyright infringement as to

Law Library Music Plagiarism Project website notes the gap between the court's analysis and the actual recording composition practices exhibited in the Harrison song. See Columbia Law School Arthur W. Diamond Law Library Music Plagiarism Project, *Bright Tunes Music v. Harrisongs Music*, http://www.columbia.edu/ccnmtl/projects/law/library/cases/case_bright_harrisongs.html (noting "the song's real locus of economic value: Harrison's quasi-improvisational recorded performance that was entirely responsible for the popularity of this number").

²⁷⁰ *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976).

²⁷¹ Arewa, *supra* note 8, at 562-63.

why two works might sound similar. Thus the court made assumptions about relative rights and infringement based largely on the universe of its limited gaze.

b. Striking Similarity and Copyright Infringement: Three Boys Corporation and Alternative Explanations for Similar Works

Three Boys Music Corp. v. Bolton is another case that considers subconscious infringement as a possible explanation for similarities between two works. This case involved the alleged infringement by Michael Bolton's song *Love Is a Wonderful Thing* of an Isley Brothers song by the same name.²⁷² Although the title may seem suggestive in this case, some 129 songs with this same name have been registered with the Copyright Office at the time of this case.²⁷³ Giving deference to the jury's credibility determinations and finding of substantial similarity at trial, the appeals court in *Three Boys* declined to overturn a jury verdict finding that the Bolton song infringed the earlier Isley Brothers work.²⁷⁴

The *Three Boys* court appears to at least have given consideration to other explanations for the similarity between the two works, indicating that the Bolton expert witness could give no examples from prior art of works with features similar to the Isley Brothers song.²⁷⁵ Despite this recognition, the *Three Boys* court's analysis of subconscious infringement reflects the same author-centric orientation and limited cultural gaze that is evident in the *Bright Tunes* case. Michael Bolton's acknowledged reverence of the Isley Brothers and the existence of a 1991 CD version of the Isley Brothers song are thus used to bolster fairly tenuous assumptions about access and subconscious infringement.²⁷⁶ The composition in which Bolton participated was also far removed from the Isley Brothers song in time as well: the Isley Brothers song was released in 1966 as a single, but not on an album, more than thirty years prior to the Bolton piece.²⁷⁷ The Isley Brothers song was far more obscure than the Chiffons' song

²⁷² *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 480 (9th Cir. 2000).

²⁷³ *Id.* at 484.

²⁷⁴ *Id.* at 485-86 ("We refuse to interfere with the jury's credibility determination, nor do we find that the jury's finding of substantial similarity was clearly erroneous.").

²⁷⁵ *Id.* at 485 ("Although the appellants presented testimony from their own expert musicologist, Anthony Ricigliano, he conceded that there were similarities between the two songs and that he had not found the combination of unprotectible elements in the Isley Brothers' song 'anywhere in the prior art.'").

²⁷⁶ *Id.* at 483-85.

²⁷⁷ *Id.* at 480-81.

in the *Bright Tunes* case and was not listed on any Top 100 charts, but was listed by Billboard on September 17, 1966 at number 110 in the “Bubbling Under the Hot 100.”²⁷⁸ The subconscious infringement theory in the *Three Boys* case is consequently even more tenuous than in the *Bright Tunes* case.

These and other cases, however, reflect somewhat inconsistent views of when similarity itself is sufficient to infer copying.²⁷⁹ Other cases demonstrate the tendency in copyright cases for copying to be assumed to be a sufficient explanation for striking similarity. *Repp v. Lloyd Webber* involved an allegation of infringement by a liturgical composer who asserted that the successful theme song from *Phantom of the Opera* was based on his setting of the *Magnificat* from the *Book of Luke*.²⁸⁰ Although the district court found that striking similarity did not indicate copying, the appeals court reversed the district court decision.²⁸¹ In the *Repp* decision, the Second Circuit noted that considerable evidence of striking similarity created a genuine issue of material fact, notwithstanding the lack of evidence demonstrating access.²⁸² The *Repp* case, taken together with *Bright Tunes* and *Three Boys*, underscores the frequently author-centric nature of copyright infringement analysis. The analyses in these cases also indicate the extent to which copyright doctrine includes an incomplete understanding of creation processes that might lead to similarity among different works. These cases tend to conceptualize similarity as reflecting copying, which necessarily must mean potential infringement, even if a theory of subconscious infringement is

²⁷⁸ *Id.* at 480.

²⁷⁹ *See Ty, Inc. v. GMA Accessories, Inc.* 132 F.3d 1167, 1170 (7th Cir. 1997) (“If, therefore, two works are so similar as to make it highly probable that the later one is a copy of the earlier one, the issue of access need not be addressed separately, since if the later work was a copy its creator must have had access to the original.”); *Selle v. Gibb*, 741 F.2d 896, 902 (7th Cir. 1984) (affirming judgment notwithstanding verdict at district court level in infringement case involving Bee Gees as defendants, noting that circumstantial evidence of access must exist by reasonable possibility, not bare possibility).

²⁸⁰ *Repp v. Lloyd Webber*, 947 F. Supp. 105, 114 (S.D.N.Y. 1996).

²⁸¹ *Repp v. Lloyd Webber*, 132 F.3d 882, 890 (2d Cir. 1997) (finding genuine issue of material fact, notwithstanding district judge’s aural examination); *see also Gladwell, supra* note 24 (discussing striking similarity in musical works involved in *Repp v. Lloyd Webber* case and noting that many musical works are strikingly similar).

²⁸² *Repp*, 132 F.3d at 890 (finding that although “little, if any, evidence demonstrating access,” existed, there was “considerable evidence” of striking similarity, including opinions given by plaintiff’s musicologist expert witnesses, that created genuine issue of material fact, notwithstanding district judge’s aural examination).

required to reach a determination that a work has infringed. Such views of similarity, copying, and infringement fundamentally fail to take account of the ways in which works may be created more generally and the scope of the freedom to copy in the creation of new works. Striking similarity cases also highlight the important role often played by expert witnesses in copyright infringement cases.²⁸³

The limited gaze in copyright cases means that courts have great difficulty in instances of striking similarity where no access can be proven. As courts recognized in cases involving computer programs, creation processes in varied contexts may not be well understood by courts. As a result, courts' analyses in cases involving artistic works would benefit from more comprehensive inquiry that takes greater account of the broader cultural contexts within which texts are created and norms of creation within such contexts. Recognition of such factors is essential for integrating the freedom to copy in copyright doctrine. Cases involving the creation of computer programs also suggest that copyright infringement analysis could benefit from greater attention to norms of creation for artistic works in a similar fashion to assessments of computer programs. Courts should thus take account of varied ways that artistic works may be created rather than rely on unstated assumptions about norms of creation based on idealized conceptions of creativity and processes of creation.

