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

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Abstract

Treatment of musical borrowing under current copyright standards is far too often inequitable. This is evident in the works of George Gershwin, who for a number of reasons was able to borrow freely from existing traditions, works and artists, copyright the works he produced that reflected such borrowings and then restrict future borrowings and reinterpretations of his works. 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 some ways in 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. Following Gershwin’s death, however, the Gershwin family came to control his copyrights, highlighting the role that heirs now play in the actual use of copyright given the fact that copyright duration now extends to 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 reinterpretations 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

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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, particularly in cases of post-mortem artistic legacies. This separation would also involve moving in the direction of a liability rule based standard in copyright that permits borrowing other than in instances of unfair use, in contrast to current standards that significantly limit borrowing except in limited instances such as fair use.

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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. The Gershwin case thus illustrates that current copyright law consideration and treatment of musical borrowing are generally inadequate.1 If copyright is actually intended to give all potential creators the incentive or ability to create, 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 future works. In the case of George Gershwin, who borrowed extensively from African American traditions and artists, the ability to borrow from African American sources was intimately connected to societal hierarchies. These hierarchies were reflected in and reinforced by copyright frameworks that historically have permitted borrowings from certain categories and types of cultural expression, at times without compensation.2


This Article examines the uses of copyright in a particular instance, focusing specifically on uses connected with copyrights now controlled by the Gershwin family, who were a major proponent of the Sonny Bono Copyright Term Extension Act of 1998 (the “CTEA”). More specifically, this Article concentrates on the creation and uses of copyright with respect to George Gershwin’s body of works, particularly the opera *Porgy and Knowledge and Global Intellectual Property Frameworks*, 10 MARQUETTE INTELL. PROP. L. REV. (forthcoming 2006); 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).


4 Ira Gershwin, George Gershwin’s older brother, wrote lyrics for many of the works composed by George Gershwin and is thus a co-author for many of George Gershwin’s works. Throughout this paper, the identities of George
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 success, 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.5 As such, their uses of copyright reflect the behaviors employed today by individual copyright holders and other business and commercial interests that hold significant copyrights.

George Gershwin’s commercial success at least partially reflected his able uses of copyright and willingness to embrace new technologies such as radio and new methods of business practice in the face of changing technological and industry standards.6 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. These uses of copyright 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

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.


6 See infra notes 82 to 85 and accompanying text.
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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 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.7 As is the case with living creators, such artistic legacies may make use of various legal rights, including rights that emanate from copyright, right of publicity and provisions of the Lanham Act, for example.8 This Article focuses on the implications of uses of copyright by both living composers as well as the managers of post-mortem artistic legacies that may also have rights emanating from


Because of his early death, George Gershwin represents an early example of a post-mortem artistic legacy at a time when copyright duration was shorter. The uses of copyright by Gershwin and his heirs can thus shed light on the operation of post-mortem artistic legacies in today’s copyright environment. Consideration of Gershwin’s composition practices and the treatment of his musical legacy by his heirs also lends support to the benefits of separating the control and compensation elements of post-mortem artistic legacies.10

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

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9 This Article focuses on the uses of copyright and does not consider other rights such as moral rights that involve recognition of “interests of authors and artists in their work that are separate from copyright” and that may be retained even after transfer of an author or artist’s copyright to third parties. See Henry Hansmann and Marina Santilli, Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis, 26 J. LEG. STUD. 95, 95 (1997).

10 See infra notes ___ to ___ and accompanying text.
of copyright. Part V discusses alternative transmission based liability rule approaches to music copyright that may be a basis upon which to determine copyright infringement by which the control and compensation aspects of copyright frameworks might be disaggregated.

I. COPYRIGHT, CREATION AND CONTROL

A. The Scope and Duration of Copyright

Treatment of borrowings within copyright law is increasingly of concern given the progressive expansion of copyright duration and breadth during the twentieth century. This increase in duration is evident in copyright treatment of the piano concerto *Rhapsody in Blue*, one of George Gershwin’s most famous and lucrative works. At its creation in 1924, *Rhapsody in Blue* was entitled to a maximum of 56 years of copyright protection under the 1909 Copyright Act, which would have meant that its copyright would have originally expired in 1980. As a result of lobbying by copyright industries and copyright heirs, the 1976 general revision to United States Copyright Law (as amended, the “Copyright Act”) extended the duration of copyright protection of existing works,
giving *Rhapsody in Blue* an additional nineteen years of copyright protection until 1999.\(^{13}\) 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.\(^{14}\) Not surprisingly, commercial interests that derive revenue from ownership of copyrights and that include copyright heirs and content providers, again sought to expand the duration of their copyrights and licensing revenue streams. Such behaviors reflect strategic uses of intellectual property through legislative enforcement that have become increasingly common in recent years.\(^{15}\) Their efforts had their desired effect and helped ensure passage of the CTEA.

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

\(^{13}\) 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 copyright protection would have expired for *Rhapsody in Blue* on December 31, 1999 without the Copyright Term Extension Act).

\(^{14}\) See infra notes 20 to 21 and accompanying text.

until December 31, 2019, 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 future works and significantly limit reinterpretations of existing works. Moreover, the expansion of copyright duration has little to do with incentives to create new works, particularly in Gershwin’s case, since he can no longer create new works. It is highly questionable whether such expansion significantly expands incentives to create works for existing creators either. Even if such expansion does increase incentives for existing creators, the costs of this expansion are potentially quite high 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 in certain instances 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. This would entail significantly reducing or eliminating the control rights granted to heirs and others who control post-mortem artistic legacies under

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16 See Ochoa, supra note 13, at 23 (noting that the copyright on Rhapsody in Blue will not expire until December 31, 2019).
17 See infra notes 206 to 252 and accompanying text
18 See infra notes 310 to 330 and accompanying text.
The scope of copyright interests of such post-mortem legacies would thus be limited in most cases to an economic rights with a reduction of rights of control of future uses of copyrighted material.

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

The CTEA represents a significant event in the history of American copyright law.19 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,20 leading it to be called the “Mickey Mouse” Law on account of its rescuing Mickey Mouse from becoming part of the public domain.21


20 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).

21 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 19, 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
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. 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.

Not surprisingly, CTEA proponents were weighed heavily toward the copyright industries and content providers; the briefs presented to the Supreme Court in favor of upholding the CTEA in *Eldred* included briefs from the American Intellectual Property Law Association, AOL Time
greenhouse gases, and the potential for a runaway Earth. The rise of renewable energy technologies, such as solar and wind power, has contributed to a shift away from fossil fuels. The Paris Agreement, signed in 2015, aims to limit global warming to well below 2 degrees Celsius above pre-industrial levels, with the goal of limiting the temperature rise to 1.5 degrees Celsius. The agreement commits countries to take ambitious actions to reduce greenhouse gas emissions and limit their economic and social impacts.

The United Nations Framework Convention on Climate Change (UNFCCC) is the primary international framework for addressing climate change. The UNFCCC, established in 1992, entered into force in 1994 and has been endorsed by nearly 200 countries. The convention's primary objective is to strengthen the ability of countries to deal with climate change in the context of sustainable development and to enhance their ability to cope with its impacts. The convention focuses on four main areas:

1. **Reduction of Greenhouse Gas Emissions**: Countries are encouraged to reduce their greenhouse gas emissions through voluntary commitments or legally binding targets under the Kyoto Protocol.
2. **Technology Transfer**: Developed countries are expected to provide technology, finance, and technical assistance to developing countries to help them reduce their emissions.
3. **Mobilization of Funds**: Developed countries are obligated to provide financial resources to support action in developing countries and to help them adapt to the impacts of climate change.
4. **Monitoring and Reporting**: Countries are required to report on their progress in reducing emissions and implementing adaptation measures.

In addition to the UNFCCC, a number of regional initiatives and protocols have been established to address climate change, such as the North Pacific Salmon Treaty, the Western Hemispheric Treaty, and various coastal management agreements.

**The Paris Agreement**

The Paris Agreement, signed in 2015, is a landmark in the fight against climate change. It entered into force in 2016 and sets a global goal of keeping the increase in global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees Celsius. The agreement commits countries to take ambitious actions to reduce greenhouse gas emissions and limit their economic and social impacts. It also includes provisions for the development and transfer of technologies to support climate action, and for the mobilization of funds to support developing countries.

**National Climate Action Plans**

Countries are required to submit their national climate action plans, known as **National Determined Contributions (NDCs)**, to the UNFCCC. These plans outline the actions countries are taking to reduce their greenhouse gas emissions and adapt to the impacts of climate change. The NDCs are reviewed and updated every five years, and they provide a framework for the development of policies and strategies to address climate change.

**Renewable Energy Technologies**

Renewable energy technologies, such as solar and wind power, are becoming increasingly cost-competitive with fossil fuels. Solar photovoltaics, for example, have seen significant cost reductions in recent years, making them a competitive option for electricity generation. Similarly, wind power has become a major source of electricity in many countries, with wind turbines generating a substantial portion of the electricity in some regions.

**Carbon Capture and Storage (CCS)**

Carbon capture and storage (CCS) is a technology that captures carbon dioxide emissions from power plants and industrial processes and stores them underground. CCS is considered a key technology for achieving deep reductions in greenhouse gas emissions, particularly in hard-to-abate sectors such as energy-intensive industries and power generation.

**Greenhouse Gas Inventories**

Countries are required to submit greenhouse gas inventories to the UNFCCC, which track their emissions and help identify areas for reduction. These inventories are an important tool for understanding the sources and magnitudes of greenhouse gas emissions, and for setting targets and policies to reduce emissions.

**Climate Change Adaptation**

Adaptation is a critical component of climate change mitigation. While efforts to reduce greenhouse gas emissions are necessary, they alone are not enough to prevent the impacts of climate change. Countries are required to develop and implement adaptation strategies to help communities and ecosystems adapt to the impacts of climate change. This includes measures such as infrastructure improvements, early warning systems, and the development of resilience plans.

