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Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection

K. J. Greene

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Copyright, Culture & Black Music: A Legacy of Unequal Protection

by
K.J. GREENE*

I.	Structure And Function Of The Copyright Regime..	344
A.	Origins and Purpose.....	344
B.	Foundations of Copyright Law.....	348
1.	Rights Protected by Copyright.....	348
2.	The Idea-Expression Dichotomy.....	349
3.	Requirement of Reduction to Tangible Form ..	351
4.	Originality and Minimal Creativity	351
5.	Registration Formalities	353
II.	Copyright and Culture	354
III.	African-American Artists & Intellectual Property	361
A.	Background.....	361
B.	A History of Appropriation	367
1.	Patterns of Inadequate Protection	371
2.	Harm To The Community.....	373
C.	The Relationship Between Appropriation of African-American Music and American Copyright Law	375
IV.	Civil Rights As Intellectual Property Rights.....	383
V.	Toward Possible Prescriptions	388
A.	Access to Legal Services	389
B.	Importation of Moral Rights Notions	390
C.	Heightened Standard of Originality.....	391
VI.	Conclusion.....	391

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Introduction

This article explores a dynamic of Black history and the law largely ignored or overlooked by legal scholars: how African-American music artists, as a group, were routinely deprived of legal protection for creative works under the copyright regime. This perspective has only been faintly hinted at in legal scholarship, leaving Black artists as the “invisible” men and women of copyright jurisprudence. The issue of copyright deprivation and Black artists is highly significant, given the enormous cultural contribution of Black music to American society, the importance of the music to Black culture, and the tremendous economic benefits at stake.

When one examines the history of issues like the exploitation of Black artists, there is the risk of falling into a “victim” perspective, with all its attendant emotional baggage. But the future for Black artists—and indeed artists of all races—will be brighter if we understand the pitfalls of the past. Moreover, as a society:

to deal with what remains [w]e have run away from race for far too long. We are so afraid of inflaming the wound that we fail America's central social problem. We will never achieve racial healing if we do not confront each other, take risks, make ourselves vulnerable. . . .¹

Copyright law and other intellectual property law theoretically provides neutral economic incentives to creators, and protects economic interests in original works.² It has been

1. HARLAN L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS & WHITES 4 (1995).

2. The source of Congress' power to protect authors and inventors is the United States Constitution, which provides that Congress shall have the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries.” U.S. CONST. art. I, §8.

The term intellectual property encompasses, broadly, patents, copyrights and trademarks. See Dale A. Nance, *Foreword: Owning Ideas*, 13 HARV. J. OF L. & PUB. POL. 757, 757 (1990) (“Roughly speaking, patents are federal statutory rights over novel inventions or designs. Copyrights are federal . . . rights over original literary or artistic expressions . . . trademarks are identifications of commercial origin . . .”); see also Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. REV. 287, 294 (1988) (“A universal definition of intellectual property might begin by identifying it as nonphysical property which stems from,

said that “[i]n essence, copyright is the right of an author to control reproduction of his intellectual creation.”³ Yet this right has failed Black musicians and composers as a group in the recent past. Black artists as a class consistently received inadequate compensation, credit, and recognition for original works.⁴ Part of the reason for the endemic exploitation of Black artists is the interaction of the copyright regime and the contract regime, a subject beyond the scope of this article, but one ripe for further exploration. While it is true that the music industry has generally exploited music artists as a matter of course,⁵ it is also undeniable that African-American artists have borne an even greater level of exploitation and appropriation.

As new technologies continue to cause explosive growth in the value of information, the value of copyrights and intellectual property will continue to increase sharply. The Constitution established the copyright regime, but the rapid emergence of new technologies and multimedia have more recently “promoted [copyrights] from pawns to queens on the global chessboard.”⁶ Increasingly, all artists will need to stay well-informed of intellectual property law to reap the full benefits of the emerging information super-highway⁷ and

is identified as, and whose value is based upon some idea or ideas. Furthermore, there must be some element of novelty.”).

3. ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT FOR THE NINETIES*, 13 (4th Ed. 1993) (citing Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 3-6 (1961)).

4. The influence of blues artists on white rock and roll artists has been well-documented. It has been said, for example, that the British rockers the “Rolling Stones confirmed four basic rock and roll truths: attitude is (nearly) everything; rock’s original sources (black and country music) remain its most fertile ones; Chuck Berry-derived rhythm guitar is rock’s essential sonic vehicle; and lyrics are most evocative when just short of indecipherable.” ANTHONY DECURTIS & JAMES HENKE, *THE ROLLING STONE ALBUM GUIDE 600* (1992).

5. See Theresa E. Van Beveren, *The Demise of Long-Term Personal Service Contracts in the Music Industry: Artistic Freedom Against Company Profit*, 3 *UCLA ENT. L. REV.* 377, 381 (1996), noting that “[r]ecording companies have traditionally taken advantage of their artists’ ignorance, inexperience, lack of involvement, naivete and/or lower social status.”

6. Alan J. Hartnick, *Aid for Copyright Lawyers in International Transactions*, *N.Y.L.J.*, Dec. 7, 1990, at 5.

7. The Internet, often called the “information super-highway” is a complex communications network that links private and public computer networks,

multimedia works of art made possible by computer technology.⁸ The legal issues raised by these technologies will require ever more vigilance and sophistication to obtain and ensure the protection of original works of music and other artistic creations:⁹ a “virtually unlimited future looms on the horizon for would-be thieves as popular forms of entertainment become increasingly available with just a few keystrokes at a computer terminal.”¹⁰

Given the heightened importance of copyright in the information age, it is just as important to look backwards as it is to look forward. History teaches us that the social structure of our racially stratified society, along with structural elements of the copyright system— such as the requirements of tangible (written) form, and minimal standard of originality— combined to deny Black artists both compensation and recognition for their cultural contributions.¹¹

systems and individuals. See Dan Thu Thi Phan, *Will Fair Use Function on the Internet*, 96 COLUM. L. REV. 169, 187 (1998) (The Internet is an international network of linked, overlapping, and interconnected computers and computer networks). See also First Amended Complaint, *America Online, Inc. v. Cyber Promotions, Inc.*, Civ. Act. No. 96-462 (E.D. Va. 1996) (alleging use of the Internet to “as a tool to perpetuate fraud, [and] to misappropriate intellectual property.”).

8. For an overview of multi-media, see Judith Merians, *An Overview of New Technology and the Entertainment Industry*, 1995-96 ENT., PUB. & THE ARTS HANDBOOK 241, 243 (1996) (“[b]roadly defined, a multimedia work is one that results from the combination of images, sound, text, computer software and hardware.”).

9. See Mark Litwak, *Potholes On the Information Superhighway: A Road Map to Legal Issues in Multimedia Productions*, 1995-96 ENT., PUB. & ARTS HANDBOOK, Edit. 199 (1995-6) (noting that numerous “legal hurdles to overcome in making even a simple multimedia program . . .”).

10. John Gibeaut, *Zapping Cyber Piracy*, ABA J., Feb. 1997, at 60-61.

11. Few intellectual property scholars have examined the relationship between culture and copyright. This fact seems surprising since much of the subject matter of copyright— art, music, literature, dance— must be considered products of various cultures. Without cultural production, there would be no need for copyright. In this connection generally, it has been noted that “very few articles on popular culture and law have made it into legal scholarship, and even fewer actually use the methodology of cultural studies.” Naomi Mezni, Note, *Legal Radicals in Madonna’s Closet: The Influence of Identity, Politics, Popular Culture, and a New Generation on Critical Legal Studies*, 46 STAN. L. REV. 1835, 1859 (1994).

It would be unfortunate if the inequality of the past persists into the world of cyberspace¹² and multi-media.¹³ The "hip hop" nation of "Generation X"¹⁴ inner-city youths may in many ways be compared to the Blues artists of the pre-war South. Both groups are legally unsophisticated, and thus subject to economic exploitation without due compensation. The lessons to be learned from the treatment of Blues musicians should be used to prevent similar abuses against today's hip hop artists.

As new issues develop in copyright law, it will be important to people of color, and to an egalitarian society as a whole, that the new copyright regime not duplicate the inequalities of the old. An underlying assumption of race-neutrality pervades copyright scholarship. However, not all creators of intellectual property are similarly situated in a race-stratified society and culture. The history of Black music in America demonstrates the significant inequality of protection in the "race-neutral" copyright regime.¹⁵ It is the hope of this author that questioning the assumption of race

12. Cyberspace has been defined as a "nonphysical universe' resulting from the linking of computers and computer networks, [which] allows individuals to communicate together 'without the constraints of time and distance.'" Cynthia L. Counts, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in this New Frontier*, 59 ALBANY L. REV. 1083, 1086 n. 5 (1996).

13. The possibilities of artist exploitation have been expanded by the emergence of new technologies. See, e.g., Note, *Visual Artist's Rights in a Digital Age*, 107 HARV. L. REV. 1977, 1979 (noting that "digital technology makes it easier to manipulate existing works, which leads to new possibilities for artists who can harness the technology, but also increases the potential for unauthorized alteration and appropriation of copyrighted works.").

14. For a description of the term "Generation X", see Note, Steven M. Cordero, *Cocaine-Cola, The Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons*, 8 FORD. INTEL. PROP., MEDIA & ENTERTAIN., L.J. 599, 654 n.21 (The term, Generation X, now widespread, was first popularized to describe the generation born between 1964 and 1979).

15. Scholars in recent years have begun to question claims of neutrality in legal discourse, reasoning that the application of neutrality to the minority experience masks forms of social domination. See Steven H. Shiffirin, *Racist Speech, Outsider Jurisprudence and the Meaning of America*, 80 CORNELL L. REV. 43, 45 n. 10 (1995) ("Critical race theory . . . [emphasizes] the extent to which claims of neutrality and universality are in reality proxies for racist political and cultural assumptions. In the same vein, feminist jurisprudence emphasizes the gendered character of claims to neutrality and universality.").

neutrality in copyright law and examining how social factors impact intellectual property may assist in changing the way we devise strategies to equalize our society, and may also empower others to move forward in the conversation about race, entitlement and restitution.

This article contains five sections. Part I outlines briefly the historical, structural and theoretical under-pinnings of the copyright regime. Part II explores the relationship between Black culture and music. Part III critiques the elements of the copyright regime that have facilitated cultural and commercial appropriation of Black music. Part IV explores the relationship between civil rights and intellectual property. Finally, Part V briefly discusses possible prescriptions to the pattern of appropriation and discrimination, including the importation of moral rights notions.

I

Structure And Function Of The Copyright Regime

A. Origins and Purpose

Ownership of property has long been central to the American experience, and vital to success, status and prosperity in America.¹⁶ It has been noted that:

[t]he concept of property is powerful . . . [and holds] a particularly fundamental place in our constitutional structure . . . property has been more than simply an imaginative or symbolic concept; it has been the medium through which struggles between individual and collective goals have been refracted.¹⁷

16. The centrality of property ownership to American culture and society is difficult to overstate. Property scholars have postulated that a connection exists between property and the experience of self. *See, e.g.*, Barbara Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) ("The premise underlying the personhood perspective is that to achieve proper self-development—to be a person—an individual needs some external control over resources in the external environment. The necessary assurances take the form of property rights.").

17. Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).

John Locke's philosophical legacy deeply influenced the thinking of our Constitutional founders, who consistently equated liberty with property ownership.¹⁸ For example, Alexander Hamilton, a vehement stalwart for property protection by the State, asserted at the Constitutional Convention that the "[o]ne great object of government is personal protection and the security of property."¹⁹ Locke's theory of personal property asserted that "every man has Property in his own Person [and thus] the Labour of his body and the work of his hands is properly his."²⁰ Taken literally, Locke's philosophy is the antithesis of slavery,²¹ as a slave, by definition, does not own the labor of her or his own body.²²

The founding fathers' passion for property rights extended to the cultural and scientific products of creativity, such as inventions, which received patent protection, and literary and artistic creations, which received copyright protection. Copyright is "the body of law that protects works of authorship . . . [and] includes books, music, sculpture, movies, and even computer programs but not ideas, processes or systems, no matter how valuable or creative."²³ Of all the

18. See Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1368 (1990). "The framers of the Constitution were greatly concerned with property rights and market freedom. As heirs to the property-protective tradition of Locke, it is not surprising that they viewed protection of property rights as the cornerstone of just government." *Id.*

19. Underkuffler, *supra* note 17, at 133.

20. J. LOCKE, *SECOND TREATISE OF GOVERNMENT* 27 (1953).

21. In contrast to Locke's thesis, the original Constitution "arguably" explicitly or implicitly approved of slavery. See Randy E. Barrett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PACIF. L.J. 977, 991 (1991) (There are three passages in the original Constitution that are commonly thought to refer and constitutionally legitimate slavery (citing Art. I, sect. 2, Art. I, sect. 9, and Art. IV, sect. 2)). Blacks as a class have been excluded until modern times from the ancient legal principle that labor and services must be compensated. See generally, Henderson, *Promises Grounded in the Past: Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1150-51 (1971).

22. This paradox of slavery has not been lost on other commentators. See Carol M. Rose, *Women and Property*, 78 VIR. L. REV. 421, 453 (1992) ("It has often been noted that the slave's status is that of person who is also an object of property [T]he status of the slave [is] a person who can own no property and have no assets.").

23. Wendy Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of*

clauses of the Constitution, only the Copyright Clause spells out its purpose.²⁴ The Clause passed the Constitutional Convention without debate or controversy.²⁵ Significantly, at the time of the enactment of the first intellectual property statutes, most Blacks in America remained in slavery, unable to own any type of property.

The American copyright system originated in England.²⁶ The British government designed the system to provide incentives to printers by offering limited state monopolies of the reproduction right.²⁷ On the European Continent, a broader notion of intellectual property protection developed, which included not only economic rights in authorship, but

Consistency, Consent, and Encouragement Theory, 41 STAN. L. REV. 1342, 1365 (1989).

24. See HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* 1 (1991).

Perhaps the most striking characteristic of the copyright-patent clause is that it is the only clause in the original Constitution other than the preamble, which states the ultimate goal to be served by its allocation of power; it begins by providing the justification for such legislation as Congress may choose to adopt: 'to promote the Progress of Science and Useful Arts.' This undoubtedly laudable public purpose becomes a value whose consideration is constitutionally suggested, if not mandated, in any analysis of copyright issues.

