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## I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons

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## **Cover Page Footnote**

I benefited from the time and insights of several colleagues who read and commented on drafts of this Article, including Sonia Katyal, Sabrina Saffrin, Alan Hyde, Dennis Kim-Prieto, Twila Perry, Jim Pope, Suzanne Kim, John Leubsdorf, Brandon Paradise, and Gizelle Jacobs. I wish to thank Markis Abraham, Jihwan Kim, and Neil Shah for their extraordinary research assistance and dedication. As always, I am indebted to my wife Shawn and my daughters for their patient support.

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David Dante Troutt\*

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\* Professor of Law and Justice John J. Francis Scholar, Rutgers School of Law (Newark). I benefited from the time and insights of several colleagues who read and commented on drafts of this Article, including Sonia Katyal, Sabrina Saffrin, Alan Hyde, Dennis Kim-Prieto, Twila Perry, Jim Pope, Suzanne Kim, John Leubsdorf, Brandon Paradise, and Gizelle Jacobs. I wish to thank Markis Abraham, Jihwan Kim, and Neil Shah for their extraordinary research assistance and dedication. As always, I am indebted to my wife Shawn and my daughters for their patient support. All mistakes are mine.

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## INTRODUCTION

*The problem is in this business that you don't own your product. If you record, it's the record company that owns it; if you play at a club, it's the nightclub owners who charge people to listen to you, and then they tell you your music is not catching on. . . . This has been my greatest problem—being shortchanged because I'm a Negro, not because I can't produce. Here I am being used as a Negro who can play jazz, and all the people I recorded for and worked for act as if they own me and my product. They have been guilty of making me believe I shouldn't have the profits from my product simply because they own the channels of production. . . . They act like I owe them something for letting me express myself with my music, like the artist is supposed to suffer and not to live in clean, comfortable situations. . . . The insanity of*

*living in America is that ownership is really strength. It's who owns who's strongest in America. . . . That's why it's so hard to lend your music to that kind of existence.*

—Ornette Coleman<sup>1</sup>

The problem that jazz great Ornette Coleman describes in the above quote from the 1960s reflects a continuing legal problem that has received scant attention in the academic literature: music copyright law has done very little to empower or incentivize musical authors. In fact, its rules have traditionally favored non-author intermediaries. Since music was first covered by copyright in 1831, only composers held ownership rights in their music while publishers could be assigned a substantial share.<sup>2</sup> After the introduction of the phonograph and radio, record companies controlled the remainder of rights in composition.<sup>3</sup> Sound recordings, which were not even protected by copyright until 1972,<sup>4</sup> are typically assigned contractually to the record label by the artist.<sup>5</sup> And rights in musical performance have always been secondary, though performance remains the means by which most musicians are compensated for their talents.<sup>6</sup> Thus, Coleman's

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<sup>1</sup> A.B. SPELLMAN, *FOUR LIVES IN THE BEBOP BUSINESS* 129–31 (1966).

<sup>2</sup> See Charles W. Joiner, *Analysis, Criticism, Comparison and Suggested Corrections of the Copyright Law of the United States Relative to Mechanical Reproduction of Music*, 2 *COPYRIGHT L. SYMP. (ASCAP)* 43, 45–47 (1939).

<sup>3</sup> *Id.* at 46–47.

<sup>4</sup> See Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. §§ 1, 5, 19, 20, 26, 101 (2006)).

<sup>5</sup> Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 *S. CAL. L. REV.* 375, 377 (2002).

<sup>6</sup> See *Music on the Internet: Is There an Upside to Downloading? Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 14 (2000) [hereinafter *Music on the Internet*] (“In all cases the publicity generated by having recordings available and promoted on radio, created an audience for my live performances. My performing work is how I make my living. Even though I’ve recorded over twenty-five records, I cannot support my family on record royalties alone.” (statement of Roger McGuinn, founder of the Byrds)); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 *U. CHI. L. REV.* 263, 308–09 (2002) (“For the artist, free music is a complementary good that increases ticket sales.”); John Perry Barlow, *The Economy of Ideas*, *WIRED*, Mar. 1994, [http://www.wired.com/wired/archive/2.03/economy.ideas\\_pr.html](http://www.wired.com/wired/archive/2.03/economy.ideas_pr.html) (“We [the Grateful Dead] have been letting people tape our concerts since the early seventies, but instead of reducing the demand for our product, we are now the largest concert draw in America, a fact that is at least in part attributable to the popularity generated by those tapes.”); Janis Ian, *The Internet Debacle—An Alternate*

lament is a historic and contemporary sentiment, whose factual predicates contradict most of what we understand about the rationale and substance of copyright law. That understanding may be a result of failing adequately to consider music copyright from the music author's perspective and to see that perspective embodied in not one but two copyright interests, utility and personality.

This Article attempts to do both, for the sake of a better understanding of what the revolution in digital music means for copyright reform. Radical changes in the production, consumption and compensation of music and musicians have altered many of the assumptions on which music copyright ownership is based. The traditional roles of intermediaries are threatened, while many more music authors now possess the means to be independent. From the consumer's perspective, we are approaching a digital commons in which music, because of its reduced costs and easy transferability, is analogized to information.<sup>7</sup> Information, goes the digital age mantra, "wants to be free."<sup>8</sup> As a consequence, legal scholars have offered a range of copyright law reforms that seek to balance the often competing interests of artists, intermediaries, and consumers. Inherent in most of these reform proposals are assumptions about authorship that revolve around a need for just compensation. This economic emphasis is consistent with a century-old trend in copyright jurisprudence. Grounded in a larger critique about the unchecked expansion of copyright

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View, PERFORMING SONGWRITER, May 2002, available at [http://www.janisian.com/article-internet\\_debacle.html](http://www.janisian.com/article-internet_debacle.html) ("Again, from personal experience: in 37 years as a recording artist, I've created 25+ albums for major labels, and I've never once received a royalty check that didn't show I owed them money. So I make the bulk of my living from live touring, playing for 80-1500 people a night, doing my own show.").

<sup>7</sup> See *Music on the Internet*, *supra* note 6, at 16 ("[Online file-sharing] simply facilitates communication among people interested in music. It is a return to the original information-sharing approach of the Internet, and it allows for a depth and a scale of information that is truly revolutionary." (statement of Hank Barry, CEO of Napster)).

<sup>8</sup> See, e.g., Charles Warner, *Information Wants to Be Free*, HUFFINGTON POST, Feb. 20, 2008, [http://www.huffingtonpost.com/charles-warner/information-wants-tobef\\_b\\_87649.html](http://www.huffingtonpost.com/charles-warner/information-wants-tobef_b_87649.html). But see *Music on the Internet*, *supra* note 6, at 11 ("Information does not want to be free. Only the transmission of information wants to be free." (statement of Lars Ulrich (quoting Edward Rothstein))).

ownership,<sup>9</sup> it supports the conclusion reached by many reformers that traditional copyright may no longer be the best protector of music authors' rights.

I argue for greater skepticism about the value to authors of a more limited copyright regime. Critical to the argument are normative considerations of who music authors should be, what interests copyright law should protect, and what copyright law under previous technologies and industry practices has done historically to compromise the interests of music authors. American music very quickly replaced the ideal of the Romantic author with the reality of the non-author copyright owner. At the same time, copyright doctrine relinquished its emphasis on natural rights, or rights in authorial personality,<sup>10</sup> in favor of a narrower interest in compensating authors for the utilitarian benefit they bring the rest of us:<sup>11</sup> more music. The utilitarian rationale for ownership served non-author business intermediaries well, as we will see, but not musicians. In fact, the move from dual interests, utility and personality, to a single interest, economic utility, facilitated systematic harms against authorship that may only be understood as interests in personality. These are the general harms to which Ornette Coleman refers as an author but not an owner.

What is an interest in personality? As I discuss in Part II, personality has its roots in the early copyright notion of the Romantic author in which a grant of exclusivity for invention was justified as rewarding the investment of self.<sup>12</sup> In this regard, personality reflects a Hegelian construction of labor.<sup>13</sup> But this

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<sup>9</sup> See, e.g., Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895–904 (1997); see also *White v. Samsung Elec. Am. Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting). In general, I have no quarrel with the thrust of this scholarship and have offered my own critique of expansion in the trademark and publicity rights context. See generally David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification and Redescription*, 38 U.C. DAVIS L. REV. 1141 (2005).

<sup>10</sup> See Roberta Rosenthal Kwall, "Author Stories:" *Narrative's Implications for Moral Rights and Copyrights' Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 19–21 (2001) [hereinafter Kwall, "Author Stories"].

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* at 19.

<sup>13</sup> See Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1338 (1996).

elusive idea of personhood in the work is probably more, I argue. An author's personality interest is known also by the product of its loss. That loss is not merely economic—though it may often have economic implications—but is reflected in the diminished capacity for control, message, performance and interaction with present and future audiences. Some legal interests, like the dignitary interest in torts, are better understood in the negative, by the character of the harms to them. For copyright's personality interest we may call them appropriative harms.

Nowhere are the appropriative harms to personality more manifest than in the history of black musical authorship in the United States, and many of those developments are described in Part III. Black artists have often been the canaries in the copyright coalmine. The history of appropriative harms I describe is divided between the genres developed before and during the 1909 Copyright Act<sup>14</sup> and those that followed passage of the 1976 Act.<sup>15</sup> The first demonstrates how in “soul music”—spirituals, minstrelsy, jazz, rhythm and blues and rock and roll—black authorship was expropriated by law and business entities on many levels, including the fraudulent divestiture of credit and compensation and through the usurpation of style and mimicry.<sup>16</sup> Many of these common practices directly contradicted or exploited basic copyright doctrine, such as the originality requirement<sup>17</sup> and the idea/expression dichotomy.<sup>18</sup> This treatment, chronicled almost exclusively by Professor K.J. Greene<sup>19</sup> who has likened it to share-cropping, is important also for the creative responses it engendered from black artists. In almost every instance, we see the tendency

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<sup>14</sup> Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976).

<sup>15</sup> Copyright Act of 1976, Pub. L. No. 93-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810, 1101 (2006)).

<sup>16</sup> See K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 372–73 (1999) [hereinafter Greene, *Copyright, Culture & Black Music*].

<sup>17</sup> See *id.* at 380.

<sup>18</sup> See *id.* at 349–51.

<sup>19</sup> *Id.* at 349–53; K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1197 (2008) [hereinafter Greene, “Copynorms”]; see also Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 722 (2007).

to approach discrimination and appropriation with what might be called “innovative escape,” ingeniously developing new genres and styles after being dispossessed of earlier ones.

In Part IV, the history continues through the 1976 Act to show that many of the practices used against black music authors had become institutionalized in the record industry, including assumptions about the value and distribution of rights in copyright ownership. Ironically, § 106 of the revised Act more explicitly divides (and makes divisible) the bundle of rights to which copyright holders are entitled,<sup>20</sup> suggesting that different kinds of infringements—say, of the right of reproduction versus the right of adaptation—may result in different kinds of harms. Yet all harms continue to be understood in only economic terms. While conglomeration occurred among the major record labels in the 1990s,<sup>21</sup> technology eventually provided a vehicle for artist independence, if not resistance, to many common industry norms. Specifically, in the case of hip-hop music, the rise of entrepreneurs who both sampled other artists freely (and, for a while, cheaply) and built their own record companies proved a harbinger of the independence now commonly seen among music authors and artists in the digital era.<sup>22</sup> Artist independence may indicate as much about authorial personality as it does freedom from onerous business terms.

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<sup>20</sup> See H.R. REP. NO. 94-1476, at 61 (1976) (“The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called ‘bundle of rights’ that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201, each subdivision of an exclusive right may be owned and enforced separately.”).

<sup>21</sup> See DAVID J. PARK, CONGLOMERATE ROCK: THE MUSIC INDUSTRY’S QUEST TO DIVIDE MUSIC AND CONQUER WALLETS 24 (2007).

<sup>22</sup> See, e.g., Kenneth M. Achenbach, Comment, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 205–06 (2004) (“For example, Russell Simmons, the founder and CEO of Phat Fashions 96 and co-founder of Def Jam Records, began his business career as an undergraduate student at City College of New York in the mid-1970s when he became the manager of the seminal hip-hop group Run-DMC. Without the capital he drew from sample-based music, Mr. Simmons could not have established himself in the music industry and built his multi-million dollar business empire.”); see also *infra* notes 312–13, 316–18 and accompanying text.

The contours of those developments and how they interact with personality is the subject of Part V. There I review radical changes in the production and dissemination of recorded music that have the potential to produce a “pure” system from an artist’s perspective—that is, one in which control, compensation, and ownership may remain in the artist. To illustrate a music author’s perspective on those changes, I use the experience of a real, now-independent singer-songwriter, Citizen Cope.<sup>23</sup> Although Citizen Cope does not happen to be a black musical author, his experience as a twenty-first century author and performer is relevant to both the history of artists under copyright and their future. Finally, I compare Citizen Cope’s goals and interests to copyright law reform proposals offered by Raymond Ku, William Fisher, Jessica Litman, and Lawrence Lessig and reach a somewhat ironic conclusion. All offer significant improvements to the current system of copyright as it affects consumers, a robust public domain and, to a lesser extent, artist compensation. However, I conclude that, as a result of industry changes wrought by digital technology, music authors who are protective of personality interests may be equally content with the status quo.

#### I. THEORETICAL CONCEPTIONS OF COPYRIGHT AUTHORSHIP AND ARTISTIC PERSONALITY

Although early conceptions of copyright justified the grant of exclusive rights to a Romantic author on natural law and utilitarian grounds, courts were at least mindful of an underlying interest in personality that copyright law should protect. The next section analyzes that philosophical tradition, followed by an examination of the kind of authorship it privileged. The Part concludes with a discussion of how more Hegelian notions of personhood were reflected in early case law, and how, from the perspective of black—if not most—musicians, such notions are needed now. Those notions amount to a resuscitation of the author’s personality interest, defined here primarily by the nature of the harms inflicted upon it.

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<sup>23</sup> The reader may find more information about Citizen Cope at Citizen Cope, [www.CitizenCope.com](http://www.CitizenCope.com) (last visited Nov. 14, 2009).

*A. Labor, Utility and the Economic “Author”*

Before purely economic analysis conquered intellectual property law, the natural law justification for protection began with the assertion that an author has an inherent right in the fruits of her labor.<sup>24</sup> John Locke’s familiar labor theory of property modernized the Roman framework, at least in England, and held that, out of a state of nature where resources are held in common, individuals convert goods into private property through their labor.<sup>25</sup> Under most interpretations, private property is an individual’s reward for the value that her labor adds to goods; such productive activity becomes a benefit to society as a whole.<sup>26</sup> The theory is subject to the proviso that within the commons there are enough and as good materials to go around, and that one’s accumulation is conditioned upon not wasting them.<sup>27</sup> Whatever the basis for applying Locke’s theory to the acquisition of physical property today, there is little doubting its applicability to intellectual property—provided we agree that the production of ideas requires labor of some kind.<sup>28</sup>

Alfred Yen’s study of the early development of copyright law in England demonstrates how the first copyright act, the Statute of Anne of 1710, was motivated by both natural law and pure economic considerations.<sup>29</sup> While English courts subsequently rejected the natural law basis for copyright,<sup>30</sup> American legislatures did not, in some cases explicitly writing both bases into state statutes between 1783 and 1786.<sup>31</sup> These acts are interesting, as Professor Yen points out, because of the clear link

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<sup>24</sup> See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 522–24 (1990).

<sup>25</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 27 (C.B. Macpherson ed., Hackett Publ’g 1980) (1690).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* § 37.

<sup>28</sup> See MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS* § 1.03 (2008).

<sup>29</sup> See Yen, *supra* note 24, at 526. Although the statute, entitled “An Act for the Encouragement of Learning,” secured copyright terms for authors as economic incentives to publish, it clearly benefited powerful printing interests as well. *Id.* at 525–26.

<sup>30</sup> See *id.* at 528.

<sup>31</sup> *Id.* at 528–29.

they make between a concern for rewarding the labor of authorial genius, on the one hand, and the utilitarian interest in promoting social welfare through the production of creative works and inventions, on the other.<sup>32</sup> The preamble to Connecticut's copyright act, entitled "An Act for the Encouragement of Literature and Genius," illustrates the connection:

Whereas it is perfectly agreeable to the Principles of natural Equity and Justice, that every Author should be secured in receiving the Profits that may arise from the Sale of his Works, and such Security may encourage Men of Learning and Genius to publish their Writings; which may do Honour to their Country, and Service to Mankind.<sup>33</sup>

Thus, early copyright law enshrined two primary grounds for legal protection: the economic reward to the author, and the public's benefit in artistic innovations. However, the law would develop subsequently to transform the first into an instrumental predicate for the second, so that the economic reward to the author provided the necessary incentive to produce artistic innovations for the public's benefit.<sup>34</sup>

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<sup>32</sup> *See id.*

<sup>33</sup> 1783 Conn. Pub. Acts 617; *see also* An Act to Promote Literature, ch. 54, 1786 N.Y. Laws 99. North Carolina made the link even more explicit:

Whereas Nothing is more strictly a Man's own than the Fruit of his Study, and it is proper that Men should be encouraged to pursue useful Knowledge by the Hope of Reward; and as the Security of literary Property must greatly tend to encourage Genius, to promote useful Discoveries and to the general Extension of Arts and Commerce . . . .

An Act for Securing Literary Property, ch. 26, 1785 N.C. Sess. Laws 563.

<sup>34</sup> *See, e.g.,* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. . . . [H]owever, this is not 'some unforeseen byproduct of a statutory scheme.' It is, rather, 'the essence of copyright.'" (internal citation omitted)); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.")

Anchoring the early copyright scheme was the construction of the author in Romantic terms.<sup>35</sup> As the Connecticut statute suggests, the status of an author was conceptualized as a gifted, autonomous person capable of producing works that, if not original genius, were merely inspired by others.<sup>36</sup> The antithesis of the author deserving of a copyright monopoly was the plagiarist who appropriated the work of others as his own.<sup>37</sup> This aspirational ideal of a lone author, expressing his genius on paper or canvas in a candlelit study or studio, served to justify the extension of a time-limited economic monopoly in the work to only a qualified few.<sup>38</sup>

However, the adoption of a narrowly drawn author within a protection regime bent toward economic benefit would necessarily prefer certain authors and certain types of authorship over others.<sup>39</sup> These we see illustrated in several foundational copyright doctrines. First, the originality requirement by its terms excludes musical compositions that are shown to be borrowed or too directly derivative of others.<sup>40</sup> While this may seem like an obvious constraint on protection, it clearly disfavors works created within openly intertextual or syncretic genres where authors freely acknowledge that their work flows from folk or other traditions

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<sup>35</sup> See Kwall, "Authors Stories," *supra* note 10, at 19–21.

<sup>36</sup> See *id.* at 21.

<sup>37</sup> Kembrew McLeod has observed that "[p]rint culture resulted in attempts to close down intertextuality by emphasizing Romantic notions of 'originality' and 'creativity,' and at this time there came into being the notion that words can be privately owned." KEMBREW MCLEOD, *OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW* 72 (2001). This led to a notion of the work as subject to commodification, which of course had implications for the meaning of ownership. *Id.* Law would regulate that. *Id.* "The thread that ties these concepts together is copyright law, and plagiarism provides the deeply resonating moral underpinnings for this economically grounded legal construction." *Id.*

<sup>38</sup> Not surprisingly, seminal cases addressing the issue of copyrightability repeatedly struggle at the bottom with the question of the deserving author. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252–53 (1903) (Harlan, J., dissenting) ("The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.").

<sup>39</sup> See Kwall, "Authors Stories," *supra* note 10, at 19–21.

<sup>40</sup> See Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright, and Cultural Context*, 84 N.C. L. REV. 547, 571–73 (2006).

that discourage credit-taking.<sup>41</sup> Second, the idea/expression dichotomy, together with the long absence of standalone rights in musical performance, excludes from ownership non-composers as well as composers who do not write down their work in musical notation.<sup>42</sup> Third, the formalities of registration and maintenance of copyright that were not abandoned until the 1976 Act favored literate musical authors with the personal means or external resources to secure formal ownership of their work while disfavoring the great many musicians who did not.<sup>43</sup> Finally, the principle of the autonomous work embedded in the Romantic author ideal discounted the efforts of authors of joint and collective works.<sup>44</sup> These and other doctrinal rules would disproportionately affect African-American artists, as Professor K.J. Greene has convincingly argued.<sup>45</sup> The historical analysis will show how these rules would provide multiple avenues for expropriation by non-author intermediaries who, primarily motivated by economic gain, would structure the artist-distributor relationship around adhesion and a dispossession of ownership.<sup>46</sup> The point for now is that the move from natural rights to economic incentives facilitated such inequitable arrangements.

Another consequence of drawing the author concept narrowly is the ease with which she may be characterized as an economic actor. As she responds efficiently to economic incentives, her identity as an artist recedes. Modern copyright case law is dominated not just by concern for the economic interplay in ownership rights, but also by a conception of the author as responsive to financial incentives in ways no different than other market participants.<sup>47</sup> She is a producer of “public goods.”<sup>48</sup>

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<sup>41</sup> See MCLEOD, *supra* note 37, at 73–77.

<sup>42</sup> See, e.g., Greene, *Copyright, Culture & Black Music*, *supra* note 16, at 377–80.

<sup>43</sup> See *id.* at 353–54.

<sup>44</sup> See Kwall, “*Authors Stories*,” *supra* note 10, at 5.

<sup>45</sup> See generally Greene, *Copyright, Culture & Black Music*, *supra* note 16.

<sup>46</sup> See *infra* Part II.B.

<sup>47</sup> See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’” (citation omitted)); *accord* *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.”).

Legal commentators, even very thoughtful legal commentators, often view the return for her labor in stark business terms, much as a manufacturer, a stockbroker, or a small business person views her labor.<sup>49</sup> What makes much of the analysis resonate is the fact that the modern copyright author-rights holder *is* in fact a business person. Indeed, in the case of music, the author is probably a corporation, such as a record company. But that does not negate the existence of an artist-author behind the initial creation of the musical work. It simply converts her legally and figuratively into an employee of the record label.<sup>50</sup> Thus, the gradual erosion of the Romantic author ideal in favor of an economic actor restricted the range of authorial identity. Ironically, it also made it easier to attack the current expansion of copyright ownership rights once that “author” became a very powerful and expansive economic actor.