**The Role of International Law**

International law plays a crucial role in addressing climate change. The landmark convention, the **United Nations Framework Convention on Climate Change (UNFCCC)**, was adopted in 1992 and is the primary international framework for addressing climate change. The convention establishes a bottom-up approach, requiring countries to set their own targets for reducing greenhouse gas emissions and taking actions to adapt to the impacts of climate change.

**The Kyoto Protocol**

The **Kyoto Protocol** is an amendment to the UNFCCC that entered into force in 2005. It sets legally binding greenhouse gas emission reduction targets for developed countries, with a goal of reducing emissions by an average of 5.2% below 1990 levels by 2012. The protocol also includes provisions for the transfer of technology and financial resources to help developing countries.

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

While general perspectives with respect to copyright rules may be instructive, looking at the uses of copyright in specific instances by copyright holders can shed light on how copyrighted works are actually created, maintained and controlled by their holders. In addition, the dialogue that emerged surrounding the CTEA necessarily entails

Opposition to Copyright Term Extension (discussing the implications of the CTEA term extension), at http://www.public.asu.edu/~dkarjala/commentary/PhillipsStmt.html.

28 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 2005 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.

consideration of the core goals of copyright law in general. Although the goals of copyright law are often discussed in connection with the creation of new works, as CTEA opponents have emphasized, copyright has a profound influence on the creation of future works and the ability of future creators to use existing works. Consequently, copyright law should be constructed to permit borrowing that enables the creation of future works as well as provide compensation to creators of prior works on which such future works are based.

In focusing on the general implications of copyright laws, much discourse surrounding the CTEA assesses the impact of the CTEA on both copyright holders and the public domain. The extensive commentary surrounding the *Eldred* case, which focused particularly on the constitutionality of the CTEA, 30 reflects arguments on both sides of the CTEA debate. 31 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

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incentivize and reward creators. 32 This approach emphasizes the incentives that give impetus to potential creators to create new works. 33

In contrast, although often also rooted in the copyright as tool of innovation approach, opponents of the CTEA have tended to take note to a greater extent of actual behaviors with respect to copyright over time periods other than in relation to the moment of creation of a copyrighted work. As such, they focus in greater depth on issues related to control and consider some implications of the process by which copyrights are actually used over time and the impact of copyright laws on the creation of new works. 34 This view evident in discourse of CTEA opponents focuses

32 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 19, 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 27 and infra note 224 and accompanying text for a discussion of the arguments of amici curiae for the respondents in the Eldred case.


34 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
particular attention on the effect of copyright rules on the public domain.

Considerations of copyright from both sides of the CTEA debate have tended to approach consideration of the issues raised by the CTEA from a macro and rule-focused perspective that seeks to delineate the general implications of copyright rules for the public domain and 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 actual uses of copyright in relation to the stated rationales for copyright in the first place. In addition, such discourse does not fully take into account the extent to which the value of a copyright for its holder may inhere in uses of copyright that have little or nothing to do with the creation of new works and the implications of this for behaviors evident with respect to copyright.  

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 can reveal something about the origins of Gershwin’s works and his musical

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such as the English Licensing Act of 1662); *see also supra* note 24 and accompanying text.

35 The Economist Brief, however, did address issues relating to the behavioral impact of particular copyright rule structures. *See* Economist Brief, *supra* note 26, at ___.

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borrowings, the extent to which collaborators and the sources of borrowings were compensated or acknowledged by Gershwin and the uses of copyright both by Gershwin as well as the entities that have held Gershwin copyrights since his death.

C. Strategic Uses of Copyright

The ways in which holders of Gershwin’s copyright have maintained, enforced and expanded their effect rights reflect general copyright strategies used by copyright holders today. Particularly relevant are the strategic business behaviors that increasingly characterize the exercise of intellectual property right frameworks. Such behaviors highlight areas in which assumptions and assertions about the goals, purposes and uses of copyright do not always fully map onto observed behaviors in the copyright realm.

1. The Complexity of Motivations to Create New Works

Assertions about the benefits of intellectual property frameworks are typically based on an implicit acceptance of the fundamental notion that intellectual property frameworks have the beneficial effect of promoting innovation. Those on both sides of the CTEA debate appear to accept at least in principle the proposition that copyright actually creates incentives to create new works, an assumption that is not really empirically supported. While copyright may provide such incentives to create in

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

37 See, e.g., RUTH TOWSE, CREATIVITY, INCENTIVE, AND REWARD : AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE
some instances, the actual processes by which new works are created are often complex. The motivations that might be extracted from the behavior of George Gershwin, for example, would reflect a composer who was inspired by both financial and other considerations. Although Gershwin might have been motivated by money and royalties in some instances, particularly with respect to his popular music songwriting, he was also clearly impelled to create new works for reasons that had little if anything to do with financial considerations and even invested his own money in works that had no assurance of financial success. This reflects the fact that people create new works for a variety of reasons and motivations.

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38 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).

In addition, regardless of whether copyrights give 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 the creation of future works.40

2. Intellectual Property and Strategic Business Behaviors

Aggressive and strategic behaviors are increasingly associated with the use and enforcement of intellectual property rights.41 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.42 This move to the digital economy era has “increased the stakes in the global dimensions of intellectual property rights.”43 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

40 Id.; see also 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).
41 See Arewa, Strategic Behaviors, supra note 15.
copyright infringement. 44 In another example, following passage of the Digital Millenium Copyright Act (the “DMCA”), 45 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. 46

These and other examples suggest that aggressive and often strategic business behaviors are increasingly a part of the use of copyright and


46 See FEP, Intellectual Freedom, supra note 21, 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 that under the DMCA 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); Marjorie Heins & Tricia Beckles, Will Fair Use Survive? Free Expression in the Age of Copyright Control, Free Expression Policy Project, Brennan Center for Justice, New York University Law School 4-5 (2005), at http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf (noting chilling effect of DMCA Section 512 takedown letters) (hereinafter, FEP, Fair Use).
intellectual property rights in general. Such behaviors may be exemplified by both actual legal actions as well as the threat of legal action through licensing letters or cease and desist letters.47 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.48 As a result, threats can be important avenues for strategic behaviors.

Although strategic behaviors are by no means a new phenomenon,49 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”).50

47 FEP, Fair Use, supra note 46, at 4-5, 36-37 (noting potential chilling effect of cease and desist letters and other enforcement practices of copyright holders)
48 See Wendy J. Gordon, Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship, 57 U. CHI. L. REV. 1009, 1030 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.”); see also Arewa, Strategic Behaviors, supra note 15.
49 See Arewa, Strategic Behaviors, supra note 15.
50 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 norms, or . . . the social meanings that surround us”); ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY 17-18 (1984) (“Rules are often thought of in
Such rules of the game, which include copyright rules, developed under a tangible asset paradigm economic and business model associated with the nineteenth and much of the twentieth century.\textsuperscript{51} 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.\textsuperscript{52} 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.\textsuperscript{53}

D. Copyright, Strategic Behavior and Value

Views that focus on the incentives copyright gives for the creation of new works are based on assumptions about how copyright holders derive value 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.”).

\textsuperscript{51} See Arewa, Knowledge Economy, supra note 42.

\textsuperscript{52} Id.

\textsuperscript{53} Id. at ___ (discussing the implications of the intangibles paradigm for securities law and accounting frameworks); see also Olufunmilayo B. Arewa, Securities Regulation of Private Offerings in the Cyberspace Era: Legal Translation, Advertising and Business Context, 37 U. Tol. L. Rev. ___ (forthcoming 2005) (discussing some implications of the cyberspace era for securities regulation).
from copyright.\textsuperscript{54} Although compensation for creation of a new work may be a source of value for copyright holders,\textsuperscript{55} 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.\textsuperscript{56} 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.\textsuperscript{57} 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.\textsuperscript{58} The actions of such holders highlights the strategic behaviors commonly asserted in the intellectual property realm today more generally, including through both judicial and legislative enforcement.

1. Strategic Behavior and Judicial Enforcement

Judicial enforcement may be evident in a number of behaviors, including actual suit or the threat of suit, sending of cease and desist letters, suits


\textsuperscript{55} Eldred, 537 U.S. at 218-219 (discussing copyright incentives and the nature of copyright’s limited monopoly).

\textsuperscript{56} See infra notes ___ to ___ and accompanying text.

\textsuperscript{57} See infra notes ___ to ___ and accompanying text.

\textsuperscript{58} See Garon, supra note 11, at ___.

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against large numbers of people as is evident in the case of RIAA suits and the recent Bridgeport cases where some 800 defendants were sued. The recent SCO case illustrates the use of judicial enforcement to expand existing rights connected to copyright in a business context. The ongoing SCO-Linux dispute exemplifies aggressive strategic behavior with respect to intangibles. This dispute involves claims by The SCO Group, with respect to open source Linux technology, which has been alleged by SCO to infringe upon copyrights, not actually owned by SCO, with respect to proprietary Unix technology. SCO’s assertion of rights has involved its sending letters to more than 1,500 companies in the United States and overseas demanding that these companies pay SCO licensing fees on account of their use of Linux. These licensing letters were followed by several lawsuits, some of which were filed against recipients of SCO licensing letters.

59 See supra note 43 and accompanying text.
61 See Arewa, Strategic Behaviors, supra note 15 (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).
62 The SCO Group (“SCO”) bought its Unix business in 1995. Unix copyrights were explicitly excluded from the transaction. See Arewa, Strategic Behaviors, supra note 15.
63 See Arewa, Strategic Behaviors, supra note 15 for a more comprehensive discussion of the SCO-Linux dispute.
64 Id.
65 Id.
Judicial enforcement of copyright may involve behaviors that have little to do with the creation of new works or the commercialization or distribution of such works. Rather, judicial enforcement efforts may reflect the value that may be derived from intellectual property rights that may come from the expansion of the effective scope of existing rights instead of the creation of new works. In addition, such actions are often used by companies to signal the value of intangibles to markets.

