

**COPYRIGHT ON CATFISH ROW:
MUSICAL BORROWING, CONTROL AND COMPENSATION IN *PORGY
AND BESS***

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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. Looking at the operation and uses of copyright in the specific instance of George Gershwin's musical practice reflects uses of copyright in the musical arena and demonstrates the extent to which current copyright rules 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 career and immersed himself in African American musical traditions. Gershwin was also quite attuned to the importance of copyright. Following his premature death in 1937 at age 38, 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 70 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 interpretations of existing musical works reflects the fact that copyright structures to this point have been based on 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 compensation aspects of copyright. The division of control from compensation will not only help keep the public domain strong, but may limit the opportunities for strategic and other behaviors that are becoming increasingly characteristic of the operation of copyright and intellectual property rights more generally.

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I. INTRODUCTION

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. Current copyright law consideration and treatment of musical borrowing are generally inadequate.¹ If copyright is actually intended to give all potential creators incentive to create, the use of existing works in future creations needs to be explicitly addressed and considered by copyright frameworks, both with respect to the sources of new works as well as subsequent uses of such works to create additional 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 hierarchies of culture that were reflected in and reinforced by copyright frameworks that historically have permitted borrowings from certain categories and types of cultural expression, often without compensation.²

Treatment of borrowings within copyright law is increasingly of concern given the progressive expansion of copyright duration during the twentieth century.³ This increase in duration is evident in copyright treatment of the piano concerto *Rhapsody in Blue*, which is one of George Gershwin's most famous and lucrative

¹ See Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. (forthcoming 2006) (hereinafter, "Arewa, *Hip Hop*") (discussing the pervasiveness and importance of musical borrowing).

² See Olufunmilayo B. Arewa, *Cultural Borrowing and Global Intellectual Property Frameworks: History, Hierarchy and Conceptions of Culture in Local Knowledge Discourse* (2005) (manuscript on file with author) (hereinafter, "Arewa, *Cultural Borrowing*"); Olufunmilayo B. Arewa, *TRIPs and Traditional Knowledge: Local Communities, Local Knowledge and International Intellectual Property Frameworks* (2005) (manuscript on file with author).

³ 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").

works. At its creation in 1924, *Rhapsody in Blue* was entitled to a maximum of 56 years of copyright protection under the 1909 Copyright Act,⁴ 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 1999.⁵ A number of 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.⁶ Not surprisingly, copyright businesses and 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, reflecting strategic uses of intellectual property that have become increasingly common in recent years.⁷ Their efforts had their desired effect and helped ensure passage of the Sonny Bono Copyright Term Extension Act of 1998 (the “CTEA”).⁸

As a result of the CTEA, *Rhapsody in Blue* is now protected by

⁴ Under the 1909 Copyright Act, *Rhapsody in Blue* would have been entitled to an initial 28 year term and one 28 year renewal term. See Section 24, Copyright Act of 1909, ch. 320, *superceded by* the Copyright Act of 1976, 35 Stat. 1075, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1010 (2003)).

⁵ See Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC’Y U.S.A. 19, 20-23 (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 56 years of protection a new term of life plus 50 years); E. Scott Johnson, *Law Gives Copyright New Life*, NAT’L L. J., Feb. 8, 1999, at C12 (noting that, without the Copyright Term Extension Act, copyright protection would have expired for *Rhapsody in Blue* on December 31, 1999).

⁶ See *infra* notes 12 to 13 and accompanying text.

⁷ See Olufunmilayo B. Arewa, *Blocking, Tackling and Holding: Boundaries, Marking and Strategic Business Uses of Intangibles* (2004) (manuscript on file with author) (hereinafter, “Arewa, *Blocking*”).

⁸ See Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827-28 (codified as amended at 17 U.S.C. §§ 302, 304 (2003) (amending 17 U.S.C. §§ 302, 304 (1976)).

copyright until December 31, 2019,⁹ giving a total of 85 years of copyright protection to this work. Although the increase in duration does give Gershwin's heirs an additional 20-year stream of licensing revenues, it also 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 later 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 both with respect to the public domain, those who seek to interpret existing works as well as creators of new works who base their creations on existing works. The potential costs of extending copyright duration suggests that on balance the current scope of copyright needs to be tempered at a minimum by reducing the control rights that accompany copyright protection and significantly limiting the expansion in duration to rights that relate to compensation for uses of protected works.¹⁰

The CTEA represents a significant event in the history of American copyright law.¹¹ The CTEA lengthened the term of copyright protection in the United States by 20 years, extending copyright protection to 70 years beyond the life of individual creators of copyrighted works,¹² leading it to be called the "Mickey

⁹ See Ochoa, *supra* note 5, at 23 (noting that the copyright on *Rhapsody in Blue* will not expire until December 31, 2019).

¹⁰ See *infra* notes 294 to 311 and accompanying text.

¹¹ See Christina N. Gifford, Note: *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 378 (2000) ("The CTEA is one of the most drastic changes in copyright law since the current Copyright Act took effect in 1978."); Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTEL. PROP. L. REV. 193 (2004), available at <http://mipr.umn.edu/archive/v5n2/Langvardt.pdf>.

¹² See Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 FLA. L. REV. 989 (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).

Mouse” Law on account of its rescuing Mickey Mouse from becoming part of the public domain.¹³ The importance of the CTEA is reflected in the resources that were directed toward both assuring and preventing its passage and the atypical alliances that arose to challenge its passage.¹⁴ The dispute concerning the CTEA continued in court after its passage, culminating most recently in the case *Eldred v. Ashcroft*, in which the Supreme Court upheld the constitutionality of the CTEA.¹⁵

Not surprisingly, the side in favor of passage of the CTEA was 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

¹³ See 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); Gifford, *supra* note 11, at 385 (noting that Michael Eisner went to lobby personally for passage of the CTEA); FREE EXPRESSION POLICY PROJECT, “THE PROGRESS OF SCIENCE AND USEFUL ARTS”: WHY COPYRIGHT TODAY THREATENS INTELLECTUAL FREEDOM 2 (2003) (“The Sonny Bono law was the result of strenuous lobbying by the copyright industry. Often called the “Mickey Mouse Law” because of the Walt Disney Company’s central role in urging its passage, it prevented the original image and character of Mickey, who made his screen debut in 1928 in the film *Steamboat Willie*, from entering the public domain in 2003. Disney and other film companies pushed aggressively for term extension, smoothing the way, as one journalist noted, with ‘well-targeted campaign contributions’.”) (hereinafter, “Free Expression Project”); Douglas A. Hedenkamp, *Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909*, 2 VA. SPORTS & ENT. L.J. 254 (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); Phyllis Schafly, *Why Disney Has Clout with the Republican Congress*, Nov. 28, 1998 (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), at <http://www.eagleforum.org/column/1998/nov98/98-11-25.html>.

¹⁴ The opponents of the CTEA cut across ideological and other divisions and included law professors, libraries, archives, economists and Phyllis Schafly’s Eagle Forum, for example. See Brief of *Amici Curiae* Eagle Forum Education & Legal Defense Fund and The Association of American Physicians & Surgeons, Inc. In Support Of Petitioners.

¹⁵ *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (finding that Congress acted within its constitutional authority in passing the CTEA).

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.¹⁶ In contrast, briefs opposing upholding the CTEA reflected contributions from law professors,¹⁷ economists,¹⁸ libraries and archives and others, including Intel Corporation and the Free Software Foundation.¹⁹

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

¹⁶ See, e.g., Brief Amici Curiae of The American Association of Publishers, Amberson Holdings LLC, Richard Avedon, The George Balanchine Trust, Peter Bartok, Boosey & Hawkes, Inc., The Aaron Copland Fund for Music, Inc. European-American Music Corporation, The George Gershwin Family Trust, The Leonore S. Gershwin Trust for the Benefit of the Ira and Leonore Gershwin Philanthropic Fund, The Leonore S. Gershwin Trust for the Benefit of the Library of Congress, The Keith Haring Foundation, The Frederick Lowe Foundation, Inc., David Mamet, Glen Roven, The Kurt Weill Foundation for Music, In Support of the Respondents, *Eldred v. Ashcroft* (hereinafter, "Trust Brief"); Brief for AOL Time Warner as Amicus Curiae in Support of Respondents, *Eldred v. Ashcroft*, Brief of Amici Curiae of The Bureau of National Affairs, Inc.; CCH Incorporated; Houghton Mifflin Company, Inc.; The McGraw-Hill Companies; Reed Elsevier Inc.; and the Software & Information Industry Association In Support of Respondent.

¹⁷ See, e.g., Brief Amici Curiae of Constitutional Law Professors in Support of Petition, *Eldred v. Ashcroft*, No. 01-618; Brief Amici Curiae of Copyright Law Professors in Support of Petition, *Eldred v. Ashcroft*, No. 01-618.

¹⁸ Brief Amici Curiae of Economics Professors in Support of Petition, *Eldred v. Ashcroft*, No. 01-618 (hereinafter, "Economist Brief").

¹⁹ See, e.g., Brief Amici Curiae of The American Association of Law Libraries, American Historical Association, American Library Association, Art Libraries Society of North America, Association For Recorded Sound Collections, Association of Research Libraries, Council on Library And Information Resources , International Association of Jazz Record Collectors, Medical Library Association, Midwest Archives Conference, Music Library Association, National Council on Public History, Society For American Music, Society of American Archivists , and Special Libraries Association, In Support of the Petitioners, *Eldred v. Ashcroft* (discussing the constitutionality of the CTEA and its implications for the public domain); Statement of Timothy Phillips in Opposition to Copyright Term Extension (discussing the implications of the CTEA term extension) , at <http://www.public.asu.edu/~dkarjala/commentary/PhillipsStmnt.html>.

\$330 million a year for copyright holders by 2017.²⁰ 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.²¹

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 that are used to create later ones.

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 CTEA.²² More specifically, this Article concentrates on the creation and uses of copyright with respect to

²⁰ See Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, Congressional Research Service Report 98-144 E (1998) (estimating that annual royalties for works that will not enter the public domain as a result of the CTEA will be \$50 million by 2002 and \$330 million per year by 2017 (at 1997 prices) or \$59 million by 2002 and \$389 million in 2017 in 2004 dollars). Determination of 2004 dollars was made based on the applicable Consumer Price Index (CPI) in the years since the year of payment. Calculations were made using the calculation engine at the Minneapolis Federal Reserve Bank website at <http://minneapolisfed.org/Research/data/us/calc/index.cfm>.

²¹ See *supra* note 16 and accompanying text; Nadine Farid, *Not In My Library: Eldred v. Ashcroft and the Demise of the Public Domain*, 5 TUL. J. TECH. & INTELL. PROP. 1, 15 (2003) (noting disregard for the public domain inherent in the CTEA).

²² See Trust Brief, *supra* note 16.

George Gershwin's body of works,²³ particularly the opera *Porgy and Bess*, which premiered in 1935 shortly before Gershwin's premature death at age 38 in 1937. Gershwin is an excellent case to consider with respect to uses of copyright because of his 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 copyright holders, particularly successful ones, 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 willingness to embrace new technologies such as radio and new methods of business practice in the face of changing technological and industry standards.²⁴ Examination of the creation and uses of copyright in this specific context helps shed light on how copyrighted works may be created and the sources from which holders of such rights actually derive value, which in turn can be drawn on to further assess the scope of 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 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

²³ 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 paper, the identities of George Gershwin's identified co-authors are only noted when relevant to discussion. Further, 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.

²⁴ See *infra* notes 73 to 76 and accompanying text.

connected to creators may develop, thrive and have new life even in the death of the figure upon which such industries are based. Such *post-mortem* legacies are often evident in the case of heirs, for whom the maintenance and protection of the artistic legacies of dead creators is a core business interest.²⁵

Part II of this Article focuses on assumptions often made with respect to the creation of copyrighted works and particularly the extent to which a right of control is treated as an inherent part 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 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 approaches to copyright that may be a basis upon which to determine copyright infringement by which the control and compensation aspects of copyright frameworks might be disaggregated.

II. COPYRIGHT, CREATION AND CONTROL

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

Much discourse surrounding the CTEA considers the general impact of the CTEA on both copyright holders and the public domain. The extensive commentary surrounding the *Eldred* case, which focused particularly on the constitutionality of the CTEA,²⁶

²⁵ See Olufunmilayo B. Arewa, *The Elvis Industry: Intellectual Property and Post-Mortem Artistic Legacies* (2005) (manuscript on file with author) (hereinafter, "Arewa, *Elvis*").

²⁶ See, e.g., Jane C. Ginsburg, Wendy J. Gordon, Arthur R. Miller & William M. Patry, *The Constitutionality of Copyright Term Extension: How Long is Too Long?*, CARDOZO ARTS & ENT. L.J. SYMPOSIA (2000); Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOYOLA L.A. L. REV. 83, 95 (2002) (noting the CTEA violates the First Amendment and prevents expression that

reflects arguments on both sides of the CTEA debate. 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.²⁷ This approach emphasizes the incentives that serve to give impetus to potential creators to create new works.²⁸

In contrast, although often also rooted in the intellectual property as tool of innovation approach, opponents of the CTEA have tended to emphasize to a greater extent behaviors with respect to copyright over time periods other than in relation to the moment of creation of a copyrighted work. As such, they consider some implications of the process by which copyrights are actually used over time as well as the costs and impact of copyright laws on the creation of new works by virtue of what might be termed the control aspects of copyright that give copyright holders exclusion rights that allow them to determine what uses may be made of their works during the period of copyright protection.²⁹ This view

would otherwise occur); Dan T. Coenen & Paul J. Heald, *Means/Ends Analysis in Copyright Law: Eldred v. Ashcroft in One Act*, 36 LOYOLA L.A. L. REV. 96 (2002).