Existing copyright cases reflect an emphasis on authorship and a denial of the reality that works from within a similar cultural setting may be quite similar for reasons that may not be a simple question of whether a defendant copied or did not copy from an existing work. As discussions of intertextuality and borrowing suggest, the relationship between texts is frequently complex and multifarious. This suggests that copyright frameworks need to address more comprehensively the manners in which copying may be an inherent part of creation, at least in some instances. In doing so, copyright doctrine must come to terms with the scope of the freedom to copy and the ways in which

²⁸³ Vargas v. Transeau, No. 04 Civ.9772 WHP, 2007 WL 1346618, at *6 (S.D.N.Y. May 9, 2007) (granting summary judgment in copyright infringement case in part based on experts "expressly admit[ting] to the possibility of independent creation"); The Patry Copyright Blog, <http://williampatry.blogspot.com/> (May 17, 2007, 8:16 PST) ("Striking similarity and experts are, for me, a toxic combination. Striking similarity is the last refuge of delusional plaintiffs who have failed to meet the pitifully low standard of showing a reasonable opportunity of access: experts are the vehicle used to help such plaintiffs survive a summary judgment motion and get to a jury."); *id.* (June 5, 2007, 5:26 PST) ("The use of experts in copyright infringement analyses where copying and substantial similarity are at issue is problematic.").

new works can and should use existing works, and the role cultural conventions and norms of creation might play in creation processes.

3. Formulaic Cultural Production and *Nichols v. Universal Pictures*

Formulaic cultural production is another area where consideration needs to be given to how courts approach infringement analysis. The denial of borrowing and collaboration in copyright doctrine has important consequences. This denial may cause legal considerations of cultural production to fail to consider adequately the extent to which certain works may reflect formulaic aspects. A failure to adequately account for borrowing may also lead to an improper identification and incomplete distinguishing of formulaic works from other works that copy and use existing ideas, and expression, or conventions in their creation. The denial of copying thus hinders the development of a nuanced typology of copying in the law.

Formulaic aspects of cultural production have been assessed in a number of contexts in the folklore and popular culture areas. Russian folklorist Vladimir Propp identified certain formulaic aspects of Russian oral folktale narratives in his seminal study of such narratives.²⁸⁴ Propp's work suggests that "the tremendous diversity of details in Russian wondertales [fairy tales] is reducible to one single plot, that the elements of this plot (thirty-one in number) are always the same and always follow one another in the same order, and, finally, that only seven different characters should be taken into consideration."²⁸⁵

The syntagmatic structuralist approach of Propp is by no means limited to oral narratives and has been applied, for example, to popular culture, including Western films.²⁸⁶ Sociologist Will Wright has extended Propp's analytical framework to popular culture and identifies four underlying narrative structures of Western films that subsume a broad array of film productions.²⁸⁷

²⁸⁴ See VLADIMIR PROPP, *MORPHOLOGY OF THE FOLKTALE 19-65* (2d ed. 1968).

²⁸⁵ Anatoly Liberman, *Introduction* to VLADIMIR PROPP, *THEORY AND HISTORY OF FOLKLORE*, at ix, xii (Anatoly Liberman ed., Ariadna Y. Martin & Richard P. Martin trans., 1984).

²⁸⁶ See WILL WRIGHT, *SIXGUNS AND SOCIETY: A STRUCTURAL STUDY OF THE WESTERN 29-123* (1975) (discussing narrative and symbolic structure of Western films).

²⁸⁷ See *id.*

The first underlying narrative structure identified by Wright is the classical Western film structure, which includes the following sixteen functions:²⁸⁸

1. The hero enters a social group.
2. The hero is unknown to the society.
3. The hero is revealed to have an exceptional ability.
4. The society recognizes a difference between themselves and the hero; the hero is given a special status.
5. The society does not completely accept the hero.
6. There is a conflict of interests between the villains and the society.
7. The villains are stronger than the society; the society is weak.
8. There is a strong friendship or respect between the hero and a villain.
9. The villains threaten the society.
10. The hero avoids involvement in the conflict.
11. The villain endangers a friend of the hero.
12. The hero fights the villain.
13. The hero defeats the villain.
14. The society is saved.
15. The society accepts the hero.
16. The hero loses or gives up his special status.

Some of these functions are optional and may not occur in each classical Western film.²⁸⁹ These functions do, however, describe common actions and situations that occur in classical Western films.²⁹⁰ Wright sees these sixteen functions as describing the narrative structure and presenting a “dramatic model of communication and action between characters who represent different types of people in our conceptualization of society.”²⁹¹ Unlike Propp’s functions, the

²⁸⁸ *Id.* at 40-49.

²⁸⁹ *See id.* at 46 (noting that functions two, eight, 10 and 11 are optional).

²⁹⁰ *Id.* at 40.

²⁹¹ *Id.* at 49; *see also* Federico Varese, *The Secret History of Japanese Cinema: The*

functions in Wright's Western narratives do not necessarily occur in order.²⁹²

Wright also identifies three other formulaic structures in Western films. The second narrative structure is the vengeance plot.²⁹³ The vengeance narrative structure includes thirteen functions. The third narrative structure, the transitional plot, is characterized as representing a reorganization of images and narrative structure vis-à-vis the classical Western narrative structure and constituting a direct inversion of the classical Western structure.²⁹⁴ The fourth and final narrative structure is the professional plot, which is similar to the classical Western one, but in which the hero is a professional fighter.²⁹⁵ The professional plot consists of twelve functions.²⁹⁶ The formulaic aspects of narrative structures identified by Propp and Wright are distinct from plot.²⁹⁷

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

Yakuza Movies 5-6 (Univ. of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 22/2006, 2006), available at <http://ssrn.com/abstract=902415> (noting circular borrowing of symbols between films and real life, reflected in borrowing and adoption of behaviors and mannerisms from gangster films by Mafiosi in Italy and United States).

²⁹² See WRIGHT, *supra* note 286, at 31-32; 49 (noting that classical Western narrative structure includes *Cimarron*, *The Plainsman*, *Wells Fargo*, *Dodge City*, *Union Pacific*, *Destry Rides Again*, *Northwest Mounted Police*, *Canyon Passage*, *San Antonio*, *Duel in the Sun*, *California*, *Whispering Smith*, *Yellow Sky*, *Bend of the River*, *Shane*, *Saskatchewan*, *The Far Country*, *Vera Cruz*, *How the West Was Won*, and *Hombre*).