A corollary to expansive economic actors as authors is that creative authors may be easily reduced to the status of employees with no ownership rights to respect, and worse, easily exploited “talent” without the business sophistication to demand better or the leverage to resist aggressive business behavior.<sup>51</sup> As we see in Part II, black artists in particular were denied both of the chief virtues of the copyrights holder, receiving neither the economic benefits of authorship nor the credit for and control of their work.<sup>52</sup> In sum, under a utilitarian variation of the Romantic author, the artist’s

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<sup>48</sup> See Ku, *supra* note 6, at 277 (“Public goods are generally defined by two traits. First, once produced, they are virtually inexhaustible. This means that it is possible at no cost for additional persons to enjoy the same unit of a public good. Second, it is difficult to prevent people from enjoying the good.” (citation omitted)).

<sup>49</sup> See, e.g., *id.* at 305–08 (arguing that music creation now costs relatively little and that because musicians make most of their money outside of copyright, ownership rights are no longer relevant).

<sup>50</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903) (noting that the material in question could be copyrighted by the employer because it had “been produced by persons employed and paid by the [employer] in [the employer’s] establishment to make those very things”); see also *Real Estate Data, Inc. v. Sidwell Co.*, 809 F.2d 366, 371 (7th Cir. 1987) (recognizing *Bleistein* as the origin for the work-for-hire doctrine).

<sup>51</sup> See Julie Katzman, Note, *Joint Authorship of Commissioned Works*, 89 COLUM. L. REV. 867, 875–81 (1989) (noting that the work-for-hire doctrine may be especially inefficient regarding commissioned work).

<sup>52</sup> See *infra* Part II.

investment of creativity has been too easily discounted and unprotected.

### B. Authorial Personality

What is missing might be called authorial personality—whatever that is. We are slow to recognize an interest in personality in part because it is hard to determine its contents or its scope. The challenge is particularly difficult for law. A few courts and a great many commentators have suggested that our utilitarian justification for intellectual property rights—especially aesthetic works capable of copyright protection, such as most music—protect something like authorial personality.<sup>53</sup> The most quoted judicial acknowledgment comes from Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*,<sup>54</sup> who is explicit in his conclusion that, beyond recognition, what gets protection in an original work of authorship is personality:

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. That something he may copyright unless there is a restriction in the words of the act.<sup>55</sup>

Other courts (though few of them recent) have almost suggested as much.<sup>56</sup> In these conceptions, personality is special

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<sup>53</sup> See e.g., Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1938 (1990) (stating that copyrights should only be sought to “safeguard personal goodwill” when a work shows “authorial personality”); Stephen P. Tarolli, Comment, *The Future of Information Commerce Under Contemporary Contract and Copyright Principles*, 46 AM. U. L. REV. 1639, 1642–43 (“The prevailing judicial interpretation of modern U.S. copyright law fails to guarantee protection to works of information and other utilitarian works of high labor but low creative authorship. The law would be more true to its historical origins if it recognized a binary approach to copyright protection that: (1) protects the author’s expression in high authorship works, and (2) protects the author’s commercial investment in low authorship or utilitarian works.”).

<sup>54</sup> 188 U.S. 239 (1903).

<sup>55</sup> *Id.* at 250.

<sup>56</sup> See, e.g., *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102–03 (2d Cir. 1951) (“No large measure of novelty is necessary.”).

but not necessarily good, unique for being the only one of its kind, ordinary yet mysteriously capable.<sup>57</sup> The threshold is well below genius or gifted—in trademark terms, perhaps merely distinctive.<sup>58</sup>

Most commentators who have argued for greater recognition of authorial personality ultimately conclude that U.S. copyright law should adopt some version of moral rights,<sup>59</sup> as most European countries have.<sup>60</sup> Moral rights protect attribution and integrity.<sup>61</sup> Roberta Kwall, for instance, argues that U.S. copyright's abandonment of the artist's intrinsic, non-economic motivations to innovate was unnecessary.<sup>62</sup> Recognizing the "intrinsic dimension of creativity" was possible alongside utilitarian justifications,<sup>63</sup> she emphasizes that "the prevailing law and policies deemphasize the intrinsic process of creation in favor of a narrative favoring dissemination, commodification, and economic reward."<sup>64</sup> Ultimately, she argues in favor of moral rights.

Similarly, Doris Long argues for adopting some version of moral rights—especially of disclosure and integrity—in light of the increasing lack of authorial control.<sup>65</sup> Forgotten by economic

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<sup>57</sup> *Id.* at 102.

<sup>58</sup> *See* *Two Pesos v. Taco Cabana*, 505 U.S. 763, 768 (1992) (stating that "Marks are often classified in categories of generally increasing distinctiveness; . . . they may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." (citations omitted)).

<sup>59</sup> *See, e.g.*, Greene, *Copyright, Culture & Black Music*, *supra* note 16, at 390–91; Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 290–303 (1988); Kwall, "Authors Stories," *supra* note 37, at 5; Doris Estelle Long, *Dissonant Harmonization: Limitations on "Cash N' Carry" Creativity*, 70 *ALB. L. REV.* 1163, 1204–05 (2007).

<sup>60</sup> *See generally* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, 25 *U.S.T.* 1341, 828 *U.N.T.S.* 221; *see also* Kimberly Y.W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 *BUFF. INTELL. PROP. L.J.* 105, 105 (2006) ("All countries that are party to the Berne Convention are required to provide a minimum level of protection for moral rights.").

<sup>61</sup> *See* NIMMER, *supra* note 28, § 8D.02(C) (noting incorporation into the Berne Convention). Generally speaking, attribution is the right of the author to be correctly identified as the author of a work. *Id.* § 8D.03. Integrity is the author's right to prohibit objectionable uses or derogations of the work. *Id.* § 8D.04.

<sup>62</sup> Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 *NOTRE DAME L. REV.* 1945, 1949 (2006).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1983.

<sup>65</sup> Long, *supra* note 59, at 1193.

analyses and rejected by post-structuralism, creativity has been devalued: “The importance of authorship has been questioned; creativity has been largely disconnected from it; and any authorial control under copyright is rapidly devolving into a ‘cash n’ carry’ compensatory right, reducing the relationship between authorship, copyright, and control to little more than an economic right of compensation.”<sup>66</sup>

Whether a musician’s personality resides in matters of control, attribution, or other aspects of integrity such that moral rights are the appropriate remedy is complicated by a fuller discussion of financial dynamics in the next Part.<sup>67</sup> Nevertheless, these observations strengthen the overarching argument that more recognition is both needed and possible even within the existing theoretical framework for intellectual property protection. Musicians themselves know personality when they feel it. As the following account from the early recording era shows, authorial personality expresses something unmistakable about the self, which can then be combined and communicated with others:

When they recorded, the musicians were astounded to hear themselves on disk, disembodied and unadorned. In 1925, Hoagy Carmichael and his Indiana friends made their first recording, and “tears came to our eyes as we listened to it. Tears of affection for each other, tears at the imagined beauty of our playing. Every note an individual thing; a part of the man who played it and that man a friend”—but now every note was apart from the man, and that disembodiment helped to inspire the strong emotion. When Eddie Condon and others heard their first disks in 1928, they knew that their experiences had been translated into oddly satisfying new artifacts. “The nights and years of playing in cellars and saloons and ballrooms, of practicing separately and together, of listening to Louis and Joe Oliver and Jimmy Noone and Leon

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<sup>66</sup> *Id.* at 1167 (footnotes omitted).

<sup>67</sup> *See infra* Part I.C.

Rappolo, of losing sleep and breathing bad air and drinking licorice gin, paid off. . . . We had never been an audience for ourselves. . . . At the finish, we were all laughing and pounding each other on the back.”<sup>68</sup>

This mysterious capacity to have the hours of one’s life known in the work reflects a more Hegelian view of property rights, as I discuss next.

### C. *The Hegelian Turn and the Author’s Personhood*

From Hegel, we get a clear articulation of a personality justification for intellectual property and an acknowledgment of the unique character of creation that goes beyond the establishment of exclusive rights incident to the mere execution of labor. Under Hegel, property provides an avenue for self-actualization,<sup>69</sup> or, as Margaret Radin wrote, enriched “personhood.”<sup>70</sup> It accomplishes this through the individual’s investment and expression of personality. “Personality,” according to Hegel, “is that which acts to overcome this restriction and to give itself reality, or in other words to claim that other world as its own.”<sup>71</sup> Property rights in one’s work, therefore, are partially justified as the manifestation of one’s personality<sup>72</sup> and “the first existence of freedom.”<sup>73</sup> A personality justification is particularly suited to the copyright of aesthetic works.<sup>74</sup>

But if intellectual property embodies so much of an author’s personality, how would Hegel justify its free alienability? The

<sup>68</sup> BURTON W. PERETTI, *THE CREATION OF JAZZ: MUSIC, RACE, AND CULTURE IN URBAN AMERICA* 153 (1992) (citations omitted); *see also* ROLAND GELATT, *THE FABULOUS PHONOGRAPH 1877–1977*, at 213–24 (2d rev. ed. 1977); PAUL OLIVER, *SONGSTERS AND SAINTS: VOCAL TRADITIONS ON RACE RECORDS 2–3* (1984).

<sup>69</sup> *See* Hughes, *supra* note 59, at 333. *See generally* Hegel, *infra* note 71.

<sup>70</sup> *See* MARGARET JANE RADIN, *CONTESTED COMMODITIES* 37–40 (1996).

<sup>71</sup> GEORG WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* ¶ 39 (T.M. Knox trans., Oxford Univ. Press 1945) (1821).

<sup>72</sup> *Id.* ¶ 51.

<sup>73</sup> *Id.* ¶ 45.

<sup>74</sup> Copyrights in aesthetic works are also well-suited to a labor theory. While a labor theory may justify granting protection to all, if not most, categories of intellectual property, personality may not. *See* Hughes, *supra* note 59, at 339–40.

answer lay in the belief that alienation involves the externalization of the author's self to be shared and absorbed by other selves.<sup>75</sup> The sharing for payment constitutes an important recognition of that author's personhood.<sup>76</sup> Should the form of sharing matter—say, selling copies versus selling ownership? Probably somewhat, since the latter may also constitute an abandonment. But increasingly the chief benefit of ownership is exchange through licensing, which provides authors with control over ever broadening means to reach audiences. Thus, Hegelian personality considerations point us back toward the utilitarian rationale: Artists must be compensated as authors for the expressions of their personality. Exchange by itself does no harm. Exploitation and appropriation do harm—at least equal to infringement harm—because they negate the potential for freedom and deny both of the interests that copyright law should protect, utility and personality.<sup>77</sup> The remaining question is, what is the personality interest?

*D. The Musician's Personality Interest and Appropriative Harm*

*You've taken my blues and gone—*

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<sup>75</sup> HEGEL, *supra* note 71, ¶ 71.

<sup>76</sup> *Id.*; Hughes, *supra* note 59, at 349. This gives rise to a paradox of alienation, according to Professor Justin Hughes. Hegel believed that recognition of personhood occurred in the alienation of a work's *copies* but not through sale (i.e., abandonment) of the whole. Hughes suggested that Hegel's personality theory is a better justification for protection than for exchange. Hughes, *supra* note 59, at 345. He describes it as follows:

The present owner maintains ownership because he identifies the property as an expression of his self. Alienation is the denial of this personal link to an object. But if the personal link does not exist—if the object does not express or manifest part of the individual's personality—there is no foundation for property rights over the object by which the "owner" may determine the object's future. An owner's present desire to alienate a piece of property is connected to the recognition that the property either is not or soon will not be an expression of himself. Thus, the justification for property is missing. This subtle control of the object's future does not jibe with foreseen future denial of the personality stake.

*Id.*

<sup>77</sup> See Hughes, *supra* note 59, at 290–303. But see Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV 453, 453–54 (2006) ("Hegel is often cited by personality theorists, but almost always incorrectly. . . . The personality theory of property that dominates American intellectual property scholarship is imbued by a Romanticism that is completely antithetic to Hegel's project.").

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*I OWN THEREFORE I AM*

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*You sing 'em on Broadway  
And you sing 'em in Hollywood Bowl,  
And you mixed 'em up with symphonies  
And you fixed 'em  
So they don't sound like me.  
Yep, you done taken my blues and gone.*<sup>78</sup>

In the introduction, I suggested that copyright law's bundle of rights to the rights holder is so extensive that it clearly indicates a recognition that multiple kinds of harms may be inflicted, not all of them economic nor always easy to pinpoint. In Part I.A, I argued that the origins of copyright law reveal a recognition that the interests protected by copyright law are not exclusively economic, even though modern courts have treated them as such.<sup>79</sup> In Part I.B–C, I argued that a personality interest should be elevated alongside a strictly utilitarian or economic interest.<sup>80</sup> The question now is, what is that interest? The answer is that we often know an interest by the harms to it.

Tort law is full of examples of this. The dignitary interest, for instance, is known mainly by the harm of offense to dignity, which we assume occurs when a personal space is intentionally invaded<sup>81</sup>

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<sup>78</sup> LANGSTON HUGHES, *Note on Commercial Theater*, in *POETRY FOR YOUNG PEOPLE* 34 (Sterling Publ'g Co. 1994).

<sup>79</sup> *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 206–07 (2003) (noting that in addition to international concerns, Congress passed the CTEA in light of demographic, economic, and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“The Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *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.’”).

<sup>80</sup> *See supra* Part I.B.

<sup>81</sup> *See, e.g.*, *Fisher v. Carrusel Motor Hotel, Inc.*, 424 S.W.2d 627, 630 (Tex. 1967) (“Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual harm, but also for those which are offensive and insulting.”).

or a peace to which we are entitled is intentionally disrupted.<sup>82</sup> Reputational harm at common law assumed that a serious affront to sensibility would inevitably occur as a result of certain words spoken.<sup>83</sup> All of these examples have a character of appropriative harm, and appropriative harm is at the essence of the harm inflicted on a music author's personality interest when aspects of the bundle of copyright rights are infringed.

Similarly, the law of racial discrimination is replete with negative definitions of personal interests. When Kenneth Karst, analyzing civil rights law in the context of the *Brown v. Board of Education*<sup>84</sup> decision, attempted to define harm in positive terms, he referred to it as the frustrated desire for belonging and the right to inclusion under law that accompanies citizenship.<sup>85</sup> But his analysis was clearer when he described the negation of that interest as stigma.<sup>86</sup> Stigma, he explained, is certainly psychic harm to the personality, but it often manifests itself in economic disadvantage as well.<sup>87</sup> It is a product of the loss, the non-static result of the taking.<sup>88</sup>

We may therefore understand a music author's personality interest in her creative work by the special loss she experiences from its expropriation. In this conception, the content of the personality interest may be more clearly understood through the loss of the thing (and the loss of control of the thing) than by the thing itself. Put another way, the measure of what is gained by copyright ownership is what is *not lost* to coerced control, unauthorized adaptation or infringement. The loss of selfhood through the theft of one's creation inflicts an incalculable kind of harm. As the Langston Hughes poem above suggests and like the Ornette Coleman statement earlier,<sup>89</sup> the harm of loss represents

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<sup>82</sup> See, e.g., *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 292 (Cal. 1952).

<sup>83</sup> See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (stating that the common law against slander was designed to address society's "pervasive and strong interest in preventing and redressing attacks upon reputation").

<sup>84</sup> 347 U.S. 483 (1954).

<sup>85</sup> See KENNETH KARST, *BELONGING TO AMERICA* 15–27 (Yale 1989).

<sup>86</sup> See *id.* at 25–27.

<sup>87</sup> See *id.* at 26–27.

<sup>88</sup> See *id.* at 25–27.

<sup>89</sup> See *supra* text accompanying notes 1 and 78.

something profound about the relationship between authorship and ownership that copyright can and should recognize.<sup>90</sup> That recognition goes beyond the remedial question of whether monetary compensation for theft is enough. Based on a review of past wrongs to artists, it supports the present-day conclusion that limiting or abolishing copyright is one of the worst things we could do to music authors.

This somewhat simple, rather vague idea, will get more contour in the next Part when I explore the various ways the development of the modern recording industry model used copyright law to reproduce personality injury to black music authors. For now, however, it is important to consider two contemporary implications of recognizing personality in appropriative harm, the “information analogy” and wealth.

By the information analogy, I refer to the increasingly commonplace statement that music is information or, more accurately, that because of the technology that brings us digital music downloads, music is a lot like other information that may be digitized and easily downloaded.<sup>91</sup> What often follows from this characterization of music is the assertion that “information wants to be free.”<sup>92</sup> There are several flaws in this analogy. The primary flaw is that it originates from a music consumer’s perspective, not an author’s, and that it is utterly dependent upon advanced technology for its truth.<sup>93</sup> In a world of only live music, for instance, calling music another form of information would make

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<sup>90</sup> Indeed, it is profound enough to lament in poetry and other very personal, non-monetizable expressions of loss.

<sup>91</sup> Michael Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1406–07 (2004) (“Some declare that ‘information wants to be free’ and that music, like all other forms of digitized cultural expression, no longer can be or should be treated as proprietary information.”); see RONALD S. ROSEN, MUSIC AND COPYRIGHT 152–59 (2008) (discussing, inter alia, *Hirsch v. Paramount Pictures, Inc.*, 17 F. Supp. 816 (S.D. Cal. 1937)).

<sup>92</sup> Carroll, *supra* note 91, at 1406–07.

<sup>93</sup> See Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 VA. J.L. & TECH. 4, 56 n.154 (2004) (“The author cites attempts to curb reverse engineering and parodying as two prime examples of overreaching which put copyright owners in a bad light. . . . End users and consumers, on the other hand, overreach when claiming that information ‘wants to be free’ and that they should therefore be allowed to freely share movies across peer-to-peer networks.”).

little sense. The deeper problem with the analogy is its corresponding conclusion that music must therefore cost little or nothing to obtain.<sup>94</sup> If we imagine the music author's ownership interest in strictly economic terms, we struggle only to arrive at an ever diminishing price.<sup>95</sup> However, if we recognize a personality interest in the musical work, we are more apt to see that the conclusion imposes categorical opposition between music author and consumer.<sup>96</sup> If music is really information that should be free to consumers, authors are mere service providers who require no more incentive to create than the prevailing wage. Copyright law should avoid that. While the author's personality interest is only faintly drawn in copyright jurisprudence,<sup>97</sup> a consumer interest has no recognized basis.<sup>98</sup>

Second, the same technological changes that give rise to a belief that music is information demonstrate that a music author's personality interest may easily converge with his economic interest.<sup>99</sup> Digitization, as we will see in the final Part, greatly reduces the costs of music production.<sup>100</sup> With lower costs come expectations of lower prices to consumers.<sup>101</sup> Eventually, as *A&M Records, Inc. v. Napster, Inc.*<sup>102</sup> teaches, those expectations join with the self-help nature of new technologies to take for nothing what one no longer wishes to negotiate on the market.<sup>103</sup> The lesson of copyright law reform today may be that we struggle to

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<sup>94</sup> *Id.*

<sup>95</sup> See Ku, *supra* note 6, at 306–319.

<sup>96</sup> See, e.g., Jane Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 63 (2002).

<sup>97</sup> U.S. CONST. art. I, § 8, cl. 8 reads: “Congress shall have the power . . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” See also Justin Hughes, *The Personal Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 89–90 (1998).

<sup>98</sup> Hughes, *supra* note 97, at 89–90.

<sup>99</sup> See, e.g., WILLIAM PATRY, PATRY ON COPYRIGHT § 106(3) (West 2008).

<sup>100</sup> See Ku, *supra* note 6, at 306.

<sup>101</sup> *Id.* at 319 (explaining that even if the price is low, the consumer would still be “unwilling” to pay).

<sup>102</sup> 239 F.3d 1004 (9th Cir. 2001).

<sup>103</sup> See Ku, *supra* note 6, at 273–74.

find effective ways to capture those lost fees for the author.<sup>104</sup> Given the technology, the capture problem may only increase in proportion to the range of uses that become available for the music. Each of these is both a potential loss of self (personality) and of compensation for the author's present and future welfare (economic). The music author must retain the rights with which to recapture those losses. In the past, the loss of those rights was attributable mainly to the exploitative practices of record labels and intermediaries, as the next Part shows.<sup>105</sup> In the future, as artists become more independent, those losses will be attributable mainly to the appropriative practices of consumers, as the final Part shows.<sup>106</sup> Rights retention remains the best safeguard against whatever changes occur. Ownership is not only the thing that may validate and remunerate now. It is the foundation for an author's wealth and control in the future. In that sense, it represents a true investment of self that copyright law should encourage.

Having introduced the dual theoretical framework (utility and personality) for conceiving of property rights in music, I look now to how these ideas took form in U.S. music history. Specifically, I browse the history of African-American musical authorship to show how, like canaries in a coalmine, the appropriative harms committed against them were facilitated by the structure of copyright law and repeated against other musical authors.

## II. OWNERSHIP CAPTURE, BLACK MUSICAL AUTHORS, AND THE FRACTURE OF PERSONALITY: A SUBALTERN HISTORY

This Part provides an abbreviated history of the law and business practices of music production in the United States, with particular emphasis on black musicians and the genres most identified with them. I organize the mostly descriptive discussion

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<sup>104</sup> The online music industry continues to be very unstable and offers few sustainable business models for profitability. See, e.g., Brad Stone, *Music Labels Ease Up to Assist Start-ups*, N.Y. TIMES, May 28, 2009, at B1 (describing the failure of multiple legal online music start-ups and the corresponding lowering of major label license fees to new ones based on the inability to achieve profitability).

<sup>105</sup> See *infra* Part II.A.