Id.

25. See, e.g., Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 114 (1929).

26. For an analysis of copyright protection which predated European copyright, see Alan J. Schuchatowitz, *Copyright Protection in Jewish and American Law: A Comparative Study* 3 (unpublished manuscript on file with Touro College of Law, 1994) (noting that "[c]opyright protection first became an issue in Jewish Law in the early 16th century due to the widespread use of printing presses and the need for Jewish authors and publishers to protect the rights to use their works.").

27. Britain passed the first copyright law, the Statute of Anne, in 1710. See Richard Chen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 OHIO ST. L.J. 517, 526 (1991). The law provided exclusive rights for authors to print their works, and gave authors copyright terms of up to twenty-eight years for newly published works. See *id.* Significantly, the Statute of Anne:

protected the interests of booksellers by extending the exclusive rights to the assigns of authors as well. The booksellers knew that their position in the market was such that authors would, as a practical matter, be forced to sell their manuscripts to the Stationers' company if they wanted to get their work published at all.

Id.

"moral rights."²⁸ In France, the notion of moral rights, in addition to economic rights of authors, provided personal and artistic protection to creative works.²⁹ Moral rights generally include, the right to be known as the author of a work (paternity), the right to prevent others from being named the author of a work (attribution), and the right to prevent others from using a work or an author's name in such a way as to reflect adversely on her professional standing (integrity).³⁰

In contrast, the American legal system, rooted firmly in British jurisprudence, did not import continental notions of moral rights into its copyright law. The focus in the American copyright system has been on economic protection, rather than protection of personal rights of artists.³¹ The Supreme Court has expressed the copyright system's rationale thusly: "It is said that reward to the author or artist serves to induce release to the public of his [or her] creative genius."³²

Other Supreme Court authority states that although "[t]he immediate effect of our copyright law is to secure a fair return of for an author's creative labor . . . the ultimate aim is, by

28. Moral rights regimes, as distinct from strictly economic protection, exist in some European countries. "Under the civil law doctrine of 'moral rights', the author maintains the right to claim recognition of his work, the right to prevent false attribution of his name to another's work, and the right to prevent objectionable alterations of his work." Note, *An Author's Artistic Reputation Under The Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1492 (1978).

29. As distinct from an economic protection regime, the moral right doctrine "is concerned with the creator's personality rights and society's interest in preserving its culture." Roberta Kwall, *Copyright and the Moral Right: Is An American Marriage Possible?* 38 VAND. L. REV. 1, 23-24 (1985). Moral rights encompass three major components—the right to disclosure, the right of paternity, and the right of integrity. See *id.*

30. See NIMMER ON COPYRIGHT, 8D.01[a] (1992).

31. See, e.g., Jimmy Frazier, *On Moral Rights, Artist-Centered Legislation and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TULANE L. REV. 313, 315 (1995) ("Unlike French law, American copyright law focuses overwhelmingly, if not exclusively, on economic rights. It protects the economic rights of the copyright holder, not the 'moral' rights of artists.").

32. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). See also *Goldstein v. California*, 412 U.S. 546 (1973) (noting that "to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee authors and inventors a reward in the form of control over the sale or commercial use of copies of their works.").

this incentive, to stimulate artistic creativity for the general public good.”³³ It is said that the

Principal object of intellectual property law in the United States is to ensure consumers a wide variety of information products at the lowest possible price . . . through the grant of private property rights enabling individuals and businesses to appropriate to themselves the value of the information they produce, giving them incentive to produce still more.³⁴

Accordingly, American copyright law roots have been firmly, if not inextricably grounded, in economic incentive theory.³⁵

B. Foundations of Copyright Law

1. Rights Protected by Copyright

Copyright law protects a core bundle of an author's rights.³⁶ The 1909 Act set forth the basic bundle of rights of copyright owners, which the 1976 Act reiterates. Section 1 of the 1909 Act provided the following exclusive rights to copyright holders: the right to print, reprint, publish, copy and sell copyrighted works; to translate, convert, arrange or adapt copyrighted works; and to distribute and publicly perform copyrighted works.³⁷ Similarly, the 1976 Act provides five fundamental rights—the so-called “bundle of rights”—to copyright owners.³⁸ These comprise the exclusive rights of

33. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

34. PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY* (4th ed. 1997).

35. This is clearly the modern view. It has been noted, in contrast, that “early American copyright theorists did share the modern view that copyright is motivated solely by economic considerations [but] . . . saw copyright as a matter of both economic policy and natural law. This means that modern copyright theory has touch with one of copyrights' roots in early American legal thought.” Chen, *supra* note 27, at 529.

36. The bundle of rights concept reflects contemporary property theorists conception of property not as things, but as a legal relationship in a social section. See, e.g., Michael A. Heller, *The Tragedy of Anticommons: Property in the transition from Marx to Markets*, 111 HARV. L. REV. 621, 622 (1998).

37. See Copyright Act of 1909, sect. I, in Roger E. Schechter, *SELECTED INTEL. PROP. AND UNFAIR COMP. STATUTES, REGULATIONS & TREATIES* 164-66 (1997).

38. See 17 U. S. C. §106 (1994).

reproduction, adaptation, publication, performance and display.³⁹ Copyright law prohibits the commercial appropriation of an author's creative works, which constitutes actionable "infringement." The prohibition on the "taking" of copyrights reflects a current against takings or appropriation in other areas, such as the right of publicity⁴⁰ and trademark. Copyright infringement suits allow authors to recover damages from illegal takings by artistic thieves and to enjoin continued infringement.⁴¹

2. *The Idea-Expression Dichotomy*

A basic distinction in copyright law dictates that no person may protect broad and general ideas from free public access. Copyright law does not protect ideas, principles, genres or facts from public use.⁴² "Only the form of the expression is protected. This basic principle of copyright law, known as the idea-expression dichotomy, purportedly serves both to protect the freedom of expression guaranteed by the First Amendment, and to divide the domain of copyrights from that of patents."⁴³

39. The exclusive rights of copyright owners are set out in section 106 of the 1976 Act. *See id.* Reproduction, adaptation and publication rights extend to every type of copyrighted work, while public performance rights extends to literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings. *See* Copyright Law Revision, H.R.Rep. No. 94-1476, 94th Cong., 2d Sess. 61-65 (1976).

40. *See, e.g.,* Todd F. Simon, *Right of Publicity Reified: Fame As Business Asset*, 30 N.Y.L. SCH. L. REV. 699, 701 (1985) (noting that "the right of publicity as it currently exists is a direct descendant of the 'appropriation' branch of common law invasion of privacy.").

41. Accordingly, copyright provides entitlement to property rule protection as defined by economic analysis of the law, *See* Guido Calabresi and Douglas Melamed, *Property Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). *See also* Roger D. Blair & Thomas F. Cooter, *An Economic Analysis of Damage Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585, 1694, n.15 (1998) (A property rule confers upon the owner of an entitlement the right to enjoin others from using that entitlement without permission).

42. *See, e.g.,* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985) (noting that a fundamental principle of copyright law is that "[n]o author may copyright his ideas or the facts he narrates.").

43. JAY DRATTLER, JR., *INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY* 1.02[2] (1993).

The rationale for denying protection to raw ideas and concepts is two-fold. First, a monopoly on general ideas would reduce the amount of information available and would lead to inefficiencies. Second, the restriction of ideas would contravene First Amendment values of free expression.⁴⁴ It has been said in this connection that the "First Amendment is an essential part of our cultural policy because it gives the artist, the thinker and the social commentator the right to speak freely without intellectual restraint of any kind."⁴⁵

Nichols v. Universal Picture Corp. is a seminal case on the idea-expression doctrine.⁴⁶ In *Nichols*, the court bifurcated the plaintiff playwright's play into two elements.⁴⁷ The court found that the idea in the form of the play's plot outline was uncopyrightable, as distinct from the copyrightable expression of the idea.⁴⁸ The court in *Nichols* held "an author's uncopyrightable ideas could always be borrowed, and future infringement cases [have since been decided] by asking whether or not the defendant had borrowed ideas or expressions from a plaintiff's copyrighted work."⁴⁹

44. See *Red Lion Broadcasting Co. v. Federal Communications Comm.*, 395 U.S. 367 (1969) "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.* at 390.

Ironically, the major restrictions on free expression have been created by our "free" marketplace, and consolidation of mass media and communication industries. See Thomas I. Emerson, *Colonial Intentions And Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 751 (1977).

Perhaps the major discrepancy between the system of freedom of expression visualized by the colonists and the system as it exists today is the nature of the marketplace in which political expression takes place. That market place is dominated by the mass media, and the communications flowing into the market largely reflect a single political, economic and social point of view. Many would-be speakers do not have access to the market, and there is a serious lack of diversity.

Id.

45. John Frohnmayer, *Should the United States Have a Cultural Policy?* 38 VILL. L. REV. 195, 198 (1993).

46. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

47. See *id.*

48. See *id.*

49. Chen, *supra* note 27, at 536.

The idea-expression dichotomy has been criticized by commentators for being "so general in its statement as to defy particular application."⁵⁰ Other analysts have described the idea-expression as "[t]he most notorious problem in copyright law."⁵¹ As Judge Learned Hand noted, in determining the parameters of idea-expression "[o]bviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea', and has borrowed its 'expression'. Decisions must therefore inevitably be *ad hoc*."⁵²

3. Requirement of Reduction to Tangible Form

The Copyright Act of 1976, Section 102(a) provides that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with aid of a machine or device."⁵³

As one commentator remarked, [t]he existence of a chattel 'embodiment' is essential to federal copyright, which applies only to works 'fixed', embodied in 'stable', 'tangible medi[a] of expression'. . . [s]o, for example, until a playwright makes a stable record of his play, via pen, video camera, or otherwise, federal copyright law does not protect it.⁵⁴

4. Originality and Minimal Creativity

Copyright law, consistent with the Copyright Clause, provides that copyright protection subsists in "original works of authorship."⁵⁵ Earlier in this Century, courts construed the

50. Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 324 (1989).

51. For an excellent analysis of the idea-expression principle, see John Shepard Wiley, Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 121 (1991). In criticizing the analytical usefulness of the doctrine, Wiley argued that "the idea/expression doctrine is incoherent and lacks any stated alternative foundation." *Id.*

52. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

53. 17 U.S.C. §102(a) (1994).

54. Gordon, *supra* note 23, at 1367 n. 107.

55. 17 U.S.C. § 102. It has been noted that "[o]riginality is distinct from novelty. To be original, a work must be the product of independent creation."

originality requirement of the copyright law to require some level of artistic merit.⁵⁶ However, “this approach disappeared after the turn of the century when the Supreme Court effectively removed any requirement that works demonstrate value as a prerequisite to copyright.”⁵⁷ Also it should be noted that the concept of originality, like the idea-expression doctrine, has been attacked by some scholars as analytically deficient.⁵⁸

The leading Supreme Court case on the issue of originality is *Bleistein v. Donaldson Lithographing Co.*⁵⁹ The *Bleistein* Court held that a plaintiff could recover for defendant's copying of chromolithographs for a circus advertisement.⁶⁰ Significantly, the Court refused to assess the novelty or artistic quality of the plaintiff's original prints, remarking that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”⁶¹ Similarly, in *Alfred Bell & Co. v. Catalda Fine Arts Inc.*, the Second Circuit rejected a novelty standard of originality, stating that “[a]ll that is needed . . . is that the author contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own’.” Originality in this context ‘means little more than a prohibition on actual copying.’ No matter how poor artistically, the ‘author’s’ addition, it is enough if it be his own.⁶²

The originality requirement continued to fade, as demonstrated by the decision in *Donald v. Zack Meyer's T.V.*

GORMAN, et al, *supra* note 3, at 88; see also *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340 (1991). “Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.” *Id.* at 345.

56. See Chen, *supra* note 27, at 533.

57. *Id.*

58. For a vigorous attack on the originality requirement see Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1004 (1990), arguing “that the concept of originality is a poor substitute for tangible boundaries among parcels of intellectual property because it is inherently unascertainable.” *Id.*

59. 188 U.S. 239 (1903).

60. See *id.*

61. *Id.* at 251.

62. 191 F.2d 99, 102-03 (2d Cir. 1951).

*Sales & Service.*⁶³ In that case, the court stated that “a work may be protected by copyright even though it is based on a prior copyrighted work or something already in the public domain if the author, through his skill and effort has contributed a distinguishable variation from the older works.”⁶⁴ Current legal scholarship indicates that “the requirements [for copyright] are modest— originality, variously interpreted— but so is the protection, essentially against copying, but not against exploiting an independently developed similar expression.”⁶⁵

5. *Registration Formalities*

The two most important sources for an analysis of registration formalities are the Copyright Acts of 1909 and 1976. Congress legislated sweeping changes to the 1909 Act in 1976.⁶⁶ Much of the inequality to African-American artists detailed in this article occurred under the 1909 Act. In the last 150 years, three distinctively African-American forms developed: blues, jazz, and rock and roll. These new forms transformed the American musical scene. At the same time, discrimination and segregation marked the Black experience in every social sphere and region of America. In contrast to the 1976 Copyright Act, which provides that copyright protection begins upon the creation of a work, “under the 1909 Act, there was no Federal copyright protection until the work was either published with proper notice or registered. Thus, under the 1909 Act, the initial copyright registration for a work could list a claimant other than the author as the copyright owner . . .”⁶⁷ This factor had a particularly disadvantageous impact on Black artists, who consistently created highly original, innovative, and valuable works, but who frequently found

63. 426 F.2d 1027, 1029 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

64. *Id.*

65. Ejan Mackaay, *Legal Hybrids: Beyond Property and Monopoly?* 94 COLUM. L. REV. 2630, 2631 (1994).

66. “Perhaps the most significant reform of the 1976 Act is the adoption of a unitary federal system of copyright protection in lieu of the prior system under which federal law protected published works and state common law governed unpublished works.” Kwall, *supra* note 29, at 1 n. 1.