²⁹³ *Id.* at 64-69 (noting that vengeance plot includes films such as *Stagecoach*, *The Man from Laramie*, *One-Eyed Jacks*, and *Nevada Smith*).

²⁹⁴ *Id.* at 74 (noting that transitional narrative structure includes films such as *High Noon*, *Broken Arrow* and *Johnny Guitar*).

²⁹⁵ *Id.* at 99-113 (noting that films in professional narrative structure include *Rio Bravo*, *The Professionals*, *True Grit*, *The Wild Bunch*, and *Butch Cassidy and the Sundance Kid*).

²⁹⁶ *Id.* at 113.

²⁹⁷ Although Wright uses the term plot to refer to the narrative structures consisting of functions that he identifies, he clearly distinguishes between plot and narrative structure elsewhere. See JOHN STOREY, AN INTRODUCTORY GUIDE TO CULTURAL THEORY AND POPULAR CULTURE 74 (1993) (distinguishing Wright's approach from that of Claude Lévi-Strauss and noting that Wright insists that social meaning of myth must be analyzed with respect to both its binary structure and its narrative structure); WRIGHT, *supra* note 286, at 33 (distinguishing plot summaries from structural functions that characterize all Western films).

The existence of formulaic aspects of popular culture in particular has particularly significant implications for the ways in which copyright ownership rights are represented and allocated. This issue also remains under-examined from the perspective of copyright theory.

Copyright infringement analysis recognizes particular approaches that are better suited to analysis of formulaic works. In doing so, however, courts do not properly recognize that formulaic works are just one way in which similarities may arise between texts. By failing to recognize how similarities between formulaic works may be different from similarities that arise from other creation methods that involve copying and uses of existing expression and conventions, courts do not adequately visualize the many ways in which creation may occur and ways in which copying may play an important role in new creations.

In the *Nichols v. Universal Pictures Corp.* case, Judge Learned Hand considered the extent to which the elements of two works might indicate substantial similarity.²⁹⁸ In considering whether the film *The Cohens and the O'Kelleys* infringed the play *Abie's Irish Rose*, the court examined the specific elements in both works and developed the abstractions test for copyright infringement,²⁹⁹ which considers whether a “pattern as a sufficiently concrete expression of an idea warrants a finding of substantial similarity.”³⁰⁰ The test developed by the *Nichols* court reflects the application of substantial similarity analysis to formulaic works. The *Nichols* court and other courts that consider the discernible elements of formulaic works, however, tend to equate such elements with plot, making significant interpretive assumptions in the course of determining copyright infringement.³⁰¹ The formulation in *Nichols* represents a reasonable way to think about creation and the range of acceptable copying in the context of formulaic works, particularly literature and films. This test, however, provides a limited basis for understanding the range of acceptable copying, particularly with respect to works created by borrowing from or otherwise copying existing expression. The *Nichols* test is consequently not as well-suited to delineating the scope of acceptable copying in non-formulaic works.

²⁹⁸ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

²⁹⁹ *Id.* at 123 (finding no infringement between two works).

³⁰⁰ 4-13 NIMMER & NIMMER, *supra* note 27, § 13.03[A][1][b].

³⁰¹ *Nichols*, 45 F.2d at 122; 4-13 NIMMER & NIMMER, *supra* note 27, § 13.03[A]; Rotstein, *supra* note 178, at 761 (“Judge Hand obviously engaged in an act of interpretation of the works at issue in *Nichols*, reaching a conclusion about the works that was, by reason of the above analysis, not the only plausible interpretation.”).

C. *Idea, Expression, and Transmission*

The *Nichols* abstractions test represents a seminal expression of the idea-expression dichotomy in copyright. However, *Nichols* and other cases that discuss the idea-expression dichotomy fail to take sufficient account of the importance of copying of expression in the creation of new works. As Professor Julie Cohen has noted, this reflects the assumption in copyright theory that ideas rather than expression are the mode of transmission that copyright law should endeavor to leave free to be copied.³⁰² As a result, copying of expression itself is only permissible when such copying complies with limited, unpredictable, and often unsatisfactory legal avenues. The assumption that ideas are the mode of transmissions that may be freely copied disregards the insights of cultural studies disciplines in which the copying of expression is clearly demonstrated to be an important and at times critical element in the creation of new works.

Viewing cultural texts from the perspective of common cultural elements used in particular formulaic ways or that used some form of copying in the creation process could have implications for how two similar texts might be viewed in a copyright infringement case, for example.³⁰³ Such a perspective would also impel recognition of the copying of expression as a key vehicle by which new works may be created. This recognition would thus provide a range of explanations for why two works might be similar, not all of which should be impermissible under copyright law.

This suggests that greater emphasis should be given to the communicative elements of knowledge transmission. A focus on transmission requires courts to focus less on the apparent similarity of the actual cultural texts and more on contexts of creation and norms of creation in making determinations of infringement. Other perspectives on cultural texts from disciplines other than law may thus be utilized to shed light on ways to look at the formation and configuration of cultural texts within copyright theory. Such

³⁰² Cohen, *supra* note 14, at 1171.

³⁰³ Jaszi, *supra* note 99, at 47 (“[The judge’s] opinion (in *Rogers v. Koons*) effectively embraces an approach to substantial similarity analysis that is structurally biased in favor of the claims of the ‘author’ whose work has temporal priority — a standard that cannot account fully for the possibility that ‘recognizable’ borrowings incorporated from preexisting works into new ones may be of elements that are in the public domain.”); *see also* *Rogers v. Koons*, 751 F. Supp. 474, 481 (S.D.N.Y. 1990), *aff’d*, 960 F.2d 301 (2d Cir. 1992) (finding copyright infringement by sculpture by artist Jeff Koons that reproduced photographic image of German Shepherd puppies in photograph taken by Art Rogers).

approaches from other disciplines delineate ways in which similarities between works can be the result of more than a simple matter of copying.³⁰⁴

IV. UNFAIR USE AND THE FREEDOM TO COPY

*[T]he goal of copyright . . . is generally furthered by the creation of transformative works [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.*³⁰⁵

*The primary objective of copyright is not to reward the labor of authors but “to promote the Progress of Science and useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate.*³⁰⁶

The framing of copyright narratives has a significant impact on the effective operation copyright frameworks. Copyright discourse also shapes the public policy choices that are made in the copyright arena. The lack of consideration of the freedom to copy and the importance of copying in the creation of new works has significant implications. Recognition of the freedom to copy mandates reconsideration of copyright frameworks in light of the ways in which such frameworks might advance the freedom to copy as well as the goals of copyright more generally.