<sup>106</sup> See *infra* Part IV.

chronologically, beginning with two important nineteenth century musical genres—spirituals and minstrelsy—and the legislative struggles to pass the 1909 Act. I end with trends leading to our current digital environment.<sup>107</sup>

Several conceptual fault lines emerge. First, as Lisa Gitelman points out, the early legislative period saw the introduction of a dichotomy between “writing” and “reading,” which had tremendous implications for what received legal protection and arguably continues in some form to this day.<sup>108</sup> Second, the secondary status given to performers and performance under copyright law has been a critical lever in determining the scope of economic benefit and artistic recognition under music copyright law.<sup>109</sup> Third, there is a continuing tension between appropriation and mimicry in both the law’s treatment of claims as well as in the ability of black musicians in particular to benefit from their works.<sup>110</sup> For them, where appropriation of their work facilitated mimicry by white performers, their labor was most easily expropriated.<sup>111</sup> Finally, however, this capture of black musicians’ styles, songs, performances, and earnings often seemed to lead to “innovative escape”—a Houdini-esque maneuvering back into creative relevance and musical livelihood following the theft of

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<sup>107</sup> Music was often a puzzle for copyright, especially in the beginning. See Lisa Gitelman, *Reading Music, Reading Records, Reading Race: Musical Copyright and the U.S. Copyright Act of 1909*, 81 *MUSICAL Q.* 265, 273 (1997) (“The combination of pliable uses and new forms made music hard to pin down. The varied economy of American music at the end of the nineteenth century was perched on the edge of mass culture: it relied on noninstitutional as well as institutional means of creating markets for its principal commodity, printed sheet music, while it proved less able to commodify musical performances, phonograph records, and piano rolls in a rational or universal way.”).

The history could be presented differently by treating, for instance, changes in technology as the critical moments in the system’s development, such as the move from sheet music to phonograph records, the introduction of radio, or the proliferation of the compact disc. Alternatively, one could follow genres, tracking themes as they adapt or dissipate within the public’s consumption of one type of music or another. I will attempt to include both perspectives in the chronology.

<sup>108</sup> *Id.* at 275.

<sup>109</sup> See Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 *BUFF. INTELL. PROP. L.J.* 83, 83–84 (2009).

<sup>110</sup> See *infra* Part III.A.

<sup>111</sup> RICHARD CRAWFORD, *AMERICA’S MUSICAL LIFE: A HISTORY* 197 (2001).

one's earlier expression—and the emergence of new music. These concepts describe a system of rights that devalued personality and would often subsume it. Ironically, it also revealed artist personalities that persevered anyway. Together, the concepts help define what it has meant to be a musician in the American music industry and provide a context for evaluating the copyright reform proposals that have been introduced since digital distribution.

A. *Cultural Capture and the Miner's First Canaries: Spirituals and Minstrelsy in the Nineteenth Century*

From the beginning, the expression of personality through music has been both fraught and essential for African Americans and American whites. It was fraught in that slaveholders demanded music from blacks, though with significant restrictions such as the outlawing of drums,<sup>112</sup> and in the duplicitous way that blacks performed musical meanings in whites' presence.<sup>113</sup> It was also essential as a means of integrating and understanding lived, often excruciating, experiences.<sup>114</sup> These general tensions were evident in two important forms of music, spirituals and minstrelsy, and both began during slavery and survived well after it.

Spirituals—the sacred songs that emerged from plantation life such as “Go Down, Moses” and “Swing Low, Sweet Chariot”—combined a religious poetry unique to slaves with many musical antecedents from African culture and the surviving rituals such as ring shouts.<sup>115</sup> During and after the Civil War, white abolitionists collected and circulated these spirituals in the accurate belief that the music's beauty would reveal the humanity of blacks and “their fitness to live as free Americans.”<sup>116</sup> Beyond what the spirituals themselves meant to ex-slaves, the recognition by whites of the form represented a source of dignified personhood in authorship, one “owned” by slave creators and ultimately “shared” with whites

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<sup>112</sup> *Id.* at 410.

<sup>113</sup> *See, e.g., id.* at 408 (describing how a slave song that started “I am going away to the great house farm, O yea! O yea! O yea!” was “jargon to others, but full of meaning” to the slaves, who “told a tale of grief and sorrow”).

<sup>114</sup> *Id.* at 408–09.

<sup>115</sup> *See id.* at 416–18.

<sup>116</sup> *Id.* at 415.

as distinctly “American.”<sup>117</sup> (It is doubtful, however, that the economic benefits of creative authorship came to blacks upon publication of the spirituals.)

Yet white acknowledgment of black personality was more ambivalent and opportunistic in minstrelsy. During slavery, “[t]he minstrel persona offered white entertainers and audiences a chance to visit and explore expressive territory that would otherwise have remained private.”<sup>118</sup> This occurred behind black face, performed by “negro impersonators” and “Ethiopian delineators” who mimicked stereotypical “coon” dialect, behavior, and attitudes to dance and music.<sup>119</sup> White minstrels created demeaning characters like Zip Coon (the urban rascal) and Jim Crow (the country Sambo) whose popularity included White House performances.<sup>120</sup> White minstrelsy appropriated the music and the instruments used by black slaves, such as the banjo.<sup>121</sup> It assumed falsity in the way that blacks presented themselves to whites and exploited this social mechanism as a liberating mask behind which whites could express social commentary about their own conditions.<sup>122</sup> White minstrels engaged in a studied theft of black personality and music, creating a popular decades-long industry that black minstrels eventually joined.<sup>123</sup>

The point of this music historical allegory so far is not to reiterate longstanding racial critiques but rather to illustrate how, during the emergence of distinctly American musical forms and the development of the nation’s early treatment of copyright, race was the artist’s first canary in the proverbial coalmine. That is, the early imposition on music of common themes of racial hierarchy,

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<sup>117</sup> Crawford’s account suggests that this may have been one of the earliest instances of an American musical heritage: “In fact, the circulation of spirituals after the Civil War gave many white Americans their first hint that if the United States was a nation with its own distinctive music, the ex-slave population was in large part responsible.” *Id.* at 412.

<sup>118</sup> *Id.* at 198.

<sup>119</sup> *See id.* at 199–201.

<sup>120</sup> *See id.* at 201–02.

<sup>121</sup> *Id.* at 205.

<sup>122</sup> *See id.* at 198–99.

<sup>123</sup> *Id.* at 218. According to Crawford, the trend lived on: “In their challenge to civilized decorum, blackface minstrels of the 1840s and early 1850s hold traits in common with rock-and-roll musicians from the 1950s on.” *Id.* at 198.

subordination, and role-playing for complex purposes of personhood would continue to play out as acceptable—even expected—constructs in how ownership and authorship were defined. In particular, the subsuming of personality into economic interests by copyright law would facilitate the inequitable structure of the music business for most music artists. It began largely with people who had no economic agency worth recognizing and who occupied the status of free labor—slaves and freedmen. Almost none of these creators owned copyrights in their works.

*B. Legal Capture: Nineteenth Century Copyright and Passage of the 1909 Act*

The commercial exploitation of any copyrighted work often requires the participation of professional intermediaries to sell it. Much of the history of music copyright features the role of non-author intermediaries, particularly publishers who, given the primacy of sheet music and their control of printing presses, have always been regarded as central to copyright's scheme.<sup>124</sup> It was their insistence that led to many of the provisions of the first copyright act in 1790;<sup>125</sup> when music was added in 1831, only sheet music was copyrightable.<sup>126</sup> These business-side facts of music production were reflected doctrinally in the idea/expression dichotomy, which privileged only music that had been transcribed into conventional notation.<sup>127</sup> The creative-side consequence was to demand a basic literacy for copyright protection. For the public's enjoyment, music would be “read”—played at home on

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<sup>124</sup> Carroll, *supra* note 91, at 1410.

<sup>125</sup> Susanna Monseau, “Fit for Purpose”: *Why the European Union Should Not Extend the Term of Related Rights Protection in Europe*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 629, 643 (2009).

<sup>126</sup> Copyright Act of 1831, ch. 16, 4 Stat. 436 (amended 1856); see Joiner, *supra* note 2, at 46 (“The composers . . . did not consider seriously the various musical boxes, barrel organs, bird organs, chiming clocks and snuff boxes that had been known for centuries as encroaching on any of their rights . . . as these inadequate mechanical contrivances could play but a limited number of musical airs and could play them only under severe limitations.”).

<sup>127</sup> See Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 337 (1989) (discussing *White-Smith Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908), and its implications for the idea/expression doctrine in various musical forms).

the piano, heard in performance.<sup>128</sup> For ownership, music would be “written.”<sup>129</sup> However, prior to the adoption of the 1909 Copyright Act, musicians who sought ownership of their creative work could rely only on a hodgepodge of state common law rules.<sup>130</sup> After transcribing her composition, an artist would have to follow the formalities to copyright registration with the Copyright Office, including deposit and renewal.<sup>131</sup> Failure to satisfy these requirements would release the work to the world or at least limit the term of ownership.<sup>132</sup> Music authors frequently had a difficult time obtaining and enforcing copyrights in their work.<sup>133</sup>

The music publishers, on the other hand, did not have difficulty obtaining and enforcing copyrights, and they held a dominant position in the music industry until about 1920, largely because of their (sometimes shared) ownership of composition copyrights and their control over access to music consumers.<sup>134</sup> Publishers exercised power during this period by giving songwriters a flat fee for their compositions, rarely paying royalties,<sup>135</sup> and forcing songwriters to transfer their copyrights to them.<sup>136</sup> At its height in the late nineteenth century, the group of powerful music publishers located in New York’s Tin Pan Alley engineered the country’s

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<sup>128</sup> Gitelman, *supra* note 107, at 285.

<sup>129</sup> *Id.* at 275.

<sup>130</sup> The Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831), covered only books, maps, and charts. Statutory protection for other types of creative works expanded over time. Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 744–45 (2009).

<sup>131</sup> NIMMER, *supra* note 28, § 7.16(A).

<sup>132</sup> Some states enforced copyrights in unpublished works under state common law. Exclusive rights under the Act were limited to reproduction, adaptation (the right mainly to prepare derivative works), and distribution/performance. *See id.* § 7.16(A)(2)(b).

<sup>133</sup> The difficulty partly came from the strict requirement on “deposit” under the Act. In order to facilitate the requisition of an author’s copyright, the Supreme Court, in *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1939), held that the words “promptly deposited,” in section 13 of the Act, might not be read as a condition subsequent that, if not satisfied, would result in destruction of the copyright. *Id.* at 32.

<sup>134</sup> *See* CRAWFORD, *supra* note 111, at 222 (“The sheet-music trade required several agents . . . Each played a necessary role, but publishers were the chief architects.”).

<sup>135</sup> *See id.* at 472–73.

<sup>136</sup> *See id.* at 473.

tastes in popular music.<sup>137</sup> These publishers employed songwriters to produce new arrangements of existing songs and song “promoters” to ensure that their products were used in the most popular shows and played by the most popular bands.<sup>138</sup> Tin Pan Alley controlled the music of Broadway, the concert halls, cabarets, dance halls, vaudeville, minstrelsy, and other popular music outlets.<sup>139</sup>

Publishers would gain access to the original scores and re-publish them, attributing authorship to the company or a composer related with the company,<sup>140</sup> often reworking the original score by simplifying the melodies.<sup>141</sup> Within this general practice, the exercise (or usurpation) of authorial power over black music—changing, sanitizing, or simplifying it in order to satisfy perceived white tastes—is a trend that runs through the entire history of black musical authorship in the United States.

Technology and America’s racial culture altered the balance of power in the late-nineteenth century music industry in ways that would be reflected in the 1909 Act. Specifically, the dispute involving a music publisher and a manufacturer of then-popular piano rolls revealed the confusion over the copyright statute’s definition of a readable “copy.” The defendant in *White-Smith Music Publishing Co. v. Apollo Co.*<sup>142</sup> had created perforated piano rolls of two popular “coon” songs whose copyrights had been assigned by the composer to the plaintiff.<sup>143</sup> The legal issue in

<sup>137</sup> See *id.* at 471 (“New York City’s magnetic pull in the field of entertainment during the nineteenth century’s later years turned it into the capital of popular-song publishing in the United States.”).

<sup>138</sup> See *id.* at 474–75.

<sup>139</sup> See *id.* at 471–76.

<sup>140</sup> See PERETTI, *supra* note 68, at 150; *id.* at 162 (“[T]he players’ talents were seen by industries as a raw material, an abstract production resource that they alienated from the musicians.”).

<sup>141</sup> *Id.* at 149.

<sup>142</sup> 209 U.S. 1 (1908).

<sup>143</sup> The songs were “Kentucky Babe” and “Little Cotton Dolly.” *Id.* at 8. Below is an illustrative excerpt from a coon song, “Whistling Coon,” as recorded by the popular black minstrel George Johnson, probably in 1891, who used to sing it on the street.

Oh, I’ve seen in my time some very funny folks,  
But the funniest of all I know,  
Is a colored individual as sure as you’re alive,  
He’s black as any black crow . . .

*White-Smith Music* mirrored the cultural issue: whether a perforated sheet, indecipherable to the human eye, was a copy like a duplicate page of sheet music?<sup>144</sup> Underlying this legal issue was a cultural one: what were the racial meanings of a blackface genre that had once been seen but might, with the aid of technology, only be heard?

The Court resolved the case in favor of the piano roll manufacturer because the perforations existed in some ambiguous realm between reading and writing.<sup>145</sup> With the passage of the 1909 Act, however, the legal conflict was resolved in favor of a composer's right against unlicensed mechanical reproductions.<sup>146</sup>

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You may talk until you're tired, but you'll never get a word  
 From this very funny queer old coon . . .  
 He's a knock-kneed, double-jointed, hunky-plunky moke  
 But he's happy when he whistles this tune . . .  
 (Whistles refrain)  
 He's got a pair of lips, like a pound of liver split,  
 And a nose like an injun rubber shoe,  
 He's a limpy, happy, chuckle-headed huckleberry nig,  
 And he whistles like happy killy loo . . .  
 He's an independent, free and easy, fat and greasy ham,  
 With a cranium like a big baboon . . .  
 Say! I never heard him talk to anybody in my life,  
 But he's happy when he whistles this tune . . .  
 (Whistles refrain)

TIM BROOKS, *LOST SOUNDS: BLACKS AND THE BIRTH OF THE RECORDING INDUSTRY 1890–1919*, at 28 (2004). As described by Gitelman, “the coon song was a complex, late-nineteenth-century survival of an already intricate and naggingly visual experience, the midcentury minstrel show.” Gitelman, *supra* note 107, at 276. The coon song was not part of minstrel shows, but shared its traditions. *Id.* at 277. It peaked in popularity as reflected in sheet music sales in the late 1890s, eclipsing the popularity of minstrelsy and finding a place in recordings. *Id.* This changed the class make-up of listeners. *See id.* (“Whereas minstrelsy had been an acknowledged white, working-class form, the coon song allowed middle-class penetration of its tradition, and coon songs were played in middle-class parlors, concerts, syndicated vaudeville, and the other bourgeois venues where sheet music was increasingly consumed.”).

<sup>144</sup> *See White-Smith Music*, 209 U.S. at 17.

<sup>145</sup> *See id.* at 18 (“These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.”).

<sup>146</sup> Gitelman, *supra* note 107, at 283. Congress swiftly responded to this decision by broadly drafting language that stated that copyright existed in music “in any system of notation or any form of record,” specifically passing § 1(e), which deemed mechanical

Unresolved was the racial question of a performer's identity. The composer of a coon song—black or white—feigned blackness by employing certain stereotypes; so did the performer—black or white.<sup>147</sup> The composer's identity as author was now protected under the 1909 Act, but not the performer's.<sup>148</sup> “[T]he result was an even more heightened sense of ‘the talent’ as a commodity.”<sup>149</sup> Further, without disclosure the race of the singer would remain ambiguous, leading to what Gitelman calls “racial ventriloquism”—the unseen white singer who sounded black—which would only be enhanced with the popularity of radio and phonograph records.<sup>150</sup> Of course, these developments had direct consequences for the economic and personality interests of black musicians whose works, styles and even caricatures were being appropriated by whites from a kind of cultural commons.

### C. Performance, the Phonograph, and Radio Under the 1909 Act

Few factors would affect all musicians' rights and incomes like the various and intense disputes about performance rights and performers under the 1909 Copyright Act. This section looks at

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reproductions of music as copies. Copyright Act of 1909, ch. 320, § 1(e), 30 Stat. 1075, 1076 (repealed 1976). However, it also struck several compromises, one of which was the creation of a compulsory licensing provision in which once the “owner of a musical copyright has used or permitted . . . use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may” do so provided they pay the copyright proprietor a two-cent royalty on each part manufactured. *Id.*; see Gitelman, *supra* note 107, at 285 (“[R]eadings under the 1909 act were made into writings.”).

<sup>147</sup> In a sense, this type of music could be a veritable theater of racial performance. The imitation of black musical origins by white composers and performers comprised its own idea of popular blackness, which itself could be reproduced—even by blacks, who adopted certain stereotypes of themselves to accommodate white consumer expectations of an authentic black sound. Other types of music—namely, the blues, soul and later rap—employ their own conventions of racial performance based on popular stereotypes.

<sup>148</sup> See Gitelman, *supra* note 107, at 283.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 277–78. The performance of race, like the performance of musical composition, was often contested, and the resolution of the conflict coincided with the division of property rights under copyright. See *id.* at 276–78. Limiting the rights in performance would not only limit the composer's exclusive rights, but for manufacturers of phonographs and record companies, it might contribute to a more competitive market for performers. *Id.* at 283. Thus, both a cultural and commercial rationale underlay the secondary treatment of performers.

the contests between publisher power and the power of two giants either in their infancy or not yet born in 1909, record companies and radio broadcasters.<sup>151</sup> The denial of sound recording rights until 1972 reflects the early hegemony of publishers as well as the availability of state law alternatives.<sup>152</sup> Their belated adoption is testament to the power shift that saw record companies eclipse publishers in the last decades of the twentieth century. What is sometimes lost in the battle of titans is the near unanimous rejection of rights in performance that would have been critical to musicians' interests. After all, whether they were composers and performers or only performers, the majority of musicians then and now received most of their income as artists from performance.<sup>153</sup> The fact that the 1909 Act continued to regard most performance as, in Gitelman's analysis, unprotected "reading" of protectable "writing," severely disadvantaged many musicians for generations, especially black artists who were often rendered unprotected performers after the theft of their compositions by unscrupulous intermediaries.<sup>154</sup>

Under the 1909 Act, one of the exclusive rights of a copyright owner was the right to "public performance for profit."<sup>155</sup> In its early days, the radio industry, as well as major radio users such as restaurants, hotels, and ballrooms, attempted to exempt themselves from having to pay public performance royalties.<sup>156</sup> Broadcasters

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<sup>151</sup> See, e.g., *id.* at 271 ("[T]he industry,' as it had now become, grew more and more musically oriented through the 1890s, dominated in the new century by three patent-holding phonograph companies, American Graphophone (later Columbia), Victor Talking Machine (later Victor/RCA), and Edison's National Phonograph."); Paul Gitlin, *Radio Infringement of Music Copyright*, 1 COPYRIGHT L. SYMP. (ASCAP) 61, 62 (1938), reprinted in 46 J. COPYRIGHT SOC'Y U.S.A. 7, 15-17 (1998) (stating that "[r]adio had grown tremendously since the first broadcast by Station KDKA" in 1920).

<sup>152</sup> See Gitelman, *supra* note 107, at 283-85.

<sup>153</sup> See *supra* note 6 and accompanying text; see also Peter Kafka, *The Road to Riches*, FORBES.COM, July 7, 2003, <http://www.forbes.com/forbes/2003/0707/078.html> ("The top 10% of artists make money selling records. The rest go on tour," says Scott Welch, who manages singers Alanis Morissette and LeAnn Rimes.").

<sup>154</sup> See PERETTI, *supra* note 68, at 148-49.

<sup>155</sup> Copyright Act of 1909, ch. 320, § 1(e), 30 Stat. 1075, 1076 (repealed 1976).

<sup>156</sup> See, e.g., *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931); *Herbert v. Shanley Co.*, 242 U.S. 591 (1916); *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929); *SESAC v. N.Y. Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937); *M. Whitmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923).

justified their claimed exemption on the ground that radio was essentially advertising for sheet music and record sales, despite mounting evidence that radio was becoming a market substitute.<sup>157</sup> In suits often brought by The American Society of Composers, Authors, and Publishers (“ASCAP”), publishers secured their rights under both the “for profit”<sup>158</sup> and “public performance”<sup>159</sup> language. The battles in Congress between the National Association of Broadcasters and ASCAP were just as unrelenting, with similar results favoring publishers.<sup>160</sup> So the basic performance right held by composition copyright holders stayed firm.<sup>161</sup>

But the manufacturers of phonograph records would have no such luck getting statutory protection for sound recordings.<sup>162</sup>

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<sup>157</sup> According to ASCAP, prior to 1925, a hit song had an average life of sixteen months and total sheet sales of 1,156,134; by 1932, the average life of a hit song was only three months and total sheet sales were 229,866. Gitlin, *supra* note 151, at 66. In 1934, the number one hit “Love in Bloom” sold under 500,000 copies, even though it was performed 24,374 times on the air. *Id.* In 1937, the top songs were “Chapel in the Moonlight” and “When My Dream Boat Comes Home,” both of which sold under 500,000 copies, which was inversely proportional to the time these songs spent on radio airplay. *Id.*

<sup>158</sup> See, e.g., *Herbert*, 242 U.S. at 591 (concerning the indirect benefit to a restaurant where the price of music is included in the price of food); *M. Whitmark*, 291 F. at 776 (concerning an indirect benefit to department store from music broadcasts).

<sup>159</sup> See, e.g., *Jerome H. Remick & Co. v. Am. Auto. Accessories Co.*, 5 F.2d 411, 412 (6th Cir. 1925) (holding that, whether visible, live, or otherwise, the “artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance”), *rev’g* 298 F. 628 (S.D. Ohio 1924); *Jerome H. Remick & Co. v. Gen. Elec. Co.*, 16 F.2d 829 (S.D.N.Y. 1926) (broadcasting an unauthorized performance constitutes contributory infringement); see also *Jewell-La Salle Realty Co.*, 283 U.S. at 196–202 (holding that hotel’s reception and reproduction of public radio broadcasts to individual rooms and bedrooms constituted public performance for profit); *SESAC*, 19 F. Supp. at 5–6 (same). But see *Debaum*, 40 F.2d at 735 (holding that, by giving radio station a public performance license, the copyright holder “impliedly sanctioned and consented” to a café owner who played the broadcast for his patrons).