67. Abrams, *supra* note 24, at 1-18 n. 66.

their creations used or copyrighted by a non-creator who was clever enough to secure copyright on the works.⁶⁸

The 1909 Act also contained convoluted and complex requirements of notice and publication. As a result, artists unfamiliar with legal requirements could easily find their works injected into the public domain, which resulted in the loss of their economic rights to copyright protection.⁶⁹ The 1976 Act effectively eliminated the traditional rigid formalities imposed under the 1909 Act as a condition of copyright.⁷⁰ More importantly, under the 1976 Act "[a] large body of works that used to go into the public domain as a result of a copyright proprietor's intentional or inadvertent failure to act . . . simply no longer have that effect."⁷¹

II

Copyright and Culture

The copyright regime converts cultural by-products such as art, dance, music, and literature into commodities, labeled generally as intellectual property.⁷² In simple societies—often and derogatorily described as primitive—music and other

68. This dynamic has occurred frequently to indigenous people worldwide. See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 28 (1997) (noting that "[o]ften it may be an outsider who first fixes an indigenous work in a tangible medium - a documentary film maker who videotapes a ritual . . . or a musician who writes down the words or notes of a song for the first time."). While technically, the person who first fixes the work is not the author, in practicality, such violations were difficult to detect, and difficult to enforce for low-status artists.

69. See ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL K WALL, *INTELLECTUAL PROPERTY CASES AND MATERIALS ON TRADEMARK, COPYRIGHT AND PATENT LAW* 234 (1996) (noting that under the 1909 Copyright Act, uncounseled artists and authors "frequently lost their rights inadvertently").

70. See *id.* at 233 (noting that the 1976 Copyright Act "reduced the significance of formalities such as publication with the requisite notice.").

71. Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPR. SOC'Y. 137, 156-57 (1993).

72. See, e.g., JOHN FISKE, *UNDERSTANDING POPULAR CULTURE* 27 (1989) (asserting that "[i]n a consumer society, all commodities have cultural as well as functional values. To model this we need to extend the idea of an economy to include a cultural economy where the circulation is not one of money, but of meanings and pleasures.").

artistic works comprise the raw material of popular culture. As a result, they have tremendous social transformative power.⁷³ But in modern capitalist culture, songs, books, music, and dance also become items in the supermarket of ideas. In addition to expressing cultural attributes, such as shared mores and popular sentiments,⁷⁴ intellectual property provides tremendous economic power.

Theoretically, copyright functions to protect the creative output of authors, regardless of external social factors such as race. The outputs of cultural production—music, lyrics, poetry, and art—would be wrongfully exploited by non-creators without some system of protection in a market economy.⁷⁵ However, copyright law exists expressly to foster cultural productivity by providing economic incentives to individual artists/creators.⁷⁶ In this sense, the copyright regime is a “race-neutral” one.

In the abstract, the notion of protecting intellectual and artistic property seems obvious. Concretely, protection is available only by way of a very specialized area of the law

73. See, e.g., Joan McGettigan, *The Sam Spade Case: Definitions of the Spade Character in Legal, Literary and Cinematic Discourse*, 17 ENT. PUB. & ARTS HANDBOOK, 1994-95 ed. (1995) (noting that popular culture has been described as “the ground on which the transformations [of society] are worked . . .”).

74. Generally, three views exist on what comprises culture: “[T]o the anthropologist . . . [culture] is part of the immutable web of what a society is and does . . . the best manifestation of what society . . . values A second view is that culture can be defined as what is collected by a country’s museums and libraries.” Finally, “[a] third view contends that our culture resides in those commodities that we are able to buy and sell, and the greater the price, the more prized the item.” Frohnmayer, *supra* note 42, at 195-96.

75. See, e.g., Trotter Hardy, PROPERTY (AND COPYRIGHT) IN CYBERSPACE, 1996 U. CHI. LEGAL F. at 258-59 (“Would-be authors need an incentive to create informational works. . . . [o]ne important class of such incentives consists of the assurance that others have a limited ability to make unauthorized uses of the informational work.”).

76. A less common, but more persuasive rationale for the basis of copyright law is that copyright is founded in natural law, based on the individual’s moral right to property in the fruit of his or her labor. “Under this theory, copyright’s justification does not rest upon any showing of economic necessity. Instead, copyright exists because society’s failure to protect authors’ property interests would result in the denial of a basic human right.” Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, 10 CARDOZO ARTS & ENT. L.J. 423, 425-26 (1992).

inaccessible to the unschooled.⁷⁷ Intellectual property has been worthless where the creator failed to comply with legal requirements.⁷⁸ Furthermore, the legal system, including copyright law, generally was created without deference to the interests of large segments of society.⁷⁹ The copyright regime is owner-centered, not creator-centered,⁸⁰ and reflects a possessory attitude best summed up as follows: "[T]hat is property to which the following label can be attached: To the world: Keep off unless you have my permission, which I may grant or withhold."⁸¹

In practice, Blacks as a class received less protection for artistic musical works due to (1) inequalities of bargaining power⁸² (2) the clash between the structural elements of copyright law and the oral predicate of Black culture, and (3) broad and pervasive social discrimination which both

77. In the view of some property theorists, the essence of property is the expectation of legal protection. See RALPH BOYER, et. al., *THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY* 1, 2 (1991) (noting that according to Jeremy Bentham, "property is a legally protected 'expectation . . . of being able to draw such or such an advantage from the thing' in question, 'according to the nature of the case.'").

78. See, e.g., *Durham Indus. Inc. v. Tomy Corp.*, 630 F.2d 905, 908 (2d Cir. 1980) ("Before asking a court to consider the question of infringement, a party must demonstrate the existence and the validity of its copyright, for in the absence of copyright . . . protection, even original creations . . . may be freely copied.").

79. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1282 (1991), commenting that "[n]o woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live . . . [e]quality was not mentioned in the Constitution or the Bill of Rights." *Id.*

80. Here, it must be noted that if *only* authors/creators of original works could own copyrights, and Black artists had been able, and indeed permitted to secure copyright protection, there would not have been the extensive history of appropriation explored in this article.

81. Felix S. Cohen, *Dialogue on Private Property*, 9 *RUTGERS L. REV.* 357, 374, (1954).

82. For example, many innovative blues artists, such as Robert Johnson, did not register for copyright, and were customarily paid up front for performances, not in royalties. See Jennifer L. Hall, *Blues and the Public Domain - No More Dues to Pay?*, 42 *J. COPR. SOC'Y.* 215, 224 (1994). In contrast, white band leader Benny Goodman's contract with RCA Records stipulated that Goodman would receive royalties on record sales. GROVER SALES, *JAZZ: AMERICA'S CLASSICAL* 58 (1984).

devalued Black contributions to the arts and created greater vulnerability to exploitation and appropriation of creative works.⁸³ This phenomenon of cultural appropriation experienced by Black artists compares to the history of legal subordination experienced by African-Americans under property law principles.

Legal devices such as restrictive covenants at one time excluded certain "out" groups from access to property.⁸⁴ Blacks, historically, constituted the quintessential "out" group in American society.⁸⁵ Social status and copyright law replicated inequality, and deprived the African-American community of untold millions in royalties and other revenues.⁸⁶

Music scholars have noted that Black artists, as a class of performers, routinely found their works appropriated and

83. The copyright system in this instance cannot be separated from the music recording and publishing industry, which perpetuated particular inequalities for Black artists as a group. See, e.g., Sales, *supra* note 82, at 35 (noting that "[a]lthough a form of black music, ragtime was first published in 1897 by the white composer W.H. Krell because it was unthinkable in those times, and in the decades to follow, for a black artist to slash his way unaided through the jungle of greed, avarice and double-dealing that infested the music publishing world of Tin Pan Alley.").

84. Racially restrictive covenants in real estate sales were enforceable until the later 1940s. See e.g. *Shelley v. Kramer*, 334 U.S. 122 (1948) (striking down state enforcement of racially restrictive covenants in real property titles). For a description of racial discrimination in real estate transactions, see Phyllis Craig-Taylor, *To Be Free: Liberty, Citizenship, Property and Race* 14 HARV. BLACKLTR. L.J. 45, 59 (1998), noting that restrictions on African-Americans in the post-reconstruction period severely limited their ability to own productive property and "were enforced by a complex web of racist doctrine, local legislation, and property covenants."

85. Justice Stone, in his famous footnote four, coined the term of "discrete and insular minorities" to describe such "out" groups in our society. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938).

86. The amount of revenue lost due to creative appropriation and cultural devaluation cannot be quantified, but it is not unreasonable to presume it is a staggering sum. See Paul Robeson, *The Negro Artist Looks Ahead*, in HERBERT APTHEKER, *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES* 85-86 (1993). Robeson, an outstanding Black scholar, athlete, and performer, argued that "[o]ur great creation, modern popular music, whether it be in theater, film, radio, records . . . is almost completely based on the Negro idiom. . . . billions, literally billions of dollars are being earned from [the cultural production of Black artists], and the Negro people have received almost nothing."

exploited by publishers and managers.⁸⁷ The publishers typically (although hardly always)⁸⁸ were white.⁸⁹ As a result, Black artists as a class were denied the economic benefits of the copyright system. The prolific exploitation of Black artists casts doubt on the value and neutrality of legally sanctioned economic incentives. The copyright system did not protect Black artists as class from disproportionate economic and cultural exploitation and appropriation of the fruits of their works.⁹⁰ Yet Black artists, even as slaves, continued to produce original works. This suggests that people from non-western cultures would create original works even without financial incentives.⁹¹ For example, Black American slaves created an impressive body of musical and artistic work, which like their physical labor, went uncompensated.⁹²

Part of the pattern of cultural appropriation included the predisposition of the dominant culture to stereotype and demean minority cultures.⁹³ The copyright system does not

87. See THOMAS J. HENNESSEY, *FROM JAZZ TO SWING: AFRICAN-AMERICAN JAZZ MUSICIANS AND THEIR MUSIC* 149 (1994) (noting that black musicians were disturbed because "managers deprived them of their freedom of movement, legal rights to intellectual property, and pay guaranteed by contract. . . . Musicians were most victimized, perhaps, when promoters and [band] leaders systematically deprived them of royalties from their own compositions.").

88. For example, it is suspected that the prolific jazz composer Duke Ellington may have claimed as his own compositions of band members. *Id.* at 150-51.

89. See, e.g., SIDRAN, *BLACK TALK*. Sidran noted that "the first large financial gains [by blues musicians] were made by white musicians playing black music to essentially white audiences [many of whom] got their musical education in the 'second line' of the black marching bands and admittedly tried to play as much like the black originators as possible." *Id.*

90. A sad and not uncommon example of this dynamic was pianist and composer Jelly Roll Morton, one of the all-time geniuses of the blues. Morton was invited to the Library of Congress in 1938 to record an oral history of the blues. HENNESSEY, *supra* note 87, at 151. Morton "began by outlining his plans to sue [the record company] MCA and ASCAP for copyright infringement Morton's publishers . . . had systematically deprived him of all his royalties Morton was heartbroken at [his death in 1940] because the royalties were tied up. *Id.*

91. See FRANCIS BEBEY, *AFRICAN MUSIC: A PEOPLE'S ART* 33 (1975).

92. If trends in the most recent music, rap, are illustrative, it would appear on the surface at least, that there is an insistence, if not an obsession with "getting paid in full." See Eric B. & Rakim, *PAID IN FULL* (Atlantic, 1986).

93. See Kimberlee Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV.

exist in a vacuum, but in a concrete social milieu. The cultural or economic impact of the copyright regime on minority groups requires examination from a historical and social perspective. In a concrete social, cultural, and historical context, the degree of protection accorded to intellectual property in American society, as with tangible property, frequently depended on the racial (as well as gender and class) status of the individual. Disparate treatment occurred despite the ostensible race neutrality of the copyright regime.⁹⁴ Superficially, the copyright system sits outside of social factors of discrimination.⁹⁵ But the legal structure itself, as a "sub-culture" of society, incorporates values of the dominant Anglo-American culture.⁹⁶ These values include individualism and formalism.

1331, 1380 (1988) ("White race consciousness, which includes the modern belief in cultural inferiority, acts to further Black subordination by justifying all the forms of unofficial racial discrimination, injury and neglect that flourish in a society that is only formally dedicated to equality.").

A similar dynamic of exclusion has also affected women as a class. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32-44 (1987) ("I agree that [women] create culture. . . . I also know that [women] have not only been excluded from making what has been considered art; our artifacts have been excluded from setting the standards by which art is art. Women have a history all right, but it is a history both of what was and what was not allowed to be.").

It has been noted in this context, that societal bias against women has resulted in the devaluation of women "in the almost exclusively male world of hip-hop . . . [w]omen's lyrics are often still viewed by men and women themselves as not valid— or simply 'wack'." Danyel Smith, *Ain't a Damn Thing Changed: Why Women Rappers Don't Sell*, 125, in SEXTON, *RAP ON RAP* (1995).

94. Simply put, this would comprise a classic case of economic discrimination. "Economic discrimination is defined to occur when equivalent factors of production receive different payments for equal contributions to output." WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* (4th ed.1989).

95. For some, the fact that societal, as opposed to "purposeful," discrimination is at fault renders legal intervention unwarranted. See *Washington v. Davis*, 426 U.S. 229 (1976). However, we might just as well assert that the requirement of purposeful discrimination "overlooks the fact that minorities can also be injured when the government is 'only' indifferent to their suffering or 'merely' blind to how prior official discrimination contributed to it and how current official acts will perpetuate it." See LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1518-19 (2d ed. 1988).

96. See, e.g., Gregory A. Mark and Christopher L. Eisgruber, *Introduction: Law and Political Culture*, 55 U. CHI. L. REV. 413 (1988) (The authors note that

In contrast to Anglo-American culture, Black culture has traditionally been transmitted orally and communally, and has stressed group endeavors above individual achievement.⁹⁷ These cultural facets have disadvantaged the Black minority in a dominant culture which stresses written communication and individualism.