²⁷ See Davis, *supra* note 3, at 998-999 (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 11, at 392-397 (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.”); see also *supra* note 19 and *infra* note 211 and accompanying text for a discussion of the arguments of *amici curiae* for the respondents in the *Eldred* case.

²⁸ Arewa, *Blocking*, *supra* note 7 (discussing the intellectual property as tool of innovation approach); see also William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright*, 18 J. LEG. STUD. 325 (1989); Henry Hansmann and Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEG. STUD. 95 (1997); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (1934); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966).

²⁹ See L. Ray Patterson, Case 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 16 and accompanying text.

focuses particular attention on the impact 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 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 the implications of copyright rules in general, such commentary does not as a result fully consider the significance of the 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.³⁰

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 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 may thus reveal something of the origin of Gershwin's works and his musical borrowings,³¹ 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.

B. *Strategic Uses of Copyright*

1. The Complexity of Motivations to Create New Works

Assertions about the benefits of intellectual property frameworks are typically based upon an implicit acceptance of the fundamental

³⁰ The Economist Brief, however, did address issues relating to the behavioral impact of particular copyright rule structures. See Economist Brief, *supra* note 18.

³¹ Musical borrowing entails the use of existing cultural elements or works in creations. See Arewa, *Hip Hop*, *supra* note 1 (discussing musical borrowing).

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 really empirically supported.³² 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 have little if anything to do with financial considerations and even invested his own money in works that had no assurance of financial success.³³ This reflects the fact that people create new works for a variety of reasons and motivations.³⁴ In addition, regardless of whether copyrights gives incentives to create a work, subsequent to their creation, intellectual property rights such as copyright may in fact also be used as strategic weapons in a manner that may actually impede

³² See, e.g., RUTH TOWSE, *CREATIVITY, INCENTIVE, AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE* 21 (2001) (noting that “we still cannot say with any conviction that intellectual property law in general, and copyright law in particular, stimulates creativity. That is no argument for not having it but it should sound loud notes of caution about increasing it. And we still know very little about its empirical effects.”); Julie E. Cohen, Lochner in *Cyberspace: The New Economic Orthodoxy of Rights Management*, 97 MICH. L. REV. 462, 505 fn. 160 (1998-1999) (noting that the role of copyright in the production of cultural texts remains an unanswered empirical question); Mark S. Nadel, *Questioning the Economic Justification for (and thus Constitutionality of) Copyright Law’s Prohibition Against Unauthorized Copying: §106* (January 2003), AEI-Brookings Joint Center Related Publication 03-1 (noting that economic justification for copyright prohibition against unauthorized copying is not be necessary to stimulate an optimal level of new creations and in fact appears to have a net negative effect on creative output).

³³ 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 John Andrew Johnson, *Gershwin’s Blue Monday (1922) and the Promise of Success*, in *THE GERSHWIN STYLE: NEW LOOKS AT THE MUSIC OF GEORGE GERSHWIN* 111, 111 (Wayne Schneider ed., 1999).

³⁴ See Arewa, *Blocking*, *supra* note 7.

the creation of future works.³⁵

2. The Intangibles Paradigm and Strategic Business Behaviors

Aggressive and strategic behaviors are increasingly associated with the use and enforcement of intellectual property rights.³⁶ 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.³⁷ This move to an intangible paradigm has “increased the stakes in the global dimensions of intellectual property rights.”³⁸ 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 (“RIAA”) has aggressively pursued alleged copyright infringers in large numbers. By June 2004, the RIAA had initiated more than 2,000 lawsuits against alleged file sharers for copyright infringement.³⁹ In another example, following passage of the Digital Millennium Copyright Act (the

³⁵ See DORON S. BEN-ATAR, *TRADE SECRETS: INTELLECTUAL PIRACY AND THE ORIGINS OF AMERICAN INDUSTRIAL POWER* (2004) (highlighting the fact that intellectual property frameworks have been used historically in the international intellectual property arena as a tool of piracy).

³⁶ See Arewa, *Blocking*, *supra* note 7.

³⁷ See Olufunmilayo B. Arewa, *Securities Regulation in the Knowledge Economy: Adopting Disclosure Frameworks for a New Intangibles Age* (2005) (manuscript on file with author) (hereinafter, “Arewa, *Knowledge Economy*”).

³⁸ See 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 Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT’L L. 933, 947 (2003) (noting that “[c]ountries engaged in a large amount of research and development or who otherwise produce a great deal of intellectual property prefer a system of rigorous protection and enforcement of intellectual property rights around the world . . . These net exporters of intellectual property, therefore, prefer an international regime in which intellectual property rights are relatively expansive and strictly enforced”); Arewa, *Blocking*, *supra* note 7; Arewa, *Knowledge Economy*, *supra* note 37.

³⁹ As of June 22, 2004, 2,047 “John Doe” lawsuits had been filed targeting groups of suspected copyright infringers. See Congressional Budget Office, *Copyright Issues in Digital Media* 19 (Aug. 2004), at <http://www.cbo.gov/ftpdocs/57xx/doc5738/08-09-Copyright.pdf> (hereinafter, “CBO”); see also Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales* (March 2004) (discussing effect of file sharing on record sales).

“DMCA”),⁴⁰ 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.⁴¹

These and other examples suggest that aggressive and often strategic business behaviors are increasingly a part of the use of copyright and intellectual property 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. 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.⁴² As a result, threats can be important avenues for strategic behaviors.

Although strategic behaviors are by no means a new phenomenon,⁴³ the intangibles paradigm 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”).⁴⁴ Such rules of the game, which

⁴⁰ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified at 17 U.S.C. §1201 et seq.).

⁴¹ See Free Expression Project, *supra* note 13, at 32 (“The DMCA has also become a weapon for companies seeking to squelch competition.”); Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1110-1114 (2003) (noting strategic behaviors were used to “suppress competing technology by preventing interoperability with products that include technical protections,” rather than protect innovation or prevent unauthorized copying or distribution of copyrighted works).

⁴² See Arewa, *Blocking*, *supra* note 7; see also 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 fn. 78 (1990) (Review of PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* (1989)) (“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.”).

⁴³ See Arewa, *Blocking*, *supra* note 7.

⁴⁴ *Id.* (noting difference between rules of the game or formal legal rules and regulations that constitute intellectual property frameworks and the manner of play, which refers to “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 Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 947 (1995) (“governments, as well as others, act to construct the social structures, or social

include copyright rules, developed under a tangible asset paradigm economic and business model.⁴⁵ 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.⁴⁶ 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.⁴⁷

C. *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 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 them by the CTEA is close to expiring.⁴⁸ The actions of

norms, or . . . the social meanings that surround us”); 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 the game. Although the use of the rules of the game 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.”).

⁴⁵ See Arewa, *Knowledge Economy*, *supra* note 37.

⁴⁶ *Id.*

⁴⁷ See Arewa, *Knowledge Economy*, *supra* note 37; 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. ____ (forthcoming 2005).

⁴⁸ See Garon, *supra* note 3, at ____.

such holders highlights the strategic behaviors commonly asserted in the intellectual property realm today more generally.

1. Strategic Behavior and Judicial Enforcement

The recent SCO case illustrates the use of judicial enforcement to expand existing rights connected to copyright in a business context.⁴⁹ In 2003, SCO began sending out licensing letters to more than 1,500 companies claiming that such companies' use of open source code Linux operating system software violated Unix copyrights that SCO did not actually own.⁵⁰ SCO subsequently filed several lawsuits, including two against recipients of licensing letters, and one against each of IBM and Novell, the latter being the actual owner of the Unix copyrights.⁵¹ The SCO suits related to its attempt to seek judicial enforcement of its alleged rights with respect to the Novell copyrights and other related claims.⁵²

The SCO case illustrates the activities of a company with respect to copyright that have nothing to do with the creation of new works or the commercialization or distribution of such works. Rather, SCO's actions 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.⁵³ SCO derived a significant amount of value from the increased market value of the company following its indication by way of licensing letters, lawsuits and press releases that it was pursuing an aggressive litigation strategy with respect to its intellectual property.⁵⁴ SCO's indication of this strategy in effect operated as a market signal of its intent to pursue its strategic business objectives through the aggressive exercise of intellectual

⁴⁹ See Arewa, *Blocking*, *supra* note 7 (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).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (noting that SCO seeks to enforce rights in relation to Unix copyrights held by Novell, which SCO may have acquired when Novell sold the Unix business to a predecessor company of SCO).

⁵⁴ *Id.*

property rights,⁵⁵ reflecting a strategy used by companies today to signal the value of intangibles to markets.⁵⁶

Such signaling behavior may reflect different value assignments than the copyright as 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 a value in copyright derived from utilization of copyright with respect to other concurrently or potentially existing rights or commercial uses. Strategic behaviors may consequently be used in the intellectual property arena to block other products or competitors.⁵⁷ In the case of SCO, SCO's attempted assertion of rights represents an attempt to extend the scope of copyright in a manner that was not previously recognized by a party that does not actually own the copyrights at issue. On the other side of SCO's expansion then, is the potential contraction of rights of Linux users, who under SCO's theory of copyright would now be required to pay license fees for uses that were previously not considered to fall within the scope of another's copyright. By focusing on copyright with respect to acts of creation, the copyright as 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.

The success of SCO's signaling strategy was initially reflected in a

⁵⁵ See Olufunmilayo B. Arewa, *Strategic Behavior and Sources of Value: Some Implications of the Intangibles Paradigm*, in *NEW DIRECTIONS IN COPYRIGHT* (forthcoming 2005, Edward Elgar) (noting use of market signaling to indicate strategic business objectives with respect to intangibles).

⁵⁶ See David S. Gelb & Philip Siegel, *Intangible Assets and Corporate Signaling*, 15 *REV. QUANTITATIVE FIN. & ACCOUNTING* 307, 321 (2000) (noting that as a result of differential accounting treatment of intangibles, companies with significant amounts of intangible assets "face the rather formidable task of credibly signaling firm value to investors and shareholders"); see also Arewa, *Knowledge Economy*, *supra* note 37 (discussing failure of accounting measures to adequately measure or account for the role played by intangibles today).

⁵⁷ See Arewa, *Blocking*, *supra* note 7; see also *supra* notes 40 to 41 and accompanying text for a discussion of strategic behavior in connection with the DMCA.

stock price of more than 700% in 2003.⁵⁸ Despite the fact that SCO's stock price subsequently declined significantly, increases in stock price have independent value to many companies.⁵⁹ Further, SCO was able to garner significant value from its elevated stock price prior to its subsequent decline in a number of ways, including in attracting new company investors or potential acquirors and by virtue of management stock sales worth millions of dollars to management stockholders.⁶⁰ 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 as a potential source of value is also reflected in the legislative arena.⁶¹ Another avenue for the use of

⁵⁸ See Arewa, *Knowledge Economy*, *supra* note 37.

⁵⁹ See Daniel C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 972 (2002) (noting that "a high stock price has an independent competitive purpose").

⁶⁰ See SCO Press Release, *The SCO Group Closes \$50 Million Equity Financing* (Oct. 16, 2003), at <http://ir.sco.com/ReleaseDetail.cfm?ReleaseID=120229> (announcing closing of a \$50 million SCO financing); Arewa, *Blocking*, *supra* note 7 (noting that SCO management principals sold millions of dollars of stock during the time that SCO's stock price was elevated); Peter Williams, *SCO Lawsuit Could End in IBM Buyout*, VNUnet.com (Mar. 3, 2003) (speculating that SCO lawsuit was an invitation to IBM to make an acquisition offer), at <http://www.vnunet.com/News/1139406>.

⁶¹ Matthew J. Baker & Brendan M. Cunningham, *Court Decisions and Equity Markets: Estimating the Value of Copyright Protection* 19-20 (2004) (manuscript on file with author) (finding in empirical study that "excess returns to equity are driven, in part, by the breadth of copyright as determined by courts," whereas lengthening of the statutory term provides little incentive due to the increased cost of creating derivative works); *see also* Economist Brief, *supra* note 18 (giving an economic analysis of the CTEA from the perspective of CTEA opponents); Stan J. Liebowitz & Stephen E. Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects* 19 (2001), CAPRI Publication 04-01 (manuscript on file with author) (discussing the assumptions of the Economist Brief and noting that little empirical evidence exists with respect to considerations of duration and a complete approach to this topic requires consideration of "the responsiveness of

strategic behaviors with respect to intellectual property relates to use of the legislative process to promote statutory changes. Such statutory changes may increase the scope or 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.⁶²

Legislative enforcement may relate to the creation of new rights or 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 users. In the case of the CTEA, the potential users who had less expansive rights as a result of the CTEA included potential users of the public domain, borrowers who use existing works and those who reinterpret of 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 company attempts to seek or 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 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.⁶³

creative efforts to marginal incentives and the function of ownership of intellectual property beyond the incentive to create”).

⁶² 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.”); Arewa, *Hip Hop*, *supra* note 1 (discussing the role of commercial interests in shaping copyright law).