<sup>160</sup> See Gitlin, *supra* note 151, at 15–17.

<sup>161</sup> There were, of course, exceptions such as the juke box exemption. Copyright Act of 1909, ch. 320, § 1(e), 30 Stat. 1075, 1076 (repealed 1976) (“The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.”).

<sup>162</sup> The House Report for the 1909 Act stated: “It is not the intention of the committee to extend the right of copyright to the mechanical reproductions [records] themselves, but only to give the composer or copyright proprietor the control, in accordance with the

Three main reasons were offered. First, Congress feared that a single company, Aeolian, would succeed in dominating the music industry by exclusively contracting with music publishers and buying up all recording rights in what would amount to a “musical trust.”<sup>163</sup> Second, Congress felt that sound recordings did not constitute “writings” as intended by the Constitution, nor were record companies or performers deemed “authors.” Third, there was state copyright and common law unfair competition to protect against unauthorized copying.<sup>164</sup>

To some extent, state law did protect sound recordings under either common law copyright or unfair competition.<sup>165</sup> Yet, for our

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[compulsory licensing] provisions of the bill, of the manufacture and use of such devices.” H.R. REP. NO. 60-2222, at 7–9 (1909).

<sup>163</sup> Robert T. Mowrey, *The Rise and Fall of Record Piracy*, 27 COPYRIGHT L. SYMP. (ASCAP) 155, 163 (1982). For the same reason, Congress implemented the compulsory license provision.

They [Congress] were first inclined to give the copyright owner the exclusive right to make sound recordings . . . however, it was learned that one dominant record company, anticipating the establishment of an exclusive recording right, had contracted with the leading music publishers for the exclusive right to record all their music. To forestall the danger that this company would acquire a monopoly in the making of records, the committees adopted the device of the compulsory license.

REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW § 7a (1961).

<sup>164</sup> Legislative committees held hearings to take up the issue of sound recording rights under the Act during the latter part of the 1920s, when phonograph records gained significant popularity in the market and at least four different times in the 1930s. *See* Gitlin, *supra* note 151, at 70–71, 78–79, 81–83, 85. During House hearings in 1939, broadcasters reiterated their arguments; authors and publishers reiterated theirs, adding that the common law provided sufficient protection; and even lawyers chimed in to argue for contractual, rather than ownership solutions to recording infringement. *See* BARBARA A. RINGER, *THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS* 33 (1957) [hereinafter *RINGER STUDY*]. In the 1939 report by the ABA Copyright Committee, the drafting of the bill was deemed defective, but the committee unanimously embraced the idea of a copyright for recorded performances, and also mentioned that the subject of authorship “should be determined as a matter of contract between the respective parties contributing to the composite result, continuing the assumption of the present act that an employer for hire has capacity for authorship.” *Id.* (citing *Committee Reports*, 1939 A.B.A. SEC. PAT. TRADEMARK & COPYRIGHT L. 18).

<sup>165</sup> According to Professor Nimmer, common law copyrights vest in an author of a work when the following three elements are met: 1) there is an expression beyond an abstract

purposes, the case law reveals the difficult position of musical performers under a rights regime that consistently excluded them. For example, in *Waring v. WDAS Broadcasting Station, Inc.*,<sup>166</sup> Fred Waring, a white man and one of the most prominent orchestra leaders of the day, sued a broadcasting company for playing his recordings over the air.<sup>167</sup> He had no exclusive right to public performance for profit under the federal copyright regime, because his were interpretations of popular compositions.<sup>168</sup> But the court was determined to find a remedy under a property theory for performers capable of unique artistic contributions.<sup>169</sup> The rationale went beyond mere labor or economic incentives to create, but to some characteristic of personality.<sup>170</sup> “A musical composition in itself is an incomplete work; the written page evidences only one of the creative acts which are necessary for its enjoyment; it is the performer who must consummate the work by transforming it into sound,” said the court.<sup>171</sup> Further, “such a property right inheres in the case of those artists who elevate interpretations to the realm of independent works of art.”<sup>172</sup> Furthermore, because such a rendering can be captured and reproduced, the rendering can be deemed property as firm as any corporeal property.<sup>173</sup> Unfortunately, the *Waring* reasoning was

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idea; 2) it is original to the author; and 3) it is unpublished. NIMMER, *supra* note 28, § 4.02(C).

<sup>166</sup> 194 A. 631 (Pa. 1937).

<sup>167</sup> Note that the party bringing the suit was not the copyright holder in the musical composition (who could have a claim if the broadcast were unauthorized), but the recording artist, whose product (the recording) was not protected under federal copyright.

<sup>168</sup> Interestingly, the previous year, Waring actually applied to the Copyright Office for a copyright on his musical interpretation of the song “Lullaby of Broadway.” Walter L. Pforzheimer, *Copyright Protection for the Performing Artist in His Interpretive Rendition*, 1 COPYRIGHT L. SYMP. (ASCAP) 9, 12 (1938). The Copyright Office rejected the application as being beyond the scope of federal copyright law. *Id.*

<sup>169</sup> See *Waring*, 194 A. at 635.

<sup>170</sup> See *id.* at 643.

<sup>171</sup> *Id.* at 635.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 632. The court seemed to imply that the interpretation has to be assessed as to its artistic value. See *id.* at 635; see also *Metro. Opera Ass’n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483, 489–90 (N.Y. Sup. Ct. 1950).

not generally followed and was even repudiated on the ground that Waring's recording constituted a publication to the world.<sup>174</sup>

As a performer, Fred Waring was exceptional. During the early part of the twentieth century, most performing artists, particularly black ones, suffered a distinct lack of bargaining power among another set of music industry intermediaries, venue owners.<sup>175</sup> While the publishers controlled the sheet music revenues, the venue owners controlled the live performance revenues. All but the most popular bands and musicians were subject to low, flat fee payments for performances, even when admission revenues were extremely high.<sup>176</sup> As touring circuits developed, owners used booking agents to coordinate performances, and these agents quickly controlled access to thousands of venues across the country.<sup>177</sup> Popular performance, therefore, was an arena of competitive conflict in which musicians' share of financial rewards was customarily subordinated to non-musician intermediaries.<sup>178</sup> These relationships hardened with the growth of the industry fueled by phonograph records and radio, and they were accompanied by the rise of Jim Crow and the migration to northern cities of so many black musicians from the South.<sup>179</sup> This legal and business architecture combined with social relations at the time to facilitate the dispossession of music author and performer's rights. The personality harms lamented by Ornette Coleman, a jazz musician, were commonplace.

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<sup>174</sup> See *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 87–90 (2d Cir. 1940) (Hand, J.) (“[W]e think that the ‘common-law property’ in these performances ended with the sale of the records and that the restriction did not save it; and that if it did, the records themselves could not be clogged with a servitude.”).

<sup>175</sup> See PERETTI, *supra* note 68, at 148–49.

<sup>176</sup> See *id.* at 148.

<sup>177</sup> See CRAWFORD, *supra* note 111, at 476 (“In 1896, six of these [booking] agents joined together to form the Syndicate . . . [and by] 1926, the Syndicate boasted a network of some seven hundred theaters nationwide.”). Because musicians and bands relied on consistent touring for income, they were subject to the attitudes and preferences of the booking agents. *Id.* During periods when it was typical for bands to play at one venue for long periods of time, owners would threaten and carry out physical violence against bands who attempted to play elsewhere, and booking agents would use slander or influence to get musicians banned from touring circuits. See PERETTI, *supra* note 68, at 146–47.

<sup>178</sup> See CRAWFORD, *supra* note 111, at 478.

<sup>179</sup> See PERETTI, *supra* note 68, at 58.

## 1. Jazz Music

Jazz music's place in this analytic chronology brings together themes central to an understanding of industry capture of artists' rights amid important racial dynamics. It illustrates more of the imitative practices apparent in minstrelsy as well as the appropriation of black creative ownership by an industry controlled by and catering to whites.<sup>180</sup> More subtly, jazz history represents dueling adaptations that occurred partly as a result of appropriation. That is, white record producers and club owners often adapted black musical styles to perceived white consumer tastes.<sup>181</sup> Black jazz artists then adapted new musical forms to flourish creatively and, just as importantly, to overcome economic marginalization.<sup>182</sup> In this case, discrimination, not ownership, motivated the creation of new expressions of artistic personality as well as new markets.

This last point is evident in the very genesis of jazz, as a combination of various music disciplines, following the adoption of Jim Crow laws in New Orleans.<sup>183</sup> Once a cosmopolitan city whose musical culture was influenced by the American black, Haitian, French, Spanish, English, Irish, German, Italian, and Cuban origins of its residents, as well from rural and regional musical traditions,<sup>184</sup> New Orleans became legally segregated.<sup>185</sup> The new legislation classified Creoles as Blacks for the first time.<sup>186</sup> The false racial binary concentrated the disparate/existing musical influences to create a musical culture that was urban,

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<sup>180</sup> See *id.* at 148 (“[W]hites [in the 1920s] began to realize the talent Negroes had, and they began scheming how to commercialize it.”); Gitelman, *supra* note 107, at 276–78 (discussing the appropriation of black creative ownership in minstrelsy).

<sup>181</sup> See NIK COHN, *ROCK: FROM THE BEGINNING* 13 (1969).

<sup>182</sup> See JAMES LINCOLN COLLIER, *THE RECEPTION OF JAZZ IN AMERICA: A NEW VIEW* 24 (1988).

<sup>183</sup> *AFRICAN AMERICAN MUSIC: AN INTRODUCTION* 147 (Mellonee V. Burnim & Portia K. Maultsby eds., 2006) [hereinafter Burnim & Maultsby].

<sup>184</sup> See *id.*; see also THOMAS J. HENNESSEY, *FROM JAZZ TO SWING: AFRICAN-AMERICAN JAZZ MUSICIANS AND THEIR MUSIC 1890–1935*, at 15 (1994).

<sup>185</sup> Burnim & Maultsby, *supra* note 183, at 147.

<sup>186</sup> *Id.* Now, Creoles and Blacks had a common prejudice against them. This narrative supports the theory that Jazz was formed through a combination of Blacks, who were known for their brass and string band blues music, and Creoles, who were known for their instrumental virtuosity, music literacy, and training in classical music. See *id.*

competitive, sometimes violent, heavy on instrumental improvisation, and consciously virtuoso.<sup>187</sup> New Orleans jazz musicians early on thought of themselves as highly skilled “artists.”<sup>188</sup>

The dissemination of jazz also has roots in racial discrimination. Many jazz musicians joined the Great Migration of blacks fleeing lynching and Jim Crow oppression and seeking better economic opportunities in northern cities.<sup>189</sup> This established Chicago as a destination for New Orleans musicians,<sup>190</sup> and, like New York, it developed a complex performance culture that promoted jazz music from within dance halls, local cabarets,<sup>191</sup> and touring circuits.<sup>192</sup> A host of new intermediaries emerged such as managers, promoters, and booking agents to coordinate the various venues and performances.<sup>193</sup>

Along with the popularity of the music blacks brought came familiar patterns of exploitation and racism.<sup>194</sup> For instance, the Theater Owners Booking Agency (“TOBA”) was the first booking agency to feature black acts on touring circuits,<sup>195</sup> but was renowned for low wages and discriminatory policies, taking on the

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<sup>187</sup> See PERETTI, *supra* note 68, at 26–37.

<sup>188</sup> *Id.* at 37.

<sup>189</sup> See *id.* at 43. Of those that migrated from South to North between 1915 and 1920, 60,000 migrated to Chicago. *Id.* at 45.

<sup>190</sup> *Id.*

<sup>191</sup> See COLLIER, *supra* note 182, at 9 (“[A]s the music began to move north and west, it was being played in the main in cabarets and dance halls populated with prostitutes, despite occasional forays into vaudeville, and the impression that the music was somehow related to sexual sin was generally accurate. Now, however, with the success of the Original Dixieland Jass Band at a prestigious restaurant, the music was seen as more respectable.”).

<sup>192</sup> Hennessey notes that the bulk of black Americans still lived in the rural areas, especially the South, in the period from 1914–23. HENNESSEY, *supra* note 184, at 49. The tradition of circus and vaudeville tent show gave way to vaudeville theater, dance halls, and cabarets. See *id.* Many of these venues became part of regional touring circuits to which local and regional jazz bands had access. See *id.* at 54.

<sup>193</sup> See CRAWFORD, *supra* note 111, at 476.

<sup>194</sup> PERETTI, *supra* note 68, at 148 (“Black players found, as Earl Hines put it, that ‘whites [in the 1920s] began to realize the talent Negroes had, and they began scheming how to commercialize it.’” (alteration in original)).

<sup>195</sup> *Id.*

nickname among Blacks “Tough on Black Artists/Asses.”<sup>196</sup> Promoters (and some band leaders) rarely paid royalties and routinely stole original works.<sup>197</sup> Record companies usually paid flat fees to instrumentalists.<sup>198</sup> Only the most popular songs were paid royalties.<sup>199</sup> Rooted in the folk traditions of the rural South, many musicians were unacquainted with the idea of individual authorship and royalty rights.<sup>200</sup> Some musicians who were savvy took advantage of their band mates by taking credit for the entire composition even though it was collaboration.<sup>201</sup>

Of course, critical to the success of the genre was wide acceptance by white audiences,<sup>202</sup> yet legal segregation and the real or perceived antipathy for black musicians severely circumscribed opportunities for black jazz artists.<sup>203</sup> Thus, a critical pattern

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<sup>196</sup> *Id.* (noting that TOBA used black musicians extensively in its touring shows of the twenties but paid poor wages and enforced discriminatory policies).

<sup>197</sup> *See id.* at 150 (noting that one Tin Pan Alley copyist had a room filled with Benny Carter arrangements that he went around and sold, to which Carter responded: “He’s such a nice man that [I] figured, ‘well, if he’s making a couple of bucks, what the heck, you know.’”). Many musicians gained royalties only after legal proceedings, as stories of these unfair practices led musicians to become more careful and litigious. *See id.*

<sup>198</sup> *See id.* at 148, 153 (“Record company agents did not always pay musicians as they promised, and written record contracts were rarely drawn up. . . . Record companies kept artist payments as low as possible to maintain their profit margins. Instrumentalists were usually paid flat fees (ranging from \$30 to \$75) for making both sides of a 78-rpm disk, and they never obtained royalties.”).

<sup>199</sup> *See id.* at 149 (“[T]he American Society of Composers, Authors, and Publishers (ASCAP), founded in 1914, had begun to ensure that at least the best-selling song composers would get their royalties.”).

<sup>200</sup> *See id.* at 149–50.

<sup>201</sup> *See id.* at 150 (noting many bands worked out compositions together, but a band leader who was aware of ASCAP and the concept of royalties could take credit). Duke Ellington was called out for just such a thing and responded by saying “everybody else steals from me.” *Id.* Ellington would pay small sums for ideas but would not allow the originator to share in the large royalties. *Id.* One frustrated band mate even said, “I don’t consider you a composer. You are a compiler.” *Id.*

<sup>202</sup> *See* COLLIER, *supra* note 182, at 12–14 (“It is critical to our understanding of early jazz and American culture to recognize that by far the largest proportion of the American audience for the music consisted of mainstream whites drawn from the whole spectrum of society, from the upper crust looking for new thrills down to working people paying a nickel a dance in the jitney dance halls. . . . Jazz could not have survived as anything but a tiny local music had it been forced to depend mainly on finding a black audience. From the beginning it was the white audience that provided the economic base for it.”).

<sup>203</sup> For instance, the Chicago Federation of Musicians—led by Mobsters—was a whites-only union that commanded the highest wages. PERETTI, *supra* note 68, at 157–58.

begun during the minstrel era continued: Black musical genres and styles were appropriated as property by white composers, publishers, and promoters, then altered to more closely fit expected white consumer tastes and sold.<sup>204</sup> In the early jazz period, this was demonstrated most clearly in the difference between “hot” jazz and “sweet” jazz.<sup>205</sup>

The major record companies of the time included Victor, RCA, and Columbia.<sup>206</sup> Many of the jazz bands that were recording on a regular basis were made up of white musicians, who tended to play in the “sweet” jazz style.<sup>207</sup> While black bands were often denied opportunities to record, the style of jazz played also dictated the recording opportunities black bands had.<sup>208</sup> During the first decade of recording, from 1918 to the late 1920s, the sweet jazz band dominated the popular music scene, both in the clubs and the recording studios.<sup>209</sup> Large audiences remained for the hot jazz sound associated with black jazz bands,<sup>210</sup> but recording companies and promoters alike focused on the sweet jazz sound.<sup>211</sup>

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Booking shows at hotels and clubs that denied access to blacks further diminished the opportunities for black performers. *See* Burnim & Maultsby, *supra* note 183, at 152.

<sup>204</sup> *See* PERETTI, *supra* note 68, at 186–87.

<sup>205</sup> *See id.* at 154.

<sup>206</sup> Chris Morris, *A History of Independent Labels*, BILLBOARD, Nov. 1, 1994, at 131 (noting that when recording became a big part of the industry, it was dominated by the majors, which, generally speaking, would dominate the music market place until the late forties and early fifties).

<sup>207</sup> Peretti describes that style as follows: “This music syncopated mildly, rarely used the blues or swung, and it almost never stressed improvisation, and so it is rarely considered part of the great jazz tradition.” PERETTI, *supra* note 68, at 94.

<sup>208</sup> *See id.* at 201–02.

<sup>209</sup> *See* COLLIER, *supra* note 191, at 17–18 (describing how in the early twenties, symphonic sweet Jazz began to push out the hot jazz of black bands, dominating the field for several years and making many rich).

By 1922 Vincent Lopez was commanding \$5,000 a week for his orchestra . . . and Whiteman himself was paying his star clarinetist, Ross Gorman[,] . . . an astounding \$400 a week. . . . [M]usicians in the better-known orchestras were earning from \$75 to \$300 a week. By 1925 . . . [the] top bands [in New York] were being paid \$10,000 a week.

*Id.* White bands almost exclusively played for white audiences. *Id.* at 22.

<sup>210</sup> *See id.* at 20, 22 (noting that “[b]y 1930 Duke Ellington was Victor’s second best seller” and that by 1931, Louis Armstrong had sold over 100,000 records).

<sup>211</sup> *See id.* at 19–22 (noting that, during the twenties, when the orchestra band was the most popular but the “hot” jazz band was still around, music trade magazines paid more

The pattern of racial exclusion and appropriation continued into the swing era, well into the forties,<sup>212</sup> when, except for a few of the most popular black-lead jazz bands, black musicians,<sup>213</sup> and the music associated with them, were not heard on radio.<sup>214</sup> “Consequently, to the broader White public, swing did not appear to be Black music. This perception was reinforced by Jim Crow barriers that kept African-American bands from being heard through the same high-visibility broadcast channels.”<sup>215</sup> Even in modern jazz, as artists like Ornette Coleman and black intellectuals

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attention to the orchestra type band; however, in *Variety*, popular white “hot” bands were listed but not any similarly popular black “hot” bands).

To be sure, there were independent labels that dedicated their resources to recording and promoting the hot jazz sound during this period. See PERETTI, *supra* note 68, at 149 (“Jack Kapp became a powerful benefactor to jazz when he wholly dedicated his successful American Decca company to popular dance music, [but] he nevertheless hurt the music by diluting it in the recording studio, simplifying melodic lines and eliminating much improvisation.”). The recording business was one wrought with financial difficulties and uncertainties. See *id.* at 153. Often, the independent labels could not sustain themselves long, and larger record companies would buy these struggling companies. See *id.*

In addition, unscrupulous treatment by managers exploited the vulnerability of black musicians—many of them illiterate or not formally trained musically—to convert ownership of their work. See *id.* at 147–50. Professional managers took liberties with their artists’ creations. See *id.* at 147–48. For example, Irving Mills, a singer/songwriter who managed Duke Ellington’s band, took partial credit for many Duke Ellington compositions to which he did not contribute. *Id.* at 148. Also, “Paddy” Harmon, an owner of Chicago’s Dreamland Café, took credit for inventing a trumpet mute that Joe “King” Oliver and other black musicians had been using for decades. *Id.*

<sup>212</sup> See COHN, *supra* note 181, at 9–13. After the war, economics (the war) forced bands to assemble in smaller groups. See *id.* at 10. But this also prolonged the popularity of the big band since record companies were not promoting the small band style during the interwar period. See *id.*

<sup>213</sup> See PERETTI, *supra* note 68, at 154 (noting “sweet” dance bands dominated radio (mostly white) in 1930s to the detriment of “hot” jazz bands (mostly black)).

<sup>214</sup> DAVID P. SZATMARY, *ROCKIN’ IN TIME: A SOCIAL HISTORY OF ROCK-AND-ROLL 19–20* (1987) (quoting Johnny Otis, who argued that “in the thirties and forties, black music was summarily cut off the radio”).

<sup>215</sup> *Id.* The radio jobs that were available to black musicians were not desirable from an artistic standpoint because the musicians could not control the musical content. See PERETTI, *supra* note 68, at 162 (“The radio network jobs were the best paying in the jazz world, but they were few in number and fell often to those who were the most willing to let producers dictate their musical expression.”). It became clear that musical production would be dictated by radio and record company executives’ determination of what style would sell; to them, the more “commercialized” the music, the better. See *id.* at 156.

like Harold Cruse would attest in the late-1960s,<sup>216</sup> jazz was typically a tough business for jazz authors. Whether recording or performance, the incentives to create that copyright ownership theoretically promotes had to come mainly from some other source.