Strategic judicial enforcement 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, for example, in the intellectual property arena to block other products or

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

67 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 42 (discussing failure of accounting measures to adequately measure or account for the role played by intangibles today).
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. 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 is also evident in the legislative arena.69

68 See Arewa, Strategic Behaviors, supra note 15; see also supra notes 45 to 46 and accompanying text for a discussion of strategic behavior in connection with the DMCA.

69 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 26 (giving an economic analysis of the CTEA from the perspective of CTEA opponents); Liebowitz, Stan J. and Margolis, Stephen E., "Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects" [19] (December 2003). http://ssrn.com/abstract=488085 (noting lack of consideration of “the responsiveness of creative efforts to
Another avenue for the use 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.  

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 existing works whose scope of rights was lessened because of the CTEA.

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

70 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).

71 *Eldred v. Ashcroft*, 537 U.S. 186, 194-95, 200 (noting that the 1790, 1831, 1909 and 1976 copyright acts all applied new copyright terms to new and existing works so that all under copyright protection could be “governed evenhandedly under the same regime”).
The promotion of statutory changes through legislative enforcement as a means to expand copyright protection thus parallels to a large extent the strategic business behaviors evident in attempts to seek or 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.72

II. THE MUSICAL ORIGINS OF PORGY AND BESS

Consideration of varieties of strategic behavior in the copyright context shines a needed spotlight on the behavioral aspects of copyright enforcement. Such behavioral aspects illustrate the ways in which copyright owners maintain, reinforce and at times expand the scope of the intellectual property rights held by them. The uses of copyright by George Gershwin and the Gershwin family reflect the uses of copyright for a variety of purposes reflecting varied value assignments. Any consideration of creation in the case of Gershwin’s compositions must begin with a discussion of the musical origins of George Gershwin’s works, including his seminal opera *Porgy and Bess*.

A. *The Creation and Development of the Music and Libretto*

 George Gershwin is the most successful and renowned American

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72 See infra notes 28 to 29 and accompanying text.
composer in American history. 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. His life was the subject of Hollywood treatment in the 1945 film *Rhapsody in Blue*.

His success may be measured both in terms of both his artistic and financial accomplishments. Gershwin composed a number of successful Broadway musical during his short career. The financial success of

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75 *Id.*

76 *New Grove, Gershwin, supra* note 73, at ___ (noting that Gershwin left Jerome H. Remick & Co., a music publishing firm on Tin Pan Alley, in March 1917 and began working as rehearsal pianist for *Miss 1917*, a show by Jerome Kern and Victor Herbert, and
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,\(^{77}\) did not receive much critical acclaim until well after Gershwin’s death.\(^{78}\) The reception of *Porgy and Bess* typified the generally negative critical reception of Gershwin’s more “serious” works during his lifetime.\(^{79}\) The value of many Gershwin works, including *Porgy and Bess*, as “serious” music is now increasingly acknowledged.\(^{80}\)

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\(^{77}\) 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).

\(^{78}\) See infra notes 143 to 151 and accompanying text.

\(^{79}\) *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).

Gershwin’s works have achieved continuing financial success that is often attributed to the appeal of his melodies.\textsuperscript{81} 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.\textsuperscript{82} For example, he gave radio performances of his and others’ works,\textsuperscript{83} which helped ensure widespread distribution and public awareness of his works.\textsuperscript{84} In addition, Gershwin was also able to benefit from changing industry business structures and the increased financial clout of

\textsuperscript{81} Steven E. Gilbert, \textit{Gershwin’s Art of Counterpoint}, 70 MUSICAL Q. 423, 425 (1984) (“Most of Gershwin’s tunes are indeed memorable.”); Larry Starr, \textit{Gershwin’s ‘Bess, You Is My Woman Now’: The Sophistication and Subtlety of a Great Tune}, 72 MUSICAL Q. 429, 430 (1986) (noting that Gerwhsin was “a fabulous melodist”); New Grove, Gershwin, \textit{supra} note 73, at ___ (“The melodies of Gershwin’s concert works are surely the chief reason for their appeal.”).

\textsuperscript{82} \textit{See} George Gershwin, \textit{The Composer and the Machine Age}, in \textit{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).

\textsuperscript{83} Richardson, \textit{supra} note 74, at 170 (noting that Gershwin had a radio show twice a week); \textit{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).

\textsuperscript{84} \textit{ALEC WILDER, THE AMERICAN POPULAR SONG: THE GREAT INNOVATORS}, 1900-1950, at 122-123 (1990) (noting enormous exposure provided to Gershwin by radio); Peyser, \textit{supra} note 79, 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).
songwriters who owned their own publishing businesses. Both Irving Berlin and George Gershwin formed their own publishing businesses.85

*Porgy and Bess*, which premiered in New York City in 1935,86 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,87 which Heyward’s wife Dorothy transformed into a play that formed the basis of the *Porgy and Bess* libretto.88 Heyward was born in South Carolina of an aristocratic family.89 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.90 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 1932.91

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, tell only one part of the story of the creation of musical works such as *Porgy and Bess*. Throughout his career, George Gershwin borrowed extensively from other

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85 Peyser, supra note 79, at 130.
86 New Grove, Gershwin, supra note 73, at ___ (noting that *Porgy and Bess* opened in New York in October 1935 in a Broadway theater and not an opera house and ran for 124 performances, which was not enough to recover the original investment).
87 Id. at 159.
88 Id.
89 Jablonski, supra note 83, at 252.
90 Id.
91 Id.
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, Gershwin’s compositional technique generally involved extensive collaboration and musical borrowing, in his case particularly from African American sources. The availability for uses in new works of existing works and styles was thus crucial to the production of Gershwin’s music. Examining the processes through which Gershwin created his music highlights the borrowing often inherent in the composition process and the importance of composers being able to draw upon prior works in creating new ones.

1. **Gershwin’s Technical Collaborations**

In addition to collaborating with a number of lyricists, the most prominent

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93 *Id.* (discussing the pervasiveness of musical borrowing).
94 New Grove, Gershwin, *supra* note 73, at ___ noting that Gershwin’s concert works draw heavily on black American elements).
of whom was his brother Ira,95 Gershwin relied extensively on the technical assistance of musicians with a better theoretical grounding in music.96 Gershwin typically did not give credit to these collaborators,97 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.98

Although Gershwin had classical musical training and was considered to

95 Peyser, supra note 79, 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’s Lady in the Dark and the film A Star is Born).
96 Peyser, supra note 79, 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).
97 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).
98 Id. at 120-121.
be an excellent pianist, part of Gershwin’s technical limitations came from the fact that he lacked formal training in music theory and counterpoint, having largely ceased piano lessons with Charles Hambitzer at age sixteen after he began working in Tin Pan Alley. 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. In the 1920s, Gershwin began to feel that his musical ambitions and creativity were hindered by his lack of technical capacity. As a result, he studied music theory and counterpoint with other teachers, including Edward Kilenyi, Henry Cowell and Joseph Schillinger, and

99 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).

100 Peyser, supra note 79, at 31 (noting that Gershwin stopped regular piano lessons at sixteen).

101 Peyser, supra note 79, at 35 (“He got his piano style not only from the player piano but also from the black musicians he watched and heard in Harlem.”); New Grove, Gershwin, supra note 73, at ___ (noting that Gershwin began working for Jerome H. Remick & Co., a music publishing firm on Tin Pan Alley, as a song plugger for $15 per week); Hamm, supra note 99, at 346 (noting that Gershwin cut some 125 piano rolls after 1915).


103 Peyser, supra note 79, at 158 (noting Gershwin studies with Cowell, who may have sent Gershwin to study with Schillinger); Richardson, supra note 74, at 164 (noting harmonization, orchestration and form studies with Kilenyi); New Grove, Gershwin, supra note 73, at ___ (noting that Gershwin studied with a succession of teachers, including Rubin Goldmark, Riegger and Cowell).
unsuccessfully solicited instruction from the composers Maurice Ravel and Arnold Schoenberg.104 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.105

2. Gershwin’s Borrowings of Music and Musical Style

Popular song from the 1920s to 1950s was far closer to classical music than African American music and African American musical elements


105 See Richard Crawford, It Ain’t Necessarily Soul: Gershwin’s *Porgy and Bess* as a Symbol, 8 YB 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 99, 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.”).
were for the most part assimilated through ragtime, blues, African American Broadway musicals and jazz.\textsuperscript{106} In addition to \textit{Porgy and Bess}, Gershwin composed many pieces of music that reflect significant musical influence and borrowing from various sources, particularly African American cultural forms. George Gershwin was thus unusual in the extent of his reliance on such musical forms.\textsuperscript{107} His song \textit{I Got Rhythm}, for example, “was full of the accents of ragtime and, to a lesser extent, blues.”\textsuperscript{108} The emphasis on ragtime in \textit{I Got Rhythm} reflects the fact that by the time of Gershwin’s birth, the U.S. was captivated by ragtime music.\textsuperscript{109} 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 \textit{Porgy and Bess}.\textsuperscript{110} In

\begin{footnotesize}
\begin{enumerate}
\item Small, \textit{supra} note 105, 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”).
\item Hamm, \textit{supra} note 99, at 352 (noting that African American music struck a deep responsive chord in Gershwin).
\item Small, \textit{supra} note 105, at 277; [hip hop sources]
\item Peyser, \textit{supra} note 79, at 38.
\item See David Horn, \textit{From Catfish Row to Granby Street: Contesting Meaning in Porgy and Bess}, 13 \textit{POP. MUSIC} 165, 166 (1994) (noting that Gershwin holidayed in the Sea Islands and Charleston, observed Gullah folk traditions and attended church services where he joined in shouts and heard the calls of street vendors); DuBose Heyward, \textit{Porgy and Bess Return on the Wings of Song, in George Gershwin} 34, 39 (Merle Armitage ed., 1938) (discussing George
\end{enumerate}
\end{footnotesize}
consciously seeking out African American music, Gershwin was “schooled and indoctrinated in the African-American musical cauldron that was the Harlem Renaissance”111 and was profoundly influenced by African American music from his adolescence.112 Gershwin’s music emphasized blue notes typically associated with jazz.113 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

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111 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 79, at 36 (“George Gershwin was certainly one of the earliest [white songwriters] to seek out black music purely from personal interest. He soaked himself in it.”); 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 73, 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.”).

