

SEEING BUT NOT HEARING MUSIC HOW COPYRIGHT GOT (AND DIDN'T GET) THE BLUES

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ABSTRACT

Music copyright has got the blues and is currently in disarray. Although this disarray has been particularly noted in the digital era, existing problems reflect a long historical track record of copyright exceptionalism in the music arena more generally. Technology has been a persistent underlying factor in continuing issues in the application of copyright law to music. Copyright law has traditionally tended to see music largely in its visual form as a music composition (e.g., sheet music). During the twentieth century, however, a broad range of new nonvisual technologies of musical reproduction became widely disseminated and dominant forms of musical reproduction. Such technologies have included the player piano, record player, compact disc and MP3 player, for example. Digital music disarray is partially a result of copyright law frameworks not getting the blues and other musical genres created and distributed primarily in nonvisual form. Copyright law thus sees music but fails to hear it. In other words, the advent of nonvisual forms of musical reproduction have continued to challenge copyright law interpretations that remain caught in the visual assumptions of the nineteenth century musical landscape. Consideration of the impact of nonvisual technologies is of far more than theoretical importance. Current debates about music copyright in the digital era underscore significant differences of opinion about how copyright should be allocated and copyright benefits distributed. Consequently, music copyright is an important milieu within which to reconsider questions of fundamental importance for copyright. The incentive story of copyright assumes that copyright gives creators particular incentives to create new works and is based on notions about the incentives for and returns on investments in creative works that may be more tenuous in practice than is often assumed. Robert Johnson, now the foremost exemplar of the early blues era of recorded music, offers an example of the ways in which copyright incentives and rewards may play out in real world contexts of creation and performance. The

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case of Robert Johnson illustrates what many see as the proper operation of copyright. In reality, however, Johnson's story belies many assumptions typically made about the operation of the incentive and reward in copyright. Further, Johnson's posthumous copyright rewards may actually be more consistent with an incentive story that reflects the operation of copyright as a lottery, which has significant implications for our assumptions about incentives to create and the distribution of copyright rewards. This paper evaluates the ways in which broader cultural and business contexts, including pervasive segregation in the recording industry, shaped creation, reception and reward in the case of Robert Johnson and other early blues artists. It discusses the implications of conflicting readings of the Robert Johnson story for assumptions typically made in copyright theory about creation, incentive and reward.

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INTRODUCTION

The current digital music copyright mess has been a long time coming. Rather than merely reflecting the advent of digital forms and creation and reproduction, the current disarray has come to pass in part as a result of the peculiar ways in which copyright has been applied to nonvisual technologies of musical creation and reproduction. In the nineteenth century, music creation and reproduction reflected a live performance tradition, within a commercial context in which sheet music was the dominant form of fixed musical reproduction. Although copyright has always been an inexact fit for music generally,¹ in a world in which sheet music was the primary form of fixed musical reproduction, this bad fit was discernible but far less devastating in impact than is the case today. In the twentieth century, however, new forms of musical reproduction became broadly distributed commercially, including the player piano and recording technology in the earlier part of the century. These new technologies and the musical technological innovations that came after them have contributed to the current music copyright disarray.

The application of copyright to new music technologies has led to a general lack of clarity in the music copyright space. This lack of clarity in turn underscores the continuing debate over allocations of rights and the distribution of benefits in the music copyright arena. Events surrounding blues exemplar Robert Johnson and blues music more generally represent an important early example of these continuing tensions. After its introduction as a musical form in the first decade of the nineteenth century, spread through sheet music and vaudeville performers,² Blues music later flourished on the commercial scene as a genre distributed primarily in nonvisual form. Rather than being based in the sheet music culture that had formerly been predominant, early blues music soon came to be reproduced via recording technology, with the first blues recording

¹ Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006).

² ELIJAH WALD, *ESCAPING THE DELTA: ROBERT JOHNSON AND THE INVENTION OF THE BLUES* 15-16 (2004) (noting that the first published blues song appeared in New Orleans in 1908, composed by an Italian American named Antonio Maggio, and that when blues became a musical term in the early teens, recording was still at its infancy and printed music remained the main way of distributing new compositions).

appearing in 1914.³ The transition from sheet music to recorded music had significant business and cultural implications: it meant that live performance could be encoded, reproduced and transmitted in nonvisual form. As a result, early blues recordings reflect an important transition point in the history of commercial dissemination of music and the application of music copyright to nonvisual forms of music reproduction. Copyright treatment of early blues artists and the topography of incentive and reward for such artists thus have direct bearing on continuing debates in the music copyright arena today.

The ways in which context played a role in shaping Johnson's copyright treatment and posthumous copyright rewards are significant. Robert Johnson exemplifies what many see as the proper operation of copyright yet at the same time belies many assumptions made about incentive and reward in copyright. Robert Johnson's copyright success is actually more consistent with an incentive story that reflects copyright as a lottery, which has significant implications for our assumptions about investments in expressive works and the distribution of copyright rewards.

This Article evaluates the application of copyright to nonvisual forms of musical reproduction, with a particular emphasis on the contexts of musical creation, reproduction and dissemination of early blues recordings. It discusses how unresolved conflicts evident in copyright today became increasingly apparent in blues contexts and delineates some implications of such conflicts for assumptions typically made in copyright theory about creation, incentive and reward. Part I of this article discusses creation and context in blues music as well as rock and roll traditions that later emerged from the blues. Part II focuses on the business contexts of blues, particularly in its earliest iterations, and draws attention to the ways in which pervasive segregation in the music industry diminished the creative role and compensation of a broad range of artists, including African American blues musicians. Part III discusses the ways in which pervasive borrowing has shaped blues in different contexts and the implications of such borrowings for copyright, particularly with respect to incentive and reward. The final section of this paper highlights the significant implications of continuing tensions in music copyright that reflect competing assumptions in copyright theory about creation, risk, incentive and reward.

³ *Id.* at 17-18 (noting the first recording of a blues composition in 1914 by the Victor Military Band, which cut a version of W.C. Handy's "Memphis Blues" and the first sung blues on record in 1915 by Morton Harvey).

I. CREATION AND CONTEXT: BLUES AND THE BIRTH OF ROCK AND ROLL

In 2004, Eric Clapton released the DVD-CD *Sessions for Robert J*⁴ and the CD *Me and Mr. Johnson*,⁵ which paid homage to Robert Johnson, one of Clapton's greatest musical influences. Clapton is not alone in his reverence of Robert Johnson. The ascension of Robert Johnson to the status of preeminent representative of early recorded blues traditions reflects broader trends in the creation and reception of blues music in the twentieth century. Johnson's position decades after his death at age is a startling contrast to the circumstances of his short life and the contexts within which he lived and performed.⁶

In many respects, however, Robert Johnson did not distinguish himself musically from his peers during his lifetime.⁷ The legend of Robert Johnson, however, far surpasses that of his musical contemporaries: Robert Johnson is the most well known bluesman of his era today.⁸ Further, Johnson "is the only prewar blues artist whose records are still widely owned and heard today."⁹ From his humble beginnings and obscure death,¹⁰ Robert Johnson later emerged to become one of the biggest influences on rock and roll music, particularly through musicians in Great Britain, many of whom like Eric Clapton, count Robert Johnson as one of their greatest influences. Robert Johnson was one of the first 12 inductees into the Rock and Roll Hall of Fame.¹¹ Robert Johnson is far more famous in death than he could ever have envisaged during his lifetime. The story of Robert Johnson is thus an important one for the history of music, particularly in relation to the development of blues music traditions and the rock and roll traditions that emerged from blues.

⁴ Eric Clapton, *Sessions for Robert J.* (Reprise/Wea 2004).

⁵ Eric Clapton, *Me and Mr. J.* (Reprise/Wea 2004).

⁶ See *infra* notes ___ to ___ and accompanying text.

⁷ WALD, *supra* note 2, at 111, 117, 121 (noting that although all were impressed by Johnson's musical abilities, including a "powerful voice and uncanny facility on guitar," Johnson's debut did not "set the blues world on fire")

⁸ *Id.* at 105 ("To many modern listeners he is all of early blues").

⁹ *Id.* at xv.

¹⁰ *Id.* at xiv-xv (noting that Johnson "died virtually unknown in a rural backwater, without making any appreciable dent on the blues world of his day.").

¹¹ See *Robert Johnson—Early Influence*, Rock and Roll Hall of Fame website, at <http://www.rockhall.com/hof/inductee.asp?id=134>.

A. *The Contexts and Origins of Blues: Legends, Romance and Authenticity*

Blues emerged from African American communities in the American south by the early twentieth century.¹² Soon after its emergence, Blues had become a popular music form distributed largely through sound recordings made by African American musicians for African American audiences.¹³ Although blues sound recordings were based on a continuing live blues performance tradition, the types of recordings that were distributed by companies that distributed so-called “race” records, of which blues formed an important segment, were significantly influenced by cultural assumptions about and hierarchies of race and music. The ways in which music industry representatives used copyright in their business dealings with early blues musicians reflected these hierarchical assumptions. The contexts of performance and reception of blues music have, however, not remained static. Blues genre has been reinvented in different times and contexts by a diverse range of performers for varied audiences. In the case of early recorded blues, later treatment of such music was also significantly influenced by blues collectors, who played an important role in shaping and preserving our legacy of recorded blues.¹⁴

Blues is a distinctively American musical form and one of the most important of such forms.¹⁵ Blues music is an important element in a broad range of other musical forms, including jazz, country music, rhythm and blues and rock and roll.¹⁶ Blues consists of a “definable body of musical elements or traits inherited from both African and European traditions,

¹² RICHARD J. RIPANI, *THE NEW BLUE MUSIC: CHANGES IN RHYTHM & BLUES, 1950-1999*, at 4-9 (2006).

¹³ WALD, *supra* note 2, at xiii-xv (discussing blues as popular music).

¹⁴ *Id.* at ____.

¹⁵ RIPANI, *supra* note 12, at 3-5 (discussing the new blue music that originates in African American folk music in the mid-nineteenth century that was a blend of various combinations of inherited elements and that was “wholly new and totally American”).

¹⁶ Robert Walser, *Rock and Roll*, in ____ *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS* ____, ____ (Stanley Sadie ed., 2001), *available at* <http://www.grovemusic.com> (noting the influence of blues on rock and roll); Paul Oliver, *Blues*, in ____ *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS* ____, ____ (Stanley Sadie ed., 2001), *available at* <http://www.grovemusic.com> (noting the influence of blues on the Beatles, Rolling Stones, the Animals and the Who); EILEEN SOUTHERN, *THE MUSIC OF BLACK AMERICANS: A HISTORY* 361–65, 505 (3d ed. 1997) (noting the influence of blues on jazz and rock music); Peter Wicke, *Rock Music: A Musical-Aesthetic Study*, 2 *POPULAR MUSIC* 219, 222 (1982) (noting origin of rock and roll in various rhythm and blues playing styles as well as other musical genres).

that forms the foundational language of much twentieth-century American musical style.”¹⁷ The musical characteristics of blues are typically identified as including 4/4 syncopated or offbeat phrasing rhythmic structure, a unique musical mode that may incorporate flatted thirds and sevenths and lyrics in a three line stanza in which the second line repeats the first (AAB).¹⁸ Blues music, however, represents far more than the specific musical characteristics that might distinguish it. Blues music has also been characterized as representing a view of experience.¹⁹ Further, the blues musical system, including its lyrical, harmonic and melodic conventions, has been characterized as serving “as a trope in much of twentieth-century black music history in America,”²⁰ although some commentators assert that discussions of the blues as a key symbol of African American vernacular culture fail to acknowledge the essentialist focus on authenticity contained within such discussions.²¹

The origins of blues remain steeped in mystery and shrouded in legend.²² Blues has roots in African music and African American folk and work songs,²³ as well as European musical traditions. Many commentators trace the first recognizable blues is traced to the late nineteenth century to early

¹⁷ RIPANI, *supra* note 12, at 16.

¹⁸ *Id.* at 17-61; SOUTHERN, *supra* note 16, at 334-36 (noting three line stanzas, personal lyrics, duple rhythm with marked syncopated patterns, an entire song in twelve bars and an altered scale with the third, fifth, seventh and occasionally the sixth degrees being treated ambiguously and sometimes being lowered); JEFF TODD TITON, *EARLY DOWNHOME BLUES: A MUSICAL AND CULTURAL ANALYSIS* 137-174 (2d. ed. 1994) (describing the musical characteristics of traditional country blues).

¹⁹ HOUSTON A. BAKER, JR., *BLUES, IDEOLOGY AND AFRO-AMERICAN LITERATURE: A VERNACULAR THEORY* 7 (1984) 7 (suggesting that blues be considered as a “forceful matrix in cultural understanding . . . [whose] performers offer interpretations of the experiencing of experience”).

²⁰ GUTHRIE P. RAMSEY, JR., *RACE MUSIC: BLACK CULTURES FROM BEBOP TO HIP-HOP* 45 (Regents of the Univ. of Cal. 2003); *see also* LEROI JONES, *BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA* (1999); SAMUEL A. FLOYD, JR., *THE POWER OF BLACK MUSIC: INTERPRETING ITS HISTORY FROM AFRICA TO THE UNITED STATES* (1995).

²¹ RAMSEY, *supra* note 20, at 45 (noting that some scholars “have recently questioned the status of the blues as a key symbol of black vernacular authenticity on grounds that stem from larger critiques of ‘authenticity’ and ‘essentialism’.”).

²² PAUL OLIVER, *SONGSTERS & SAINTS: VOCAL TRADITIONS ON RACE RECORDS* 260 (1984) (“When, or indeed how, the blues emerged is a questions which has provoked much speculation but, not surprising, no incontestable evidence.”).

²³ ROBERT PALMER, *DEEP BLUES* 25-37 (1982); William F. Danaher, *The Influence of Blues Queens, 1921 to 1929*, 48 *AM. BEHAVIORAL SCI.* 1453, 1454 (2005).

twentieth century.²⁴ Despite its widespread popularity over an extended period of time, blues has over time been a flexible category subject to many romanticized conceptions. Furthermore, what constitutes blues has meant different things to different people at different times.

Although the origins of blues remain obscure,²⁵ what many refer to as blues had emerged by the turn of the century as a form of African American vernacular music.²⁶ Although blues music was produced throughout the American South,²⁷ the Mississippi Delta has produced a disproportionate share of great blues musicians and “was home to a unique strain of blues music, which has become extremely influential on the modern-day scene.”²⁸ The world from which blues derived was far from romantic: “if there is one place and one time outside of slavery that black Americans have no romanticism or nostalgia about, it is Depression-era Mississippi.”²⁹ Blues took root in the abject poverty of the Mississippi Delta region among players whose parents had in many instances been slaves or the children of slaves. The social conditions in Mississippi during that time period were characterized by a plantation based sharecropping system that “at times seemed little different from slavery,”³⁰ segregation and pervasive oppression of African Americans.³¹ Conditions

²⁴ PALMER, *supra* note 23, at 44 (noting that blues was so firmly rooted in earlier African American folk music that identifying when it became blues is difficult to say with certainty); Danaher, *supra* note 23, at 1454.

²⁵ SOUTHERN, *supra* note 16, at 332 (noting that less is known about the origin of the blues than the beginning of ragtime).

²⁶ *Id.* at 332-33, 338 (noting that W.C. Handy, the first man to popularize the blues, published his first blues composition, the *Memphis Blues* in 1912 and first thought about using it in a composition after hearing a singer in a Mississippi train station and that Gertrude “Ma” Rainey, the earliest professional blues singer, remembered first hearing the blues in 1902); WALD, *supra* note 2, at xiii (noting that blues was “primarily black popular music” for the first fifty years of its existence).

²⁷ WALD, *supra* note 2, at 83.

²⁸ *Id.* at 83; Stephen A. King, *Blues Tourism in the Mississippi Delta: The Functions of Blues Festivals*, 27 *POPULAR MUSIC & SOC’Y* 455, 456 (2004) (noting that the Mississippi Delta has been called the “home of the blues”).