## 2. Rock and Roll & Rhythm and Blues

The pattern of racial appropriation—black music artists developing a musical genre controlled first by white business intermediaries then by creative imitators, and black economic disenfranchisement from the financial gains of the music industry they helped to build and dispossession of ownership in original works of authorship and performance—continued after World War II and into the vast increase in popularity of recorded music on vinyl records.<sup>217</sup> Rock and roll in its popular form emerged around 1955–56.<sup>218</sup> Major record labels could no longer deny the popularity of Rhythm & Blues (“R&B”) music, but they eschewed its black creators.<sup>219</sup> As a result, major labels attempted to record

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<sup>216</sup> According to Cruse, beneath even the failure to award Duke Ellington the Pulitzer Prize, everything is appropriative harm. HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* 110–11 (N.Y. Review of Books 2005) (1967). The prize itself is not really that important, but what lies behind the denial of the prize, is:

a whole history of organized duplicity and exploitation of the Negro jazz artist—the complicated tie-in between booking agencies, the musicians’ unions, the recording companies, the music publishers, the managers, the agents, the theater owners, the nightclub owners, the crooks, shysters, and racketeers. The Negro creative intellectuals have to look into the question of how it is possible for a Negro jazz musician to walk the streets of large cities, jobless and starving, while a record that he cut with a music company is selling well, both in the United States and in Europe. They have to examine why a Negro jazz musician can be forced to pay dues to unions that get him no work, and that operate with the same discriminatory practices as clubs, halls and theaters. The impact of the cultural tradition of Afro-American folk music demands that the racially corrupt practices of the music-publishing field be investigated.

*Id.*

<sup>217</sup> See Burnim & Maultsby, *supra* note 183, at 245–46.

<sup>218</sup> Arnold Shaw, *Researching Rhythm & Blues*, 1 *BLACK MUSIC RES. J.* 71, 74 (1980) (“Chronologically, the R & B era embraces the 1940s and early 1950s, whereas rock ‘n’ roll emerges in 1955–56.”).

<sup>219</sup> See *id.* at 71 (noting Rock emerged as a direct result of R&B in the early ‘50s).

white men with a black sound.<sup>220</sup> A more up-tempo version of R&B with elements of soul music, “rock and roll”—a black vernacular term describing sexual relations—was being played by black musicians since the late forties.<sup>221</sup> To obfuscate the source of the R&B music from which rock and roll developed, popular radio DJs such as Alan Freed used the term “rock & roll.”<sup>222</sup> Rock emerged as a symbol of white teenage aggression and a rebellion from the manners and the music of their parents.<sup>223</sup>

R&B, on the other hand, officially emerged as a distinct genre in the music industry in 1949 when *Billboard* provided a separate chart for the music.<sup>224</sup> Up to that point all music created by black artists for black listeners was grouped under the designation “race” record.<sup>225</sup>

However, R&B, as it came to be defined musically, was being played since the early 1940s.<sup>226</sup> At that time, jazz had experienced a temporary decline as a performance art.<sup>227</sup> World War II led to fewer men in the country; band personnel were unstable, and ballrooms closed.<sup>228</sup> Smaller bands were formed to play smaller venues; these bands developed new musical repertoires, specifically bebop and R&B.<sup>229</sup> The creators of these new repertoires were former jazz and blues musicians who joined together.<sup>230</sup> The styles were adopted by young adults raised in

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<sup>220</sup> See *id.* at 72.

<sup>221</sup> See SZATMARY, *supra* note 214, at 15–19 (noting Little Richard and Chuck Berry were the first established “rock and roll” artists, a term used by blacks for sex and first used to describe all R&B artists).

<sup>222</sup> COHN, *supra* note 181, at 13.

<sup>223</sup> See *id.* at 14–15 (noting teens had money and needed things to spend it on, which created a market for all things teen, especially music).

<sup>224</sup> Matthew A. Killmeier, *Race Music*, ST. JAMES ENCYC. OF POP & CULTURE, Jan. 29, 2002, [http://findarticles.com/p/articles/mi\\_g1epc/is\\_tov/ai\\_2419101005/](http://findarticles.com/p/articles/mi_g1epc/is_tov/ai_2419101005/) (noting that the term “R&B” was first used by *Billboard* in 1949, replacing the use of “race” to describe black music by black artists).

<sup>225</sup> See Greene, “Copynorms,” *supra* note 19, at 1189–90.

<sup>226</sup> See Burnim & Maultsby, *supra* note 183, at 255 (noting that the Orioles were formed in 1946 and are considered the first rhythm and blues vocal harmony group).

<sup>227</sup> See *id.* at 248.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

impoverished urban environments whose musical influences came out of black church music, such as jubilee and gospel.<sup>231</sup>

On the business side, R&B was primarily produced by small independent record labels and grew as a result of longstanding industry conflicts.<sup>232</sup> Independent record labels recognized the market potential for R&B because of its popularity among teenagers, and further because of the fact that major labels still did not want to record or market to blacks, a situation that had persisted since the dawn of the swing era.<sup>233</sup> They aggressively sought R&B acts.<sup>234</sup> With the major recording companies ignoring the R&B market, along with the availability of independent pressing plants, many independent labels entered the music business.<sup>235</sup> At the same time, the National Association of Broadcasters formed its own performing artists' organization, Broadcast Music Incorporated ("BMI"), ending ASCAP's virtual monopoly, creating "a cultural space for [R&B] artists."<sup>236</sup>

R&B then entered the mainstream through radio, specifically independent radio,<sup>237</sup> where it became fodder for imitation and appropriation. The advent of television had devastated network radio and spawned the growth of independent stations needing to appeal to their own audiences.<sup>238</sup> R&B discs were banned at white

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<sup>231</sup> *Id.*

<sup>232</sup> See Killmeier, *supra* note 224.

<sup>233</sup> *Id.*

<sup>234</sup> Chris Morris has noted: "In the 10-year period following the end of World War II, a group of fast-moving indie labels keenly read the barometer of mass taste and issued music by groups and artists who would virtually define the currents of popular music through the first rock'n'roll era." Morris, *supra* note 206, at 132. Thus, for the first time independent labels were in control of popular music.

<sup>235</sup> Burnim & Maulsby, *supra* note 183, at 399.

<sup>236</sup> *Id.* at 398. But radio listeners might no longer have access to ASCAP songs. *Id.* While ASCAP's members included the industry catalogues for Broadway and film, BMI turned to the songwriters themselves for membership. *Id.* "This move signaled a new era in Black popular music in the sense that ASCAP, and its considerable influence in shaping public taste, was challenged publicly for the first time, creating a cultural space for [R&B] artists." *Id.*

<sup>237</sup> See SZATMARY, *supra* note 214, at 19. Television made radio space available to more recording artists. *Id.* It was curtailed during the war but became more popular and affordable after. By absorbing the network radio shows (all white), television allowed radio to be more available to black artists. *Id.*

<sup>238</sup> Burnim & Maulsby, *supra* note 183, at 399.

stations, which contributed to artists' rampant covering in 1955–56.<sup>239</sup> Labels recorded covers of the music with white groups and changed the arrangements to make it more palatable for radio and mainstream America.<sup>240</sup> Only after teens began to demand the genuine source did major recording companies begin to record black artists.<sup>241</sup>

Yet the practice of “racial covers” reveals how explicit statutory provisions worked against black R&B artists.<sup>242</sup> Without the ability to make white covers of black songs under the Act's compulsory license mechanism,<sup>243</sup> the industry would have had to alter its racist behavior sooner—playing black artists on white stations, signing black R&B artists to major labels, and expanding the opportunities for popular and financial recognition for black musical authors.<sup>244</sup>

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<sup>239</sup> COHN, *supra* note 181, at 13.

<sup>240</sup> Burnim & Maultsby, *supra* note 183, at 246.

<sup>241</sup> *See id.* at 246–47 (“With few exceptions and adhering to the social practices of a segregated society, record labels initially promoted these groups exclusively in African American communities.”); *see also id.* at 262 (“[R]hythm and blues remained popular among White youth. Record labels, eager to cater to the musical tastes of this group, pondered new and noncontroversial strategies to market this music across racial, class, and generational lines.”).

<sup>242</sup> As R&B and rock artist Bo Diddley said of the effect of covers on his career as an innovator: “With me, there had to be a copy. . . . They wouldn't buy me, but they would buy a white copy of me. Elvis got me. I don't even like to talk about it.” SZATMARY, *supra* note 214, at 25.

<sup>243</sup> *See* Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1076 (repealed 1976).

<sup>244</sup> *See* Neela Kartha, Comment, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 224–28 (1997) (arguing that the compulsory license provision of the Copyright Act disempowers African-American music artists). Interestingly, at the same time the practice of racial covers was occurring, in its 1961 report, the Register of Copyrights recommended to Congress a sweeping revision of the Copyright Act that would eliminate the compulsory licensing provision entirely. *See* REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. (1961), *reprinted in* 6 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 1, 717 (George S. Grossman ed., 2001).

The report reiterates the record industry's main arguments against the elimination of the compulsory license. According to the Recording Industry Association of America (“RIAA”): (1) a variety of recordings of a musical work are beneficial to the public, and without a compulsory license, music publishers/composers would grant exclusive licenses that would prevent this; (2) compulsory licenses enable smaller record companies to exploit the same music as larger ones, and thus stay in business; and (3)

On the back of rock, the record industry experienced enormous growth during this time period, increasing sales three-fold by the end of the 1950s.<sup>245</sup> Independent labels reaped most of these early rewards,<sup>246</sup> as the major labels avoided recording this music.<sup>247</sup> Many majors responded by attempting to buy the smaller independent labels or individual artists.<sup>248</sup>

The exploitation of black artists during the period of R&B's rise in popularity is now the stuff of legend and litigation. For instance, Chuck Berry successfully sued the Beach Boys for

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music publishers and composers actually benefit from the multiplicity of records. *Id.* at 714.

The rejoinders by the Register are also noteworthy. First, even without compulsory licenses, music publishers and composers would probably still issue multiple licenses anyway, but with the added benefit that they could refuse licenses to irresponsible or undesirable recordings. *Id.* at 715. Second, even if music publishers and composers were to issue more exclusive licenses, this might be beneficial because record companies would then be forced to take on more new music. *Id.* In other words, while variety in the number of recordings of one work may be sacrificed, the offset is the variety of the actual works recorded. Third, while it is true that under the present scheme, smaller companies can make competing renditions of a song by a bigger company, if a smaller company were to have exclusive licenses, and if the smaller company is lucky to have taken on a song that turns out to be a hit (the idea is that you never know what's going to be a "hit"), they would not have competition from larger companies. *Id.* at 715–16.

The thrust of the Register's arguments go to concerns about the integrity (non-distortion) of a song with "bad" covers—a moral rights-type interest. The RIAA's thrust goes to free access concerns. Both positions have merit. However, neither addressed the widespread practice of racial covers, though both certainly could have included the issue within the framework of their arguments.

<sup>245</sup> See SZATMARY, *supra* note 214, at 54 ("Record sales went from 189 million in 1950 to almost 600 million by the end of the decade.").

<sup>246</sup> See Morris, *supra* note 206, at 132 ("The indies gained substantially in this rock'n'roll gold rush: According to a breakdown of top 10 singles on Billboard's charts by rock historian Charlie Gillett, indies accounted for 59 of the 89 top 10 records in 1959, as opposed to only 11 of 51 entries in 1955.").

<sup>247</sup> See *id.* at 131–32 ("The reasons for the upswing in the indie trade were numerous . . . [and indie labels] were more than happy to cater to the niche tastes of audiences that were not being served by the major labels' pop-skewed artists.").

<sup>248</sup> See *id.* at 136 ("Consolidation became a byword in the record industry once more during the '60s. Two formidable New York indies with storied catalogs—Elektra Records, the folk-based imprint founded in 1950 by Jac Holzman, and Atlantic Records, started up in 1948 by Herb Abramson and Ahmet Ertegun, were both acquired by National Kinney Corp. in the late '60s, becoming . . . the industry's market-share leader in the '90s, the Warner Music Group.").

copyright infringement of his compositions.<sup>249</sup> Muddy Waters settled with Led Zeppelin for the expropriation of his work.<sup>250</sup> Many lesser known artists were not as successful in ever vindicating their rights as authors and performers.<sup>251</sup> The financial losses, as discussed in the last Part, constitute staggering harms when compared to the future value of so much of the era's music. However, the appropriative harm to personality in the theft of song and style and the lost opportunities that routinely resulted from common business models represents a defining characteristic of risks to music authors even in the later part of the twentieth century.

### 3. Soul Music

Soul was the new popular black music of the 1960s,<sup>252</sup> representing an altered black vernacular that combined the urbanization of black culture with so many of the rural, Southern, and gospel influences of the past.<sup>253</sup> On the business side, the launch of soul music's Motown Records by Berry Gordy in 1959 marked a new epoch as the crystallization of many of the creative and business trends described thus far.<sup>254</sup> Yet Motown also represented features of black musical experience we have already seen: the dialectic of self-disguise and white mimicry,<sup>255</sup> the requirement of suiting white tastes,<sup>256</sup> and artistic innovation for the sake of a competitive advantage amid the chronic market failure of industry racism.<sup>257</sup> What was different, however, was the successful emergence of black entrepreneurship on a grand scale. It soon became the largest black-owned corporation in the

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<sup>249</sup> Alan Korn, *Renaming That Tune: Aural Collage, Parody and Fair Use*, 22 GOLDEN GATE U. L. REV. 321, 341 n.106 (1992).

<sup>250</sup> Aoki, *supra* note 19, at 763–64.

<sup>251</sup> See Greene, *Copyright, Culture & Black Music*, *supra* note 16, at 353–54 (noting that even after the 1909 Copyright Act, lesser known African American artists frequently had original work misappropriated by non-creators).

<sup>252</sup> Candace G. Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 485 n.159 (2005).

<sup>253</sup> See COHN, *supra* note 181, at 127.

<sup>254</sup> See *id.* at 134–36.

<sup>255</sup> See Greene, *Copyright, Culture & Black Music*, *supra* note 16, at 372–73.

<sup>256</sup> See Gitelman, *supra* note 107, at 148.

<sup>257</sup> See *supra* Part II.C.1.

country.<sup>258</sup> Gordy combined talent management, producing, recording, and publishing.<sup>259</sup>

Soul music also represents the era in which a convergence of artistic stardom (personality) and business acumen (control) started to take the form of a more assertive consciousness about ownership rights. James Brown was one of the first artists to control his career, forming his own production company and getting a percentage of his performances.<sup>260</sup> When his record label refused to finance a recording of a live show at the Apollo, he financed it himself.<sup>261</sup> Sam Cooke, Curtis Mayfield, and Ray Charles, along with Brown, represented the handful of artists that were able to control their careers from an artistic and financial standpoint.<sup>262</sup> Nonetheless, they were the exception. Although this was the era in which artists were increasingly autonomous as writers and performers, there was still a general lack of appreciation for owning intellectual property rights. Record companies, even black-owned companies such as Motown, continued to keep the lion's share of the ownership rights and profits.<sup>263</sup>

Finally, soul music may represent the point at which a white-dominated music industry began to re-examine the principle of

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<sup>258</sup> See Kenneth Meeks, *Berry Gordy: America's First Black Music Mogul: The Architect of the Motown Sound Ushered in a New Era of Music*, BLACK ENTERPRISE, Oct. 2005, available at [http://findarticles.com/p/articles/mi\\_m1365/is\\_3\\_36/ai\\_n15679382/](http://findarticles.com/p/articles/mi_m1365/is_3_36/ai_n15679382/).

<sup>259</sup> See *id.*

<sup>260</sup> See COHN, *supra* note 181, at 129.

<sup>261</sup> *Id.*

<sup>262</sup> See Gail Mitchell, *Black Artists Struggle to Regain Ownership of Master Recordings*, BILLBOARD, Mar. 2, 2002, at 89 (“Precedents for attaining control were set by such farsighted artist/businessmen as Cooke, [Ray] Charles, and Mayfield. A handful of white acts is also part of that select group, including country major leaguers Buck Owens and Kenny Rogers and ’50s and ’60s-era acts the Four Seasons (the group’s VeeJay and Philips material), Paul Anka, and Fats Domino (their ABC-Paramount material).”).

<sup>263</sup> See Debbie Snook, *That MOTOWN Magic: The People, Hits That Launched a Revolution in Black Music*, PLAIN DEALER, July 16, 1995, at 1J (“The Jacksons’ initial contract with Motown was for a 2.7 percent royalty rate, ‘better than previous deals,’ writes Nelson George, ‘but hardly generous in an era when royalty rates were often 8 percent.’”); see also Mitchell, *supra* note 262, at 89 (“‘At Vee-Jay, there was no money,’ recalls Michael McGill of the Dells, whose first R&B chart hit was 1956’s ‘Oh What a Nite.’ ‘[Vee-Jay] would tell us, You make your money on the road. The records are just to promote you.’”).

racially segregated tastes from a business perspective. It was the occasion, in 1971, for a now-famous report that Columbia Records Group commissioned researchers at the Harvard Business School to conduct.<sup>264</sup> The report's findings presage a changed, but still racially ambivalent, attitude toward black music and musicians' rights after the addition of sound recording rights in 1972<sup>265</sup> and the wholesale amendment of the copyright act in 1976:<sup>266</sup>

Soul music is one of the very few basic art forms which is indigenous to America, although its roots may be traced to Africa. It has been and probably will continue to be a vital and influential force on contemporary popular music. And soul is by no means a static music form. It too will continue to change. Companies able to work successfully in this art form will be in a position to relate more dynamically to its impact on other forms of popular music, such as pop and rock. This will be especially important as these three music styles converge upon one another.<sup>267</sup>

### III. THE 1976 COPYRIGHT ACT AND THE EFFECT OF HIP-HOP AND INDIE ENTREPRENEURS

The 1976 amended Copyright Act had tremendous potential to benefit musical artists—especially performers—who, in 1972,

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<sup>264</sup> The "Harvard Report," as it is known, is not publicly available, but numerous writers have seen it and commented on its contents. *See, e.g.,* Yvonne Bynoe, *Money, Power, and Respect: A Critique of the Business of Rap Music*, in R&B (RHYTHM AND BUSINESS): THE POLITICAL ECONOMY OF BLACK MUSIC 200, 204 (Norman Kelley ed., 2005). Bynoe summarized the findings as follows: soul music has a broad appeal; cultivating black radio was important; black music consumers are a key test audience; and whites in the industry were too removed from black music. *Id.* It recommended that CRG develop black personnel in-house. *Id.*

<sup>265</sup> *See* Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, 21 INTELL. PROP. & TECH. L.J. 10, 10 (2009).

<sup>266</sup> *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; *see also* Evitt, *supra* note 265, at 10.

<sup>267</sup> Bynoe, *supra* note 264, at 205 (internal quotations omitted) (quoting the Harvard Report).

nominally received for the first time rights in their sound recordings.<sup>268</sup> Specifically, the 1976 Act now reduced the formalities for copyright ownership,<sup>269</sup> extended the term to the author's life plus seventy years,<sup>270</sup> created compulsory licensing mechanisms that facilitate wider performance of musical compositions,<sup>271</sup> and finally codified a right in public performances for sound recordings.<sup>272</sup> The Act made copyright's bundle of rights divisible<sup>273</sup> and added a right of termination of transfers after thirty-five years.<sup>274</sup> Its limitations and exceptions are substantial, including the express adoption of fair use<sup>275</sup> and provisions limiting an artist's say in the use of her work by cable broadcasters and satellite carriers.<sup>276</sup>

However, the limitations on performance rights in sound recordings may be the most telling in terms of the imbalance of power between artists and intermediaries. The new right was narrowly drawn to permit claims for infringement only when non-trivial amounts of the actual recording were reproduced without permission.<sup>277</sup> The same is true for the sound recording artist's derivative right, which, unlike the composer's right to prevent substantially similar adaptations, is only triggered by an exact duplication.<sup>278</sup> Lastly, the sound recording artist has no exclusive

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<sup>268</sup> Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. §§ 1, 5, 19, 20, 26, 101 (2006)).

<sup>269</sup> Compare Copyright Act of 1976, Pub. L. No. 94-553, § 102(a), 90 Stat. 2541, 2544–45 (1976) (providing that copyright attaches upon fixation in a tangible medium of expression), with Copyright Act of 1909, ch. 320, § 10, 30 Stat. 1075, 1077 (repealed 1976) (providing that copyright attaches upon publication and notice).

<sup>270</sup> 17 U.S.C. § 302.

<sup>271</sup> *Id.* §§ 115, 801–03.

<sup>272</sup> *Id.* § 106.

<sup>273</sup> *Id.* § 201.

<sup>274</sup> *Id.* § 203.

<sup>275</sup> *Id.* § 107.

<sup>276</sup> *Id.* § 111.

<sup>277</sup> *Id.* § 114(b).

<sup>278</sup> *Id.*

right in public performance—only the composer<sup>279</sup> (usually half music publisher) does.<sup>280</sup>

A. *The 1976 Act: Resistance, Entrepreneurism and Conglomeration*

Most observations about what the artist could or couldn't have under the 1976 Act are academic, because the standard recording contract includes an assignment of all the recording artist's rights in the work.<sup>281</sup> In fact, the standard record deal is more like a personal services employment agreement under which the creative artist's efforts are expressly made a work-for-hire.<sup>282</sup> The record label is, in most cases, the legal "author."<sup>283</sup>

It is important to note that the 1976 Act was passed during a period in which albums ("LP"s), rather than singles, were dominant in recorded music, and recording, marketing, and distribution costs for a completed album were substantial.<sup>284</sup> The sheer number of technical contributors to the finished work in some ways justified a greater degree of control over the work by the party making the greatest capital investment—the record company.<sup>285</sup> However, it is by no means clear that the labels had to take as much as they did. The facts show artists at a tremendous disadvantage, notwithstanding provisions in the new Act to the contrary.<sup>286</sup>

Nor is it clear why the Act's structure so easily allowed non-creative interests to own creative rights. The termination clause

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<sup>279</sup> *Id.* § 114(a).

<sup>280</sup> See generally WILLIAM KRASILOVSKY & SYDNEY SHEMEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE BUSINESS AND LEGAL ISSUES OF THE MUSIC INDUSTRY* 133–52 (10th ed. 2007).

