COPYRIGHT ON CATFISH ROW: MUSICAL BORROWING, PORGY AND BESS, AND UNFAIR USE

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ABSTRACT

Treatment of musical borrowing under current copyright standards is far too often inequitable. This is evident in the works of George Gershwin, who, for a number of reasons, was able to borrow freely from existing traditions, works and artists, copyright the works he produced that reflected such borrowings, and then restrict future borrowings and reinterpretations of his works. The operation and the uses of copyright in the specific instance of George Gershwin’s musical practice reflect actual uses of copyright in the musical arena and demonstrates some ways in which current copyright frameworks may not adequately contemplate actual practices of music copyright holders. George Gershwin borrowed from a wide range of musical sources, worked extensively with technical collaborators throughout his

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career, and immersed himself in African-American musical traditions. Following Gershwin’s death, however, the Gershwin family came to control his copyrights, highlighting the role that heirs now play in the actual use of copyright given the fact that copyright duration now extends to seventy years beyond the lives of individual creators. The Gershwin heirs have, in most cases, not permitted borrowing or significant reinterpretation of George Gershwin’s works. The ability of heirs to control borrowing from and reinterpretations of existing musical works reflects the fact that copyright structures to this point have been based on the combining of rights of control and compensation within copyright frameworks. Through various mechanisms, heirs, in particular, tend to exert control over uses of copyright in ways that have little to do with the creation of musical works that is a major rationale for copyright. By potentially significantly limiting borrowing and reinterpretation, the exercise of control over copyright in such instances may actually hinder the creation of later works. Uses of copyright by creators such as Gershwin and his heirs suggest that it would be prudent in some instances to separate the control and the compensation aspects of copyright, particularly in cases of post-mortem artistic legacies. This separation would also involve moving in the direction of a liability-based standard in copyright that permits borrowing other than in instances of unfair use, in contrast to current standards that significantly limit borrowing except in limited instances such as fair use.
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Treatment of musical borrowings under current copyright standards is far too often inequitable. This is evident in the works of George Gershwin, who, for a number of reasons, was able to borrow freely from existing traditions, works, and artists, copyright the works he produced that reflected such borrowings, and then restrict future borrowings and reinterpretations of his works. The Gershwin case thus illustrates that current copyright law consideration and treatment of musical borrowing are generally inadequate.\(^1\) If copyright is actually intended to give all potential creators the incentive or ability to create, then the use of existing works in future creations needs to be better addressed and considered by copyright frameworks, both with respect to the sources of new works and the subsequent uses of such works to create future works. In the case of George Gershwin, who borrowed extensively from African-American traditions and artists, the ability to borrow from African-American sources was intimately connected to social and cultural hierarchies. These hierarchies were reflected in and reinforced by copyright frameworks that historically have permitted borrowings from certain categories and types of cultural expression, at times without compensation.\(^2\)

This Article examines the uses of copyright in a particular instance, focusing specifically on uses connected with copyrights now controlled by the Gershwin family, who were a major proponent of the Sonny Bono

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Copyright Term Extension Act of 1998 (the “CTEA”). More specifically, this Article concentrates on the creation and the uses of copyright with respect to George Gershwin’s body of works, particularly the opera *Porgy and Bess*, which premiered in 1935, shortly before Gershwin’s premature death at age thirty-eight in 1937. Gershwin is an excellent case to consider with respect to uses of copyright because of his success and prominence, and the uses of copyright by him and his heirs. Gershwin interests have also played a role in shaping copyright law and were closely involved in the legislative process that led to extensions of copyright duration, in both discussions leading to the general revision of the Copyright Act in 1976 and the later passage of the CTEA. As such, their uses of copyright reflect the behaviors employed today by individual copyright holders and other business and commercial interests that hold significant copyrights.

George Gershwin’s commercial success at least partially reflected his able uses of copyright and his willingness to embrace new technologies such as radio and new methods of business practice in the face of changing technological and industry standards. The creation and the uses of copyright in this specific context help to shed light on how copyrighted works may be created and the sources from which holders of such rights actually derive value. These uses of copyright, in turn, can be drawn on to further assess the scope of the rights that accompany copyright, not just in relation to duration, but also in terms of the effective rights of exclusion (sometimes termed monopoly rights) granted to copyright holders.

Changes in copyright duration have serious implications for the treatment of copyright by heirs and legal successors following the death of a creator. This means that in addition to looking at uses of copyright during the

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4. Ira Gershwin, George Gershwin’s older brother, wrote lyrics for many of the works composed by George Gershwin and is, thus, a co-author for many of George Gershwin’s works. Throughout this Article, the identities of George Gershwin’s identified co-authors are only noted when relevant to discussion. Furthermore, figures for revenues to Gershwin family members of Gershwin family-controlled entities typically reflect revenues on account of the authorship of both George and Ira Gershwin, unless otherwise stated.


6. See infra notes 86-89 and accompanying text.

life of creators of copyright-protected works, consideration must be given to how such works are protected following the deaths of creators. Since copyright duration now extends to essentially one lifetime beyond the lifetime of the individual creator of a copyrighted work, post-mortem industries connected to creators may develop, thrive, and have new life, even after the death of the figure upon which such industries are based. Such post-mortem legacies are often controlled by heirs, for whom the maintenance and the protection of the artistic legacies of dead creators is a core business interest.\(^8\) As is the case with living creators, such artistic legacies may make use of various legal rights, including rights that emanate from copyright, right of publicity, and provisions of the Lanham Act,\(^9\) for example.\(^10\) This Article focuses on the implications of uses of copyright by both living composers as well as the managers of post-mortem artistic legacies that may also have rights emanating from copyright.\(^11\) Because of his early death, George Gershwin represents an early example of a post-mortem artistic legacy at a time when copyright duration was shorter. The uses of copyright by Gershwin and his heirs can thus shed light on the operation of post-mortem artistic legacies in today’s copyright environment. Gershwin’s composition practices and the treatment of his musical legacy by his heirs also lend support to the benefits of separating the control and the compensation elements of post-mortem artistic legacies.\(^12\)

Part II of this Article focuses on assumptions often made with respect to the creation of copyrighted works and, particularly, the extent to which rights of control and compensation are treated as linked and inherent parts of the rights of copyright holders. Part III looks at the creation of *Porgy and Bess*, discussing George Gershwin’s musical borrowings in *Porgy and Bess* and other works. Part IV concentrates on the uses of copyright by the Gershwin

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8. See infra notes 207-08 and accompanying text.
11. This Article focuses on the uses of copyright and does not consider other rights such as moral rights that involve recognition of “interests of authors and artists in their work that are separate from copyright” and that may be retained even after transfer of an author or artist’s copyright to third parties. Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEG. STUD. 95, 95 (1997).
12. See infra Part IV.
trusts that control *Porgy and Bess* and other copyrights of George Gershwin and his brother Ira, who often acted as George Gershwin’s lyricist. Part V examines the implications of the social and cultural contexts of copyright for the creation of works such as *Porgy and Bess* and the significance of control exercised and evident in various uses of copyright. Part VI discusses alternative transmission-based liability rule approaches to music copyright that may be a basis upon which to determine copyright infringement by which the control and the compensation aspects of copyright frameworks might in certain instances be disaggregated.

II. COPYRIGHT, CREATION, AND CONTROL

**A. The Scope and Duration of Copyright**

Treatment of borrowings within copyright law is increasingly of concern given the progressive expansion of copyright duration and breadth during the twentieth century. This increase in duration is evident in copyright treatment of the piano concerto *Rhapsody in Blue*, one of George Gershwin’s most famous and lucrative works. At its creation in 1924, *Rhapsody in Blue* was entitled to a maximum of fifty-six years of copyright protection under the 1909 Copyright Act, which would have meant that its copyright would have originally expired in 1980. As a result of lobbying by copyright industries and copyright heirs, the 1976 general revision to United States Copyright Law (as amended, the “Copyright Act”) extended the duration of copyright protection of existing works, giving *Rhapsody in Blue* an additional nineteen years of copyright protection until 1999.

13. See Jon M. Garon, Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas, 17 CARDOZO ARTS & ENT. L.J. 491, 518 (1999) (“Congress has repeatedly extended the breadth and scope of copyright protection, straining the meaning of the phrase ‘for limited times’ well beyond any historical recognition.”).


15. See Tyler T. Ochoa, Patent and Copyright Term Extension and the Constitution: A Historical Perspective, 49 J. COPYRIGHT SOC’Y U.S.A. 19, 21-23 (2002) (noting lobbying by copyright industries with respect to the Copyright Act of 1976, which gave existing works that previously were entitled to a maximum of fifty-six years of protection a new term of life plus fifty years); E. Scott Johnson, Law Gives Copyright New Life, Nat’l L.J., Feb. 8, 1999, at C12-13 (noting that copyright protection would have expired for *Rhapsody in Blue* on December 31, 1999, without the Copyright Term Extension Act).
profitable works, including those of George Gershwin and a number of prominent Disney characters, were then scheduled to lose copyright protection in and around the late 1990s. Not surprisingly, commercial interests that derive revenue from ownership of copyrights and that include copyright heirs and content providers, again sought to expand the duration of their copyrights and licensing revenue streams. Such behaviors reflect strategic uses of intellectual property through legislative enforcement that have become increasingly common in recent years. Their efforts had their desired effect and helped ensure passage of the CTEA.

As a result of the CTEA, Rhapsody in Blue is now protected by copyright until December 31, 2019, giving a total of eighty-five years of copyright protection to this work. This increase in duration gives Gershwin’s heirs an additional twenty-year stream of licensing revenues. It also, however, extends the period of time during which his heirs can exercise broad control over uses of this and other Gershwin works. This exercise of control by Gershwin heirs and other copyright holders can impede the creation of future works and significantly limit reinterpretations of existing works. Moreover, the expansion of copyright duration has little to do with incentives to create new works, particularly in Gershwin’s case, since he can no longer create new works. It is highly questionable whether such expansion significantly expands incentives to create works for existing creators either. Even if such expansion does increase incentives for existing creators, the costs of this expansion are potentially quite high for both those who seek to interpret existing works and creators of new works who base their creations on existing works.

The potential costs of extending copyright duration suggest that, on balance, the current scope of copyright needs to be tempered, at a minimum, by reducing in certain instances the control rights that accompany copyright protection and by significantly limiting the expansion in duration to rights that relate to compensation for uses of protected works. This would entail

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16. See infra notes 22-23 and accompanying text.
17. See infra Part II.D.2. See generally Olufunmilayo B. Arewa, Strategic Behavior and Sources of Value: Some Implications of the Intangibles Paradigm, in NEW DIRECTIONS IN COPYRIGHT LAW, VOLUME 2272, at 272 (Fiona Macmillan ed., 2006); Olufunmilayo B. Arewa, Strategic Behaviors and Competition: Intangibles, Intellectual Property, and Innovation (Feb. 19, 2005) (unpublished manuscript at 7-9, on file with author) [hereinafter Arewa, Strategic Behaviors] (discussing some implications of strategic behaviors with respect to intangible resources such as intellectual property).
19. See infra notes 210-55 and accompanying text
20. See infra notes 314-36 and accompanying text.
significantly reducing or eliminating the control rights granted to heirs and others who control post-mortem artistic legacies under copyright laws. The scope of copyright interests of such post-mortem legacies would thus be limited in most cases to economic rights with a reduction of rights of control of future uses of copyrighted material.

B. Copyright Discourse and the CTEA: General and Specific Instances of Copyright Use

The CTEA represents a significant event in the history of American copyright law. \(^{21}\) The CTEA lengthened the term of copyright protection in the United States by twenty years, extending copyright protection to seventy years beyond the life of individual creators of copyrighted works,\(^{22}\) leading it to be called the “Mickey Mouse” Law on account of its rescuing Mickey Mouse from becoming part of the public domain.\(^{23}\) The importance of the CTEA is reflected in the resources that were directed toward both assuring


\(^{22}\) See Michael H. Davis, Extending Copyright and the Constitution: “Have I Stayed Too Long?,” 52 FLA. L. REV. 989, 990-91, 996-99 (2000) (discussing the one-sided nature of much of the Congressional testimony associated with passage of the CTEA and the fact that the CTEA extension is both prospective and retrospective in application).

\(^{23}\) See Free Expression Policy Project, “THE PROGRESS OF SCIENCE AND USEFUL ARTS”: WHY COPYRIGHT TODAY THREATENS INTELLECTUAL FREEDOM: A PUBLIC POLICY REPORT 2, 15 (2003) [hereinafter FEP, INTELLECTUAL FREEDOM] (discussing the aggressive campaign by Disney and other companies promoting term extension), available at http://www.fepproject.org/policyreports/copyright2d.pdf; Douglas A. Hedenkamp, Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909, 2 VA. SPORTS & ENT. L.J. 254, 255 (2003) (arguing that Disney Mickey Mouse copyrights are void on account of Disney's failure to meet copyright notice requirements applicable at the time of publication); Gifford, supra note 21, at 385 (noting that Michael Eisner went to lobby personally for passage of the CTEA); Dennis Harney, Note, Mickey Mousing the Copyright Clause of the U.S. Constitution: Eldred v. Reno, 27 DAYTON L. REV. 291, 291 (2002) (noting that Mickey Mouse will now enter the public domain in 2024 instead of 2004 as a result of the CTEA); Phyllis Schlafly, Why Disney Has Clout with the Republican Congress, Nov. 25, 1998, http://www.eagleforum.org/column/1998/nov98/98-11-25.html (noting that the following Disney copyrights were soon to expire without the CTEA, including Mickey Mouse (2003), Pluto (2005), Goofy (2007) and Donald Duck (2009), making the CTEA worth billions to Disney).
and preventing its passage and the atypical alliances that arose to challenge its passage. The dispute concerning the CTEA continued in court after its passage, as reflected in the case of *Eldred v. Ashcroft*, in which the Supreme Court upheld the constitutionality of the CTEA.

Not surprisingly, CTEA proponents were weighed heavily toward the copyright industries and content providers; the briefs presented to the Supreme Court in favor of upholding the CTEA in *Eldred* included briefs from the American Intellectual Property Law Association, AOL Time Warner, the Association of American Publishers, Dr. Seuss Enterprises, the Motion Picture Association of America, the Recording Industry Association of America, the Songwriters Guild of America, and a number of estates, foundations, representatives, or other entities associated with prominent composers and lyricists, including Aaron Copland, George Gershwin, Ira Gershwin, Bela Bartok, Richard Rogers, Frederick Lowe, Arnold Schoenberg, and Kurt Weill. In contrast, briefs in opposition to upholding the CTEA reflected contributions from law professors, economists, libraries and archives, and others, including Intel Corporation and the Free Software Foundation.

The debate over the CTEA reflects the significant commercial and economic interests affected by its terms. Estimates suggest that extension of...
copyright protection may be valued at as much as $330 million per year for copyright-holders by 2017. 30 While supporters of the CTEA have emphasized the incentives that copyright gives to creation of new works, much of the discourse of opponents of the CTEA has focused on assessing the general impact of copyright duration on the public domain and the creation of future works.

While general perspectives with respect to copyright rules may be instructive, looking at the uses of copyright in specific instances by copyright holders can shed light on how copyrighted works are actually created, maintained, and controlled by their holders. In addition, the dialogue that emerged surrounding the CTEA necessarily entails consideration of the core goals of copyright law in general. Although the goals of copyright law are often discussed in connection with the creation of new works, as CTEA opponents have emphasized, copyright has a profound influence on the creation of future works and the ability of future creators to use existing works. Consequently, copyright law should be constructed to permit borrowing that enables the creation of future works as well as provide compensation to creators of prior works on which such future works are based.

In focusing on the general implications of copyright laws, much discourse surrounding the CTEA assesses the impact of the CTEA on both copyright holders and the public domain. The extensive commentary surrounding the *Eldred* case focused particularly on the constitutionality of the CTEA. 32 Within discourse surrounding the CTEA and *Eldred*, two
particular themes may be extracted. On the one hand, a significant theme emphasized by supporters of the CTEA relates to the compensatory aspect of copyright as a tool of innovation related to acts of creation that is intended to both incentivize and reward creators. This approach emphasizes the incentives that give impetus to potential creators to create new works.

In contrast, although often also rooted in this copyright as a tool-of-innovation approach, opponents of the CTEA have tended to take note to a greater extent of actual behaviors with respect to copyright over time periods other than in relation to the moment of creation of a copyrighted work. As such, they focus in greater depth on issues related to control, which have long been an aspect of copyright statutes. As a consequence, such views consider some implications of the process by which copyrights are actually used over time and the impact of copyright laws on the creation of new works. This view, evident in discourse of CTEA opponents, focuses particular attention on the effect of copyright rules on the public domain.

Considerations of copyright from both sides of the CTEA debate have tended to approach consideration of the issues raised by the CTEA from a macro and rule-focused perspective that seeks to delineate the general implications of copyright rules for the public domain and the creation of new works. Further, much of this discourse largely assumes that the control and compensation elements of copyright are necessarily linked. By focusing on

33. See Davis, supra note 22, at 998-99 (discussing the appeal of heirs of individual composers in Congressional hearings who focused on the economic losses they would suffer without passage of the CTEA); Gifford, supra note 21, at 390 (noting that in addition to global competition and harmonization with the European Union, “[t]he final rationale cited by supporters of the CTEA is that a longer term of protection would serve as a greater incentive for creation of artistic and literary works”). For discussions of the arguments of amici curiae for the Respondents in the Eldred case, see supra note 26 and infra note 228 and accompanying text.

34. See Hansmann & Santilli, supra note 11, at 112; Robert M. Hurt & Robert M. Schuchman, The Economic Rationale of Copyright, 56 Am. Econ. Rev. 421, 425-26 (1966); William M. Landes & Richard A. Posner, An Economic Analysis of Copyright, 18 J. Legal Stud. 325, 326 (1989); Arnold Plant, The Economic Aspects of Copyright in Books, 1 Economica 167, 190-91 (1934); see also Arewa, Strategic Behaviors, supra note 17 at 36-37 (discussing approaches to intellectual property that focus on the operation of intellectual property as an incentive for innovation).

35. See L. Ray Patterson, Comment, Eldred v. Reno: An Example of the Law of Unintended Consequences, 8 J. Intell. Prop. L. 223, 238 (2001) (noting monopolistic control aspects of early statutes dealing with literary works such as the English Licensing Act of 1662); see also supra note 26 and accompanying text.

36. See infra note 287 and accompanying text.
the implications of copyright rules in general, such commentary does not fully consider the significance of actual uses of copyright in relation to the stated rationales for copyright in the first place. In addition, such discourse does not fully take into account the extent to which the value of a copyright for its holder may inhere in uses of copyright that have little or nothing to do with the creation of new works and the implications of this for behaviors evident with respect to copyright.37

Although such general considerations are no doubt valuable, looking at specific instances of the uses of copyright can also be instructive. In the music area, looking at both the creation and the uses of copyrighted works in particular instances can illuminate much about the actual working of copyright in specific contexts. In the case of George Gershwin’s works, including the opera *Porgy and Bess*, such examination can reveal something about the origins of Gershwin’s works and his musical borrowings,38 the extent to which collaborators and the sources of borrowings were compensated or acknowledged by Gershwin, and the uses of copyright both by Gershwin as well as the entities that have held Gershwin copyrights since his death.