²⁹ WALD, *supra* note 2, at 82.

³⁰ *Id.* at 84.

³¹ King, *supra* note 28, at 459 (describing the Mississippi Delta as the “lynching capital of the U.S.”); FRANTZ FANON, *Racism and Culture* (speech to the First Congress of Negro Writers and Artists in Paris), in *TOWARD THE AFRICAN REVOLUTION* 46f (Haakon Chevalier, trans.) (1967) (“Thus the blues—‘the black slave lament’—was offered up for the admiration of the oppressors. This modicum of stylized oppression is the exploiter’s and the racist’s rightful due. Without oppression and without racism you have no blues. The end of racism would sound the knell of great Negro music.”).

in the Mississippi Delta today continue to echo these historical circumstances.³²

B. *Blues as Popular Music: Mining the Mississippi Delta*

Since blues has meant different things to different people at different times, much confusion exists about blues as musical phenomenon and blues as marketing phenomenon. Not much is known about the early origins of blues music that came to be recorded and distributed to larger audiences by the 1920s.³³ Although blues derives from forms of African American music, as is often the case, clear lines do not always exist between folk culture and popular culture.³⁴

As was the case with later musicians who borrowed from blues, the folklorists and record industry scouts who mined blues music from the Mississippi Delta were focused on finding “authentic” forms of musical production.³⁵ This gave professional African American musicians during that time period significant incentives to produce the type of music that would more likely give them the opportunity to be recorded.³⁶ The focus on authenticity reflects a historic emphasis in the folklore discipline.³⁷ The British musicians who were influenced by blues traditions in the

³² King, *supra* note 28, at 460 (noting that the Mississippi Delta is still segregated and many of its citizens, particularly African Americans, live in abject poverty—“nearly 75 percent of the black households in the small Delta town of Shelby did not possess a car.”) (citations omitted).

³³ SOUTHERN, *supra* note 16, at 332.

³⁴ DOMINIC STRINATI, AN INTRODUCTION TO THEORIES OF POPULAR CULTURE 38 (2004) (discussing the differences between folk, elite and mass culture); JOHN STOREY, AN INTRODUCTORY GUIDE TO CULTURAL THEORY AND POPULAR CULTURE 17-18 (1993) (noting the definitional problems in distinguishing between popular culture and other forms of cultural production); HERBERT GANS, POPULAR CULTURE AND HIGH CULTURE: AN ANALYSIS AND EVALUATION OF TASTE 38 (1999) (discussing borrowings in high culture and popular culture from folk culture).

³⁵ BENJAMIN FILENE, ROMANCING THE FOLK: PUBLIC MEMORY AND AMERICAN ROOTS MUSIC (2000).

³⁶ *Id.* at 22 (“black performers were ghettoized, and their access to the recording world was dependent on their singing ‘black’ music”).

³⁷ REGINA BENDIX, IN SEARCH OF AUTHENTICITY: THE FORMATION OF FOLKLORE STUDIES 198 (1997); Benjamin Filene, “*Our Singing Country*”: John Lomax, Alan Lomax, Leadbelly and the Construction of an American Past, 43 AM. Q. 602, 613 (1991) (noting that the Lomaxes worked hard to preserve Leadbelly’s authenticity and at times controlled his repertoire); Ron Eyerman & Scott Baretta, *From the 30s to the 60s: The Folk Music Revival in the United States*, 25 THEORY & SOC’Y 501, 512 (1996) (noting that Leadbelly was coached by the Lomaxes as to his repertoire).

1950s and 1960s, however, also tended to view blues through a particular lens that reinforced existing emphases on authenticity.³⁸ This focus on authenticity was also evident in the activities of the earliest critics and collectors of blues music,³⁹ who played an important role in constructing the blues canon.⁴⁰ This focus on authenticity by varied actors in the blues arena at different points in time has meant that the corpus of early blues recordings represents a biased sample.⁴¹ The magnitude of this bias can only be estimated.⁴² The other types of music that early blues recording artists could and did perform have consequently been largely lost.⁴³

This focus on authenticity in blues had two important consequences. It

³⁸ WALD, *supra* note 2, at 46-48.

³⁹ Eyerman & Baretta, *supra* note 37, at 503, 508, 51 (noting that American folk music was invented in the 1930s by an urban intellectual elite with a left political orientation and that early recording undertaken under the Federal Arts Project of the WPA led to the creation of an archive or even canon of folk music for future generations and movements).

⁴⁰ John Dougan, *Objects of Desire: Canon Formation and Blues Record Collecting*, 18 J. POPULAR MUSIC STUD. 40, 40 (2006); Mike Daley, “Why Do Whites Sing Black?”: *The Blues, Whiteness, and Early Histories of Rock*, 26 POPULAR MUSIC & SOC’Y 161, 163 (2003) (noting that the idea of blues is a constructed one influenced by multiple sources, including collectors, critics and the musicians who reinterpreted the blues for a wider audience).

⁴¹ WALD, *supra* note 2, at 57 (“[O]verall the recordings left to us by the folklorists and the commercial companies both tend to give a skewed view of the racial divide in the music of early rural performers, and reinforce the impression that such players were limited to a distinct ‘country’ repertoire.”); Dougan, *supra* note 40, at 41 (noting the role of recording in the transition of blues music to mass art and the relationship of mostly African American consumers of blues recordings in the 1920s and 1930s and white, male record collectors of the post-World War II era who became self-appointed keepers of the canon); Scott DeVeaux, *Bebop and the Recording Industry: The 1942 AFM Recording Ban Reconsidered*, 41 J. AM. MUSICOLOGICAL SOC’Y 126, 127 (1988) (noting the role of the recording industry in the selection process of the existing repertory of bebop recordings in the 1940s); Filene, *supra* note 37, at 618-19 (discussing an episode in which the Lomaxes, who operated closely with prison officials, attempted to get a recording from a prisoner who was brought to the room at gunpoint and noting that the “Lomaxes did not reflect on whether going to such lengths to ferret out songs created a skewed portrait of America’s folk music.”); H. Bruce Franklin, *Songs of an Imprisoned People*, 6 MELUS 6, 17 (1979) (noting that John Lomax collected ten versions of the work song “Go Down Old Hannah” from Texas convicts).

⁴² WALD, *supra* note 2, at 47 (noting that record scouts discouraged black musicians from playing “hillbilly” music, which is why “all but a tiny sample of rural fiddle music” recorded during the 1920s come from white players); Dougan, *supra* note 40, at 43 (noting that talent scouts and label executives discouraged artists from recording popular non-blues songs that would have required that they pay mechanical royalties).

⁴³ WALD, *supra* note 2, at 57.

first of all made many think of blues as a primitive form of folk music, rather than as a form of music that like ballet was derived from folk forms but that also came to be performed by professional musicians.⁴⁴ Although the folk tradition existed alongside professional blues musicians, many of the rural blues musicians who were recorded in the 1920s were professional musicians.⁴⁵ In addition, the tendency to see blues music as a primitive form of collective folk production reflected widespread stereotypes about African Americans and was part of a conceptual framework of later borrowers that facilitated the free borrowing of such music, often without attribution, let alone compensation.⁴⁶

C. *The Robert Johnson Puzzle: Uncovering a Murdered Musical Cipher*

Robert Johnson was murdered at age 27. He died impoverished in obscurity under mysterious circumstances in 1938 at a country crossroads near Greenwood, Mississippi. Johnson has been described as a cipher,⁴⁷ and the circumstances of his death remained unknown, uncertain and a subject of much speculation for decades after his death.⁴⁸ Blues researcher and collector, Gayle Dean Wardlow, found Johnson's death certificate after years of rumors about where, when and how he died. Wardlow searched from 1965 to 1968 in Mississippi, Arkansas and Texas and eventually found evidence of Johnson's death.⁴⁹

Robert Johnson's death remains a subject of discussion among blues fans, even today some 70 years after he died: a British doctor has recently suggested that Marfan's Syndrome is consistent with Johnson's arachnodactyly (spider fingers in which the fingers are abnormally long and slender) and described symptoms shortly before his death.⁵⁰ Although

⁴⁴ *Id.* at 43; PETER GURALNICK, SEARCHING FOR ROBERT JOHNSON 48 (1989) (noting that Robert Johnson was a professional musician).

⁴⁵ WALD, *supra* note 2, at 43 (noting that the purveyors of blues recorded in the 1920s were people who played music for a living, some of whom had other jobs as well).

⁴⁶ See *infra* notes ___ to ___ and accompanying text.

⁴⁷ WALD, *supra* note 2, at ___.

⁴⁸ In the Matter of the Estate of Johnson, Harris and Anderson v. Johnson, 767 So.2d 181, 182 (Miss. S. Ct. 2000) (noting that Johnson died an apparent indigent).

⁴⁹ Gayle Dean Wardlow, *Searching for the Robert Johnson Death Certificate (1965-1968)*, in CHASIN? THAT DEVIL MUSIC: SEARCHING FOR THE BLUES 86, 86-90 (1998).

⁵⁰ David Connell, Retrospective Blues: Robert Johnson—An Open Letter to Eric Clapton, 333 BRIT. MED. J. 489, 489 (2006), <http://www.bmj.com/cgi/content/full/333/7566/489> (responding to Eric Clapton's discussion about Robert Johnson and noting that Johnson's

speculation about Johnson's cause of death still exists, the best evidence suggests that Johnson, who had a reputation as a ladies' man who enjoyed his liquor, appears to have been given a whiskey drink poisoned by the husband of one of his lovers.⁵¹ However, many different accounts have been given of his death over the years, including rumors that Johnson was shot or stabbed, died of syphilis, the actual cause of death listed on his death certificate, or died of pneumonia.⁵² Mack McCormick, a researcher said to have interviewed actual witnesses to Johnson's death, corroborates the scenario of murder by poison:

“The accounts agreed substantially as to the motive, the circumstances, and in naming the person responsible for the murder. It had been a casual killing that no one took very seriously. In their eyes Robert Johnson was a visiting guitar player who got murdered.”⁵³

Johnson's death came at a pivotal time in his career less than two years after he made his first recordings, which consist of two discs of 29 recordings made in two separate recording sessions in 1936 and 1937.⁵⁴ Around the time of his murder, a leading Jazz impresario, John Hammond, was trying to locate Johnson to invite him to appear in a groundbreaking concert entitled “From Spirituals to Swing” to take place in New York's Carnegie Hall.⁵⁵

Johnson was one of a number of musicians who made their way through the Mississippi Delta during the time period of his life and death. Although Johnson is now a cult idol, surprisingly little is known about his life. Further, as blues musician and Robert Johnson scholar Elijah Wald has noted, Robert Johnson's “legend, combined with the many blank spaces in his story, have created a mass of exaggerations, confusion, legal cases, and secretiveness that make [any attempt to create a full biography

death may have been caused by Marfan's syndrome, which may be indicated by Johnson's unnaturally long fingers as evident in his photographs).

⁵¹ WALD, *supra* note 2, at 122-24.

⁵² *Id.* at 124.

⁵³ GURALNICK, *supra* note 44, at 50.

⁵⁴ WALD, *supra* note 2, at 126-89 (listing and assessing all of the recordings made by Johnson in his two recording sessions); *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 686 (9th Cir. 2000) (noting that Johnson recorded 29 songs in two recording sessions in November 1936 and June 1937 before he was murdered in 1938).

⁵⁵ WALD, *supra* note 2, at 186-87.

of Johnson] both frustrating and futile.”⁵⁶

Robert Johnson is nonetheless now the most influential blues musician from the early period of blues recording.⁵⁷ This was not always the case, and Johnson was not among the most popular blues musicians of his time,⁵⁸ at least based on record sales of his recordings at the time of their initial release.⁵⁹ Robert Johnson’s music has been described as having emotional intensity and visceral appeal, as well as important aesthetic and musical qualities.⁶⁰ Further, later commentators have typically placed Johnson on a pedestal far above those who played during his era.⁶¹

Commentators have so elevated Johnson by using classic language associated with Romantic author discourse that emphasizes the unique genius of Johnson’s compositions. Romantic author discourse has generally played an important role in defining who constitutes an “author” for copyright purposes in part by emphasizing the unique and genius-like contributions of individual creators. Romantic author assumptions are a primary mechanism by which borrowing and collaboration in creation are minimized or even denied.⁶² This vision of authorship has significant implications for the application of copyright to blues music. The collaborative nature of blues musical composition does not lend itself very well to Romantic author characterizations. In blues practice, the combination of individual performers crafting material from a collaborative tradition is a difficult one from the perspective of current

⁵⁶ WALD, *supra* note 2, at 105.

⁵⁷ Charles Ford, *Robert Johnson’s Rhythms*, 17 POPULAR MUSIC 71, 71 (1998) (noting that Robert Johnson provides one of the few pre-war influences on rock and attributing his influence to his pitch and timbre and irregular, syncopated rhythms).

⁵⁸ WALD, *supra* note 2, at xv (noting that Johnson’s music excited little interest among black blues fans of his time); Ford, *supra* note 57, at 78 (noting that “Terraplane Blues” was the only Johnson recording to achieve substantial sales).

⁵⁹ WALD, *supra* note 2, at xv (noting the lack of popularity of Johnson’s music in the recordings released before his death).

⁶⁰ James Bennighof, *Some Ramblings on Robert Johnson’s Mind: Critical Analysis and Aesthetic Value in Delta Blues*, 15 AM. MUSIC 137, 138 (1997).

⁶¹ WALD, *supra* note 2, at ____.

⁶² See Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 15, 21 (Martha Woodmansee & Peter Jaszi eds., 1994) (discussing the “modern myth that genuine authorship consists in individual acts of origination”); Peter Jaszi, *Contemporary Copyright and Collective Creativity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29, 40, 48 (Martha Woodmansee & Peter Jaszi eds., 1994) (noting that assumptions about cultural production in existing legal cases discourage artists who use existing materials).

assumptions about creation in copyright. Later romanticization of his musical creations aside, Robert Johnson falls firmly within a blues tradition characterized at least in part by repetition and reuse of existing music and lyrics as a core aesthetic.⁶³ The divergence between Robert Johnson's actual musical practice and later characterizations of both the nature and musical practices underlying his "musical genius" is thus significant.

The conceptual positioning of Robert Johnson and his talents is important for understanding how he became so prominent as compared with his peers. Robert Johnson is separated from the broader field of blues musicians by being characterized as a musical genius and creator of a unique corpus of music:

Robert Johnson became the personification of the existential blues singer, unencumbered by corporeality or history, a fiercely incandescent spirit who had escaped the bonds of tradition by the sheer thrust of genius . . . Like Shakespeare, though, the man remains the mystery. How was one individual, unschooled and seemingly undifferentiated from his fellows by background or preparation, able to create an *oeuvre* so original, or such sweeping scope and power, however slender the actual body of work may have been in Johnson's case. . . The sources of his art will likewise remain a mystery. The parallels to Shakespeare are in many ways striking. The towering achievement. The shadowy presence . . . I am not arguing that Robert Johnson's art has a Shakespearean scope . . . As a lyric poet, though, he occupies a unique position where he can very much stand on his own. His music remains equally unique. Not that it cannot be placed within a definable tradition.⁶⁴

The above characterization of Johnson presents an interesting contrast to an experience discussed by Elijah Wald, who taught a series of classes on blues history. He played blues music sequentially in chronological order, ending with Robert Johnson. Wald reports being caught off guard by the reaction of his students:

Finally we came to Robert Johnson, the most famous Mississippian of all. My students had all heard of him, knew he was supposed to be the pinnacle of the Delta style, but most had

⁶³ Ford, *supra* note 57, at 88 (noting that Johnson borrowed and pasted-in materials much like his predecessors and shaped his pieces into unique and autonomous forms).

⁶⁴ GURALNICK, *supra* note 44, at 2, 6, 55-56.

never actually listened to his music. Now, as he sang and played, they looked at me blankly. What was so special about this? Compared to some of the earlier players, Johnson seemed rather sedate. Why would he be hailed as a musical revolutionary, towering above his elders and contemporaries?