The collision of disparate cultures creates cross-cultural dissonance. Cultures that operate from communal and informal bases (such as the African culture) clash with the individualistic, formalistic culture inherited from Europe.⁹⁸ It has been noted, for example, that "folk culture . . . is a social culture; it is produced in societies where social experience is more important than private experience, and is typically produced and reproduced communally."⁹⁹ For ill or good, liberal individualism is an essential component of Anglo-American culture.¹⁰⁰ The Founding Fathers assumed that

"the interpretive study of political culture attempts to understand how the interpretation of the legal system must be located within a legal culture (a culture which may legitimate the actions of actors within it and even create icons for the society generally). . . the legal culture is in turn located within a political culture that gives meaning to and draws meaning from the legal culture.").

97. See BEBEY, *supra* note 91.

98. A similar cross-cultural clash exists in legal academia. Minority scholars who have claimed the existence of a unique voice and used non-traditional modes of legal analysis, such as storytelling, have met considerable resistance. I myself have encountered resistance about this article from skeptical academics who have questioned whether there is any meaningful relationship between racial subordination and copyright law, or whether Black artists have experienced disparate treatment. It is hoped that this article will "make explicit the need for fundamental change in the ways we think and construct knowledge . . . Exposing how minority cultural viewpoints differ from white cultural viewpoints requires a delineation of the complex set of social interactions through which minority consciousness has developed." Robin D. Barnes, *Race Consciousness: The Thematic Content Of Racial Distinctiveness In Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990).

99. FISKE, *supra* note 72.

100. There have been two general criticisms of liberal individualism, "first, for its conception of human beings as asocial, egoistic individuals whose fundamental motivation in acting is the satisfaction of their own interests [and] second, for countenancing and justifying extreme inequalities in economic and social life by protecting the right to unlimited accumulation of private property regardless of its social consequences." ROBERT GOULD, *RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMICS, AND SOCIETY* (1988).

individual, rather than group, creation is normative.¹⁰¹ Accordingly, the intellectual property rights they endorsed represent the belief that economic rewards to individuals best serve the common good. These underlying assumptions of copyright law conflict with the concept of group or communal creation which characterize other cultures.¹⁰² In such cultures, aesthetic and spiritual rewards, rather than economic rewards, may be a primary motivator for creating art.¹⁰³

III

African-American Artists & Intellectual Property

A. Background

The contribution of African-Americans to the cultural landscape of art, literature, and especially music is indisputable. No ethnic or racial group has contributed more, or been more influential, in the area of music.¹⁰⁴ A wealth of distinctly North "American" art and culture bears the stamp of the Black experience in America.¹⁰⁵ Black Americans retained

101. See FARLEY, *supra* note 68, at 29 (noting that "copyright law is premised on individual rights, and recognizes group rights only in limited situations.").

102. See *id.*

103. For a contrast of Western values to artists in African cultures, see, BEBEY, *supra* note 91, at 33, (remarking that the African musician does not reserve his extraordinary talents for his immediate circle, but shares them with anyone who is willing to listen. . . . Many Europeans are amazed to see first rate African musicians agreeing to record for radio without payment. . . . In the 1950's many records of traditional and more modern African music were made under such circumstances with the artists sometimes being rewarded with no more than a bottle of locally brewed beer.").

104. In music, for example, it has been noted that Louis Armstrong's genius transformed not only jazz, but all American music: "[j]azz was not the only music changed by the advent of Armstrong. All American music—serious and popular—has been affected by him through and through." DAN MORGENSTERN, *JAZZ PEOPLE* 81 (1976).

105. This is particularly true of music, and probably just as true of art and literature. Jazz music "evolved in part from spirituals song by slaves [and] is the only truly American musical form. It was created by blacks for blacks." See FRANK BERGEROT, *THE STORY OF JAZZ: BOP AND BEYOND* 13 (1991). It has similarly been noted that "the music of Black America, beginning with ragtime at the turn of the century, sent successive shock waves throughout the white mass culture . . . [which] left lasting marks on our social landscape." SALES, *supra* note 82, at 4.

many uniquely African cultural traditions in the forced immigration from Africa to America.¹⁰⁶ However, much of the collective Black experience in America has been influenced by discriminatory politics and economics in the United States. Without the ideology of racial segregation in American history, no need would have existed for a distinct "Black" culture. Racial segregation required cultural adaptations and responses for survival that account for much of the distinctiveness of African-American culture, and hence art.¹⁰⁷ African-American leaders like W.E.B. Dubois believed that the price of desegregation would be the demise of "American Negro Culture."¹⁰⁸

Many cultural works have reflected the centrality of race relations to American history, and the phenomena of cultural and racial segregation.¹⁰⁹ For example, the film which "altered the entire course of American movie making", D.W. Griffith's *The Birth of a Nation* (1915), was also widely "denounced as the most slanderous anti-Negro movie ever released."¹¹⁰ The

106. See Gene Lees, *Jazz Lives: 100 IN JAZZ, Foreword* (1992), noting that "African culture was primarily oral, and the very deprivation of formal literate education for blacks has had the effect of keeping a form of it alive well into our own time . . . [a]n oral culture is inherently different from a literate one, since speech is a spontaneous and improvisational act."

107. See LEROY JONES, *BLUES PEOPLE*, 66-67 (1968): "Early blues developed because of the Negro's peculiar position in America . . . and was perhaps the most impressive expression of the Negro's individuality within the superstructure of American society."

108. BOXHILL, *BLACKS & SOCIAL JUSTICE* 184 (rev. ed. 1984).

109. Perhaps it is not then surprising that the recent leading cases on parody and obscenity in music involve the Black rap group 2 Live Crew. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (upholding as fair use 2 Live Crew's unauthorized parody of the Roy Orbison composition "Pretty Woman"); *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990) (declaring 2 Live Crew's best-selling rap album "As Nasty as They Wanna' Be" to be legally obscene).

110. DONALD BOGLE, *TOMS, COONS, MULATTOES, MAMMIES AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS* 10 (1989). The film depicts the idyllic "Old South, the Civil War, the Reconstruction period and the emergence of the Ku Klux Klan." *Id.* Bogle notes that the film, memorialized the enduring stereotype of the "black bucks . . . big, baadddd niggers, oversexed and savage, violent and frenzied as they lust for white flesh . . . Griffith played hard on the beastiality of his black villainous bucks and used it to arouse hatred." *Id.* at 13-14. That the film was advertised relentlessly, suggests a correlation with a large increase in lynching in the South. See *id.* at 15.

courts of the time reflected the prejudices perpetuated by Hollywood—a situation which has persisted even in recent decades.¹¹¹

Even as a people regarded by white society of that era as subhuman “baboons, monkeys [and] mules,”¹¹² slaves and their free ancestors created many original works with great impact on American society.¹¹³ Black slaves in America passed down the African musical tradition,¹¹⁴ incorporating European music styles to create something totally new.¹¹⁵ Music was critical to the continuity of African folk culture, and has been to African-American culture as well. In the African tradition, “music was not only an individual expression accompanying

111. For a narrative analysis of racial divisions and animus toward minorities in the courts see, BRUCE WRIGHT, *BLACK ROBES, WHITE JUSTICE* 24 (1987). Wright, a former New York judge, charged that “[r]acism inside the courts is but a reflection of what goes on in society in general.” *Id.* at 24. For this reason, state law copyright doctrine has never comprised a predictable or coherent body of law, and Black Americans, the majority of whom lived in the South, were excluded from filing civil suits in the courts under the regime of Jim Crow. See Ralph S. Brown & Robert Denicola, *COPYRIGHT: UNFAIR COMPETITION, & OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL & ARTISTIC WORKS* (6th ed. 1995). “Prior to Jan. 1, 1978, the effective date of the 1976 Copyright Act, many works of authorship were protected, if at all, under state rather than federal law.” *Id.*

112. KENNETH M. STAMP, *THE ERA OF RECONSTRUCTION 1865-1877* 169-70 (1965).

113. See, e.g., FISHER, *NEGRO SLAVE SONGS IN THE UNITED STATES* 39 (1990): “It was impossible for white people to remain uninfluenced by the behavior and singing of black folk.” (describing how the exuberance of the slave’s religious services transformed white church behavior).

114. For a description of music created by the Black slaves, see, JULIO FINN, *THE BLUESMAN: THE MUSICAL HERITAGE OF BLACK MEN AND WOMEN IN THE AMERICAS* 170 (1992). Finn notes that “[u]nder slavery, music was the only art form black people were able to practice. . . . For under racism as practiced in America the august role of ‘artist’ was looked upon as something beyond the scope of a person of color. . . . so it was believed that artistic creativity was also the exclusive preserve of the European. . . . Here we have an unparalleled case of a whole people being denied the employment of its creative faculties.” *Id.*

115. See TIMOTHY WHITE, *ROCK LIVES: PROFILES AND INTERVIEWS XVII* (1990), noting that “[i]n New Orleans’ Congo Square, in the early 1800s, slaves were permitted by their masters to congregate on certain days and play their native instruments. . . . [T]hese displaced Ashanti, Yoruban, and Senegalese people combined their own riveting rhythms with new ones that had bombarded them during their difficult passage and in their new surroundings: hymns, sea chanteys, flamenco tempos, and brass quadrilles.”

daily tasks and reflecting experiences . . . [but comprised] the voice of tribal, and even of racial prayer, the molding, in art-form, of communal group sentiment, and the living fluent utterance of the people's inspiration . . ."¹¹⁶

It is undeniable that African-Americans, by way of popular music, have influenced pop culture. African-American innovators historically created the genres which defined popular music in America: blues, jazz, rock and roll,¹¹⁷ soul, and more recently, rap and hip-hop.¹¹⁸ The rap and R & B categories alone, for example, grossed \$700 million for the recording industry.¹¹⁹ These creations pervade American society, from Madison Avenue to Disney World, and generate billions in revenues.¹²⁰ It is undeniable that the "appropriation of rap is readily apparent in pop culture."¹²¹

116. NATALIE CURTIS BURLIN, *SONGS AND TALES FROM THE DARK CONTINENT* (1930).

117. The influence of Black artists on and in rock and roll has been well-documented. See DAVE DIMARTINO, *SINGER-SONGWRITERS* 10 (1994). ("If an entire genre of music can be credited to one man, that genre would be rock and roll, and the man would be Chuck Berry.")

118. See FRANK KOFKY, *BLACK NATIONALISM AND THE REVOLUTION IN MUSIC* (1970).

If we were to compile the names of the ten or twenty-five or fifty most significant jazz artists, those whose ideas move and have the greatest influence on contemporary and subsequent generations, [the] color of such a list would be overwhelmingly black. . . . it is probably safe to state that there have been more black innovators on any two instruments we might choose at random . . . than there have been whites all instruments put together.

119. See S.H. FERNANDO JR., *THE NEW BEATS: EXPLORING THE MUSIC, CULTURE AND ATTITUDES OF HIP-HOP* (1994). Fernando notes that the "pervasive influence of hip-hop extends to television, film, advertising, fashion, the print media and language itself. . . . [w]hile addressing the hopes, dreams and frustrations of America's minorities, rap is the music of a whole generation, breaching the barriers of race and class."

120. The impact of Black culture via music is global in scope. See James Bernard, *A Newcomer Abroad, Rap Speaks Up*, N.Y. TIMES, Aug. 23, 1992, sect. 2. (noting that "[f]rom small clubs in Moscow to the favelas of Rio de Janeiro to MTV in Tokyo, rap has begun to elbow its way onto the world's stage . . . increasingly, rappers in other countries are using [the music of American rappers] to reflect on and grapple with their own local realities, adding their own flavor to an American art form.")

121. Kimberlee Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1299 n.161 (1991). Crenshaw notes that there is "an overall pattern of cultural appropriation

In the era of the Sixties, former "colored" folks proclaimed that "black is beautiful," and literally refused to sit in the back of the bus in American life.¹²² The music then, as in times gone by, recounted Black history in the making, and reflected what it meant to be Black in a white-dominated society. Bessie Smith¹²³ and the great blues singers of the South evoked the rural heritage and urban evolution spurred by massive Black migration northward.¹²⁴

Black American music, such as slave field songs, spirituals, and Blues, reflected the lineage of its African roots, and expressed the oral history of the Black agrarian workers and the newly minted city slickers from Chicago to Memphis.¹²⁵ Jazz masters like Miles Davis and John Coltrane expressed both the energy and anomie of the mass migration of Blacks to the cities. In doing so, these musical innovators created a legacy of genius and greatness rarely attained in any human endeavor.

The transition and transmutation reflected in African-American based music, from blues to jazz to rock and roll, and on to soul through hip-hop, mirrored the complex transformation of the Black American population from country workers to urban denizens. Similarly, when James Brown, in his own words, "invented" soul¹²⁶ and sang "say it loud, I'm

that predates the rap controversy." *Id.*

122. Rosa Parks' courageous act of defiance in 1955 sparked the Montgomery Bus Boycott and the rise of the Civil Rights Movement to new heights. *See e.g.*, Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *YALE L.J.* 999 (1989).

123. In a microcosm of the intense discrimination faced by Blacks in the South of the 1930s, Smith—called without exaggeration "one of the most influential singers in this country's history. . . stirring, troubling, electrifying, the art of Bessie Smith is a national treasure,"—died in a car accident when refused treatment at a nearby "whites only" hospital; the nearest "colored" hospital proved too far away to save Smith's life. *ROLLING STONE ALBUM GUIDE* 648 (1992).

124. *See HENNESSEY, supra* note 87, at 9 (noting that "[b]etween 1890 and 1935, the United States changed from a rural, handmade, homemade culture to an urban, mass-produced culture. Jazz as an art form and entertainment medium was a product of this shift.").

125. For a gripping individual account of the personal changes undergone by rural Blacks resulting from the migration from rural to urban areas, see *THE AUTOBIOGRAPHY OF MALCOLM X* (1963).