C. The Uses of Copyright

The ways in which holders of Gershwin’s copyright have maintained, enforced, and expanded their effect rights reflect general copyright strategies used by copyright holders today. Such strategies, although not new, encompass a range of behaviors that at times reflect interest group pressures, as well as offensive uses of intellectual property that relate to activities other than the creation of new works.39 Particularly relevant are the strategic business behaviors that increasingly characterize the exercise of intellectual property right frameworks. Such behaviors highlight areas in which assumptions and assertions about the goals, purposes, and uses of copyright do not always fully map onto observed behaviors in the copyright realm.

37. The Economist Brief, however, did address issues relating to the behavioral impact of particular copyright rule structures. See Economist Brief, supra note 28, 2002 WL 1041846, at *10-14 (discussing the costs associated with copyright term extension with respect to increased social costs associated with monopoly as well as the fact that the CTEA reduces innovation by restricting the production of new creative works that use existing materials).
38. Musical borrowing entails the use of existing cultural elements or works in later creations. See Arewa, *Hip Hop*, supra note 1, at 552-85 (discussing musical borrowing).
39. See Arewa, Strategic Behaviors, supra note 17, at 26 (discussing some implications of strategic behaviors).
1. The Complexity of Motivations to Create New Works

Assertions about the benefits of intellectual property frameworks are typically based on an implicit acceptance of the fundamental notion that intellectual property frameworks have the beneficial effect of promoting innovation. Those on both sides of the CTEA debate appear to accept, at least in principle, the proposition that copyright actually creates incentives to create new works, an assumption that is not empirically supported. While copyright may provide such incentives to create in some instances, the actual processes by which new works are created are often complex. The motivations that might be extracted from the behavior of George Gershwin, for example, would reflect a composer who was inspired by both financial and other considerations. Although Gershwin might have been motivated by money and royalties in some instances, particularly with respect to his popular music songwriting, he was also clearly impelled to create new works for reasons that had little, if anything, to do with financial considerations and even invested his own money in works that had no assurance of financial success. This reflects the fact that people create new works for a variety of reasons and motivations. In addition, regardless of whether copyrights give incentives to create a work subsequent to their creation, intellectual property rights may also be used as strategic weapons in a manner that may actually impede the creation of future works.


41. This is particularly true in the case of Gershwin’s later works, including Porgy and Bess, which was not a commissioned work and in which Gershwin invested his own money. See Susan Richardson, Gershwin on the Cover of Rolling Stone, in The Gershwin Style: New Looks at the Music of George Gershwin 161, 170 (Wayne Schneider ed., 1999) [hereinafter The Gershwin Style].

42. See Arewa, Strategic Behaviors, supra note 17, at 19.

2. Intellectual Property and Strategic Business Behaviors

Aggressive and strategic behaviors are increasingly associated with the use and the enforcement of intellectual property rights. These behaviors are, in part, a result of the transition in developed countries from a tangible industrial production economic paradigm to an intangible paradigm based on information technology. This move to the digital economy era has "increased the stakes in the global dimensions of intellectual property rights." Two recent examples of the use of copyright reflect this trend. In the case of peer-to-peer file-sharing, for example, the Recording Industry Association of America (the "RIAA") has aggressively pursued alleged copyright infringers in large numbers. By June 2004, the RIAA had initiated more than 2000 lawsuits against alleged file-sharers for copyright infringement. This number had increased to more than 15,000 by November 2005. In another example, following passage of the Digital Millennium Copyright Act (the "DMCA"), companies immediately began to use the DMCA as a competitive weapon for purposes that had essentially nothing to do with the creation of new works, but more to do with the prevention of competition.

that intellectual property frameworks have been used historically in the international intellectual property arena as a tool of piracy).

44. See Arewa, Strategic Behaviors, supra note 17, at 13-14.
46. Ruth L. Gana, Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property, 24 DENVER J. INT’L L. & POL’Y 109, 119 (1995); see also Arewa, Knowledge Economy, supra note 45, at 55-66 (discussing some implications of the ongoing transition to an intangibles paradigm); Arewa, Strategic Behaviors, supra note 17, at 5-6 (discussing some implications of the intangibles paradigm for strategic behaviors).
50. See Dan L. Burk, Anticircumvention Misuse, 50 UCLA L. REV. 1095, 1110-14 (2003) (noting that under the DMCA strategic behaviors were used to “suppress competing
These and other examples suggest that aggressive and often strategic business behaviors are increasingly a part of the use of copyright and intellectual property rights in general. Such behaviors may be exemplified by both actual legal actions as well as the threat of legal action through licensing letters or cease-and-desist letters.\textsuperscript{51} Threats of legal action have the potential to cause a chilling effect because allegations of infringement may, in the end, differ little in their effects on the behavior of the party deemed to infringe than in cases of actual infringement.\textsuperscript{52} As a result, threats can be important avenues for strategic behaviors.

Although strategic behaviors are by no means a new phenomenon,\textsuperscript{53} the digital economy era facilitates such behaviors by virtue of the increasing divergence between systems of rules (the “rules of the game”) and observed behaviors associated with such rules (the “manner of play”).\textsuperscript{54} Such rules of technology by preventing interoperability with products that include technical protections,” rather than to protect innovation or prevent unauthorized copying or distribution of copyrighted works); FEP, INTELLECTUAL FREEDOM, supra note 23, at 32 (“The DMCA has also become a weapon for companies seeking to squelch competition.”); Marjorie Heins & Tricia Beckles, Will Fair Use Survive? Free Expression in the Age of Copyright Control, 35-36 (Brennan Center for Justice, Free Expression Policy Project 2005) [hereinafter FEP, Fair Use], available at http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf (noting the chilling effect of DMCA Section 512 take-down letters).

\textsuperscript{51} FEP, Fair Use, supra note 50, at 4-5, 36-37 (noting the potential chilling effect of cease-and-desist letters and other enforcement practices of copyright-holders).

\textsuperscript{52} See Wendy J. Gordon, Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship, 57 U. CHI. L. REV. 1009, 1030 n.78 (1990) (book review) (“At issue here, however, is the chilling effect on artists, and artists are not usually copyright experts. Thus, the fact that a work could be a potential infringement is as important in practical terms as actual infringement.”); see also Arewa, Strategic Behaviors, supra note 17, at 14.

\textsuperscript{53} See Arewa, Strategic Behaviors, supra note 17, at 26.

\textsuperscript{54} Id. at 26 n.50 (noting the difference between “rules of the game” (i.e., formal legal rules and regulations that constitute intellectual property frameworks) and “manner of play” (i.e., “how participants subject to such game rules interpret and transform these rules in actual play and the implications of such transformations for the game and consequently system of rules themselves”)); see also ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY 17-18 (1984) (“Rules are often thought of in connection with games, as formalized prescriptions. The rules implicated in the reproduction of social systems are not generally like this. Even those which are codified as laws are characteristically subject to a far greater diversity of contestations than the rules of games. Although the use of the rules of games such as chess, etc. as prototypical of the rule-governed properties of social systems is frequently associated with Wittgenstein, more relevant is what Wittgenstein has to say about children’s play as exemplifying the routines of social life.”); Lawrence Lessig, The Regulation of Social Meaning, 62 U. CHI. L. REV. 943, 947 (1995) (“[G]overnments, as well as others, act to construct the social structures, or social norms, or . . . the social meanings that surround us.”).
the game, which include copyright rules, developed under a tangible asset paradigm economic and business model associated with the nineteenth and much of the twentieth century. Consequently, such rules do not always adequately contemplate the reality of behaviors and value assignments, including those evident under the intangibles paradigm associated with the era of digital copyright. This disjuncture between rules and practice is by no means limited to the exercise of intellectual property rights. It is also an important aspect of the transition of legal rules in the knowledge economy in other legal spheres as well.

D. Copyright, Strategic Behavior, and Value

Views that focus on the incentives copyright gives for the creation of new works are based on assumptions about how copyright holders derive value from copyright. Although compensation for creation of a new work may be a source of value for copyright holders, strategic behaviors suggest that the use of copyright reflects a process over time, rather than necessarily only in relation to a specific moment of creation. Furthermore, copyright-holders also derive value from copyright in a number of ways in relation to the use of copyright over time that may have little to do with the creation of the work itself, but rather in how they can expand and manipulate the scope of existing rights through various means, including both judicial and

55. See Arewa, Knowledge Economy, supra note 45, at 31-38 (discussing the importance of changing business models associated with the intangibles paradigm in contrast to previous eras in which the exploitation of physical assets was more characteristic of prevailing business models).


57. Arewa, Knowledge Economy, supra note 45, at 13-17 (discussing the implications of the intangibles paradigm for securities law and accounting frameworks); see also Olufunmilayo B. Arewa, Securities Regulation of Private Offerings in the Cyberspace Era: Legal Translation, Advertising and Business Context, 37 U. Tol. L. Rev. 331, 331-33 (2006) (discussing some implications of the cyberspace era for securities regulation).


59. Id. at 218-19 (discussing copyright incentives and the nature of copyright’s limited monopoly).

60. See supra notes 34-35 and accompanying text.
legislative enforcement. As a result, it is likely that prominent copyright-holders will again seek to extend the length of copyright duration when the twenty-year extension given to them by the CTEA is close to expiring. The actions of such holders highlight the strategic behaviors commonly asserted in the intellectual property realm today more generally, including through both judicial and legislative enforcement.

1. Strategic Behavior and Judicial Enforcement

Judicial enforcement may be evident in a number of behaviors, including actual suit or the threat of suit, sending of cease-and-desist letters, and suits against large numbers of people as is evident in the case of RIAA suits and the recent Bridgeport cases where some 800 defendants were sued. The recent actions undertaken by The SCO Group with respect to Linux technology illustrates the use of judicial enforcement to expand existing rights connected to copyright in a business context. This dispute involves claims by The SCO Group (“SCO”), with respect to open source Linux technology, which SCO alleges infringes on UNIX copyrights. These copyrights on proprietary UNIX technology may not actually even be owned by SCO. SCO’s assertion of rights has involved its sending letters to more than 1500 companies in the United States and overseas demanding that these companies pay SCO licensing fees on account of their use of Linux. These licensing letters were followed by several lawsuits, some of which were filed against recipients of SCO licensing letters.

Judicial enforcement of copyright may involve behaviors that have little to do with the creation of new works or the commercialization or distribution

61. See infra Part II.D.1-2.
62. See Garon, supra note 13, at 524.
63. See supra note 47 and accompanying text.
65. See Arewa, Strategic Behaviors, supra note 17, at 67 (noting that one complication in the SCO case relates to accusations that SCO is being used by Microsoft to attack open source code Linux technology that Microsoft sees as a threat to its proprietary Windows operating system).
66. SCO bought its Unix business in 1995. Unix copyrights were explicitly excluded from the transaction. See Arewa, Strategic Behaviors, supra note 17, at 3 n.1.
67. For a more comprehensive discussion of the SCO-Linux dispute, see id. at 62-63.
68. Id.
69. Id. at 65-66.
of such works. Rather, judicial enforcement efforts may reflect the value that may be derived from intellectual property rights that may come from the expansion of the effective scope of existing rights, instead of the creation of new works.\textsuperscript{70} In addition, such actions are often used by companies to signal the value of intangibles to markets.\textsuperscript{71}

Strategic judicial enforcement may reflect different value assignments than the copyright as a tool-of-innovation approach might assume. Such an approach implicitly presumes that the value of a copyright for its holder largely rests in some type of commercial exploitation or distribution of a work, which is the fundamental basis for accepted views of copyright as giving incentives to create new works. In contrast, strategic uses of copyright often reflect values in copyright derived from utilization of copyright with respect to other concurrent or potential future rights or commercial uses. Strategic behaviors may consequently be used, for example, in the intellectual property arena to block other products or competitors.\textsuperscript{72}

By focusing on copyright with respect to acts of creation, the copyright as a tool-of-innovation approach does not adequately encompass the range of copyright behaviors over time reflected in the manner of play that forms an important part of the actual operation of the rules of the game. Although judicial enforcement is typically sought with respect to individual cases, such enforcement attempts can have broader implications for the scope of rights of other copyright-holders by virtue of legal precedents that might be established in such cases.

2. Strategic Behavior and Legislative Enforcement

In addition to using judicial enforcement to expand the scope of intellectual property rights through legal action or the threat of such action,
strategic behavior is also evident in the legislative arena. Another avenue for the use of strategic behaviors with respect to intellectual property relates to the use of the legislative process to promote statutory changes. Such statutory changes may increase the scope or the duration of copyright protection with respect to typically broader groups of holders than might often be the case in instances of judicial enforcement. Copyright has historically been used by commercial interests to promote a legal framework that maximizes the value of their investments in copyright.

Legislative enforcement may relate to the creation of new rights or the expansion of existing rights and may affect both new and existing works. As is the case with judicial enforcement, legislative expansion with respect to existing and new rights often results in expansion of such rights with respect to other potential concurrent and future users. In the case of the CTEA, the potential users who had less expansive rights as a result of the CTEA included, among others, potential users of the public domain, borrowers who use existing works, and those who reinterpret existing works whose scope of rights was lessened because of the CTEA.

The promotion of statutory changes through legislative enforcement as a means to expand copyright protection thus parallels, to a large extent, the strategic business behaviors evident in attempts to seek or to threaten judicial enforcement of intellectual property rights in business settings. Both types of enforcement may function to expand in effect some aspect of the rights that


74. See Arewa, Hip Hop, supra note 1, at 593-94, 605-08 (discussing the role of commercial interests in shaping copyright law); Jessica Litman, Innovation and the Information Environment: Revising Copyright Law for the Information Age, 75 OR. L. REV. 19, 22-23 (1996) (“Until now, our copyright law has been addressed primarily to commercial and institutional actors who participated in copyright-related businesses.”).

75. See Eldred v. Ashcroft, 537 U.S. 186, 194-95, 200 (2003) (noting that the 1790, 1831, 1909, and 1976 copyright acts all applied new copyright terms to new and existing works so that all under copyright protection could be “governed evenhandedly under the same regime”).
inhere in copyright, including breadth, scope, and duration. The activities of the proponents of the CTEA from the copyright industries reflect these types of strategic behaviors. The economic gains to be realized from expansion of copyright duration were no doubt a critical factor underlying the activities of CTEA proponents.\textsuperscript{76}

III. THE MUSICAL ORIGINS OF \textit{PORGY AND BESS}

Consideration of varieties of strategic behavior in the copyright brings needed attention to actual behaviors in the copyright realm. Such behaviors illustrate the ways in which copyright-owners maintain, reinforce, and, at times, expand the scope of the intellectual property rights held by them. The uses of copyright by George Gershwin and the Gershwin family reflect the uses of copyright for a variety of purposes reflecting varied value assignments. Any consideration of creation in the case of Gershwin’s compositions must begin with a discussion of the musical origins of George Gershwin’s works, including his seminal opera \textit{Porgy and Bess}.

A. The Creation and Development of the Music and Libretto

George Gershwin is the most successful and renowned American composer in American history.\textsuperscript{77} He had unparalleled popular stature at the time of his premature death in 1937—the impact of which has been compared to John Lennon’s death in 1980.\textsuperscript{78} His life was the subject of Hollywood treatment in the 1945 film \textit{Rhapsody in Blue}.\textsuperscript{79}

His success may be measured in terms of both artistic and financial accomplishments. Gershwin composed a number of successful Broadway

\textsuperscript{76}. See supra notes 30-31 and accompanying text.

\textsuperscript{77}. See Charles Hamm, \textit{Towards a New Reading of Gershwin, in The Gershwin Style}, supra note 41, at 3, 3 (“The United States has not produced a more famous composer than George Gershwin . . . .”); \textit{The George Gershwin Reader}, at xi (Robert Wyatt & John Andrew Johnson eds., 2004) (“During his lifetime, George Gershwin (1898-1937) achieved an almost unprecedented level of success marked by an international reputation, massive wealth, celebrity status, and an uncanny means of attracting attention.”); 9 \textit{The New Grove Dictionary of Music and Musicians} 749 (Stanley Sadie ed., 2d ed. 2001) [hereinafter \textit{New Grove Gershwin}] (“Remarkably, Gershwin broadened his musical scope without sacrificing his popularity. Free of false modesty, he reveled in success, which he accepted as no more than his due. By the early 1930s his fame, earning power, and the range of his works made Gershwin unique among American composers.”).

\textsuperscript{78}. Richardson, \textit{supra} note 41, at 168 (“His untimely death was felt throughout society, causing shock and public grief comparable to that over John Lennon’s death in 1980.”).

\textsuperscript{79}. \textit{Id.}
musical during his short career. The financial success of Gershwin’s works did not end with his death in 1937, but rather continued to grow. *Porgy and Bess*, composed shortly before Gershwin’s death and described as a folk opera in its first performances during Gershwin’s lifetime, did not receive much critical acclaim until well after Gershwin’s death. The reception of *Porgy and Bess* typified the generally negative critical reception of Gershwin’s more “serious” works during his lifetime. The value of many Gershwin works, including *Porgy and Bess*, as “serious” music is now increasingly acknowledged.

Gershwin’s works have achieved continuing financial success that is often attributed to the appeal of his melodies. Moreover, Gershwin’s financial success was bolstered by his ability to take advantage of changing business structures and technology in the musical arena of his time. For

80. *NEW GROVE GERSHWIN*, supra note 77, at 748-50 (noting that Gershwin left Jerome H. Remick & Co., a music publishing firm on Tin Pan Alley, in March, 1917, and began working as a rehearsal pianist for Miss 1917, a show by Jerome Kern and Victor Herbert; and by his twenty-first birthday had “a Broadway show on the boards, several songs in print, and a prestigious publisher awaiting more”).

81. See George Gershwin, *Rhapsody in Catfish Row*, in *GEORGE GERSHWIN*, supra note 81, at 72, 72 (Merle Armitage ed., 1938) (noting that *Porgy and Bess* was called a folk opera because it was a folk tale and the music was folk music that was written by Gershwin based upon original folk material).

82. See infra notes 147-55 and accompanying text.

83. JOAN PEYSER, THE MEMORY OF ALL THAT: THE LIFE OF GEORGE GERSHWIN 193, 214 (1998) (noting that Gershwin was held in contempt by serious American composers as well as by critics, academics, and European conductors).


85. See, e.g., Steven E. Gilbert, *Gershwin’s Art of Counterpoint*, 70 MUSICAL Q. 423, 425 (1984) (“Most of Gershwin’s tunes are indeed memorable.”); *NEW GROVE GERSHWIN*, supra note 77, at 750 (“The melodies of Gershwin’s concert works are surely the chief reason for their appeal.”); Lawrence Starr, *Gershwin’s “Bess, You Is My Woman Now”*: The Sophistication and Subtlety of a Great Tune, 72 MUSICAL Q. 429, 430 (1986) (noting that Gershwin was “a fabulous melodist”).