A. Copyright, Fair Use, and Property Rules

Copyright as applied to the realm of creation of new works typically operates as a property rule.³⁰⁷ Although liability rule elements are currently present in copyright, particularly through compulsory license provisions such as § 115,³⁰⁸ the general underlying

³⁰⁴ Rotstein, *supra* note 178, at 765 (“The difficulty in trying to interpret ‘works’ as if they were autonomous objects also underlies the courts’ attempts to identify ‘expression.’ Although the cases treat expression as the most valued portion of the text, they rarely say what expression is. Rather, expression is generally what is left over after ‘idea’ — the chaff of copyright — is removed.”).

³⁰⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

³⁰⁶ Lethem, *supra* note 2, at 68.

³⁰⁷ Arewa, *supra* note 8, at 638 (“[C]urrent copyright system operates under a property rule theory, in which nonconsensual takings are discouraged.”).

³⁰⁸ 17 U.S.C. § 115 (2000).

assumptions of copyright doctrine largely reflect the normative assumptions of a property rule. Under copyright as a property rule, copying of expression is generally characterized as a nonconsensual taking that should not occur unless the copyright owner agrees to the taking.³⁰⁹ This means, for example, in the case of hip-hop sampling, that a prospective sampler must obtain a separate permission from the owners of the copyrights for the musical composition and sound recording for each sample that the sampler wishes to use in his or her work.³¹⁰ Although copyright doctrine includes legal avenues for second comers such as the de minimis and fair use doctrines,³¹¹ such doctrines do not generally take adequate account of the reality of borrowing and copying of expression in the creation of new works, particularly in the music arena.³¹²

In contrast, a copyright liability rule regarding the creation of new works as contrasted with issues of distribution would permit infringement and later bargaining with the entitlement holder.³¹³ Liability rules better accommodate the freedom to copy and should be used with respect to at least some of the works to which a property rule now applies.³¹⁴ Although copyright has extensive administrative structures that temper the operation of the default property rule,³¹⁵ these administrative structures do not truly accommodate sufficient freedom to copy in creating new works.³¹⁶ Compulsory, or mechanical licenses, are licenses issued at prescribed statutory rates under the

³⁰⁹ Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 705 (1996) (“Property rules are liability rules with an exercise price so high that the option is almost never taken.”); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972) (articulating concept of “entitlements” protected by property, liability, or inalienability rules); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655 (1994) (noting that property rule is legal entitlement in which infringement can occur only after bargaining with entitlement holder).

³¹⁰ Arewa, *supra* note 8, at 637 (noting that current hip-hop industry practices require individually negotiated licenses).

³¹¹ *Id.* at 573-79.

³¹² *See generally id.* at 571-79 (discussing existing elements of copyright doctrine that are intended to permit access to existing works).

³¹³ *Id.* at 538-39 (noting that liability rules permit ex post determination of liability).

³¹⁴ Arewa, *supra* note 93, at 343-50.

³¹⁵ Merges, *supra* note 309, at 2655 (noting that copyright is property rule with administrative structure that effectively functions as statutory liability rule).

³¹⁶ Arewa, *supra* note 8, at 630-32.

Copyright Act.³¹⁷ Mechanical licenses reflect the operation of a liability rule because once an owner of a copyright permits public distribution of recordings of a musical composition in audio form, a compulsory license becomes available.³¹⁸ Most mechanical licenses are negotiated privately and thus not fully in accordance with the statutory provisions, but the statutory license fee rate is typically applied to privately negotiated licenses.³¹⁹ The mechanical license provisions are used, for example, by artists to create cover recordings, which are rerecordings of existing sound recordings.³²⁰

B. Conceptualizing Copying: Limitations of Fair Use and Derivative Works Doctrine

Fair use doctrine also reflects the assumptions and operation of copyright as a property rule. Fair use standards are codified in the Copyright Act. Originally, however, fair use standards were developed by judicial doctrine.³²¹ Fair use permits use of existing works for certain specific purposes that fall within statutory parameters as typically interpreted by courts.³²² Fair use, however, tends to be applied most typically in instances of texts that involve parody or what courts interpret as transformative borrowings.³²³

³¹⁷ *Id.* at 634-35.

³¹⁸ 17 U.S.C. § 115(a)(1) (2000); *see also* H.R. REP. NO. 94-1476, at 108 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5723 (“Under the clause, a compulsory license would be available to anyone as soon as ‘phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner.’”); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 681 (2003) (noting that § 115 requires that musical work must have been previously distributed to public, which distribution is embodied in phonorecord created under authority of copyright owner).

³¹⁹ AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 682-84 (3d ed. 2002) (noting that such compulsory licensing provisions for mechanical licenses under Copyright Act impose number of requirements, resulting in virtually all mechanical licenses being negotiated between parties rather than fully conforming to statutory requirements, although statutory rate is still maximum price).

³²⁰ *Cf.* Loren, *supra* note 318, at 681 (noting that compulsory licenses allow recording artists to make cover recordings, which are musical works written by someone else and previously released on album by different recording artist).

³²¹ William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1644 (2004) (noting that fair use defense was developed by federal courts long before it was codified).

³²² *Id.* at 1643 (noting that fair use allows copying of parts and sometimes entire copyrighted works without copyright owner’s authorization).

³²³ *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (holding that “a parody’s commercial character is only one element to be weighed in a fair use

Although fair use offers one basis upon which existing works may be used, it is limited in two significant respects. The first limitation relates to the historical development of fair use doctrine in the context of commentary about literary works. The origins and primary use of fair use doctrine in works involving commentary and parody reflects the limited applicability of fair use to other types of cultural production, including musical notes, which are difficult to encompass within current conceptions of fair use.³²⁴ The limitations of fair use analysis mean that fair use as a concept does not significantly broaden the limited cultural gaze evident in copyright doctrine. As a result, fair use cannot be applied easily to the full spectrum of the creation of cultural texts, development of new texts that use existing works, or the contexts of creation of new works.

The second limitation of fair use reflects some of the implications of copyright as a property rule. Although fair use operates as a defense to copyright infringement claims, the current copyright environment effectively limits legislative recognition of a more expansive fair use doctrine.³²⁵ The current environment may also have led to a chilling effect, which may effectively hinder use of existing works without prior consent, even in seemingly clear instances of fair use. This chilling effect may mean that those who might benefit from a fair use defense may temper their creation of new works or fail to create cultural texts that might result in their being sued or threatened with legal action.³²⁶

Fair use doctrine was originally crafted to address the question of when a second author might be permitted to copy a prior author's work.³²⁷ The copying considered in this context typically related to

enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying" in case involving parody of Roy Orbison's song *Pretty Woman*); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (finding that allegedly infringing defendant is entitled to fair use defense for novel *The Wind Done Gone*); Arewa, *supra* note 8, at 576.