126. On the album, *I'm Real*, Brown boasts "Check out Brother Brown—I

Black and I'm proud",¹²⁷ the music of Black Americans mirrored growing pride (and nascent militancy) fired by the Civil Rights movement¹²⁸ and its fiery apostle, Malcolm X.¹²⁹ Black music and culture have always been inextricably intertwined, mirroring the both the centrality of music to Black culture, and of race to American history and society.¹³⁰ However, it has long been believed in the Black community that Black artists have not received economic rewards commensurate with their contributions.¹³¹ History validates the common belief that Black creators have historically

invented soul." JAMES BROWN, *I'M REAL* (BMG/Scotti Bros. 1998). Brown also claims, with some justification, to have invented a number of other distinctive Black musical styles, genres and dances, including go-go, disco, funk, rap and the moon walk: "Down in D.C., they talk about the go-go but I had them kids out in the streets while they were still babies, doing the Popcorn with the original Disco Man. Funk I invented back in the fifties. The rap thing I had down on my Brother Rapp (Part I) . . . Michael Jackson, he used to watch me in the wings and got his moon walk from my camel walk. . . ." WHITE, *supra* note 115, at 69.

127. JAMES BROWN, *Say It Loud - I'm Black & I'm Proud*, on *SAY IT LOUD - I'M BLACK AND I'M PROUD* (PGD/A&M 1969).

128. See BERGEROT, *supra* note 105, at 57 (noting that the "history of free jazz corresponds to the history of the civil rights movement; the rise of demands under Martin Luther King, Jr. and other more radical leaders.").

129. In 1965, addressing the "worldwide revolution going on, Malcolm X noted that the startling militancy of African independence movements had "given pride to the Black man in Latin America, and has given pride to the Black man right here in the United States." BRUCE PERRY, *MALCOLM X: THE LAST SPEECHES* 127-28 (1989). The music of the times also clearly fueled Black pride in America, from Civil Rights anthems such as "We Shall Overcome" to more angry and radical songs such as Sly & the Family Stone's "Don't Call Me Nigger, Whitey."

130. Several of the defining moments, lows, and triumphs of American history—the debate over slavery in the Constitutional Convention, the Civil War, the Civil Rights Movement—have largely centered around race relations. See GEOFFREY R. STONE, *et. al.*, *CONSTITUTIONAL LAW* 435 (1986) (noting that "in one form or another, the controversy about the legal status of blacks has been central to U.S. politics since the founding of the republic."). However, it has been argued in more recent years that race has played a less important role in defining status in U.S. culture and society. See JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 144-154, 154 (1980).

131. This situation has also generated considerable anger among Black artists. See KOFISKY, *supra* 118, noting that:

[t]here can be little question among serious students of music that jazz has inevitably functioned not solely as music, but also as a vehicle for the expression of outraged protest at the specific exploitation to which the jazz musician, as black artists, have been perennially subjected in an art of their own creation.

received unequal copyright protection for their art. The copyright regime, although facially race-neutral, exists in the same society that produced a deep-seated legacy of separation and racial inequality.¹³² As a result, "cultural trailblazers like Little Richard and James Brown have been squeezed out of their place in popular consciousness to make room for Elvis Presley, Mick Jagger, and others."¹³³

B. A History of Appropriation

Until recent decades, African-Americans, as a class, have been victimized by systematic takings of their property.¹³⁴ It

132. Issues of discrimination and exclusion persist in recent times for minorities in the arts. Despite the liberal image of the entertainment industry, minority artists and professionals face significant obstacles. See Lois L. Krieger, Note, "Miss Saigon" and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for Cultural Identity in the Theater, 43 SYRACUSE L. REV. 839, 844 (1992) (remarking that "an Equity survey conducted over the course of four years revealed that over ninety percent of all plays produced professionally during the mid-1980's had all white casts. . . . This is a problem that affects more than just the theater: dancers, painters and other artists complain of an exclusive art world in which 'artists of color have been relegated to a marginal status.'").

133. Crenshaw, *supra* note 121, at 1288 n.161.

134. The issue of victimization has recently become a hot button in the discourse on race, power politics and discrimination in American society. Shelby Steele, a commentator on the Black experience in America, has argued that African-Americans' predisposition to see themselves as victims of racial injustice, and not racial injustice itself, accounts for lack of Black advancement. See SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 149-65 (1990). Steele's argument has proved highly controversial, and has been widely criticized. For a critique of Steele's perspective of racial discrimination, see, e.g. Jody David Armour, *Affirmative Action: Diversity of Opinions: Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173, 1177 n.11 (1977).

It has been noted that the "concept of 'racial discrimination' may be approached from the perspective of either its victim or its perpetrator." Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). Freeman argues that while

[f]rom the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. . . . [t]he perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. . . . From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.

has often seemed particularly ironic to this author that many of our laws are preoccupied with preventing “takings” of property,¹³⁵ while—as noted by Supreme Court Justice Thurgood Marshall—the property rights of Blacks have historically not been respected in the United States.¹³⁶

The treatment of Black artists by the music industry and the copyright system reveals a pervasive history of infringement. For blues artists particularly, it was almost as if their work—some of the most innovative, original and imaginative artistic work ever produced in America—was, to use a legal term of art, “in the public domain”, *i.e.*, freely usable by anyone.¹³⁷ Similarly, there exist clear patterns of economic exploitation and cultural distortion of the work and forms of minority creators.¹³⁸ A strikingly consistent characteristic of cultural appropriation is its one-way direction—white performers obtaining economic and artistic benefits at the expense of minority innovators.¹³⁹ Copyright law

Id. at 1052-54.

135. U.S. CONST. amend. V. The Founders' obsession with takings ironically extended to “takings” of slave property. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 851 (1995) (noting that “Madison recognized that slaveowners were similarly threatened by the majoritarian process and . . . imagined that the clause would protect them . . . [believing] that the Takings Clause established an absolute requirement that the government owed the slaveowner compensation whenever it freed a slave.”).

136. See *University of Calif. Regents v. Bakke*, 438 U.S. 265 (1978). Justice Marshall remarked that “during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro . . . the position of the negro today in America is the tragic but inevitable consequence of centuries of unequal treatment.”

137. See, *e.g.*, MCCARTHY ON TRADEMARKS §1.15[6] (“A thing is in the public domain only if no intellectual property right protects it.”).

138. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1758-59 (1989) (commenting that

the privileging of whites in cultural enterprise is pervasive. . . . '[r]hythm and blues' played a major role in transforming the sensibilities of many young whites, [but] the color bar prevented black musicians from capitalizing fully on the popularity of the genre they had done much to establish; instead white cultural entrepreneurs typically reaped the largest commercial rewards—a pattern still visible today, albeit in less dramatic form.).

139. See ROBERT PALMER, *DEEP BLUES*, 16: (1981) (“The significance of Delta

has provided very little protection from such exploitation. Likewise, free competition has historically provided little relief; it has been noted that market forces did not prevent the under-inclusion of minorities in the marketplace.¹⁴⁰

The persistence of notions of white superiority and ideology of separation resulted in the cultural devaluation of works by minority artists as a class.¹⁴¹ The distortion and devaluation of Black art in the past was illustrated by the minstrel shows, which appropriated Black music and dance for the service of social stereotyping.¹⁴² Similarly, because Black artists were not considered acceptable to mainstream (white) audiences, “covers” of black recordings by white artists become commonplace in the recording industry.¹⁴³ In a racially separatist society, Black artists did not have the same opportunity to be acknowledged as “great.”¹⁴⁴ For example, the

blues is often thought to be synonymous with its worldwide impact. According to this line of reasoning, the music is important because some the worlds most popular musicians—the Rolling Stones, Bob Dylan, Eric Clapton—learned to sing and play by imitating it and still revere the recorded works of the Delta masters.”).

140. “Black musicians . . . were kept off of radio despite their popularity. . . .” Sally Morris, *One More Battle in the Ongoing War over Affirmative Action: Metro Broadcasting, Inc. v. FCC*, 26 NEW ENGL L. REV. 921, 950 n.242 (1992).

141. The idiocy of discrimination in the past did not spare even the greatest geniuses of jazz. The legendary “Birdman,” Charlie Parker was once “admonished [by a club owner in St. Louis] . . . for having taken a drink with a customer, [who asserted] that he didn’t want black musicians to drink from the same glasses his white clientele were using. Parker proceeded to break every glass in sight, explaining he couldn’t be sure they hadn’t all been contaminated. Further violence was only narrowly avoided.” BURTON W. PERETTI, *THE CREATION OF JAZZ: MUSIC, RACE AND CULTURE IN URBAN AMERICA* 199 (1994).

142. See ALLEN WOLL, *BLACK MUSICAL THEATER: FROM COONTOWN TO DREAMGIRLS* 1 (1989). Ironically, Woll notes that the racist minstrel shows may actually have helped to facilitate the desegregation of white theaters for Black performers in later years, when Black minstrel performers came into high demand. See *id.*

143. See SZATMARY, *ROCKIN’ IN TIME: A SOCIAL HISTORY OF ROCK-AND-ROLL* 27 (1995) (noting that to reverse the dominance of independent record labels in rock music, many of which were Black owned, “larger companies signed white artists to copy, or ‘cover’ the songs of African-American artists, sometimes sanitizing the lyrics.”).

144. See Jimmy A. Frazier, *On Moral Rights, Artist-Centered Legislation and the Role of the State in Art Worlds: Notes On Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 326 (1995) (noting that it has been theorized “that the process of becoming a ‘great’ artist is really about being endowed by, prominent

great jazz composer Duke Ellington, a towering figure in American music, was rejected for a Pulitzer Prize in the 1960's "because the board deemed his music insufficiently 'serious;' it regularly awarded the prize to composers working in the European art music idiom descended from Haydn, Mozart, Beethoven, Brahms, Mahler, and Schoenberg."¹⁴⁵

Daphne Harrison, in documenting the history of women blues singers in the 1920s, noted that "the market for black stage talent was lucrative enough to attract exploiters; living and performing conditions [for African-American women blues singers] often bordered on hazardous, [and] black talent and audiences remained under the financial control of white theater owners and booking agencies."¹⁴⁶ In fact, "with typical irony, it was the active search for and use of blues songs by major white entertainers that thrust the blues into the center of the entertainment industry."¹⁴⁷

Given the context of inferiority fostered by the ideology of separation, it is likely that society would not generally value a work by a minority artist as much as the same work by a white artist.¹⁴⁸ As one commentator has alleged, "the indignity of [economic devaluation] is not the sole one to which the black [artist] is exposed. [They] must also watch as less talented and but more palatable white imitators and popularizers reap the financial benefits of black innovations."¹⁴⁹ The Black artist was thus subject to forms of

art worlds, with the reputation of being a great artist. Thus, 'great' works are great not because they speak to timeless human values, but rather because their creators have been endowed, socially, with 'greatness'. Only an elaborate set of cultural myths . . . sustains the belief in the great artist.").

145. Peter Margulies, *Doubting Doubtless, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought*, 51 U. MIAMI L. REV. 1155 (1997).

146. DAPHNE DUVAL HARRISON, *BLACK PEARLS: BLUES QUEENS OF THE 1920'S* (1990).

147. *Id.* at 44.

148. Bo Diddley, one of the pioneer R&B and rock artists, expressed this dynamic, bemoaning that his performances of his own music never sold as well as did the versions by white artists who "covered" his work: "With me, there had to be a copy . . . [t]hey wouldn't buy me, but they would buy a white copy of me. Elvis got me. I don't even like to talk about it." SZATMARY, *supra* 143, at 27.

149. KOFKY, *supra* note 118.

discrimination, exclusion and exploitation at a level rarely experienced by white artists, even where economically disadvantaged.¹⁵⁰

1. *Patterns of Inadequate Protection*

An examination of American popular music reveals patterns of Black musical innovation and communal creation, followed by dominant culture copying or imitation and appropriation, exist.¹⁵¹ In these patterns, the “appearance of whites in a black musical form has historically prefigured the mainstreaming of the form, the growth of the white audience, and the resulting dominance of white performers.”¹⁵²

History indicates that from an early point in the history of the United States, European-American society has frequently claimed minority-originated music as its own creation.¹⁵³ This process was particularly pronounced in the jazz area, where the “transformation of jazz from a primarily local music rooted in black folk traditions to the tightly managed product of a national industry controlled by white businessmen and aimed a predominately white mass market paralleled the changing nature of American society.”¹⁵⁴ It has been noted that “primarily because of its appeal as dance music, [jazz] became so popular among whites, and white bands began playing it in

150. See SALES, *supra* note 82. (pointing out that “[a]lthough born poor, [jazz band leader Benny] Goodman had access to the ‘proper’ training and jobs usually denied the black players who dominate jazz history. . . . [S]ymphony orchestras refused to hire blacks years after professional baseball was integrated.”).

151. See NELSON GEORGE, *THE DEATH OF RHYTHM AND BLUES* 108 (1988) (1995) (“Although the most fanatical students of blues history have been white . . . with the exception of Eric Clapton and maybe Johnny Winter, no white blues guitarist has produced a body of work in any way comparable to that of the black giants. Blacks [innovate] and then move on. Whites document and then recycle. In the history of popular music, these truths are self-evident.”).

152. DAVID SAMUELS, *THE RAP ON RAP: THE BLACK MUSIC THAT ISN'T EITHER*, in ADAM SEXTON, *RAP ON RAP: STRAIGHT-UP TALK ON HIP-HOP CULTURE* 241, 245 (1995).

153. See GEORGE, *supra* note 151, see also Sidran, *supra* note 89 (“Black music . . . came to light only after it was sold over the counter on an international scale through predominantly white imitations.”).

154. HENNESSEY, *supra* note 87, at 11.

such large numbers, that from the 1920's to the 1940's, jazz was seen as white music."¹⁵⁵

The intended model of copyright protection consists of creation of a work by an individual, reduction of the work to tangible form, and compliance with formalities, such as notice and registration prior to 1976; once these prerequisites are met, copyright protection begins. In the case of African-American artists, however, the model has not worked. Rather, we can identify four different patterns that have resulted in inadequate intellectual property protection for Black music artists.

First, we have what one could call the Frankie Lymon pattern. This is a pattern of creation by Black artists, followed by outright appropriation. Frankie Lymon, along with band members Jimmy Merchant and Herman Santiago, co-wrote the 1950's hit, *Why do Fools Fall in Love*. However, the group's manager registered the copyright for the composition under only Lymon's and the manager's name.¹⁵⁶ This pattern was common among Black blues artists in the first half of this century, who were often illiterate, and who were taken advantage of by roving record companies and promoters.