86. See George Gershwin, *The Composer and the Machine Age*, in *GEORGE GERSHWIN*, supra note 81, at 225, 225-29 (noting the significance of the machine age in influencing
example, he gave radio performances of his and others’ works, which helped ensure widespread distribution and public awareness of his works. In addition, Gershwin was able to benefit from changing industry business structures and the increased financial clout of songwriters who owned their own publishing businesses. Both Irving Berlin and George Gershwin formed their own publishing businesses.

Porgy and Bess, which premiered in New York City in 1935, depicts the life of Porgy, Bess, and other African-American inhabitants of the fictional Catfish Row near Charleston, South Carolina. Porgy and Bess was based on the novel Porgy by DuBose Heyward, which Heyward's wife Dorothy transformed into a play that formed the basis of the Porgy and Bess libretto. Heyward was born in South Carolina of an aristocratic family. Lacking formal education, Heyward became a cotton-checker on the Charleston wharves, where he was exposed to African-American dockworkers and fishermen on whom he based his novel. Gershwin first approached the Heywards in 1926, but did not actually compose Porgy and Bess until after he signed a contract with the Heywards in October 1932.

The collaboration of the Gershwin with the Heywards was an acknowledged one in which all parties received copyright credit and compensation. Such acknowledged collaborations, however, tell only one part of the story of the creation of musical works such as Porgy and Bess. Throughout his career, George Gershwin borrowed extensively from other

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87. Edward Jablonski, Gershwin 260-63, 276-77 (1998) (noting that Gershwin had a radio show called “Music by Gershwin,” the first series of which aired twice weekly for fifteen minutes on Monday and Friday evenings from February to May, 1934, and a second series, a half-hour program on Sunday night that ran from September to December, 1934); Richardson, supra note 78, at 170 (noting that Gershwin had a radio show twice a week).

88. See Peyster, supra note 83, at 127, 130 (noting that the Gershwin founded the New World Music Company, which published all Gershwin works, as a subsidiary of T.B. Harms); Alec Wilder, The American Popular Song: The Great Innovators, 1900-1950, at 122-23 (1990) (noting the enormous exposure provided to Gershwin by radio).

89. Peyster, supra note 83, at 127.

90. New Grove Gershwin, supra note 77, at 749 (noting that Porgy and Bess opened in New York in October, 1935, in a Broadway theater and not an opera house and ran for 124 performances, which was not enough to recover the original investment).

91. Peyster, supra note 83, at 159.

92. Id.


94. Id.

95. Id. at 250.
musicians and other music and had numerous collaborators, many of whom were not acknowledged, received no credit, and were given no compensation. The fact of these collaborations reflects the process of creation of musical works and is by no means atypical. Rather, borrowing is a norm in the creation of music that copyright law has not yet fully confronted. How copyright structures interface with musical borrowing is a complex question that touches upon broader societal concerns, including hierarchies and the relative power and status of the sources from which new creators draw both inspiration and material.

B. Musical Borrowing and Porgy and Bess

As is often the case in the creation of music, Gershwin’s compositional technique generally involved extensive collaboration and musical borrowing, in his case particularly from African-American sources. The availability for uses in new works of existing works and styles was thus crucial to the production of Gershwin’s music. Examining the processes through which Gershwin created his music highlights the borrowing often inherent in the composition process and the importance of composers being able to draw upon prior works in creating new ones.

1. Gershwin’s Technical Collaborations

In addition to collaborating with a number of lyricists, the most prominent of whom was his brother Ira, Gershwin relied extensively on the technical assistance of musicians with a better theoretical grounding in

96. See infra notes 158-64 and accompanying text.
97. Arewa, Hip Hop, supra note 1, at 550-51 (discussing the failure of current copyright doctrine to reflect adequately the reality of borrowing).
98. Id. (discussing the pervasiveness of musical borrowing).
99. New Grove Gershwin, supra note 77, at 751 (noting that Gershwin’s concert works draw heavily on black American elements).
100. See id. at 748 (“George found an artistic collaborator in the person of his older brother Ira, who wrote the lyrics for most of his songs.”); Peyser, supra note 83, at 69 (noting that Ira became George’s full-time lyricist in the mid-1920s). Following George’s death, Ira continued as a successful lyricist, working with Kurt Weill and writing the lyrics for a number of films, including A Star is Born. See Edward Jablonski, What About Ira?, in The Gershwin Style, supra note 41, at 255, 259, 272-73 (noting Ira’s work on the lyrics of Weill’s Lady in the Dark and the film A Star is Born).
music.\textsuperscript{101} Gershwin often typically did not give credit to these collaborators,\textsuperscript{102} who in some instances provided critical assistance in correcting technical inadequacies in Gershwin’s works:

What made Kay especially valuable was that she had studied counterpoint—the discipline that Gershwin lacked . . . . She could give George sound advice and notate the music he played, an enormously time-saving service. Kay Swift did this not only with his songs, but she helped transcribe the three piano preludes, which were first performed in December 1926 and published the following year . . . . Gershwin had to have envied her superior musical training.\textsuperscript{103}

Although Gershwin had classical musical training and was considered to be an excellent pianist,\textsuperscript{104} part of Gershwin’s technical limitations came from the fact that he lacked formal training in music theory and counterpoint, having largely ceased piano lessons with Charles Hambitzer at age sixteen after he began working in Tin Pan Alley.\textsuperscript{105} Gershwin’s piano style came from his experience making player piano rolls at the beginning of his career and African-American musicians he watched and heard in Harlem.\textsuperscript{106} In the 1920s, Gershwin began to feel that his musical ambitions and creativity were hindered by his lack of technical capacity.\textsuperscript{107} As a result, he studied music theory and counterpoint with other teachers, including Edward Kilenyi,

\textsuperscript{101} PEYSER, \textit{supra} note 83, at 71, 120-21, 194 (noting that at various times, Gershwin relied on Will Vodery, James P. Johnson, Kay Swift, Edward Kilenyi, and Bill Daly for orchestrations).

\textsuperscript{102} \textit{Id.} at 104 (noting that Gershwin did not give credit to James P. Johnson for Gershwin’s use of the Charleston rhythm originated by Johnson).

\textsuperscript{103} \textit{Id.} at 120-21.

\textsuperscript{104} CHARLES HAMM, \textit{"It’s Only a Paper Moon"; or, The Golden Years of Tin Pan Alley, in YESTERDAYS: POPULAR SONG IN AMERICA} 326, 346, 348-49 (1983) (noting that Gershwin was an excellent pianist who had received a sound classical training, a reliable technique, and exposure to the music of Bach, Beethoven, Liszt, Chopin, Ravel, and Debussy from his piano teacher Hambitzer).

\textsuperscript{105} PEYSER, \textit{supra} note 83, at 31.

\textsuperscript{106} HAMM, \textit{supra} note 104, at 346 (noting that Gershwin cut some 125 piano rolls after 1915); PEYSER, \textit{supra} note 83, at 35 (“He got his piano style not only from the player piano but also from the black musicians he watched and heard in Harlem.”); NEW GROVE GERSHWIN, \textit{supra} note 77, at 748 (noting that Gershwin began working for Jerome H. Remick & Co., a music publishing firm on Tin Pan Alley, as a song-plugger for $15 per week).

\textsuperscript{107} WILLIAM G. HYLAND, \textit{GEORGE GERSHWIN: A NEW BIOGRAPHY} 167 (2003).
His progression from a background in popular music practice and immersion in African-American musical traditions prior to becoming a more “serious” composer influenced his musical production.110

2. Gershwin’s Borrowings of Music and Musical Style

Popular song from the 1920s to 1950s was far closer to classical music than African-American music, and African-American musical elements were, for the most part, assimilated through ragtime, blues, African-American Broadway musicals, and jazz.111 In addition to Porgy and Bess, Gershwin composed many pieces of music that reflect significant musical influence and borrowing from various sources, particularly African-American cultural forms. George Gershwin was thus unusual in the extent of

108. PEYSER, supra note 83, at 158 (noting Gershwin’s studies with Cowell, who may have sent Gershwin to study with Schillinger); NEW GROVE GERSHWIN, supra note 77, at 748 (noting that Gershwin studied with a succession of teachers, including Rubin Goldmark, Riegger, and Cowell); Richardson, supra note 41, at 164 (noting harmonization, orchestration, and form studies with Kilenyi).

109. Charlotte Greenspan, Rhapsody in Blue: A Study in Hollywood Hagiography, in THE GERSHWIN STYLE, supra note 41, at 145, 150 (noting that Gershwin solicited instruction from Ravel and Schoenberg, both of whom assured Gershwin that he did not need lessons from them).

110. See HAMM, supra note 104, at 348 (noting that Gershwin was distinguished from other Tin Pan Alley songwriters by his involvement in classical music and jazz); CHRISTOPHER SMALL, MUSIC OF THE COMMON TONGUE: SURVIVAL AND CELEBRATION IN AFRO-AMERICAN MUSIC 350 (1987) (“George Gershwin is a different case altogether, for despite the classical training which he underwent in common with many of the other ‘Broadway masters’ of the time, he came as a practicing musician to classical composition only after considerable experience in Afro-American music; the small number of concert pieces he created before his premature death in 1937, and especially his opera Porgy and Bess, give a hint of a genuinely popular concert and theatre music, of a kind that Mozart would have understood.”); Richard Crawford, It Ain’t Necessarily Soul: Gershwin’s “Porgy and Bess” as a Symbol, 8 Y.B. INTER-AM. MUSICAL RES. 17, 19-20 (1972) (noting that Gershwin’s career as a “serious” composer “was launched by the Aeolian Hall concert” of Rhapsody in Blue, which reflected his study of “aspects of serious composition with private teachers” and Gershwin’s solidifying of ties with “serious” music at the same time as he continued to prosper on Broadway).

111. SMALL, supra note 110, at 277 (“Musically, the popular song from the 1920s to the 1950s was much closer to classical music than to black music. Black elements which, as we have seen, were absorbed in the teens of this century from ragtime and from blues as well as through the black Broadway musicals, were now also assimilated through jazz, but they remained what they had always been—a gloss on what were essentially European closed forms . . . .”).
his reliance on such musical forms. His song “I Got Rhythm,” for example, “was full of the accents of ragtime and, to a lesser extent, blues.”

The emphasis on ragtime in “I Got Rhythm” reflects the fact that by the time of Gershwin’s birth, the United States was captivated by ragtime music. Gershwin also actively sought out the opportunity to hear African-American performers, both closer to home in Harlem during the artistic flowering that formed the Harlem Renaissance as well as in South Carolina, where he spent time observing Gullah communities in the South Sea Islands during the time that he composed *Porgy and Bess*. In consciously seeking out African-American music, Gershwin was “schooled and indoctrinated in the African-American musical cauldron that was the Harlem Renaissance” and was profoundly influenced by African-American music from his adolescence. Gershwin’s music emphasized blue notes typically associated with jazz. In *Rhapsody in Blue*, for example, “the inventive rhythms, the swinging touch that came directly from jazz, brought a quality to the classical-music world

112. Hamm, supra note 104, at 352 (noting that African-American music struck a deep responsive chord in Gershwin).
113. Small, supra note 110, at 277.
114. See Peyser, supra note 83, at 38.
115. See DuBose Heyward, *Porgy and Bess Return on the Wings of Song, in George Gershwin*, supra note 81, at 34, 39 (discussing George Gershwin’s stay in 1934 on Folly Island, a barrier island ten miles from Charleston); David Horn, *From Catfish Row to Granby Street: Contesting Meaning in Porgy and Bess*, 13 Pop. Music 165, 166 (1994) (noting that Gershwin holidayed in the Sea Islands and Charleston, observed Gullah folk traditions, and attended church services where he joined in shouts and heard the calls of street vendors).
116. Samuel A. Floyd, Jr., *The Power of Black Music: Interpreting Its History from Africa to the United States* 165 (1995); see also Hamm, supra note 77, at 7 (“It should also be noted that Gershwin, more than any other composer (or critic, or historian) of his time, constantly sought out black musicians and listened to the widest possible range of black music.”); Peyser, supra note 83, at 36 (“George Gershwin was certainly one of the earliest [white songwriters] to seek out black music purely from personal interest. He soaked himself in it.” (alteration in original) (internal citation omitted)); Catherine Parsons Smith, *From William Grant Still: A Study in Contradictions, in The George Gershwin Reader*, supra note 77, at 147, 150 (“Gershwin was well known to seek out performances by black musicians . . . .”).
117. Floyd, supra note 116, at 165 (“Beginning in the early 1920s, George Gershwin composed music influenced by and based on black musical devices and traits, including the opera *Blue Monday Blues* (1922), the concerto *Rhapsody in Blue* (1924), and the orchestral tone poem *An American in Paris* (1928).”); Peyser, supra note 83, at 36.
118. Peyser, supra note 83, at 69 (noting that Gershwin emphasized blue notes or intervals of flat thirds and sevenths); Wilder, supra note 88, at 19 (“Long before George Gershwin began toying with them, the flatted seventh and flatted third of the scale were conventional elements of the blues.”).
that was perceived as genuine freshness." The popularity of *Rhapsody in Blue*, composed in 1924, "inspired Gershwin to make extensive study of the idioms and characteristics of American folklore." Gershwin borrowed the piano style of Luckey Roberts, a prominent African-American pianist in New York City prior to World War I. From Roberts, Gershwin learned drive and syncopation that was at that time unknown to most white piano players. Judith Anne Still, the daughter of William Grant Still, a classically trained African-American composer, has alleged that Gershwin’s piece “I Got Rhythm” was stolen from her father. At a minimum, Gershwin ingested and borrowed significantly from African-American musical styles and musicians. Further, Gershwin’s talent in playing the piano and style of playing that was largely unheard outside of African-American musical circles, “gave him entry into a more elevated stratum of society than he could have entered without it.”

Gershwin’s composition practice was based on borrowing and reflected a synthesis of elements derived from a variety of stylistic sources. Gershwin found inspiration in African American blues and jazz styles, Tin Pan Alley idioms, and the languages and forms of European art music. He achieved his synthesis through the identification and structural exploitation of musical characteristics shared among these diverse traditions. One example of this is the extensive use he made in *Porgy and Bess* of the relationships that can be developed between “blue” thirds (of the type found in blues and jazz music) and the kind of modal mixture and harmonic complexity associated with late Romantic tonal harmony.

119. Peyser, supra note 83, at 84; see also New Grove Gershwin, supra note 77, at 748 ("The musical juxtapositions of *Rhapsody in Blue* had roots in a sensibility that never fully accepted a separation between popular and classical genres.").


121. Peyser, supra note 83, at 40-41.

122. *Id.* at 41 (noting that Robert’s trademark was “a left hand of dazzling speed and an idiosyncratic way of playing tremolo with the right”).

123. *Id.* at 42-43. Peyser also notes “the very real sense of rage that many blacks continue to feel because they believe a language that was once theirs was expropriated from them and exploited by whites.” *Id.* at 44.

124. *Id.* at 41 (“Gershwin appropriated this from the blacks, ingested it until it was his own, and transformed it into his songs.”).

125. *Id.* at 42.

3. Musical Borrowing, Musical Collaboration, and *Porgy and Bess*

Gershwin’s use of borrowing in his compositional practice was also reflected in *Porgy and Bess*. In fact, Gershwin’s first opera, *Blue Monday Blues* (1922), which used African-American musical devices and traits, foreshadowed *Porgy and Bess*. During the process of composing *Porgy and Bess*, Gershwin worked closely with the Heywards and his brother Ira, who received credit for writing the lyrics for some of the songs from the opera, while DuBose Heyward received credit for the lyrics of others. Both Gershwin and Heyward were interested in creating an authentic folk opera, which resulted in a treatment of African-American life that was highly unusual in their day in the “serious” music arena. Also atypical was the reliance of *Porgy and Bess* on an African-American cast, a decision that was reached after considering having Porgy portrayed by Al Jolson in blackface. The original *Porgy and Bess* was drawn largely from African-American classical singers for whom the opportunity to sing classical music in front of white audiences was, for the most part, new.

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129. *See JABLONSKI*, supra note 87, at 263-72 (noting that Ira’s sophisticated songwriting style was particularly suited to songs performed by the character Sporting Life, a Harlem gambler who drifted into Catfish Row).
130. *HYLAND*, supra note 107, at 164 (noting that Gershwin set many Heyward lyrics, including “I Got Plenty o’ Nuttin’” and “Summertime” to music with few changes).
131. *Id.* at 162 (noting the incongruities of “a Russian Jew from the Lower East Side and a white southern aristocrat collaborating to write an opera about life in the Negro quarter of Charleston, South Carolina”).
133. *See JABLONSKI*, supra note 87, at 280-83 (noting that a number of members of the cast were students and graduates of the Juilliard school and other conservatories who had previously performed in black versions of classical operas and that one singer, Edward Matthews, had performed in Thompson’s *Four Saints in Three Acts*).
As he composed *Porgy and Bess*, Gershwin spent time in Gullah communities in and around Charleston, South Carolina. Gullah communities are rich in cultural traditions and also retain a significant number of Africanisms in cultural expression, including language and music; they thus represented a rich resource from which Gershwin could draw. During his stay in South Carolina, Gershwin had the opportunity to hear spirituals in churches in the area. The music that he heard in South Carolina shaped Gershwin’s treatment of the storm scene in *Porgy and Bess*, which involves the intertwining of six individual prayers that culminates in a traditional spiritual sung in harmony by the chorus. In addition to borrowing generally from African-American musical styles and works, *Porgy and Bess* incorporates the spiritual “Sometimes I Feel Like a Motherless Child” in the aria “Summertime.” Both “Summertime” and “Sometimes I Feel Like a Motherless Child” also follow the same harmonic scheme.

Gershwin may have borrowed from other sources as well. Schillinger, Gershwin’s music theory teacher, later alleged that he was a major contributor to *Porgy and Bess*. Although Schillinger’s contributions to *Porgy and Bess* are not substantiated, some of Gershwin’s prior works, including *Variations on I Got Rhythm* and *Cuban Overtures*, “owed a lot to

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134. See HYLAND, supra note 107, at 160 (noting that DuBose Heyward’s mother, Janie, was an expert in Gullah culture and dialect); JABLONSKI, supra note 87, at 272-76 (discussing Gershwin’s stay at Folly Island).


136. JABLONSKI, supra note 87, at 274.

137. Id. at 276 (noting that Gershwin re-created the effect that he heard in the churches he visited in the storm scene in act II, scene 4).

138. FLOYD, supra note 116, at 218 (noting that “Summertime” involves extended troping of this tune, including with respect to the intervallic structure of minor and major thirds and major seconds, the rhythm of the spiritual, the spiritual’s melodic and rhythmic structures as well as beat); see also Samuel A. Floyd, Jr, *Troping the Blues: From Spirituals to the Concert Hall*, 13 BLACK MUSIC RES. J. 31, 37-42 (1993) (discussing Gershwin’s troping of “Sometimes I Feel Like a Motherless Child” as the first extended troping of the song and describing “Summertime” as a “masterful revision of the old spiritual”).