⁶³ See *infra* notes 20 to 21 and accompanying text.

3. Strategic Business Behaviors and Value Assignments

Strategic business behaviors often reflect assignments of value that often differ from those assumed under an intellectual property as tool of innovation approach. Intellectual property may function and be used for actions over the time period within which works are protected by copyright that are not connected to acts of creation. As a result, the source of value in an intellectual property right for the holder of the right may not have anything to do with creation or innovation.⁶⁴ In addition to reflecting potentially divergent value assignments from those assumed by the rules of the game, strategic business behaviors also reflect actual manners of play. The potential divergence in sources of value underlying strategic uses of copyright highlights the potential inadequacies with respect to the manner of play of the copyright as tool of innovation approach, which focuses on the value to be gained by a holder on account of compensation for the creation of new works. Rather, comprehending various manners of play requires close scrutiny of the behaviors enabled by the exclusionary or control rights that are currently part of copyright frameworks. Looking at specific instances of copyright uses can thus shed light on the manner of play.

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. Assessing their uses of copyright should begin with assessment of the role of creation in the uses of copyrights by the Gershwins. Any consideration of creation must begin with a discussion of the musical origins of George Gershwin's works, including his seminal opera *Porgy and Bess*.

III. THE MUSICAL ORIGINS OF PORGY AND BESS

A. *The Creation and Development of the Music and Libretto* George Gershwin is the most successful and renowned American

⁶⁴ See Liebowitz and Margolis, *supra* note 61, at 19 (noting need to understand ownership function of intellectual property beyond incentives to create).

composer in American history.⁶⁵ He had unparalleled popular stature at the time of his premature death in 1937, whose impact has been compared to John Lennon's death in 1980.⁶⁶ His life was the subject of Hollywood treatment in the 1945 film *Rhapsody in Blue*.⁶⁷

His success may be measured both in terms of both his artistic and financial accomplishments. 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,⁶⁸ did not receive much critical acclaim until well after Gershwin's death.⁶⁹ The reception of *Porgy and Bess* typified the generally negative critical reception of Gershwin's more "serious" works during his lifetime.⁷⁰ The value of many Gershwin works, including *Porgy and Bess*, as "serious" music is now increasingly acknowledged.⁷¹

⁶⁵ See THE GEORGE GERSHWIN READER xi (Robert Wyatt & John Andrew Johnson eds., 2004) (hereinafter, "THE GEORGE GERSHWIN READER") ("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."); Charles Hamm, *Towards a New Reading of Gershwin*, in THE GERSHWIN STYLE: NEW LOOKS AT THE MUSIC OF GEORGE GERSHWIN 3, 3 (Wayne Schneider ed., 1999) ("The United States has not produced a more famous composer than George Gershwin").

⁶⁶ Susan Richardson, *Gershwin on the Cover of Rolling Stone*, in THE GERSHWIN STYLE: NEW LOOKS AT THE MUSIC OF GEORGE GERSHWIN 161, 168 (Wayne Schneider ed., 1999) ("His untimely death was felt throughout society, causing shock and public grief comparable to that over John Lennon's death in 1980.").

⁶⁷ *Id.*

⁶⁸ See George Gershwin, *Rhapsody in Catfish Row*, in GEORGE GERSHWIN 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).

⁶⁹ See *infra* notes 131 to 139 and accompanying text.

⁷⁰ 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 critics, academics and European conductors).

⁷¹ Larry Starr, *Ives, Gershwin, and Copland, Reflections on the Strange History of American Art Music*, 12 AM. MUS. 167, 186 (1994) ("Gershwin is at last being treated seriously by many") (hereinafter, "Starr, *Art Music*"); Hans Keller, *Gershwin's Genius*, 103 MUSICAL TIMES 763 (1962) (discussing Gershwin's genius); Larry Starr, *Toward a Reevaluation of Gershwin's Porgy and Bess*, 2 AM. MUS. 25 (1984) (discussing musicologist Starr's surprise at the

Gershwin's works have achieved continuing financial success that is often attributed to the appeal of his melodies.⁷² 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.⁷³ For example, he gave radio performances of his and others' works,⁷⁴ which helped ensure widespread distribution and public awareness of his works.⁷⁵ In addition, Gershwin was also 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.⁷⁶

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,⁷⁷ which Heyward's wife Dorothy transformed

accomplishments of Gershwin in *Porgy and Bess* after seeing the Houston Grand Opera production of *Porgy and Bess* in New York in 1977); HOLLIS ALPERT, *THE LIFE AND TIMES OF PORGY AND BESS: THE STORY OF AN AMERICAN CLASSIC* 5 (1990) (noting initially negative response to what would become "regarded as this country's greatest contribution to opera, and would later conquer many of Europe's most prestigious opera stages").

⁷² Steven E. Gilbert, *Gershwin's Art of Counterpoint*, 70 *MUSICAL Q.* 423, 425 (1984) ("Most of Gershwin's tunes are indeed memorable."); Larry 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").

⁷³ See George Gershwin, *The Composer and the Machine Age*, in *GEORGE GERSHWIN* 225, 225-229 (Merle Armitage ed., 1938) (noting the significance of the machine age in influencing everything Gershwin did, from the arts to finance, and the fact that composers have been helped by the mechanical reproduction of music).

⁷⁴ Richardson, *supra* note 66, at 170 (noting that Gershwin had a radio show twice a week); EDWARD JABLONSKI, *GERSHWIN* 260-263, 276-277 (1998) (noting that Gershwin had a radio show called "Music by Gershwin," the first series of which aired twice weekly for 15 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).

⁷⁵ ALEC WILDER, *THE AMERICAN POPULAR SONG: THE GREAT INNOVATORS, 1900-1950*, at 122-123 (1990) (noting enormous exposure provided to Gershwin by radio); Peyser, *supra* note 70, at 127, 130 (noting that the Gershwins founded the New World Music Company, which published all Gershwin works, as a subsidiary of T.B. Harms).

⁷⁶ Peyser, *supra* note 70, at 130.

⁷⁷ *Id.* at 159.

into a play that formed the basis of the *Porgy and Bess* libretto.⁷⁸ Heyward was born in South Carolina of an aristocratic family.⁷⁹ Lacking formal education, Heyward became a cotton checker on the Charleston wharves, where he was exposed to African American dockworkers and fisherman on whom he based his novel.⁸⁰ 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 1932.⁸¹

The collaboration of the Gershwins with the Heywards was an acknowledged one in which all parties received copyright credit and compensation. Such acknowledged collaborations, however, may 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 musicians and other music, 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,⁸² 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 process through which Gershwin created his music highlights the borrowing often inherent in the composition process and the importance of

⁷⁸ *Id.*

⁷⁹ Jablonski, *supra* note 74, at 252.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Arewa, *Hip Hop*, *supra* note 1 (discussing the pervasiveness of musical borrowing).

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,⁸³ Gershwin relied extensively on the technical assistance of musicians with a better theoretical grounding in music.⁸⁴ Gershwin typically did not give credit to these collaborators,⁸⁵ 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.⁸⁶

Although Gershwin had classical musical training and was considered to be an excellent pianist,⁸⁷ part of Gershwin's

⁸³ Peyser, *supra* note 70, 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: NEW LOOKS AT THE MUSIC OF GEORGE GERSHWIN* 255, 259, 272-273 (Wayne Schneider ed., 1999) (noting Ira's work on the lyrics of Weill, *Lady in the Dark* and the film *A Star is Born*).

⁸⁴ Peyser, *supra* note 70, at 71, 120-121, 194 (noting that at various times, Gershwin relied on Will Vodery, James P. Johnson, Kay Swift, Edward Kilenyi and Bill Daly for orchestrations).

⁸⁵ *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).

⁸⁶ *Id.* at 120-121.

⁸⁷ Charles Hamm, "It's Only a Paper Moon"; or *The Golden Years of Tin Pan Alley*, in *YESTERDAYS: POPULAR SONG IN AMERICA* 326, 346, 348 (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).

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.⁸⁸ 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.⁸⁹ In the 1920s, Gershwin began to feel that his musical ambitions and creativity were hindered by his lack of technical capacity.⁹⁰ As a result, he studied music theory and counterpoint with other teachers, including Edward Kilenyi, Henry Cowell and Joseph Schillinger,⁹¹ and solicited instruction from the composers Maurice Ravel and Arnold Schoenberg.⁹² 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.⁹³

⁸⁸ Peyser, *supra* note 70, at 31 (noting that Gershwin stopped regular piano lessons at sixteen).

⁸⁹ Peyser, *supra* note 70, 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.”)

⁹⁰ WILLIAM G. HYLAND, *GEORGE GERSHWIN: A NEW BIOGRAPHY* 167 (2003).

⁹¹ Peyser, *supra* note 70, at 158 (noting Gershwin studies with Cowell, who may have sent Gershwin to study with Schillinger); Richardson, *supra* note 66, at 164 (noting harmonization, orchestration and form studies with Kilenyi).

⁹² Charlotte Greenspan, *Rhapsody in Blue: A Study in Hollywood Hagiography*, in *THE GERSHWIN STYLE: NEW LOOKS AT THE MUSIC OF GEORGE GERSHWIN* 145, 150 (Wayne Schneider ed., 1999) (noting that Gershwin solicited instruction from Ravel and Schoenberg, both of whom assured Gershwin that he did not need lessons from them).

⁹³ See Richard Crawford, *It Ain't Necessarily Soul: Gershwin's 'Porgy and Bess as a Symbol*, 8 *YEARBOOK 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); Hamm, *supra* note 87, 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 AFRICAN 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.”).

2. Gershwin's Borrowing 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.⁹⁴ 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 unusual in the extent of his reliance on such musical forms.⁹⁵ His song *I Got Rhythm*, for example, “was full of the accents of ragtime and, to a lesser extent, blues.”⁹⁶

By the time of Gershwin's birth, the U.S. was captivated by ragtime music.⁹⁷ 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*.⁹⁸ In consciously seeking out African American music, Gershwin was “schooled and indoctrinated in the African-American musical cauldron that was the Harlem Renaissance”⁹⁹ and was profoundly

⁹⁴ Small, *supra* note 93, 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 terms 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”).

⁹⁵ Hamm, *supra* note 87, at 352 (noting that African American music struck a deep responsive chord in Gershwin).

⁹⁶ Small, *supra* note 93, at 277.

⁹⁷ Peyser, *supra* note 70, at 38.

⁹⁸ See David Horn, *From Catfish Row to Granby Street: Contesting Meaning in Porgy and Bess*, 13 POP. MUS. 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); DuBose Heyward, *Porgy and Bess Return on the Wings of Song*, in GEORGE GERSHWIN 34, 39 (Merle Armitage ed., 1938) (discussing George Gershwin's stay in 1934 on Folly Island, a barrier island 10 miles from Charleston).

⁹⁹ SAMUEL A. FLOYD, JR., THE POWER OF BLACK MUSIC: INTERPRETING ITS HISTORY FROM AFRICA TO THE UNITED STATES 165 (1995) (citations omitted); see also Peyser, *supra* note 70, at 36 (“George Gershwin was certainly one of the earliest [white songwriters] to seek out black music purely from personal

influenced by African American music from his adolescence.¹⁰⁰ Gershwin's music emphasized blue notes typically associated with jazz.¹⁰¹ 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 that was perceived as genuine freshness."¹⁰² The popularity of *Rhapsody in Blue*, composed in 1924, "inspired Gershwin to make extensive study of the idioms and characteristics of American folklore."¹⁰³

Gershwin borrowed the piano style of Luckey Roberts, an African American pianist who was prominent in New York prior to World War I.¹⁰⁴ From Roberts, Gershwin learned drive and syncopation that was at that time unknown to most white piano players.¹⁰⁵ 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.¹⁰⁶ Gershwin thus ingested and borrowed from African American musical styles and musicians.¹⁰⁷ Gershwin's talent in playing the piano and style of

interest. He soaked himself in it."); Catherine Parsons Smith, *From William Grant Still: A Study in Contradictions*, in THE GEORGE GERSHWIN READER, 147, 150 ("Gershwin was well known to seek out performances by black musicians"); Hamm, *supra* note 65, 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.").

¹⁰⁰ Peyser, *supra* note 70, at 36; Floyd, *supra* note 99, 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).").

¹⁰¹ Peyser, *supra* note 70, at 69 (noting that Gershwin emphasized blue notes or intervals of flat thirds and sevenths); Wilder, *supra* note 75, 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.").

¹⁰² Peyser, *supra* note 70, at 84.

¹⁰³ J. Rosamond Johnson, *Emancipator of American Idioms*, in GEORGE GERSHWIN 65, 66 (Merle Armitage ed., 1938).

¹⁰⁴ Peyser, *supra* note 70, at 40-41.

¹⁰⁵ *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.").

¹⁰⁶ *Id.* at 43-44 (noting "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").

¹⁰⁷ *Id.* at 41 ("Gershwin appropriated this from the blacks, ingested it until it was his own, and transformed it into his songs.").

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.”¹⁰⁸

Gershwin’s composition practice was based 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.¹⁰⁹

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),¹¹⁰ which used African American musical devices and traits, foreshadowed *Porgy and Bess*.¹¹¹ During the process of composing *Porgy and Bess*, Gershwin worked closely with the Heywards and his brother Ira, who received credit writing the lyrics for some of the songs from the opera,¹¹² while DuBose Heyward received credit for the lyrics others.¹¹³ Both Gershwin and Heyward were interested in creating

¹⁰⁸ *Id.* at 42.