Second, we have what could be called the Little Richard/Chuck Berry Pattern. Under this scenario, we have creative innovation by Black artists, followed by an unconscionable sale or transfer of the copyright, typically to the record company or the artist's manager.¹⁵⁷ Both Richard

155. GEORGE, *supra* note 151. See also, MILES MARK FISHER, NEGRO SLAVE SONGS IN THE UNITED STATES 22, 23 (1990) (Similarly, in the earlier part of this century, white academics developed "the hypothesis that Negro spirituals were copied from white revival songs . . . [and posited that] Blacks were "simply imitators who pathetically cried in their captivity." Fisher notes that in the mindset of the age, it "was fair to say" that the 'stream of Negro music in America starts and finishes with white men."

156. See Don E. Tomlinson, *Everything That Glitters Is Not Gold: Songwriter - Music Publisher Agreements and Disagreements*, 18 HASTINGS COMM/ENT L.J. 85,129 (1995). Despite proof the copyright to the song had been acquired under duress, the Second Circuit rejected Merchant and Santiago's recent copyright claim because the statute of limitations had long run out. See Donald E. Biederman, *Limitations of Claims of Ownership and Claims for Royalties*, 20 HASTINGS COMM/ENT L.J. 1, 5 (1997).

157. For an examination of unconscionable contracts in the music industry,

and Berry, and many Blues, Jazz and R&B artists of the past, sold hit compositions to record companies for absurdly small sums.¹⁵⁸

Third, we find a pattern of creation— and often innovative creation of a whole new style or genre of music by a Black artist— followed by imitation by white performers, who typically reap the real commercial benefit of the innovation. This might be called the Bo Diddley pattern. Bo Diddley authored a number of hit tunes, but found that white performers “covering” his work eliminated his opportunity to become a hit-maker himself.

Fourth, we have a pattern of creation by Black artists, followed by imitation and distortion by white performers. This might be called the Minstrel Show pattern. The distortion either (1) portrays Black culture in negatively stereotypical ways, such as the old Minstrel Shows, or (2) waters down the vitality of Black music to make it more palatable for white audiences, the so-called “cross-over” phenomena.

2. Harm To The Community

It has been posited that the “act of copying seems to harm no one . . . there is no perceptible loss, no shattered lock or broken fencepost, no blood, not even a psychological sensation of trespass”¹⁵⁹ This view fails to recognize the pain of

see Tamera H. Bennett, *Risky Business: Rejecting Adherence to Industry Standards in Exclusive Songwriter Agreements*, 4 TEX. WESLEYAN L. REV. 71 (1997) (noting that copyright law has failed to “protect creative persons from unconscionable contractual terms that have had a long history and tradition in the music industry.”); see also, Hal I. Gilenson, *Badlands: Artist-Personal Manager Conflicts of Interest in the Music Industry*, 9 CARDOZO ARTS & ENT. L.J. 501 (1991) (arguing that the rife existence of conflicts of interests promote “unethical and abusive business practices which often result in the exploitation and predation of recording and other music artists.”).

158. This dynamic is arguably more rooted in contract bargaining inequality than in copyright structure— clearly these situations present the problem of “harsh . . . terms which the party would not have agreed to except for his weak bargaining position” common to the music industry. See Tomlinson, *supra* note 156, at 93 (1995). (contract issues of adhesion and unconscionability, while fascinating, are beyond the scope of this article).

159. Gordon, *supra* note 23, at 1346.

artists who, having created an original work find their works appropriated without compensation.¹⁶⁰

The appropriation of Black music without compensation feeds into the often-intense experience of anger that is part of the collective Black experience in America.¹⁶¹ No one can be happy about being or feeling victimized, and no one likes to have anything personal taken from them. As one commentator has noted:

[m]ost people possess certain items they feel are almost part of themselves . . . [such] objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world . . . an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement.¹⁶²

Clearly, songs, poems, lyrics, art, and music are such objects, born of intensely personal experiences.¹⁶³ This "property" looks and feels more connected to personhood than "tangible" forms of property, such as land, buildings or business property. Misappropriation of intellectual property, such as music and art, hurt at a very spiritual level.¹⁶⁴ Inadequate copyright protection has increased the economic inequality in our society. Blacks, deprived by legal and social

160. See Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490 (1979) ("An author . . . desires legal protection not only for his work's economic value, but for the value of his artistic reputation expressed within his work. . . . Failure to associate the author's name with his work denies him recognition of his achievement Alteration of an author's work both misrepresents the author's efforts and mischaracterize the personality that informs the work." *Id.* at 1490-91).

161. Sidran quoted an anonymous Black artist on the subject of the appropriation of Black music: "You see, as soon as we have a music, the white man comes and imitates it. We've had jazz now for fifty years, and in all those fifty years, there's not been a single white man, perhaps leaving aside Bix [Beiderbeck] who has an idea. Only the colored men have ideas. But if you see who's got famous, they're all white." Sidran, *supra* note 89, at 57.

162. Radin, *supra* note 16, at 959.

163. See Kwall, *supra* note 29, at 2 (copyright law protects works that are the product of the creator's mind, heart, and soul, a degree of protection in addition to that which guarantees financial returns is warranted.).

164. Many Black musical forms reflect intensely personal, and often spiritual experiences. See PAUL C. HARRISON, *BLACK LIGHT: THE AFRICAN-AMERICAN HERO* 91 (1993) (noting that "[a]t the core of African-American music, in all its various modes of expression—Gospel, Blues, Pop, Jazz—is an everpresent sense of spirituality which cannot be repressed.).

segregation and discrimination of access to capital, property, and the best jobs, could least afford to miss the opportunity of residual income offered by copyrights.¹⁶⁵ Yet history indicates that the Black community has not reaped the benefits of its phenomenal creativity. Clearly, one can find examples of outright fraud. Greed also played its part.¹⁶⁶

C. The Relationship Between Appropriation of African-American Music and American Copyright Law.

When we think of private property, we think of three characteristics: the right to exclude others, title (ownership), and the right to collect income or rent off the property.¹⁶⁷ In each of the patterns of appropriation of Black cultural production, we see Black artists deprived of some combination, if not all three, of the private property characteristics of creative works.

The American copyright system, unlike other areas of property law, identifies an "author" as the source and owner of certain rights, without ever locating authors in any social context.¹⁶⁸ Obviously, not all minority artists experience discrimination in the protection of artistic property. However, minority artists have almost certainly borne a heavier burden

165. See, e.g., Note, *The Perpetuation of Discrimination in Public Contracting: A Justification for State and Local Minority Business Set-Asides After Wygant*, 101 HARV. L. REV. 1797, 1807 n.62 (1988) (noting that "minority businesses face unique barriers because of racial discrimination . . . such discrimination exacerbates the economic disadvantage of blacks because they have limited personal wealth. . .").

166. It has been noted that "the question of copyright has always been joined with that of commercial value" and that by providing economic incentives to authors "our Constitution relies on wrangling greed to promote the advancement of both creativity and profit." Jane Ginsberg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1866 (1990). In the case of many Black artists in music, this theorem has been turned on its head— wrangling greed denied artists of compensation and profit.

167. For a detailed analysis of the characteristics of property, see Heller, *supra* note 36, at 663 n.187 citing Honore's list of Eleven Property incidents.

168. See Gregory Albright, *Digital Sound Sampling and the Copyright Act of 1976: Are Isolated Sounds Protected?*, 75 COPYRIGHT L. SYMP. (ASCAP) 38, (1992) (noting that "copyright in a work of authorship vests initially in the person or persons who authored the work . . . only authors or those who claim through them can be owners of the copyright in a work of authorship").

of exploitation. Although it cannot be said that the copyright system was intentionally designed to disadvantage Blacks, it has nonetheless operated in such a fashion.

The factors which disadvantaged African-Americans as a group from acquiring traditional forms of wealth and property also imposed disadvantages in the intellectual property system.¹⁶⁹ It has been noted that:

intellectual property law can ameliorate but not eliminate underlying disparities in bargaining power [and accordingly] economic need might induce an impecunious author or inventor to part with control over her work, and even give up liberty to use it, perhaps in return for fairly small rewards. Thus, although intellectual property improves the creative person's position, it can guarantee neither adequacy of compensation nor continuation of control.¹⁷⁰

In the abstract, this observation seems sensible enough, but in the concrete, it fails to account for invidious, systematic discrimination which consistently forced a class of artists to part with their creative works "for fairly small" or no economic rewards.¹⁷¹ The impact on artists personally of the appropriation of their works was often devastating and tragic.¹⁷² Rock pioneer Little Richard sold his publishing rights to the record company for fifty dollars, "and part of that deal seems to have included the addition of a mystery name . . . to the songwriting credits."¹⁷³ One might draw a parallel between Blacks in the share crop system to Black artists in the recording industry. The share crop system divested economic

169. If this is the case, it would not be unprecedented to explore some remedy for past discrimination, as Congress did in passing employment discrimination legislation. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (noting that the primary purpose of Title VII of the Civil Rights Act was "to insure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.").

170. Gordon, *supra* note 23, at 1345 n.8.

171. See *id.*

172. King Oliver, the great New Orleans jazz pioneer and foundation artist "ran a fruit stand before being reduced to working as a poolroom attendant[.]" where he died in 1938. DAN MORGENSTERN, *JAZZ PEOPLE* 35 (1976).

173. JIM DAWSON & STEVE PROPES, *WHAT WAS THE FIRST ROCK AND ROLL RECORD?* 189 (1992). Apparently, the mystery credit for *Tutti Frutti*, which Richard composed exclusively, was a dummy company for Richard's manager. See *id.*

compensation from Black farmers who did not own capital resources (such as equipment, seeds, etc.), or maintain the financial records detailing who owed how much.¹⁷⁴ Furthermore, many Black farmers were illiterate or semi-literate, reflecting a legacy of segregated and substandard educational facilities. The result was pervasive exploitation of agrarian Blacks, despite the theoretical race-neutrality of the share-crop system.¹⁷⁵

Similarly, agents of the recording industry appropriated intellectual property from these same agrarian Blacks who created the music which came to be known as the blues.¹⁷⁶ Again, as in the share-crop system, white businessmen controlled the capital resources (such as record studios and publishing houses), as well as access to the expertise needed to secure legal protection.¹⁷⁷ In the employment area, Blacks had been subject to rampant exploitation; the situation seems identical in the artistic area, in spite of, and to a degree perhaps because of, copyright law.¹⁷⁸ Particularly in a multi-billion industry, such as the recording industry, it seems difficult to reconcile the fact that while Black-created music is omnipresent, the flow of dollars has only occasionally created Black millionaires.

174. See LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 387-449 (1979). Litwack concluded that "the former slave found all too little had changed [from subjugation under slavery to the sharecrop system] . . . [b]y resorting to a sharecropping arrangement [the former slaves] had hoped to achieve a significant degree of autonomy; instead, [they] found [themselves] plunged ever deeper into dependency and debt." *Id.* at 448.

175. See *id.* at 448-449.

176. See PALMER, *supra* note 139, at 17. "Blues in the Delta . . . was created not just by black people but by the poorest, most marginal black people. Most of the women and men who sang and played it could neither read nor write. They owned almost nothing and lived in virtual serfdom." *Id.*

177. The exploitation of minority artists in the music industry has led some to compare the situation to colonialism. See Kofsky, *supra* note 118, at 12. "With very minor exceptions, it is whites who own the major economic institutions of the jazz world—the booking agencies, recording companies, nightclubs, festivals, magazines, radio stations, etc. Blacks own nothing but their own talent." *Id.*

178. It is said that "[t]he ambition of most every bluesman was to get on to records. It was common in the 1920's for field scouts to move through major cities of the deep South seeking more grist for the lucrative 'race records' mill." WHITE, *supra* note 115, at 6.

The fact that minority artists received less protection—or in many cases no protection—for their compositions undermines the incentive theory of intellectual property laws. Many Black artists received little no economic reward for their creations.¹⁷⁹ Others certainly received less than what they should have.¹⁸⁰ Something beyond the Western notion of incentive must have motivated these blues and jazz artists of Black ancestry to continue to create.¹⁸¹

Perhaps the most taxing structural element of the copyright regime vis-a-vis Black artists has been the requirement of reducing works to a tangible form.¹⁸² The copyright law will not protect works which are not “fixed” in some tangible form. In practice, this means that the work must be reduced to writing. Black culture, however, historically reproduces itself out of an oral predicate.¹⁸³ Furthermore, as a result of educational deprivation, many Black artists of the past could not functionally read or write. The reduction to tangible form or embodiment tenet clearly values written expressions, which will be deemed “tangible” over non-written, i.e. oral expressions, and non-tangible

179. Professor Longhair (born Henry Roeland Byrd) wrote the anthem of the annual New Orleans Mardi Gras celebration “but he did not own it, and he never received a dime for the single in either writer’s or artist’s royalties.” WHITE, *supra* note 115, at 14-16.

180. See LEONARD FEATHER, FROM SATCHMO TO MILES 15-16 (1972) commenting that:

Louis Armstrong’s situation was common to black artists during the Prohibition years. He was being manipulated by the rival gangs that controlled many of the speakeasies where musicians worked. Although his records would become classics, his musical genius was, at the time, secondary to his role as a pawn in a sinister game he scarcely understood.

181. See Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 310 (1978) (noting that “the purpose of helping certain groups . . . perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries . . . are thought to have suffered.”).

182. See, e.g., Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1405 (1997) (noting that improvisational performers, including Jazz artists, “have been needlessly marginalized by Federal Copyright Law for far too long.”).

183. See SIDRAN, *supra* note 89.

improvisation.¹⁸⁴ The structure of the copyright regime itself, which requires fixation of works of authorship in a "tangible medium" could be said to impose disadvantages on Black artists as a class, who were raised in an oral tradition dating back to Africa.¹⁸⁵ It has been noted that "[t]he structure of preliterate society renders conventional intellectual property protection ineffective. Typically, such cultures lack both written records and formal government. As a result, western-style patent and copyright laws, which require elaborate documentation and bureaucratic enforcement, are not feasible".¹⁸⁶

Two prominent examples are jazz music and African-influenced dancing. As one commentator pointed out:

[t]he Black approach to rhythm, being a function of the greater oral approach to time, is more difficult to define in writing. *Capturing the rhythms of African or modern Afro-American music with Western notation is a lot like trying to capture the sea with a fishnet . . . the complexity of this rhythmic approach is in large part due to the value placed on spontaneity and the inherently communal nature of oral improvisation.*¹⁸⁷

Other music scholars have similarly noted the incompatibility of jazz music with a system of written notation.¹⁸⁸

184. See Benjamin Kaplan, *Publication in Copyright Law: the Question of Phonograph Records*, 103 U. PA. L. REV. 469, 473 (1955) (noting that "[c]opyright law, precisely because it has taken shape around the model of a book communicated to the public by multiplication of copies, has experienced difficulty, not to say frustration with cases where communication is by performance or representation").