I did my best to come up with answers, but I was caught off guard, and over the next months this experience forced me to rethink much of what I knew—or thought I knew—about blues. My student’s reaction, far from being stupid or ill-informed, was closer to the reaction of most 1930s blues fans than mine was.⁶⁵

The ability to characterize Johnson and his contributions in particular ways were facilitated by the mystery of Robert Johnson,⁶⁶ including his fairly obscure life, mysterious death, the lack of any visual representations or photos of him until some thirty-five years after his death⁶⁷ and alleged connections to Satanism. As the story is sometimes told, Johnson is said to have received his guitar playing skills as the result of a deal with the Devil.⁶⁸ Elijah Wald, who attended the dedication of Johnson’s grave marker in Mississippi in 1991, describes the scene and notes that the members of Mount Zion Missionary Baptist Church where Johnson is said to have been buried. “had been a bit dubious, especially after learning that Robert Johnson was famous not only for his music but for being involved with satanic forces.”⁶⁹

Given that an estimated 517 reported lynchings occurred in the Mississippi Delta (described as the “lynching capital of the U.S.”) between 1892 and

⁶⁵ WALD, *supra* note 2, at 126-27.

⁶⁶ SAMUEL CHARTERS, ROBERT JOHNSON 4 (1973) (“Until his sister was found recently in Washington, D.C. Robert Johnson’s life was one of the elusive mysteries of the blues.”).

⁶⁷ *Anderson v. LaVere*, 895 So. 2d 828, 831 (Miss. S. Ct. 2004) (noting that Robert Johnson’s photographs were given to Steve LaVere, a music historian, in connection in a transaction in which Johnson’s heirs assigned to LaVere the rights to photographs of Johnson and other memorabilia and copyright to Johnson’s works in exchange for 50% of any royalties to be earned by LaVere for their use).

⁶⁸ *Id.* at 265-267 (noting the cliché that connects Robert Johnson and the Devil); *see also* Gayle Dean Wardlow, *Stop, Look, and Listen at the Cross Road, in CHASIN’ THAT DEVIL MUSIC: SEARCHING FOR THE BLUES* 196, 196, 203 (1998) (noting “the present-day myth that Robert Johnson sold his soul to the devil at a cross road in exchange for phenomenal guitar skills has no single source” and that record companies in the 1920s used the devil theme to “depict the dangers associated with playing the blues”).

⁶⁹ WALD, *supra* note 2, at xvi-xvii ().

1927,⁷⁰ the mysterious death of a black male in the Mississippi Delta during this time period was likely neither unique nor unusual. The Mississippi Delta, which makes up one-sixth of the state's area,⁷¹ accounted for over a third of the lynchings reported in Mississippi between 1900 and 1930,⁷² and "was legendary for towns with signposts warning black people not to be caught within their borders after sundown."⁷³ Notably, the death of Johnson was to some extent extracted from the violent context of its occurrence and imbued with a mystery that only further contributed to Johnson's mystique. As a result, Johnson's death became a factor that distinguished him from other blues musicians: "Robert Johnson's death in 1938 has spawned more questions and controversies than any other event in blues history."⁷⁴ The lack of knowledge about Johnson also contributed to Johnson's status as a blues cultural icon and meant that many later fans could use Johnson as "a screen on which [to project their] dream movie of the blues life."⁷⁵

Conceptions of Robert Johnson's work highlight the context dependent nature of notions of originality. Originality is yet another characteristic of copyrightability that is not always easy to delineate in actual contexts of creation.⁷⁶ However, what might seem original to those in one context may not seem as original in other contexts. Consequently, within the context of African American audiences of the 1920s and 1930s, Johnson's work probably did not seem startlingly original in the way that it did to British and other musicians and audiences listening to Johnson's music, often in relative isolation, in the 1950s and 1960s. This later audience was largely removed from the original context of other music that was prevalent at the time Johnson produced his music or able to listen to a

⁷⁰ King, *supra* note 28, at 459 (noting that an estimated 517 reported lynchings occurred in the Mississippi Delta between 1882 and 1927).

⁷¹ WALD, *supra* note 2, at 84.

⁷² JAMES C. COBB, *THE MOST SOUTHERN PLACE ON EARTH: THE MISSISSIPPI DELTA AND THE ROOTS OF REGIONAL IDENTITY* 114 (1992).

⁷³ WALD, *supra* note 2, at 84.

⁷⁴ Gayle Dean Wardlow, *Robert Johnson: New Details on the Death of a Bluesman*, in CHASIN' THAT DEVIL MUSIC: SEARCHING FOR THE BLUES 91, 91-93 (1998).

⁷⁵ WALD, *supra* note 2, at xvi; *see also* BARRY LEE PEARSON & BILL MCCULLOCH, *ROBERT JOHNSON: LOST AND FOUND I* (2003) ("Decades after his death this slightly built African American drifter named Robert Johnson rose from obscurity to become an all-American musical icon, the best-known although least understood exemplar of the Mississippi Delta blues tradition.").

⁷⁶ Arewa, *supra* note 1, at ____.

limited and likely biased sample of such music.⁷⁷

For early African American blues listeners, what seemed original and interesting was very different than what seemed interesting and original to the largely white blues fans that were the major force behind the blues revival in the 1950s and 1960s.⁷⁸ For the latter, romantic conceptions about the blues were closely tied to notions of authenticity that are often unsuited to musical creation in living musical traditions.⁷⁹ As a result, what is perceived as original may depend in significant part on the contexts within which listeners hear music.⁸⁰ For this reason, assessments of originality, particularly with respect to older music, are potentially quite difficult, in part because of selection bias that results in contemporary listeners only being exposed to a portion of the broader music scene during the time such older music was produced.⁸¹ Although Elijah Wald also describes Robert Johnson as a “unique genius,”⁸² he notes that later users who listened to Johnson did not approach him by way of “the records that preceded and surrounded him,” but rather came “to him by traveling backward from the Rolling Stones via Chuck Berry and Muddy Waters—the path taken by virtually all modern listeners. Given this, their reactions made perfect sense. Not that I believe Johnson was in any way an ordinary talent, but what makes him great is by no means as obvious and clear-cut as it has often appeared to the generations of what rock and jazz fans who have heard him in a vacuum, cut off from the larger blues world of his time.”⁸³

This is an issue that is increasingly of concern today given the longer duration of copyright, which makes assessments of originality more

⁷⁷ Ford, *supra* note 57, at 86 (discussing the author’s introduction to blues as a member of the British substantial minority who had an interest in blues as a declining form of “negro music” and noting that rural blues were at that time “mistakenly . . . valued for their pre-commercial authenticity, an attitude which quickly degenerated into an atavistic idealisation of ‘primitive spontaneity’.”).

⁷⁸ WALD, *supra* note 2, at xvi-xvii (noting the different reactions and responses to white and black audiences for blues).

⁷⁹ See Arewa, *supra* note 1, at ___ (discussing how notions of authenticity have contributed to the creation of the classical music canon since the nineteenth century).

⁸⁰ Arewa, *supra* note 1, at 304-05.

⁸¹ WALD, *supra* note 2, at 30-42 (discussing the ways in which blues scouts selected musicians to record and helped determine what type of music such musicians performed).

⁸² *Id.* at ___.

⁸³ *Id.* at 127-28.

difficult, particularly with respect to music of earlier generations.⁸⁴ The segmentation of the recording industry by race has further complicated assessments about originality in that music that may seem original in one context may be commonplace in another. Determinations of what is commonplace in one context as opposed to another may also be closely related to recording industry marketing practices and market segmentation. Industry practices may also shape determinations of what is considered original. In the early blues arena, concepts of originality derived from copyright also influenced the types of blues music that were recorded since record company scouts required that any recorded songs be original in part due to their desire to avoid paying mechanical licenses fees.⁸⁵

D. *Blues and British Rock: Cultural Icons, the Diffusion of Blues and Reinvention of Blues Tradition*

The diffusion of blues music outside of its contexts of origin raises important issues about how copyright operates in an environment of cultural diffusion in a broader milieu characterized by significant inequalities and oppression. The diffusion of blues also raises questions about the boundaries between diffusion and exploitation. The diffusion of blues thus forces consideration of when uses of existing material with limited or no compensation may be inappropriate given the contexts of such usage.

Blues diffused to from the southern U.S. northward with the migration of significant numbers of African Americans north in the early twentieth century.⁸⁶ The diffusion of blues was accompanied by the invention of new narratives about the blues. Such narratives included a recalibration of the legacy of early blues artists by early jazz critics and others, including a reevaluation of the contributions of Robert Johnson, who did not have a

⁸⁴ Arewa, *supra* note 1, at ___ (noting potential difficulties that may result from a expansion on copyright duration).

⁸⁵ Dougan, *supra* note 40, at 43 (“Originality was an aesthetic designation partly defined by copyright law and, to all those involved in the race record business, meant that a song could not show the influence of anything previously recorded or published.”) (citations omitted).

⁸⁶ CLYDE WOODS, DEVELOPMENT ARRESTED: THE BLUES AND PLANTATION POWER IN THE MISSISSIPPI DELTA 103-04, 115 (1998) (noting that in 1890 one in ten African Americans in the U.S. lived in Mississippi, that 60 percent of the Mississippi population or 743,000 people was African American and that more than 100,000 African Americans left Mississippi between 1915 and 1920 for factory and domestic work in Memphis, St. Louis, Detroit and Chicago, with Chicago rapidly emerging as a Delta blues center).

big impact on audiences of his time relative to his peers. Foremost among those who have contributed to the deification of Robert Johnson are rock and roll musicians who came of age in Britain and who were significantly influenced by blues music in the 1950s and 1960s.⁸⁷ The names of those so influenced reads like a Who's Who of the early rock and roll era and include the Beatles, the Rolling Stones, Eric Clapton, Cream, Jeff Beck, Led Zeppelin, Fleetwood Mac, the Yardbirds, the Kinks and the Animals.⁸⁸

Such artists and the reverence expressed for the blues by many of them had a tremendous impact on the reception of Robert Johnson during the rock era: “the language of Robert Johnson entered into the common vocabulary of rock . . . [p]rimarily through the Rolling Stones and Eric Clapton and their versions of Johnson’s ‘Love in Vain’ and ‘Crossroads’ in particular.”⁸⁹ Robert Johnson is thus different from many other early blues musicians in his status as a cultural icon of modern music. Johnson’s status is also reflected in the accolades accorded him by later rock musicians such as Eric Clapton: “Robert Johnson to me is the most important blues musician who ever lived . . . I have never found anything more deeply soulful than Robert Johnson. His music remains the most powerful cry that I think you can find in the human voice.”⁹⁰

The status of Robert Johnson today illustrates the fact that cultural icons and cultural branding are increasingly important aspects of the broader entertainment industry.⁹¹ Cultural icons represent exemplary “symbols

⁸⁷ PEARSON & MCCULLOCH, *supra* note 75, at 108-09 (discussing why Johnson was singled out for special veneration)

⁸⁸ STEPHEN DAVIS, *HAMMER OF THE GODS: THE LED ZEPPELIN SAGA 5* (1997) (“In fact all the young English musicians to flood America in the wake of the Beatles—the Rolling Stones, Animals, Yardbirds, and Kinks in the first wave; Cream, Fleetwood Mac, Jeff Beck, and Led Zeppelin in the second—considered themselves blues scholars.”); PALMER, *supra* note 135, at 235–36 (noting the influence of blues artists on musicians in Britain).

⁸⁹ GURALNICK, *supra* note 44, at 5.

⁹⁰ *Id.* (statement by Eric Clapton).

⁹¹ DOUGLAS B. HOLT, *HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING* 1-2 (2004) (noting that cultural icons “dominate our world” and that the use of cultural icons has changed in modern times in that the circulation of cultural icons has become a central economic activity, including through cultural icons such as James Dean “take on intensive and pervasive meaning”); OXFORD ENGLISH DICTIONARY ____ (2d ed. 1989), *available at* <http://dictionary.oed.com> (defining a cultural icon as “[a] person or thing regarded as a representative symbol, esp. of a culture or movement; a person, institution, etc., considered worthy of admiration or respect.”).

that people accept as shorthand to represent important ideas.”⁹² Robert Johnson has come to represent the idea of the early blues musical tradition. The increasing importance of cultural icons such as Robert Johnson has also accentuated the influence of models of copyright exploitation based on valuable asset conceptions of culture.⁹³ Such valuable asset models that focus on the exploitation of cultural material as assets, have contributed to the rise of industries based on cultural icons.⁹⁴ Further, the distribution of copyright rewards reflects the business implications of cultural icons reflected in the “enormous income of top producers of intellectual property.”⁹⁵ This distribution of reward has implications for assumptions about copyright incentives and rewards that merit further examination. The Robert Johnson story also reflects some ways in which copyright may in some instances operate as a lottery with respect investments decisions in expressive works.

The emergence of Robert Johnson as blues cultural icon marks an important transition in conceptions of blues as an innovative living tradition and conceptions of blues as an important source of proceeds for eminent blues artists. Valuable asset models have cultural implications that merit greater scrutiny. The implications of valuable asset models are all the more pertinent given that copyright frameworks have to date not sufficiently grappled with the reality of borrowing as a norm and the ways in which sharing and collaboration are inherent aspects of many living cultural traditions.⁹⁶ Rather, in parallel with the increasing importance of cultural icons, copyright has increasingly come to accept models based on cultural production as a valuable asset to be used only by true creators and authorized users.⁹⁷ This view of copyright has tremendous implications for later creators who use existing works in their creations that is magnified in the context of living cultural traditions.

In large part due to his status as a cultural icon and influence on British

⁹² Holt, *supra* note 91, at 1.

⁹³ Olufunmilayo B. Arewa, *All Work and No Play . . . : Intellectual Property as Serious Business* (2008) (manuscript on file with author).

⁹⁴ David Wall, *Reconstructing the Soul of Elvis: The Social Development and Legal Maintenance of Elvis Presley as Intellectual Property*, 24 INT’L J. SOC. L. 117, 119 (1996) (noting the development of the Elvis industry within hours of his death).

⁹⁵ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 54 (2003).

⁹⁶ Arewa, *supra* note 93, at ____.

⁹⁷ *Id.*; Michael J. Madison, *IP and Americana, or Why Intellectual Property Gets the Blues* 18 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 677, ____ (2008) (noting ways in which copyright law may have maintained or enabled changes in blues musical practice).

rock and roll artists, Robert Johnson has come to symbolize early and authentic blues. Robert Johnson is thus distinguished in many respects in the blues arena by the ways in which later blues fans identify with his persona and music. The mystery and enigma that have for many years surrounded both his life and death have made his appeal no doubt all the more intense for his fans. Although Robert Johnson represents an earlier artist who became eminent in a later era, his status as cultural icon reflects general trends in the entertainment industry. Cultural icons have in particular become an inseparable part of the music industry. This in part reflects the fact that the “commercial imperatives of the music industry necessarily leads to the promotion of a star system.”⁹⁸ Cultural icons have copyright implications because such icons are often imbued with characteristics that are parallel to features used to describe artistic production within Romantic author conceptions.

Johnson’s status as a cultural icon was facilitated by the lack of information about him. Since Johnson died at age 27, he also remained forever young and fresh and new in the eyes of his listeners, unlike many of his peers, who had aged and changed musically in ways that made them seem perhaps less “authentic.” The allure and mystery of Johnson was increased by the absence of knowledge about important details of his life and death.⁹⁹

The expansion of audiences for Robert Johnson and other early blues musicians was part of the broader diffusion of blues in the U.S. and internationally. This diffusion highlights ways in which experiences of blues musicians have been significantly shaped by hierarchies of race and culture. Such hierarchies shaped blues in both its early years as well as the latter diffusion of blues in the rock and roll context. The diffusion of blues during the early rock era, for example, took place in the context of an American recording industry that had long been shaped along racial lines. Such racial categories had significant implications for performance opportunities as well as copyright treatment of a wide range of musicians, including blues artists

⁹⁸ Reebee Garofalo, *How Autonomous is Relative: Popular Music, the Social Formation and Cultural Struggle*, 6 *POPULAR MUSIC* 77, 81 (1987).