¹⁰⁹ Starr, *Art Music*, *supra* note 71, at 170-171 (citations omitted).

¹¹⁰ Floyd, *supra* note 99, at 165 (noting African American musical devices and traits in Gershwin’s music).

¹¹¹ *See*, Hyland, *supra* note 90, at 158-159.

¹¹² Jablonski, *supra* note 74, at 263-272 (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).

¹¹³ Hyland, *supra* note 90, at 164 (noting that George set many Heyward lyrics, including “I Got Plenty of Nuttin’ and “Summertime” to music with few changes).

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.¹¹⁴ Also atypical was the reliance of *Porgy and Bess* on an African American cast,¹¹⁵ a decision that was reached after considering having Porgy portrayed by Al Jolson in blackface.¹¹⁶ 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.¹¹⁷ This case included Todd Duncan, a baritone who was head of the Music Department and a voice teacher at Howard University.¹¹⁸

As he composed *Porgy and Bess*, Gershwin spent time in Gullah communities in and around Charleston, South Carolina.¹¹⁹ Gullah communities are rich in cultural traditions and also retain a significant number of Africanisms in cultural expression, including language and music;¹²⁰ they thus represented a rich resource from which Gershwin could draw. During his stay South Carolina,

¹¹⁴ Hyland, *supra* note 90, at 163 (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.”).

¹¹⁵ *Porgy and Bess* was not the first “serious” musical work for white audiences that relied on an African American cast. Virgil Thompson’s opera *Four Saints in Three Acts*, which was not related to African American cultural themes, also relied on an all black cast. Gershwin cast Edward Matthews, who had performed in the Thomson opera, as Jake in *Porgy and Bess*. Peyser, *supra* note 84, at 229-230.

¹¹⁶ Hyland, *supra* note 90, at 255-258 (noting that Al Jolson actively pursued the role of Porgy but was unable to find time to undertake the role and that Heyward was initially opposed but soon became resigned to Jolson’s portraying Porgy).

¹¹⁷ Jablonski, *supra* note 74, at 280-283 (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 Thomson’s *Four Saints in Three Acts*).

¹¹⁸ Jablonski, *supra* note 74, at 280 (noting that Duncan, a conservatory trained classical singer and graduate of Columbia University who had a master’s degree in voice, initially approached Gershwin with disdain).

¹¹⁹ Hyland, *supra* note 90, at 160 (noting that DuBose Heyward’s mother, Janie, was an expert in Gullah culture and dialect); Jablonski, *supra* note 74, at 272-276 (discussing Gershwin stay at Folly Island).

¹²⁰ See Lorenzo D. Turner, *Problems Confronting the Investigation of Gullah*, in *MOTHERWIT FROM THE LAUGHING BARREL: READINGS IN THE INTERPRETATION OF AFRO-AMERICAN FOLKLORE* 126-140 (Alan Dundes ed., 1973) (discussing parallels between Gullah and West African languages).

Gershwin had the opportunity to hear spirituals in churches in the area.¹²¹ The music 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.¹²² In addition to borrowing generally from African American musical styles, *Porgy and Bess* incorporates the spiritual "Sometimes I Feel Like a Motherless Child" in the aria "Summertime."¹²³ Both "Summertime" and "Sometimes I Feel Like a Motherless Child" also follow the same harmonic scheme.¹²⁴

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*.¹²⁵ Although Schillinger's contributions to *Porgy and Bess* are not substantiated,¹²⁶ some of Gershwin's prior works, including *Variations on I Got Rhythm* and *Cuban Overtures*, "owed a lot to Schillinger."¹²⁷ Some passages from *Porgy and Bess* appear to

¹²¹ Jablonski, *supra* note 74, at 274 (noting that Gershwin learned a lot of spirituals by going to churches around the area).

¹²² *Id.* at 276 (noting that Gershwin re-created the effect he heard in the churches he visited in the storm scene in Act II, Scene 4).

¹²³ Floyd, *supra* note 99, 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); Samuel A. Floyd, Jr. *Troping the Blues: From Spirituals to the Concert Hall*, 13 BLACK MUS. RES. 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").

¹²⁴ Floyd, *supra* note 99, at 218.

¹²⁵ Hyland, *supra* note 90, at 167 (noting that Schillinger following Gershwin's death alleged that he had contributed to *Porgy and Bess*, an assertion rebutted vehemently by Ira Gershwin).

¹²⁶ *Id.*

¹²⁷ *Id.*; see also Vernon Duke (Dukelsky), *Gershwin, Schillinger, and Dukelsky*, 75 MUSICAL Q. 119 (discussing the relationship between Gershwin, Schillinger and the author, who completed Gershwin's songs for the film *Goldwyn Follies* following Gershwin's death); Peyser, *supra* note 70, at 300 (noting that Ira Gershwin completed the songs for *Goldwyn Follies* with Duke following George Gershwin's death); Paul Nauert, *Theory and Practice in "Porgy and Bess": The Gershwin-Schillinger Connection*, 78 MUSICAL Q. 9, 12 (1994) (noting that Gershwin took 4 1/5 hours of lessons a week for the first year or two of his lessons with Schillinger and that Schillinger's influence on this music is hotly debated).

some commentators to show signs of Schillinger's influence.¹²⁸ At a minimum, Gershwin's orchestrations improved significantly as a result of his lessons with Schillinger.¹²⁹

4. Borrowings and the Reception of *Porgy and Bess* by African Americans

The general tendency of Gershwin to borrow from African American cultural expression has significantly influenced responses to *Porgy and Bess*.¹³⁰ 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."¹³¹

Although *Porgy and Bess* did receive laudatory reviews during its run in Boston,¹³² critical reviews of *Porgy and Bess* were at best mixed during Gershwin's lifetime.¹³³ The initial New York run

¹²⁸ See Nauert, *supra* note 127, 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; the choral background in "Gone, Gone, Gone") (citations omitted).

¹²⁹ *Id.* at 12 (noting that "virtually all agree that his orchestrations improved significantly thanks to Schillinger").

¹³⁰ Crawford, *supra* note 93, 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).

¹³¹ Richardson, *supra* note 66, 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'"); Crawford, *supra* note 93, 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).

¹³² Jablonski, *supra* note 74, at 288 (noting success of the Boston run).

¹³³ Peyser, *supra* note 70, at 248 (noting that New York reviewers reacted negatively to the cuts made by Gershwin in the opera); Jablonski, *supra* note 74, at 89 (noting that dramatic critics tended to like the production while music critics did not).

was not successful commercially and closed with losses.¹³⁴ 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 1935.¹³⁵ 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.¹³⁶ By the late 1970s, musicologists and critics had begun to reevaluate *Porgy and Bess*,¹³⁷ which received the imprimatur of the Metropolitan Opera, which performed a version of *Porgy and Bess* in 1985, thirty years after its premiere.¹³⁸

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*.¹³⁹ The African American critical response to *Porgy and Bess* has been mixed. Many performers of *Porgy and Bess*, including William Warfield, have been supportive of the work.¹⁴⁰ Others, including Duke

¹³⁴ Jablonski, *supra* note 74, at 89 (noting that the run closed after 124 performances in New York); Stanley Green, *Oklahoma!: Its Origin and Influence*, 2 AM. MUS. 88, 89 (1984) (noting that *Porgy and Bess* was not initially a financial success); Wilder, *supra* note 75, at 155 (noting that *Porgy and Bess* "lost a good deal of money, and, in general, the opera critics dismissed it").

¹³⁵ 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 44 to 27 pieces).

¹³⁶ See Peyser, *supra* note 70, at 246-248 (noting cuts made by Gershwin prior to the New York premiere); Hamm, *supra* note 65, 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).

¹³⁷ See Hyland, *supra* note 90, at 176-177.

¹³⁸ *Id.* at 177.

¹³⁹ See Horn, *supra* note 98, at 168 (noting that the debate about aesthetic merit and representations of African Americans came into direct contact in a debate in Liverpool relating to a proposed production of *Porgy and Bess*).

¹⁴⁰ *Id.* at 173-174.

Ellington and journalist James Hicks, reacted negatively to the African American characterizations in *Porgy and Bess*.¹⁴¹

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

Gershwin's borrowings lie close to the borrowing intensive end of a spectrum of borrowings from African American cultural expression in the United States. As has been the case with other instances, 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 cultural hierarchies.¹⁴² 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.¹⁴³

In some cases, a tendency to designate particular forms of cultural expression 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.¹⁴⁴

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 result of hierarchies of culture, power and

¹⁴¹ *Id.*

¹⁴² See Arewa, *Cultural Borrowing*, *supra* note 2; see also *infra* notes 155 to 163 and accompanying text.

¹⁴³ See Arewa, *Cultural Borrowing*, *supra* note 2.

¹⁴⁴ See *infra* note 255 and accompanying text.

taste.¹⁴⁵ 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.¹⁴⁶ The uses of African American cultural expression without compensation during the twentieth century have, in some instances, reflected the existence and 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 and roll artists, who frequently borrowed from the blues tradition and blues artists.¹⁴⁷

Gershwin borrowed both from common pool resources that may be considered public domain as well as 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 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 *Porgy and Bess*, which contains depictions of African Americans and African

¹⁴⁵ Arewa, *Cultural Borrowing*, *supra* note 2.

¹⁴⁶ *Id.*

¹⁴⁷ Rock and roll artists borrowed extensively from the African American blues tradition, many of whom did not receive compensation for such borrowings. One example of a legal case involving such borrowings is the 1985 suit by blues singer 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*. This case eventually settled out of court. See *Dixon v. Atlantic Recording Corp.*, 1985 U.S. Dist. LEXIS 15291(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*); SHIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 117-148 (2001) (discussing copyright and African American music); Perry A. Hall, *African-American Music: Dynamics of Appropriation and Innovation*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 31-51 (Bruce Ziff & Pratima V. Rao eds., 1997) (discussing appropriation of African American musical forms); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999) (commenting on use of copyright to appropriate African American music); see also Arewa, *Elvis*, *supra* note 25.

American culture that were questioned and criticized by even the standards of the time of its creation on account of the characterizations it included. *Porgy and Bess* is also a popular and widespread work and one of the few representations of African American culture in the “high” culture sphere. Gershwin family restrictions on uses of *Porgy and Bess* substantially affects cultural meaning in preventing any reinterpretation of this work, which now represents a seminal “high” culture depiction of African Americans and African American culture.

C. *Hierarchies of Culture 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,¹⁴⁸ the initial response to the opera was rooted in pervasive hierarchies of culture and taste.¹⁴⁹ 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,¹⁵⁰ but simultaneously 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.¹⁵¹

From the nineteenth century onwards, rankings of aesthetic value of musical works, or what might be termed hierarchies of taste, have been characteristic of evaluations of musical production and

¹⁴⁸ See Hyland, *supra* note 90, at 178.

¹⁴⁹ See Arewa, *Cultural Borrowing*, *supra* note 2 (discussing the role of hierarchies of cultural forms in music and other expressive arts).

¹⁵⁰ See Crawford, *supra* note 93, at 23 (noting that *Porgy and Bess* is a paradoxical work of “opera interlaced with hit songs”); Richard Crawford, *Gershwin’s Reputation: A Note on Porgy and Bess*, 65 *MUSICAL Q.* 257, 257-258 (1979) (noting that scholars are uneasy about Gershwin because his music is difficult to classify); 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 72, at 429-430 (noting that Gershwin’s “free embrace of influences from popular idioms resulted in 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”).

¹⁵¹ See Crawford, *supra* note 93, at 19 (noting that *Rhapsody in Blue* was Gershwin’s “first unclassifiable act as a musician”).

have significantly influenced the development of copyright frameworks.¹⁵² George Gershwin's background and image

played out the generalizations that established guardians of American high culture found so disturbing. He grew up as part of a Jewish working-class America, straddling volatile racial lines.¹⁵³

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."¹⁵⁴

2. Insider and Outsider Status, Hierarchies and Copyright

Gershwin's simultaneous insider and outsider status meant that he both benefited from 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 ways not then available to African American artists who worked in those idioms.¹⁵⁵ 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.¹⁵⁶ 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

¹⁵² See Arewa, *Hip Hop*, *supra* note 1 (discussing hierarchies of taste in hip hop music); Arewa, *Cultural Borrowing*, *supra* note 2 (discussing hierarchies of culture and hierarchies of taste with respect to music in the nineteenth century).

¹⁵³ Richardson, *supra* note 74, at 167.

¹⁵⁴ *Id.*

¹⁵⁵ Small, *supra* note 93, at 331-332 (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).

¹⁵⁶ See Arewa, *Cultural Borrowing*, *supra* note 2 (discussing borrowings from African American traditions).

that such borrowings were not deemed copyright infringement, highlighting the intimate relationship between the scope of copyright protection, power and status.¹⁵⁷

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.¹⁵⁸ Opportunities for Jewish composers were restricted in the serious music realm in Gershwin's time.¹⁵⁹ In addition, a pervasive anti-Semitism is evident in some commentary about Gershwin's music,¹⁶⁰ including composer Virgil Thompson's review of *Porgy and Bess*, which referred to "gefilte fish orchestration."¹⁶¹ 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,¹⁶² or American Jewish composers such as Aaron Copland, who had studied extensively in Europe.¹⁶³

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

¹⁵⁷ *Id.* (discussing rock and roll borrowings from the blues tradition); *see also* HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* __ (1984) (discussing *Porgy and Bess* as a paradigm case of the lack of control of African Americans over their artistic and cultural destiny).