112 Peyser, supra note 79, at 36; Floyd, supra note 111, 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).”).

113 Peyser, supra note 79, at 69 (noting that Gershwin emphasized blue notes or intervals of flat thirds and sevenths); Wilder, supra note 84, 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.”).
perceived as genuine freshness.”114 The popularity of *Rhapsody in Blue*, composed in 1924, “inspired Gershwin to make extensive study of the idioms and characteristics of American folklore.”115

Gershwin borrowed the piano style of Luckey Roberts, a prominent African American pianist in New York City prior to World War I.116 From Roberts, Gershwin learned drive and syncopation that was at that time unknown to most white piano players.117 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.118 At a minimum, Gershwin ingested and borrowed significantly from African American musical styles and musicians.119 Further, Gershwin’s talent in playing the piano and style of playing that was largely unheard outside of African American musical circles, “gave him entry into a more elevated stratum of society than he could have entered without it.”120

114 Peyser, *supra* note 79, at 84; New Grove, Gershwin, *supra* note 73, at ___ (“The musical juxtapositions of *Rhapsody in Blue* had roots in a sensibility that never fully accepted a separation between popular and classical genres.”).
117 *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.”).
118 *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”).
119 *Id.* at 41 (“Gershwin appropriated this from the blacks, ingested it until it was his own, and transformed it into his songs.”).
120 *Id.* at 42.
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.\footnote{Starr, Art Music, supra note 80, at 170-171 (citations omitted).}

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),\footnote{Floyd, supra note 111, at 165 (noting African American musical devices and traits in Gershwin’s music).} which used African American musical devices and traits, foreshadowed Porgy and Bess.\footnote{See Hyland, supra note 102, at 158-159.} 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, while DuBose Heyward received credit for the lyrics of others. Both Gershwin and Heyward were interested in creating an authentic folk opera, which resulted in a treatment of African American life that was highly unusual in their day in the “serious” music arena. Also atypical was the reliance of Porgy and Bess on an African American cast, a decision that was reached after considering having Porgy portrayed by Al Jolson in blackface. The original Porgy and Bess was drawn largely from African American classical singers for whom the opportunity to sing classical music in front of white audiences was for the most part new.

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124 Jablonski, supra note 83, 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).
125 Hyland, supra note 102, at 164 (noting that George set many Heyward lyrics, including “I Got Plenty of Nuttin’ and “Summertime” to music with few changes).
126 Hyland, supra note 102, 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.”).
128 Hyland, supra note 102, 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).
129 Jablonski, supra note 83, 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 Thompson’s Four Saints in Three Acts).
As he composed *Porgy and Bess*, Gershwin spent time in Gullah communities in and around Charleston, South Carolina. Gullah communities are rich in cultural traditions and also retain a significant number of Africanisms in cultural expression, including language and music; they thus represented a rich resource from which Gershwin could draw. During his stay South Carolina, Gershwin had the opportunity to hear spirituals in churches in the area. 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. In addition to borrowing generally from African American musical styles and works, *Porgy and Bess* incorporates the spiritual “Sometimes I Feel Like a Motherless Child” in the aria “Summertime.”

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130 Hyland, *supra* note 102, at 160 (noting that DuBose Heyward’s mother, Janie, was an expert in Gullah culture and dialect); Jablonski, *supra* note 83, at 272-276 (discussing Gershwin stay at Folly Island).
132 Jablonski, *supra* note 83, at 274 (noting that Gershwin learned a lot of spirituals by going to churches around the area).
133 *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).
134 Floyd, *supra* note 111, 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
Both “Summertime” and “Sometimes I Feel Like a Motherless Child” also follow the same harmonic scheme.\textsuperscript{135}

Gershwin may have borrowed from other sources as well. Schillinger, Gershwin’s music theory teacher, later alleged that he was a major contributor to \textit{Porgy and Bess}.\textsuperscript{136} Although Schillinger’s contributions to \textit{Porgy and Bess} are not substantiated,\textsuperscript{137} some of Gershwin’s prior works, including \textit{Variations on I Got Rhythm} and \textit{Cuban Overtures}, “owed a lot to Schillinger.”\textsuperscript{138} Some passages from \textit{Porgy and Bess} appear to some

\begin{footnotesize}
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\item Floyd, supra note 111, at 218.
\item Hyland, supra note 102, at 167 (noting that Schillinger following Gershwin’s death alleged that he had contributed to \textit{Porgy and Bess}, an assertion rebutted vehemently by Ira Gershwin).
\item Id.
\item Id.; see also Vernon Duke (Dukelsky), \textit{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 \textit{Goldwyn Follies} following Gershwin’s death); Peyser, supra note 79, at 300 (noting that Ira Gershwin completed the songs for \textit{Goldwyn Follies} with Duke following George Gershwin’s death); Paul Nauert, \textit{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).
\end{enumerate}
\end{footnotesize}
commentators to show signs of Schillinger’s influence.139 At a minimum, Gershwin’s orchestrations improved significantly as a result of his lessons with Schillinger.140

4. Borrowings and the Reception of _Porgy and Bess_

The general tendency of Gershwin to borrow from African American cultural expression has significantly influenced responses to _Porgy and Bess_.141 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.142 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.”143

139 See Nauert, _supra_ note 138, 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).

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

141 Crawford, _supra_ note 105, 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).

142 _See infra_ notes 161 to 185 and accompanying text.

143 Richardson, _supra_ note 74, 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 105, 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
Although *Porgy and Bess* did receive laudatory reviews during its run in Boston,\(^{144}\) critical reviews of *Porgy and Bess* were at best mixed during Gershwin’s lifetime.\(^ {145}\) The initial New York run was not successful commercially and closed with losses.\(^ {146}\) 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.\(^ {147}\) 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.\(^ {148}\) By the late 1970s, musicologists and

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\(^{145}\) Peyser, *supra* note 79, at 248 (noting that New York reviewers reacted negatively to the cuts made by Gershwin in the opera); Jablonski, *supra* note 83, at 89 (noting that dramatic critics tended to like the production while music critics did not).

\(^{146}\) Jablonski, *supra* note 83, at 89 (noting that the run closed after 124 performances in New York); Stanley Green, *Oklahoma!: Its Origin and Influence*, 2 AM. MUSIC 88, 89 (1984) (noting that *Porgy and Bess* was not initially a financial success); Wilder, *supra* note 84, at 155 (noting that *Porgy and Bess* “lost a good deal of money, and, in general, the opera critics dismissed it”).

\(^{147}\) 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).

\(^{148}\) See Peyser, *supra* note 79, at 246-248 (noting cuts made by Gershwin prior to the New York premiere); Hamm, *supra* note 73, at 11 (noting that all versions of
critics had begun to reevaluate *Porgy and Bess,*\(^{149}\) which received the imprimatur of the Metropolitan Opera, which performed a version of *Porgy and Bess* in 1985, fifty years after its premiere.\(^{150}\)

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.*\(^{151}\) 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.\(^{152}\) Others, including Duke Ellington and journalist James Hicks, reacted negatively to the African American characterizations in *Porgy and Bess.*\(^{153}\)

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

Like many others, Gershwin borrowed extensively from African American

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*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).

\(^{149}\) See Hyland, *supra* note 102, at 176-177.

\(^{150}\) *Id.* at 177; *see also* “*Porgy and Bess: An American Voice* (PBS ____), at http://www.pbs.org/wnet/gperf/porgy/index.html).

\(^{151}\) See Horn, *supra* note 110, at 168 (noting that the debate about aesthetic merit and representations of African Americans came into direct contact in a debate in Liverpool, England relating to a proposed production of *Porgy and Bess*).

\(^{152}\) *Id.* at 173-174.

\(^{153}\) *Id.*
cultural expression. As has been true in other cases, borrowings from African American traditions and artists have often taken place within the context of copyright frameworks that have historically facilitated the use without compensation of cultural forms that fall in a lower place in sociocultural hierarchies.\textsuperscript{154} 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.\textsuperscript{155}

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 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

\textsuperscript{154}See Arewa, Piracy, supra note 2; see also infra notes 168 to 176 and accompanying text.

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 taste. 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. 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 musicians, who frequently borrowed from the blues tradition and blues artists.