⁹⁹ GURALNICK, *supra* note 44, at 2, 6, 55-56.

II. RACE MUSIC: BLUES AND THE RECORDING INDUSTRY

A. *Music, Genre, and American Racial Categories*

Music and musical genre are often conceptualized today in racial terms.¹⁰⁰ As a result, certain types of music are frequently categorized as connected to particular racial or ethnic groups. Contemporary genre categories reflect in part the historical legacy of racial categories that were an integral part of the marketing of records since the earliest days of the recording industry.¹⁰¹ Although genres are frequently taken for granted, we often do not appreciate the ways in which the recording industry has shaped not only genres but also the types of music that different musicians could record.¹⁰² Consequently, the fact that black hillbilly singers existed in significant number and that musicians often classified within the blues genre could create and play a broad range of music from hoe down music to hillbilly music have been written out of or minimized in much music history.¹⁰³ Further, the role of white musicians in early blues traditions is often ignored.¹⁰⁴ The influence of the blues on the country music tradition

¹⁰⁰ WALD, *supra* note 2, at 28 (noting that views of music history are steeped in race); William G. Roy, “Race Records” and “Hillbilly Music”: *Institutional Origins of Racial Categories in the American Commercial Recording Industry*, 32 *POETICS* 265, 277 (2004) (noting that recording industry marketing categories eventually became musical genres, which served as aesthetic guides to performance).

¹⁰¹ Roy, *supra* note 100, at 266 (noting that in the 1920s recording firms adopted blatantly racial categorical schemes for their catalogs and marketing that consisted of the category of “race records” to describe African American music and “hillbilly” or “old time” music to describe the music of rural whites).

¹⁰² Damon J. Phillips & David A. Owens, *Incumbents, Innovation and Competence: The Emergence of Recorded Jazz, 1920 to 1929*, 32 *POETICS* 281, 292-93 (2004) (discussing the ways in which recording industry behaviors, including with respect to the race, shaped musical innovation in jazz in the 1920s); Keith Negus, *Cultural Production and the Corporation: Musical Genres and the Strategic Management of Creativity in the US Recording Industry*, 20 *MEDIA, CULT & SOC’Y* 359, 360 (1998) (considering the ways in which recording companies divide operations according to social-cultural identity labels and the ways in which this industry organization can be used as a “direct intervention into and contribution towards the way in which social life is rationalized and fragmented and through which different experiences are separated and treated unequally.”); CHRISTOPHER SMALL, *MUSIC OF THE COMMON TONGUE: SURVIVAL AND CELEBRATION IN AFRICAN AMERICAN MUSIC* 395 (1987) (noting the profound influence of records and the recording industry on Western musical performance in the twentieth century generally).

¹⁰³ WALD, *supra* note 2, at 44.

¹⁰⁴ *Id.* at 18 (noting that little attention has been devoted to early white blues pioneers such as Morton Harvey, Al Brenard and Marion Harris).

is also typically diminished,¹⁰⁵ despite the fact that a significant African American hoedown tradition profoundly influenced country music.¹⁰⁶ Also minimized today is the extent to which musicians and music, both tunes and styles, crossed racial categories: for example, “several interracial string bands recorded in the 1920s” and “across the South, if one bothers to ask, one finds reports of black and white musicians working together.”¹⁰⁷

What is also often forgotten is the fact that genres and categories of music were in large part invented as a means of filing and marketing records.¹⁰⁸ Prior to the advent and dissemination of records and recording technology, entertainment was largely live, much more diverse and less amenable to classifications and hierarchies of musical production, although such hierarchies were increasingly evident even in live performance traditions of the nineteenth century.¹⁰⁹ Further, prior to the dissemination of records, musicians had to be versatile performers who could play a broad variety of music.¹¹⁰ Genre distinctions were thus much less part of the musical lives of most people prior to the advent of recorded music.¹¹¹ Prior to the recording age, African American musicians, for example, typically played a broad range of music. In colonial America, for example, “black musicians provided much of the dance music for the colonists of all classes” in the North and South and played for country dances, balls, and dancing schools.¹¹² The contribution of such musicians were evident in a broad range of musical traditions: “the most sophisticated American

¹⁰⁵ Rebecca Thomas, *There’s a Whole Lot O’Color in the “White Man’s” Blues: Country Music’s Selective Memory and the Challenge of Identity*, 96 *MIDWEST Q.* 73, 81 (1996) (noting that DeFord Bailey, an African American country music artist, performed in the Grand Ole Opry on radio shows but was fired as new technology brought the Opry into people’s homes).

¹⁰⁶ WALD, *supra* note 2, at 47 (noting that most experts agree that between one third and one half of the standard Southern fiddle repertoire is drawn from the black tradition); Thomas, *supra* note 105.

¹⁰⁷ WALD, *supra* note 2, at 27, 48 (noting that as “for white performers like Bernard and Harris, there has not been even the most cursory study of their work” and that little evidence supports the assertion of some scholars that interracial musical groupings were a rarity).

¹⁰⁸ *Id.* at 28.

¹⁰⁹ *Id.*; LAWRENCE W. LEVINE, *HIGH BROW, LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* (1988) (describing sacralization in the establishment of hierarchies of forms of cultural production in nineteenth century U.S. expressive culture and the diversity of types of works performed in single performance settings).

¹¹⁰ WALD, *supra* note 2, at 44.

¹¹¹ *Id.* at 56.

¹¹² SOUTHERN, *supra* note 16, at 43-44.

guitarist of the nineteenth century was a black man from Virginia, Justin Holland, who introduced the European techniques of Sor and Carcassi to the United States.”¹¹³

The varied musical contexts in which African American musicians played meant that such musicians were often comfortable playing a diverse range of music of many genres and styles. Accomplished black banjo and fiddle players were, for example, not at all atypical in the era before the recording age. Recording industry business and marketing practices created incentives that tended to diminish this diversity of musical styles and performers: “[the choices of recording industry scouts] left black string bands in a double bind: They were banned from the hillbilly catalogs because they were black, and from the Race catalogs because they played hillbilly music.”¹¹⁴

B. *Recording Industry Marketing Practices and the Construction of “Black” Music*

With the recording industry came the establishment of categories such as “race” music, “plantation music” or “coon songs,”¹¹⁵ which meant that the vast majority of African American musicians were marketed playing music that was deemed to be appropriate for the limited African American consumer market rather than the broader public.¹¹⁶ The establishment of recording industry and recording industry marketing practices helped define the types of music that were thought to constitute “black music”: “The record companies not only prevented black bands from playing what was perceived as ‘white’ music, but limited both white and black

¹¹³ WALD, *supra* note 2, at 46.

¹¹⁴ *Id.* at 52; *see also* SOUTHERN, *supra* note 16, at 43 (noting that one of the best known fiddle players in New England was a slave named Samson, owned by Colonel Archelaus Moore).

¹¹⁵ Thomas, *supra* note 105, at 74 (noting that prior to the 1940s, the recording industry categorized certain forms of African American music as “race music,” “plantation music” or “coon songs.”).

¹¹⁶ Perry A. Hall, *African-American Music: Dynamics of Appropriation and Innovation*, in BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 31, 38 (Bruce Ziff & Pratima V. Rao eds., 1997) (“Under the precepts of the recording industry’s segmented marketing systems, however, recordings of their [i.e., cornetist Louis Armstrong and pianist Ferdinand “Jelly Roll” Morton] music were distributed on ‘race record’ labels geared specifically to Blacks and remained invisible to most whites. By that time music recorded by white dance bands, led by Paul Whiteman’s, was being introduced to mainstream as ‘jazz’ through record labels and performance venues specifically marketed to them.” (footnote omitted)).

musicians in all sorts of important ways.”¹¹⁷

The term race music came to be used by the recording industry to describe music performed by African American musicians and marketed to an African American audience.¹¹⁸ The U.S. recording industry began targeting this market in the 1920s.¹¹⁹ This market was targeted at least in part as a result of the emergence of innovation in the recording industry, particularly with the emergence of new, smaller independent companies.¹²⁰

The commercial success of initial “race” records led to the release of numerous other “race” recordings by both smaller and large recording companies.¹²¹ The selection of material to be recorded and the marketing of such recordings had in many cases a discernible impact on the

¹¹⁷ WALD, *supra* note 2, at 52.

¹¹⁸ RAMSEY, *supra* note 20, at 113 (noting that a recording by blues singer Mamie Smith in 1920 helped to establish the race records institution); David Brackett, *What a Difference a Name Makes: Two Instances of African-American Popular Music*, in THE CULTURAL STUDY OF MUSIC: A CRITICAL INTRODUCTION 238, 241 (Martin Clayton, Trevor Herbert & Richard Middleton eds., 2003) (noting that in the 1920s the recording industry organized the popular music fields around the divisions of “popular,” “race,” and “hillbilly”); Stephen Calt, *The Anatomy of a “Race” Music Label: Mayo Williams and Paramount Records*, in RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC 86, 87 (Norman Kelley ed., 2002) (explaining that race music “became a fixture” of the 1920s “because recording policies . . . were increasingly dictated by a new breed of salesmen who were willing to set aside their own musical tastes in the interests of commerce that ‘race’ music became a fixture of the decade”); OLIVER, *supra* note 22, at 1-17 (noting that Race records were marketed primarily for a black audience).

¹¹⁹ Timothy J. Dowd, *Production Perspectives in the Sociology of Music*, 32 POETICS 235, 242-43 (2004) (discussing the ways in which legal struggles in the recording performance rights and radio industries contributed to marketing of “race” music by the recording industry).

¹²⁰ Peter J. Alexander, *New Technology and Market Structure: Evidence from the Music Recording Industry*, 18 J. CULTURAL ECON. 113, 118 (1994) (noting that Swan Records, a small, independent company, signed the first popular black female singer to be recorded in 1920); RICK KENNEDY & RANDY MCNUTT, LITTLE LABELS—BIG SOUND: SMALL RECORD COMPANIES AND THE RISE OF AMERICAN MUSIC xiv (1999) (noting that in the early 1920s, increased competition made possible by the expiration of key recording technology patents permitted smaller to pursue rural and black urban audiences that were neglected by major record companies); David Davis & Ivo De Loo, *Black Swan Records – 1921-1924: From Swanky Swan to a Dead Duck*, 8 ACCOUNTING HIST. 35, 37 (2003) (discussing the rise and fall of Black Swan Records, a small independent record label that was at one time the most successful African American owned business of the 1920s).

¹²¹ Alexander, *supra* note 120, at 118.

popularization of recorded music.¹²² In 1949, the “race music” category was changed by the recording industry to R&B or rhythm and blues.¹²³ The term rhythm & blues then became a marketing term that was applied to a broad range of music whose most significant commonality was the race of its performers and targeted market.¹²⁴ Rhythm & blues thus encompassed blues shouting, jump blues, blues ballads, country blues, vocal groups and gospel music.¹²⁵ The context of “race” record and recording industry marketing and business practices are important background factors in considering copyright treatment of the blues.

III. COPYRIGHT AND BLUES

A. *Borrowing, Creativity, and Creation in Blues*

Blues music traditionally has reflected an aesthetic based on borrowing, which has contributed to the dynamism and widespread reach of blues as a musical form.¹²⁶ The importance of borrowing is by no means unique to blues as a musical form.¹²⁷ However, blues compositional practice, particularly in the days of early recorded blues, also reflected significant nonvisual elements in that composition and performance were not in many instances rooted in a visual sheet music tradition. This compositional practice was also closely related to a living performance tradition in which hearing music was likely far more important than seeing it, and musical transmission between artists involved significant use of shared musical phrases and lyrics.

¹²² Tim Brooks, “*Might Take One Disk of this Trash as a Novelty*”: *Early Recordings by the Fisk Jubilee Singers and the Popularization of “Negro Folk Music,”* 18 AM. MUSIC 278 (2000) (discussing the impact of recordings of the Fisk Jubilee singers on the popularization of “Negro Folk Music”).

¹²³ Brackett, *supra* note 118, at 242; RIPANI, *supra* note 12, at 5 (noting that the term “rhythm & blues” was first used by *Billboard* magazine in its June 25, 1949 issue when the company switched its terms of reference from “best Selling Race Records” to “Best Selling Retail Rhythm & Blues Records”).

¹²⁴ RIPANI, *supra* note 12, at 5-6 (noting that rhythm and blues “is a conglomerate of many different musical styles”).

¹²⁵ Thomas, *supra* note 105, at 74; RIPANI, *supra* note 12, at 6 (noting that acceptance of the characterization of rhythm & blues as a trade category makes explanation of the songs included within the category easier).

¹²⁶ Bruno Nettl, *World Music in the Twentieth Century: A Survey of Research on Western Influence*, 58 ACTA MUSICOLOGICA 360, 361 (1986) (noting that cultural mixture is a major prevailing force in musical innovation).

¹²⁷ Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation and Context* 41 U.C. DAVIS L. REV. 477, ___ (2007).

Compositional practice and borrowing in the blues tradition is evident in many ways, including through use of common lyrics, music and musical forms. Borrowing is thus an inherent aspect of the creation and performance of blues music.¹²⁸ Early pre-war blues performers frequently swapped tunes and lyrics: Willie Dixon's "Hoochie Coochie Man" has the same melody as John Brim's "Tough Times;" Chuck Berry took the talking verse of Bo Diddley's "I'm a Man" for his own piece "No Money Down."¹²⁹ The two Robert Johnson recording sessions, which have been discussed and analyzed in detail,¹³⁰ reflect borrowing from a number of sources, including Leroy Carr,¹³¹ Kokomo Arnold,¹³² Skip James¹³³ and Son House.¹³⁴ When folklorist Alan Lomax first recorded Muddy Waters, Muddy Waters sang his version of a song that was well known in the Mississippi Delta.¹³⁵ Muddy Waters called his version "Country Blues."¹³⁶ This same song had been recorded by Son House as "My Black Mama" and Robert Johnson as "Walkin' Blues,"¹³⁷ which reflects a creative tradition in blues composition of rearranging existing music and adding new verses.¹³⁸

Rock and roll artists in the post-war era also borrowed significantly from the blues tradition. Chuck Berry had deep roots in the blues: "Berry introduced a level of lyrical and analysis to rock'n'roll that was firmly

¹²⁸ J. Peter Burkholder, *Borrowing*, in 4 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 1, ___ (Stanley Sadie ed., 2001), available at <http://www.grovemusic.com> (noting that blues and jazz involved improvisation and composition based on existing harmonies, melodies and bass patterns, and similar practices continued into popular music derived from black American traditions, including rhythm and blues and rock and roll).

¹²⁹ Paul H. Fryer, "Brown-Eyed Handsome Man": *Chuck Berry and the Blues Tradition*, 42 *PHYLON* 60, 63 (1981).

¹³⁰ See, e.g., WALD, *supra* note 2, at 126-189; CHARTERS, *supra* note 66, at 25-87.

¹³¹ WALD, *supra* note 2, at 131.

¹³² *Id.* at 133.

¹³³ *Id.* at 142.

¹³⁴ *Id.* at 150.

¹³⁵ PALMER, *supra* note 23, at 4 (discussing the first recordings of Muddy Waters).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ WALD, *supra* note 2, at xx (noting that introducing songs as one's own composition meant that a performer had rearranged the compositions and added some new verses); John Cowley, *Really the 'Walking Blues': Son House, Muddy Waters, Robert Johnson and the Development of a Traditional Blues*, 1 *POPULAR MUSIC* 57, 58 (1981) (discussing the questions Alan Lomax asked Muddy Waters in August 1941 during interviews in which Muddy Waters noted that his song "Country Blues" used the same tune as Robert Johnson's "Walkin' Blues").

rooted in the blues tradition.”¹³⁹ As was the case with Chuck Berry, British rock and roll artists, including the Beatles, Rolling Stones, Led Zeppelin, Cream, Eric Clapton, Fleetwood Mac and others, borrowed extensively from the blues tradition.¹⁴⁰ Given the sociocultural context within which blues arose in the U.S. and the role of racial categories in the recording industry, not surprisingly, borrowings from blues music from musicians outside of the communities in which blues music was originally created and performed were so dominated by British musicians. British musicians were likely more removed from American racial hierarchies and likely more open to overt use of a musical form that ranked at the bottom of American cultural and racial hierarchies.¹⁴¹

How later artists borrowed from existing blues works reflects important issues connected to copyright and borrowing. In the blues, as is the case with other musical forms based on certain African American aesthetic practices, repetition, revision and synthesis of varied musical influences is a core aspect of creation and innovation.¹⁴² The varied ways in which new works may be created is often in significant tension with copyright assumptions about the mechanisms and means of transmission used to create new works. Varied aesthetics of creation evident in music and other fields demonstrate that musical innovation and creativity may occur

¹³⁹ Fryer, *supra* note 129, at 62, 71.