¹⁵⁸ *See supra* notes 110 to 139 and accompanying text.

¹⁵⁹ Peyser, *supra* note 70, at 222-223 (noting that the 1920s was "the first decade in the history of Western music that Jews excluding these converts were even allowed to try to enter the exalted field of concert repertoire"); Richardson, *supra* note 66, at 167 (noting Gershwin's image as part of a Jewish, working-class, immigrant family who straddled racial lines).

¹⁶⁰ Peyser, *supra* note 70, at 237-239.

¹⁶¹ *Id.* at 248 (noting the smarmy anti-Semitism in Thompson's remarks).

¹⁶² *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)

¹⁶³ *Id.* at 97-99 (noting that Copland, who 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 71, at 180 (noting Copland studies in Paris with Nadia Boulanger, where "Copland quickly absorbed important elements of contemporary European musical styles").

orchestration, and commercial success.¹⁶⁴ Gershwin did attempt throughout his life to rectify his formal musical deficiencies through studies with teachers such as Joseph Schillinger.¹⁶⁵ Gershwin also relied on others throughout his career to do his orchestrations and assist with notation.¹⁶⁶

Gershwin started his musical career at age fifteen,¹⁶⁷ first as a pianist and later as a piano roll player in Tin Pan Alley in New York City.¹⁶⁸ 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 the center of popular music production globally,¹⁶⁹ continued to taint his work in the views of classical music critics of the time.¹⁷⁰ 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.¹⁷¹

In the last years of his life from 1932 to 1937, Gershwin was

¹⁶⁴ Peyser, *supra* note 70, at 57 (discussing gaps in Gershwin's technical music training).

¹⁶⁵ *Id.* at 197-198.

¹⁶⁶ *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 83 to 93 and accompanying text.

¹⁶⁷ See Ira Gershwin, *My Brother*, in GEORGE GERSHWIN 16, 17 (Merle Armitage ed., 1938) (noting that George became a piano pounder in Tin Pan Alley at age 15 for \$15 a week (approximately \$287 in 2004 dollars)).

¹⁶⁸ *Id.* at 31, 33.

¹⁶⁹ Charles Hamm, "After the Ball"; or *The Birth of Tin Pan Alley*, in YESTERDAYS: POPULAR SONG IN AMERICA 284, 285-286 (1983) (discussing birth of Tin Pan Alley in New York City in 1880s, which by 1900 controlled the popular song industry).

¹⁷⁰ See THE GEORGE GERSHWIN READER, *supra* note 65, at xi (noting that Gershwin was "[I]mbasted by 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: NEW LOOKS AT THE MUSIC OF GEORGE GERSHWIN 95, 95 (Wayne Schneider ed., 1999) ("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 sophisticates, authorities and would-be authorities on Gershwin have claimed that he simply lacked the technique to construct convincing large-scale works.").

¹⁷¹ *Id.* at 97 ("Music in New York in the 1920s was still very much a European property . . . [v]irtually anyone who wanted to pursue serious music went abroad to study").

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.¹⁷² 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,¹⁷³ which were associated with the decline in power of music publishers.¹⁷⁴ In addition to writing songs for Tin Pan Alley and Broadway musicals, Gershwin also wrote songs for a number of Hollywood films.¹⁷⁵ 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."¹⁷⁶ As a result, in addition to forming his own music publishing company,¹⁷⁷ he "always insisted on receiving a full 50% interest in a composition, even when two lyric writers

¹⁷² Peyser, *supra* note 84, at 214-215 (noting the publications of the League of Composers rarely referred to Gershwin in other than a pejorative fashion, partly because he was so popular).

¹⁷³ See Hamm, *supra* note 65, 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").

¹⁷⁴ See Reebee Garofalo, *From Music Publishing to MP3: Music and Industry in the Twentieth Century*, 17 AM. MUS. 318, 336 (1999) (noting that records becoming a staple of radio programming was the basis of records displacing live performers in radio broadcasting and record companies' displacing publishing house as a power center);

¹⁷⁵ Peyser, *supra* note 84, at 180-181, 258-290 (noting that George and Ira Gershwin relocated to California in August 1936 to write songs for Hollywood movies).

¹⁷⁶ Richardson, *supra* note 66, at 169.

¹⁷⁷ Peyser, *supra* note 84, 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).

contributed to the song, each lyric writer in such an instance sharing the other 50% interest equally.”¹⁷⁸ In other instances, it has been asserted that George and Ira Gershwin replaced Ira when Ira was not available with a lyricist who would be more accommodating and who would permit Ira to retain all rights.¹⁷⁹

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.¹⁸⁰ Moreover, with one exception, all Gershwin biographers have had close ties to members of the Gershwin family.¹⁸¹ Led by Ira, following Gershwin’s death, the Gershwin family immediately moved to take control of “copyrights, permissions, and performance rights to his music.”¹⁸² The day after George’s death, Ira appeared in court to “secure control and management of George’s estate by applying for appointment as its ‘special administrator.’”¹⁸³ Four days later in New York, George’s mother Rose filed papers opposing Ira’s filing, seeking to be the sole administrator of George Gershwin’s estate.¹⁸⁴ Rose Gershwin won her case.¹⁸⁵

The court actions by the Gershwin family illustrate the focus on control that has been an integral part of Gershwin family management of George’s estate, particularly with respect to copyrights, permissions and royalties. The Gershwin family’s actions with respect to George’s legacy also reflect the *post-mortem* development of industries connected to popular figures that thrive and find new life even in the death of the figures upon

¹⁷⁸ AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 431 (3d. ed., 2002).

¹⁷⁹ Peyser, *supra* note 84, 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).

¹⁸⁰ See Hamm, *supra* note 65, at 7 (noting that understanding of Gershwin’s music has been hindered by family intervention after his death).

¹⁸¹ *Id.* at 8.

¹⁸² *Id.*

¹⁸³ Peyser, *supra* note 70, at, at 297.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 298.

which they are based.¹⁸⁶

The legacies of famous artists may be even more valuable after death than they were during the artist's lifetime,¹⁸⁷ which has important implications for copyright. Since copyright terms were originally much more limited in duration, the role of heirs and other legal successors following the death of copyright holders was not 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.¹⁸⁸ 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.¹⁸⁹ Artistic legacy is an intangible that may also be protected by the right of publicity.¹⁹⁰ The role of right of publicity with respect to artistic legacy was raised in the case *Gershwin v. The Whole Thing Co.*,¹⁹¹ which related to an unauthorized stage performance of music by the George and Ira Gershwin.¹⁹²

Further, as has been the case with the *post-mortem* Elvis empire,¹⁹³ the reified images of creators promoted by artistic legacy

¹⁸⁶ See David Wall, *Reconstructing the Soul of Elvis: The Social Development and Legal Maintenance of Elvis Presley as Intellectual Property*, 24 INT'L J. SOC. L. 117, 119 (1996) (noting the development of the Elvis industry within hours of his death).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 120 (discussing contradiction in the artistic activities of the Rolling Stones who strive to create new material but whose audience demand old songs that are identified with the image of the group 30 years ago).

¹⁸⁹ *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.”).

¹⁹⁰ *Id.* at 122, 124-133 (discussing the right of publicity in Elvis cases); Arewa, *Blocking*, *supra* note 7 (discussing implications of intangibles for strategic behavior).

¹⁹¹ 1980 U.S. Dist. LEXIS 16465, at *12 (C.D. Cal., 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”).

¹⁹² *Id.* at *3 (noting that Ira Gershwin alleged in a suit that 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”).

¹⁹³ Wall, *supra* note 186.

businesses is at times 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.”¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶

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

¹⁹⁴ *Id.* at 119-120.

¹⁹⁵ Peyser, *supra* note 70, 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).

¹⁹⁶ See *Gershwin v. Whole Thing*, 1980 U.S. Dist. LEXIS 16465, at *5 (“Mr. Gershwin has always endeavored to preserve the public respect for the Gershwins and their music.”).

established after George's death.¹⁹⁷ A number of trusts administer the copyrights of George and Ira Gershwin, including The George Gershwin Family Trust (the "George Gershwin Trust"), which administers certain rights in the works of George Gershwin,¹⁹⁸ 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.¹⁹⁹ All three Gershwin trusts support the arts and the creation of new works.²⁰⁰

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."²⁰¹ The Gershwin Philanthropic Trust provides support "for artistic organizations, education for children in the arts and certain medical facilities."²⁰²

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. 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

¹⁹⁷ Peyser, *supra* note 70, at 297-298 (noting that George Gershwin never regained consciousness after surgery for a brain tumor and did not appear to have considered or planned for his own death).

¹⁹⁸ See Trust Brief, *supra* note 19, at Addendum, 2a.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Gershwin LOC Trust 2002 Report, Guidestar EZ.com, *available at* http://www.guidestar.org/controller/searchResults.gs?action_gsReport=1&npold=394324 (summarizing figures derived from the Gershwin LOC Trust 2002 IRS Form 990 Filing).

²⁰² Gershwin Philanthropic Trust 2002 Report, Guidestar EZ.com, *available at* http://www.guidestar.org/controller/searchResults.gs?action_gsReport=1&npold=450500 (summarizing figures derived from the Gershwin Philanthropic Trust 2002 IRS Form 990 Filing).

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. With popular writers, however, an option does exist by which a popular writer's works may be written after the writer's death by others. This is the case with the works of Robert Ludlum, for example, whose popular fiction works featuring the character Jason Bourne have recently been continued by Eric Van Lustbader, whose book *The Bourne Legacy* was published in 2003, some two years after Ludlum's death in March 2001.²⁰³ This particular avenue is probably not as readily available to music composers or songwriters,²⁰⁴ 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.²⁰⁵ 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. Even if leaving assets to heirs does create incentives to create new works, it is not clear that copyright law structures as they currently exist is 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. Moreover, even in the case of creators themselves, little empirical evidence actually supports the notion that copyright gives incentives to create.²⁰⁶ The role of heirs in copyright touches upon

²⁰³ See ERIC VAN LUSTBADER, *THE BOURNE LEGACY* (2003).

²⁰⁴ See Arewa, *Hip Hop*, *supra* note 1 (discussing differences in the application of copyright to literature and music).

²⁰⁵ See Dennis S. Karjala, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution*, 36 LOY. L.A. L. REV. 199, 199 (2002) (noting that with the CTEA, "Congress acceded to the demands of noncreative heirs and assignees of old but unexpired copyrights").

²⁰⁶ See *supra* notes 33 to 37 and accompanying text.

the sources of value that legal successors derive from copyright protection and the differences between where they and creators may derive value.

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 even be far 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,²⁰⁷ 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."²⁰⁸ Since no new works are likely to emerge, at least in any quantity, estates have potentially significantly different 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.²⁰⁹ The Gershwin family, for example, has focused on controlling all images disseminated about both Ira and George Gershwin to the extent of refusing to release photographs unless stubble was airbrushed from their portraits.²¹⁰

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 really has little to do with the creation of music. In the debate concerning the CTEA, heirs were quite

²⁰⁷ Hamm, *supra* note 65, 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").

²⁰⁸ *Id.*

²⁰⁹ See Wall, *supra* note 186 (discussing the maintenance of the Elvis Presley artistic legacy).

²¹⁰ See Peyser, *supra* note 217, at 23.

active in asserting their economic interests in term extension, citing the fact that widows, children and legal successors would be harmed by a declaration of the CTEA to be unconstitutional.²¹¹ The strategic uses of copyright by heirs are rooted in the economic value of streams of licensing revenues from copyright protected works. The economic value of such revenues can be immense and can be greatly magnified after creators' deaths.²¹²

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 quite commercially successful during his lifetime and earned significant amounts of money for many of his more popular works. The piano concerto *Rhapsody in Blue*, which was composed on commission, earned Gershwin more than \$250,000 between 1924 and 1934 (approximately \$2.77 to \$3.53 million in 2004 dollars) from permissions and sales and rentals of the score.²¹³ Gershwin received \$50,000 in 1930 (approximately \$567,000 in 2004 dollars), for example, for the use of *Rhapsody in Blue* in the film *King of Jazz*.²¹⁴ 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 \$1.13 million in 2004 dollars) for the film *Delicious* and in 1932 they received \$100,000 (approximately \$1.38 million in 2004 dollars) for the Broadway musical *Of Thee I*

²¹¹ See Brief *Amici Curiae* of Amsong, *In Support of Respondent 2* ("It is the widows, children and legal successors of the creators of these treasures [such as Gershwin's *Rhapsody in Blue* and Cole Porter's *Let's Do It (Let's Fall in Love)* that would fall into the public domain without the CTEA] who would be harmed if the CTEA is declared unconstitutional.").

²¹² 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 186.

²¹³ Peyser, *supra* note 70, at 86 (noting that Gershwin received \$250,000 during the first 10 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); Richardson, *supra* note 91, at 170 (noting that Gershwin earned more than \$250,000 between 1924 and 1934 for *Rhapsody in Blue*).

²¹⁴ Jablonski, *supra* note 74, at 183.