³²⁴ See, e.g., Arewa, *supra* note 8, at 575 (discussing implications of music being nonrepresentational).

³²⁵ Patry & Posner, *supra* note 321, at 1645 (noting that asymmetric interest group pressures by copyright owners and public domain publishers weigh against legislative recognition of generous fair use defense).

³²⁶ Heins & Beckles, *supra* note 108, at 36; Brock Read, *Fighting YouTube for 'Fair Use,'* CHRON. HIGHER EDUC., Feb. 16, 2007, <http://chronicle.com/wiredcampus/index.php?id=1881> (discussing effort of Brooklyn Law School Professor Wendy Seltzer to post NFL copyright notice language on YouTube, NFL's success in getting YouTube to remove Professor Seltzer's posting, and Professor Seltzer response of informing YouTube that posting clearly constitutes fair use).

³²⁷ WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 5 (1985).

reprinting existing works, at times in an abridged format. The earliest English cases in this area thus related to the defense of fair abridgement, which addressed when existing works could be shortened into smaller versions of the same work.³²⁸ Fair uses cases, which are distinguishable from fair abridgement cases,³²⁹ addressed the question of whether an existing work was used fairly.³³⁰ Although fair use originated in English courts, the current four-factor statutory text for fair use in the United States traces back to Justice Joseph Story's decision in *Folsom v. Marsh*,³³¹ a case involving the abridgment of a book of letters, illustrations, and a biography of President George Washington.³³²

The early fair use and fair abridgment cases evaluated the extent of the allegedly infringing defendant's creative effort.³³³ In this context, however, the creative effort and copying involved was considered largely in the context of dissemination of printed works and subsequent print editions derived from such works. Fair use and fair abridgment cases reflect conceptions of creation that mirror those evident in copyright theory more generally. Further, such cases typically related to the context of use, review, and criticism of existing literary works.³³⁴ As copyright statutes were expanded from their original protection of literary works to protection of other material, such as music,³³⁵ and protection of more abstract rights, such as

³²⁸ *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489, 490 (Ch.); PATRY, *supra* note 327, at 6, 10.

³²⁹ *Cary v. Kearsley*, (1803) 170 Eng. Rep. 679, 680 (K.B.) (discussing when existing work may be used by later authors); PATRY, *supra* note 327, at 10 (distinguishing origins of fair use from fair abridgement defenses).

³³⁰ *Bell v. Whitehead*, (1839) 8 L.J.R. 141 (Ch.) (Eng.) (discussing fair use of existing work); *Cary*, 170 Eng. Rep. at 680; PATRY, *supra* note 327, at 10, 16.

³³¹ See generally *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4901) (finding no fair use in case involving abridgment of book of letters, illustrations, and biography of President George Washington).

³³² *Id.* at 345 (noting that work by Sparks comprised 12 volumes and nearly 7000 pages, while two volume work by Upham, which derived from extracts of Washington's writings and correspondence, was 866 pages long).

³³³ *Id.* (noting that fair abridgement requires "real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon").

³³⁴ PATRY, *supra* note 327, at 1-64.

³³⁵ The English Statute of Anne was extended to music in the seminal *Bach v. Longman* case. Compare An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Author's or Purchasers of Such Copies, 1709, 8 Ann., c. 19 (Eng.), with *Bach v. Longman*, (1777) 98 Eng. Rep. 1274, 1275 (K.B.). Copyright was extended to musical works in the United States under the 1831 copyright statute. See An Act to Amend the Several Acts Respecting Copy Rights, ch. 16, § 1, 4 Stat. 436, 436-37 (1831) (adding musical compositions, prints, cuts, and

derivative rights,³³⁶ the fair use defense came to be applied outside of this original literary context.³³⁷

This broader application of fair use doctrine in copyright cases is problematic and reflects the general difficulties apparent in copyright treatment of works derived from existing works. In many respects, fair use analysis confronts many of the same problems evident in considerations of what constitutes a derivative work, which remains unclear in many contexts.³³⁸ The concept of derivative rights, which have been broadened significantly since their introduction in 1870,³³⁹ is also potentially problematic in practice. A derivative work is any work that is derived from an existing work, which encompasses virtually all works.³⁴⁰ The owner of the copyrighted work owns the derivative work, which requires substantial copying and must also meet copyright originality requirements.³⁴¹

engravings to list of copyright-protected materials); An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times therein Mentioned, ch. 15, §§ 1-6, 1 Stat. 124, 124-26 (1790) (covering books, maps, and charts); PATTERSON, *supra* note 36, at 201.

³³⁶ Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y OF U.S. 209, 214-15 (1983) (noting expansion of derivative rights since their introduction in 1870); Lydia Pallas Loren, *The Changing Nature of Derivative Works in the Face of New Technology*, 4 J. SMALL & EMERGING BUS. L. 57, 62 (2000) (noting that broad statutory language in relation to derivative works "provides little guidance in determining the scope of the derivative work right"); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1233-39 (1997) (noting progressive expansion of scope of derivative rights in United States copyright doctrine).

³³⁷ See, e.g., *Green v. Luby*, 177 F. 287, 288 (C.C.S.D.N.Y. 1909) (finding infringement when entire copyrighted song was sung during as part of impersonation and mimicry of one performer by another); *Green v. Minzensheimer*, 177 F. 286, 286 (C.C.S.D.N.Y. 1909) (finding no infringement in case involving alleged infringement of voice, postures, and mannerisms of one performer by another); PATRY, *supra* note 327, at 48-52, 58-59.

³³⁸ Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1152 n.71 (2001) ("The appropriate scope of the derivative works right is the subject of considerable controversy in the offline context.").

³³⁹ Goldstein, *supra* note 336, at 214-15 (noting that Congress first granted derivative rights in 1870 and further expanded scope of derivative rights in 1909 and 1976 Copyright Acts).

³⁴⁰ 17 U.S.C. § 101 (2000) (defining derivative work as "a work based upon one or more preexisting works"); 1-3 NIMMER & NIMMER, *supra* note 27, § 3.01 (noting that "[i]n a broad sense, almost all works are derivative works in that in some degree they are derived from pre-existing works" but that a "work is not derivative unless it has substantially copied from a prior work").

³⁴¹ *Woods v. Bourne Co.*, 60 F.3d 978, 990 (2d Cir. 1995) (noting that qualifying as derivative work requires independent copyrightability); *Williams v. Broadus*, No.