<sup>281</sup> See AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 105–06 (2d ed. 1996) (providing the typical grant of rights provision in most recording contracts).

<sup>282</sup> *Cf. id.* at 413.

<sup>283</sup> *Id.*

<sup>284</sup> See KRASILOVSKY & SHEMEL, *supra* note 280, at 33.

<sup>285</sup> *Id.*

<sup>286</sup> See David K. Rehr *Delivers Speech at Radio Ink's Forecast 2008*, US FED. NEWS, Dec. 4, 2007 ("Artists, desperate to 'make it' in a very competitive industry, often sign away their rights to the record label. Before they know it, they owe the label money and can never get out from under their oppressive control.").

protects creative artists against irreversibly imprudent assignments of their rights.<sup>287</sup> Its inclusion illustrates that Congress, conscious of the history of discrimination against musicians and the disgorgement of the rights in their work, could have enacted a statutory bar on some valuable ownership transfers by artists. Arguably, the onus could shift to record labels to secure returns on investment and profit streams exclusively through contractual terms rather than to artists, who almost never do. Royalties, specifically future royalties, could constitute an economic right alienable only by actual authors and performers of creative works. (They would probably be negotiated at substantially lower rates, but at least artists would own the asset for alternative modes of commercial exploitation.) The legislative history demonstrates very little Congressional interest in such a regime.<sup>288</sup>

Not surprisingly, during the last decades of the century record companies continued to profit enormously from the new rules and to engage in the same methods of racial appropriation of black musical authorship.<sup>289</sup> What is again evident is the persistence of racial market segmentation, re-description of black music to satisfy perceived white consumer preferences and the economic marginalization of black artists—often in ways that probably diminished profits—from an industry identified by the public as more progressive, if not counter-cultural, on social issues.<sup>290</sup> This time, however, the technological changes that have always influenced recording industry methods and economics would later provide the realistic possibility of industry transformation. As we'll see more specifically in the next Part, the lower production

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<sup>287</sup> See 17 U.S.C. § 203(a) (2006). The Copyright Act's termination clause permits an artist to terminate a prior grant of rights after a period of thirty-five years notwithstanding any agreement to the contrary (e.g., a waiver of the right in a recording agreement). *Id.* § 203(a)(5). Congress predicated the right on "the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited." H.R. REP. NO. 94-1476, at 124 (1976). See generally NIMMER, *supra* note 28, § 11.01-02.

<sup>288</sup> See KRASILOVSKY & SHEMEL, *supra* note 280, at 10-12.

<sup>289</sup> See PERETTI, *supra* note 68, at 148; see also Greene, *Copyright, Culture & Black Music*, *supra* note 16, at 353-54.

<sup>290</sup> See James L. Tyson, *Ad Agencies Walk Fine Line in Tapping Inner City Trends*, CHRISTIAN SCI. MONITOR, Dec. 27, 1996, at 8 (noting that pop radio stations in the 1970s hid black music behind the tag "urban contemporary music").

costs and more democratic distribution infrastructure possible through the Internet would permit musical artists themselves to recapture the legal rights in their work and the economic benefits of exploiting them.<sup>291</sup>

### 1. The 1970s and '80s

The music business changed a great deal in the 1970s. Singles had driven the popular music industry for the previous two decades.<sup>292</sup> Economically, this allowed independent labels to compete with the major labels and for mainstream market penetration by black soul and R&B artists.<sup>293</sup> However, albums became more popular in the 1970s, increasing production costs.<sup>294</sup> Independent labels, where most black artists recorded, were not able to compete as readily as before.<sup>295</sup> In fact, the "'70s were largely quiet times for the indies, as the music dismissively known as 'corporate rock,' and later disco, reigned supreme on the charts."<sup>296</sup> Independent labels—albeit in a different form and role—made a comeback only after the popularity gains by rap music.<sup>297</sup> Notably, during the seventies, many more artists sought

<sup>291</sup> See *infra* Part IV.

<sup>292</sup> See Jack Egan, *Pop Records Go Boom*, N.Y. MAG., Oct. 31, 1983, at 56–57 (noting that singles dominated the music industry in the '50s and '60s).

<sup>293</sup> See Morris, *supra* note 206, at 132 (“A network of independent distributors catering to retailers and jukebox operators stocking independent labels’ product has also begun to spring up.”).

<sup>294</sup> See Rudy’s Corner, *Singles vs. Albums* (Mar. 26, 2007), <http://www.rudyscorner.com/88/singles-vs-albums.html>.

<sup>295</sup> JAMES HASKINS, *BLACK MUSIC IN AMERICA* 161–62 (1987) (noting black music was not the popular music of the '70s and '80s, although disco and funk were around).

A major reason, however, was changes in the record business itself. Once albums became more popular than singles, production costs soared, and small, independent labels like the kind Motown had once been could not compete with the major labels. One week in the summer of 1984, ninety-nine of the records on the Billboard Hot 100 were recorded on major labels.

*Id.* Since many blacks recorded on independent labels, this trend was bound to affect them. *Id.* Even blacks who did record for major labels found that they did not get as much promotion as white stars who recorded for the same labels. *Id.*

<sup>296</sup> Morris, *supra* note 206, at 134–35.

<sup>297</sup> See *id.* (“By the mid-'70s, rap music had begun its rise out of the New York clubs; significant single releases by such acts as the Sugar Hill Gang, Grandmaster Flash & the Furious Five, and Afrika Bambaata & Soulsonic Force appeared on such labels as Sugar

to control their intellectual property rights.<sup>298</sup> Not only were they demanding their fair share, they were also creating their own companies to manage, promote, and distribute their musical work.<sup>299</sup> This upsurge in artist-owned distribution companies coincided with the establishment of black music departments by major labels.<sup>300</sup>

By the early eighties, the majors focused on the single-superstar format, many of whom were African American.<sup>301</sup> Those artists who had reached the heights of Michael Jackson and Lionel Richie were promoted as pop acts.<sup>302</sup> While more marketing dollars were pushed their way, the artists lost much artistic and managerial freedom with their new position.<sup>303</sup> Pop music was also affected by the emergence of music videos, an important predictor of success,<sup>304</sup> and the social beliefs behind another intermediary—MTV—beginning in 1981.<sup>305</sup> In the first few years of video, black artists were categorically denied opportunities to

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Hill and Tommy Boy. Within a decade's time, the genre would experience its first platinum hit album, Run-D.M.C.'s 'Raising Hell,' issued by another New York indie, Profile.").

<sup>298</sup> See J.R. Reynolds, *Study Recommends Changes in the Black Music Industry*, BILLBOARD, June 1, 1996, at 24.

<sup>299</sup> See *id.* (describing the successful upstart of Motown).

<sup>300</sup> See *id.* ("In 1971, CBS Records commissioned from Harvard a feasibility study that led to the creation of the label's black music department, which was the first in the industry."). Further, the study revealed that CBS record executives "were pleasantly surprised at just how together the organizations" they studied were. *Id.*

<sup>301</sup> Burnim & Maultsby, *supra* note 183, at 409 (noting when the music industry came out of the early '80s recession, the major labels focused more on the single superstar format, fueled by the worldwide success of Michael Jackson's "Thriller"; many of these superstars were African American).

<sup>302</sup> See *id.*

<sup>303</sup> *Id.* (noting that big-time artists who were promoted directly under major labels' pop divisions were forced to give up the management, attorneys, etc., who started their careers; only a few major artists were able to maintain black management).

<sup>304</sup> But see Brian C. Drobnik, *Truckin' in Style Along the Avenue: How the Grateful Dead Turned Alternative Business and Legal Strategies into a Great American Business Story*, 2 VAND. J. ENT. L. & PRAC. 242, 247 n.67 (citing interview with Steve Popovich, CEO, Cleveland International Records) (noting the music video has diminished the importance of radio as a form of promotion and that trends in radio play follows those in television play).

<sup>305</sup> See Havelock Nelson, *R&B Extremes Flare in the '80s: Rap, Hip-Hop Exacerbate Generation Gap*, BILLBOARD, Feb. 18, 1995, at 20.

appear on MTV.<sup>306</sup> Michael Jackson was the first black artist to appear on MTV with his music video for the song “Beat It.”<sup>307</sup> In 1982, Tina Turner became the first black woman to appear on MTV.<sup>308</sup> Once again, their success demonstrated that white audiences would pay directly for black musical entertainment.

## 2. Hip-Hop Entrepreneurs

It was neither the Copyright Act of 1976 nor the surge in the profitability of pop music that produced a major crack in the edifice of corporate ownership over musical works, but the defiance and independence of schoolyard rap music. Rap and hip-hop music did not remain independent throughout, as I discuss just below. Yet their origins demonstrate a fierce entrepreneurism that reflected both knowledge of the exploitative practices of the music industry and a creative opportunism that resulted from social separation, access to cheap technology, and a creative intuition to break with pop conventions.<sup>309</sup> Rap’s rising popularity during the eighties spurred the comeback of independent labels,<sup>310</sup> such as Def Jam and Priority Records.<sup>311</sup> Artist-owned entrepreneurial efforts also started to become more prevalent during the late eighties, as evidenced by rapper Luke Skywalker of 2 Live Crew

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<sup>306</sup> *Id.* (““When it first started airing [on MTV], [black artists] weren’t even allowed,” he says. ‘So people started adjusting their music to fit the format.’ All of a sudden, he says, executives ‘at record labels started telling writers this or that’s too black.’” (quoting songwriter and producer James Mtume)). Thus, as in the early days of R&B, executives were trying to tone down black music to fit a white audience attracted to MTV. *Id.* MTV refused to let black acts on so the execs assumed that its growing popularity required them to mirror their music to the station’s playlist. *Id.*

<sup>307</sup> David Bauder, *You Say It’s Your Birthday? MTV’s Turning Today, but You Wouldn’t Know It by Watching*, SEATTLE TIMES, Aug 1, 2006, at D1.

<sup>308</sup> HASKINS, *supra* note 295, at 165.

<sup>309</sup> Hip-hop in the South Bronx in the 1970s. Burnim & Maultsby, *supra* note 183, at 410.

<sup>310</sup> See Morris, *supra* note 206, at 134.

<sup>311</sup> *Id.* at 136 (“Independent success stories have continued to crop up in the pages of Billboard to the present day. Through the ’80s, rap accounted for some of the indies’ biggest sales tales: Hardcore efforts by such L.A.-based gangsta acts as N.W.A. and its members Ice Cube and Eazy-E racked up major numbers for the Ruthless and Priority imprints. Just last year, an independent scored a mega hit with one of the most ubiquitous rap singles of all time—‘Whoomp! (There It Is)’ by Tag Team, which moved a staggering 4 million copies for L.A.’s Bellmark Records.”).

forming 2 Live Crew Records in 1985,<sup>312</sup> and soul artist James Brown buying a radio station in 1989.<sup>313</sup> Despite the initial reluctance of major record companies to sign artists who proudly (and sometimes violently) asserted their affiliation with a marginalized inner city, hip-hop's signature music, rap, has consistently been a major economic force in the music industry since the mid-nineties and is currently the second best-selling genre of music in the U.S.<sup>314</sup>

Hip-hop artists, including rappers and hip-hop influenced R&B acts, have exhibited greater ownership and control interest than perhaps any genre.<sup>315</sup> The trend gained momentum in the early nineties when popular rap artists increasingly produced records on their own labels, securing publishing and distribution deals with the majors.<sup>316</sup> These deals became more prevalent throughout the nineties for three reasons: (1) artists were able to produce the music they wanted without acceding to pressure from, or compromising with, a record label, including independent labels

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<sup>312</sup> Connie Benesch, *Taking Care of Business: Enterprising Rappers Cash in on Their Entrepreneurial Talents*, BILLBOARD, Nov. 27, 1993, at 46.

<sup>313</sup> LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. C.R. & SOC. JUST. 97, 130 (2006).

<sup>314</sup> RECORDING INDUS. ASS'N OF AM., 2007 CONSUMER PROFILE 1 (2008), available at <http://76.74.24.142/44510E63-7B5E-5F42-DA74-349B51EDCE0F.pdf>; see also Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 992-93 (2004) (describing hip-hop's influence on consumers); Alan Hughes, *Hip-Hop Economy*, BLACK ENTERPRISE, May 2002, at 70; Gail Mitchell, *Black-Music's Historic Week: Hot 100 Testifies to Mainstreaming of R&B/Hip-Hop*, BILLBOARD, Oct. 18, 2003, at 20.

<sup>315</sup> See Marlynn Snyder, *Urban Entrepreneurship: Young Mavericks Make Noise with Their Own Labels*, BILLBOARD, June 3, 1995, at 24 (“[Michael] Bivins started in the industry as a member of multiplatinum teen act New Edition and later formed R&B/hip-hop trio Bell Biv DeVoe. His relationship with Motown began as a production deal with his Biv Entertainment, which launched successful careers for Another Bad Creation and MC Brains. In addition to the Biv 10 label, whose first act is the popular Chicago teen foursome Subway, Bivins plans to expand his operation with Biv Films and Biv Clothing.”).

<sup>316</sup> See *id.* (“Many of these mavericks have struck lucrative label deals with the majors to promote, market and/or distribute their releases. Among these up-and-coming label heads are 26-year-old Michael Bivins, president/CEO, Biv 10 Records; Marion ‘Suge’ Knight, 29, co-founder/CEO, Death Row Records; Jermaine Dupri, 22, president, So So Def Recordings; and Sean ‘Puffy’ Combs, 24, president/CEO, Bad Boy Entertainment. [The four labels are joint ventures with Motown, Interscope/Atlantic, Columbia and Arista, respectively.]” (alteration in original)).

owned by businessmen; (2) they saw more money selling fewer units than they would if they sold more units with a major label; and (3) majors welcomed them because these deals helped keep the majors profitable.<sup>317</sup>

Independent labels have recently played a more complicated role than previously thought, occupying less the role of more equitable and streamlined finder of talent and more as a conduit and sometimes partner to the major labels seeking to reduce production costs and hoping to avoid paying union wages.<sup>318</sup> Cooperating with indies allows majors to circumvent costly union agreements to which they are signatories, but indies are not.<sup>319</sup>

Ultimately, hip-hop itself is a complicating genre for a project like this. Its “street” origins and almost vernacular entrepreneurship when establishment companies shunned it is representative of the blues, jazz, R&B, and soul traditions before

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<sup>317</sup> See Mitchell, *supra* note 262, at 90 (“Like KRS-One, one of the more popular ways that contemporary artists have gained a measure of masters control is through joint ventures. Such rappers as Master P, the Cash Money Collective, and others were well on their way to sales success before aligning themselves with major labels for wider distribution.”). Also, being able to have significant sales as an independent entity attracts major labels and allows indies to keep most of the control:

“Our sales gave us a lot of weight and pull,” says Cash Money CEO Ronald Williams, whose label is distributed through Universal. “We used to hear a lot about the majors—how they take control—and we didn’t want to go out like that. But it’s going to be a fight right now for artists to keep their masters. You just have to fight to keep 100% of your company.”

*Id.*

<sup>318</sup> See Michael Roberts, *Papa’s Got a Brand-New Bag: Big Music’s Post-Fordist Regime and the Role of Independent Music Labels*, in *THE POLITICAL ECONOMY OF BLACK MUSIC*, *supra* note 264, at 24, 26.

<sup>319</sup> Independent labels do not typically have contracts with the American Federation of Musicians (“AFM”). *Id.* The majors are “signatory” companies with the AFM, and there are three contracts they have with musicians: the Phonograph Record Labor Agreement (wage scales and health and pension), the Phonograph Record Trust Agreement, and the Special Payments Fund (both for AFM members and free public concerts). *Id.* at 27. The major may own up to 50% of an indie subcontractor and avoid the union agreements. *Id.* at 37–38. Without direct major-indie competition, cooperation has led to equity deals and joint ventures, ownership sharing, and most vitally, deals over distribution. *Id.* Majors have also increased their distribution capacities. *Id.* Distribution by a major of a non-union, non-signatory label relieves it of any obligations under the Phonograph Record Labor Agreement. *Id.*

it.<sup>320</sup> Its intertextuality—the borrowing of previous works and integrating them, sometimes transformatively—is also reminiscent of some of the earliest black musical traditions, though the claims of theft by sampled but not compensated artists raises legitimate concern.<sup>321</sup> However, it is the character of its entrepreneurial side that suggests something about the proliferation of economic motive and a muddier picture of the artist’s personality interest. First, many hip-hop artists have succeeded in reaping greater financial gains by garnering extra-musical fame and exploiting it through merchandising, fashion lines, movie stardom, product endorsement and other pursuits unrelated to making music.<sup>322</sup> Second, hip-hop’s enormous “cross-over” appeal to white, suburban consumers—while putting the lie to the longstanding beliefs by white music industry executives that white consumers require sanitized versions of black music genres—reflects the internalization by black artists of many accumulated harms under American music copyright.<sup>323</sup> More than a century separates hip-hop and the participation of black minstrels in a form of music that involved the imitation through degrading stereotypes of black personalities, but some parallels are unmistakable.<sup>324</sup> As Norman Kelley writes in a contemporary vein:

To a certain degree, blacks have become the “accessorized other,” whose culture, through commodification, can be sampled and discarded, or used as a reference point for authentication. Even more pervasive is the economic incentive for young blacks to act and perform in ways that conform to white buyers’ concept of “blackness.” Rap music is supposed to be *about* “blackness,” as argued by

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<sup>320</sup> See Nelson, *supra* note 305, at 20.

<sup>321</sup> See *infra* text accompanying notes 354–61.

<sup>322</sup> See, e.g., Hughes, *supra* note 314.

<sup>323</sup> See Justin D. Ross, *Offended? The Rap’s on Me*, WASH. POST, Sept. 9, 2007, at B02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/07/AR2007090702048.html> (noting the absence of themes that would make suburban white customers uncomfortable).

<sup>324</sup> JOSHUA SEFFINGA, HIP-HOP MEETS MUSIC VIDEO: THE NEW MILLENIUM MINSTREL SHOW 1, available at [http://classweb.gmu.edu/ajryan/nclc375\\_s04/minstrel2.pdf](http://classweb.gmu.edu/ajryan/nclc375_s04/minstrel2.pdf).

some rappers, yet still plays into a market-based expectation or interpretation of the term.<sup>325</sup>

As for the music author's personality interest, the history since passage of the 1976 Act demonstrates less pronounced appropriation of black musicians' creations as the music industry relied less on the mechanics of society's racial caste system to exploit authors and instead used its increased power to implement a business model of onerous, though more uniform, contractual terms.<sup>326</sup> Black musical authors functioned less as the miner's canary in the world of musical authorship. However, as the entrepreneurial pursuits of several soul and rap stars demonstrate, they continued to manifest a transformative aspect of creative authorship by innovating forms of music that avoided corporate capture (at first) and by demanding ownership control of their work.<sup>327</sup>

*B. Epilogue: Summary Elements, Authorship, and Personality*

Did changes in the 1976 Act—specifically the addition of sound recording rights—create more equity for musicians' interests? Certainly some who benefited from the tremendous growth and profitability of the industry would say yes. Many would say no, especially those whose main body of work occurred before 1978 when the Act became effective. As law professor K.J. Greene and numerous musicologists have demonstrated, the economic casualties to black artists covered by this subaltern history includes more than the routine exploitation that led Greene to analogize the early music industry to share-cropping.<sup>328</sup> As a result of the expropriative law and practices described earlier in this Part, many of America's best-known and appreciated artists were devastated by the combination of law and practice that

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<sup>325</sup> Norman Kelley, *Notes on the Political Economy of Black Music*, in *THE POLITICAL ECONOMY OF BLACK MUSIC*, *supra* note 264, at 6, 20.

<sup>326</sup> See, e.g., Brian Ward, "All for One, and One for All": *Black Enterprise, Racial Politics and the Business of Soul*, in *THE POLITICAL ECONOMY OF BLACK MUSIC*, *supra* note 264, at 142, 151; see also Bynoe, *supra* note 264, at 297.

<sup>327</sup> But see Dipanitta Basu, *A Critical Examination of the Political Economy of the Hip-Hop Industry*, in *AFRICAN AMERICANS IN THE U.S. ECONOMY* 258, 258 (2005).

<sup>328</sup> Greene, *Copyright, Culture & Black Music*, *supra* note 16, at 376–77.

expropriated profits from them. The great minstrel composer James Bland, ragtime composer Scott Joplin, blues artists W.C. Handy and Bo Diddley all suffered the theft of significant earnings for their work.<sup>329</sup> Jelly Roll Morton, a founder of jazz, Bessie Smith, the legendary blues singer, and Big Bill Crudup, one of the pioneers of rock and roll, all died destitute.<sup>330</sup>

Under the 1909 Act in particular, a template was established for appropriating the work of black musicians.<sup>331</sup> Together a variety of distributor-favored means converged against artists, including copyright formalities that either dispossessed poor, sometimes illiterate musicians through technical requirements (e.g., registration),<sup>332</sup> doctrinal rules (e.g., idea/expression dichotomy),<sup>333</sup> or specific statutory provisions (e.g., compulsory licenses for racial covers),<sup>334</sup> exploitation and discrimination by unscrupulous intermediaries such as publishers, club owners and managers;<sup>335</sup> adherence terms within the standard contracts of record labels;<sup>336</sup> and most importantly, the systematic application of leverage to divest both composer- and performer-authors of ownership of the copyrights in their work as either assignments or works-for-hire (or both).<sup>337</sup> Most of these laws and practices—though not the routine cultural appropriations and artistic mimicry—would work against all musicians regardless of race. However, just as important was the capacity for innovative escape demonstrated by so many black musicians unable to rely solely on economic incentives to produce work. It is this aspect of the history that best indicates the character of an artistic personality

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<sup>329</sup> Greene, “Copynorms,” *supra* note 19, at 1197.

<sup>330</sup> *See id.* at 1198; *see also* *Gee v. CBS*, 471 F. Supp. 600, 611–12 (E.D. Pa. 1979).

<sup>331</sup> *See* Greene, *Copyright, Culture & Black Music*, *supra* note 16, at 349–53, 376–77.