185. One of the few articles that makes this point, noting that the "legal protection for [jazz] improvisations is, in many cases, limited or non-existent" is Stanley Turk, *Copyrights and Jazz Improvisation: Creativity Unprotected*, 1 U. BALT. INTELL. PROP. L.J. 66 (1992). Since, as Turk accurately notes, "[i]mprovisation is the heart and soul of jazz," there appears to be a fundamental contradiction between the aims of the music and a system "which limits the public performance rights" of improvisational forms of production. *Id.* at 75.

186. Mark Suchman, *Invention & Ritual: Notes on the Interrelation of Magic & Intellectual Property in Preliterate Societies*, 89 COLUM. L. REV. 1264, 1272 (1989).

187. SIDRAN, *supra* note 89, at 7 (emphasis added).

188. See, e.g., GENE LESS, *MEET AT JIM AND ANDY'S: JAZZ MUSICIANS AND THEIR WORLD* 35 (1983). "For jazz finds its last and supreme glory in the skill for improvisation exhibited by the performers . . . [a] good jazz band should never play, and actually never does play, the same piece twice in the same manner." *Id.*

Prior to 1976, it was necessary for musical compositions to be in written form to obtain copyright registration.¹⁸⁹ Hennessey notes that the “improvisation and tonal variations that were at the core of jazz performances could not be captured on sheet music, the main form of music distribution before 1914.”¹⁹⁰ It has been noted that “[e]ven today . . . music notation is the only way to actually copy a musical composition. A phonorecord merely captures a particular performance by musicians, whose interpretation and technique cause the performance to exist independently from the composition.”¹⁹¹ However, “a singer’s performance is not copyrightable under the federal law.”¹⁹²

In contrast to patent law, the copyright law has an extremely low threshold of originality. This threshold arguably preserves First Amendment values of free expression, but clearly promotes imitation which does rise to the level of actual plagiarism, or copying.¹⁹³ In practice, therefore, Black innovators in music have been powerless to prevent white imitators from capitalizing on their ground-breaking efforts, and, in a racially polarized society, reaping the profits of Black innovation and creativity.¹⁹⁴ The copyright regime’s standard of

189. See BOORSTYN ON COPYRIGHT §2.07 (1993). In contrast, the 1976 Act “protects all musical compositions from the time of their fixation in any form, whether published or unpublished, registered or unregistered.” *Id.*

190. HENNESSEY, *supra* note 87, at 32-33.

191. Mark A. Bailey, *Phonorecords and Forfeiture of Common-Law Copyright in Music*, 71 WASH. L. REV. 151, 158 (1996). The author also points out that “[w]hen Congress first extended the Copyright Act to protect musical compositions, sheet music was the only way such works were copied and registered.” *Id.* at 157.

192. Melissa M. Davis, Note, *Voicing Concern: An Overview of the Current Law Protecting Singers’ Voices*, 40 SYRACUSE L. REV. 1255, 1265-66 (1989). The author noted that “[a]lthough the law prohibits unauthorized copying of songs and musical compositions, actual performances can be freely imitated Vocal improvisations and actual performances of a song are not ‘fixed’ within the meaning of the [Copyright Act], and therefore are denied copyright protection.” *Id.*

193. For example, in the area of sound recordings, “a recording artist who intentionally creates a sound recording which imitates, simulates or impersonates a copyrighted sound recording does not violate the right of reproduction as long as the recording does not recapture the actual sounds of the protected recording by mechanical means.” Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 TEX. INTELL. PROP. L.J. 333, 337 (1997).

194. This dynamic has been particularly pronounced in the area of country

minimal originality for authorship, while prohibiting outright copying, encouraged imitation.¹⁹⁵ Certainly, a strong current favoring imitation animates American jurisprudence.¹⁹⁶ There is an inherent tension between compensating originators and promoting creativity by permitting borrowing.¹⁹⁷ Imitation may be the sincerest form of flattery, but in a society where separation is the norm, the direction of who profits from imitation has been decidedly one-way in its direction.¹⁹⁸ Our

music. Virtually all the top-grossing country music stars acknowledge their debt to Black music sources, and as the New York Times noted, virtually no Black artists are promoted in the country music world. See Mantho Bayles, *It's Not Sexist, It's Only Rock and Roll*, N.Y. TIMES, Sept. 28, 1996, sec. 1 at 23.

195. The phenomena of imitation, arguably fostered by the copyright regime's tolerance of imitation, cuts across racial lines. For instance, it has been posited that ["blues] artists have all copied from the style of past masters It's hard to make an easy judgment as to whether an arrangement of such music is indeed new and original enough to claim copyright," Hall, *supra* note 82, at 221.

196. See *American Safety Table Co. Inc. v. Schreiber*, 269 F.2d 255, 272 (2d Cir. 1959) (pronouncing the "imitation is the life blood of competition [T]he unimpeded availability of substantially equivalent units that permits the normal operation of supply and demand to yield a fair price society must pay for a given commodity."); see also, *In Re Morton-Norwich Products, Inc.*, 671 F.2d 1332 (2d Cir. 1982) (positing that "there exists a fundamental right to compete through imitation of a competitor's product, which can only be temporarily denied by the patent or copyright laws").

197. See, e.g., Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 81 (1991) (noting that "the creation of new works is heavily dependent on the ability of new authors to borrow from already existing materials"). Ironically, the issue of "borrowing" in music did not become a hot topic until inner-city youth began incorporating protected sounds in rap music "samples". See, Note, Sherry Carl Hempel, 1992 U. ILL. L. REV. 559, 589, noting that although "digital sampling pervades all of rock music, much the attention and controversy is focused on rap musicians . . . rap was created by young blacks from the inner city . . . [t]here is some evidence that racial and socio-economic biases could be the reason for all the attention." See also, Note, Matthew M. Passmoore, *A Brief Return to the Digital Sampling Debate*, 20 HASTINGS COMM/ENT L.J. 833, 845 (1998), noting that "samples from copyrighted works become the raw artistic material of many rap artists in their critique of a majority culture that often excludes them."

198. See PETER ROSS, *NO RESPECT: INTELLECTUALS AND POPULAR CULTURE* 67-68 (1989). [Q]uestions about imitation, and (the romanticizing of) authenticity, while they relate primarily to African-American vernacular traditions, are also part and parcel of the long transactional history of white responses to black culture, of black counter-responses, and of further countless and often traceless negotiations, tradings, raids, and compromises [which signify] a racist history of exploitation exclusively weighted to dominant white interests. Given such a history, it is no wonder that terms like "imitation" are often read directly

society has arguably become less racially stratified in recent decades, yet the pattern seems present today; one of the top-selling rap songs of all time is Ice, Ice Baby, by white rapper Vanilla Ice.¹⁹⁹ Similarly, The Beastie Boys, a white group, were the first rap group to top the Billboard album charts.²⁰⁰ The irony of this is stark when compared to the fact that “[r]ap music is a Black cultural expression that prioritizes black voices from margins of urban America. . . .”²⁰¹ Perhaps even more ironic is that judges in recent times have characterized one of today’s primary Black art forms – rap— as a form of theft.²⁰²

Under the idea-expression doctrine, only specific expressions of an author are protected, not the underlying ideas embodied in the work. Some have argued that the idea-expression doctrine is intellectually bankrupt.²⁰³ The idea-

as “theft” and “appropriation.” See *id.*

199. Vanilla Ice was a white rapper who completely faked his “credentials” as a tough inner city kid; it turned out on investigation that Ice was raised in a posh Texas suburb. See BRUCE HARING, *OFF THE CHARTS: RUTHLESS DAYS & RECKLESS NIGHTS INSIDE THE MUSIC INDUSTRY* 107, 108 (1996). Haring also notes that “Vanilla Ice’s debut album, released on September 10, 1990, was the fastest selling album since Michael Jackson’s *Thriller*. . . . ‘Ice, Ice Baby’ became the first rap single on the Billboard Hot 100 Singles chart.” *Id.*

200. See Jeffrey H. Brown, Note, “*They Don’t Make Music The Way They Used To*”: The Legal Implication of “Sampling” in *Contemporary Music*, 1992 WIS. L. REV. 1941, 1949, n.37 (1992).

201. TRICIA ROSE, *BLACK NOISE: RAP MUSIC & CULTURE IN CONTEMPORARY AMERICA* 2 (1994). The cultural clash becomes even more ironic when culturally obtuse white judges rule in rap cases: the judge in the 2 Live Crew obscenity case held, preposterously, that rap music conventions—call and response, boasting, and “doing the dozens”—were not examples of Black culture. See *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 594 (S.D. Fla. 1990).

202. See *Grand Upright Music Ltd. v. Warner Bros. Records Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991). The district court in that case upheld a copyright infringement claim by Gilbert O’Sullivan for rapper Biz Markie’s sampling of the song *Alone Again, Naturally*. In this, the first sampling case, Judge Duffy cited no other authority than the Bible’s commandment that “Thou shalt not steal.” See *id.* See also, Carl Falstorm, Note, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359 (1994).

203. See John Shepard Wiley, Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 121 (1991) (characterizing the idea-expression dichotomy as “the most notorious problem in copyright law”). In criticizing the doctrinal usefulness of the doctrine, Wiley argues that “the idea/expression doctrine is incoherent and lacks any stated alternative foundation.” *Id.* at 123.

expression doctrine has also penalized the most innovative artists in blues, jazz, and rock, essentially denying protection of their signature styles and denying compensation for the creation of genres. Little Richard's syncopated whooping style of singing, or the ragtime chops of W.C. Handy would be considered a style, essentially a non-protected idea, rather than a protected expression. However, copyright will generally not protect either style or genres, and imitation of style (e.g. Little Richard's style of singing to the Beatles on *She Loves You, Yeah*), is generally not actionable.²⁰⁴ Accordingly, while a jazz composition is protectible under the copyright system, the idea or genre of jazz would not be.²⁰⁵ This doctrine can be said to have a disparate impact on innovators of genres, vis-a-vis imitators that capitalize on a non-protectible "idea." The idea-expression dichotomy of intellectual property precludes monopoly protection of rap or jazz as a genre. Yet, many of the innovators of these genres lived or died in relative obscurity and poverty, while the imitators, typically white and not nearly as creative or innovative musically, reaped a windfall.²⁰⁶

IV

Civil Rights As Intellectual Property Rights

Given the pervasiveness of the economic exploitation of Black artists, and the cultural distortion and devaluation of their works, it could be argued that the lack of legal protection

204. See, Judith B. Prowda, Application of Copyright and Trademark Law in the protection of style in the visual arts, 19 COLUM.-VLA J.L. & ARTS 269, 275-76 (1995).

205. See *id.* at 269, 275-76. Prowda notes that "[s]tyle is one of the most elusive concepts in the history of culture and it is one in which English-speaking art historians have been content to leave ambiguous. . . . far from being a superficial characteristic of art, [style] belongs to the deepest foundations of cognition, or the inner essence of things." Prowda concludes "copyright law is ill-equipped to protect an unestablished artist whose works are not widely recognized." *Id.* at 296. Significantly Prowda recognizes that "[p]rotecting style would give unknown artists the opportunity to reap the benefits of their innovation." *Id.*

206. Revisionist jazz critics such as Ralph Gleason have asserted that "[i]t is possible to speculate that all the white musicians could be eliminated from the history of [jazz] music without significantly altering its development." See Sales, *supra* note 82, at 35.

could comprise another instance where “the state . . . has acted in a lawless fashion towards African-Americans.”²⁰⁷

If our law is genuinely committed to justice²⁰⁸ and fundamental fairness, we cannot separate the effects of segregation and discrimination from Intellectual Property or any legal regime. “The principles of justice are distributive: [j]ustice is concerned not only with increasing the total amount of a good a society enjoys, but also with how that good should be distributed among individuals.”²⁰⁹ In theory, our intellectual property system is committed to fostering fairness and equality through competition.²¹⁰ The pretense of equal protection demands that the law may not treat things which are the same as things which are different.²¹¹ Minority artists

207. Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African Americans*, 107 HARV. L. REV. 1209 (1994). Brown-Scott argues that the state has acted lawlessly “by failing, through both the abusive exercise of its power and the withholding of its laws to protect people of African descent.” *Id.* at 1209.

208. The concept of justice, which Aristotle would have defined as giving to each their due, is relative, and is only meaningful “within a concrete social context. . . .[s]lave owner and slave, landowner and serf, capitalist and worker may all agree that each person should receive what is due to them, but they will define justice differently according to their understanding of who is to count as a person, and what the grounds of entitlement should be.” Emrys Westacott, *Relativism and Autonomy*, 27 PHIL. F. 127, 135 (1996).

209. BOXHILL, *supra* note 108.

210. See Paul Goldstein, *The Competitive Mandate: From Sears to Lear*, 59 CAL. L. REV. 873, 875-878 (1971) (“The Federal constitutional mandate for a competitive economy occupies a small but decisive corner in American law’s general commitment to competitive principles. This commitment predicates that the nation’s interest in the equitable distribution of income, in the promotion of technological advance, and in the dedication of resources to their most productive uses will best be advanced by a market economy. . . . [t]he operation of federal patent, copyright and trademark laws is assumed to advance the federal competitive mandate.”).