¹⁴⁰ Peter Wicke, *Rock Music: A Musical-Aesthetic Study*, 2 POPULAR MUSIC 219, 222 (1982) (noting that rhythm and blues playing styles were based in part on rhythm and blues playing styles); Bruce Tucker, “Tell Tchaikovsky the News”: *Postmodernism, Popular Culture, and the Emergence of Rock ‘N’ Roll*, 9 BLACK MUSIC RES. J. 271, 282 (1989); Charles Gower Price, *Sources of American Styles in the Music of the Beatles*, 15 AM. MUSIC 208, 210 (1997); PALMER, *supra* note 135, at 235–36.

¹⁴¹ BAKER, *supra* note 19, at 11 (noting that “Afro-Americans [are] at the bottom even of the vernacular ladder in America”); SMALL, *supra* note 102, at 350 (discussing the attitude of classical musicians towards the Afro-American tradition as ranging from at best incomprehension and condescension to at worst violent antagonism).

¹⁴² David Evans, *Musical Innovation in the Blues of Blind Lemon Jefferson*, 20 BLACK MUSIC RES. J. 83, 98 (2000) (noting that Blind Lemon Jefferson’s musical innovation was based on synthesis of existing works and styles); BAKER, *supra* note 19, at 172 (describing blues as involving “performers [who] offer interpretations of the experience of experience”); HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM* xxiv (1988) (“Repetition and revision are fundamental to black artistic forms, from painting and sculpture to music and language use.”); James A. Snead, *On Repetition in Black Culture*, 15 BLACK AM. LIT. F. 146, 149–50 (1981) (noting that “[b]lack culture highlights the observance of ... repetition” and “[r]epetition in black culture finds its most characteristic shape in performance: rhythm in music and dance and language”).

in a broad range of ways.¹⁴³

Prevailing views of borrowing in copyright discourse are closely connected to at times vague and mystical representations of creativity that assume that copying of existing texts reflects a lack of creativity or originality.¹⁴⁴ The structure of copyright as a property rule and notions of derivative works are closely tied to such assumptions about the ways in which new works should be created.¹⁴⁵ These assumptions about creation are often quite contrary to how creation actually occurs, which presents tremendous problems for a broad range of cultural texts, including those that reflect an African American aesthetic of repetition and revision.¹⁴⁶ Treatment of blues music and blues musicians within copyright frameworks may also illustrate some ways in which copyright may actually operate in specific contexts that may reflect existing inequalities and the influence of factors such as race and fame. Such factors continue to shape copyright in practice in ways that are not always sufficiently analyzed in copyright discourse.

B. *Copyright, Blues and Hierarchies*

In addition to assumptions about the nature of creation and the use of existing works in new creation and compositional practices, hierarchies of culture and power have played an important role in shaping both copyright and musical industry structures through which copyright is often applied. In the blues context, hierarchies relating to race were inextricably intertwined with copyright treatment of blues artists. Such hierarchies were by no means limited to race; hierarchies relating to gender were evident, for example, in treatment of blues queens, whose role in the early commercial successes of blues was diminished as a consequence of their gender.¹⁴⁷ Similarly, status hierarchies contributed to the treatment of

¹⁴³ See Arewa, *supra* note 1, at ___ (discussing the existence of varied aesthetics of creation in the musical arena).

¹⁴⁴ Arewa, *supra* note 1, at ___ (discussing the problematic application of generally accepted conceptions about creativity in copyright to hip hop music); Negus, *supra* note 102, at 362 (discussing writings about creativity and noting that “creativity is often treated in a vague and mystical manner, with many writers assuming that we all know and recognize ‘creativity’ when we meet it.”).

¹⁴⁵ Arewa, *supra* note 1, at ___.

¹⁴⁶ *Id.* at ___.

¹⁴⁷ WALD, *supra* note 2, at 26 (“Relatively few CDs attest to the dominance of the blues queens, while there are hundreds of overlapping reissues of their male contemporaries.”); K.J. Greene, *Blues Women of the 1920s* (2008) (manuscript on file with author); Danaher, *supra* note 23.

musicians categorized within the “hillbilly” music genre, which was a corresponding category to “race” records for rural white performers.¹⁴⁸ Treatment of performers by the music industry varied to some extent based on performers’ assigned trade categories.

Music publishers allied with the radio and film business were the dominant power in the music industry prior to the rock and roll era.¹⁴⁹ Prior to the Second World War, songs were a primary source of revenues in a market dominative by writers and publishers who exercised collective power through collective rights organizations such as the American Society of Authors, Composers and Publishers (ASCAP).¹⁵⁰ ASCAP, however, reflected societal hierarchies in excluding black and country western writers.¹⁵¹ Broadcast Music Incorporated (BMI) was formed in 1939 in part as a result of problems with ASCAP.¹⁵² BMI resulted in extension of the “protection of copyright to ‘bluesmen’ and ‘hillbillies’.”¹⁵³

The power of music publishers declined as the recording industry became more powerful.¹⁵⁴ By the early 1950s, records had replaced sheet music as the primary source of music industry revenue.¹⁵⁵ The shift to recordings as a dominant source of revenue reinforced existing hierarchies, particularly as they relate to race. Under the recording industry’s race-based genre categorization system, although the names of the categories have shifted over time from “race” to “rhythm and blues” to “soul” and later “black” music, a performer whose music is classified as “black” must first be successful on the “black” market before being able to crossover to

¹⁴⁸ Roy, *supra* note 100, at 266 (noting use of the terms “hillbilly” or “old time” music to describe the music of rural whites).

¹⁴⁹ Garofalo, *supra* note 98, at 77; Frank Geels, *Reconfiguring the American Music Industry and the Breakthrough of Rock ‘n’ Roll (1930-1970): A Multi-Level Analysis of the Production, Distribution and Consumption of Music* 6, Paper for the Fourth European Meeting on Applied Evolutionary Economics, May 21, 2005 (connecting the power of music publishers to the Copyright Act of 1909).

¹⁵⁰ Garofalo, *supra* note 149, at 77.

¹⁵¹ *Id.*

¹⁵² Lucia S. Schultz, *Performing-Rights Societies in the United States*, 35 NOTES 511, 516–22 (1979) (noting that radio broadcasters formed BMI in response to alleged excessive pricing, price-fixing and other practices by ASCAP).

¹⁵³ Garofalo, *supra* note 149, at 77.

¹⁵⁴ Reebee Garofalo, *From Music Publishing to MP3: Music and Industry in the Twentieth Century*, 17 AM. MUSIC 318, 336 (1999) (noting that publishing houses became displaced as records became a staple of radio programming instead of performances by live performers).

¹⁵⁵ Garofalo, *supra* note 149, at 77.

the pop charts.¹⁵⁶ Even today, performers whose music is not classified as “black” music, such as Bruce Springsteen, either has a successful pop hit or not.¹⁵⁷ These types of race-based genre distinctions continue to pervade the music industry and influence choices about marketing, booking and other aspects of the music industry.¹⁵⁸

These types of categorizations have influenced the ways in which blues music was borrowed, in large part because the original performers of blues and other music categorized as “black” were often not permitted to record music they may have recorded as “race” music for “pop” and other market segments that were categorized as “white.”¹⁵⁹ In addition, normative conventions existed that resulted in African American artists being excluded from various arenas at different points in time, including live radio: “In the music system, there was a normative convention, shared by radio stations, not to broadcast black performers.”¹⁶⁰

Similarly, copyright law provisions that permit cover recordings have, particularly in the past, been used in a way that reinforces existing racial hierarchies: songs recording by African American rhythm and blues artists were typically rerecorded in “cover versions” “by another artist in a style thought to be more appropriate for the mainstream market . . . Most of the performers whose songs were covered were black.”¹⁶¹

Consequently, the sources of such material were often seen as readily appropriable for uses in “white” markets.¹⁶² The industry structures within which blues was created and marketed were shaped by existing

¹⁵⁶ Garofalo, *supra* note 149, at 81.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Geels, *supra* note 149, at 9; William Barlow, *Black Music on Radio During the Jazz Age*, 29 AFRICAN AM. REV. 325, 326 (1995) (noting that African American dance bands were seldom heard on radio in the 1920s; instead, “it was the commercial successful white dance bands of the era . . . that were regularly featured on the airways, giving their popularity an added boost.”); Derek W. Vaillant, *Sounds of Whiteness: Local Radio, Racial Formation, and Public Culture in Chicago, 1921-1935*, 54 AM. Q. 25, 29 (2002) (noting total exclusion of African Americans from Chicago radio airwaves in the 1920s and early 1930s with the exception of one radio program).

¹⁶¹ Reebee Garofalo, *Crossing Over: From Rhythm & Blues to Rock ‘n’ Roll*, in RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC 116, 128-29 (Norman Kelley ed., 2005); *see also* Hall, *supra* note 116, at 44 (noting Little Richard’s recounting in a Home Box Office television special that a version of his rock anthem *Tutti Frutti* that reached number one on the pop charts in a version recorded by Pat Boone).

¹⁶² Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 Rutgers L.J. 277 (2006).

sociocultural hierarchies that in turn influenced the application of copyright to the blues and other musical traditions that involved significant numbers of African American performers.

C. *Copyright, Nonvisual Reproduction and Blues*

1. Copyright and Music Industry Structure

As a result of this musical industry structure, the application of copyright to music categorized as “black,” which includes but is by no means limited to the blues, has been historically problematic, contested and criticized as exploitative.¹⁶³ Consideration of the treatment of blues under copyright frameworks also raises significant questions related to context. The experience of many blues musicians also highlights fundamental tensions in the application of copyright in varied contexts.

2. Seeing But Not Hearing: Visual Perceptions of Music in a World of Nonvisual Musical Reproduction

How blues musical production and creativity are conceptualized has significant copyright implications, particularly given the emphasis on independent creation by those deemed authors that copyright discourse about creation often emphasizes.¹⁶⁴ The depictions of Robert Johnson’s contributions to blues music by later musicians and musical commentators highlight the curious ways in which blues creativity may be conceptualized. The elevation of Robert Johnson as blues exemplar has involved significant diminution of the role of shared and collaborative aspects of blues creation and performance in Johnson’s works.¹⁶⁵ Robert Johnson’s status has in turn been accompanied by more favorable outcomes for his estate from a copyright perspective. For this reason, copyright treatment of Robert Johnson and other blues musicians over time reveals something of copyright’s underlying assumptions about creation as well as the ways in which creators in living musical traditions

¹⁶³ SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 117-48 (2001) (discussing copyright and African-American music); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 361-83 (1999) (commenting on the use of copyright to appropriate African-American music); Hall, *supra* note 116, at 37-58.

¹⁶⁴ Arewa, *supra* note 127, at ____.

¹⁶⁵ See *supra* notes ____ to ____ and accompanying text.

may not be well served by such assumptions.

Copyright has in many respects provided an inexact fit for musical creations, particularly musical forms based on nonvisual technologies of musical reproduction.¹⁶⁶ This reflects in part the formation of copyright originally in relation to literary works.¹⁶⁷ As copyright came to be applied to other types of cultural production such as music,¹⁶⁸ the application of existing copyright doctrine to music has not surprisingly at times been easier in questions relating to musical texts or lyrics,¹⁶⁹ which are highly visual in nature.

Copyright treatment of new technologies has been significantly influenced by the 1908 case *White-Smith Music v. Apollo*, where the Supreme Court found that player piano perforated rolls were not copies within the meaning of the copyright act.¹⁷⁰ The *White-Smith* case illustrates some of the problems that courts have faced in trying to apply copyright frameworks to new nonvisual technologies of musical creation and dissemination.¹⁷¹ The *White-Smith* case played a significant role in shaping legal responses to dissemination of later technologies nonvisual technologies of musical reproduction such as sound recordings. The legal analysis in *White-Smith* is relentlessly visual in its discussion of the nature of music and what it means for something to be a copy:

When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. ***These musical tones are not a copy which appeals to the eye.*** In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the

¹⁶⁶ Arewa, *supra* note 1, at ___ (discussing the inexact fit of copyright for music).

¹⁶⁷ *Id.* at ___.

¹⁶⁸ *Id.* at ___ (noting that *Bach v. Longman* (1777) clearly established that the Statute of Anne applied to music and that U.S. copyright law was applied to music with the 1831 Copyright Act).

¹⁶⁹ *Id.* at ___ (discussing the use of fair use doctrine as applied to musical text as compared with the difficulty of applying fair use doctrine to musical notes, which are nonrepresentational).

¹⁷⁰ *White-Smith Music v. Apollo*, 209 U.S. 1, 17–18 (1908) (holding that perforated player piano music rolls were not copies within the meaning of the applicable copyright statute).

¹⁷¹ Lisa Gitelman, *Reading Music, Reading Records, Reading Race: Music copyright and the U.S. Copyright Act of 1909*, 81 *MUSICAL Q.* 265, 274–75 (discussing issues that arose as copyright confronted new technologies of musical creation and dissemination).

mind of the composer; he may play it for the first time upon an instrument. *It is not susceptible of being copied until it has been put in a form which other can see and read.* The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.¹⁷²

Some six decades after *White-Smith*, Congress added limited copyright protection for sound recordings.¹⁷³ The sound recording copyright protected against dubbing but not against imitation.¹⁷⁴ Following adoption of copyright protection for sound recordings, a copyright may exist for the musical composition, including lyrics and musical notes, and any sound recordings,¹⁷⁵ which are implicitly assumed to derive from some underlying musical composition. The sound recording copyright adds a layer of complexity to copyright determinations in the music context.

Copyright treatment of sound recordings reflects the limitations of perceptions of music that see but fail to truly hear and incorporate the implications of nonvisual forms of musical reproduction. A series of copyright cases have applied copyright to instances of borrowings involving or relating to sound recordings in a potentially problematic way for those who create music that may bear similarities to or use existing sound recordings. These cases also highlight the continuing difficulty courts experience in attempting to grapple with nonvisual forms of musical reproduction. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*¹⁷⁶ found that the George Harrison song “My Sweet Lord” infringed the Chiffon’s song “He’s So Fine” based on theories of subconscious copyright infringement.¹⁷⁷ In its discussion of Harrison’s infringement,

¹⁷² *White-Smith*, 209 U.S. at 29-30 (emphasis added).

¹⁷³ See *infra* notes ___ to ___ and accompanying text.

¹⁷⁴ 1-4 NIMMER ON COPYRIGHT (2008), at §4.05[B][5] (“Under the 1909 Act, as expanded by the Sound Recording Amendment, however, if a phonorecording were published bearing the prescribed notice, the sound recording contained therein thereby acquired a statutory copyright . . . It is arguable that the underlying material recorded therein also acquired a statutory copyright, subject only to a limitation of remedies. That is, the sound recording copyright per se only protected against dubbing (or “recapture”) of the original sounds contained on the recording, not against imitation.”) (citations omitted)

¹⁷⁵ Arewa, *supra* note 1, at ___ (discussing the application of copyright to music).

¹⁷⁶ 420 F. Supp. 177, 178 (S.D.N.Y. 1976).