Conceptions of fair use and derivative works become increasingly difficult in application in a world where borrowing, copying, and collaboration are acknowledged. Further, the problems in applying these concepts in the musical arena are particularly evident in musical composition cases, where, for example, the standards for whether a musical arrangement may be copyrighted remain unclear.³⁴² The derivative rights concept also presents problems for the many genres of music and other artistic works that are improvisatory or whose norms of creation involve use of existing works.³⁴³

The assumptions underlying fair use do not always translate as well outside of the context of literary works and parodies.³⁴⁴ This is particularly true in the case of musical notes, which are not representational in not involving everyday world phenomena and based on musical conventions that govern chord progressions.³⁴⁵ Although the transformative fair use standard is intended to create a broader basis for the application of the fair use defense,³⁴⁶ fair use does not map particularly well on the full spectrum of creation processes with respect to the ways in which new works have used existing works. In general, for example, both copyright and fair use doctrine have provided an inexact fit for varied types of musical creation.³⁴⁷

99 Civ. 10957 MBM, 2001 WL 984714, at *2 (S.D.N.Y. Aug. 27, 2001) (noting that in determining whether work is derivative work, courts consider whether work “would be considered an infringing work’ if the pre-existing material were used without permission”); 1-3 NIMMER & NIMMER, *supra* note 27, § 3.01.

³⁴² Woods, 60 F.3d at 990 (noting that originality standard requires that derivative work must have some substantial variation and not merely trivial variation); Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 244 (1996) (noting uncertain application of existing legal standards to determinations of when new arrangement of existing choral work is copyrightable).

³⁴³ Arewa, *supra* note 8, at 551-52; Stephen R. Wilson, *Rewarding Creativity: Transformative Use in the Jazz Idiom*, 6 U. PITT. J. TECH. L. & POL’Y 1, 3-5 (2003) (noting that copyright frameworks create problems for jazz artists who create cover versions of existing works, which as derivative works cannot receive copyright protection); Note, *Jazz Has Got Copyright Law and That Ain’t Good*, 118 HARV. L. REV. 1940, 1941 (2005) (noting lack of protection for improvised material by copyright that “discourages vital reinterpretation” in musical forms such as jazz).

³⁴⁴ Arewa, *supra* note 8, at 575-78.

³⁴⁵ *Id.* at 555-58 (discussing inexact fit of copyright for musical works); Susan McClary, *The Blasphemy of Talking Politics During Bach Year*, in *MUSIC AND SOCIETY*, *supra* note 48, at 13, 16 (noting that music is nonrepresentational in that musical notes do not involve everyday world phenomena).

³⁴⁶ See Leval, *supra* note 226, at 1111.

³⁴⁷ See Arewa, *supra* note 8, at 575-78.

In addition, fair use is inextricably linked to the operation of copyright as a property rule. It is based on the assumption that borrowing is not the norm and that existing works were largely created autonomously.³⁴⁸ Fair use analysis typically does not fully consider the broader common context from which new works originate and existing works derive. Fair use doctrine also typically incorporates questions of commercial contexts of uses of existing works without commensurate consideration of cultural contexts or norms of creation.

C. *Unfair Use Doctrine, Liability Rules, and the Freedom to Copy*

Questions about the appropriateness of copying in the creation of new works are not unique to legal discourse. Such concerns are evident in discussions of music, art, writing, and other creative fields.³⁴⁹ What is unique in the legal arena, however, is the continued primary reliance on author-centric notions of creativity that focus on measuring creation with models that emphasize the autonomous creation of works deemed to be original. Copyright theory would benefit from refining narratives of authorship and conceptions of copying. This would enable copyright doctrine to break down conceptions of copying into smaller constituent parts. As others have noted, one place to draw lines delineating types of copying would be in distinguishing questions of copying in relation to the creation of new works from those that arise in the distribution context.³⁵⁰

³⁴⁸ *Id.*; Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1495 (2004) (noting that fair use does not take account of traditional practices such as musical borrowing).

³⁴⁹ See, e.g., George J. Buelow, *The Case for Handel's Borrowings: The Judgment of Three Centuries*, in *HANDEL TERCENTENARY COLLECTION* 61, 62 (Stanley Sadie & Anthony Hicks eds., 1987) (discussing how Handel composed in way that emphasized reworking, revising, adapting, and transcribing his own and others' musical ideas); John H. Roberts, *Why Did Handel Borrow?*, in *HANDEL TERCENTENARY COLLECTION*, *supra*, at 83, 91 (attempting to determine why Handel borrowed so extensively); Percy Robinson, *Was Handel a Plagiarist?*, 80 *MUSICAL TIMES* 573, 575-77 (1939) (discussing borrowing by Handel); Gladwell, *supra* note 24, at 40-48 (discussing borrowing and reuses of existing works in varied contexts and implications of such borrowings for intellectual property frameworks); Lethem, *supra* note 2, at 59-71 (discussing endemic nature of borrowing and collaboration in cultural production); David Segal, *Can Photographers Be Plagiarists? The Case of the Nanpu Bridge*, *SLATE*, Feb. 7, 2007, <http://www.slate.com/id/2159172/> (using example of two similar pictures of bridge of Nanpu Bridge in Shanghai, China to discuss issues connected to similarities between artistic works generally).

³⁵⁰ See, e.g., Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 267 (2002)

Copyright theory needs to develop a more nuanced vocabulary for dealing with copying generally, as well as specifically in connection with the creation of new works. This would mean distinguishing between different types of copying in different contexts, in part based upon norms of creation.

This reconceptualization of copyright would require distinguishing between copying contextually, in part based upon norms of creation. Such reconfiguration of copyright would necessarily mean that copyright owners would have less control over later uses of their works, which would obviously be of significant concern to many copyright owners.³⁵¹ Any frameworks incorporating greater conceptions of the freedom to copy would need to carefully consider the types of future uses that should continue to be subject to a property rule, where *ex ante* permission from the copyright owner would be required, as contrasted with uses where questions of liability would be determined *ex post*. A key element of such frameworks would be to ensure that copyright owners could receive compensation for commercial uses of their works in certain contexts, while limiting their ability to control future commercial and noncommercial uses and their rights to compensation for noncommercial uses.³⁵²

Such limitations on the rights of copyright owners would produce public policy limitations on the scope of copyright that are both permissible and desirable since copyright is a limited government granted right. Further, such limitations on copyright's scope are more likely than present frameworks to encourage the types of creative activities that copyright law seeks to encourage.³⁵³ As we do not know the value of future works that might borrow and otherwise copy from existing expression, in certain circumstances, it may also be more efficient to permit copying which may in fact serve to promote the creation of new works.³⁵⁴ In conjunction with the development of

("[C]yberspace and the economics of digital technology require the unbundling of the public's interests in the creation and distribution of digital works.").