139. FLOYD, supra note 116, at 218.

140. HYLAND, supra note 107, at 167 (noting that following Gershwin’s death, Schillinger alleged that he had contributed to *Porgy and Bess*, an assertion rebutted vehemently by Ira Gershwin).

141. Id.
Schillinger. Some passages from Porgy and Bess appear to some commentators to show signs of Schillinger’s influence. At a minimum, Gershwin’s orchestrations improved significantly as a result of his lessons with Schillinger.

4. Borrowings and the Reception of Porgy and Bess

The general tendency of Gershwin to borrow from African-American cultural expression has significantly influenced responses to Porgy and Bess. The critical response to Porgy and Bess has tended to be influenced by the sources of Gershwin’s borrowings, which prior to the 1970s, led to Gershwin not being accorded the status of a “serious” composer. The reception of Porgy and Bess has been guided by the complexities of the work as “an opera, as folklore, as racial stereotype, and as cultural exploitation.”

142. Id.; see Paul Nauert, Theory and Practice in Porgy and Bess: The Gershwin-Schillinger Connection, 78 MUSICAL Q. 9, 12 (1994) (noting that Gershwin took four half-hours of lessons per week for the first year or two of his lessons with Schillinger and that Schillinger’s influence on this music is hotly debated); see also PEYSER, supra note 83, at 300 (noting that Ira Gershwin completed the songs for Goldwyn Follies with Duke following George Gershwin’s death). See generally Vernon Duke, Gershwin, Schillinger, and Dukelsky, 75 MUSICAL Q. 102 (discussing the relationship between Gershwin, Schillinger, and the author, who completed Gershwin’s songs for the film Goldwyn Follies following Gershwin’s death).

143. See Nauert, supra note 142, at 14 (“A few passages from the opera have struck commentators as showing the clearest signs of Schillinger’s influence. These include the ‘fugue’ that accompanies the crap game in act 1, scene 2, and returns, expanded, during Crown’s murder in act 3, scene 1; the storm/hurricane music; [and] the choral background in ‘Gone, Gone, Gone’ . . . .” (footnotes omitted)).

144. Id. at 12 (noting that “virtually all agree that his orchestrations improved significantly thanks to Schillinger”).

145. See Crawford, supra note 110, at 24-32 (distinguishing the reaction to Porgy and Bess from four perspectives: as an American opera, as American folklore, as racial stereotype, and as cultural exploitation).

146. See infra notes 165-89 and accompanying text.

147. Richardson, supra note 41, at 169 (noting complexities of Porgy and Bess “and the fact that the opera was ‘not only written but produced, directed, and staged by whites, which means that whites reaped the monetary profits of its success’” (quoting Crawford, supra note 110, at 23)); see also Crawford, supra note 110, at 23 (noting the complexities of Porgy and Bess as a work of “serious” art depicting African-Americans in the South are reflected in Gershwin’s distance from the authenticity of the original material and the act of two white men manipulating the imagery of African-American culture for their own purposes).
Although *Porgy and Bess* did receive laudatory reviews during its run in Boston,\textsuperscript{148} critical reviews of *Porgy and Bess* were, at best, mixed during Gershwin’s lifetime.\textsuperscript{149} The initial New York run was not successful commercially and closed with losses.\textsuperscript{150} The Gershwin family has permitted extensive musical revisions of *Porgy and Bess* since the time of George Gershwin’s death. For example, the revival of *Porgy and Bess* from 1941 to 1944 was a popular but extensively modified version from the one that premiered in New York in 1935.\textsuperscript{151} The version of *Porgy and Bess* presented to audiences prior to the 1970s, however, was one based on cuts made by Gershwin after the Boston run and prior to the New York world premiere of the opera.\textsuperscript{152} By the late 1970s, musicologists and critics had begun to reevaluate *Porgy and Bess*,\textsuperscript{153} which received the imprimatur of the Metropolitan Opera, which performed a version of *Porgy and Bess* in 1985, fifty years after its premiere.\textsuperscript{154}

In contrast to the general critical response which has focused on the status of *Porgy and Bess* as a work of art, African-American commentary has tended to look at the representations of African-American culture within *Porgy and Bess*.\textsuperscript{155} The African-American critical response to *Porgy and Bess* has been mixed. Many performers of *Porgy and Bess*, including

\textsuperscript{148} Jablonski, supra note 87, at 287-88.

\textsuperscript{149} Id. at 289 (noting that dramatic critics tended to like the production, while music critics did not); Peyster, supra note 83, at 248 (noting that New York reviewers reacted negatively to the cuts made by Gershwin in the opera).

\textsuperscript{150} Jablonski, supra note 87, at 291 (noting that the run closed after 124 performances in New York); Wilder, supra note 88, at 155 (noting that *Porgy and Bess* “lost a good deal of money, and, in general, the opera critics dismissed it”); Stanley Green, *Oklahoma!: Its Origin and Influence*, 2 Am. Music 88, 89 (1984) (noting that *Porgy and Bess* was not initially a financial success).

\textsuperscript{151} See Charles Hamm, *The Theatre Guild Production of Porgy and Bess*, 40 J. Am. Musicological Soc’y 495, 497 (1986) (noting the popularity of the Cheryl Crawford revival, which reduced the cast and chorus by half and the orchestra from forty-four to twenty-seven pieces).

\textsuperscript{152} See Peyster, supra note 83, at 246-48; Hamm, supra note 77, at 11 (noting that all versions of *Porgy and Bess* are problematic and that even the Houston Grand Opera Company and Metropolitan Opera version are based on a score that was complete six months before the first performance and, thus, likely not an accurate reflection of Gershwin’s intent since revisions made and approved by him may not have been incorporated in this score).

\textsuperscript{153} See Hyland, supra note 107, at 176-77.


\textsuperscript{155} See Horn, supra note 115, at 168 (noting that the debate about aesthetic merit and representations of African-Americans came into direct contact in a debate in Liverpool, England relating to a proposed production of *Porgy and Bess*).
William Warfield, have been supportive of the work. Others, including Duke Ellington and journalist James Hicks, reacted negatively to the African-American characterizations in *Porgy and Bess*.

5. The Shape of the Public Domain: Determining the Scope of Common Pool Resources

Like many others, Gershwin borrowed extensively from African-American cultural expression. As has been true in other cases, borrowings from African-American traditions and artists have often taken place within the context of copyright frameworks that have historically facilitated the use without compensation of cultural forms that fall in a lower place in socio-cultural hierarchies. As a result, certain types of cultural expression may be treated as a public domain resource available to all, as is often the case, for instance, with local knowledge in the context of global intellectual property regimes today.

In some cases, a tendency to designate particular forms of cultural expression as a public domain resource may be a result of the fact that the source may truly reflect a common pool of resources from which many draw inspiration and material. In such cases, payment of compensation for use of such material is often not feasible and likely not desirable, since common pool resources are commons that should be generally available to all. Although compensation may not be feasible or desired in such cases, attribution to the source of the material would probably be beneficial. In addition, when public domain resources are embedded within copyrighted works, care should be taken to ensure that copyright protection does not eliminate future access to the public domain elements within the copyrighted work. Preventing access to such elements could effectively prevent future uses of such public domain material for the duration of copyright protection.

In contrast to uses of public domain resources, in other cases certain types of cultural expression may be treated as a common pool resource as a

156. *Id.* at 173-74.
157. *Id.*
158. See *Arewa, Piracy*, supra note 2, at 54; see also *infra* notes 172-80 and accompanying text.
160. See *infra* note 277 and accompanying text.
result of hierarchies of culture, power, and taste.\footnote{161} Such hierarchies are often expressed through and reflected in the operation of copyright law structures, which may facilitate the borrowing without compensation of cultural expression of certain often disempowered individuals or groups.\footnote{162} The uses of African-American cultural expression without compensation during the twentieth century have, in some instances, reflected the existence and the operation of such hierarchies with respect to copyright law and its application. Such uses have included borrowings by composers such as Gershwin as well as others, including rock ‘n’ roll musicians, who frequently borrowed from the blues tradition and blues artists.\footnote{163}

Gershwin borrowed both from common pool resources that may be considered public domain as well as from knowledge that, although treated as a public domain resource, was likely not a public domain resource and for which compensation could and, in some instances, perhaps should have been paid. Both types of borrowings are potentially problematic in light of the current aggregation of control and compensation within copyright law frameworks, which may enable users of public domain resources or other existing works to use copyright protection to prevent similar uses of their works. In addition to being highly inequitable, this outcome is particularly ironic with respect to Gershwin’s works, including \textit{Porgy and Bess}, which contains depictions of African-Americans and African-American culture that were questioned and criticized by even the standards of the time of its creation on account of the characterizations it included. \textit{Porgy and Bess} is also a popular and widespread work and one of the few representations of African-American culture in the “high” culture music sphere. Gershwin family restrictions on uses of \textit{Porgy and Bess} substantially affect cultural meaning in preventing any reinterpretation of this work, which now represents a seminal “high” culture depiction of African-Americans and African-American culture.\footnote{164}

\footnote{161} Arewa, Piracy, supra note 2, at 18, 45
\footnote{162} Id.
\footnote{163} See Dixon v. Atl. Recording Corp., 222 U.S.P.Q. 559, 560 (1985) (involving suit by blues artist Willie Dixon against the rock group Led Zeppelin, alleging that Led Zeppelin’s song “Whole Lotta Love” constituted copyright infringement of Dixon’s song “I Need Love”); see also Vaidyanathan, supra note 2, at 117-48 (discussing copyright and African-American music); Greene, supra note 2, at 357-58 (“Music scholars have noted that [b]lack artists, as a class of performers, routinely found their works appropriated and exploited by publishers and managers. The publishers typically (although hardly always) were white. As a result, [b]lack artists as a class were denied the economic benefits of the copyright system.” (citations omitted)); Hall, supra note 2, at 31-51.
\footnote{164} See infra notes 197-99 and accompanying text.
C. Hierarchies of Cultural Forms and Gershwin’s Works

1. *Porgy and Bess* as “Serious” Art

Although *Porgy and Bess* has since its creation leapt from the world of popular art to high culture, the initial response to the opera was rooted in pervasive hierarchies of cultural forms. Part of the reaction to *Porgy and Bess* and other Gershwin works after the concerto *Rhapsody in Blue* came from the fact that they were difficult to classify within existing hierarchies as popular music given their technical attributes. At the same time, such works did not fit within accepted characterizations of “serious” music on account of their being based in vernacular cultural forms, including those coming from African-American traditions.

From the nineteenth century onwards, rankings of the aesthetic value of musical works, or what might be termed hierarchies of taste, have been characteristic of evaluations of musical production and have significantly influenced the development of copyright frameworks. George Gershwin’s background was interpreted in light of such hierarchies. Gershwin grew up as part of a Jewish working-class America, straddling volatile racial lines. As a result of his background and musical choices in the context of such hierarchies, Gershwin was “regarded either as an outsider or, once inside, as associated with ‘lower’ art.”

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166. See Arewa, Piracy, *supra* note 2, at 45, 47 (discussing the role of hierarchies of cultural forms in music and other expressive arts).
167. See Richard Crawford, *Gershwin’s Reputation: A Note on Porgy and Bess*, 65 Musical Q. 257, 257-58 (1979) (noting that scholars are uneasy about Gershwin because his music is difficult to classify); Crawford, *supra* note 110, at 23 (noting that *Porgy and Bess* is a paradoxical work of “opera interlaced with hit songs”); Carol Oja, *Gershwin and American Modernism*, 78 Musical Q. 122, 122 (1994) (noting that Gershwin straddled the divide between high and low culture forms); Starr, *supra* note 85, at 429-30 (noting that Gershwin’s “free embrace of influences from popular idioms resulted in a music with a more conservative harmonic and rhythmic surface than that typical of contemporaneous ‘avant-garde’ works” and was also a stumbling block toward his music being taken “seriously”).
168. See Crawford, *supra* note 110, at 19 (noting that *Rhapsody in Blue* was Gershwin’s “first unclassifiable act as a musician”).
169. See Arewa, *Hip Hop, supra* note 1, at 582-86 (discussing hierarchies of taste in hip hop music); Arewa, Piracy, *supra* note 2, at 47 (discussing hierarchies of culture and hierarchies of taste with respect to music in the nineteenth century).
171. Id.
2. Insider and Outsider Status, Hierarchies, and Copyright

Gershwin’s simultaneous insider and outsider status meant that he both benefited and suffered as a result of hierarchies of culture. George Gershwin benefited immensely from the existence of such hierarchies. As a white composer whose work involved extensive borrowing from African-American cultural forms, Gershwin was able to present musical forms derived from that tradition in arenas not then available to African-American artists who worked in those idioms.\(^{172}\) Such music, coming from outside of the classical tradition, seemed fresh and inventive to those who heard it, many of whom were not well acquainted with the context from which such music derived. In addition, hierarchies affected Gershwin’s ability to borrow from African-American sources without compensation. This ability to borrow reflected the fact that African-American cultural traditions have been, for the most part, treated as part of the public domain.\(^{173}\) This categorization as a public domain resource enabled Gershwin and others to borrow liberally from African-American sources during much of the twentieth century. The public domain categorization also meant that such borrowings were not deemed copyright infringement, highlighting the intimate relationship between the scope of copyright protection, power, and status.\(^{174}\)

At the same time, Gershwin also suffered from hierarchies of taste on account of being Jewish, lacking formal musical training, and his connection with popular and non-European musical forms.\(^{175}\) Opportunities for Jewish composers were restricted in the serious music realm in Gershwin’s time.\(^{176}\) In addition, a pervasive anti-Semitism is evident in some commentary about

\(^{172}\) SMALL, supra note 110, at 331-32 (noting that Gershwin’s Rhapsody in Blue was commissioned by Paul Whiteman, the “self-styled ‘King of Jazz,’” as part of Whiteman’s effort to make jazz respectable and accessible to white Americans).

\(^{173}\) See Arewa, Piracy, supra note 2, at 53 (discussing borrowings from African-American traditions).

\(^{174}\) See Arewa, Hip Hop, supra note 1, 616-18 (discussing rock and roll borrowings from the blues tradition); see also HAROLD CRUSE, THE CRISIS OF THE NEGRO INTELLECTUAL 103-04 (1984) (discussing Porgy and Bess as a paradigm case of the lack of control of African-Americans over their artistic and cultural destiny); VAIDHYANATHAN, supra note 2, at 117-48 (discussing copyright and African-American music); Greene, supra note 2, at 357-58 (commenting on the use of copyright to appropriate African-American music); Hall, supra note 2, at 39-40 (discussing the systematic appropriation of African-American musical forms).

\(^{175}\) PEYSER, supra note 83, at 222; see supra notes 127-58 and accompanying text.

\(^{176}\) PEYSER, supra note 83, at 222-23 (noting that the 1920s was “the first decade in the history of Western music that Jews . . . were even allowed to try to enter the exalted field of concert repertoire”); Richardson, supra note 78, at 167 (noting Gershwin’s image as part of a Jewish, working-class, immigrant family who straddled racial lines).
Gershwin’s music, including composer Virgil Thomson’s review of *Porgy and Bess*, which referred to “gefilte fish orchestration.” Further, Gershwin’s family came to the United States from Russia, which meant that he fell in a lower place in social and cultural hierarchies than Jewish composers from Austrian and German backgrounds, such as Arnold Schoenberg, or American Jewish composers such as Aaron Copland, who had studied extensively in Europe.

3. Gershwin’s Musical Training, Experience, and Commercial Success

Gershwin’s music was also denigrated because of his lack of formal training in classical theory, particularly counterpoint and orchestration, and because of his commercial success. Gershwin did attempt throughout his life to rectify his formal musical deficiencies through studies with teachers such as Joseph Schillinger. Gershwin also relied on others throughout his career to do his orchestrations and assist with notation. Gershwin started his musical career at age fifteen, first as a pianist and later as a piano roll player in Tin Pan Alley in New York City. Later in his career as he attempted to move into the realm of serious composition within the classical music idiom, Gershwin’s connection with Tin Pan Alley, then

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177. PEYSER, supra note 83, at 237-38.
178. *Id.* at 248 (noting the smarmy anti-Semitism in Thompson’s remarks).
179. *Id.* at 33 (noting that prior to 1915, only German and Austrian Jewish composers such as Mendelssohn, Mahler, and Schoenberg had established successful careers as composers and that these composers were highly educated, assimilated men who had formally converted to other religions).
180. *Id.* at 97-99 (noting that Copland became identified as the dean of American music despite the far greater popularity and public consciousness of Gershwin’s works); Starr, *Art Music*, supra note 84, at 180 (noting Copland studied in Paris with Nadia Boulanger, where “Copland quickly absorbed important elements of contemporary European musical styles”).
181. PEYSER, supra note 83, at 57 (discussing gaps in Gershwin’s technical music training).
182. *Id.* at 197-98.
183. *Id.* at 71 (noting that Will Vodery, an African-American friend and colleague of Gershwin, orchestrated Gershwin’s short opera *Blue Monday Blues*; see supra notes 100-03 and accompanying text.
184. See NEW GROVE GERSHWIN, supra note 77, at 748 (approximately $304 in 2006 dollars).
185. *Id.*
the center of popular music production globally, continued to taint his work in the views of classical music critics of the time. In addition, Gershwin’s syncretic style, which derived much inspiration and borrowing from African-American and other traditions outside of the mainstream European classical tradition, including Jewish scales and motifs, was also often dismissed because of its connection with such forms.

In the last years of his life from 1932 to 1937, Gershwin was subjected to enormous criticism as he attempted to become a more serious composer. Gershwin’s enormous commercial success was a continuing hurdle to his ambitions since his experience also ran counter to notions that great musicians should suffer from deprivation. Gershwin’s commercial success was both partly attributable to and reinforced by his uses of copyright.

IV. THE GERSHWINS, CONTROL AND THE USES OF COPYRIGHT

A. George Gershwin and the Uses of Copyright

George Gershwin actively participated in technological transformations in music practice and performance associated with the advent of the recording industry and radio, which were in turn connected to the decline in power of music publishers. In addition to writing songs for Tin Pan

186. CHARLES HAMM, “After the Ball”; or The Birth of Tin Pan Alley, in YESTERDAYS: POPULAR SONG IN AMERICA 284, 285-86 (1979) (discussing the birth of Tin Pan Alley in New York City in the 1880s, which by 1900 controlled the popular song industry).

187. See THE GEORGE GERSHWIN READER, supra note 77, at xi (noting that Gershwin was “[l]ambasted by his critics for a lack of formal compositional techniques”); Larry Starr, Musings on “Nice Gershwin Tunes,” Form, and Harmony in the Concert Music of Gershwin, in THE GERSHWIN STYLE, supra note 41, at 95, 95 (“But from the first reviews of Rhapsody in Blue through the early criticism of Porgy and Bess and up to the present day, connoisseurs and sophisticated authorities and would-be authorities on Gershwin have claimed that he simply lacked the technique to construct convincing large-scale works.”).

188. Starr, Art Music, supra note 84, at 180 (“In the 1920s Aaron Copland followed the traditional path for American artists, especially musicians, who wished a respectable completion for their studies: that is to say, he left the country.”).