¹⁷⁷ *Bright Tunes*, 420 F. Supp. at 181 (holding that Harrison committed subconscious infringement in copying He’s So Fine)

the court focused exclusively on the visual representation of individual musical notes, with little or no reference to any nonvisual elements. For example, the court describes the two songs at issue as follows:

He's So Fine, recorded in 1962, is a catchy tune consisting essentially of four repetitions of a very short basic musical phrase, "sol-mi-re," (hereinafter motif A), altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, "sol-la-do-la-do," (hereinafter motif B). While neither motif is novel, the four repetitions of A, followed by four repetitions of B, is a highly unique pattern. In addition, in the second use of the motif B series, there is a grace note inserted making the phrase go "sol-la-do-la-re-do." My Sweet Lord, recorded first in 1970, also uses the same motif A (modified to suit the words) four times, followed by motif B, repeated three times, not four. In place of He's So Fine's fourth repetition of motif B, My Sweet Lord has a transitional passage of musical attractiveness of the same approximate length, with the identical grace note in the identical second repetition. The harmonies of both songs are identical.¹⁷⁸

The court's discussion of these two songs is highly visual and does not discuss other musical features of the two works, particularly nonvisual features that are less visual or amenable to notation such as rhythm and timbre.¹⁷⁹ A similar theory of infringement was used to find Michael Bolton liable for infringement of a song originally released by the Isley Brothers.¹⁸⁰ The Ninth Circuit's discussion of the jury verdict in the *Three Boys* case is instructive. In discussing the evidence of substantial similarity at trial, which included testimony from the appellant Bolton's expert witness regarding the combination of unprotectible elements in the Bolton work, the court notes: "On the contrary, Eskelin [Bolton expert] testified that the two songs shared a combination of five unprotectible elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending."¹⁸¹ The outcome in the *Three Boys* case reflects some failings of current legal approaches to similarity in cases involving musical works.¹⁸² Further, the *Three Boys* outcome underscores the confusion of current legal approaches in parsing out and

¹⁷⁸ *Bright Tunes*, 420 F. Supp. at 178.

¹⁷⁹ *Arewa*, *supra* note 127, at 536-37.

¹⁸⁰ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 480 (9th Cir. 2000).

¹⁸¹ *Three Boys*, 212 F.3d at ____.

¹⁸² *Arewa*, *supra* note 127, at ____.

interpreting the significance of nonvisual aspects of musical works,¹⁸³ as is clearly reflected in the *Three Boys* court's analysis of the Bolton work tape, which demonstrates Bolton's compositional practice in creating his work.¹⁸⁴

The *Bright Tunes* and *Three Boys* cases, taken together, reflect assumptions about musical composition and practice in both blues and popular music that fail to take adequate account of the collaborative nature of composition in both musical areas,¹⁸⁵ as well as the significance of nonvisual musical features. Although distorted views of musical creation have long been a part of copyright considerations of music, changing musical practices with respect to uses of sound recordings, which are nonvisual and which today form an important aspect of musical creation, challenge copyright assumptions about contemporary musical creation. Music today is often created in the sound recording studio.¹⁸⁶ Further, the most visual aspect of a musical work, the musical composition, is often derived from the nonvisual medium of the sound recording. This means that the visual form of the music representation may be derived from a nonvisual sound recording of the relevant work. This movement from the nonvisual to the visual contrasts significantly with assumptions about the mechanics of musical creation evident in copyright discussions of music. Such discussions tend to remain focused on written compositions (i.e., music and lyrics), particularly with respect to their visual aspects, as reflective of musical composition and sound recordings as evidence of musical performance of an underlying written musical composition. This means that written music is often taken as a true indication of compositional practice, an assumption that may be not entirely reflective of actual musical creation today in some musical genres. The emphasis on written musical forms reflects the continuing emphasis on visual forms of musical reproduction as authoritative representations of musical composition and intent. This visual/nonvisual distinction parallels the distinction frequently made between composition and performance.¹⁸⁷

¹⁸³ *Id.* at ____.

¹⁸⁴ *Three Boys*, 212 F.3d at 485.

¹⁸⁵ Arewa, *supra* note 127, at ____.

¹⁸⁶ Paul Théberge, *Technology, Creative Practice and Copyright*, in MUSIC AND COPYRIGHT 139, 141 (Simon Frith & Lee Marshall eds., 2d ed. 2004) (“With the introduction in the 1960s of multitrack recording technology and the recording practices associated with it, popular musicians began to explore the possibilities offered by the recording medium, to regard sound recording not simply as a means of reproducing music but as an integral part of musical creation.”).

¹⁸⁷ See *infra* notes ____ to ____ and accompanying text.

The distinctions courts make between visual forms of musical reproduction and nonvisual forms of reproduction in sound recordings and publication and performance is evident in the case *Newton v. Diamond*.¹⁸⁸ The *Newton* case involved a suit by jazz flutist James Newton against the Beastie Brothers, who had sampled a sound recording of Newton's composition, "Choir."¹⁸⁹ Although the Beastie Boys had obtained a license for use of the sound recording, they did not obtain a license from Newton for the underlying musical composition. The court affirmed the lower court holding of de minimis use.¹⁹⁰ In its discussion of the musical composition and sound recording, the *Newton* court notes:

His (Newton's) experts reveal the extent to which the sound recording of "Choir" is the product of Newton's highly developed performance techniques, rather than the result of a generic rendition of the composition. As a general matter, according to Newton's expert Dr. Christopher Dobrian, "the contribution of the performer is often so great that s/he in fact provides as much musical content as the composer." This is particularly true with works like "Choir," given the nature of jazz performance and the minimal scoring of the composition . . . And it is clear that Newton goes beyond the score in his performance. For example, Dr. Dobrian declared that "Mr. Newton blows and sings in such a way as to emphasize the upper partials of the flute's complex harmonic tone, [although] such a modification of tone color is not explicitly requested in the score" . . . Once we have isolated the basis of Newton's infringement action -- the "Choir" composition, devoid of the unique performance elements found only in the sound recording -- we turn to the nub of our inquiry: whether Beastie Boys' unauthorized use of the composition, as opposed to their authorized use of the sound recording, was substantial enough to sustain an infringement action.¹⁹¹

The *Newton* case reflects the ways in which courts perceive the visual and nonvisual and publication and performance distinctions.

Another line of cases involving hip hop music add complexity to copyright considerations of uses of sound recordings themselves as parts of new creations. In *Grand Upright v. Warner Bros. Records* hip hop

¹⁸⁸ 349 F.3d 591 (9th Cir. 2003).

¹⁸⁹ *Newton*, 349 F.3d at 593-94.

¹⁹⁰ *Newton*, 349 F.3d at 598.

¹⁹¹ *Newton*, 349 F.3d at 595-96.

artist Biz Markie was found liable for infringement of the Gilbert O'Sullivan song "Alone Again Naturally," without any analysis concerning the nature or basis of infringement and use of the Seventh Commandment of the Bible ("Thou Shalt Not Steal") as the primary source of legal authority for the decision.¹⁹² The type of reuse in the Biz Markie song and other hip hop recordings is highly nonvisual in nature. The nonvisual aspects of hip hop creation and performance, which is based on reuse of sound recordings, challenges copyright both by virtue of its extensive borrowing and use of nonvisual and nonrepresentational aspects of music.

In the more recent ruling in *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit held that sound recordings may not be used without authorization of the copyright owner.¹⁹³ The *Bridgeport* case involved a two-second sample of an arpeggiated guitar chord from a song by George Clinton and the Funkadelics. The much criticized *Bridgeport* holding is based on outdated assumptions about the nature of musical composition that does not take sufficient account of the ways in which sound recordings have become reflective of composition practice and tools used to enable composition itself.¹⁹⁴

The assumptions about composition and performance evident in such cases involving sound recordings highlight the inability of current dominant perceptions of music widely held in copyright to encompass musical practice in living musical traditions such as the blues that are rife with borrowing and improvisatory practices. The application of copyright to blues music is thus complicated both by questions in relation to the nature of blues composition as well as copyright treatment of recordings and nonvisual aspects of musical creation and reproduction more generally. This issue is particularly highlighted in the case of blues because blues as a genre came to commercial prominence with the advent of the recording industry. Blues and other forms of cultural production thus provide an uneasy fit for copyright. This broader context of blues, nonvisual reproduction and copyright serves as an important backdrop in considering Robert Johnson and his copyright rewards.

¹⁹² 780 F. Supp. 182 (S.D.N.Y. 1991).

¹⁹³ *Bridgeport Music, Inc. v. Dimension Films*, 2004 FED App. 0297P, 9, 401 F.3d 647, 655 (6th Cir.) (noting that the analysis for determining infringement of a musical composition is not the same as the analysis applied to determine infringement of a sound recording).

¹⁹⁴ Arewa, *supra* note 127, at ____.

IV. CONTEXTS OF THE BLUES: CREATION AND REWARD

A. *Robert Johnson and Copyright*

1. Copyright and the Business of Blues

Robert Johnson is a seminal figure among pre-war blues musicians, both by virtue of his transcendent popularity as well the ways his estate has exploited copyrights in his work. Additionally, by distinguishing Johnson's musical practice in many respects from those of his temporal peers, commentators about Johnson have laid the groundwork for exceptionalism in the application of copyright to Johnson's works. The world in which Robert Johnson came of age was one in which his identity as an African American had significant implications for his likely ability to have and exploit copyrights. As was the case with most country blues players who cut records in the pre-war era, Robert Johnson did not hold copyrights in his compositions; rather blues musicians were typically bound by "race" recording contracts that were in many instances exploitative: "Most artists were paid according to the custom of the day, receiving a flat recording fee and waiving the rights to their compositions . . . The chief means by which dishonest recording officials of the era cheated artists was by filching composer credits for their songs in order to draw a publishing royalty."¹⁹⁵ Very few blues singers received much compensation for their work.¹⁹⁶ In the 1920s and 1930s, many African American musicians assigned their copyrights to recording companies.¹⁹⁷ In exchange for such assignments, black artists were generally paid less money than white musicians.¹⁹⁸

Unlike many blues musicians, however, Robert Johnson's estate has taken advantage of and profited from Johnson's continuing popularity. Johnson's continuing popularity and exalted artistic reputation are in turn closely related to his status as a cultural icon among early blues performers:

¹⁹⁵ Calt, *supra* note 118, at 103.

¹⁹⁶ Greene, *supra* note 269 (discussing the generally inequitable contractual terms and lack of compensation of African American blues artists).

¹⁹⁷ Candace Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 480 (2005).

¹⁹⁸ *Id.*; Greene, *supra* note 269, at 1204-07 (discussing the fact that Bessie Smith received little compensation during her life and the failure of a court case seeking remedies for this lack of compensation).

An arresting voice, virtuoso guitar playing, indecipherable words, suggestions of psychic anguish, death at an early age, the touching anecdotes promulgated as part of the initial liner-note mythology—it all seemed to support the Faustian tragedy that was eventually constructed to explain Johnson’s art.¹⁹⁹

Johnson’s continuing popularity has also meant that he is one of the few pre-war blues musicians to have earned significant royalties from his work. The royalties earned by the Johnson estate from Johnson’s recordings also reflect the ways in which blues music may interact with copyright frameworks. A number of commentators highlight borrowings from blues music by later artists and point out that the broader context of such uses reflected societal conditions in which African Americans were exploited in artistic production and other circumstances.²⁰⁰ The exploitation of African American artists, which is fairly well documented, occurred in a complex environment in which African American businesses also developed and African American businessmen prospered based on uses of African American cultural production.²⁰¹ Further, in some instances, certain “renowned” blues artists or their representatives, including the Robert Johnson estate and bluesman Willie Dixon, have been able to sue and receive compensation for uses of their works.²⁰² The Willie Dixon case, which involved a suit by blues great Willie Dixon against Led Zeppelin, settled out of court, while the Robert Johnson case ended with a decision in favor of Johnson’s representatives.²⁰³

The Johnson and Dixon cases suggest that certain renowned blues artists can and did receive compensation for uses of their works. This success does not, however, substantially alter or improve circumstances that led to a general lack of compensation for blues artists more generally, both at the

¹⁹⁹ PEARSON & MCCULLOCH, *supra* note 75, at 109

²⁰⁰ Greene, *supra* note 269, at ___; VAIDHYANATHAN, *supra* note 163, at 117-48; Greene, *supra* note 163, at ___; Hall, *supra* note 116, at 37-58; Hines, *supra* note 197, at ___.

²⁰¹ Davis & Loo, *supra* note 120, at ___ (noting that Black Swan Records a small independent race record label that was at one time the most successful African American owned business of its time); Calt, *supra* note 118 (discussing the activities of Mayo Williams, an African American, who played an important role in the Paramount race record business).

²⁰² Willie Dixon v. Atlantic Recording Corporation, 1985 U.S. Dist LEXIS 15291 (S.D.N.Y. 1985) (denying the licensing agent’s motion for summary judgment in a suit by Willie Dixon, the renowned blues artists, against member of the legendary rock group Led Zeppelin alleging that the Led Zeppelin composition “Whole Lotta Love” infringed on Dixon’s composition “I Need Love.”).

²⁰³ VAIDHYANATHAN, *supra* note 163, at ___ (noting that the Dixon case ended in a settlement).

hands of “race” record companies as well as later users of blues material, including rock and roll musicians. The patterns of rewards in the case of the blues, however, suggest that copyright rewards can reflect factors, including elements more akin to investment in a lottery, that are not adequately considered in existing incentive models of copyright.²⁰⁴

The existence of cases in which blues artists received compensation should also not obscure the difficulties inherent in making copyright infringement claims in blues cases. Current copyright assumptions about creation make it difficult to allocate copyright ownership rights to musical compositions in forms such as the blues that are based in nonvisual forms of musical reproduction and that use extensive borrowing.²⁰⁵ However, few blues artists had and renewed copyrights for blues musical compositions.²⁰⁶ As a result, under the 1909 Copyright Act, which prior to adoption of the Copyright Act of 1976, provided for a term of 28 years, plus 28 more with renewal,²⁰⁷ blues standards that might have appeared in sheet music form would typically no longer protected today.²⁰⁸ However, since much blues music appeared primarily in sound recordings, the copyright status of sound recordings under the 1909 Act in many cases will depend upon whether the distribution of the sound recording is deemed a “publication” under the 1909 Act, which is not always an easy thing to determine. Under the 1909 Act, “an unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the

²⁰⁴ Frederic Scherer has made a similar point with respect to patent. See F.M. Scherer, *The Innovation Lottery*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 3, 14 (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First, eds. 2001); [see also Jonathan Barnett, Gilles Grolleau & Sana El Harbi, *The Fashion Lottery: Cooperative Innovation in Stochastic Markets*, Am. L. & Econ. Assoc. Annual Meetings (2008), <http://law.bepress.com/cgi/viewcontent.cgi?article=2486&context=alea> (discussing a risk based model of cooperative innovation).]

²⁰⁵ Jennifer L. Hall, *Blues and the Public Domain—No More Dues to Pay?*, 42 J. COPYRIGHT SOC’Y U.S.A. 215, 215 (1995) (quoting an archivist from the Smithsonian Institution as stating that “[f]olk and blues are really problematic because you have these verses and classical instrumental licks that float all over the place and appear again and again.”).

²⁰⁶ *Id.* at 224 (noting that early blues musicians such as Robert Johnson did not register for copyrights and were paid upfront, not in royalties); Hines, *supra* note 197, at 480-81.

²⁰⁷ See An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 24, 35 Stat. 1075, 1080-81 (1909), *superceded by* the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

²⁰⁸ Hall, *supra* note 205, at 216.

federal copyright scheme.”²⁰⁹

2. Copyright and Blues Recordings

Many blues works appeared only on phonorecords, which has potentially significant copyright implications. As has been the case with other technologies, the advent of sound recordings led to the (much later) adoption of copyright statutes intended to extend copyright protection to the sound recording medium.

The adoption of copyright protection for sound recordings led to a legal framework that added a level of complexity to existing copyright frameworks that initially covered only musical compositions, which became protected under the 1831 Copyright Act.²¹⁰ The addition of a sound recording copyright in the 1970s has also resulted in a potentially complex and at times ambiguous copyright status for pre-1978 sound recordings.