Sing.²¹⁵ Gershwin would also have earned royalties from the publication of sheet music for such works. Some of the productions were also financially successful. *Of Thee I Sing* ended its Broadway run with a gross of more than \$1,400,000 (approximately \$15.88 million in 2004 dollars).²¹⁶

At the time of his death in 1938, Gershwin's estate was listed at \$430,841 gross (approximately \$5.79 million in 2004 dollars) and \$341,089 net (approximately \$4.58 million in 2004 dollars).²¹⁷ 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.²¹⁸ *Rhapsody in Blue* became United Airlines theme song for \$500,000.²¹⁹

Today, close to 70 years after George's death and some 20 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 \$6 million each or close to \$13 million in aggregate between 1998 and 2002 as reported on trust IRS Form

²¹⁵ 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 70, at 127, 180, 196.

²¹⁶ *Id.* at 196.

²¹⁷ See Peyser, *supra* note 70, at 298 (noting that the value of specific pieces in the residuary estate included *Rhapsody in Blue* (\$20,125), *An American in Paris* (\$5,000), *Of Thee I Sing* (\$4,000), *Concerto in F* (\$1,750) and *Porgy and Bess* (\$250)).

²¹⁸ See Trust Brief, *supra* note 19, at 29; David D. Kirkpatrick, *Media; Publishers and Libraries Square Off Over Free Online Access to Books*, NY TIMES, June 17, 2002, at C7; 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 15 years prior to that time).

²¹⁹ Trust Brief, *supra* note 19, at 29; Fialka, *supra* note 218 (noting the soaring value of old songs and 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").

990 filings.²²⁰ 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.²²¹ In addition to being Gershwin's last major work, Gershwin described *Porgy and Bess* as a "labor of love."²²² Since Gershwin's death, the Gershwin family has closely controlled performances of *Porgy and Bess*, particularly with respect to casting.

1. The Gershwin Trusts and Family Control

The Gershwin trusts were strong proponents of the CTEA and participated in a brief for *Eldred*.²²³ As was the case with Disney, George Gershwin's works would have entered the public domain in the next few years without the 20-year extension given under the CTEA.²²⁴ 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

²²⁰ The exact figures for this time period for the Gershwin Philanthropic Trust are \$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. 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.

²²¹ See Johnson, *supra* note 33, at 111 (noting that *Porgy and Bess* is among Gershwin's greatest achievements and certainly constitutes his magnum opus); Crawford, *supra* note 93, at 21 (describing *Porgy and Bess* as Gershwin's magnum opus).

²²² See Johnson, *supra* note 33, at 111.

²²³ See Gifford, *supra* note 11, at 385 ("Other notable lobbyists included the Gershwin family, whose copyright on George Gershwin's Rhapsody in Blue" was due to expire.").

²²⁴ See Sabra Chartrand, *Patents; 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 next few years).

uses and purposes that have little to do with the creation of new works. In fact, such control serves to limit future uses of copyrighted works, which is ironic in the Gershwin case given the extent to which Gershwin used musical borrowing as an indispensable part of his compositional style.²²⁵ 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.

2. The Gershwin Trusts and Racial Casting

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 *Porgy and Bess* casting. The George Gershwin Trust closely controls casting of *Porgy and Bess* by stipulating that certain performances of *Porgy and Bess* be performed such that characters in the opera that are black must be cast with black singers:²²⁶

For example, even when Mr. Gershwin licenses the full grand musical play “Porgy and Bess,” he

²²⁵ See *supra* notes 82 to 129 and accompanying text.

²²⁶ Although many discussions indicate that the Gershwin family requires an all black cast, this is not actually entirely true because *Porgy and Bess* includes characters that are not African American. See Gail Russell Chaddock, *When Is Art Free?* CHRISTIAN SCI. MONITOR, June 11, 1998, at B1 (noting racial casting); see also Garon, *supra* note 5, at 595-596 (“When 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.”) (citing Chaddock, *supra*); Symposium, *Mickey Mice? Potential Ramifications of Eldred v. Ashcroft*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 771, 808 (2003) (noting Gershwin estate requirement that *Porgy and Bess* have a cast that is all black); Christine Quintos, Case Notes and Comments: *Congress’ Green Monster: Copyright Extension and the Concern for Cash over the Propagation of Art*, 12 DEPAUL-LCA J. ART & ENT. L. 109 (2002) (noting creative control of Gershwin Family trust over *Porgy and Bess* in allowing only an all African American cast to perform the play).

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 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.²²⁷

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.²²⁸ Whether such racial casting is appropriate is an ongoing dialogue 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.”²²⁹ The stipulation with respect to *Porgy and Bess*, which does not apply to concert versions of the opera, but only staged versions. In some instances, the Gershwins have transferred rights to some songs to music publishers, particularly with respect to small performing rights or nondramatic rights. 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 Gershwins even if performing rights or nondramatic rights had been transferred to music publishers, because in such an instance, grand performing rights (grand rights or dramatic rights) would be needed. The Gershwins have typically retained such grand

²²⁷ *Gershwin v. The Whole Thing Co.*, 1980 U.S. Dist. LEXIS 16465, at *9.

²²⁸ *Id.* at *11-12; see also *infra* note 230.

²²⁹ Anthony Tommasini, *All-Black Casts for “Porgy”? That Ain’t Necessarily So*, NY TIMES, Mar. 20, 2002, at E1 (noting the Gershwin estate stipulation that *Porgy and Bess* be performed by an all black cast, noting the difficulties in assembling such casts and interviewing African American bass-baritone Simon Estes, who discusses the refusal of an opera director to cast him as Wotan in Wagner’s opera *Parsifal* because he is African American, and who “considers the all-black cast stipulation a disservice both to “Porgy and Bess” and the cause of integration”).

rights.²³⁰ The racial casting restriction in *Porgy and Bess* has led to *Porgy and Bess* serving as a springboard for many African American classical performers, including Leontyne Price and William Warfield,²³¹ 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.²³² Further, the use of copyright evident in *Porgy and Bess*, as is true of many strategic uses of copyright, may actually undermine the public interest side of the copyright balance.

3. 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.²³³ 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 legacy 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 seriously the creation of future works by preventing current creators from using copyright protected works for their new creations as well as suppress alternative interpretation of existing texts.²³⁴ Such suppression of alternate interpretations may actually be a disincentive to the production of future works and have the

²³⁰ See *Gershwin v. Whole Thing*, 1980 U.S. Dist. LEXIS 16465, at *11-12.

²³¹ David Schiff, *The Man Who Breathed Life into 'Porgy and Bess'*, NY TIMES, Mar. 5, 2000, at 35 (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).

²³² See Tommasini, *supra* note 229 (noting that “if nontraditional casting is going to work, it has to be applied to all operas, ‘Porgy and Bess’ included).

²³³ See Gerald Nachman, Letter, *Let's Say Enough to Corporate Welfare*, NY TIMES, Feb. 25, 1995, at ____

²³⁴ See Ida Shum, Note, *Getting “Ripped” Off by Copy-Protected CDs*, 29 J. LEGIS. 125, 223 (2002) (noting that those controlling the Gershwin trusts do not have “any more competence to understand and convey the real ‘meaning’ of his works than others who might hear his works); Karjala, *supra* note 205, at 222.

potential to create a chilling effect on artistic expression and creation.²³⁵ In the case of the Gershwin family, the family has even hindered the access of scholars that might produce alternative interpretations.²³⁶

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 highlight the manner of play in specific instances. Such uses of copyright draw attention to the implications of copyright structures for cultural expression.²³⁷ How rights are allocated matters because initial allocations of rights are often important.²³⁸ 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.²³⁹ This does not validate the initial assignment of the right to the holder in the first place 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:

²³⁵ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

²³⁶ See Hamm, *supra* note 65, at 7 (noting role of Gershwin family in impeding understanding of Gershwin’s music).

²³⁷ See Free Expression Project, *supra* note 13, at 2 (noting that the *Eldred* court decision ignored the law’s adverse effects on culture).

²³⁸ 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.”) (citations omitted).

²³⁹ Julio H. Cole, *Patents and Copyrights: Do the Benefits Outweigh 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.”).

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 Gershwin sculptures. The resulting damage to the Gershwin sculptures is immeasurable and perhaps irreparable.²⁴⁰

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.²⁴¹ Consequently, extracting a song from a Gershwin musical bears little if any resemblance to removing the bent arm from the Rodin statue *The Thinker* and placing it somewhere on his statue *The Kiss*.

The view of musical works expressed by the court in *Gershwin v. The Whole Thing* is distorted in that it fails to recognize the musical borrowing collaborative processes by which Gershwin created his works and by which many musical works are created.²⁴² 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.²⁴³ In addition, the Gershwin family in fact authorized

²⁴⁰ *Gershwin v. The Whole Thing Co.*, 1980 U.S. Dist. LEXIS 16465, at *9-10.

²⁴¹ 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) (noting that music appears to be non-representational, unlike literature and the visual arts, which make use of characters, plots, color and shapes that resemble everyday world phenomenon).

²⁴² See *supra* notes 82 to 147 and accompanying text; see also Arewa, *Hip Hop*, *supra* note 1.

²⁴³ See *supra* notes 213 to 220 and accompanying text for a discussion of the value of Gershwin song licenses.

performances of the 1992 Tony award winning musical *Crazy For You*, which was comprised of pieces from different Gershwin musicals.

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.²⁴⁴ As a result, they focus 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.²⁴⁵ The fact that copyrights are now used as sources to be mined for licensing revenue,²⁴⁶ and are important anticompetition weapons, for example, 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 strategic weapons is that they gain value by doing so. In addition to seeing costs in a way that is dissimilar from how courts and legal commentators might view them, the benefits copyright holders may accrue are similarly different and need to be examined

²⁴⁴ See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 794 (1994) (“... with assumption of a unitary kind of valuation, we will sometimes offer inadequate predictions, explanations and recommendations for law”).

²⁴⁵ See Giddens, *supra* note 44, at 30 (“normative 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”).

²⁴⁶ See Paul Edward Geller, *Copyright History and the Future: What’s Culture Got to Do with It?*, 46 J. COPYRIGHT SOC’Y U.S.A. 209, 230 (2000) (noting that in twentieth century, copyright was “looked to as means for securing and protecting income streams, and it has been expanded accordingly”).

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, increased market capitalization, increasing stockholder value, gaining greater attractiveness to potential acquirers or investors or other factors.²⁴⁷ How copyright holders wield their rights has significant implications for the underlying knowledge upon which their copyrights are based.

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.²⁴⁸ 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 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

²⁴⁷ See *supra* notes 49 to 60 and accompanying text for a discussion of SCO.

²⁴⁸ Arewa, *Blocking*, *supra* note 7 (noting that an intellectual property right involves two levels of intangibility, one level relating to the intellectual property right itself and an underlying intangible resource embodied in the knowledge upon which the intellectual property right is based).

knowledge in the work is worthy of intellectual property protection. Copyright frameworks thus embed assumptions about the nature of knowledge that merits copyright protection. Typically, only underlying knowledge that is deemed sufficiently original is copyrightable.²⁴⁹ 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.

1. Knowledge, Borrowing and Cultural Texts

The assumptions made concerning underlying knowledge are in many respects at the core of problems and controversies today in the intellectual property arena. As Gershwin's composition practice suggests, the production of cultural texts such as music and literary works typically involves some sort of collaboration and, in the case of music, at times extensive borrowing.²⁵⁰ This collaboration may be serial or contemporaneous collaboration or both. Thus, creators of cultural texts may interact as part of a process of cumulative development of knowledge over time (serial collaboration) or as part of a contemporaneous discussion and dialogue (contemporaneous collaboration).²⁵¹ As a result, the

²⁴⁹ See Arewa, *Hip Hop*, *supra* note 1 (“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.”) (citations omitted).

²⁵⁰ *Id.*

²⁵¹ Much evidence exists to support the fact that scientific and technical knowledge is cumulative. See, e.g., PAUL A. DAVID, *THE ECONOMIC LOGIC OF “OPEN SCIENCE” AND THE BALANCE BETWEEN PRIVATE PROPERTY RIGHTS AND THE PUBLIC DOMAIN IN SCIENTIFIC DATA AND INFORMATION: A PRIMER 2* (Stanford Institute for Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSPECTIVES 29 (1991); Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017 (1987); Robert P. Merges, *Property Rights Theory and the Commons: The Case of Scientific Research*, 13 SOC'Y PHIL. & POL'Y 145 (1995). Although less well studied empirically, the production of cultural texts is often similarly cumulative. See Peter Jaszi, *Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29, 40 (Martha Woodmansee & Peter Jaszi eds., 1994). (“Copyright law, with its emphasis on rewarding and safeguarding ‘originality,’ has lost sight of the cultural value of what might be called ‘serial collaborations’ – works resulting

producers of such creations may seek to use existing material in different ways and may, for example, seek to enmesh themselves in the existing social fabric or distinguish themselves from existing cultural texts by radically departing from and being excised from the existing social fabric. Cultural texts are thus dynamic and interactive elements that form threads in the social fabric from which they emerge.

2. Borrowing, Creation and the Romantic Author

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.²⁵² Copyright as currently constructed involves substantial denial of borrowing and collaboration.²⁵³ 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 taken by many CTEA proponents.²⁵⁴ 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

from successive elaborations of an idea or text by a series of creative workers, occurring perhaps over years or decades.”)

²⁵² 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 a horseless carriage and the Internet the information superhighway.