189. See PEYSER, supra note 83, at 214-15 (noting the publications of the League of Composers rarely referred to Gershwin in other than a pejorative fashion, partly because he was so popular).

190. See Hamm, supra note 77, at 14 (noting that Gershwin was “the first American composer whose early career was built largely on the success of sales of phonograph records of his songs”).

191. See Reebee Garofalo, From Music Publishing to MP3: Music and Industry in the Twentieth Century, 17 AM. MUSIC 318, 336 (1999) (noting that records becoming a staple of
Alley and Broadway musicals, Gershwin also wrote songs for a number of Hollywood films. Gershwin’s involvement in popular and commercial music likely made him more conscious of the value of copyrights. In fact, Gershwin’s uses of copyright anticipated twentieth-century “popular music figures in his dealings with a new and immediately complicated music business that embraced both technology—whether in print, recording, or film—and attendant legalities, such as royalties.” As a result, in addition to forming his own music publishing company, he “always insisted on receiving a full 50% interest in a composition, even when two lyric writers contributed to the song, each lyric writer in such an instance sharing the other 50% interest equally.” In other instances, it has been asserted that when Ira was not available, he was replaced with a lyricist who would be accommodating and would permit Ira to retain all rights.

B. The Role of Artistic Legacies as Business: Control of the Post-Mortem George Gershwin Artistic Legacy

The Gershwin family has exerted significant control over Gershwin’s musical legacy and image since his death. Moreover, with one exception, all Gershwin biographers have had close ties to members of the Gershwin family. A focus on control has been an integral part of Gershwin family management of George Gershwin’s estate, particularly with respect to copyrights, permissions, and royalties. The Gershwin family’s actions with respect to George’s legacy reflect the post-mortem development of industries

radio programming was the basis of records displacing live performers in radio broadcasting and record companies’ displacing publishing house as a power center).

192. See PEYSER, supra note 83, at 180-81 (noting that George and Ira Gershwin relocated to California in August, 1936, to write songs for Hollywood movies).
193. Richardson, supra note 41, at 169.
194. PEYSER, supra note 83, at 127 (noting that George and Ira formed the New World Music Company, which published all Gershwin works with profits going two-thirds to George and one-third to Ira, as a subsidiary of T.B. Harms).
196. PEYSER, supra note 83, at 123 (noting that Howard Dietz claims that the Gershwins selected him rather than P.G. Wodehouse to fill in for Ira when Ira had an appendectomy and was unavailable for six weeks, because he would be more accommodating than Wodehouse about rights and would permit Ira to retain all the credit and money).
197. See Hamm, supra note 77, at 7 (noting that understanding of Gershwin’s music has been hindered by family intervention after his death).
198. See id. at 8.
connected to popular figures that thrive and find new life even in the death of the figures upon which they are based.\textsuperscript{199}

The legacies of famous artists may be even more valuable after death than they were during the artist’s lifetime,\textsuperscript{200} which has important implications for copyright. Since copyright terms were originally much more limited in duration,\textsuperscript{201} the role of heirs and other legal successors following the death of copyright-holders was not typically as pertinent an issue. Today, however, with copyright extending for a generation after the death of creators, the role of copyright-holder legacies as a business is increasingly visible and important. The tension between artistic practice and artistic legacy is by no means limited to deceased creators.\textsuperscript{202} Death, however, ends the artistic practice side of the equation and tends to remove the artistic legacy from its origin in the artistic practice that originally generated the legacy.\textsuperscript{203} Artistic legacy is an intangible that may also be protected by the right of publicity.\textsuperscript{204} The role of the right of publicity with respect to artistic legacy was raised in the case \textit{Gershwin v. Whole Thing Co.},\textsuperscript{205} which related to an unauthorized stage performance of music by George and Ira Gershwin.\textsuperscript{206}

Further, as has been the case with the post-mortem Elvis empire,\textsuperscript{207} the reified images of creators promoted by artistic legacy businesses is at times


\textsuperscript{200} See id.


\textsuperscript{202} See Wall, supra note 199, at 120 (discussing the contradiction in the artistic activities of the Rolling Stones who strive to create new material but whose audience demands old songs that are identified with the image of the group thirty years ago).

\textsuperscript{203} See id. ("In the long term, death or dissolution of partnership or artistry has the effect of rarefying the artist and alienates the abstract image from its physical origin, it also encourages reification.").

\textsuperscript{204} See id. at 122, 124-33 (discussing the right of publicity in Elvis cases); see also Arewa, \textit{Strategic Behaviors, supra note 17} (discussing the implications of intangibles for strategic behaviors).

\textsuperscript{205} No. CV-80-569, 1980 U.S. Dist. LEXIS 16465, at *12 (C.D. Cal. Mar. 10, 1980) (discussing grand rights and finding that a producer would need grand rights to the extent that a performance tells a story or is “performed with dialogue, scenery, or costumes”).

\textsuperscript{206} Id. at *3 (noting Gershwin’s allegation that a license was needed because “the music publishers did not possess sufficient rights of copyright for the dramatic live stage production of ‘Let’s Call the Whole Thing Gershwin’ and because Mr. Gershwin’s rights of publicity would be invaded”).

\textsuperscript{207} See Wall, \textit{supra} note 199, at 119.
in tension with the creators themselves, whose “artistry and ambitions often cause them to develop their artform in directions different to those which made them popular.” This tension was particularly evident in Gershwin’s case in the last years of his life as he strove to develop his music in a direction that diverged significantly from the work that made him so popular.

As is the case with other business interests, controllers of copyright artistic legacies actively advance their strategic interests to a great extent by the same means as businesses do more generally. Consequently, such holders are typically less connected to acts of creation than was the case during the life of the creator. This dynamic is evident in the Gershwin case in the activities of the Gershwin family, who has played a significant role in shaping depictions of George Gershwin and his music following his death. In the case of the Gershwins, maintaining respect for the Gershwin image and music has been a key priority in controlling uses of Gershwin copyrights.

The business activities of cultural legacies have significant implications for copyright by virtue of the sources from which such legacies derive value. Such sources of value are often not adequately contemplated in existing copyright discourse. As a result, understanding the business structure and operation of artistic legacies is important for understanding how such legacies interact with copyright frameworks today.

C. Businesses Structures in Copyright Artistic Legacy Maintenance

1. The Gershwin Trusts

In the case of the Gershwin family, control of the copyrights for both George and Ira is administered by a series of trusts established after George’s death. A number of trusts administer the copyrights of George and Ira Gershwin, including the George Gershwin Family Trust (the “George

208. Id. at 119-20.
209. Peyser, supra note 83, at 86 (noting that Ira Gershwin and his wife Leonore, “jealously guarded his position . . . during George’s lifetime [and] in the manipulation of history after his death”).
210. See Gershwin, 1980 U.S. Dist. LEXIS 16465, at *5 (“Mr. [Ira] Gershwin has always endeavored to preserve the public respect for the Gershwins and their music.”).
211. See Peyser, supra note 83, at 297-98 (noting that George Gershwin never regained consciousness after surgery for a brain tumor); see also New Grove Gershwin, supra note 77, at 749 (noting that George Gershwin died on the morning of July 11, 1937, after emergency surgery for a brain tumor and was buried in Mount Hope Cemetery, Hastings-on-Hudson, New York, following memorial services in New York and Hollywood).
Gershwin Trust”), which administers certain rights in the works of George Gershwin,212 and the Leonore S. Gershwin Trust for the Benefit of the Ira and Leonore Gershwin Designated Philanthropic Fund (the “Gershwin Philanthropic Trust”) and the Leonore S. Gershwin Trust for the Benefit of the Library of Congress (the “Gershwin LOC Trust”), both of which derive revenue solely from the copyrights of Ira Gershwin.213 All three Gershwin trusts support the arts and the creation of new works.214

The Gershwin LOC Trust has the specific mission of protecting and preserving “the musical history of Ira Gershwin” and managing the assets of the trust to “support the Library of Congress.”215 The Gershwin Philanthropic Trust provides support “for artistic organizations, education for children in the arts[,] and certain medical facilities.”216

2. The Gershwin Family and Control of Copyright and Artistic Legacies by Heirs

a. Control of Artistic Legacies

The combination of control and compensation in copyright is particularly problematic in the case of heirs and other legal successors to copyright interests. Copyright is often viewed as an incentive to reward creation.217 Even if aggregating control and compensation makes sense while a composer is alive, justifying this combination in the case of heirs is not quite the same. After the creator’s death, strategic uses of copyright inevitably become paramount because at this point copyright can no longer be seen as connected to incentives to create in most instances since new works from the deceased creator could only come from works that were either undiscovered or unpublished prior to the creator’s demise.

212. See Trust Brief, supra note 3, 2002 WL 1836626, at *2aa.
213. Id.
214. Id.
217. Landes & Posner, supra note 34, at 326 (“Copyright protection . . . trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.”).
With popular writers, however, an option does exist by which a popular writer’s works may be written by others after the writer’s death. This is the case with the works of Robert Ludlum. Ludlum’s popular fiction works featuring the character Jason Bourne have recently been continued by Eric Van Lustbader, whose book *The Bourne Legacy* was published in 2004, some time after Ludlum’s death in March 2001. This particular avenue is probably not as readily available to music composers or songwriters, although the post-mortem repackaging of compilations of works of artists such as Elvis Presley, Jimi Hendrix, and others may be the closest equivalent in the music context.

The extent to which control of copyright by heirs is an aspect of creators’ incentives to create may be an unanswered empirical question. Heirs and legal successors are in most instances not creative. Constructing an argument that justifies continued control of copyrighted works by heirs on the grounds of giving incentives to create is far more tenuous than such justifications in relation to creators. Moreover, even in the case of creators themselves, little empirical evidence actually supports the notion that copyright gives incentives to create. Even if leaving assets does create incentives to create new works, it is not clear that copyright law structures as they currently exist are the appropriate way to do this, given the need to balance the public interest in copyright. The desire to leave assets to heirs as an incentive to create lends support to the idea that compensation and control within copyright structures should, at least in some instances, be disaggregated. The role of heirs in copyright touches upon the sources of value that legal successors derive from copyright protection and the differences between where they and creators may derive value.


219. See Arewa, *Hip Hop*, supra note 1, at 555-58 (discussing differences in the application of copyright to literature and music).

220. See, e.g., Jimi Hendrix, The Ultimate Experience (MCA 1993) (consisting of a compilation of tracks selected from a Jimi Hendrix fan poll); Elvis Presley, Elvis 30 #1 Hits (RCA 2002) (including thirty Elvis number one hits); Elvis Presley, Elvis 2nd to None (BMG Heritage 2003) (following the successful release of Elvis 30 #1 Hits and including thirty additional tracks from Elvis Presley’s catalog).


222. See supra notes 41-45 and accompanying text.

b. The Value of Artistic Legacies

The value that estates of deceased artists and heirs derive from exercise of copyright likely has nothing to do with creation and may be further removed from issues of musical integrity. This has been clearly evident in the Gershwin case. In contrast to George Gershwin’s insistence on playing his own music or controlling performers who played his music, the Gershwin family has “tended to authorize performances that gave the most promise of financial return or favorable publicity, with less regard for quality or integrity.” Since no new works are likely to emerge, at least in any quantity, estates potentially have significant differences in interests in the rights that inhere in copyright. As a result, in the case of estates in particular, factors that could be termed strategic, including the extraction of revenues and control over image, are often a predominant focus. The Gershwin family, for example, has focused on controlling all images disseminated of both Ira and George Gershwin to the extent of refusing to release photographs unless stubble was airbrushed from their portraits.

The role of estates is increasingly relevant since copyright duration now extends far beyond the life of the original creator. Use of copyright by heirs thus brings attention to the control and compensation rights within copyright, as well as the fact that the control rights of copyright do not fit well within the incentive model of copyright in this particular context. Although control of copyrighted works may be desirable for reasons of image and reputation, it is not clear that copyright should be a mechanism for this, particularly since this has little to do with the creation of music. In the debate concerning the CTEA, heirs were quite active in asserting their economic interests in term extension, citing the fact that widows, children, and legal successors would be harmed by a declaration that the CTEA is unconstitutional. The strategic uses of copyright by heirs are rooted in the economic value of streams of licensing revenues from copyright-protected works. The economic

224. Hamm, supra note 77, at 10 (noting that George Gershwin either performed his music himself or insisted on “certain controls over other performers who wanted to play his music”).
225. Id.
226. See Wall, supra note 199, at 118-19 (discussing the maintenance of the Elvis Presley artistic legacy).
227. See Peyster, supra note 83, at 23.
value of such revenues can be immense and can be greatly magnified after creators’ deaths.229

3. The Value of Gershwin’s Works

The value of Gershwin’s works was high during his lifetime and only increased following his death. Gershwin was commercially successful during his lifetime and earned significant amounts of money for many of his more popular works. Gershwin’s first hit song, *Swanee*, was recorded by Al Jolson in 1920 and earned Gershwin $10,000 in composer’s royalties in 1920 alone (approximately $101,000 in 2006 dollars).230 The piano concerto *Rhapsody in Blue*, which was composed on commission, earned Gershwin more than $250,000 between 1924 and 1934 (approximately $2.96 to $3.78 million in 2006 dollars) from permissions, sales, and rentals of the score.231 Gershwin received $50,000 in 1930 (approximately $607,000 in 2006 dollars), for example, for the use of *Rhapsody in Blue* in the film *King of Jazz*.232

In addition to royalty income, Gershwin commanded significant fees for his songwriting work. In 1930, for example, he and his brother earned fees of $100,000 (approximately $1.21 million in 2006 dollars) for the film *Delicious* and in 1932 they received $100,000 (approximately $1.48 million in 2006 dollars) for the Broadway musical *Of Thee I Sing*,233 which won a Pulitzer Prize for drama.234 Gershwin would also have earned royalties from the publication of sheet music for such works. Some of the Gershwin Broadway productions were also financially successful.

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229. This is evident in the case of Elvis Presley, whose bankrupt estate was said to be worth less than $500,000 at the time of his death and whose value was greatly augmented by the Presley estate’s gaining of control over finances and control of the Presley image and name. See Wall, supra note 199, at 123.


231. *Peyser*, supra note 83, at 86 (noting that Gershwin received $250,000 during the first ten years of publication of the T.B. Harms two-piano version of *Rhapsody in Blue* despite the fact that both parts were exceptionally difficult to play); *New Grove Gershwin*, *supra* note 77, at 748 (noting that *Rhapsody in Blue* was composed and performed for a well-publicized concert organized by dance band leader Paul Whiteman and was first performed on February 12, 1924, in a concert billed as “An Experiment in Modern Music”); Richardson, *supra* note 41, at 170 (noting that Gershwin earned more than $250,000 between 1924 and 1934 for *Rhapsody in Blue*).


233. The figures for *Delicious* and *Of Thee I Sing* reflect the amounts for both George and Ira, who split fees two-thirds to one-third. See *Peyser*, supra note 83, at 127, 180, 196.

234. *New Grove Gershwin*, *supra* note 77, at 749 (noting that *Of Thee I Sing* won a Pulitzer Prize for drama).
At the time of his death in 1938, Gershwin’s estate was listed at $430,841 gross (approximately $6.19 million in 2006 dollars) and $341,089 net (approximately $4.90 million in 2006 dollars).\(^{235}\) Gershwin’s works continued to be valuable after his death. The value of Gershwin’s works, from a licensing perspective, has increased in recent years. In 2002, a nationwide license of a Gershwin work was valued at $250,000, an increase from a value of $45,000 to $75,000 fifteen years prior to that time.\(^{236}\) \(Rhapsody in Blue\) became United Airlines’ theme song for $500,000.\(^{237}\)

Today, close to seventy years after George’s death and some twenty years after Ira’s death, the Gershwin family trusts continue to realize significant revenue streams from George and Ira Gershwin copyrights. In the case of the Gershwin Philanthropic Trust and Gershwin LOC Trust, which relate to Ira, for example, trust revenues were in excess of six million dollars each or close to thirteen million dollars in aggregate between 1998 and 2002 as reported on trust IRS Form 990 filings.\(^{238}\) In addition to garnering significant revenues from uses of copyrighted works, the Gershwin family significantly controls the use and interpretation of such works.

**D. Control of Porgy and Bess**

\(Porgy and Bess\) is one of George Gershwin’s greatest achievements and constitutes his magnum opus.\(^{239}\) In addition to being Gershwin’s last major

\(^{235}\) See Peyser, supra note 83, at 298 (noting that the value of specific pieces in the residuary estate included \(Rhapsody in Blue\) ($20,125), \(An American in Paris\) ($5000), \(Of Thee I Sing\) ($4000), \(Concerto in F\) ($1750), and \(Porgy and Bess\) ($250)).

\(^{236}\) Trust Brief, supra note 3, at *29 n.85; see also John J. Fialka, \(Music: Songwriters’ Heirs Mourn Copyright Loss\), WALL ST. J., Oct. 30, 1997, at B1 (noting that a nationwide license for a Gershwin song went for between $200,000 and $250,000 in 1997, in contrast to the $45,000 to $75,000 the license would have cost fifteen years prior to that time).

\(^{237}\) Trust Brief, supra note 3, 2002 WL 1836626, at *29 n.85; Fialka, supra note 236, at B1 (noting the soaring value of old songs and the fact that three companies, AT&T Corp., Ford Motor Co., and Farmers Insurance Group, were “currently running television ads featuring songs written by the Gershwins”).

\(^{238}\) The exact figures for this time period for the Gershwin Philanthropic Trust were $6,332,724 (revenues), $7,720,696 (expenses), $4,769,089 (average assets), $3,594,948 (grants and allocations), and $932,605 (compensation of officers and directors). See Form 990 Filings of the Gershwin Philanthropic Trust, 1998-2003 (on file with author). Figures for the Gershwin LOC Trust are $6,450,098 (revenues), $6,835,189 (expenses), $3,925,999 (average assets), $136,399 (average liabilities), $3,185,275 (grants and allocations), and $932,605 (compensation of officers and directors). See Form 990 Filings of the Gershwin LOC Trust, 1998-2003.

\(^{239}\) See John Andrew Johnson, \(Gershwin’s Blue Monday (1922) and the Promise of Success, in \(The Gershwin Style\), supra note 41, at 111; Crawford, supra note 110, at 21.
work, Gershwin described *Porgy and Bess* as a “labor of love.” Since Gershwin’s death, the Gershwin family has closely controlled performances of *Porgy and Bess*, particularly with respect to casting. *Porgy and Bess* illustrates a number of different ways in which the control aspects of copyright may be manifested, including issues connected to control by heirs, control of future performances of works, control of reinterpretation of works, and control of future borrowings from works.

1. Control by Heirs: The Gershwin Trusts and Family Control

Control of copyright by heirs is increasingly important given the current length of copyright terms. The most recent copyright term extension intensifies the influences of heirs on the uses of copyright. As a result, any consideration of the use of copyright should consider how heirs use copyright, both in terms of control of future borrowing, performances and reinterpretations, and with respect to strategic expansion of existing rights.