The 1971 Sound Recording Act, which was later superseded by the Copyright Act of 1976, established a separate copyright for sound recordings that exists in addition to any copyrights for any underlying musical compositions. Section 303 of the Copyright Act provides a statutory framework for pre-1978 phonorecordings.²¹¹ Under Section 303, copyrights in works created before 1978 but not theretofore in the public domain or copyrighted began on January 1, 1978 and had a duration for the term provided in Section 302 of the Copyright Act, provided that in no event can such term expire before December 31, 2001.²¹² Further, the term of works published on or before December 31, 2002 would expire at the earliest on December 31, 2047.²¹³ Under Section 303(b), which was

²⁰⁹ *Id.*

²¹⁰ See An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times therein Mentioned, ch. __, §§ ____, 1 Stat. 124 (1790) (covering books, maps and charts); An Act to Amend the Several Acts Respecting Copy Rights, ch. 16, §§ 1, 4 Stat. 436, 436-37 (1831) (adding musical compositions, prints, cuts and engravings to the list of copyright protected materials); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 201 (1968) (noting that musical compositions became protected under the 1831 Copyright Act).

²¹¹ 17 U.S.C. § 303 (2003).

²¹² 17 U.S.C. § 303(a) (2003).

²¹³ 17 U.S.C. § 303(a) (2003).

amended in 1997,²¹⁴ however, the distribution of phonorecords prior to January 1, 1978 does not constitute a publication of the musical work embodied in the phonorecord.²¹⁵ When a work was published, it lost state common law protection; if the owner did not wish for the work to enter the public domain, the owner could obtain federal protection by complying with the 1909 Act's requirements.²¹⁶ Recent court cases have interpreted the implications of Section 303(b) for blues recordings. These recent blues cases are instructive in outlining the business terms to which blues musicians have been subject and the ways in which courts have treated claims of copyright infringement in the blues context.

La Cienega v. ZZ Top involved a claim by blues legend John Lee Hooker and Bernard Besman, to whom Hooker's copyrights in his musical composition "Boogie Chillen" had been assigned.²¹⁷ Hooker and Besman alleged that the song "La Grange" by the Texas blue-rock band ZZ Top infringed their musical composition "Boogie Chillen."²¹⁸ Hooker and Besman became aware that the ZZ Top song "La Grange" was similar to the three versions of "Boogie Chillen" that had been written by Hooker and Besman in 1948, 1950 and 1970.²¹⁹ Besman had registered all versions of "Boogie Chillen" in the Copyright Office.²²⁰ After realizing the similarity, Hooker and Besman notified the publisher of "La Grange", alleging that the ZZ Top song "La Grange" was similar to "Boogie Chillen."²²¹ The publisher of "La Grange" filed a declaratory judgment action in Texas to resolve the dispute; Besman filed suit in the Central District of California on behalf of La Cienega, in which Besman was the sole proprietor.²²²

In the *La Cienega* decision, the Ninth Circuit assessed whether the sale of an unregistered recording constituted a "publication" for copyright purposes,²²³ finding that the sale of recordings constituted a "publication" under the Copyright Act of 1909 and that the Hooker/Besman publications

²¹⁴ Jonathan C. Stewart & Daniel E. Wanat, *Section 303 of the Copyright Act is Amended and a Pre-78 Phonorecord Distribution of a Musical Work is Not a Divestitive Publication*, 19 LOY. L.A. ENT. L.J. 23 (1998)

²¹⁵ 17 U.S.C. § 303(b) (2003).

²¹⁶ *La Cienega Music Co., v. ZZ Top*, 53 F.3d 950, 952-53 (9th Cir. 1995).

²¹⁷ *La Cienega*, 53 F.3d at 952-53.

²¹⁸ *La Cienega*, 53 F.3d at 952.

²¹⁹ *La Cienega*, 53 F.3d at 952.

²²⁰ *La Cienega*, 53 F.3d at 952.

²²¹ *La Cienega*, 53 F.3d at 952.

²²² *La Cienega*, 53 F.3d at 952.

²²³ *La Cienega*, 53 F.3d at 952.

were published in 1948, 1950 and 1970, respectively.²²⁴ Whether a distribution of a recording constitutes a “publication” is a significant question that can determine whether the copyright for a sound recording is still valid. In the “Boggie Chillen” case, the court finding that the sale of the recording constituted a “publication” led to the court remanding claims with respect to the 1970 “Boogie Chillen” version but finding that the earlier “Boogie Chillen” compositions entered the public domain in 1976 and 1978, when the statutory copyrights expired without renewal.²²⁵ In reaching its decision, the *La Cienega* court touches directly on the issue of what constitutes a “copy” of a musical composition that was at issue in the *White-Smith* case. The Supreme Court’s visual reading of musical reproduction in *White-Smith* led to a split between the circuits as to what constitutes a copy of a musical work. Some courts followed the minority rule established in *Rosette v. Rainbow Record Mfg. Co.*,²²⁶ which held that the sale of a phonograph record does not constitute a “publication” under the 1909 Act.²²⁷ The *Rosette* rule, which was noted in a dissenting opinion in *La Cienega*,²²⁸ reflects the conflict evident in *White-Smith* with respect to how to interpret nonvisual representations of music and the extent to which such nonvisual representations represent a copy of an underlying work or constitute a composition or musical performance. The *Rosette* court noted that “it is difficult to rationalize accepted principles of copyright law to make performance of a composition a publication of the composition itself.”²²⁹

The determination of whether a distribution of a phonorecord constitutes a “publication” has significant business implications. As recordings surpassed sheet music as the primary source of revenue for the music industry, record companies often no longer registered sheet music versions of records they released.²³⁰ As David Nimmer notes, industry practice was to not obtain statutory copyright of musical compositions prior to sale of

²²⁴ *La Cienega*, 53 F.3d at 953 (noting that the court is adopting the majority rule, which is contrary to the minority rule evident in the Second Circuit case *Rosette v. Rainbow Record Mfg. Corp.*).

²²⁵ *La Cienega*, 53 F.3d at 953.

²²⁶ *Rosette v. Rainbow Record Mfg. Corp.*, 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff’d per curiam*, 546 F.2d 461 (2d Cir. 1976) (adopting the rule that a sound recording does not constitute a “publication” of an underlying musical composition under the 1909 Act).

²²⁷ *Rosette*, 354 F. Supp. at 1191-92.

²²⁸ *La Cienega*, 53 F.3d at 354c.

²²⁹ *Rosette*, 354 F. Supp. at 1191.

²³⁰ NIMMER *supra* note 174, at § 4.05[B][4], at 23 (“it is a common practice to market records of a musical work without publishing the work in sheet music form”).

phonorecords of the compositions, an often “deliberate omission on advice of counsel, who concluded . . . that sale of a phonorecord would not constitute a surrender of common law rights in the recorded work.”²³¹ The failure to register copyrights for sound recordings also reflected an industry gaming strategy that sought to avoid compulsory license provisions of the Copyright Act.²³²

Reflecting continuing problematic assumptions about nonvisual manners of musical reproduction, even those who sought to register copyrights encountered problems with the Copyright Office because it:

consistently refused to *register copyright in a musical composition as a published work where the registration was sought based on a recording embodying the composition*. The Office, instead, would advise applicants that, to be registered as a published work, *visually perceptible copies of the work*--that is, sheet music copies--had to have been sold or offered to the public. Where only recordings had been sold, the Office would suggest registration of the musical composition as an unpublished work.²³³

In contrast to *Rosette*, the majority rule for courts applying the 1909 Act reflects a view that a “publication” did occur upon the sale of a phonorecord.²³⁴ As a result of *La Cienega*, songwriters lobbied Congress to change the Copyright Act.²³⁵ Congress responded by adopting Section 303(b), which provides that the distribution of a phonorecord before January 1, 1971 does not constitute a publication of the musical underlying musical work.²³⁶ Although this statutory provision now protects songwriters from inadvertent (or improvident) failure to include

²³¹ *Id.*

²³² *Id.* (“Second, as a strategic matters, musical proprietors were reluctant to secure statutory copyright in their musical compositions, even as a precautionary measure against the increasing number of decisions holding sale of phonorecords to be a publication. Underlying such an imprudent course of conduct was apparently the desire to avoid subjecting the recorded composition to the compulsory license provisions of Section 1(e) of the 1909 Act. In the last particular, the subject course of conduct amounted to an attempt to exploit a medium regulated by statute without submitting to that regulation.”).

²³³ Testimony of Edward P. Murphy, Subcommittee on Courts and Intellectual Property of the House Judiciary Committee, Hearings on Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses, Serial No. 39 at 19 (June 27, 1997) (emphasis added).

²³⁴ NIMMER, *supra* note 174, at [4-26] (citations omitted).

²³⁵ *Id.* at

²³⁶ 17 U.S.C. § 303(b) (____).

the copyright notice on a phonorecord,²³⁷ it does little to address the visual/nonvisual or composition/performance dichotomies that have long proved troublesome in the music copyright arena.

As a result of the post-*La Cienega* amendment to the Copyright Act, the case involving Robert Johnson's works followed the *Rosette* minority rule and thus reached a different outcome than *La Cienega*. Eleven of the songs recorded by Robert Johnson were released with a year of their being recorded.²³⁸ Twenty-two of the 29 songs recorded by Robert Johnson were rereleased well after his death.²³⁹ Columbia Records re-released Johnson's recordings in the early 1960s and released a two-CD boxed set of Johnson's recordings in 1990.²⁴⁰

Two songs recorded by Johnson, "Stop Breakin' Down" and "Love in Vain," were rerecorded by the Rolling Stones.²⁴¹ No copyrights were filed for either of these songs.²⁴² The Rolling Stone albums on which the Johnson songs were included have both been ranked by *Rolling Stone Magazine* as among the "greatest albums of all time."²⁴³ Copyright registrations for the Rolling Stone adaptations were filed in May 1970 for "Love in Vain" and 1972 for "Stop Breakin' Down."²⁴⁴ Unlike Columbia Records and others who adapted Johnson's work, however, ABKCO did not recognize Johnson's common law copyrights.²⁴⁵ Steve LaVere had reached an agreement in 1974 with Johnson's then sole surviving heir, Carrie Thompson, in which he received fifty percent of all royalties in exchange for her assignment to him of all of her copyright interests in Johnson's works.²⁴⁶ LaVere filed copyright registrations for the 1991 Columbia release and demanded that ABKCO cease and desist from

²³⁷ NIMMER, *supra* note 174, at 23.

²³⁸ ABKCO Music, Inc. v. LaVere, 217 F.3d 684, ___ (9th Cir. 2000)

²³⁹ See *Robert Johnson—Early Influence*, Rock and Roll Hall of Fame website, at <http://www.rockhall.com/hof/inductee.asp?id=134> (noting that 22 of Johnson's 29 recordings appeared on 78 rpm singles released on the Vocalion label).

²⁴⁰ ABKCO, 217 F.3d at 687.

²⁴¹ ABKCO, 217 F.3d at 6867 (noting that an adapted version of "Love in Vain" was included on the Rolling Stones album *Let It Bleed*, while "Stop Breaking Down" was included on the album *Exile on Main Street*).

²⁴² ABKCO Music, Inc. v. LaVere, 217 F.3d at 687.

²⁴³ W. Russell Taber, Note: *Copyright Déjà vu: A New Definition of "Publication" under the Copyright Act of 1909*, 58 VAND. L. REV. 857, 895 (2005).

²⁴⁴ ABKCO, 217 F.3d at 686.

²⁴⁵ ABKCO, 217 F.3d at 686.

²⁴⁶ ABKCO, 217 F.3d at 686.

unlicensed uses of the Johnson song.²⁴⁷ After unsuccessful negotiations, ABKCO filed an action for declaratory relief.²⁴⁸

In analyzing the application of Section 303(b) of the Copyright Act to *ABKCO*, the Ninth Circuit noted that under *White-Smith*, the piano rolls at issue constituted a performance rather than a publication of a musical composition,²⁴⁹ which reinforces the visual-nonvisual dichotomy evident in *White-Smith* and other music copyright cases. The publication-performance distinction noted by the *ABKCO* court again highlights the difficulty many legal commentators have in grappling with a musical universe where nonvisual technologies such as sound recordings may have taken on attributes with respect to musical creation formerly ascribed to visual written musical compositions. This is particularly notable in certain musical genres, including the blues. At issue in *ABKCO* was the retroactive application of Section 303(b) of the Copyright Act.²⁵⁰ More specifically, the court considered whether the Johnson songs were published in 1938 and 1939 when they were released on phonorecord, as *La Cienega* would dictate. This would mean that the Johnson copyrights would have expired in 1967-68, 28 years after their initial publication (i.e., release of the phonorecord),²⁵¹ since the copyrights were not renewed prior to the expiration of the initial copyright term. In contrast, if Section 303(b), as amended in 1997 were to apply, the Johnson songs would not have been published until the 1990 Columbia release was copyrighted because under Section 303(b) distribution must occur before 1978 to not constitute a publication.²⁵²

In contrast to *La Cienega*, the *ABKCO* court held that Section 303(b) controlled and interpreted the 1997 amendment as simply clarifying the meaning of the 1909 Act, thus correcting the outcome in *La Cienega*.²⁵³ As a result of *ABKCO*, the Johnson songs recorded by the Rolling Stones “had not entered the public domain and were thus not freely available for use by the Rolling Stones in the late 1960s and early 1970s.”²⁵⁴ As a result of *ABKCO*, Johnson’s works will effectively receive more than 100

²⁴⁷ *ABKCO*, 217 F.3d at 686.

²⁴⁸ *ABKCO*, 217 F.3d at 686.

²⁴⁹ *ABKCO*, 217 F.3d at 688.

²⁵⁰ *ABKCO*, 217 F.3d at 689.

²⁵¹ *ABKCO*, 217 F.3d at 689.

²⁵² *ABKCO*, 217 F.3d at 690-92.

²⁵³ *ABKCO*, 217 F.3d at 686.

²⁵⁴ Benjamin Gemperle, *Note: Can’t Get No Satisfaction: How ABKCO v. LaVere Bowed to Pressure from the Music Industry*, 22 LOY. L.A. ENT. L. REV. 85, 97 (2001).

years of protection, since the copyrights will not expire until 2047 or later under the provisions of Section 303(b).²⁵⁵ Section 303(b) reflects an expansion in the rights of copyright owners that in this particular instance has benefited a class of potential owners who have typically not benefited from copyright frameworks. *ABKCO* does, however, reflect the continuing confusion connected to questions of what constitutes a “publication” of underlying works under the 1909 Act.²⁵⁶ The *ABKCO* decision also underscores the continuing power and confusion that emanate from the visual/nonvisual and composition/performance distinctions in copyright.

3. Copyright Royalties and the Johnson Estate

In addition to and likely in part as a consequence of his status as blues cultural icon, Robert Johnson’s estate has profited significantly from the exploitation of copyrights in Johnson’s works. Although the *ABKCO* case has enabled Robert Johnson’s estate to collect additional royalties, blues copyright cases have not addressed questions of equity and fairness for blues artists or similarly positioned musicians more generally. For select blues artists such as Robert Johnson, however, effective copyright enforcement have enabled a seemingly fairy tale ending for Robert Johnson’s son and recently identified heir.

The use of copyright by Steve LaVere, who received an assignment in 1974 of Johnson’s copyrights from Johnson’s then last known surviving heir, his sister Carrie Thompson, contributed to the accumulation of significant royalties in the Johnson estate and Steve LaVere’s wallet. After a series of at times colorful cases spanning some 15 years in Mississippi state courts, Claude L. Johnson, a gravel truck driver from Crystal Springs, Mississippi,²⁵⁷ was found to be the illegitimate son of Robert Johnson.²⁵⁸ The recognition of Claude L. Johnson entitled him to

²⁵⁵ *Id.*

²⁵⁶ Michael Landau, “Publication,” *Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years*, 2 VAND. J. ENT. L. & PRAC. 29, ___ (2000).