211. This paradigm of differences itself has been subjected to criticism by feminist scholars. See MacKinnon, *supra* note 79, at 1287, 1290 (arguing that “[i]nequality is treating someone differently if one is the same, the same if one is different. Unquestioned is how difference is socially created or defined, who sets the point of reference for sameness, or the comparative approach itself . . . [t]he insult to Black culture inherent in the view that to be different is to be inferior, meaning properly outside the reach of equal treatment is an assumption that lies coiled like a snake in Brown’s ringing axiom that separate but equal is inherently unequal.”).

as a class have not been situated similarly to white artists.²¹² It has been suggested, for example, that Black artists historically had to “cope not merely with being [artists] . . . but with the almost insufferable obstacle of attempting to define [themselves] as black artists practicing a black-based art in a country that is deathly afraid of both its artists and its blacks.”²¹³ Ironically, this dynamic has, in some cases, resulted in even greater creativity and complexity of Black forms of music.²¹⁴

It has long been recognized that a law or legal regime may be facially neutral, yet in operation disadvantage minorities.²¹⁵ For example, lending laws do not contain explicit racial prescriptions, yet it is manifest that Blacks as a class have received unequal access to bank loans.²¹⁶ Similarly, Black artists as a class have not shared equally in the benefits of copyright ownership.

212. This article uses the common sense meaning of equal protection, rather than the Constitutional Equal Protection doctrine, which, while effective in bringing out formal equality, has failed to achieve real equality in our society. See *TRIBE*, *supra* note 95, at 1515:

A more promising theme in equal protection doctrine may well be an anti-subjugation principle which aims to break down legally created or legally reinforced systems of subordination which treat some people as second-class citizens. The core value of this principle is that all people have equal worth. When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied equal protection of the laws. *Id.*

213. Kofsky, *supra* note 118, at 26.

214. See Bergerot, *supra* note 105, at 57 (noting that free jazz, embodied by artists like the towering jazz innovator John Coltrane, was a response to “to reappropriate [jazz] from the dominant white culture.”).

215. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (“Though [a] law itself be fair on its face and impartial in its appliance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”).

216. See e.g., Gwen A. Ashton, *The Equal Credit Opportunity Act From Civil Rights Perspective: The Disparate Impact Standard*, 17 ANN. REV. BANK. L. 465, 466 (1997) noting that “[i]n 1996 African-Americans, Hispanics and Native Americans were all more likely to be denied a mortgage in 1996 was more than twice as likely to be turned down than a white applicant.”

The disparity in protection can be attributed to both social inequality and the structure of the copyright regime itself.²¹⁷ The factors of societal discrimination include substandard education, illiteracy, and a lack of access to legal assistance. Each of these factors has an impact on who will get protection for artistic and creative works. The exclusion of Blacks from cultural institutions of power such as law firms, governmental positions, and corporations is another factor in the disparity in protection in the copyright system.

White decision-makers, as privileged elites in the political and cultural hierarchy, have determined how the Black population is treated both as consumers and as producers in the supermarket of ideas.²¹⁸ Powerful segments of white society, with legal backing, vigorously enforced racial segregation. The legal system validated the culture and practice of racial inferiority and segregation in decisions like *Dred Scott v. Sandford*,²¹⁹ the *Chinese Exclusion Case*,²²⁰ and *Plessy v. Ferguson*.²²¹

217. It is at least clear that "infringements of intellectual property are more difficult to detect and to prove than trespasses on real property or conversion of personal property." GOLDSTEIN, *supra* note 34, at 29.

218. See, e.g., T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060, 1070 (1991) (commenting that "[i]n a curious yet powerful way, whites create and reflect a cultural understanding of blackness that requires little contribution from blacks. The dominant and dominating story excludes or ignores black representations and blackness not out of vindictiveness or animus but because the black stories simply do not register.").

219. 19 How 393, 407 (1857) (holding that Black slaves were not legally citizens and asserting that Blacks could be "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.").

220. *Chae Chan Ping v. U.S.*, 130 U.S. 581, 606 (1889) (upholding legislation to restrict the "hordes" of Chinese immigration: "If . . . the government of the United States . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.").

221. 163 U.S. 537 (1896) (holding that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races on terms unsatisfactory to either.").

Intellectual property, unlike other goods, is not created from the physical world but is invented, subject only to the constraints of the human imagination. Human beings are inherently creative beings and, accordingly, any human can create intellectual property.²²² This fact has particular import for cultural “out” groups, such as African-Americans. “[Unlike] traditional notions of property that tend to stabilize social stratification . . . intellectual property is far more egalitarian. Of limited duration and obtainable by anyone, intellectual property can be seen as a reward, an empowering instrument for the talented upstarts [conservative elites have often] sought to restrain.”²²³

Intellectual property thus becomes even more important to Blacks and other “out” groups that historically faced legal obstacles, as well as purely economic restraints on acquiring tangible property in the United States. Legal devices such as restrictive covenants and discrimination in lending, education, housing, and employment reduced opportunities for certain racial minorities— and women²²⁴— to accumulate property and wealth. A similar dynamic has impacted access to the fruits of intellectual property. Since copyright is a form of wealth,²²⁵ the pattern of creation by Blacks and appropriation of the fruits of Black performers by the dominant group—whites in America— comprised a wealth transfer away from the Black community. This has not been, but could be, construed as a denial of civil rights. The United States Supreme Court has recognized that:

222. See, e.g., Richard D. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 756 (1990) (remarking that “[t]he system of copyrights and patents allows everyone to participate. It gives greater protection to the exertion of labor than does the pure common law system, and that surely is a theme that resonates with the Lockean labor theory of acquisition.”).

223. See Hughes, *supra* note 2, at 291.

224. See Carol Rose, 78 VIR. L. REV. 421, at 453-54 (positing “that women are better off with property than they would be without [it]. . . . [t]he inability to own property is the guarantor of some version of enslavement, however benevolent it may be in a particular instance.”).

225. See Gordon, *supra* note 23, at 1345, n.8. “The primary protection that intellectual property law gives creators is a legal right against *copying* those who would use or copy the work without permission. That right can be employed as a tool of creative control. However, it is also a form of wealth.”).

[t]he dichotomy between personal liberties and property rights is a false one . . . in fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.²²⁶

Further, Black artists as a class have not received “equal protection” of intellectual property rights in part due to social and economic inequality and social discrimination. These factors reduced access to social benefits such as literacy, legal assistance, as well as positions of decisionmaking in the cultural institutions that disseminate, market, and distribute cultural commodities.²²⁷

V

Toward Possible Prescriptions

Looking back, it seems clear that Black artists as a class have received discriminatory treatment under the United States copyright system, due to both the social structure of society and structural elements of the copyright regime which rendered protection of Black forms of cultural production more problematic. The past offers some insight into what types of measures might increase the likelihood that the future will not replicate the past. The past also leads us to the question of “whether a ‘wired’ society will be one of information haves and have-nots, divided along lines of race, gender or wealth. . . .”²²⁸ It is clear that the new media and the

226. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

227. Only in recent years have Blacks, and, to a lesser extent, women and other minorities entered positions in significant numbers in the entertainment industry as producers, directors, writers and executives. Perhaps not coincidentally, artists such as Oprah Winfrey, Spike Lee and Bill Cosby have begun to transform the way Blacks are presented in media, moving away from the stereotypical representations that traditionally characterized Blacks in Hollywood depictions. For a history of those stereotypes, see Bogle, *supra* note 110.

228. Diane L. Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 3 NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW 403, 405 (1994). The author expressed less concern with structural inequality than with “a fundamental, negative shift in the information climate that will impose cumbersome and unduly costly barriers to all potential users, regardless of wealth or class or gender or ethnicity.” *Id.*

Internet already present tremendous issues of copyright infringement.²²⁹

A. Access to Legal Services

Unlike employment or educational practices, the copyright system and discrimination in the arts, has never received the intense scrutiny of progressive attorneys seeking to combat and redress discrimination. By making a concerted legal effort to attack school desegregation and racially biased hiring practices, as well as discrimination in public accommodations, organizations such as the NAACP Legal Defense Fund were able to make significant changes.²³⁰ However, Black artistic endeavors have never received the same kind of focused attention.

A society which subjected Blacks to many types of invidious discrimination was unquestionably affected when Blacks started to receive vigorous legal representation in the civil rights area. Similarly, it seems clear that had the Black blues, jazz, and rock/soul artists of past eras received honest and vigorous legal representation, the pattern of appropriation might have been stopped. Of course, such representation would have presumed social transformation: the NAACP's legal strategy occurred in the context of a mass movement for social justice. The conceptualization of artist's rights as essential civil rights, however, never happened; in general the civil rights movement generally focused on voting, housing and accommodation issues, not economic issues per se.²³¹

229. See Note, *Taping to the Beat of a Different Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, 59 ALB. L. REV. 789, 807 (1995) (noting that copyright violations are "commonplace" on the Net, and that "the issue of compensation for copyrighted works on the Internet is exactly what concerns the general and legal communities . . . [i]n essence, 'there's no way to ensure that a teenager who buys a new record will not send it to 1,000 of her closet friends.'").

230. See JONATHAN KAUFMAN, *BROKEN ALLIANCE: THE TURBULENT TIMES BETWEEN BLACKS AND JEWS IN AMERICA* 98 (1988) (noting that [w]orking with 102 cooperating lawyers throughout the South, the Legal Defense Fund in 1963 [alone] defended 10,487 civil rights demonstrators, fought 168 groups of legal action in 15 states, and brought 30 cases to the Supreme Court.").

231. In contrast, international law explicitly recognizes intellectual property rights as human rights. See United Nations Declaration of Human Rights art.

Based on current events, it would seem that the rap artists of today are as susceptible to exploitation as were the blues artists of the 1920's. For example, the estate of Tupac Shakur, a platinum-selling rap artist, sued Tupac's record company, Death Row Records, alleging massive fraud and theft of assets by the record company.²³² The rap artists of the 90's are probably as poorly educated as the blues artists of the 20's; but artists of today who are economically successful will not want for legal representation. The effectiveness of the availability of representation in ensuring protection for the artists remains to be seen, but the economic power to command legal attention is an improvement for Black artists as individuals, if not as a class of artists.

B. Importation of Moral Rights Notions

The moral rights doctrine protects not just economic rights, but personal rights of artists. To the degree that moral rights notions protect the integrity and paternity of musical works, moral rights notions might have prevented distortions such as minstrel shows and sanitized versions of cover records.²³³ The moral rights doctrine "is concerned with the creator's [as opposed to the owner's] personality rights and society's interest in preserving the integrity of its culture."²³⁴ Absent economic considerations, there would be no reason not to protect an artist's rights of attribution and integrity;²³⁵

27(2) (providing that "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production.").

232. See *Estate of Tupac Shakur v. Death Row Records, Inc.* (C.D. Cal. 1997).

233. See L.A. TIMES, Dec. 17, 1989, noting "Black rock 'n' roll stars were often forced to endure all manner of sanitization before the white consumers would accept them, and even then they were treated as second-class performers" See also, Neela Kartha, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218 (1997) (arguing that the compulsory license provision of the Copyright Act disempowers African-American music artists).

234. Kwall, *supra* note 29, at 23-24.

235. See Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 263 (1995) (concluding that "[i]n a copyright world free of economic considerations, none would deny the claims of authors that their personalities should be unreservedly linked to the works: at the very least, they should be entitled to decide rights of attribution and integrity. . . . [t]he simple fact is that moral rights impinge upon economic

certainly such protection would have served Black innovators well.²³⁶ It would appear, however, that the copyright regime is moving further from, rather than closer to, moral rights adoption.²³⁷

C. Heightened Standard of Originality

It would seem that a heightened standard of originality would have given better protection of creative rights to innovative Black artists. These artists essentially laid the tracks for the phenomenon of rock and roll, but did not receive the benefits enjoyed by white imitators who were bound to be better accepted in a racially biased social structure.

VI Conclusion

Black artists as a class experienced disparate treatment under the copyright regime in the past.²³⁸ The reasons for this have been two-fold. First, the condition of mistreatment and discrimination generally present in American society led to the mistreatment and exploitation of Black artists as a class, resulting in educational deprivation, lack of access to legal resources, and exploitation in the entertainment industry.

activity and where they exist, cannot be ignored.”).

236. See Kwall, *supra* note 29, at 37 (noting that “[o]n the whole, copyright law cannot serve as an adequate moral rights substitute. The copyright law’s overriding concern for the copyright owner rather than the creator is a significant disadvantage for creators whose moral rights interests conflict with the pecuniary interests of the copyright owners of their works.”).

237. See Marc A. Hamilton, *Appropriation Art, and the Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. CPYRT. SOC. USA 93, 98 (1994) (arguing that “one can discern a trend our copyright culture . . . which would permit authors to continue to demand remuneration for their works but which would drastically reduce their capacity to control who uses their works and how.”).

238. The recording industry has begun, at long last, to acknowledge the rife exploitation of Black recording artists and composers. Beginning in 1989, a number of major record labels began paying royalties to artists from the 1940’s and 1950’s, “like Muddy Waters, Wolf, Buddy Guy, Bo Didley and the Soul Stirrers [who] were paid flat fees for their recordings and received no royalty payments [for record sales].” See Richard Harrington, *MCA to Pay Royalties to R&B Greats*, WASH. POST, Dec. 7, 1989.

Second, the structure of copyright law, with its emphasis on written reduction to form and minimal originality, disfavored Black artists and particularly Black innovators.

Looking ahead, many of the abuses suffered by Black artists should dissipate as racism in our society in general dissipates. As a result, Black artists will be better educated, more able to secure legal representation, and be better informed on how to protect their rights achieving more acceptance on their own terms by society at large. Assuming these factors converge, the new technologies and the industries they inspire— should create more opportunities for Blacks than did the technologies of the past.²³⁹ In any event, whether the abuses and losses suffered by the Black jazz, blues, soul, and rock artists of the past are duplicated on the emerging information/art super-highway will be a good indicator of how Blacks in general are progressing in American society, and sharing in the vision of profit by promoting the useful arts and sciences.

239. The impact of new technologies in the past has had an impact on both how Blacks played music, and how their music fared in the supermarket of ideas. See HENNESSEY, *supra* note 87, at 32 (noting that “records had a direct impact on black jazz musicians and their music. . . . by [enlarging] the audience for the music, making it easier for musicians to learn from each other, [imposing] technical limits on the music and. . . . introducing another layer of gatekeepers, the record companies, between the musicians and their audiences.”).