The Gershwin trusts were surprisingly not strong proponents of the CTEA and participated in a brief for *Eldred v. Ashcroft*. As was the case with Disney, George Gershwin’s works would have entered the public domain in the next few years without the twenty-year extension given under the CTEA. In addition to assuring such heirs continued streams of licensing revenues for a longer period of time, however, the CTEA also permits continued control of copyright-protected works for uses and purposes that have little to do with the creation of new works.

2. Controlling Borrowing: The Irony of Gershwin Family Restrictions

Copyright control aspects often serve to limit future uses of copyrighted works. This is ironic in the Gershwin case given the extent to which Gershwin used musical borrowing as an indispensable part of his compositional style. Current copyright standards significantly restrict borrowing and uses of existing works unless such borrowings or uses fall

240. *See Johnson, supra* note 239, at 111.

241. *See Gifford, supra* note 21, at 386 (“Other notable lobbyists included the Gershwin family, whose copyright on George Gershwin’s ‘Rhapsody in Blue’ was due to expire . . . .”).

242. *See* Sabra Chartrand, *Congress Has Extended Its Protection for Goofy, Gershwin and Some Moguls of the Internet*, N.Y. TIMES, Oct. 19, 1998, at C2 (noting that at the time of adoption of the CTEA, the songs of Ira and George Gershwin were scheduled to lose copyright protection in the coming years).

243. *See supra* notes 98-144 and accompanying text.
within an exception that may rebut a charge of copyright infringement. Existing exceptions include fair use and de minimis use. In this manner, copyright protection substantially privileges incumbents, who are permitted to borrow while restricting others from borrowing or using their copyrighted works in the future to create new works. With the current long duration of copyright, the inclusion of control features within copyright are increasingly problematic, which is reflected in the assertions of opponents of the CTEA about the influence of current copyright duration on the public domain.

3. Controlling Performances: The Gershwin Trusts and Racial Casting

Control of future performances is another aspect of the exercise of control by copyright-holders. With respect to Porgy and Bess, the control aspect of the exercise of copyright by the Gershwin family is most evident in its control of the manner in which that show is performed. The George Gershwin Trust closely controls casting of Porgy and Bess by stipulating that in certain performances, characters in the opera that are black must be cast with black singers:

For example, even when Mr. Gershwin licenses the full grand musical play “Porgy and Bess,” he demands that each performance meet a number of requirements. One such requirement is that the play be performed by a Black cast and a Black chorus. The reason for this is quite simple. George and Ira Gershwin created “Porgy and Bess” to be a musical play about Southern Blacks. Today, Mr. Gershwin demands of companies, including the New

244. See Arewa, Hip Hop, supra note 1, at 573-79.

245. Although many discussions indicate that the Gershwin family requires an all-black cast, this is not entirely true because Porgy and Bess includes characters such as Archdale who are not black. See Gail Russell Chaddock, When Is Art Free?, CHRISTIAN SCI. MONITOR, June 11, 1998, at B1 (noting racial casting); see also Garon, supra note 13, at 595-96 (“[W]hen Washington’s Shakespeare Theater decided to cast a white actor, Patrick Stewart, as Othello along with an all-black cast last year, they didn’t need permission from Shakespeare’s heirs, because the play was already in the public domain. But a theater group wanting to perform Porgy and Bess with an all-white cast could not, because the Gershwin Family Trust stipulates that the work can be performed only with an all-black cast.”) (alteration in original) (quoting Chaddock, supra); Hugh C. Hansen et al., Panel II: Mickey Mice? Potential Ramifications of Eldred v. Ashcroft, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 771, 808 (2003) (noting the Gershwin estate requirement that Porgy and Bess have a cast that is all black); Christine Quintos, Comment, Congress’ Green Monster: Copyright Extension and the Concern for Cash over the Propagation of Art, 12 DEPAUL-LCA J. ART & ENT. L. 109, 130 (2002) (noting creative control of the Gershwin Family Trust over Porgy and Bess in allowing only an all-African-American cast to perform the play).
York Metropolitan Opera, that their non-Black contract players be paid not to perform in productions of “Porgy and Bess” and that they be replaced with Black actors and actresses. 246

The Gershwin family is able to enforce this stipulation by virtue of the control rights given them within copyright structures and their typical retention of grand rights. 247 Whether such racial casting is appropriate is an ongoing debate among singers and other musicians. Simon Estes, the African-American bass-baritone, who was not cast as Wotan in the Wagner opera Parsifal because he is African-American, has stated that he “considers the all-black cast stipulation a disservice both to ‘Porgy and Bess’ and the cause of integration.” 248 The Porgy and Bess stipulation does not apply to concert versions of the opera, but only staged versions. In some instances, the Gershwin family has transferred rights to some songs to music publishers, particularly with respect to small performing rights or non-dramatic rights. 249 As a result, a concert performance of Porgy and Bess would not be subject to the casting restriction. In contrast, a staged performance of Porgy and Bess with costumes would require a license from the Gershwin even if performing rights or non-dramatic rights had been transferred to music publishers, because in such an instance, grand performing rights (grand rights or dramatic rights) would be needed. The Gershwin family has typically retained such grand rights. 250 The racial casting restriction in Porgy and Bess has led to it serving as a springboard for many African-American classical performers, including Leontyne Price and William Warfield, 251 who performed Porgy and Bess early in their respective careers. Regardless of whether racial casting is justified, such control is clearly not an essential or necessary feature of copyright. 252 Further, the use of copyright evident in

247. Id. at *11-12; see also infra note 249 and accompanying text.
250. See id. at *11-12.
251. David Schiff, The Man Who Breathed Life into ‘Porgy and Bess,’ N.Y. TIMES, Mar. 5, 2000, at 35, 39 (discussing the New York City Opera production of Porgy and Bess and noting that the opera has “served as a springboard for the careers of so many great black singers, including Todd Duncan, William Warfield, Leontyne Price, Donnie Ray Albert, Clamma Dale and Wilhelmenia Fernandez”).
252. See Tommasini, supra note 248, at E2 (noting that “if nontraditional casting is going to work, it has to be applied to all operas, ‘Porgy and Bess’ included”).
Porgy and Bess, as is true of many strategic uses of copyright, may actually undermine the public interest side of the copyright balance.

4. Controlling Reinterpretation: The Implications of Casting Control

Racial casting is just one illustration of the type of creative control that copyright permits with its current framework that combines control and compensation.253 Racial casting also touches on the meaning of cultural texts and whose interpretation should govern uses of such texts. Current copyright structures give copyright-holders the ability to impose unitary meanings of their determination on copyright-protected material that they control. In the case of heirs, those who control copyright and artistic legacies following the death of a creator often have the right to impose their preferred meanings with respect to uses of protected texts. In either case, the control aspect of copyright has potential to stifle the creation of future works by preventing current creators from using copyright-protected works for their new creations as well as suppressing alternative interpretation of existing texts.254 Such suppression of alternate interpretations may actually be a disincentive to the production of future works and have the potential to create a chilling effect on artistic expression and creation.255 In the case of the Gershwins, the family has even hindered the access of scholars that might produce alternative interpretations.256

254. See Karjala, supra note 221, at 223 (noting that those controlling the Gershwin trusts do not have “any more competence to understand and convey the real ‘meaning’ of his works than anyone else who has listened to and studied Gershwin’s works”); Ida Shum, Note, Getting “Ripped” Off by Copy-Protected CDs, 29 J. LEGIS. 125, 148-49 (2002) (noting that “both cultural giants and corporate giants borrow from the public domain[; f]or example, West Side Story is an adaptation of Shakespeare’s Romeo and Juliet” (footnote omitted)).
256. See Hamm, supra note 77, at 7 (noting the role of the Gershwin family in impeding understanding of Gershwins’s music).
V. THE CONSTRUCTION OF KNOWLEDGE: THE SOCIAL AND CULTURAL CONTEXTS OF COPYRIGHT

A. Incentives to Create and the Value of Copyright

The uses of copyright by creators such as Gershwin and his heirs draw attention to the implications of copyright structures for cultural expression. The argument that copyright, even though an imperfect tool, is acceptable or should be expanded because it gives some incentive to creators that will translate into a societal benefit is fundamentally flawed, at least in certain instances. A holder of a copyright could likely take any right given it and wield ownership of such a right for its benefit. This does not validate the initial assignment of the right to the holder or structuring the scope of such rights so as to ensure that the holder’s grandchildren have a right to receive not only income from the holder’s creations, but also to substantially control all uses and interpretations of the holder’s works:

Continued and widespread performances of “Let’s Call the Whole Thing Gershwin” have a substantial possibility of destroying the goodwill associated with Gershwin works by mutilating the carefully sculptured works of art so tenaciously preserved by Mr. [Ira] Gershwin over the years. “Let’s Call the Whole Thing Gershwin” is an agglomeration of Gershwin compositions from a large number of different Gershwin musical plays. In effect Whole Thing has taken the arm of one Gershwin sculpture and grafted it onto the body of another, while using a head or another arm from still other

257. See FEP, INTELLECTUAL FREEDOM, supra note 23, at 2 (noting that the Eldred court decision ignored the law’s adverse effects on culture).

258. Cass R. Sunstein, Switching the Default Rule, 77 N.Y.U. L. REV. 106, 112 (2002) (“Where the Coase Theorem blunders is in suggesting that no matter the initial allocation of the entitlement, people will bargain to the same result. The Coase Theorem fails to account for the fact that the initial allocation seems to create an endowment effect. When the endowment effect is at work, those who initially receive a legal right value it more than they would if the initial allocation had given the right to someone else. There is a great deal of evidence to this effect.” (footnotes omitted)).

259. Julio H. Cole, Patents and Copyrights: Do the Benefits Exceed the Costs?, 15 J. LIBERTARIAN STUD. 79, 83 (2001) (“Obviously, like any other monopoly privilege, patents can be valuable for their owners, though that is not in itself a sufficient reason to justify concessions of that sort.”).
Gershwin sculptures. The resulting damage to the Gershwin sculptures is immeasurable and perhaps irreparable.260

Musical works are not truly comparable to sculptures in this way, partly because musical notes, in particular are not representational, whereas sculptures more often are.261

The view of musical works expressed by the court in Gershwin v. Whole Thing Co. is distorted in that it fails to recognize the musical borrowing that was so central to Gershwin’s creative processes and the creative processes of many other composers.262 Moreover, the notion of musical works being comprised of inseparable elements is clearly not an argument that even the Gershwin family follows in practice since they have historically been quite happy to decapitate sculptures and license songs or parts of songs from works for use in commercials, for example.263 In addition, the Gershwin family in fact authorized performances of the 1992 Tony award-winning Broadway musical Crazy for You,264 which was comprised of pieces from different Gershwin musicals, seriously undercutting the logic of the court’s argument in Gershwin v. Whole Thing Co.

In addition, serious consideration needs to be paid to how the structure of values surrounding intellectual property rights is actually assembled in particular instances. Current evaluations of intellectual property frameworks are based on universal and unitary notions of value.265 As a result, they focus

261. Susan McClary, The Blasphemy of Talking Politics During Bach Year, in Music and Society: The Politics of Composition, Performance and Reception 13, 16 (Richard Leppert & Susan McClary eds., 1987) [hereinafter Music and Society] (noting that music appears to be “non-representational . . . . [u]nlike literature or the visual arts (which . . . make use of characters, plots, color, and shapes that resemble phenomena in the everyday world”).
262. See supra notes 98-163 and accompanying text; see also Arewa, Hip Hop, supra note 1, at 586-618.
263. See supra notes 231-38 and accompanying text for a discussion of the value of Gershwin song licenses.
265. See Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779, 794 (1994) (“[W]ith the assumption of a unitary kind of valuation, we will sometimes offer inadequate predictions, explanations, and recommendations for law.”).
on intellectual property rights as tools of innovation generally and assume that innovation and the products resulting from such innovation are the major sources of value for holders of such rights in specific cases. One result of this approach is that the entirety of behaviors that surround uses of intellectual property rights by holders in other ways and for other purposes are often not recognized, let alone adequately explained.\textsuperscript{266} The fact that copyrights are now used as sources to be mined for licensing revenue,\textsuperscript{267} has potentially profound implications for copyright frameworks whose goal is to promote the creation of new works. Examining the broader context of copyright usage can reveal other sources of value that supplement or substitute for those typically assumed and that may also elucidate the behaviors of copyright-holders.

One of the major reasons copyright-holders may wield copyrights as a strategic weapon is that they gain value by doing so. In addition to potentially imposing costs that may be unlike those contemplated by courts and legal commentators, the benefits copyright-holders may accrue may similarly be different and need to be examined more closely. This value may include benefits such as securing streams of licensing income, blocking or preventing commercial competitors or alternative uses or interpretations, bolstering the creator's public image, increasing market capitalization, increasing stockholder value, gaining greater attractiveness to potential acquirers or investors, or other factors.\textsuperscript{268} These benefits may thus impose significant costs on other potential users of the underlying knowledge on which such copyrights are based. Since the magnitude and importance of borrowing in cultural expression is often underestimated, the extent of these costs may not always be fully recognized. Consequently, how copyright-holders wield their rights also has significant implications for the underlying knowledge upon which their copyrights are based.

\textsuperscript{266} See GIDDENS, supra note 54, at 30 ("[N]ormative elements of social systems are contingent claims which have to be sustained and ‘made to count’ through the effective mobilization of sanctions in the contexts of actual encounters. Normative sanctions express structural asymmetries of domination, and the relations of those nominally subject to them may be of various sorts other than expressions of the commitments those norms supposedly engender.").

\textsuperscript{267} See Paul Edward Geller, Copyright History and the Future: What’s Culture Got to Do with It?, 47 J. COPYRIGHT Soc’y U.S.A. 209, 230 (2000) (noting that in twentieth century, copyright was “looked to as a means for securing and protecting income streams, and it has been expanded accordingly”).

\textsuperscript{268} For a discussion of activities related to The SCO Group, see supra notes 65-72 and accompanying text.
B. Copyright and Underlying Knowledge: The Implications of the Double Intangible

An intellectual property right may be conceived as involving a double intangible or two distinguishable levels of intangible resources. The first is the intellectual property right itself, such as a copyright. Underlying this intellectual property right intangible is the knowledge upon which the right is based, which constitutes yet another intangible. In the case of Gershwin compositions, for example, the double intangible would be evident at the level of the copyright itself, which would protect the notes and lyrics comprising the piece of music. These notes and lyrics are, however, based on underlying knowledge that might be reflected in a number of factors, including common musical traditions upon which the copyrighted work is based, musical passages that might have been borrowed from prior works, the public domain, or existing musical traditions or note sequences such as blue notes that reflect the influence of jazz and blues traditions.

An intellectual property right in this sense can be seen as one way to represent, characterize, and allocate ownership interests with respect to particular configurations of such underlying knowledge. The Eldred Court recognized this distinction in noting that copyright involves no monopoly over knowledge. Although this is true in some respects, it does not completely account for the behavioral aspects of copyright enforcement, particularly with respect to the control of meaning and reinterpretation of cultural texts and the existence of strategic behaviors that may magnify the chilling effect on the ability of others to use knowledge. These factors may effectively give copyright-holders a monopoly over underlying knowledge.

The nature of this underlying knowledge determines whether an intellectual property right may be attached to the underlying knowledge. The fact that a creator’s work is copyrightable reflects a determination that the particular configuration of underlying knowledge in the work is worthy of intellectual property protection. Copyright frameworks thus embed assumptions about the nature of knowledge that merits copyright protection.

269. Arewa, Strategic Behaviors, supra note 17, at 23-24.
270. New Grove Gershwin, supra note 77, at 751 (“Perhaps the most striking characteristic of Gershwin’s melodies is their reliance on blue notes. . . . Occasionally the blues idiom provides a harmonic structure for Gershwin, as in the second of his three piano preludes on the 12-bar blues progression. That progression also serves as a reference in the Concerto’s [Rhapsody in Blue] second movement and in An American in Paris.”).
Typically, only underlying knowledge that is deemed sufficiently original is copyrightable. The scope and duration of the copyright similarly reflects societal assumptions about value reflected in choices about the types and duration of protection to be included within copyright frameworks.

Borrowing is often part of what makes cultural texts recognizable to other participants in the cultural context from which such texts emerge. New creations are frequently framed in light of and in relation to past experience. Copyright as currently constructed involves substantial denial of borrowing and collaboration. Much of the discourse of CTEA proponents with respect to the creation of cultural texts reflects a denial or deemphasis of borrowing and collaboration. This position is in line with the revenue stream value maximization approach also taken by many CTEA proponents. This denial comes out of the seeming need to allocate clear and determinate property rights with respect to the knowledge that underlies copyrights. This underlying knowledge is thus construed as a separable fragment that can be alienated from broader fabric in which it is enmeshed and effectively given to the copyright-holder for a specified period of time. This grant of a copyright to the holder is characterized as a reward for the holder’s creative activities. Copyright, however, typically encompasses knowledge relating to elements that may be original contributions of the creator as well as preexisting knowledge that is borrowed and then enfolded within the new work.

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272. *See Arewa, Hip Hop, supra* note 1, at 565 (“One key aspect of the development of copyright in the United States, particularly from the nineteenth century onwards, has been an overriding focus on what constitutes sufficient originality to make a creation copyrightable.”).

273. This framing is evident in terminology and language used to describe new innovations. For example, the motion picture is a picture that moves; a car is a horseless carriage; and the Internet is the information superhighway.

274. William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, http://www.law.harvard.edu/faculty/tfisher/iphistory.html (last visited Apr. 15, 2006) (“Today, most writing (indeed, most creativity of all sorts) is collaborative. Equally importantly, the extent to which every creator depends upon and incorporates into her work the creations of her predecessors is becoming ever more obvious. Yet American lawmakers cling stubbornly to the romantic vision. There are few signs that it is losing its grip on the law. Indeed, the recent introduction into American copyright law of (a variant of) the Continental theory of moral rights suggests that its power may be waxing, not waning.” (footnotes omitted)).

275. *See Arewa, Hip Hop, supra* note 1, at 586-618.

276. *See Shum, supra* note 254, at 146 (noting profit maximization approach of entities with vast holdings of copyrights).
Once these preexisting and new elements are integrated, though, the
tendency is to view the holder as having intellectual property rights with
respect to the entirety of the underlying knowledge, including the preexisting
knowledge. This tendency is reinforced when copyrights have longer
duration because those viewing or hearing a work are likely increasingly
removed over time from the original context of creation of the work. As a
result, discerning borrowed elements of a work is likely to become more
difficult as copyright duration increases. Increased duration may thus make
even assessments of whether and the extent to which other works infringe on
an existing work more difficult. Similarly, contrary to the assumptions of the
Eldred Court, strategic behaviors make monopolization of underlying
knowledge a more likely outcome by virtue of a potential chilling effect on
borrowing for fear of threats of litigation or actual suit.