<sup>332</sup> *See id.* at 353–54.

<sup>333</sup> *See* Greene, “Copynorms,” *supra* note 19, at 1200.

<sup>334</sup> *See id.* at 1202.

<sup>335</sup> *See id.* at 1204–07.

<sup>336</sup> *See* Sarah Ann Smith, Note, *The New York Artists’ Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158, 168 n.56 (1984).

<sup>337</sup> *See* Greene, *Copyright, Culture & Black Music*, *supra* note 16, at 377.

interest lost in later case law but described by the likes of Hegel and Radin.<sup>338</sup>

I have argued that the author's personality interest in her music is defined then not only by the presence of certain elements, but also by the absence of certain others, such as the dignity lost to exploitation and the corresponding resistance and resourcefulness. This is not the same thing as infringement, though it is similar, because infringement analysis always depends on the appropriation of specific statutory elements<sup>339</sup> that may never be reflected in a standard recording contract or sharp practices that lead to the loss of leverage and the dispossession of one's copyright. In both, there is a taking, but what is taken may be categorically different. Nor is this necessarily remedied by moral rights. Moral rights also protect only certain aspects of creative endeavor, and they do so after the fact (indeed, after the rights may have been fully transferred).<sup>340</sup> Thus, moral rights protect aspects of what may be missing (absence) but after the author's exchange of personality with the world. In the case of either the lack of dignity during exploitation or the resistance to exploitation within the innovative escape, the author's interest is actualized by something different from, though connected to, economic motive. It is personality, which has been central to black musical creativity under almost 180 years of American music copyright law, and it is not susceptible purely to economic analysis.<sup>341</sup> Thus, we often

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<sup>338</sup> See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971–78 (1982); William Torrey Harris and the Hegelian Philosophy of Education, <http://gyral.blackshell.com/hegel/hegedu.html> (last visited Nov. 17, 2009) (“Hegelians viewed the study of art and music in schools as a means of achieving a more perfect union with the divine, and consequently, a means to ultimate knowledge.”).

<sup>339</sup> See 17 U.S.C. § 506(a) (2006).

<sup>340</sup> See Visual Artists Rights Act of 1990, 17 U.S.C. § 106A.

<sup>341</sup> Another way to see this quality of personality is to consider the characterization of intellectual property goods as non-rivalrous. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 95 (1st ed. 2001). Non-rivalrous goods are those whose consumption by one does little or nothing to impede, waste or deplete the consumption by another. *Id.* at 21. Ideas are often used as the quintessential non-rivalrous good, and the leap is easily made to their expression. *Id.* at 95. But all of this is mainly true when the source of the non-rivalrous good is deemed the state of nature or the cultural commons. *Id.* When we instead consider the source of the idea's expression, say musically, to be the creativity of a group of trained artists struggling to compose, arrange and perform a “new” work, it is harder to think of their output—the

recognize the presence of a personality interest by the kinds of harms that may be inflicted upon it. Yet finding a remedy for its trespass in economic terms is not difficult because it is often tied inextricably to the economics of artistic creation.

In sum, I have argued that the personality interest in music copyright is reflected in both its presence—the internal motives that govern persistent, devoted aesthetic production—as well as its absence—the persistence of real threats to dignity through exploitation and appropriation by necessary intermediaries, the features of the law that facilitate control by non-authors and also what we acknowledge as theft, or the infringement of one’s investment of self by other artists, the public and others. However, the personality interest should be elevated from its prior lurking status and paired with the dominant economic interest. The best evidence that this dual conception of copyright’s protectable interests is accurate may be the present, where in recent years music artists have attempted to draw greater attention to their routine exploitation as a result of standard record label practices,<sup>342</sup>

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good—as primarily non-rivalrous. *Id.* Sure, the result will utilize musical conventions that did not originate with the group, but their work constitutes a version of what most would acknowledge as a process of “authorship” that draws upon limited creative resources. WILLIAM MOYLAN, *THE ART OF RECORDING: UNDERSTANDING AND CRAFTING THE MIX* vii (2002). Should one artist quit early and exploit the collected work on his own before the others can stop him, or should a practice recording mistakenly wind up in the wrong hands and become somebody else’s hit or soundtrack, the profound sense of loss reflects something that is not fungible or merely economic. The finished work represents the effective capture of an elusive part of oneself; its *re*-capture by others—sometimes permitted *and* unpermitted—may feel incalculable. This supports on non-economic grounds the policy of granting injunctive relief in most intellectual property infringement actions. The notion of irreparable harm clearly goes beyond incalculable market injury.

<sup>342</sup> See, e.g., Courtney Love, *Artist Rights and Record Companies: A Letter to Fellow Recording Artists*, in *THE POLITICAL ECONOMY OF BLACK MUSIC*, *supra* note 264, at 307, available at <http://www.gerryhemingway.com/piracy2.html>. Vocalist Love makes three points. First, the group interests of recording artists have never been represented; the two unions that represent some artists for some issues—American Federation of Television and Radio Artists (“AFTRA”) for vocalists and AFM for non-singers and session musicians—split the interests. *Id.* at 307–08. Second, recording artists’ health care and pension needs are unprotected. *Id.* Third, recording artists are not paid what they’re worth—i.e., they receive an inequitable share of the economic value they create. See *id.* at 307–10. Many die broke. But see Danny Goldberg, *The Ballad of the Mid-Level Artist*, in *THE POLITICAL ECONOMY OF BLACK MUSIC*, *supra* note 264, at 81, 83 (“Up until the 1970s, record companies unquestionably hoarded a disproportionate share of the

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to organize<sup>343</sup> and, most importantly, to jettison the traditional routes to a musical career in favor of efficient, decentralized digital independence and audience exchange.

However, the foregoing is foundation to the analysis that follows in which I argue that recognition of the musical author's personality interest may support the status quo against proposed copyright law reform proposals. Why? Because digital technology increasingly destroys the prevailing assumptions about the nature of rights, power and infringement.

#### IV. INDEPENDENT AUTHORS AMID INDUSTRY CHANGES AND PROPOSED LEGAL REFORMS

With digital technology, virtually everything that facilitated the music business as I have described it has changed. The relationships on which musical authors were dependent for the production, marketing, and distribution of their "product" are no longer essential for reaching consumers.<sup>344</sup> At the height of record industry profits in 1999, the estimated cost of producing a typical pop album could easily exceed \$100,000;<sup>345</sup> now, most musicians can purchase the capability to record and press their own tracks for the cost of a home computer and less than \$150 in additional software and hardware.<sup>346</sup> Equally important, the advent of Apple's iTunes and a few other music download sites that resolved a decade of litigation over free music file-sharing over the Internet has facilitated inexpensive means by which even little-known artists can market their work to an interested public.<sup>347</sup> Numerous

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profits, and many artists, especially black artists, didn't get paid at all. Over the last several decades, however, as the business grew, a class of lawyers emerged to take advantage of the record companies' needs for marketable product, and the deals themselves have vastly improved for the artists.").

<sup>343</sup> But see Norman Kelley, *Blacked Out: Hip-Hop and R&B Artists MIA in Music Industry Struggle*, VILLAGE VOICE, June 11, 2002, at 47 (describing the apparent apathy among many big hip-hop artists for organized resistance to record label exploitation).

<sup>344</sup> See Ku, *supra* note 6, at 306.

<sup>345</sup> See David J. Moser, *MP3 Doesn't Spell the End of Traditional Labels*, BILLBOARD, Aug. 7, 1999, at 4.

<sup>346</sup> Ku, *supra* note 6, at 306.

<sup>347</sup> See, e.g., *New Service Brings iTunes to Indie Artists*, SPIN, Jan. 19, 2006, <http://www.spin.com/articles/new-service-brings-itunes-indie-artists>.

companies such as Amazon.com provide low-cost distribution of an artist's physical CD, though scholars like Larry Lessig believe that digital distribution portends a day when music itself is not generally owned by consumers but rented when and as needed through the use of downloads to portable devices.<sup>348</sup> For record companies, many suspect that these developments may mean the end of business under the existing model of commodification (they "cannot compete with free").<sup>349</sup> Indeed, they cite the steady decline in industry revenues, which in 1999 were \$14.5 billion, but by 2007 had dropped to just \$10.3 billion.<sup>350</sup> For artists, it is as if technology has birthed a potentially pure system, a state of creative nature where, like live performances on a festival of stages, delivery of one's work to a curious audience is unimpeded by costly intermediaries.<sup>351</sup> For consumers, music through the Internet has promised to become a digital commons.

*A. Developments: Three Thefts Upon Artists*

These changes occurred amid a rapid succession of discrete developments. I will broadly describe them here as three different kinds of thefts upon the artist, although even from an artist perspective there is considerable disagreement about that. The three are artist-to-artist appropriation through "sampling" and audio collage, consumer-to-artist appropriation through unauthorized peer-to-peer ("P2P") file-sharing, and the diminished scope of the artist's interest as a result of industry conglomeration. Though the last is a continuation of trends underway for decades, the first two were made possible by the wide availability of new, inexpensive digital technology.

First, artist-to-artist appropriation was elevated beyond the borrowing of conventions and asserted as an art form in its own

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<sup>348</sup> See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 297–98 (2004), available at <http://www.free-culture.cc/freeculture.pdf>.

<sup>349</sup> *But see id.* at 302 (citing the examples of cable television and bottled water).

<sup>350</sup> RECORDING INDUS. ASS'N OF AM., 2007 YEAR-END SHIPMENT STATISTICS 1 (2008), <http://76.74.24.142/81128FFD-028F-282E-1CE5-FDBF16A46388.pdf>.

<sup>351</sup> TODD LARSON, *COMMUNICAST: DEVELOPING A COMMUNITY-PROGRAMMED WEBCASTING SERVICE* 4 (2003), <http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/2004-01.pdf>.

right.<sup>352</sup> By the mid-1980s digital sampling, the practice of using excerpts of a recorded track in loops or other forms, became so inexpensive with digital technology and so commonplace in hip-hop (specifically rap music),<sup>353</sup> that it provoked considerable infringement litigation.<sup>354</sup> While the issue of sampling is interesting from the perspective of intertextuality and artistic appropriation<sup>355</sup>—this time mainly of black artists by other black artists—it is the technology that is most relevant to this analysis. Sampling signaled the looming threat to established recording industry interests of cheap and accessible digital devices that radically diminished production costs.<sup>356</sup> The record labels

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<sup>352</sup> See, e.g., NEGATIVLAND, FAIR USE: THE STORY OF THE LETTER U AND THE NUMERAL 2, at 21 (1995) (detailing the art of audiocollage and the group's unsuccessful litigation with established record labels and music publishers).

<sup>353</sup> MCLEOD, *supra* note 37, at 82.

<sup>354</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (sampling by 2 Live Crew of Roy Orbison's "Oh, Pretty Woman"); *Jarvis v. A & M Records*, 827 F. Supp. 282 (D.N.J. 1993) (sampling by C+C Music Factory of Boyd Jarvis's "The Music's Got Me"); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (sampling by Biz Markie of Gilbert O'Sullivan's "Alone Again (Naturally)"). The natural defense in almost every one of these cases is fair use. See 17 U.S.C. § 107 (2006). For a more fulsome analysis of digital sampling and copyright litigation, see David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recoding*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75 (2009).

<sup>355</sup> I decline to join the debate over the ethics of music sampling or its status as an independent art form in this Article. However, it is worth noting that pure positions are impossible in art forms where intertextuality—essentially, cultural sharing—is so commonplace in the creative process. Artists who borrow through sampling sometimes justify their work on grounds of inspiration, common traditions or praise, while others call it unimaginative stealing. What makes the existence of the debate so interesting from the perspective of this Article is that it emerges as perhaps the first public debate about *intra*-racial appropriation by black artists of other black artists (often from different generations). For more discussion of the odd inconsistencies provoked by the debate, see Eric Shimanoff, *The Odd Couple: Postmodern Culture and Copyright Law*, 11 MEDIA L. & POL'Y (FALL) 12, 23–29 (2002).

<sup>356</sup> Kembrew McLeod provides a fascinating discussion of the economics of sampling. See MCLEOD, *supra* note 37, at 77–99. As the business grew, two changes ushered in more attention to copyrights. The technological change in production costs was brought about by the drop in the price of digital samplers, *id.* at 82, and the creation (at the behest of big record labels) of lawyer and other service providers who would scan the market for unauthorized sampling. *Id.* at 89. What the first made easier the other would diminish through higher costs. Clearance fees for sampling increased dramatically and severely altered the extent to which hip-hop producers utilized sampling. *Id.* at 91–93. While the first of two kinds of licensing fees, publishing licenses, were not typically prohibitive, the mechanical or master recording licenses could run as high as a flat fee of \$100,000 or a

responded vigorously and, at least where fair use concerns did not predominate, with great initial success.<sup>357</sup> The public and many commentators, however, began increasingly to point to the homespun creativity of ordinary people and their digital remixes as evidence of a more democratic notion of originality.<sup>358</sup> The recording industry's reaction led to such a complicated and costly licensing process for the sampling of copyrighted works that a practice that once threatened to transform popular music has mostly receded.<sup>359</sup>

Second, and almost simultaneously, the Internet became a source for the popular distribution by consumers of copyrighted works for free—i.e., consumer-to-artist appropriation. Centralized and decentralized file-sharing attracted enormous consumer interest and downloading.<sup>360</sup> The public's capture of free music was greatly assisted by the rapid development of small, efficient,

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percentage of royalties. *Id.* at 91–92. As a result, many hip-hop acts license the publishing rights, rent live musicians to record the part, then sample *that*. *Id.* at 92–93.

<sup>357</sup> See Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 541–45 (2006) (surveying cases); see also *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004) (describing how the district court judge was in the process of handling 800 cases, likely severed from an aggregate complaint, involving sampling).

<sup>358</sup> See, e.g., DAVID KUSEK & GERD LEONHARD, *THE FUTURE OF MUSIC: MANIFESTO FOR THE DIGITAL MUSIC REVOLUTION* 50 (Susan G. Lindsay ed., 2005) (arguing that musical creation is a fluid process of building upon prior works and incapable of ownership); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 117–21 (2001) (discussing blues influences); Lawrence Lessig, Symposium, *W(h)ither the Middleman: The Role and Future of Intermediaries in the Information Age*, 2006 MICH. ST. L. REV. 33, 37–38 (describing the broader concept of “remix” as having “extraordinary democratic potential—changing the freedom to speak by changing the power to speak, making it different. Not just broadcast democracy, but increasingly a bottom-up democracy. Not just the New York Times democracy, but blog democracy. Not just the few speaking to the many, but increasingly peer-to-peer.”).

<sup>359</sup> See McLEOD, *supra* note 37, at 91–93 (illustrating the prohibitive costs of sampling and the shift to live musicians instead).

<sup>360</sup> MARK LAFFERTY, DIST. COMPUTING INDUS. ASS'N, *FTC PUBLIC COMMENT: PEER-TO-PEER FILE-SHARING TECHNOLOGY: CONSUMER PROTECTION AND COMPETITION ISSUES 1* (2004), available at <http://ftc.gov/os/comments/p2pfileshare/OL-100012.pdf> (pointing out that P2P file-sharing programs have been downloaded 700 million times, eclipsing Instant Messaging applications).

and inexpensive MP3 players, such as Apple's iPod,<sup>361</sup> which enabled users to download shared music from their computers but listen to them anywhere—as a generation before them had done with Sony Walkmen and their own music collections or shared mixed tapes.<sup>362</sup> However, the *Napster*,<sup>363</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,<sup>364</sup> and related “piracy” litigations demonstrated the weight of corporate copyright owners (the major record labels and film studios) to protect their profits from unauthorized and unpaid use.<sup>365</sup>

Finally, industry conglomeration among record companies altered the expectations between signed artist and labels, in many cases making it harder for artists to develop unless they were assured great success early in their contracts.<sup>366</sup> The record labels grew larger and commanded greater market share, having enjoyed some of their most profitable years just prior to the dissemination of popular technology that would threaten to supplant them.<sup>367</sup> Rather than make serious attempts at acknowledging and embracing the technology and the cultural preferences it suddenly liberated, the major labels fought to maintain as much of the brick-and-mortar economic infrastructure as they could.<sup>368</sup> This was reflected in the music piracy litigations. It was reflected in the industry's success in persuading Congress to grant recordings a

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<sup>361</sup> See, e.g., 100 Million iPods Sold (Apr. 9, 2007), <http://www.apple.com/pr/library/2007/04/09ipod.html> (announcing the sale of the one hundred millionth iPod in 2007).

<sup>362</sup> See, e.g., Tom Hornby, The Story Behind the Sony Walkman (Sept. 15, 2006), <http://lowendmac.com/orchard/06/sony-walkman-origin.html>.

<sup>363</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>364</sup> 545 U.S. 913 (2005).

<sup>365</sup> See WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 110–28 (2004).

<sup>366</sup> See, e.g., *infra* Part IV.B.

<sup>367</sup> See, e.g., Not So Fast, Freeloader (July 7, 2007), <http://www.lambgoat.com/features/articles/metal-hardcore-downloading.aspx> (“Century Media's [record label] Vallee echoes a similar stance, commenting, ‘We really excelled and had our most profitable years in 2002–2003. As downloading stuff became more prominent, we saw our sales decrease more and more each year. Now we're at the point where we realize, how are we going to combat this?’” (quotation marks omitted)).

<sup>368</sup> See *id.*

limited public performance right against digital broadcasting.<sup>369</sup> Yet it was further reflected in the increased frustration that many recording artists have with onerous, longstanding industry practices.<sup>370</sup> Even megastar artists such as Prince, Michael Jackson, and George Michael engaged in very public disputes over contract terms with their labels;<sup>371</sup> most recently, the band Radiohead experimented with releasing an album itself over the Internet and allowing fans to pay what they wished for it.<sup>372</sup> Smaller artists, especially newer ones, have opted to forego the terms, overhead, and whims of record companies and produce themselves over the Internet.<sup>373</sup> By the early 2000s there were only five major record labels left.<sup>374</sup> The consolidation of so much cultural property into the hands of a few multinational interests finally saw its greatest backlash in music sales, which have significantly declined.<sup>375</sup> We turn now to what this may all mean for the interest of music authors in the context of music copyright reform proposals over the Internet. The next section sets forth the experience of increasingly independent singer-songwriters—specifically, an actual recording artist named Citizen Cope. The

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<sup>369</sup> The Digital Performing Rights in Sound Recording Act (“DPRA”) was enacted in 1995, Pub. L. No. 104-39, 109 Stat. 336, followed by the Digital Millennium Copyright Act (“DMCA”) of 1998, Pub. L. No. 105-304, 112 Stat. 2860. See also FISHER, *supra* note 365, at 93, 102–10.

<sup>370</sup> See, e.g., Pay the Band, <http://paytheband.blogspot.com/2008/10/zoolights-hogle-zoos-annual-musicians.html> (last visited Nov. 17, 2009), for an example of a blog devoted to advancing the notion of compensating musicians and exposing common practices by which they are not.

<sup>371</sup> See Norman Kelley, *The Politics of Smoke & Mirrors: Music Revolution or a King on the Loose? Keepin’ It Real*, in THE POLITICAL ECONOMY OF BLACK MUSIC, *supra* note 264, at 293, 296–98.

<sup>372</sup> Jon Pareles, *Radiohead, Big Enough to Act Like a Baby Band*, N.Y. TIMES, Oct. 11, 2007, at E1.

<sup>373</sup> As David Byrne has predicted: “[W]hat we now call a record label could be replaced by a small company that funnels income and invoices from the various entities and keeps the accounts in order.” David Byrne, *David Byrne’s Survival Strategies for Emerging Artists—and Megastars*, WIRED, Dec. 18, 2007, [http://www.wired.com/entertainment/music/magazine/16-01/ff\\_byrne/?currentPage=all](http://www.wired.com/entertainment/music/magazine/16-01/ff_byrne/?currentPage=all).

<sup>374</sup> They were AOL Time Warner, Vivendi/Universal, Bertelsman Music Group (“BMG”), EMI Distribution, and Sony Music. Roberts, *supra* note 318, at 34–35 (listing the individual artists therein).

<sup>375</sup> See Mark Pytlík, *Remix/remodel*, MUSIC ADVERTISING, Nov. 1, 2004, at 31.

final section analyzes that experience against some of those salient ideas about copyright reform.

*B. Independence and the Contemporary Singer-Songwriter, Citizen Cope*

Clarence Greenwood—whose stage name is Citizen Cope—is an independent singer-songwriter, preparing to release his fourth LP/CD in 2010.<sup>376</sup> His career exemplifies many of the more recent developments in recorded music, including dissatisfaction with major labels and music publishers, dependence on performance for revenues, a strong inclination to own and control his own copyrights and finally a decision to become independent.<sup>377</sup> He recorded his first album with Dreamworks in 2002<sup>378</sup> and his second and third with RCA Records in 2004 and 2006,<sup>379</sup> respectively. Like most recording artists, he has seen a steady increase in the proportion of his music sold on-line relative to hard album/CD sales.<sup>380</sup> Although his voice, lyrics and overall sound is such a mixture of elements as to be racially ambiguous, Citizen Cope is white.<sup>381</sup>

Early on Cope decided to start his own publishing company for his songs after concluding that his publisher was more like “a collection agency” and did nothing to promote licensing opportunities.<sup>382</sup> This dissatisfaction mirrored his experience with record labels, whose services such as A&R, publicity and radio or press contacts were not as important to his success.<sup>383</sup> Citizen Cope is successful in that he has made enough money to be a full-time touring and recording musician, but his soulful, danceable yet

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<sup>376</sup> The following account of Citizen Cope’s views on his music and the music industry were expressed in an interview with the author. Telephone Interview with Clarence Greenwood, Citizen Cope (May 21, 2009) (on file with author) [hereinafter Greenwood Interview]. Citizen Cope may be reached through his website: [www.CitizenCope.com](http://www.CitizenCope.com).

<sup>377</sup> *Id.*

<sup>378</sup> Citizen Cope, Press, [http://www.citizencope.com/press/3-Music\\_:\\_](http://www.citizencope.com/press/3-Music_:_) (last visited Nov. 17, 2009).