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156 See infra note 274 and accompanying text.
157 Arewa, Piracy, supra note 2.
158 Id.
159 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); Vaidhyanathan, supra note 2, at 117-148 (discussing copyright and African American music); Hall, supra note 2, at 31-51; Greene, supra note 2, at 357-358 (“Music scholars have noted that Black artists, as a class of performers, routinely found their works appropriated and exploited by publishers and managers. The publishers typically (although hardly always) were white. As a result, Black artists as a class were denied the economic benefits of the copyright system.”) (citations omitted); see also Arewa, Elvis, supra note 7.
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 may enable users of public domain resources or other existing works to use copyright protection to prevent similar uses of their works. In addition to being highly inequitable, this outcome is particularly ironic with respect to Gershwin’s works including *Porgy and Bess*, which contains depictions of African Americans and African American culture that were questioned and criticized by even the standards of the time of its creation on account of the characterizations it included. *Porgy and Bess* is also a popular and widespread work and one of the few representations of African American culture in the “high” culture music sphere. Gershwin family restrictions on uses of *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.160

C. Hierarchies of Cultural Forms and Gershwin’s Works

1. *Porgy and Bess* as “Serious” Art

Although *Porgy and Bess* has since its creation leapt from the world of popular art to high culture,161 the initial response to the opera was rooted

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160 See infra notes ___ to ___ and accompanying text.

161 See Hyland, supra note 102, at 178.
in pervasive hierarchies of cultural forms. Part of the reaction to *Porgy and Bess* and other Gershwin works after the concerto *Rhapsody in Blue* came from the fact that they were difficult to classify within existing hierarchies as popular music given their technical attributes. At the same time, such works did not fit within accepted characterizations of “serious” music on account of their being based in vernacular cultural forms including those coming from African American traditions.

From the nineteenth century onwards, rankings of aesthetic value of musical works, or what might be termed hierarchies of taste, have been characteristic of evaluations of musical production and have significantly influenced the development of copyright frameworks. George Gershwin’s background and image

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

163 See Crawford, *supra* note 105, 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 81, 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”).

164 See Crawford, *supra* note 105, at 19 (noting that *Rhapsody in Blue* was Gershwin’s “first unclassifiable act as a musician”).

165 See Arewa, *Hip Hop*, *supra* note 1 (discussing hierarchies of taste in hip hop music); Arewa, *Piracy*, *supra* note 2 (discussing hierarchies of culture and hierarchies of taste with respect to music in the nineteenth century).
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.166

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.”167

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.168 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

166 Richardson, supra note 83, at 167.
167 Id.
168 Small, supra note 105, 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).
domain.\textsuperscript{169} This categorization as a public domain resource enabled Gershwin and others to borrow liberally from African American sources during much of the twentieth century. The public domain categorization also meant that such borrowings were not deemed copyright infringement, highlighting the intimate relationship between the scope of copyright protection, power and status.\textsuperscript{170}

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.\textsuperscript{171} Opportunities for Jewish composers were restricted in the serious music realm in Gershwin’s time.\textsuperscript{172} In addition, a pervasive anti-Semitism is evident in some commentary about Gershwin’s music,\textsuperscript{173} including

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\textsuperscript{169} See Arewa, \textit{Piracy}, supra note 2 (discussing borrowings from African American traditions).
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\textsuperscript{170} \textit{Id.} (discussing rock and roll borrowings from the blues tradition); see also \textsc{Harold Cruse, The Crisis of the Negro Intellectual} \textsc{(1984)} (discussing \textit{Porgy and Bess} as a paradigm case of the lack of control of African Americans over their artistic and cultural destiny); \textsc{Vaidyanathan, supra note 2}, at 117-148 (discussing copyright and African American music); Hall, \textit{supra note 2}, at 39-40 (discussing the systematic appropriation of African American musical forms); Greene, \textit{supra} note 2, at 357-358 (commenting on use of copyright to appropriate African American music).
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\textsuperscript{171} \textit{See supra} notes 122 to 151 and accompanying text.
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\textsuperscript{172} Peyser, \textit{supra} note 79, 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, \textit{supra note 74}, at 167 (noting Gershwin’s image as part of a Jewish, working-class, immigrant family who straddled racial lines).
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\textsuperscript{173} Peyser, \textit{supra} note 79, at 237-239.
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composer Virgil Thomson’s review of *Porgy and Bess*, which referred to “gefilte fish orchestration.”

Further, Gershwin’s family came to the United States from Russia, which meant that he fell in a lower place in social and cultural hierarchies than Jewish composers from Austrian and German backgrounds such as Arnold Schoenberg, or American Jewish composers such as Aaron Copland, who had studied extensively in Europe.

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

Gershwin’s music was also denigrated because of his lack of formal training in classical theory, particularly counterpoint and orchestration, and commercial success. Gershwin did attempt throughout his life to rectify his formal musical deficiencies through studies with teachers such as Joseph Schillinger. Gershwin also relied on others throughout his

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174 *Id.* at 248 (noting the smarmy anti-Semitism in Thompson’s remarks).
175 *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)
176 *Id.* at 97-99 (noting that Copland became identified as the dean of American music despite the far greater popularity and public consciousness of Gershwin’s works); Starr, *Art Music, supra note* 80, at 180 (noting Copland studies in Paris with Nadia Boulanger, where “Copland quickly absorbed important elements of contemporary European musical styles”).
177 Peyser, *supra note* 79, at 57 (discussing gaps in Gershwin’s technical music training).
178 *Id.* at 197-198.
career to do his orchestrations and assist with notation.\(^{179}\)

Gershwin started his musical career at age fifteen,\(^{180}\) first as a pianist and later as a piano roll player in Tin Pan Alley in New York City.\(^{181}\) 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,\(^{182}\) continued to taint his work in the views of classical music critics of the time.\(^{183}\) 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

\(^{179}\) \textit{Id.} at 71 (noting that Will Vodery, an African American friend and colleague of Gershwin, orchestrated Gershwin’s short opera \textit{Blue Monday Blues}); see \textit{supra} notes 95 to 105 and accompanying text.

\(^{180}\) See Ira Gershwin, \textit{My Brother}, in \textit{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)).

\(^{181}\) \textit{Id.} at 31, 33.

\(^{182}\) Charles Hamm, \textit{“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).

\(^{183}\) See \textit{THE GEORGE GERSHWIN READER}, \textit{supra} note 73, at xi (noting that Gershwin was “[I]ambasted by critics for a lack of formal compositional techniques”); Larry Starr, \textit{Musings on “Nice Gershwin Tunes,” Form, and Harmony in the Concert Music of Gershwin}, in \textit{THE GERSHWIN STYLE: NEW LOOKS AT THE MUSIC OF GEORGE GERSHWIN} 95, 95 (Wayne Schneider ed., 1999) (“But from the first reviews of \textit{Rhapsody in Blue} through the early criticism of \textit{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.”).
motifs, was also often dismissed because of its connection with such forms.\textsuperscript{184}

In the last years of his life from 1932 to 1937, Gershwin was subjected to enormous criticism as he attempted to become a more serious composer. Gershwin’s enormous commercial success was a continuing hurdle to his ambitions since his experience also ran counter to notions that great musicians should suffer from deprivation.\textsuperscript{185} Gershwin’s commercial success was both partly attributable to and reinforced by his uses of copyright.

III. 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,\textsuperscript{186} which were in turn connected to the decline in power of music publishers.\textsuperscript{187} In addition to writing songs for

\textsuperscript{184} \textit{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”).

\textsuperscript{185} Peyser, \textit{supra} note 96, 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).

\textsuperscript{186} See Hamm, \textit{supra} note 73, 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”).

\textsuperscript{187} See Reebee Garofalo, \textit{From Music Publishing to MP3: Music and Industry in the Twentieth Century}, 17 AM. MUSIC 318, 336 (1999) (noting that records becoming a staple of radio programming was the basis of records displacing live
Tin Pan Alley and Broadway musicals, Gershwin also wrote songs for a number of Hollywood films. Gershwin’s involvement in popular and commercial music likely made him more conscious of the value of copyrights. In fact, Gershwin’s uses of copyright anticipated twentieth-century “popular music figures in his dealings with a new and immediately complicated music business that embraced both technology—whether in print, recording, or film—and attendant legalities, such as royalties.” As a result, in addition to forming his own music publishing company, he “always insisted on receiving a full 50% interest in a composition, even when two lyric writers contributed to the song, each lyric writer in such an instance sharing the other 50% interest equally.” In other instances, it has been asserted that 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.

189 Richardson, supra note 74, at 169.
190 Peyser, supra note 96, 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).
192 Peyser, supra note 96, 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
B. The Role of Artistic Legacies as Business: Control of the Post-Mortem George Gershwin Artistic Legacy

The Gershwin family has exerted significant control over Gershwin’s musical legacy and image since his death. Moreover, with one exception, all Gershwin biographers have had close ties to members of the Gershwin family. A focus on control has been an integral part of Gershwin family management of George Gershwin’s estate, particularly with respect to copyrights, permissions and royalties. The Gershwin family’s actions with respect to George’s legacy reflect the post-mortem development of industries connected to popular figures that thrive and find new life even in the death of the figures upon which they are based.

The legacies of famous artists may be even more valuable after death than they were during the artist’s lifetime, 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 typically as pertinent an issue. Today, however, with copyright extending for a generation after the death of more accommodating than Wodehouse about rights and would permit Ira to retain all the credit and money).

193 See Hamm, supra note 73, at 7 (noting that understanding of Gershwin’s music has been hindered by family intervention after his death).
194 Id. at 8.
196 Id.
197 Eldred v. Ashcroft, 537 U.S. 186, 194-95, 200 (discussing duration of prior copyright statutes).
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.198 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.199 Artistic legacy is an intangible that may also be protected by the right of publicity.200 The role of right of publicity with respect to artistic legacy was raised in the case Gershwin v. The Whole Thing Co.,201 which related to an unauthorized stage performance of music by the George and Ira Gershwin.202

Further, as has been the case with the post-mortem Elvis empire,203 the reified images of creators promoted by artistic legacy businesses is at times in tension with the creators themselves, whose “artistry and

198 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).
199 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.”).
200 Id. at 122, 124-133 (discussing the right of publicity in Elvis cases); Arewa, Strategic Behaviors, supra note 15 (discussing implications of intangibles for strategic behavior).
201 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”).
202 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”).
203 Wall, supra note 195.
ambitions often cause them to develop their artform in directions different to those which made them popular.”204 This tension was particular 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.205 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.206

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.