The “Romantic author” concept, which emphasizes the unique and
genius-like contributions of individual creators and inventors, is a primary
mechanism by which borrowing and collaboration are denied. Modern
conceptions of authorship as involving inspiration, originality, and even
genius in the creation of autonomous cultural texts are a fairly recent
historical development. Such conceptions are nonetheless used to justify
allocation of property rights to authors or those deemed worthy of such
ownership rights by virtue of their genius, autonomy, and originality.

Without diminishing the significance of acts of creation, the rhetoric of
authorship and notions of autonomous creation obscure the actual processes
by which creations and inventions actually come into being. Many
acknowledge that cultural production involves some sort of borrowing or

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277. See, e.g., Garon, supra note 13, at 549-53 (noting that the ProCD court case
would permit control of noncopyrightable elements of copyrighted work). See generally
ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1453-55 (7th Cir. 1996) (holding that “a simple
two-party contract is not ‘equivalent to any of the exclusive rights within the general scope of
copyright’ and therefore may be enforced”).

278. See supra notes 51-52 and accompanying text.

279. See Martha Woodmansee, On the Author Effect: Recovering Collectivity, in THE
CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 15, 21
(Martha Woodmansee & Peter Jaszi eds., 1994) (discussing the “modern myth that genuine
authorship consists in individual acts of origination”).

280. See Arewa, Hip Hop, supra note 1, 566-68 (discussing “Romantic author” notions
with respect to popular and classical music); Janet Wolff, Foreword: The Ideology of
Autonomous Art, in MUSIC AND SOCIETY, supra note 261, at 1, 2 (“The Romantic notion of the
autonomy of art, which is still dominant in the late twentieth century, is essentially a product
of nineteenth-century ideology and social structure.”).

281. See MARTHA WOODMANSEE, GENIUS AND THE COPYRIGHT, in THE AUTHOR, ART,
collaboration. 282 Fewer, however, fully consider the implications of such borrowings and collaborations.

Consequently, additional consideration should be given to the fact that texts often reflect collaboration and borrowing rather than autonomy and independent creation and that acts of creation do not and should not necessarily involve original or novel elements. Instead, creators often synthesize and borrow, use existing material, and model their creations on the works of others. 283 This is the essence of borrowing that is often denied, ignored, or minimized in discussions of copyright and creation. From a legal perspective, the critical question turns on how to allocate rights in the form of copyrights with regard to underlying knowledge and thus establish bounds of acceptable appropriation and mediate between existing and original elements that comprise a particular text. As part of this allocation process, tensions between notions of collective rights and individual rights must in some manner be addressed or resolved. 284

C. General Concepts of Creation and Specific Production of Cultural Texts

In addition to not adequately considering the implications of specific costs and benefits evident in the contexts of copyright use, general views of cultural production evident in legal discussions about copyright do not adequately envisage the specific and varied ways in which cultural production actually occurs. One way to view originality is as a construction intended to represent a particular notion of how underlying knowledge is constituted. As a result, conceptions of original expression and determination of what constitutes original expression in large part determine what uses are deemed infringements of copyrights based upon such knowledge. The notion of cultural text that pervades copyright commentary can be characterized as highly unitary. Such interpretations are rooted in a unitary view of creation

282. Mark A. Lemley, The Economics of Improvement in Intellectual Property Law, 75 TEX. L. REV. 989, 997 (1997) (noting that knowledge is cumulative and that inventors build on what came before); Richard H. Stern, Legal Protection of Screen Displays and Other User Interfaces for Computers: A Problem in Balancing Incentives for Creation Against Need for Free Access to the Utilitarian, 14 COLUM.-VLA J. L. & ARTS 283, 301 (1990) (noting that screen design techniques are the cumulative result of incremental contributions by mass anonymous workers and not identifiable as creations of particular individuals).

283. Arewa, Hip Hop, supra note 1, at 601-18 (discussing borrowing in classical, hiphop, and other popular music).

that typically denies borrowing and collaboration in creation and the reality of varied aesthetics of creative production and reconstructs the nature of cultural production to suit this unitary worldview.\textsuperscript{285} As Gershwin and other examples in the music context suggest, this view of cultural production and invention does not adequately reflect the complex and varied nature of motivations to create new works or complexities of the process by which such new works are synthesized and created.\textsuperscript{286}

One potential consequence is a decrease in the public domain and reduction in diversity of cultural texts that exist by virtue of the valorization of autonomous creation, which by its nature may permit greater amounts of extraction of material from the public domain because of its denial of borrowing. The issue is not just one of keeping certain items in the public domain. Also at issue is the process by which the public domain is constituted and the types of texts whose creation or use is deemed permissible under existing copyright rules. Although recognition exists in legal scholarship concerning the general fact that cultural texts interact with the public domain,\textsuperscript{287} few conceptualize or fully discuss the specific processes by which such texts and the public domain are constituted, particularly in the specific areas of cultural texts and music.

\textsuperscript{285} Arewa, \textit{Hip Hop}, \textit{supra} note 1, at 586-629 (discussing historical and cultural specificity of conceptions of musical composition).

\textsuperscript{286} See \textit{supra} notes 41-45 and accompanying text.

D. Controlling Interpretation and Meaning in Cultural Discourses

Allocation of copyright ownership rights may have significant implications for social meaning. This is not just a reflection of the fact that copyright involves elements of expressive culture, but also because choices made about copyright rules reflect social norms and have significance for symbolic aspects of cultural production and meaning. Descriptions of the outcomes of such choices form an aspect of the expressive function of law in that they identify which “consequences count and how they should be described.”

Consequently, the exclusionary aspects of intellectual property rights reflected in control rights also result in exclusion with respect to the making and contesting of cultural meanings. Such unitary views are reflected, for example, in the Gershwin family’s control over casting in Porgy and Bess. Such control has significant implications for public policy and social meaning within the broader context of contemporary discourse about race and nonconventional casting.

Systematically ignoring or otherwise denying that certain consequences are significant influences the shape of important means of cultural expression. The control aspects of intellectual property rights can impede the development of cultural texts and production of new cultural meanings around existing texts, reinforcing reified and unitary meanings of culture. This contrasts with a more nuanced anthropological and folkloristic conception of culture and cultural texts with a multiplicity of meanings and variants. One reason for the unitary conception of cultural texts is rooted

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290. *See Madhavi Sunder, Cultural Dissent*, 54 STAN. L. REV 495, 504 (2001) (discussing situations where “the self-proclaimed guardians of culture are excluding other members of the culture from making and contesting cultural meanings”).
291. *See supra* note 248 and accompanying text.
294. *See WOLFGANG MIEDER, TRADITION AND INNOVATION IN FOLK LITERATURE*, at xi (1987) (“Such traditional texts, certainly in oral contexts, exist by repetition and therefore in
in misconceptions about the cultural context of the production of such texts. Such misconceptions construe creation as typically autonomous in a way that reflects “Romantic author” conceptions.\textsuperscript{295} As a result, a tendency exists to see the flow of cultural meaning and ownership rights in creations as a one-way movement toward the copyright-holder, who can capture all cultural meaning attached to or associated with the intellectual property right and impede any flow of meaning outward.\textsuperscript{296}

In looking at this process the potential incommensurability of scales used must be noted.\textsuperscript{297} How different participants in this process value cultural expression might be quite different both in quantitative and qualitative terms, to the extent that the same scale may not in fact be able to be used. As a result, the values of producers are not all the same, and commercial actors may assign very different values than noncommercial actors. Heirs may assign different values than creators, and the values of diffusers and second-comers may yet again be dissimilar. Values expressed by courts and in legal scholarship may similarly be quite disparate.

The recognition and mediation of these multiplicities of potential uses, values, and interpretations are important. A unitary and reified view of culture makes imposition of a single and unitary view of the function of copyright and social meaning derived from the uses of copyright easier. Such unitary meanings are increasingly weighted heavily in favor of commercial interests.\textsuperscript{298} The result is a reinforcement of controlling discourse of intellectual-property-rights-holders who are already quite powerful and who have other means of protecting themselves from alternative and even numerous variants.”); Sunder, supra note 290, at 534 (discussing the role of law in unitary view of culture that is associated with the suppression of cultural dissent).

\textsuperscript{295.} See generally Arewa, Hip Hop, supra note 1, at 566-68 (discussing the importance of borrowing in the creation of music in all genres and periods and the systematic inattention to the pervasive nature of borrowing in musical composition in legal discourse about music).

\textsuperscript{296.} Once extracted from a collaborative or communal context, it is not always clear how the uncopyrightable distinct elements comprising knowledge now subject to an intellectual property right might be used. See supra note 277 and accompanying text.

\textsuperscript{297.} See Sunstein, supra note 265, at 794; see also C. Edwin Baker, The Ideology of the Economic Analysis of Law, 5 PHIL. & PUB. AFF. 3, 8 (1975) (“Disputes about the meaning of ‘value’ are possible . . . . These disputes over the meaning of ‘value’ may take the form of controversies about what rules of ownership and change are best or most acceptable.”).

\textsuperscript{298.} See generally LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) (discussing the role of commercial interests such as the media and the ways in which such interests use legal mechanisms to control cultural production); Litman, supra note 74, at 22-23 (discussing the role of commercial and institutional actors in copyright law).
subversive meanings. Separating control from compensation in copyright doctrine is potentially one way to ameliorate this tendency for control of copyright to extend to control of meaning and reinterpretation and restore a potential multiplicity of possible meanings and interpretations of cultural texts.

VI. UNFAIR USE AND TRANSMISSION-BASED APPROACHES TO MUSICAL COPYRIGHT

The goals and beneficiaries of copyright frameworks have long been a contested issue in American copyright doctrine. Reconsideration should be given to the construction of copyright frameworks and the behaviors that may accompany with these architectures. Copyrights should be granted and enforced in a way that is informed by the context of their operation and consideration of the underlying rationales of copyright and actual uses of copyright.

A. Control, Compensation, and the Appropriation of Returns

The rationales used to justify copyright protection have been widely considered and discussed. Current copyright structures typically allow holders to have effective control rights with respect to underlying knowledge resources by virtue of copyright statutory language that gives copyright-holders substantial ability to control uses of copyright-protected works. In addition, holders are able to seek judicial and legislative enforcement or


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


302. See infra notes 316-25 and accompanying text.
expansion of their rights. Through such enforcement, holders may play a potentially significant role in determining the scope of their rights and influencing which uses by others may be deemed an infringement. This ability to control is thus fundamentally related to strategic intellectual property behaviors. For copyright-holders, control rights are often viewed through a compensatory lens. As a result, such rights are seen as the mechanism by which the copyright-holder can and in fact should ensure that it receives compensation on account of the holder’s creation or synthesis of the underlying knowledge. This connection between control and compensation, however, is neither inevitable nor necessary. It would be possible, for example, to structure an intellectual property system that offered a compensation mechanism without entitling the holder to control rights in their current form.

303. See GIDDENS, supra note 54, at 288 (noting that assessing the strategic actions of businesses means “giving primacy to discursive and practical consciousness, and to strategies of control within defined contextual boundaries”); see also supra notes 65-76 and accompanying text.

304. See Anthony L. Clapes, Patrick Lynch & Mark R. Steinberg, Silicon Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs, 34 UCLA L. Rev. 1493, 1500-01 (1987) (advocating copyright protection for software programs and noting that the software industry could be imperiled without such protection); Richard B. Graves III, Private Rights, Public Uses, and the Future of the Copyright Clause, 80 Neb. L. Rev. 64, 67 (2001) (“[T]he economic effect of copyright protection is to reserve to authors the monetary value of their works by making sales of infringing works more difficult and less profitable. This protection ensures that those who produce copyrightable works are far better able to support themselves by doing so.” (footnote omitted)); Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors, 82 Colum. L. Rev. 1600, 1610 (1982) (“If the creators of intellectual productions were given no rights to control the use made of their works, they might receive few revenues and thus would lack an appropriate level of incentive to create. Fewer resources would be devoted to intellectual productions than their social merit would warrant.” (footnote omitted)); Michael J. Meurer, Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works, 45 Buff. L. Rev. 845, 847 (1997) (noting that copyright advocates argue that “fairness requires that authors and publishers should be able to keep their share of the copyright pie in the face of new technologies”).

305. See, e.g., WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 199-258 (2004) (discussing replacing copyright with a governmentally administered rewards system); Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281, 282 (1970) (noting it would be possible without copyright to arrange for compensation of authors); Cole, supra note 259, at 99-101 (discussing alternative structures for compensation of creators in absence of a copyright regime); Hurt & Schuchman, supra note 34, at 426 (“[W]ithout some device to assist authors in receiving compensation for their services, some works with high costs of creation . . . may not be produced at all. However, it
These elements of control and compensation thus form a primary foundation for economic rationales for copyright, which emphasize appropriability, or the ability of creators to ensure that they receive a profit or return from their creations, as a source of incentives to create. The appropriation of returns is seen as permitting the creator to generate ex post rents by pricing any products or services in which such right is embedded, thus recouping high upfront costs it may have incurred in developing the knowledge resources underlying intellectual property rights, as well as realizing a profit. Existing copyright frameworks thus permit behaviors that impose costs as well as inefficiencies in the form of deadweight loss.

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306. See Digital Connections Council of the Comm. for Economic Dev., Promoting Innovation and Economic Growth: The Special Problem of Digital Intellectual Property 5 (2004) [hereinafter CED Report] (noting that "incentives provided by copyright protection are designed to encourage innovation by creators"); Kenneth W. Dam, Some Economic Considerations in the Intellectual Property Protection of Software, 24 J. LEGAL STUD. 321, 333 (1995) ("The fundamental justification for creating property rights in the results of innovation is to deal with the appropriability problem."); Lemley, supra note 282, at 993 (noting that intellectual property is about incentives to invent and create); Richard C. Levin et al., Appropriating the Returns from Industrial Research and Development, in 3 Brookings Papers on Econ. Activity 783, 783 (Martin Neil Baily & Clifford Winston eds., 1987) ("[A] firm must be able to appropriate returns sufficient to make the investment worthwhile."); Roger E. Meiners & Robert J. Staaf, Patents, Copyrights, and Trademarks: Property or Monopoly?, 13 HARV. J.L. & PUB. POL’Y 911, 913 (1990) ("The standard argument for a patent system is that innovators will not have sufficient incentive to produce innovations unless they have a monopoly (exclusive) right to the economic returns."); Netanel, supra note 255, at 308-10 (distinguishing between neoclassical approaches and economic incentive rationales for copyright, the first of which focuses on copyright as a regime of broad, fully exchangeable property rights in creative products with allocative efficiency goal, which justifies giving "copyright owners maximum rights and leaving allocation of those rights up to the market"; the second of which sees copyright as a limited grant, focusing on finding the "right amount of copyright protection required to give adequate production incentive"); Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 Mich. L. REV. 1197, 1197-98 (1996) (noting instrumental rationale for copyright as incentive and Locke labor desert theories are both based on imagery of expanding copyright protection to relieve the plight of the author); Frederick R. Warren-Boulton, Kenneth C. Baseman & Glenn A. Woroch, Economics of Intellectual Property Protection for Software: The Proper Role for Copyright, 3 STANDARD VIEW 68, 68 (1995) ("Governmental intervention is clearly desirable to establish property rights in information and to prevent users from 'free riding' on the efforts of its creators."); available at http://portal.acm.org/l_gateway.cfm?id=208168&type=pdf&coll=GUIDE&dl=ACM&CFID=69518162&CTOKEN=9726131.

307. See J. Bradford DeLong, Claudia Goldin & Lawrence F. Katz, Sustaining U.S. Economic Growth, in AGENDA FOR THE NATION 17, 44-45 (Henry J. Aaron, James M. Lindsay & Pietro S. Nivola eds., 2003); Rebecca S. Eisenberg, Patents and the Progress of Science:
Copyright then becomes characterized and perceived as a balance between benefits in the form of increased production of works and costs in the form of restrictions to access, which make it more difficult for future authors to create.\textsuperscript{309} Although the costs and deadweight loss that result from copyright are generally acknowledged, views of copyright tend to be based on questionable notions about the nature of free riding. Conceptions of copyright thus discount and even ignore borrowing at least in part as a consequence of assumptions that are often made about free riding. Discussions of free riding often fail to note sufficiently the fact that copyright frameworks result in certain types of free riding being treated differently than others,\textsuperscript{310} as well as the pervasive and inevitable nature of free riding in cultural expression. As is evident in George Gershwin’s compositional practice and music composition generally,\textsuperscript{311} music production is virtually impossible without some type of free riding or borrowing, either with respect to broader musical traditions and conventions or existing works.

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\textit{Exclusive Rights and Experimental Use}, 56 U. CHI. L. REV. 1017, 1070 (1989) (noting that patent-holders may charge higher prices as monopolists than would be possible under competitive conditions, and noting that these higher prices necessarily entail higher costs to users of patented inventions); Alfred C. Yen, \textit{Restoring the Natural Law: Copyright as Labor and Possession}, 51 OHIO ST. L.J. 517, 518 (1990) (“[E]conomic theory supports granting authors copyright in their works. However, those rights are necessarily limited in scope, because copyright imposes costs on society in exchange for the benefits of induced creative activity. First, the owner of copyright rights will charge a monopoly price for her work[,] . . . because it prohibits borrowing from existing works and makes it more difficult for future authors to create.”).


309. See CED REPORT, \textit{supra} note 306, at 6 (“Copyright law balances protection of initial creators with the importance of the competitive supply of follow-on innovation, and is (or should be) cautious about providing control to the initial innovator that would allow barring of subsequent innovators or control over the scope and direction of their innovation.”); Yen, \textit{supra} note 307, at 518 (noting that “the optimal degree of copyright protection . . . maximizes the difference between the benefits of induced creative activity and the costs of increased authors’ rights”).

310. See Dale A. Nance, \textit{Foreword: Owning Ideas}, 13 HARV. J.L. & PUB. POL’Y 757, 772 (1990) (questioning the integrity of a system of intellectual property that protects certain types of creative effort from free riding more extensively than others).