³⁵¹ See generally Arewa, *supra* note 93 (discussing ways in which copyright owners could be compensated, while simultaneously reducing control of copyright owners over future uses of copyrighted works).

³⁵² *Id.* (discussing unfair use generally); Boldrin & Levine, *supra* note 92, at 209 (noting that intellectual property has come to mean not only right to own and sell ideas, but also right to regulate their use, which creates socially inefficient monopoly that is economically dangerous).

³⁵³ Nadel, *supra* note 19, at 789 (noting that copyright frameworks may actually discourage creation of new works).

³⁵⁴ See Rufus Pollock, *Cumulative Innovation, Sampling and the Hold-Up Problem* 23 (Copenhagen Bus. Sch., Working Paper No. VI.3, 2007), available at

copyright frameworks that appropriately recognize and accommodate borrowing, copying, and other uses of existing works, copyright theory would need to develop ways to determine the appropriate limits of such uses of existing works. This would entail the development of concepts of unfair use in copyright as one aspect of the freedom to copy. Unfair use incorporates the freedom to copy by assuming that borrowing and copying are a norm in the creation of new works.³⁵⁵ From this assumption, unfair use concepts may be used to delineate the acceptable parameters of borrowing, copying, and other uses of existing works.³⁵⁶ Recognition of the freedom to copy could help to restore balance to copyright frameworks that have expanded far beyond their original scope and duration.³⁵⁷ Recognition of the importance of copying can also help facilitate experimental and other uses of existing works whose production is less likely under a property rule where permission is required.³⁵⁸

Conceptions of unfair use could be used in copyright to better elucidate what constitutes fair and equitable uses of existing material. In this sense, unfair use can be seen as analogous to unfair trade and unfair competition laws, which promote fair trade and fair competition, respectively, by delineating what constitutes unfair practices.³⁵⁹ A better comprehension of what constitutes unfair uses can facilitate understanding of what uses represent fair ones. Frameworks incorporating conceptions of unfair use can be based at least in part on insights from other disciplines such as literary criticism and musicology. Such insights provide an important window into ways for law to look at copying and creation in a more nuanced and realistic way. Further, the concept of unfair use is implicit in the operation of fair use itself. It may in fact be easier to determine what

<http://ssrn.com/abstract=961351> (discussing how asymmetric information about value of follow-on innovation can lead to holdup problems and noting that technological change such as that evident in digital era that reduces costs of sampling new ideas should imply “a reduction in the socially optimal level of intellectual property rights”).

³⁵⁵ Arewa, *supra* note 93, at 338-43.

³⁵⁶ *Id.*

³⁵⁷ See *supra* note 182 and accompanying text.

³⁵⁸ See Nadel, *supra* note 19, at 789; Pollock, *supra* note 354, at 23.

³⁵⁹ Hale E. Sheppard, *The Continued Dumping and Subsidy Offset Act (Byrd Amendment): A Defeat Before the WTO May Constitute an Overall Victory for U.S. Trade*, 10 TUL. J. INT'L & COMP. L. 121, 121-22 (2002); Robert W. McGee, *Review of the Effects of U.S. Trade Protection and Promotion Policies*, 16 WIS. INT'L L.J. 573, 575 n.3 (1998) (book review) (noting that what constitutes fair and unfair trade is disputed among economists).

should constitute an unfair use than what constitutes a fair use. The difficulty of determining what constitutes a fair use is evident today in the uncertain parameters of application of fair use doctrine.³⁶⁰

Unfair use reflects the application of a liability rule in copyright. As a result, it better encompasses the full range of ways in which cultural texts may be produced. It does so by explicitly incorporating an understanding that many new works may use existing works in ways that extend beyond those typically contemplated in current considerations of fair use.³⁶¹ Liability rule frameworks also have the potential to significantly reduce transaction costs in copyright by reducing the extent to which permissions are needed from existing copyright owners.³⁶²

Such liability rule frameworks would need to distinguish between different types of copying in the creation context and delimit such uses in accordance with principles derived from considerations of fairness. Liability rule frameworks could also be designed in such a way as to ensure that copyright owners for existing works receive compensation on account of uses of their works to create new works.³⁶³ As Professors Lemley and Weiser highlight, the manner of implementation of liability rule frameworks is a significant issue that remains under-explored, including with respect to whether courts or administrative agencies are the appropriate administrative body.³⁶⁴ Such frameworks can be incorporated in copyright doctrine in a number of ways, including through the use of some combination of

³⁶⁰ See Carroll, *supra* note 79, at 1094-95; William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1693 (1988) (noting that disarray in fair use doctrine “impairs the ability of the creators and users of intellectual products to ascertain their rights and to adjust their conduct accordingly”); HEINS & BECKLES, *supra* note 108, at 8; Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 776 (2003) (noting that fair use “is about as far from a bright line rule as statutory law should wander”); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1576-77 (2004) (noting that case-by-case character of fair use adjudication makes fair use doctrine appear to be “so fragmented as to make it useless as a predictive device for copyright owners, copyright consumers, and for courts”).

³⁶¹ See Arewa, *supra* note 93, at 338-50 (discussing unfair use as liability rule applied in copyright context); Arewa, *supra* note 8, at 629-41 (discussing adoption of liability rule frameworks based on unfair use for hip-hop music).

³⁶² Chris Johnstone, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 424 (2004) (noting reduction in transaction costs with hip-hop compulsory licensing system).

³⁶³ Arewa, *supra* note 93, at 338-50; Arewa, *supra* note 8, at 635-38.