²⁵⁷ Reed Branson, *Robert Johnson’s Blues – Property Rights Law Suit Starts*, BLUES NEWS, Oct 13, 1998, at <http://www.blues.co.nz/news/article.php?%20id=55>.

²⁵⁸ In the Matter of the Estate of Robert L. Johnson, Harris & Anderson v. Johnson, 767 So.2d 828 (Miss. S. Ct. 2004) (discussing the status of pictures of Robert Johnson with respect to his estate); In the Matter of the Estate of Robert L. Johnson, Harris & Anderson v. Johnson, 767 So.2d 181, 186 (Miss. S. Ct. 2000) (affirming the judgment of Leflore County Chancery Court in finding Claude L. Johnson to be the biological son of Robert Johnson); In the Matter of the Estate of Robert L. Johnson, Harris & Anderson v.

receive an estate worth more than \$1 million.²⁵⁹ The size of the Johnson estate reflects a translation of his cultural icon status to the economic and business arena and thus underscores in financial terms ways in which Robert Johnson can be distinguished from his peers.

B. *Copyright, Lotteries and Reward*

The Robert Johnson story is a paradoxical one from the perspective of copyright rewards. On the one hand, copyright rewards in Johnson's case can reinforce existing narratives about copyright incentives. From this perspective, Robert Johnson's story exemplifies how copyright can reward meritorious creators.²⁶⁰ However, at the same time, copyright treatment of Robert Johnson reflects a cautionary tale of the implication of copyright in contexts of collaborative cultural traditions that are later commercialized. From this perspective, as has long been recognized, copyright often reflects decisions about allocation of property rights to individual in broader contexts permeated by questions of collaborativity. This is not unique in the blues context, but is also evident in contemporary discussions about traditional knowledge, for example. In addition, copyright treatment of Robert Johnson draws attention to copyright assumptions about risk, reward and return.

1. Robert Johnson as Copyright Success Story

On one level, Robert Johnson's copyright success can be read as reflecting widespread assumptions about copyright, incentive and reward. Under this view of copyright, Robert Johnson's compensation reflects his unique genius as compared with his peers. His differential copyright outcome is thus explained in terms of his differential musical endowments, which is both circular and difficult to sustain in light of the overall context of his creations. Further, much of Johnson's corpus reflects a collaborative tradition to which many contributed, but for which few received compensation. This typical vision of copyright has significant implications for "winners" such as Robert Johnson that emerge from collaborative traditions. This is in part because the distribution of benefits to such "winners" may be highly unpredictable and even contain random elements more akin to a lottery than an investment portfolio in expressive

Johnson, 767 So.2d 828 (Miss. S. Ct. 1997) (reversing and remanding dismissal of claim of Claude L. Johnson as being time barred).

²⁵⁹ Branson, *supra* note 257.

²⁶⁰ [Patry blog discussion of this article]

works assembled based on assumptions about underlying costs and projected benefits.

Copyright is assumed to foster authorship and encourage creation by rewarding creators for their works.²⁶¹ Virtually no empirical evidence exists to corroborate this view.²⁶² Further, discussions about copyright, creation and compensation often make implicit assumptions about the nature of creators' investments in new works. However, what is often not recognized is that underlying discussions about risk, incentive and reward are implicit assumptions about the nature of creators' investments in their creative "portfolio."²⁶³ Typical visions of copyright and compensation assume that creators assemble an investment portfolio of creative works that reflects some reasoned assessment of cost and benefit. Consequently, creation decisions are assumed to be to some extent responsive to changing costs of expression and potential rewards from the creation and dissemination of copyrighted works. However, in a world in which the creation of expressive works is increasingly driven by forces such as celebrity and fame, prediction of copyright benefits seems at best tenuous.

2. Robert Johnson as Copyright Lottery Winner

Another way to potentially read the Robert Johnson success story is as an example of a copyright lottery winner. In an entertainment arena increasingly driven by fame and factors that may not reflect clear

²⁶¹ Jane Ginsburg, *Putting Cars on the "Information Superhighway": Authors: Exploiters and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1468 (1995) (noting that a primary goal of copyright law is fostering authorship).

²⁶² See, e.g., RUTH TOWSE, *CREATIVITY, INCENTIVE, AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE* 21 (2001) (noting that "we still cannot say with any conviction that intellectual property law in general, and copyright law in particular, stimulates creativity. That is no argument for not having it but it should sound loud notes of caution about increasing it. And we still know very little about its empirical effects."); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 505 n.160 (1998) (noting that the role of copyright in the production of cultural texts remains an unanswered empirical question); Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 789 (2004) (noting that economic justification for copyright prohibition against unauthorized copying is not necessary to stimulate an optimal level of new creations and in fact appears to have a net negative effect on creative output).

²⁶³ LANDES & POSNER, *supra* note 95, at 38 (noting that certain copyright laws "reduce the incentive to creative intellectual property by preventing the author or artist from shifting risk to the publisher or dealer" and discussing author incentives and rewards with respect to royalty contracts).

distinctions in artistic output, at least as considered from the time a creator makes her initial investment in creating a new work, outcomes are potentially difficult to predict with any degree of certitude. Consequently, for a creator making a decision about whether to produce a new work (i.e., invest in her creative portfolio), a lottery model may provide a more instructive picture of the creator's investment decision. This model may have particular explanatory power in the context of creative activities in corporate contexts.

Robert Johnson's outcome relative to his peers at the time he created his music was highly unpredictable. Further, much less distinguished him from his peers at the time he created his works than was the case when later commentators and musicians reconsidered his musical contributions. This tendency to continuing reassessment of creative contributions is by no means unique to Robert Johnson and is reflected in the reception of musicians such as Johann Sebastian Bach, for example. Although Bach was famous as an organ virtuoso during his lifetime, he was not as famous during his life as composers such as Telemann.²⁶⁴ His reputation as a composer was restricted to a small circle, and many regarded his work as old-fashioned.²⁶⁵ Although Bach became better known with the issuance of the *Well-Tempered Klavier* in 1801, more than 50 years after his death, the revival of interest in his music dates from the Berlin performance of the St. Matthew Passion, with Felix Mendelssohn conducting, in 1829.²⁶⁶

The unpredictability of potential rewards both reflects and reinforces the star system now widespread in the music industry. This star system underscores the skewed distribution of rewards that are evident in the musical arena. Further, as is the case with lotteries more generally, seeing copyright as a lottery suggests that existing copyright frameworks, together with the business reality of the entertainment industry, may foster overinvestment in creative portfolios by some creators and companies.²⁶⁷ In the case of lotteries, those who see lottery winning as reflective of skill and who believe that they can overcome bad odds by smart betting tend to

²⁶⁴ *Johann Sebastian Bach*, in THE OXFORD DICTIONARY OF MUSIC, ____ (Michael Kennedy ed., 2d rev. ed. 2001), available at <http://www.oxfordmusiconline.com/subscriber/article/opr/t237/e715>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*; *Bach Revival*, in THE OXFORD DICTIONARY OF MUSIC, ____ (Michael Kennedy ed., 2d rev. ed. 2001), available at <http://www.oxfordmusiconline.com/subscriber/article/opr/t237/e727>.

²⁶⁷ Elizabeth A. Freund & Irwin L. Morris, *The Lottery and Income Inequality in the States*, 86 SOC. SCI. Q 996, 1001 (2006)

overinvest in lottery investments.²⁶⁸ Robert Johnson and his success may support or belie assumptions about creation, incentive and reward in copyright, depending on what assumptions one makes about the nature of creative investment portfolios assembled by creators, both individuals and corporate entities.

C. *Copyright Lotteries and Fairness*

Pervasive borrowing is an inherent part of creation processes for many musicians. At the same time, however, borrowing may have different significance depending upon the sociocultural context within which acts of borrowing occur. In the contexts of the blues, borrowing within blues traditions in the Mississippi Delta in the 1930s and 1940s may have a fundamentally different meaning than the borrowing that occurred from blues traditions to rock and roll traditions in later eras. The potentially divergent meanings of similar acts of appropriation reflect nuances of context and the ways in which sociocultural hierarchies may play out in different circumstances. Consequently, copyright treatment of musical traditions that incorporate extensive borrowing within the tradition may have different implications when new practitioners from outside of the first context of borrowing in time or space or both also begin to use such forms. These later uses may be particularly sensitive in instances where new practitioners derive significant commercial returns from such uses. In the case of blues, many such new practitioners by the 1960s were white while the original practitioners were primarily black. Although many of the new practitioners were not American, their borrowings played out in an American context that was highly racialized. Further, pervasive recording industry racial distinctions operated in the context of a broader sociocultural environment characterized by significant racial inequalities that raise questions of fairness and distributive values of fundamental importance for copyright.²⁶⁹

The questions that arose in the U.S. context of use of blues music are not unique but rather reflect continuing issues of concern in the copyright arena more generally. Similar questions arise today, for example, in the context of debates about traditional knowledge, which has typically been treated as public domain knowledge that is free to be appropriated in the

²⁶⁸ *Id.*

²⁶⁹ Kevin J. Greene, "Copynorms," *Black Cultural Production, and the Debate over African-American Reparations*, 25 *CARDOZO ARTS & ENT. L.J.* 1179 (2008).

international intellectual property arena.²⁷⁰ How copyright frameworks should treat borrowing in such contexts is not at all clear. It does, however, militate in favor of giving greater consideration in adjudications about copyright to questions of equity and fairness.²⁷¹

The copyright lottery accorded Robert Johnson raises significant questions about the allocation of copyright rewards more generally. The operation of copyright as a lottery may lead to outcomes that appear unfair in light of the contexts of original creation, but that might appear appropriate from the perspective of later commentators. This suggests that the risk and reward profile in copyright can be unpredictable. This is particularly true in the case of collaborative traditions such as the blues in which multiple participants over extended periods of time may have contributed to the corpus that was in the end awarded to lucky lottery winners such as Robert Johnson. Although Robert Johnson was clearly talented and had enormous potential when he died, his rewards relative to his peers is difficult to explicate within the context of standard assumptions about incentive and reward in copyright.

Outcomes in instances such as Robert Johnson are potentially troubling because the copyright property rule accompanies narratives and representations about creation and creativity that discount or even ignore the importance of uses of existing texts in the creation of new ones.²⁷² Further, even if doctrines intended to enable future uses such as fair use are taken into account, such property rules have thus far not facilitated clear delineation between the scope of acceptable and unacceptable uses of existing material. Doctrines such as fair use are often insufficient to make such delineations in the context of living music traditions.

Historical consideration of popular music in the American context suggests that the operation of copyright as a property rule can also lead to outcomes that belie assumptions typically made about copyright rewards

²⁷⁰ Anupam Chander & Madhavi Sunder, *Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1351 (2004) (noting that TRIPs has left traditional knowledge in the global commons while protecting intellectual products of the developed world).

²⁷¹ Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, ___ (2006) (discussing the application of doctrines of substantive equality to intellectual property considerations in the global arena).

²⁷² See Arewa, *supra* note 1, at 638-41 (discussing property and liability rules in intellectual property); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655 (1994) (noting that a property rule can be infringed only after bargaining with the entitlement holder).

and that may in some instances be manifestly unfair. Although this is recognized to some extent in discussions of distributive values in copyright, the ways in which copyright has influenced African American artists in particular are often largely ignored other than in specific discussions of copyright and African American artists.²⁷³ One of several notable exceptions is the work of Keith Aoki, who has drawn attention to distributive implications in copyright generally and blues music specifically.²⁷⁴

General discussions of copyright largely assume a uniform application of copyright law without attending to the implications of various sociocultural hierarchies that might influence and differentiate copyright.²⁷⁵ When inequality is considered, it often includes an unsupported assumption that poorer creators benefit more from copyright than do wealthier ones. Such assumptions do not take sufficient account of the hierarchies that have significantly influenced the operation of copyright in ways that need to be better appreciated in current discussions of copyright and recommendations for copyright reform.

The ways in which hierarchy has shaped copyright are many. In some instances, for example, incumbent creators have been permitted to borrow from certain traditions, particularly traditions from groups such as African Americans, who historically have been at the bottom of most societal hierarchies of status and power.²⁷⁶ Many of these incumbents may then be able to use copyright to block borrowings from their works, despite the fact that such works borrow extensively.²⁷⁷ The operation of copyright as a property rule also disfavors certain aesthetics of cultural production, including those that use extensive borrowing, particularly when borrowing is undertaken by those with relatively low status, limited resources or less power relative to those from whom they borrow.²⁷⁸ In the international

²⁷³ VAIDHYANATHAN, *supra* note 163, at 117-48; Greene, *supra* note 163, at ___; Hall, *supra* note 116, at 37-58; Hines, *supra* note 197, at ___.

²⁷⁴ 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, ___ (2007).

²⁷⁵ See, e.g., Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1538 (2005) (“Thus copyright seems, historically at least, to have benefited poorly financed creators more than it has burdened them.”).

²⁷⁶ See Arewa, *supra* note 162, at ___ (discussing borrowings from African American music by George Gershwin).

²⁷⁷ *Id.* at ___.

²⁷⁸ See Arewa, *supra* note 1, at ___ (discussing how notions of authenticity have contributed to the creation of the classical music canon since the nineteenth century).

context, hierarchies of status and power have influenced the structure of international intellectual property frameworks and the types of knowledge that may be used without compensation within such frameworks.²⁷⁹ These contexts point out ways in which copyright may be underinclusive and fail to adequately protect forms of cultural production that perhaps should be protected. The assumptions underlying current copyright frameworks thus point out the need for better delineation of the scope of acceptable copying.

While copyright has been characterized as underinclusive, inadequate protection for some types of cultural production exists in a broader cultural milieu where many assert that copyright is overinclusive. The key to resolving this seemingly paradoxical simultaneous overinclusive and underinclusive situation rests in better identification of the scope of acceptable copying in varied contexts with simultaneous reassessment of the assumptions about cultural production that have led to the current state of affairs. The need for better demarcation of the zone of acceptable copying is further underscored by the existence of varied models of cultural production, including valuable asset models that are one important reason that some assert that copyright is overinclusive and that may also impede the diffusion and dissemination that are important aspects of living cultural traditions.

The need to both encourage and police diffusion suggests that music in the end may be better suited to the operation of liability rules, which would begin with an assumption of borrowing as a norm and require compensation when works are borrowed. Although not without problems, including questions relating to determination of appropriate levels of payment, such liability rule frameworks have the potential to address the ways that copyright's operation in particular context may reflect and even magnify existing inequalities. Liability rules will also underscore the reality of borrowing as an important aspect of the aesthetics of many artists, from classical composers to blues and hip hop artists.²⁸⁰ Such rules have the potential to promote vibrant forms of cultural production such as the blues, while ameliorating some of the more negative aspects of the operation of copyright.

²⁷⁹ Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 L. & CONTEMP. PROB. 97, 100 (2007) (discussing treatment of "poor people's knowledge" under global intellectual property frameworks).

²⁸⁰ Arewa, *supra* note 1, at ____.

CONCLUSION

Understanding how creators make decisions to create or investments in creative works is a key issue in copyright. Such decisions are shaped by risk and context in ways that may not always reflect dominant assumptions in copyright theory. A contextual understanding of copyright should use the lessons of the past to help shape the structure and operation of copyright in the future. Examination of the operation of copyright in specific instances such as Robert Johnson and the blues can point out complexities that underlie the operation of copyright.

Some complexities arise from underlying theories of copyright, as is reflected in the distinctions made between visual and nonvisual forms of musical reproduction. Notions about composition and performance closely track this visual/nonvisual distinction. Such theoretical assumptions are increasingly out of synch with musical practice and the widespread technological innovations that have changed the context of music at multiple levels, including with respect to creation, reproduction, dissemination and composition.

Other complexities arise from context. Allocations of rights in the copyright context take place in a broader sociocultural context permeated with hierarchies that may influence the effective operation of copyright frameworks. Copyright discourse needs to be based on better understanding of the actual operation of copyright. The role and power of copyright expanded significantly during the course of the twentieth century and is likely to become yet more magnified in today's knowledge and technology intensive society.