311. See \textit{supra} notes 111-44 and accompanying text; \textit{see also} J. Peter Burkholder, \textit{Borrowing, in 5 NEW GROVE GERSHWIN}, \textit{supra} note 77, at 5-20 (discussing the pervasiveness of musical borrowing in all musical genres and time periods); J. Peter Burkholder, \textit{The Uses of Existing Music: Musical Borrowing as a Field}, 50 NOTES 851, 852 (1994) (giving an overview of musical borrowing as a field).
Consequently, the appropriate question as a starting point from a copyright perspective should be transformed from one that focuses on how to limit borrowing into an inquiry into the acceptable scope of communication, free riding, or transmission of existing knowledge. The reality of free riding and borrowing in cultural production suggests that a transmission-based approach to copyright might be fruitful in first of all acknowledging the essential nature of borrowing in cultural production and secondly defining the scope of acceptable transmissions. This transmission-focused approach would be a contrast to current perspectives that treat copyright as essentially a property right that results from and is merited as a result of an autonomous act of creation.312

A transmission-based approach highlights potential complexities of the creation of cultural texts and the extent to which the use and operation of control and compensation rights within copyright do not adequately contemplate such complexities. This is particularly true since the scope of a holder’s effective control right is by no means limited to activities related to the development of products that incorporate the underlying knowledge resource over which the holder exercises control. This is not to imply that the intellectual property right as a tool-of-innovation approach is necessarily invalid but to suggest that it offers at best an incomplete picture of the operation and uses of intellectual property. The breadth of control given to copyright-holders is a direct result of “Romantic author” conceptions and continuing inattention to the importance of borrowing and free riding in cultural production. Further, existing structures do not adequately contemplate that a holder may receive value from exercise of control rights that has nothing to do with compensation or even creation. Consequently, how holders choose to exercise control rights and enforce such rights in the construction of intellectual property rights has significant implications for behavior as well as the effective operation of intellectual property rights structures such as copyright.313

312. See generally Arewa, Hip Hop, supra note 1, at 550-51.
313. See Michael Waterson, The Economics of Product Patents, 80 AM. ECON. REV. 860, 860 (1990) ("[T]he main impact of a product patent is not to create a monopoly but rather to affect the variety choices that rivals make. Moreover, the particular impact on variety choices is heavily influenced by the particular legal mechanisms that are used to enforce patent rights.").
B. Compensation and Control: Disaggregating Rights Embedded in Copyright Structures

1. The Copyright Balance

Copyright doctrine is based on an assumed balance between promotion of incentives to create new works and public access to copyright-protected materials. The balance in copyright is intended to weigh the benefits of those incentives of copyright against the costs of exclusion rights that restrict the creation of new works based on copyrighted works and the reinterpretation of existing copyrighted works. The specific uses of copyright in particular contexts, however, suggests that general costs and benefits may be evident to varying degrees in specific settings that may or may not reflect the general assumptions typically imagined.

2. The Advantages of Disaggregation: A Proposal for Separating Control and Compensation of Post-Mortem Artistic Legacies in Music

Any balancing of rights also entails determining what rights should be encompassed within copyright frameworks. Control and compensation are typically treated as inevitably united, but are in fact separate rights that should, at least in certain instances, be disaggregated. As a result, in structuring copyright frameworks, attention should be given to how the compensation and control aspects of copyright contribute to and enhance the core goals of copyright.

Disaggregation could be structured in such a way as to maintain the right to receive compensation while minimizing the extent of control over future uses of copyrighted works. One core element of copyright-holders’ exclusion or control rights is contained in § 106 of the Copyright Act, which describes the exclusive rights of copyright-holders with respect to their copyrighted-protected works. Disaggregating compensation and control would

314. See supra notes 301-13 and accompanying text.


316. Section 106 of the Copyright Act contains provisions relating to the exclusive rights of copyright holders. See 17 U.S.C. § 106 (2000) (giving copyright-holders the "exclusive rights . . . (1) to reproduce the copyrighted work in copies or phonorecords; (2) to
essentially mean reducing the exclusion rights outlined in § 106 of the Copyright Act with respect to future works, while maintaining the right of copyright-holders to receive compensation for uses of existing material in such future works that might be encompassed by the current § 106 statutory language.

An initial step toward disaggregation would be a modification of §§ 106(2) and 106(4). Section 106(2) gives copyright-holders the exclusive right to prepare derivative works based on the copyrighted work, while § 106(4) gives copyright-holders the exclusive right to perform and display musical, dramatic, and other works.

These subsections, and other provisions of the Copyright Act as might be necessary to implement this proposed structure, should be modified such that music copyright-holders would have limited ability after the death of the creator to restrict both derivative works and performances or displays that seek to reinterpret the copyright-protected work. Following a creator’s death, the control rights with respect to these subsections would then differ from their compensation rights. After a creator’s death, uses falling within §§ 106(2) and 106(4) would be permitted (“Permitted Uses”). In terms of control, certain limitations on Permitted Uses would still need to be implemented, such that the scope of control would permit a copyright-holder to restrict use of copyrighted material in certain specific contexts (“Unfair Uses”). Unfair Uses would include uses in commercial advertisements, uses for purposes that might constitute a misrepresentation and in which clear disclaimers are not used, Permitted Uses by a single person seeking to make a Permitted Use (“Permitted User”) in excess of a reasonable amount, and uses for strategic or anti-competitive actions that would be reasonably likely to damage the market share for the original work.

Under this proposal, a copyright-holder would be able to restrict Unfair Uses but could not exercise control over Permitted Uses unless a Permitted Use intentionally or maliciously sought to damage the market for the original

317. Id. § 106(2).
318. Id. § 106(4).
work (an “Exempted Permitted Use”), in which case the Permitted Use would be treated in the same manner as an Unfair Use. The copyright-holder would be entitled to receive compensation for both Permitted Uses and Unfair Uses, but would have limited control rights with respect to Permitted Uses. Unfair Uses would require a prior license from the copyright-holder and would thus be substantially similar to the existing copyright property rule.

In contrast, compensation for Permitted Uses should be based on a structure in which the Permitted User would be required to pay a fee to the copyright-holder based on the proposed use. The fees for Permitted Uses (the “Permitted Use Fees”) should be essentially a royalty based upon a fixed percentage of the net earnings from the new work, which would mean that the copyright-holder would receive more compensation for uses that are more successful financially. Obviously, determination of the percentage to be charged for Permitted Use Fees (the “Permitted Use Rate”) would be a crucial aspect of this proposal. One potential source of guidance for Permitted Use Fees could be set threshold rate levels for Permitted Use Rates that could be adjusted depending on popularity of Permitted Uses of a given work.\(^{319}\) Although copyright-holders are likely to be opposed to any type of Permitted Uses, allowing Permitted Uses following a creator’s death actually has the potential to increase revenues to heirs and legal successors.\(^{320}\) For example, such uses can bring attention to works from earlier eras or that might otherwise be unknown.\(^{321}\)

Disaggregation would thus be in line with the goals and objectives of copyright law, and reflect the fact that the substantial legally protected interest of a creator is the creator’s interest in potential financial returns from

\(^{319}\) Professor Fisher’s recently proposed rewards system that would replace copyright includes a pricing structure based upon the popularity of later uses of a work. See Fisher, supra note 305, at 199-258.


\(^{321}\) Arewa, Hip Hop, supra note 1, at 618.
such creator’s works that come from public’s appreciation of the creator’s efforts.322

“The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.”323

Disaggregation of compensation and control would move copyright in a direction that would incorporate to a greater extent the public benefits that are an integral part of the copyright balance,324 because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.325

Such disaggregation would also mean that the compensation right within copyright might not have the same scope, breadth or duration as the control


324. See 1909 House Report, supra note 323, at 7 (noting that copyright balances between stimulation of production and benefit to the public); Eldred v. Ashcroft, 537 U.S. 186, 215-17 (2003) (noting that patent involves a more exacting quid pro quo for granting an intellectual property right in exchange for the benefit derived by the public than does copyright); Craig W. Dallon, The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest, 44 SANTA CLARA L. REV. 365, 437 (2004) (noting that passage of the CTEA suggests that Congress did not give serious attention to public benefit rationale of copyright); Garon, supra note 13, at 521 (noting that “Congress has focused on the economic success of the most dominant providers of media content”).

right. Given the goals of copyright, the scope of the control right should be substantially less than the compensation right.

3. The Practical Consequences of Disaggregation

Disaggregation makes the most sense with respect to copyright law treatment of post-mortem artistic legacies. Consequently, existing copyright structures that aggregate compensation and control should at most continue to exist during the lives of creators only. This would effectively mean limiting the control aspects of certain provisions of existing copyright statutes to at most life. Provisions that relate to control, including § 106 of the Copyright Act, would thus need to be modified under this proposal.

In the case of *Porgy and Bess*, disaggregating control from compensation would mean that the Gershwin family would be entitled to receive compensation from staged productions and derivative works of Gershwin creations, but would not be able, for instance, to control casting or interpretations that might update or reinterpret the work. Racial casting could thus no longer be stipulated by the Gershwins. This proposal would have an impact on the types of cases the Gershwins could bring and would mean a different outcome for cases such as *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.* 326 where Gershwin Publishing sued Columbia Artists Management, Incorporated ("CAMI") for contributory copyright infringement relating to performers managed by CAMI who performed the piece *Bess, You Is My Woman Now* from *Porgy and Bess* at a public for-profit event without authorization from Gershwin Publishing. Under the proposal described in this Article, unless the use constitutes an Unfair Use, the Gershwins would be limited to seeking compensation for such uses to the extent that they were not already compensated as a Permitted Use.

Although Gershwin’s heirs clearly have an interest in his works, their interests, at least with respect to control elements, are outweighed by the societal benefit that would result from decreasing their control rights. This social benefit would come as a result of the increased flow of information, ideas, and commerce that were noted as an integral part of the copyright balance by the *Sony Corp. Court.* 327

326. 443 F.2d 1159 (2d Cir. 1971).
327. See *Sony Corp.*, 464 U.S. at 429.
C. Switching the Default Rule to Unfair Use: Disaggregation and Liability Rules

Current copyright standards are essentially a property rule that assumes that disfavors borrowing except in certain specified instances. Although this property rule may effectively operate as a statutory liability rule in certain respects, explicitly acknowledging the advantages of true liability rule structures in music copyright would be better suited to actual musical practice:

In most respects, the current copyright system operates under a property rule theory, in which nonconsensual takings are discouraged. In music copyright, such nonconsensual takings are conceived of as copyright infringement and are only permissible if the copyright owner consents to such use, most often through the granting of some type of license. Actual musical practice, however, has always entailed borrowing. This reality makes treatment of musical forms such as hip hop that are based on extensive borrowing far better suited to a liability rule, which would permit infringement of the legal entitlement with ex post determination of appropriate compensation.

A property rule potentially distorts the creation of music by virtue of the fact that borrowing is more difficult under a property rule. Incorporating conceptions of unfair use into copyright doctrine would mean moving from a standard of no borrowing, except in cases such as fair use, to a standard that permits borrowing other than in cases of unfair use. Unfair use doctrine could be developed through judicial application of unfair use standards, incorporation of unfair use concepts in statutes, and the development of unfair use standard commercial practices.

A liability rule based on unfair use could be used to refocus the nature of copyright as a transmission right rather than ownership right with respect to

328. See Arewa, *Hip Hop*, supra note 1, at 635-36.
331. A property rule by its nature implicitly assumes that borrowing is not the norm and should occur only with permission. In contrast, a liability rule implicitly assumes that borrowing is the norm and makes an ex post determination as to compensation. Arewa, *Hip Hop*, supra note 1, at 635.
332. Arewa, *Unfair Use*, supra note 56 (manuscript at 51-54).
underlying knowledge. A transmission-based approach would permit recognition of the original contributions of the creator, as well as the collaborative and intertextual elements of the creator’s works. The transmission right could then attach to the specific combination that comprises the knowledge intangible underlying copyright as a whole without reaching on an individual basis the constituent elements that comprise that whole. A transmission-based model is a good fit in the music area where borrowing is commonplace across time and musical genres. This would mean practically that transmissions or borrowings would in specified cases be presumed to not constitute infringement unless they damaged an existing work in specific identifiable ways.

In the case of Porgy and Bess, no license would be needed to stage a new version of Porgy and Bess. The Gershwins could, however, require a clear disclaimer that would clearly inform audiences that the production was not authorized by the Gershwins and would be able to receive a share of revenues from the new production. In addition, under a liability rule, they might still be entitled to damages or be able to obtain an injunction against Unfair Uses. The threshold for such damages should involve a standard that requires significant material damage to the prospects of the work, which should be distinguishable from the creator’s image or persona.

Focusing on constitutive processes and transmissions rather than states of being with regard to property ownership may also shed light with respect to the structure of the public domain. Current notions of the public domain can be quite static and reflect a view of the public domain as a place or status. Viewing the public domain as reflective of a process means that what constitutes the public domain is not just a question of whether something is or is not in the pool of public domain knowledge but also a question about how the public domain is constituted and reconstituted, how it interacts with “private” knowledge and how “private” spheres of knowledge interact with one other. Moving in the direction of a liability rule based on Unfair Use, combined with the disaggregation of control and compensation in certain instances, will help ensure that copyright contains rights that are consistent with its goal of compensation to authors on account of the creation of new works, not control over all uses of such works for a time period that far exceeds the lifetimes of those alive at the time such works were created.

333. Id.
334. See David Lange, Reimagining the Public Domain, 66 LAW & CONTEMP. PROBS. 463, 466-67 (2003); Lemley, supra note 282, at 997-98. See generally Chander & Sunder, supra note 159, at 1351 (noting romanticization of the public domain).
Copyright owners may argue that this will reduce the value of copyrights to holders and will make transactions more difficult to value.\(^{335}\) Even if this were the case, nothing in copyright gives copyright-holders the right to extract the maximum possible value that might possibly be extracted from a copyright. Rather copyright is a general balance between competing interests, including the public interest that is thought to provide a mechanism for the creation of new works in specific contexts of creation.\(^{336}\) The value of copyrights under the liability-rule-based structure proposed in this Article is largely a question of valuation. Copyrights could be valued under the new system of rules. The value might be less than that under current copyright rules, although this may be hard to predict with certainty since uses of existing works in new works can actually spur interest in markets for existing works. Regardless of whether such values may be less than those that might occur under a property rule, such values are ones that can be determined and calculated.

VII. CONCLUSION

By virtue of combining and synthesizing elements borrowed from various sources in the creation of his compositions, George Gershwin created music that is heard and appreciated around the world close to seventy years after his death. The music George Gershwin created was greatly facilitated by his ability to borrow. Some of his borrowings, particularly of African-American cultural elements, were facilitated by a copyright structure that mirrored existing societal hierarchies that considered the cultural production of African-Americans to be part of the public domain. Consequently, such material was seen as readily appropriable,\(^337\) particularly by white artists who were able to make cover recordings and perform such works for white audiences.\(^338\) Such use of African-American cultural production in a broader societal milieu in which African-American performers were typically subject

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\(^{335}\) See Trust Brief, supra note 3, 2002 WL 1836626, at *30 n.84 (noting that the petitioner’s assertions in the Eldred case would throw numerous transactions into doubt potentially rendering copyright transactions insecure and uncertain).

\(^{336}\) See Litman, supra note 287, at 968 (“The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.”).

\(^{337}\) Vaidyanathan, supra note 2, at 117-48; Greene, supra note 2, at 354-83; Hall, supra note 2, at 37-58.

\(^{338}\) Hall, supra note 2, at 44 (noting Little Richard’s recounting in a Home Box Office television special that a version of his rock anthem Tutti Frutti that reached number one on the pop charts in a version recorded by Pat Boone).
to significant restrictions on both their ability to perform publicly for non-
African-American audiences. These restrictions were reinforced by the
structure and marketing practices of the recording industry, which means that
African-American recording artists were typically placed in the category of
“Race” records. The dynamics of this segregation in the broader society was also a core part of how the recording industry categorized and marketed music. In fact, prior to 1949, the category now termed “R&B” or “Rhythm and Blues” was actually called “Race music,” which was marketed primarily for an African-American audience. As a result, the race of many African-American performers could be readily discerned just by virtue of how their music was categorized. Works of white performers who made recordings of this same music were not classified as Race music.

This racial categorization of music had a profound influence on borrows from African-American cultural production and the compensation and recognition given for such borrowings. An Unfair Use standard is intended to address instances where borrowings become inequitable on account of the nature of the borrowings, the broader societal

339. See, e.g., Guthrie P. Ramsey, Jr., Race Music: Black Cultures from Bebop to Hip-Hop 113 (Regents of the Univ. of Cal. 2003) (“In 1920, a recording by blues singer Mamie Smith helped to establish the race records institution in American popular culture.”); David Brackett, What a Difference a Name Makes: Two Instances of African-American Popular Music, in The Cultural Study of Music: A Critical Introduction 238, 241 (Martin Clayton, Trevor Herbert & Richard Middleton eds., 2003) (noting that in the 1920s the recording industry organized the popular music fields around the divisions of “popular,” “race,” and “hillbilly”); Stephen Calt, The Anatomy of a “Race” Music Label, in Rhythm and Business: The Political Economy of Black Music 86, 87 (Norman Kelley ed., 2002) (explaining that race music ”became a fixture” of the 1920s “because recording policies . . . were increasingly dictated by a new breed of salesmen who were willing to set aside their own musical tastes in the interests of commerce that ‘race’ music became a fixture of the decade”); Hall, supra note 2, at 38 (“Under the precepts of the recording industry’s segmented marketing systems, however, recordings of their [i.e., cornetist Louis Armstrong and pianist Ferdinand “Jelly Roll” Morton] music were distributed on ‘race record’ labels geared specifically to Blacks and remained invisible to most whites. By that time music recorded by white dance bands, led by Paul Whiteman’s, was being introduced to mainstream as ‘jazz’ through record labels and performance venues specifically marketed to them.” (footnote omitted)).

340. Greene, supra note 2, passim.

341. Brackett, supra note 339, at 242 (“The years around 1947 prove instructive: while the music industry was in the process of slowing recognizing the importance of black popular music, it effectively excluded the representation of black music from the mainstream.”).

342. Paul Oliver, Songsters & Saints: Vocal Traditions on Race Records 1-17 (1984) (noting that Race records were marketed primarily for a black audience).
context within which such borrowings occur or other factors. At the same time, this standard gives proper recognition to the importance of borrowing in the creation of music. Under an Unfair Use standard, to the extent that Gershwin’s borrowings constituted Unfair Use, they could be enjoined or Gershwin might be required to pay compensation or give acknowledgment as to the sources of his material or both.

Borrowing was an inherent part of Gershwin’s music composition process. The control now exerted by copyright-holders in the musical arena today has the potential to prevent the types of borrowing that helped make George Gershwin’s music so memorable and loved:

Marc G. Gershwin, a nephew of George and Ira Gershwin and a co-trustee of the Gershwin Family Trust, said: “The monetary part is important, but if works of art are in the public domain, you can take them and do whatever you want with them. For instance, we’ve always licensed ‘Porgy and Bess’ for stage performance only with a black cast and chorus. That could be debased. Or someone could turn ‘Porgy and Bess’ into rap music.” Indeed, that is just the issue, say critics of copyright extension who argue that constant renewals of the copyright law stifle artistic innovation, the creation of new works based on the old.343

The view of creation expressed by Marc Gershwin would mean that the types of creation in which George Gershwin engaged would likely be disallowed since his musical practice involved meshing elements from disparate traditions.344

By focusing on ensuring compensation and minimizing control with respect to cultural texts, a transmission-based liability rule approach to copyright frameworks can help ameliorate both the borrowing from sources that are for reasons of cultural hierarchies considered to be part of the public domain, as well as control over copyrighted works that might hinder the creation of new works based on such preexisting works. A transmission-based approach with a liability rule would require compensation with respect to such borrowings, but would seek to minimize impediments to and control of borrowings that might serve as the basis for the creation of future works. As such, a transmission-based approach with a liability rule has the potential to both stimulate the production of new and vibrant works as well as meet

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344. See Garon, supra note 13, at 595 (responding to the Marc Gershwin quotation and noting that given that “[t]he work of the Gershwin brothers drew on African-American musical traditions. What could be more appropriate?”).
the goals of copyright by providing compensation to creators that may incentivize creation.