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *See id.*

<sup>382</sup> Greenwood Interview, *supra* note 376.

<sup>383</sup> *Id.*

thoughtful sound is a closer fit to the amorphous “indie” category than pop.<sup>384</sup> He benefited early on from his relationship with record companies,<sup>385</sup> but now believes that he cannot afford to give up control and compensation for his work to interests that are now more “about being bought out and getting market share, signing acts.”<sup>386</sup> In his view, the majors are no longer patient or as skilled in supporting artists, but “scared and understaffed.”<sup>387</sup> Rather than being artist-driven, he says, conglomeration made it “executive-driven.”<sup>388</sup>

In deciding to become independent, Citizen Cope has concluded that he must be both artist and businessperson.<sup>389</sup> “Intellectual property is the most powerful thing that America has,” he explains.<sup>390</sup> This is a matter of financial well-being and more. “People want different things at different times in their lives.”<sup>391</sup> Cope describes elements of ownership that parallel a personality interest in music authorship: recognition, message, control, choice and interaction with his audience. “To take your music where you want it to go, you have to have some control over those copyrights.”<sup>392</sup>

However, a large concern looms over his future: What if the free downloads he, like many others, offer listeners become the distribution norm, and his personal investments in recording his work go “unrecouped”?<sup>393</sup> Worse, what if consumer-to-artist

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<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> For a sample of a contemporary artist views on music downloads, see Jeffrey P. Fisher, *The Lowdown on Downloads*, ELECTRONIC MUSICIAN, Dec. 1, 2006, at 76, available at [http://emusician.com/mag/emusic\\_lowdown\\_downloads](http://emusician.com/mag/emusic_lowdown_downloads); Marc Hopkins, *Digital Rhythms: Embracing Online Music Distribution*, JAZZTIMES, Oct. 2007, available at <http://www.jazztimes.com/articles/19109-digital-rhythms-embracing-online-music-distribution>; Jonathan Perry, *For Musicians, an Online Alternative*, BOSTON GLOBE, Mar. 1, 2006, at F1, available at [http://www.boston.com/news/globe/living/articles/2006/03/01/for\\_musicians\\_an\\_online\\_alternative](http://www.boston.com/news/globe/living/articles/2006/03/01/for_musicians_an_online_alternative); Interview by Chris Burnett with George Kahn, Pianist and Composer, in Culver City, CA (Mar. 7, 2003), available at

appropriation transcends the idea of infringement in the public's mind, and independent artists cannot survive?<sup>394</sup> That is, he must worry not only that he will not gain the sales he requires as an investor, but that he will lose control, message and the ability to express himself as an artist should his audience become parasitic.<sup>395</sup>

This account of Citizen Cope provides a profile not of all musical authors today, but of many, including the types for whom music copyright protection was originally intended—trained performing composers. In order to exploit his works' present and future value and to enforce their use against unauthorized takings, Citizen Cope would benefit greatly from the status quo in copyright law, with one major caveat. As he struggles to figure out the precise form of his independence, he will undoubtedly need to hire intermediaries on a part-time basis to help him get his CD out. These will include his lawyer, marketing help, CD manufacturing, distribution capacity, some publicity assistance and, very importantly, computer expertise for managing his web presence and sales. Composer and artist David Byrne described and evaluated a series of paths music artists can currently take in digital music.<sup>396</sup> Citizen Cope will ultimately choose some combination of these based on his particular strengths and inclinations. However, this freedom of choice is a result of recent changes that continue to shape the life of music artists.<sup>397</sup> It

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<http://www.musicdish.com/mag/print.php3?id=7358>; Posting of dorcquek to The Web Difference, <http://blogs.law.harvard.edu/webdifference/2008/02/12/class-6-liveblog-in-conversation-with-brad-turcotte> (Feb. 12, 2008, 15:26 EST); Zed Shaw, Can a Musician Sell Their Music Online? (Feb. 26, 2009), <http://www.zedshaw.com/blog/2009-02-26-2.html>.

<sup>394</sup> Greenwood Interview, *supra* note 376.

<sup>395</sup> As Citizen Cope himself put it rather humorously, "If I do a show in Tulsa, Oklahoma to 17,000 people and they all know the words to the song, I don't know if they *all* bought the single." *Id.*

<sup>396</sup> See Byrne, *supra* note 373 (describing, inter alia, the "licensing deal," the "manufacturing and distribution deal," and the "self-distribution deal").

<sup>397</sup> For a somewhat different view of what the average musician wants, see KUSEK & LEONHARD, *supra* note 358, at 52–53, who write:

Big Music has it backwards: people make music because they are emotionally and creatively driven to do so . . . not because they are looking at potential profits or to protect some rights they may have. . . . If an artist has a message, if someone is really moved by him or

reflects more than the desire to be paid fairly for one's creative works; it also recognizes that independence (or a certain amount of entrepreneurship) is the best available means to protect one's personality interests in selfhood. Therefore, at a practical level, as long as artists like Citizen Cope are not contractually beholden to intermediaries that own the work they author or/and perform, and as long as they have access to the wherewithal to do a modicum of self-production, the legal status quo may satisfy their primary career goals as artists. At a theoretical level, they are in a position to enjoy the originally intended benefits of copyright law in fulfilling both their utilitarian and personality interests.

This conclusion presents a paradox in which we might end where we began with copyright law. My analysis is not as thorough or as knowledgeable as the reformers I will summarize next, but we will analyze the thrust of their proposals against Citizen Cope's statements and the re-assertion of the status quo. The normative issue might be phrased as follows: Is the musician's interest better served by any of the following copyright reform proposals, or have we reached the optimal environment for musicians now that most may soon replace corporate "authors"?

### C. Reform Proposals

Several important assumptions underlie the digital copyright reform proposals. First, most assume that the public interest—in the primary shape of the consumer interest—is paramount.<sup>398</sup> Second, they assume that composers and artists deserve fair compensation.<sup>399</sup> Third, record labels and other large intermediaries probably deserve their precarious fate.<sup>400</sup> Most seem to assume that musicians have not and will not in the future

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her, if something really unique happens when the artist performs, and if that performance touches people's lives, it *will* have rewards for the artist.

<sup>398</sup> See, e.g., Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 965.

<sup>399</sup> See Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 960 (2007) ("It is time for lawmakers to conceive of copyright law not as a means of granting property rights, but as a means of using property rights to promote fair competition in the marketplace of expression.").

<sup>400</sup> See, e.g., MCLEOD, *supra* note 37, at 246.

earn a majority of their income from the exploitation of copyrighted works, but rather from performing or promoting one's fame or both.<sup>401</sup> The economic incentives argument, though central to the construction of copyright, is therefore never a serious challenge because it is rarely a significant factor.<sup>402</sup> Finally, they all assume that consumer downloads can be effectively captured for tracking and compensation purposes beyond attempts to evade detection.<sup>403</sup> The proposals then divide broadly into those that radically alter or overhaul current copyright rules and those that modify yet complement existing law.

### 1. Those That Radically Alter/Overhaul Current Copyright Rules

Raymond Ku sees little continued need for music copyright law on the Internet because the public now internalizes the costs of distribution through the purchase and use of music download devices, and artists generally find compensation in other ways, such as merchandising and performance.<sup>404</sup> Instead, he proposes a "Digital Recording Act."<sup>405</sup> In lieu of copyright, the act would fund musicians and songwriters through statutory levies on consumer equipment such as computers and audio electronics.<sup>406</sup> Funds could be allocated based upon the popularity of works by monitoring downloads and other indicia of a musician's popularity on the Internet.<sup>407</sup>

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<sup>401</sup> See Ku, *supra* note 6, at 309–10 ("As George Lucas demonstrated to the motion picture industry, for the artist, these secondary markets can be more lucrative than the right to reproduce and distribute content.").

<sup>402</sup> See *id.*

<sup>403</sup> See, e.g., *id.* at 314 ("[B]illboard.com maintains listings of the top downloads at various websites. Napster, AOL, and other networks could build similar tracking systems of their own. By tracking what music is being listened to, the funds from the statutory levy could be disbursed based upon consumer preference, whether defined by the percentage of downloads, number of downloads, percentage of use, or any number of formulas.").

<sup>404</sup> See *id.* at 300.

<sup>405</sup> *Id.* at 269.

<sup>406</sup> See *id.* at 312–15.

<sup>407</sup> See *id.* Neil Netanel has made similar proposals where the levy would be on the sale of any product or service whose value is enhanced by P2P file-sharing. See Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 53–55 (2003). Canada, France and Germany already impose a

William Fisher's proposed changes would also effect a drastic overhaul of existing rights under copyright law by devising a system of works registered with the Copyright Office for payment.<sup>408</sup> These works would receive a unique filename by which their digital transmissions could be tracked for frequency of use.<sup>409</sup> Copyright registrants would be paid a share of taxes levied by the government proportional to their relative popularity;<sup>410</sup> this division would follow the principle of "consumer sovereignty."<sup>411</sup> Music and films would thereafter be free, and most restrictions on reproduction, adaptation, distribution, and performance would be eliminated.<sup>412</sup> According to Fisher,

the new system would leave in place the current legal standards for determining who is the author of a creative work—just as it would the current system of contracts and customs by which "authors" compensate other people and organizations who participate in the creation or marketing of entertainment products.<sup>413</sup>

Proponents of these types of proposals point out the not insignificant social benefit of dramatically reducing the costs of copyright enforcement.<sup>414</sup>

From Citizen Cope's point of view, there is nothing particularly objectionable about plans from which he can expect to be paid, assuming tracking and capture is possible. These proposals establish efficient mechanisms for compensation that relieve him of the administrative costs. They may amount to a

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version of such levies. See generally Jeremy F. deBeer, *The Role of Levies in Canada's Digital Music Marketplace*, 4 CAN. J.L. & TECH. 153 (2005); P. BERNT HUGENHOLTZ, LUCIE GUIBAULT & SJOERD VAN GEFFEN, INSTITUTE FOR INFORMATION LAW, THE FUTURE OF LEVIES IN A DIGITAL ENVIRONMENT (2003), <http://www.ivir.nl/publications/other/DRM&levies-report.pdf> (examining existing levy systems in the European Union).

<sup>408</sup> FISHER, *supra* note 365, at 202.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 223.

<sup>412</sup> *See id.* at 202.

<sup>413</sup> *Id.* at 204–05.

<sup>414</sup> *See, e.g., id.* at 246.

greater financial reward than the current system, possibly less. We just cannot know. The administrative problem may be greater than stated. Even after *Napster* and its progeny, there exist a plethora of means for the public to receive free, unauthorized music downloads, including traditional file server-based sharing, internet-relay-client (“IRC”),<sup>415</sup> Usenet,<sup>416</sup> P2P file-sharing<sup>417</sup> and BitTorrent.<sup>418</sup> This is Cope’s looming fear of digital independence.<sup>419</sup> Once consumers figure out how to go around the system of capture, his share of financial rewards shrinks. Further, if copyright rights are substantially reduced, as Ku suggests, Cope is without the chief legal means to prevent other kinds of appropriations of his work.<sup>420</sup> That loss of enforcement control

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<sup>415</sup> Internet-relay-client (“IRC”) is a server-based chatroom system developed in the mid-1980s. See ICRC Help Archive, <http://irchelp.org/irchelp/altircfaq.html> (last visited Oct. 21, 2009). It requires the download of a client to access a server, such server containing several chatrooms that an individual can enter. *Id.* Connections to servers, as well as entry to chatrooms, may often require password authentication. *Id.* Upon entry to a chatroom, automated listings are posted in the chatroom identifying file downloads. See, e.g., Efnets IRC Network, <http://efnet.us> (last visited Oct. 21, 2009).

<sup>416</sup> Usenet is a decentralized group of servers across the world that mirror newsgroup postings on their individual servers. See mIRC, <http://www.mirc.com> (last visited Oct. 21, 2009).

<sup>417</sup> Peer-to-peer file-sharing is a phrase encompassing several different methods of file-sharing. See Wikipedia, Peer-to-Peer, <http://en.wikipedia.org/wiki/Peer-to-peer> (last visited Oct. 25, 2009). Although the method has evolved considerably since its initial development in the mid-1990s, the essential structure remains the same: (1) a client indexes all available files on a user’s computer according to file name and other metatag information; (2) the client connects to a centralized server; (3) and the server receives the user’s list of files and indexes them accordingly. See *id.* Thereafter, a connected user may use the client to search the central server for files, which can be downloaded from some other user. *Id.* Newer variants, such as Direct Connect, eliminate the user registration step, and the only information exposed (other than a user’s files), is an IP address, which is generally retained by the central server. See Wikipedia, Direct Connect (File-Sharing), [http://en.wikipedia.org/wiki/Direct\\_Connect\\_\(file\\_sharing\)](http://en.wikipedia.org/wiki/Direct_Connect_(file_sharing)) (last visited Oct. 21, 2009).

<sup>418</sup> BitTorrent is a decentralized file-distribution method in which participating users send and receive small bits of a file from each other. See BitTorrent, <http://www.bittorrent.com/btusers/help> (last visited Oct. 21, 2009). Torrents involve two fundamental concepts—swarming and tracking. A swarm is simply a group of users who wish to receive and send a certain file. *Id.* What BitTorrent provides is a method by which such users are matched up (i.e., tracking). See, e.g., Isohunt, <http://www.isohunt.com> (last visited Oct. 21, 2009).

<sup>419</sup> See Greenwood Interview, *supra* note 376.

<sup>420</sup> See Ku, *supra* note 6, at 322–23.

may become a loss of creative control and distinct harm to his personality interests as an author. From an authorial perspective, that may seem like too high a price to pay.

## 2. Those That Complement or Modify the Current Copyright Rules

With the goal of greater P2P “shareability” and an interest in paying composers and musicians directly, Jessica Litman proposes a licensing system for file-sharing that is both statutory and voluntary.<sup>421</sup> Statutory in that “the copyright law would prescribe the terms and conditions of the license;”<sup>422</sup> voluntary in that “the law would provide an opportunity to designate works as ineligible for the blanket license.”<sup>423</sup> Critical to the proposal is an opt-out provision, which imposes a heavy burden on authors who wish to remain outside the blanket license.<sup>424</sup> Thus, paid and free music, old copyright and new, would exist side by side in a royalty system administered by a government agency.<sup>425</sup>

Finally, Larry Lessig has argued persistently for a number of significant changes to the current rules while retaining much of the existing structure.<sup>426</sup> Like Litman, he would mark files to distinguish whether they are free or not.<sup>427</sup> Lessig would also increase the formal requirements for copyright ownership in order to make it more burdensome, including registration and renewal, though he would streamline these requirements by co-opting private registrars.<sup>428</sup> As to the duration of copyright ownership, Lessig would return it to the pre-1976 average term of 32.2 years, with an even shorter period for derivative rights.<sup>429</sup> Additionally, Lessig offers a host of changes aimed specifically at the different kinds of file-sharing uses. For instance, Lessig would provide

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<sup>421</sup> Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 41 (2004).

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *See id.* at 45.

<sup>425</sup> *See id.*

<sup>426</sup> *See* LESSIG, *supra* note 348, at 287 (outlining the five types of changes Lessig would make to the existing structure).

<sup>427</sup> *See id.* at 290–91.

<sup>428</sup> *Id.* at 288–89.

<sup>429</sup> *See id.* at 292–93.

blanket immunity to file-sharing of non-copyrighted works and those as to which the copyright owner plainly endorses.<sup>430</sup> As to file-sharing of content that remains under copyright, but is not readily available without undue burden, Lessig would disclaim liability for non-commercial users and impose a flat fee on commercial users.<sup>431</sup> Finally, as to those using file-sharing services as substitutes for CD purchases, Lessig would impose a tax, similar in effect to Fisher's proposal, to compensate artists to the extent they can establish harm from file-sharing.<sup>432</sup>

From Cope's vantage point, plans that complement existing law are probably more attractive than those that overhaul it. They are certainly more likely to overcome the political jockeying that accompanies reform, though Litman herself is doubtful that major reform is likely soon.<sup>433</sup> She also acknowledges that the problem with P2P, for all its excitement, is that creators are not being adequately paid from it.<sup>434</sup> In order to avoid that, plans like hers would rely on the same administrative build-ins for creator confidence that the earlier proposals hope to institutionalize.<sup>435</sup> In that regard, it suffers from similar assumptions about effective tracking and capture.

Ironically, the de facto presumption of "shareability" is less obvious in Lessig's proposal, which makes it more author-friendly (in a beneficial sense if, again, we assume the diminishing role of the record labels). In particular, Lessig's proposal trains the primary interest slightly more on the public domain than on the consumer (free file-sharing) interest.<sup>436</sup> Shorter terms, more formalities, limited derivative rights all enhance the public domain (an artist-friendly interest as well) without sacrificing robust rights for current copyright holders who can manage the details. Indeed, the tax on file-sharing's market substituting effects speaks directly

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<sup>430</sup> *Id.* at 303.

<sup>431</sup> *See id.*

<sup>432</sup> *Id.*

<sup>433</sup> Litman, *supra* note 421, at 38.

<sup>434</sup> *Id.* at 31.

<sup>435</sup> *See id.* at 38; *see also* Ku, *supra* note 6, at 310.

<sup>436</sup> *See* LESSIG, *supra* note 348, at 296 ("The aim of copyright, with respect to content in general and music in particular, is to create the incentives for music to be composed, performed, and, most importantly, spread.").

to the economic anxieties artists may see underlying the other proposals.<sup>437</sup>

Yet none of the extant proposals directly addresses the musical author's personality interest, which requires utilitarian reward (the economic interest) and long-term protections for control of message, form of expression and freedom from distortion—especially as technological change continues to alter the music landscape. Regimes that primarily ensure artist compensation on the way to flexible consumer use may miss that. They risk being little more than what Professor Long calls “cash ‘n carry” schemes.<sup>438</sup> At a very practical level, the failure to adequately marry the economic with the personality is reflected in the terms and agency of a license. If the artist controls permission over either the public's use or another artist's use of her music, she is exercising some semblance of ownership over her authorship.<sup>439</sup> If authorship is governed instead by blanket or compulsory licenses (or worse, no license at all after initial usage fees have been paid), control is lacking and personality is probably at risk.<sup>440</sup> Even post hoc control in the form of moral rights is lacking from the reform proposals, which again exposes dignity and author identity to risks. Citizen Cope may rather not wonder what his music is being used for in the world—even if he can expect some payment for it. The interest in social exchange about which many reform proponents write could also be advanced by the transaction costs associated with seeking out an artist's permission.

I had not expected to reach this conclusion at the outset of this project, but the evidence of systematic exploitation and appropriation of music authorship fairly compels it from an artist's perspective. Of course, that perspective is not the only relevant interest in music copyright law, merely the one most often subordinated. There are also many legitimate concerns about

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<sup>437</sup> *See id.*

<sup>438</sup> *See* Long, *supra* note 59, at 1163–64.

<sup>439</sup> Professor Long discusses the close, personal relationship an artist has to his/her work. Long argues that the lack of authorial control can lead to a disincentive to create new works. *See id.* at 1192–93.

<sup>440</sup> *See id.* at 1193 (“Given the personal nature of many creative acts, any diminution in authorial control must be carefully circumscribed and must include recognition of the personality rights of the artist to assure that creation is not discouraged.”).

overprotection at the expense of the public domain. Some of these may be answered by the condition precedent I assume—that artist authorship independent of record label ownership will soon be the norm—but not entirely. The proposal to both limit the duration and scope of prohibited derivative uses goes far in curbing the excesses of cultural proprietorship.<sup>441</sup> A greater judicial commitment to expanding fair uses would be another important step in this direction. But if we take seriously the natural rights aspects of copyright's origins, then we should be willing to acknowledge the continuing importance of artists' personality interests in their work and to protect them from being dismissed by exclusively economic priorities.

#### CONCLUSION

The status quo could be made even better by a more explicit marriage of justificatory interests, personality and utility, as I have argued. The historical analysis of American music and black musicians in particular demonstrates that the distributors' interest has benefited much more from an economic justification for copyright protection than actual authors. That is not an argument against the copyright owner's economic interest, but rather a general suspicion of ownership by non-authors. Author and performer-only musicians were systematically denied the financial rewards for their work (before and after the 1976 Act) by the measure of the growth of industry intermediaries who in effect employed them.<sup>442</sup> The most basic tenets of natural law are frustrated by a legal regime that facilitated so much theft, adhesion bargaining, and exploitation by necessary but often predatory intermediaries. I have argued, therefore, that the economic calculus must be reformulated—as it can be through digital

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<sup>441</sup> See LESSIG, *supra* note 348, at 295 (specifically advocating for such changes as part of his overall reform proposal); see also Henry H. Perritt, Jr., *Unbundling Value in Electronic Information Products: Intellectual Property Protection for Machine Readable Interfaces*, 20 RUTGERS COMPUTER & TECH. L.J. 415, 480–86 (1994) (“[D]isaggregation encourages the preparation of a wide variety of compilations or derivative works which, by definition, include new value, by diminishing the scope of the original author's protection.”).

<sup>442</sup> See, e.g., *supra* note 305 and accompanying text.

music—and the utilitarian interest re-examined to focus again on its nominal intended beneficiary: the author.

To do so the personality interest must be elevated. This is particularly true for aesthetic works, such as music, fiction, and visual art, where the investment in Hegelian will and personality is clearly manifest. Recognition today may be somewhat different than the Hegelian definition, but it is no less important. The current brick-and-mortar (or “lawyers-and-limos”)<sup>443</sup> system made little provision for injury to personality, and therefore its defense has been minimal and ineffectual. However, from the artist’s perspective, it is knowable by its often painful absence, which I have referred to generally as appropriative harms. Illustrated by a long and difficult history for black musical authors before and after the 1976 Act, these harms negatively define the personality interest. However, the prospects for greater artist independence through the production and distribution of digital music suggest a return to copyright’s early author emphasis and an affirmative definition of her interests in personality. Given that promise, we must be extremely cautious about limiting those protections just when they may do the most good.

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<sup>443</sup> See *supra* Part I.B.