204 Id. at 119-120.
205 Peyser, supra note 79, 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).
206 See Gershwin v. Whole Thing, 1980 U.S. Dist. LEXIS 16465, at *5 (“Mr. [Ira] Gershwin has always endeavored to preserve the public respect for the Gershwins and their music.”).
C. Businesses Structures in Copyright Artistic Legacy Maintenance

1. The Gershwin Trusts

In the case of the Gershwin family, control of the copyrights for both George and Ira is administered by a series of trusts established after George’s death.207 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,208 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.209 All three Gershwin trusts support the arts and the creation of new works.210

The Gershwin LOC Trust has the specific mission of protecting and preserving “the musical history of Ira Gershwin” and managing the assets

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207 Peyser, supra note 79, 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); New Grove, Gershwin, supra note 73, at ___ noting that George Gershwin died on the morning of July 11, 1937 after emergency surgery for a brain tumor and was buried in Mount Hope Cemetery, Hasting-on-Hudson, New York, following memorial services in New York and Hollywood).

208 See Trust Brief, supra note 27, at Addendum, 2a.

209 Id.

210 Id.
of the trust to “support the Library of Congress.”\textsuperscript{211} The Gershwin Philanthropic Trust provides support “for artistic organizations, education for children in the arts and certain medical facilities.”\textsuperscript{212}

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.\textsuperscript{213} Even if aggregating control and compensation makes sense while a composer is alive, justifying this combination in the case of heirs is not quite the same. After the creator’s death, strategic uses of copyright inevitably become paramount because at this point copyright can no longer be seen as connected to incentives to create in most instances since new works from the deceased creator could only come from works that were either undiscovered or unpublished prior to the creator’s demise.


\textsuperscript{213} Landes \& Posner, \textit{supra} note 33, at 326 (“Copyright protection . . . trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.”).
With popular writers, however, an option does exist by which a popular writer’s works may be written 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 2001.214 This particular avenue is probably not as readily available to music composers or songwriters,215 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.216

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.217 Constructing an argument that justifies continued control of copyrighted works by heirs on the grounds of giving incentives to create is far more tenuous that such justifications in relation to creators. Moreover, even in the case of creators themselves, little empirical evidence actually supports the notion that copyright gives incentives to create.218 Even if leaving assets to heirs does create incentives to create new works, it is not clear that copyright law

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215 See *Arewa, Hip Hop, supra* note 1 (discussing differences in the application of copyright to literature and music).
216 [cite example compilations]
218 See *supra* notes 38 to 42 and accompanying text.
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. The role of heirs in copyright touches upon the sources of value that legal successors derive from copyright protection and the differences between where they and creators may derive value.

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, the Gershwin family has “tended to authorize performances that gave the most promise of financial return or favorable publicity, with less regard for quality or integrity.” Since no new works are likely to emerge, at least in any quantity, estates 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

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219 Eldred v. Ashcroft, 537 U.S. 186, 215-16 (__________).  
220 Hamm, supra note 73, 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”).  
221 Id.
focus.\textsuperscript{222} 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.\textsuperscript{223}

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 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.\textsuperscript{224} 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

\textsuperscript{222} See Wall, \textit{supra} note 195 (discussing the maintenance of the Elvis Presley artistic legacy).

\textsuperscript{223} See Peyser, \textit{supra} note 232, at 23.

\textsuperscript{224} See Brief \textit{Amici Curiae} of Amsong, \textit{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.").
can be immense and can be greatly magnified after creators’ deaths.225

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. Gershwin’s first hit song, *Swanee*, was recorded by Al Jolson in 1920 and earned Gershwin $10,000 in composer’s royalties in 1920 alone (approximately $_____ in 2004 dollars).226 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.227 Gershwin received $50,000 in 1930 (approximately $567,000 in 2004 dollars), for example,

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225 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 195.

226 New Grove, Gershwin, supra note 73, at ___.

227 Peyser, supra note 79, 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 103, at 170 (noting that Gershwin earned more than $250,000 between 1924 and 1934 for *Rhapsody in Blue*); New Grove, Gershwin, supra note 73, at ___ (noting that *Rhapsody in Blue* was composed and performed for a well publicized concert organized by dance band leader Paul Whiteman and was first performed on February 12, 1924 in a concert billed as “An Experiment in Modern Music.”).
for the use of *Rhapsody in Blue* in the film *King of Jazz*. 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 Sing*, which won a Pulitzer prize for drama. Gershwin would also have earned royalties from the publication of sheet music for such works. Some of the Gershwin Broadway productions were also financially successful. *Of Thee I Sing* ended its Broadway run with a gross of more than $1,400,000 (approximately $15.88 million in 2004 dollars).

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). 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

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228 Jablonski, *supra* note 83, at 183.

229 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 79, at 127, 180, 196.

230 New Grove, Gershwin, *supra* note 76, at ___.

231 *Id.* at 196.

232 See Peyser, *supra* note 79, 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)).
time. Rhapsody in Blue became United Airlines theme song for $500,000.

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 990 filings. In addition to garnering significant revenues from uses of copyrighted works, the Gershwin family significantly

233 See Trust Brief, supra note 27, 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).

234 Trust Brief, supra note 27, at 29; Fialka, supra note 233, at B1 (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”).

235 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.
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. In addition to being Gershwin’s last major work, Gershwin described *Porgy and Bess* as a “labor of love.” Since Gershwin’s death, the Gershwin family has closely controlled performances of *Porgy and Bess*, particularly with respect to casting. *Porgy and Bess* illustrates a number of different ways in which the control aspects of copyright may be manifested, including issues connected to control by heirs, control of future performances of works, control of reinterpretation of works and control of future borrowings from works.

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

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

The Gershwin trusts were not surprisingly strong proponents of the CTEA

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236 See Johnson, supra note 38, at 111 (noting that *Porgy and Bess* is among Gershwin’s greatest achievements and certainly constitutes his magnum opus); Crawford, supra note 105, at 21 (describing *Porgy and Bess* as Gershwin’s magnum opus).

237 See Johnson, supra note 38, at 111.
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and participated in a brief for *Eldred*.\(^{238}\) 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.\(^{239}\) In addition to assuring such heirs continued streams of licensing revenues for a longer period of time, however, the CTEA also permits continued control of copyright protected works for uses and purposes that have little to do with the creation of new works.

2. Controlling Borrowing: The Irony of Gershwin Family Restrictions

Copyright control aspects often serve to limit future uses of copyrighted works, which is ironic in the Gershwin case given the extent to which Gershwin used musical borrowing as an indispensable part of his compositional style.\(^{240}\) Current copyright standards significantly restrict borrowing and uses of existing works unless such borrowings or uses fall within an exception that may rebut a charge of copyright infringement. Existing exceptions include fair use and de minimis use.\(^{241}\) In this manner, copyright protection substantially privileges incumbents, who are permitted to borrow while restricting others from borrowing or using their

\(^{238}\) See Gifford, *supra* note 19, at 385 (“Other notable lobbyists included the Gershwin family, whose copyright on George Gershwin's Rhapsody in Blue”’ was due to expire.”).

\(^{239}\) 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).

\(^{240}\) See *supra* notes 93 to 140 and accompanying text.

\(^{241}\) See Arewa, *Hip Hop, supra* note 1, at ___.

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copyrighted works in the future to create new works. With the current long duration of copyright, the inclusion of control features within copyright are increasingly problematic, which is reflected in the assertions of opponents of the CTEA about the influence of current copyright duration on the public domain.

3. Controlling Performances: The Gershwin Trusts and Racial Casting

Control of future performances is another aspect of the exercise of control by copyright holders. With respect to Porgy and Bess, the control aspect of the exercise of copyright by the Gershwin family is most evident in its control of the manner of Porgy and Bess performances. 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:

242 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 such as Archdale that are not black. See Gail Russell Chaddock, When Is Art Free? CHRISTIAN SCI. MONITOR, June 11, 1998, at B1 (noting racial casting); see also Garon, supra note 13, at 595-596 (“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,
For example, even when Mr. Gershwin licenses the full grand musical play “Porgy and Bess,” he demands that each performance meet a number of requirements. One such requirement is that the play be performed by a Black cast and a Black chorus. The reason for this is quite simple. George and Ira Gershwin created “Porgy and Bess” to be a musical play about Southern Blacks. Today, Mr. Gershwin demands of companies, including the New 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.\(^{243}\)

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.\(^{244}\) 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.”\(^{245}\) The *Porgy and Bess* stipulation

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\(^{244}\) *Id.* at *11-12; see also infra note 246.

\(^{245}\) Anthony Tommasini, *All-Back 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
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34 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.\textsuperscript{246} As a result, a concert performance of \textit{Porgy and Bess} would not be subject to the casting restriction. In contrast, a staged performance of \textit{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 rights.\textsuperscript{247} The racial casting restriction in \textit{Porgy and Bess} has led to \textit{Porgy and Bess} serving as a springboard for many African American classical performers, including Leontyne Price and William Warfield,\textsuperscript{248} who performed \textit{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.\textsuperscript{249} Further, the use of copyright evident in \textit{Porgy and Bess}, as is

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Estes, who discusses the refusal of an opera director to cast him as Wotan in Wagner’s opera \textit{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”).
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\textsuperscript{246} \textit{Gershwin v. The Whole Thing Co.}, 1980 U.S. Dist. LEXIS 16465, at *___.
\textsuperscript{248} David Schiff, \textit{The Man Who Breathed Life into ‘Porgy and Bess’}, NY \textit{Times}, Mar. 5, 2000, at 35 (discussing the New York City Opera production of \textit{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).}
\textsuperscript{249} \textit{See Tommasini, supra} note 245 (noting that “if nontraditional casting is going to work, it has to be applied to all operas, ‘Porgy and Bess’ included).
true of many strategic uses of copyright, may actually undermine the public interest side of the copyright balance.