³⁶⁴ Lemley & Weiser, *supra* note 18, at 834-41 (discussing relative costs and benefits and alternative institutional structures within which liability rule frameworks might be implemented).

judicial doctrine, statutory solutions, administrative agencies, and the development of commercial practices that acknowledge the importance of borrowing and other methods involving copying.³⁶⁵

As was the case with fair use doctrine, courts can develop and apply an unfair use doctrine. The development of unfair use doctrine by courts can help supplement existing fair use analysis. Unfair use can add to fair use analysis by considering the full spectrum of creation of new works and identifying more explicitly what uses should not occur under existing copyright frameworks. As such, unfair use as judicial doctrine can help clarify the increasingly uncertain application of fair use doctrine. Also, courts are a forum where interest group pressures are less likely to play a role than in the legislative arena.³⁶⁶

Statutory changes may be a mechanism by which unfair use concepts can be incorporated to a greater extent into copyright law. The adoption of a compulsory licensing framework for hip-hop music is one example of a statutory change that might have this effect. As has been discussed extensively,³⁶⁷ hip-hop music sampling is not permitted under existing compulsory license frameworks in copyright. Extension of a compulsory license framework to encompass hip-hop musical production practices would give an explicit compulsory license procedure through which hip-hop works could be created.³⁶⁸ Such statutory solutions could facilitate the production of a vibrant musical form while ensuring that owners of existing works are compensated for uses of their works.³⁶⁹

Current configurations of interest groups in the copyright arena, however, make statutory changes unlikely. The copyright industries play an important role in the copyright legislative drafting process.³⁷⁰ The role of such constituencies reflects the reality of interest group

³⁶⁵ See generally Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47 (1994) (giving framework for applying property and liability rules in right of publicity context).

³⁶⁶ Patry & Posner, *supra* note 321, at 1645 (“Interest-group pressures are a second consideration in favor of a judicially contoured fair use defense because such pressures play a greater role in legislation than adjudication, especially at the federal level, where judges have secure tenure.”); see also Kwall, *supra* note 365, at 48-52 (discussing ways in which property and liability rule framework might be applied in context of right of publicity).

³⁶⁷ Arewa, *supra* note 8, at 634-41 (discussing compulsory license proposals for hip-hop music).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ LITMAN, *supra* note 90, at 23-32.

pressures on the legislative front today.³⁷¹ Such interest group pressures make legislative reform an unlikely avenue for implementing conceptions of unfair use and the freedom to copy. This situation leaves judicial doctrine and changing commercial practices as the likely avenues for the development of unfair use doctrine, particularly in its early stages.

The development of commercial practices that facilitate use of existing materials is an additional way in which unfair use conceptions can be incorporated into copyright law and practice. Creative Commons reflects one avenue that encourages the development of alternative and more flexible copyright licensing frameworks.³⁷² Creative Commons provides a mechanism by which creators can mark their creative works in such a way as to clearly define the scope of the freedom to copy and potentially encourage copying by others.³⁷³ Creative Commons facilitates disaggregation of the copyright legal bundle.³⁷⁴ For example, a copyright holder could designate his or her copyrighted work using a Creative Commons Attribution License. This type of license would permit others to copy, distribute, display, and perform a work and derivative works of that work, but requires that the later users give attribution to the copyright holder.³⁷⁵ Another option available through Creative Commons is a Noncommercial License, which would permit others to copy, distribute, display, and perform a work and derivative works of that work, for noncommercial purposes only.³⁷⁶ A No Derivative Works Creative Commons License would permit others to copy, distribute, display, and perform verbatim copies of a work, but would not permit the creation of derivative works.³⁷⁷

³⁷¹ See *supra* notes 364-66 and accompanying text.

³⁷² Creative Commons, "Some Rights Reserved": Building a Layer of Reasonable Copyright, <http://www.creativecommons.org/about/history> (last visited Nov. 17, 2007).

³⁷³ See Creative Commons, Share, Reuse, Remix — Legally, <http://creativecommons.org/> (last visited Nov. 17, 2007) ("Creative Commons provides free tools that let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry.").

³⁷⁴ Arewa, *supra* note 93, at 343-51 (discussing instances in which control rights should be disaggregated from compensation in copyright doctrine).

³⁷⁵ See Creative Commons, About — Choosing a License, <http://creativecommons.org/about/licenses/> (last visited Nov. 17, 2007) ("[L]et others copy, distribute, display, and perform your copyrighted work — and derivative works based upon it — but only if they give credit the way you request.").

³⁷⁶ See *id.*

³⁷⁷ See *id.*

Initiatives such as Creative Commons have the potential to help create copyright norms that reflect a more nuanced understanding of the varied ways in which existing works might be used by a broad range of creators, users, and others.³⁷⁸ This more nuanced understanding has the potential to more fully encompass the full spectrum of creation of cultural texts. The Creative Commons license also encourages creators to make their works available to others under Creative Commons licenses. Creative Commons licenses are used increasingly in varied contexts. Authors of law reviews, for example, may make their works available to users under a Creative Commons license.

Creative Commons licenses offer an easy way to clearly permit copying under existing copyright frameworks because they encourage authors to offer license terms that permit copying and distribution of works.³⁷⁹ Authors, however, have the flexibility to restrict copying and distribution, as well as determine the terms under which others may copy and distribute their works.³⁸⁰ The flexibility of Creative Commons licenses is rooted in recognition of the importance of the freedom to copy for the creation of new works.³⁸¹ Recognition of the freedom to copy should similarly be incorporated into copyright law through the development of theoretical approaches, policies, and practical legal solutions that recognize and appropriately incorporate the freedom to copy.

CONCLUSION

Conceptions of copyright and copyright infringement should better accommodate the variety of ways in which new works are actually created and the importance of copying in the creation of new works.

³⁷⁸ Michael W. Carroll, *Creative Commons as Conversational Copyright*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 445 (Peter Yu ed., 2007); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 385-87 (2005); Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 *GEO. MASON L. REV.* 271, 295-97 (2007).

³⁷⁹ See Creative Commons, License Your Work, <http://www.creativecommons.org/license> (last visited Nov. 17, 2007).

³⁸⁰ *Id.* (noting that authors can, for example, choose to allow copying and distribution with requirement that they be given credit, or permit certain uses and not others).

³⁸¹ Creative Commons, <http://www.creativecommons.org> (last visited Nov. 17, 2007) (“Creative Commons provides free tools that let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry.”).

For this reason, recognition of the freedom to copy is important for copyright law. The freedom to copy provides a theoretical framework that can help accommodate the interests of creators of works with those of users, the public, and others who access and in some instances copy copyrighted works. Because it may be difficult to know in advance which new works are likely to be beneficial by promoting the useful arts, new creators should have greater predictability in their ability to use existing expression in their creations within the parameters of a clearly defined freedom to copy. The doctrines governing the freedom to copy should be predictable and consistent in application, in contrast to the unpredictability that presently characterizes the application of fair use doctrine, for example. Doctrines consistent with recognition of the freedom to copy, such as unfair use, can help copyright develop frameworks that encourage the creation of a fuller range of works, including those based on existing ones. Unfair use concepts may move copyright in a direction that will recognize a broader range of creative uses of existing works as involving acceptable and even desirable methods of creation. In doing so, unfair use based on the freedom to copy can potentially increase the production of varied and vibrant cultural texts.