²⁵³ William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States at* <http://www.law.harvard.edu/faculty/tfisher/iphistory.html>. (“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.”) (citations omitted).

²⁵⁴ See Shum, *supra* note 234, at 146 (noting profit maximization approach of entities with vast holdings of copyrights).

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. 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.²⁵⁵ 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 more difficult. This may make even assessments of whether and the extent to which other works infringe on an existing work more difficult.

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.²⁵⁶ Consequently, modern conceptions of authorship as involving inspiration, originality and even genius in the creation of autonomous cultural texts are a fairly recent historical development.²⁵⁷ Such conceptions are used to justify allocation of

²⁵⁵ See, e.g., Garon, *supra* note 5, at 549-553 (noting that the ProCD court case would permit control of noncopyrightable elements of copyrighted work); see also *ProCD Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

²⁵⁶ 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"); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part II*, 18 *COLUM-VLA J.L. & ARTS* 193, 213-219 (Part II) (1993) (discussing heroic inventor concept evident in patent cases and discussions of conceptions of entrepreneurship in Schumpeter's writings); Fisher, *supra* at 10 (discussing impact of imagery about inventors on patent law); Monroe Price & Malla Pollock, *The Author in Copyright: Notes for the Literary Critic*, 10 *CARDOZO ARTS & ENT. L. J.* 703 (discussing definitions of authorship in copyright).

²⁵⁷ See Janet Wolff, *Foreword: The Ideology of Autonomous Art*, in *MUSIC AND SOCIETY: THE POLITICS OF COMPOSITION, PERFORMANCE AND RECEPTION* 1, 2 (Richard Leppert & Susan McClary eds., 1987) ("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."); Arewa, *Hip Hop*, *supra* note 1 (discussing Romantic author notions with respect to popular and classical music).

property rights to authors or those deemed worthy of such ownership rights by virtue of their genius, autonomy and originality.²⁵⁸ The advent of the figure of author has been a potent force and critical factor in debates about rationales for copyright protection from the eighteenth century onward.²⁵⁹ Since that time, the intangible essence of authorship and the originality that true authorship entails has likewise been central to conceptions of copyright.²⁶⁰

3. The Romantic Author, Utilitarianism and Copyright Doctrine

The Romantic author discourse does not, however, on its own explain the development of intellectual property frameworks or court doctrines surrounding copyright.²⁶¹ Much of copyright

²⁵⁸ See Martha Woodmansee, *Genius and the Copyright*, in THE AUTHOR, ART, AND THE MARKET 35, 37 (1994) (“Eighteenth-century theorists . . . minimized the element of craftsmanship in favor of the element of inspiration, and they internalized the source of that inspiration. That is, the inspiration for a work came to be regarded as emanating not from outside or above, but from within the writer himself. ‘Inspiration’ came to be explicated in terms of *original genius*, with the consequence that the inspired work was made peculiarly and distinctively the product—and the property—of the writer.”) (citations omitted).

²⁵⁹ See Woodmansee, *supra* note 253; Woodmansee, *supra* note 257, at 35-56; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455; Jaszi, *supra* note 251; Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I*, 18 COLUM-VLA J.L. & ARTS 1 (Part I) (1993); Aoki, *supra* note 253. See also Michel Foucault, *What Is an Author?: Selected Essays and Interviews by Michel Foucault*, in LANGUAGE, COUNTER-MEMORY, PRACTICE, 113-138 (Donald F. Bouchard ed., 1977); Roland Barthes, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142-154 (1978).

²⁶⁰ See BRAD SHERMAN AND LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW 15-18 (1999) (commenting on eighteenth century discussions about the status of mental labor in law).

²⁶¹ See Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 894 (1997) (Review of JAMES BOYLE, SHAMANS, SOFTWARE, & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)) (noting that although the idea of Romantic authorship is a factor in intellectual property cases in certain instances, it does not explain much about intellectual property at either a theoretical or predictive level); Netanel, *supra* note 235, at 307, fn 97 (claiming that misguided natural rights approach, together with vestiges of nineteenth century Romanticism has influenced copyright law is wholly unconvincing and has been rejected repeatedly and in no uncertain terms by both Congress and the courts); Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over*

doctrine, for example, is based primarily on instrumental and utilitarian rationales that view copyright as a mechanism to give creators incentives to create and that seek to balance the benefits of copyright, which are assumed to be creation, with the costs that are viewed as resulting from copyright grants,²⁶² which give the copyright holder a monopoly right to exclude other potential users of the knowledge resources underlying the copyright.

Romantic author and to a lesser extent Lockean legitimating analysis is, nonetheless, a second level of analysis that relates to the knowledge that underlies the copyright itself. In order to determine whether an intellectual property right should be granted, the underlying knowledge needs to be first segregated from other potential claims. This separation may be in relation to knowledge in the public domain but may also be vis-à-vis other potential private owners. In making determinations with respect to whether a creation merits copyright protection, courts and legal commentators do not typically use utilitarian rationales. Instead a conception of value rooted in Romantic author and Lockean theories is explicitly and implicitly used to explain why this particular holder may lay claim to the underlying knowledge as opposed to other claimants and why this claimant is thus entitled to receive a copyright with respect to this knowledge,²⁶³ which is essentially a question of who is considered to be a true “author” of an original work who has produced something that is

Copyrighted Works, 42 J. COPYRIGHT SOC’Y 93, 98-112 (1994) (stating that those asserting significant natural right/Romanticism influence are “batting a straw man”).

²⁶² See *infra* notes 282 to 293 and accompanying text; see also Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. 387, 439 (2003) (“What developed in the United States was an instrumental view of copyright law through a discourse that framed copyright at times as a matter of property, and at times as a matter of economic interest. But whatever the basis, whether stable property or rootless economics, copyright in the United States was viewed in instrumental terms from the very beginning.”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990) (“It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. This utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts.”); William Patry, *Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907 (1997) (noting both instrumental and moral rights strains in U.S. copyright doctrine); Arewa, *Blocking*, *supra* note 7.

²⁶³ *Id.*

copyrightable.²⁶⁴ The Romantic author figure has become such a deeply rooted cultural assumption in discourse about creativity and invention that it often does not need to be stated, and is implicit and widely understood, for do we not all know that people who create things deserve to have protection from copying or infringement?

4. General and Context-Specific Benefits and Costs in Copyright

Commentary looking at the costs and benefits of copyright often focuses on the benefits and costs of copyright frameworks in general, which may not be reflective of the specific contexts in which copyrights are actually used. Consequently, the values assumed in the general utilitarian calculus may not match those upon which decisions about the uses of copyright are actually made in specific decisionmaking contexts. Such analyses assume that general costs and benefits and costs apply in specific cases.

To the extent that copyright holders may use a utilitarian calculus to determine whether to create a work, they may not use the same costs and benefits as a general assessment of costs and benefits might suggest.²⁶⁵ Consequently, prospective copyright holders may not be assessing the same costs and benefits in making specific decisions. They may also receive benefits from strategic and other uses of copyright that have nothing to do with creation that may not be counted as in general descriptions of the costs of copyright frameworks. Further, the extent to which such assumed incentives govern actual behavior is uncertain. The discourse of proponents of the CTEA is based on assumptions about specific incentives to create that are questionable at best. Differences in

²⁶⁴ See, e.g., *National Basketball Association v. Motorola*, 105 F.3d 841, 846 (2d Cir. 1997) (“In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute ‘original works of authorship.’”).

²⁶⁵ Extensive commentary exists on this point with respect to patents. See, e.g., WESLEY M. COHEN, RICHARD R. NELSON & JOHN P. WALSH, PROTECTING THEIR INTELLECTUAL ASSETS: APPROPRIABILITY CONDITIONS AND WHY U.S. MANUFACTURING FIRMS PATENT (OR NOT) 2 (Nat’l Bureau of Econ. Research, Working Paper No. 7552, 2000); Richard C. Levin, Alvin K. Klevorick, Richard R. Nelson, Sidney G. Winger, Richard Gilbert & Zvi Griliches, *Appropriating the Returns from Industrial Research and Development*, 1987 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 783, 799 (1987).

values and incentives in general and specific cases is one reason for the discrepancy in the intellectual property arena between conceptions of legal rules that focus largely on incentives to create and actual behaviors that often reflect value maximizing principles that have little to do with creation and more to do with the expansion of rights or other strategic uses of rights. Conceptions of creation are thus a critical element of characterizations of underlying knowledge intangibles that play an important role in shaping the construction of copyright.

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. Since originality is a construction intended to represent a particular notion of how underlying knowledge is constituted, the conception 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 may be characterized as highly unitary. Such interpretations are rooted in a unitary view of creation that typically denies borrowing and collaboration in creation and reconstructs the nature of cultural production to suit this unitary worldview.²⁶⁶ 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.²⁶⁷

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

²⁶⁶ See *supra* notes 249 to 260 accompanying text.

²⁶⁷ See *supra* notes 33 to 37 and accompanying text; see also Arewa, *Hip Hop*, *supra* note 1.

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 is or use deemed permissible under existing copyright rules. Although recognition exists in legal scholarship concerning the general fact that cultural texts interact with the public domain,²⁶⁸ 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.

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 collaboration.²⁶⁹ Fewer, however, fully consider the implications of such borrowings and

²⁶⁸ See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-967 (1990) (“Because copyright’s paradigm of authorship credits the author with bringing something wholly new into the world, it sometimes fails to account for the raw material that all authors use. This tendency can distort our understanding of the interaction between copyright law and authorship. Specifically, it can lead us to give short shrift to the public domain by failing to appreciate that the public domain is the law’s primary safeguard of the raw material that makes authorship possible.”); A. Samuel Oddi, *The Tragicomedy of the Public Domain in Intellectual Property Law*, 25 HASTINGS COMM. & ENT. L. J. 1, 1-2 (2002) (noting the little attention given the public domain in intellectual property statutes, cases and scholarly discourse); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS 33 (2001) (discussing the perceived negative effects of strong intellectual property rights on innovation and freedom); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM L. REV. 995 (2003) (arguing that intellectual property rights, even in their strong form, are likely to increase the public domain); Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 1 (2004) (noting that firms place information in the public domain to preempt or undermine the potential property rights of economic adversaries); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U.L. REV. 354 (1999) (discussing effects of enclosure on the organization of information production).

²⁶⁹ Lemley, *supra* note 261, at 997 (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 (1989-1990) (noting that screen design techniques are cumulative result of incremental contributions by mass on anonymous workers and not identifiable as creations of particular individuals).

collaborations.

Consequently, additional consideration should be given to the fact that texts often reflect collaboration rather than autonomy 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. 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.²⁷⁰

D. *Controlling Interpretation and Meaning in Cultural Discourses*

The current manner of allocation of copyright ownership rights has 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.”²⁷¹

With copyright, the allocation of copyright and duration and the breadth of such rights have enormous implications for the creation of social meaning. 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

²⁷⁰ Leighton McDonald, *Can Collective and Individual Rights Coexist?*, 22 MELB. U. L. REV. 310, 316 (1998) (discussing whether collective and individual rights can coexist in the same normative discourse).

²⁷¹ Cass R. Sunstein, *Law, Economics, & Norms: On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2048 (1996).

meanings.²⁷² 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 social meaning within the broader context of contemporary discourse about race and nonconventional casting, for example.

Systematically ignoring or otherwise denying that certain consequences are significant, influences the shape of important means of cultural expression.²⁷³ The control aspects of intellectual property rights can impede the development of cultural texts and production of new cultural meaning around existing texts, reinforcing a reified and monologic view of culture.²⁷⁴ This contrasts with a more nuanced anthropological and folkloristic conception of culture and cultural texts with a multiplicity of meanings and variants. This reflects a view of culture that is evident in anthropology and a view of cultural texts consistent with the folklorist, who sees folklore texts as typically existing in multiple variants.²⁷⁵ One reason for the monologic conception of cultural texts is rooted in a misconception of the cultural context of the production of such texts.²⁷⁶ 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

²⁷² See Mahdavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 592 (2001) (discussing situations where “the self-proclaimed guardians of culture are excluding other members of the culture from making and contesting cultural meanings.”) (citations omitted).

²⁷³ See Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990) (discussing the implications for trademark law of trademarked symbols being increasingly used as vehicles through which social meaning is conveyed).

²⁷⁴ See Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143, 147 (1996-1997).

²⁷⁵ See WOLFGANG MIEDER, TRADITION AND INNOVATION IN FOLK LITERATURE xi (1987) (“Such traditional texts, certainly oral texts, exist by repletion and therefore in numerous variants.”); Sunder, *supra* note 272 (discussing the role of law in unitary view of culture that is associated with the suppression of cultural dissent).

²⁷⁶ Such misconceptions construe creation as autonomous in a way that reflects Romantic author conceptions. See *supra* notes 252 to 264 and accompanying text.

outward.²⁷⁷

In looking at this process the potential incommensurability of scales used must be noted.²⁷⁸ How different participants in this process value 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 value 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.²⁷⁹ 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 subversive meanings.²⁸⁰ Separating control from compensation in copyright doctrine is potentially one way to ameliorate the tendency for controlling meaning and restore a multiplicity of possible meanings in interpretations of cultural texts.

²⁷⁷ 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 255 and accompanying text.

²⁷⁸ *See* Sunstein, *supra* note 244; *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.”).

²⁷⁹ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); Litman, *supra* note 62, at 22-23 (1996) (discussing role of commercial and institutional actors in copyright law).