4. Controlling Reinterpretation: The Implications of Casting Control

Racial casting is just one illustration of the type of creative control that copyright permits with its current framework that combines control and compensation. 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. Such suppression of alternate interpretations may actually be a disincentive to the production of future works and have the potential to create a chilling effect on artistic

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251 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 217, at 222.
expression and creation. In the case of the Gershwin family, the family has even hindered the access of scholars that might produce alternative interpretations.

IV. THE CONSTRUCTION OF KNOWLEDGE: THE SOCIAL AND CULTURAL CONTEXTS OF COPYRIGHT

A. Incentives to Create and the Value of Copyright

The uses of copyright by creators such as Gershwin and his heirs draw attention to the implications of copyright structures for cultural expression. Initial allocations of rights matter. 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


253 See Hamm, supra note 73, at 7 (noting role of Gershwin family in impeding understanding of Gershwin’s music).

254 See FEP, Intellectual Freedom, supra note 21, at 2 (noting that the Eldred court decision ignored the law’s adverse effects on culture).

255 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).
ownership of such a right for its benefit.\textsuperscript{256} 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:

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. \textsuperscript{257}

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.\textsuperscript{258}

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\textsuperscript{256} Julio H. Cole, \textit{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.”).


\textsuperscript{258} Susan McClary, \textit{The Blasphemy of Talking Politics during Bach Year}, in MUSIC AND SOCIETY: THE POLITICS OF COMPOSITION, PERFORMANCE AND
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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 that was so central to Gershwin’s creative processes and the creative processes of many other composers. 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. In addition, the Gershwin family in fact authorized performances of the 1992 Tony award winning Broadway musical *Crazy For You*, which was comprised of pieces from different Gershwin musicals, which seriously undercuts the logic of the court’s argument in *Gershwin v. The Whole Thing*.

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. As a

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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).

259 See supra notes 93 to 159 and accompanying text; see also Arewa, *Hip Hop*, supra note 1.

260 See supra notes 227 to 235 and accompanying text for a discussion of the value of Gershwin song licenses.

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.\textsuperscript{263} The fact that copyrights are now used as sources to be mined for licensing revenue,\textsuperscript{264} 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 potentially imposing costs that may be unlike those contemplated by courts and legal commentators, the benefits copyright holders may accrue

\begin{footnote}{See Giddens, supra note 50, 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”).

\textsuperscript{264} 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”).}
may similarly be different and need to be examined more closely. This value may include benefits such as securing streams of licensing income, blocking or preventing commercial competitors or alternative uses or interpretations, bolstering the creator’s public image, increased market capitalization, increasing stockholder value, gaining greater attractiveness to potential acquirers or investors or other factors.\(^{265}\) These benefits may thus impose significant costs on other potential users of the underlying knowledge on which such copyrights are based. Since the magnitude and importance of borrowing in cultural expression is often underestimated, the extent of these costs may not always be fully recognized. Consequently, how copyright holders wield their rights also has significant implications for the underlying knowledge upon which their copyrights are based.

B.  \textit{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.\(^{266}\) 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

\(^{265}\) See \textit{supra} notes 61 to 68 and accompanying text for a discussion of SCO.

\(^{266}\) Arewa, \textit{Strategic Behaviors}, \textit{supra} note 15 (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).
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. 267

An intellectual property right in this sense can be seen as one way to represent, characterize and allocate ownership interests with respect to particular configurations of such underlying knowledge. The Eldred court recognized this distinction in noting that copyright involves no monopoly over knowledge.268 Although this is true in some respects, it does not completely account for the behavioral aspects of copyright enforcement, particularly with respect to the control of meaning and reinterpretation of cultural texts and the existence of strategic behaviors that may magnify the chilling effect on the ability of others’ to use knowledge. These factors may effectively give copyright holders a monopoly over underlying knowledge.

The nature of this underlying knowledge determines whether an

267 New Grove, Gershwin, supra note 73, at ___ (“Perhaps the most striking characteristic of Gershwin’s melodies is their reliance on blue notes . . . Occasionally the blues idiom provides a harmonic structure for Gershwin, as in the second of his three piano preludes on the 12-bar blues progression. That progression also serves as a reference in the Concerto’s [Rhapsody in Blue] second movement and in An American in Paris.”).

268 Eldred v. Ashcroft, 537 U.S. 186, 217 (2003) (“[C]opyright gives the holder no monopoly on any knowledge. A reader of an author’s writing may make full use of any fact or idea she acquires from her reading.”).
intellectual property right may be attached to the underlying knowledge. The fact that a creator’s work is copyrightable reflects a determination that the particular configuration of underlying knowledge in the work is worthy of intellectual property protection. Copyright frameworks thus embed assumptions about the nature of knowledge that merits copyright protection. Typically, only underlying knowledge that is deemed sufficiently original is copyrightable. The scope and duration of the copyright similarly reflects societal assumptions about value reflected in choices about the types and duration of protection to be included within copyright frameworks.

Borrowing is often part of what makes cultural texts recognizable to other participants in the cultural context from which such texts emerge. New creations are frequently framed in light of and in relation to past experience. Copyright as currently constructed involves substantial denial of borrowing and collaboration. Much of the discourse of CTEA

269 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).

270 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.

271 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
proponents with respect to the creation of cultural texts reflects a denial or deemphasis of borrowing and collaboration. This position is in line with the revenue stream value maximization approach also taken by many CTEA proponents. This denial comes out of the seeming need to allocate clear and determinate property rights with respect to the knowledge that underlies copyrights. This underlying knowledge is thus construed as a separable fragment that can be alienated from broader fabric in which it is enmeshed and effectively given to the copyright holder for a specified period of time. This grant of a copyright to the holder is characterized as a reward for the holder’s creative activities. Copyright, however, typically encompasses knowledge relating to elements that may be original contributions of the creator as well as preexisting knowledge that is borrowed and then enfolded within the new work.

Once these preexisting and new elements are integrated, though, the tendency is to view the holder as having intellectual property rights with respect to the entirety of the underlying knowledge, including the preexisting knowledge. This tendency is reinforced when copyrights have longer duration because those viewing or hearing a work are likely 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).

272 See Shum, supra note 251, at 146 (noting profit maximization approach of entities with vast holdings of copyrights).

273 See, e.g., Garon, supra note 13, 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).
increasingly removed over time from the original context of creation of the work. As a result, discerning borrowed elements of a work is likely to become more difficult as copyright duration increases. Increased duration may thus make even assessments of whether and the extent to which other works infringe on an existing work more difficult. Similarly, contrary to the assumptions of the *Eldred* court, strategic behaviors make monopolization of underlying knowledge a more likely outcome by virtue of a potential chilling effect on borrowing for fear of threats of litigation or actual suit.275

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.276 Modern conceptions of authorship as involving inspiration, originality and even genius in the creation of autonomous cultural texts are a fairly recent historical development.277 Such conceptions are nonetheless used to justify allocation of property rights to authors or those deemed worthy of

275 *See supra* notes ___ to ___ and accompanying text.


such ownership rights by virtue of their genius, autonomy and originality.\textsuperscript{278}

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.\textsuperscript{279} Fewer, however, fully consider the implications of such borrowings and collaborations.

Consequently, additional consideration should be given to the fact that texts often reflect collaboration and borrowing rather than autonomy and independent creation and that acts of creation do not and should not necessarily involve original or novel elements. Instead, creators often synthesize and borrow, use existing material and model their creations on the works of others.\textsuperscript{280} This is the essence of borrowing that is often denied, ignored or minimized in discussions of copyright and creation.


\textsuperscript{279} Mark A. Lemley, \textit{The Economics of Improvement in Intellectual Property Law}, 75 TEX. L. REV. 989, 997 (1997) (noting that knowledge is cumulative and that inventors build on what came before); Richard H. Stern, \textit{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).

\textsuperscript{280} Arewa, \textit{Hip Hop, supra} note 1 (discussing borrowing in classical, hop hop and other popular music).
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.281

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

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

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

282 Arewa, Hip Hop, supra note 1 (discussing historical and cultural specificity of conceptions of musical composition).
283 See supra notes 38 to 42 and accompanying text; see also Arewa, Hip Hop, supra note 1.
specific processes by which such texts and the public domain are constituted, particularly in the specific areas of cultural texts and music.

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.\(^{285}\) 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.”\(^{286}\)

Consequently, the exclusionary aspects of intellectual property rights reflected in control rights also result in exclusion with respect to the making and contesting of cultural meanings.\(^{287}\) Such unitary views 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).

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\(^{287}\) 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).
reflected, for example, in the Gershwin family’s control over casting in *Porgy and Bess*. Such control has significant implications for public policy and social meaning within the broader context of contemporary discourse about race and nonconventional casting, for example.

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

288 See generally 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).


290 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 287 (discussing the role of law in unitary view of culture that is associated with the suppression of cultural dissent).
autonomous in a way that reflects Romantic author conceptions.\textsuperscript{291} As a result, a tendency exists to see the flow of cultural meaning and ownership rights in creations as a one-way movement toward the copyright holder, who can capture all cultural meaning attached to or associated with the intellectual property right and impede any flow of meaning outward.\textsuperscript{292}

In looking at this process the potential incommensurability of scales used must be noted.\textsuperscript{293} How different participants in this process value cultural expression might be quite different both in quantitative and qualitative terms, to the extent that the same scale may not in fact be able to be used. As a result, the values of producers are not all the same, and commercial actors may assign very different values than noncommercial actors. Heirs may assign different values than creators, and the values of diffusers and second comers may yet again be dissimilar. Values expressed by courts and in legal scholarship may similarly be quite disparate.