²⁸⁰ *See* ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* (1998) (discussing the implications of hegemonic discourses).

VI. ALTERNATIVE STRUCTURES: TRANSMISSION-BASED
APPROACHES TO MUSICAL COPYRIGHT

The goals and beneficiaries of copyright frameworks have long been a contested issue in American copyright doctrine.²⁸¹ Reconsideration should be given to the construction of copyright frameworks and the behaviors that come along 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. They should also reflect the actual uses of copyright and the behaviors engendered by existing rules with a constant eye toward the rules of the game, the manner of play and behaviors fostered by these rules and play. This involves continual consideration of the relationship between such rules, play and the broader social context.

A. *Control, Compensation and the Appropriation of Returns*

The rationales used to justify copyright protection have been widely considered and discussed.²⁸² 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.²⁸³ In addition, holders are able to seek judicial and legislative enforcement or 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.

²⁸¹ See Patry, *supra* note 262, at 907 (“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?”).

²⁸² Many of these rationales are not new and have long been used to provide support for intellectual property rights protection. See, e.g., William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 168 (Stephen R. Munzer ed., 2001); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988-1989); Netanel, *supra* note 235, at 290 (1996); Seanna Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138-167 (Stephen R. Munzer ed., 2001); Hurt & Schuchman, *supra* note 28; PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY (1996).

²⁸³ See *infra* notes 296 to 303 and accompanying text.

This ability to control is thus fundamentally related to strategic intellectual property behaviors.²⁸⁴ 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.²⁸⁵ 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.²⁸⁶

²⁸⁴ See Giddens, *supra* note 44, 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 49 to 63 and accompanying text.

²⁸⁵ See Wendy 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 would lack an appropriate level of incentive to create. Fewer resources would be devoted to intellectual productions than their social merit would warrant.”); 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, 1500-1501 (1987) (“Like other technology-based segments of a country's economy, the computer industry flourishes in an environment in which the intellectual creations that fuel technological competition are sufficiently secure from misappropriation to guarantee the creator an opportunity for return on invested effort. . . . copyright is the principal source of intellectual property protection . . . The vitality of the software industry could be imperiled by a drastic limitation of the scope of copyright protection available to authors of computer programs.”); Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845, 848 (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”); Richard B. Graves, *Private Rights, Public Uses, and the Failure of the Copyright Clause*, 80 NEB. L. REV. 64, 65 (2001) (“the 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”) (citations omitted).

²⁸⁶ See, e.g., Hurt & Schuchman, *supra* note 28, at 426 (“ . . . without 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 does not necessarily follow that the grant of a copyright monopoly is the only such device possible, nor is it the most desirable device”); Cole, *supra* note 239, at 99-101

These elements of control and compensation thus form the primary foundation for conceptions underlying dominant 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.²⁸⁷ 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 like a monopolist and thus recouping high upfront costs it may have incurred in developing the knowledge resources underlying intellectual property rights, as well as realize a profit.²⁸⁸ The behaviors permitted creators under existing copyright rules are also acknowledged to impose costs as well as

(discussing alternative structures for compensation of creators in absence of a copyright regime); 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); 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).

²⁸⁷ See COMMITTEE FOR ECONOMIC DEVELOPMENT, PROMOTING INNOVATION AND ECONOMIC GROWTH 7 (2004) (noting that “incentives provided by copyright protection are designed to encourage innovation by creators.”) (hereinafter “CED Report”); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197-1198 (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).

²⁸⁸ See J. Bradford DeLong, Claudia Goldin & Lawrence F. Katz, *Sustaining U.S. Economic Growth*, in AGENDA FOR THE NATION 19, 44-45 (H. Aaron, et al. eds., 2003), at

http://www.economics.harvard.edu/~goldin/papers/dgk_brook.pdf; Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1070 (1987) (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, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 518 (1990) (“economic 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”, including allowing the owner of the copyright to “charge a monopoly price for her works, because it prohibits borrowing from existing works and makes it more difficult for future authors to create.”).

inefficiencies in the form of dead weight loss.²⁸⁹

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.²⁹⁰ Although the costs and dead weight 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 discount and even ignore borrowing at least in part as

²⁸⁹ In addition to behavioral distortions, this monopoly capacity also imposes; Levin et al., *supra* note 265, at 783; Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993 (1997) (noting that intellectual property is about incentives to invent and create); Netanel, *supra* note 235, at 308-310 (distinguishing between neoclassical approaches and economic incentive rationales for copyright, the first of which focus 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.”); 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.”); Frederick R. Warren-Boulton & Kenneth C. Baseman, *The Economics of Intellectual Property Protection for Software: The Proper Role for Copyright* (1994), Paper prepared for June 1994 meeting of the American Council on Interoperable Systems in Washington, D.C. (“Governmental intervention is clearly desirable to establish property rights in information and to prevent users from ‘free riding’ inappropriately on the efforts of its creators); Kenneth W. Dam, *Some Economic Considerations on 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.”). costs by creating dead weight loss. See Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000); Sterk, *supra* note 287, at 1209; Fisher, *supra* note **Error! Bookmark not defined.**, at 1702-1703.

²⁹⁰ See Yen, *supra* note 288, at 518 (noting that the optimal degree of copyright maximizes the difference between the benefits of greater creative activity and the costs of increased authors’ rights); CED Report, *supra* note 287, at 8 (“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 innovator or control over the scope and director of their innovation.”).

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,²⁹¹ 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, music production is virtually impossible without some type of free riding or borrowing, either with respect to broader musical traditions and conventions or more specific past examples of musical production.

Consequently, the appropriate question as a starting point from a copyright perspective should be transformed 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 because of an autonomous act of creation.

A transmission based approach highlights potential complexities of the creation of cultural text 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.²⁹² The breadth of control given to copyright holders is a direct result of Romantic author conceptions and the denial of 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

²⁹¹ See Dale A. Nance, *Foreward: Owning Ideas*, 13 HARV. J. L. & PUB. POL. 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).

²⁹² This is not to imply that the intellectual property right as tool of innovation approach is necessarily invalid but to suggest that it offers at best an incomplete picture of the operation of intellectual property frameworks.

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.²⁹³

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 with public access to copyright protected materials.²⁹⁴ The balance in copyright is intended to weigh the benefits of the incentives of copyright against the costs of copyright grants evident in the exclusion rights given copyright holders that enable them to restrict the creation of new works based on copyrighted works as well as the reinterpretation of existing copyrighted works. The specific context of the uses of copyright in particular contexts, however, suggests that general costs and benefits may be used in varying manners in specific settings that may not reflect the general assumptions typically imagined.²⁹⁵

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. Disaggregation may be utilized at both a conceptual and practical level in considerations of copyright. On the conceptual plane, recognition should be given to the fact that

²⁹³ See Michael Waterson, *The Economics of Product Patents*, 80 AM. ECON. REV. 860, 860 (1990) (“... the 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”).

²⁹⁴ See *supra* notes 282 to 293 and accompanying text.

²⁹⁵ See *supra* notes 264 to 266 and accompanying text.

these rights are distinguishable. As a result, 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. On a practical level, the behavioral implications of copyright frameworks and how control and compensation rights are actually exercised needs to be weighed in considering the behavioral consequences of copyright frameworks.

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 Section 106 of the Copyright Act, which describes many of the exclusive rights of copyright holders with respect to their copyrighted protected works.²⁹⁶ Disaggregating compensation and control would essentially mean reducing the exclusion rights outlined in Section 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 Section 106 statutory language.

An initial step toward disaggregation would be a modification of Section 106(2), which gives copyright holders the exclusive right to prepare derivative works based on the copyrighted work, and Section 106(4), which gives copyright holders the exclusive right to perform and display musical, dramatic and other works, and other provisions of the Copyright Act as might be necessary to implement this proposed structure.

²⁹⁶ Section 106 of the Copyright Act contains provisions relating to the exclusive rights of copyright holders. *See* 17 U.S.C. § 106 (2003) (giving copyright holders the exclusive right to (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission).

These subsections 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 compensation rights with respect to them. After a creator's death, uses falling within Sections 106(2) and (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 ("Impermissible Uses").²⁹⁷

Under this proposal, a copyright holder would be able to restrict Impermissible Uses but could not exercise control over Permitted Uses unless a Permitted Use intentionally or maliciously sought to damage the market for the original work (an "Exempted Permitted Uses"), in which case the Permitted Use would be treated in the same manner as an Impermissible Use. The copyright holder would be entitled to receive compensation for both Permitted and Impermissible Uses, but would have limited control rights with respect to Permitted Uses. Impermissible 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 person seeking to make a Permitted Use (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

²⁹⁷ Impermissible 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 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.

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.²⁹⁸ 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.²⁹⁹

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 such creator's works that come from public's appreciation of the creator's efforts.³⁰⁰

The main object to be desired in expanding copyright protection accorded to music has been to give 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.³⁰¹

²⁹⁸ 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 286, at 199-258 (proposing a rewards system that would replace current copyright frameworks).

²⁹⁹ See Christopher Sprigman, *Reform(aliz)ing Copyright*, Research Paper No. 88, Aug. 2004. Forthcoming STANFORD L. REV., at <http://ssrn.com/abstract=578502> (noting that the R.E.M. 1986 cover of the song *Superman* brought attention to the original 1969 release by an obscure group named Clique and resulted in the Clique song being re-issued in a compilation recording in 1998).

³⁰⁰ *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946); *Sony Corporation v. Universal*, 464 U.S. 417, 432 (1984) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor."); Alan Latman, "Probative Similarity" As Proof of Copying: Toward Dispelling Some Myths in *Copyright Infringement*, 90 COLUM. L. REV. 1187, 1195 (1990).

³⁰¹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 163-164 (1975) (citing H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909)); see also H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909), reprinted in 6 LEGISLATIVE HISTORY

Disaggregation of compensation and control would move copyright in a direction that would incorporate to a greater extent the public interests that are an integral part of the copyright balance.³⁰²

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.³⁰³

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

OF THE 1909 COPYRIGHT ACT (E. Fulton Brylawski ed., 1976) (hereinafter, "1909 House Report").

³⁰² See 1909 House Report, *supra* note 301, at 7 (noting that copyright balances between stimulation of production and benefit to the public); Craig W. Dallan, *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 CTEA suggests that Congress did not give serious attention to public benefit rationale of copyright); Garon, *supra* note 5, at 521 (noting that Congress has "focused on the economic success of the most dominant providers of media content").

³⁰³ *Sony*, 464 U.S. at 429.

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 Corporation v. Columbia Artists Management, Inc.*,³⁰⁴ where Gershwin Publishing sued Columbia Artists Management (CAMI) for contributory copyright infringement relating to performers managed by CAMI who performed the piece “Bess, You Is My Woman Now” at a public for profit event without authorization from Gershwin Publishing. Under the proposal described in this Article, 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 the heirs of creators clearly have an interest in Gershwin’s 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* court.³⁰⁵

C. *Switching the Default Rule: Disaggregation and Liability Rules*

Part of the disaggregation process should mean moving in the direction of a liability rule rather than a property rule:

The current copyright system is in most respects a property rule under 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, which has always entailed borrowing, is far better suited to a liability rule, which would permit infringement of the legal

³⁰⁴ 443 F.2d 1159 (2d Cir. 1971).

³⁰⁵ *Sony*, 464 U.S. at 429.

entitlement with *ex post* determination of appropriate compensation.³⁰⁶

Even if current copyright rules effectively function as a statutory liability rule,³⁰⁷ such rules potentially distort the creation of music by virtue of the fact that borrowing is more difficult under a property rule.³⁰⁸ This proposal as a liability rule differs somewhat from a compulsory license structure, which is an administrative structure that effectively operates as a liability rule within a broader property rule framework.

A liability rule could be used to refocus the nature of copyright as a *transmission* right rather than ownership right with respect to 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. The threshold for such damages should involve a standard that requires significant material damage to the prospects of the work, which is distinguishable from the creator.

³⁰⁶ See Arewa, *Hip Hop*, *supra* note 1 (citations omitted).

³⁰⁷ *Id.*

³⁰⁸ 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.

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.³⁰⁹ 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 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 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 lifetime of those alive at the time such works were created.

Copyright owners may argue that this will reduce the value of copyrights to holders and will make transactions more difficult to value.³¹⁰ 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.³¹¹ The value of copyrights under the liability rule based structure proposed in this paper 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

³⁰⁹ See David Lange, *Reimagining the Public Domain*, 66 L. & CONTEMP. PROBS., 463, 467 (2003); Lemley, *supra* note 261, at 997-998.

³¹⁰ See Trust Brief, *supra* note 19, at 30 (noting that petitioner’s assertions in *Eldred* case would throw numerous transactions into doubt potentially rendering copyright transactions insecure and uncertain).

³¹¹ See Litman, *supra* note 268, at 967 (“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.”).

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 70 years after his death. The music George Gershwin created was greatly facilitated by his ability to borrow. Although some of his borrowings, particularly of African American cultural elements, were enabled by a copyright structure that considered the cultural production of African Americans to be part of the public domain, the fact of his borrowing was an inherent part of his 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.³¹²

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

³¹² Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, NY TIMES, Mar. 28, 1998, at B7.

meshing elements from disparate traditions.³¹³

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 the goals of copyright of providing compensation to creators that may incentivize creation.

³¹³ Garon, *supra* note 5, 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?”).