The recognition and mediation of these multiplicities of potential uses, values and interpretations are important. A unitary and reified view of

\textsuperscript{291} See Arewa, Hip Hop, supra note 1 (discussing the importance of borrowing in the creation of music in all genres and periods and the systematic inattention to the pervasive nature of borrowing in musical composition in legal discourse about music).

\textsuperscript{292} 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. \textit{See supra} note 274 and accompanying text.

\textsuperscript{293} See Sunstein, supra note 262; 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.”).
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. 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. Separating control from compensation in copyright doctrine is potentially one way to ameliorate this tendency for control of copyright to extend to control of meaning and reinterpretation and restore a multiplicity of possible meanings and interpretations of cultural texts.

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

The goals and beneficiaries of copyright frameworks have long been a contested issue in American copyright doctrine. Reconsideration should be given to the construction of copyright frameworks and the behaviors that come along with these architectures. Copyrights should be

294 LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); Litman, supra note 70, at 22-23 (1996) (discussing role of commercial and institutional actors in copyright law).


296 See William Patry, Failure of the American Copyright System: Protecting the Idle Rich, 72 NOTRE DAME L. REV. 907, ___ (1997) (“Since the inception of American copyright law at the end of the eighteenth century, legislators and scholars have struggled with two fundamental, related issues. First, what is the purpose of copyright? Second, to whom should benefits be granted?”).
granted and enforced in a way that is informed by the context of their operation and consideration of the underlying rationales of copyright and actual uses of copyright.

A. Control, Compensation and the Appropriation of Returns

The rationales used to justify copyright protection have been widely considered and discussed.297 Current copyright structures typically allow holders to have effective control rights with respect to underlying knowledge resources by virtue of copyright statutory language that gives copyright holders substantial ability to control uses of copyright protected works.298 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. This ability to control is thus fundamentally related to strategic intellectual property behaviors.299 For copyright holders, control

297 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 252, 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 33; PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY (1996).

298 See infra notes 312 to 319 and accompanying text.

299 See Giddens, supra note 50, at 288 (noting that assessing the strategic actions of businesses means “giving primacy to discursive and practical consciousness,
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.\textsuperscript{300} 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

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and to strategies of control within defined contextual boundaries”); \textit{see also supra} notes 61 to 72 and accompanying text.
\textsuperscript{300} \textit{See} Wendy Gordon, \textit{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, \textit{Silicon Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs}, 34 UCLA L. REV. 1493, 1500-1501 (1987) (advocating copyright protection for software programs and noting that the software industry could be imperiled without such protection); Michael J. Meurer, \textit{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, \textit{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).
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These elements of control and compensation thus form a primary foundation for economic rationales for copyright, which emphasize appropriability, or the ability of creators to ensure that they receive a profit or return from their creations, as a source of incentives to create.\textsuperscript{302} The

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\textsuperscript{301} See, e.g., Hurt & Schuchman, supra note 33, 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 256, at 99-101 (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).

\textsuperscript{302} 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); 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, 783 (1987); Lemley, supra note 279, at 993 (noting that intellectual property is about incentives to invent and create); Netanel, supra note 252, at 308-310 (distinguishing between neoclassical approaches and economic
\end{footnotesize}
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. The behaviors 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.”).

permitted creators under existing copyright rules are also acknowledged to impose costs as well as inefficiencies in the form of dead weight loss.\textsuperscript{304}

Copyright then becomes characterized and perceived as a balance between benefits in the form of increased production of works and costs in the form of restrictions to access, which make it more difficult for future authors to create.\textsuperscript{305} Although the costs and dead weight loss that result from copyright are generally acknowledged, views of copyright tend to be

\begin{quote}
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.”).
\end{quote}

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\textsuperscript{304} In addition to behavioral distortions, this monopoly capacity also imposes costs by creating dead weight loss. See Julie Cohen, Copyright and the Perfect Curve, 53 VAND. L. REV. 1799 (2000); Sterk, supra note 302, at 1209; William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 HARV. L. REV. 1659, 1702-1703 (1988).
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\textsuperscript{305} See Yen, supra note 303, 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 302, 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.”).
\end{quote}
based on questionable notions about the nature of free riding. Conceptions of copyright thus discount and even ignore borrowing at least in part as a consequence of assumptions that are often made about free riding. Discussions of free riding often fail to note sufficiently the fact that copyright frameworks result in certain types of free riding being treated differently than others, 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 existing works.

Consequently, the appropriate question as a starting point from a copyright perspective should be transformed from one that focuses on how to limit borrowing into an inquiry into the acceptable scope of communication, free riding or transmission of existing knowledge. The reality of free riding and borrowing in cultural production suggests that a transmission based approach to copyright might be fruitful in first of all acknowledging

306 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).

307 See infra notes ___ to ___ and accompanying text; see also J. Peter Burkholder, Borrowing, in 4 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 1-36 (Stanley Sadie ed. 2001) (discussing the pervasiveness of musical borrowing in all musical genres and time periods); J. Peter Burkholder, The Uses of Existing Music: Musical Borrowing as a Field, 50 NOTES, 851, 852 (1994) (giving an overview of musical borrowing as a field); Arewa, Hip Hop, supra note 1 (discussing the significance of musical borrowing for copyright frameworks).
the essential nature of borrowing in cultural production and secondly defining the scope of acceptable transmissions. This transmission focused approach would be a contrast to current perspectives that treat copyright as essentially a property right that results from and is merited as a result of an autonomous act of creation.308

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. 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 and uses of intellectual property. The breadth of control given to copyright holders is a direct result of Romantic author conceptions and continuing inattention to the importance of borrowing and free riding in cultural production. Further, existing structures do not adequately contemplate that a holder may receive value from exercise of control rights that has nothing to do with compensation or even creation. Consequently, how holders choose to exercise control rights and enforce such rights in the construction of intellectual property rights has significant implications for behavior as well as the effective operation of intellectual property rights structures such as copyright.309

308 See generally Arewa, Hip Hop, supra note 1.
309 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
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.\textsuperscript{310} 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.\textsuperscript{311} The specific context of the uses of copyright in particular contexts, however, suggests that general costs and benefits may be evident to varying degrees in specific settings that may or may not reflect the general assumptions typically imagined.

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

Any balancing of rights also entails determining what rights should be encompassed within copyright frameworks. Control and compensation are typically treated as inevitably united, but are in fact separate rights that should at least in certain instances be disaggregated. As a result, instructuring copyright frameworks, attention should be given to how the 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\textsuperscript{\textquotedblright}).

\textsuperscript{310} See supra notes 297 to 309 and accompanying text.

compensation and control aspects of copyright contribute to and enhance the core goals of copyright.

Disaggregation could be structured in such a way as to maintain the right to receive compensation while minimizing the extent of control over future uses of copyrighted works. One core element of copyright holders’ exclusion or control rights is contained in Section 106 of the Copyright Act, which describes the exclusive rights of copyright holders with respect to their copyrighted protected works.312 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) and 104(4). Section 106(2) gives copyright holders the exclusive

312 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).
right to prepare derivative works based on the copyrighted work, while Section 106(4) gives copyright holders the exclusive right to perform and display musical, dramatic and other works.

These subsections, and other provisions of the Copyright Act as might be necessary to implement this proposed structure, should be modified such that music copyright holders would have limited ability after the death of the creator to restrict both derivative works and performances or displays that seek to reinterpret the copyright protected work. Following a creator’s death, the control rights with respect to these subsections would then differ from 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 (“Unfair Uses”). Unfair Uses would include uses in commercial advertisements, uses for purposes that might constitute a misrepresentation and in which clear disclaimers are not used, Permitted Uses by a single Permitted User in excess of a reasonable amount and uses for strategic or anti-competitive actions that would be reasonably likely to damage the market share for the original work.

Under this proposal, a copyright holder would be able to restrict Unfair Uses but could not exercise control over Permitted Uses unless a Permitted Use intentionally or maliciously sought to damage the market for the original work (an “Exempted Permitted Use”), in which case the Permitted Use would be treated in the same manner as an Unfair Use. The copyright holder would be entitled to receive compensation for both Permitted Uses and Unfair Uses, but would have limited control rights
Copyright on Catfish Row

with respect to Permitted Uses. Unfair Uses would require a prior license from the copyright holder and would thus be substantially similar to the existing copyright property rule.

In contrast, compensation for Permitted Uses should be based on a structure in which the 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 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.313 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.314 For example, such uses can bring attention to works from earlier eras or that might otherwise be unknown.315

313 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 301, at 199-258 (proposing a rewards system that would replace current copyright frameworks).

314 See Christopher Sprigman, Reform(aliz)ing Copyright, 57 STANFORD L. REV. 485, 515-516 (2004) (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
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.\footnote{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).}

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


\footnote{Arewa, Hip Hop, supra note 1.}
be founded upon the very rights granted to the composer for the purpose of protecting his interests.317

Disaggregation of compensation and control would move copyright in a direction that would incorporate to a greater extent the public benefits that are an integral part of the copyright balance.318

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.319


318 See 1909 House Report, supra note 317, at 7 (noting that copyright balances between stimulation of production and benefit to the public); Craig W. Dallon, The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest, 44 SANTA CLARA L. REV. 365, 437 (2004) (noting that passage of CTEA suggests that Congress did not give serious attention to public benefit rationale of copyright); Garon, supra note 13, at 521 (noting that Congress has “focused on the economic success of the most dominant providers of media content”); Eldred v. Ashcroft, 537 U.S. 186, 215-217 (2003) (noting that patent involves a more exacting quid pro quo for granting an intellectual property right in exchange for the benefit derived by the public than does copyright).

319 Sony, 464 U.S. at 429.
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 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.*,\(^\text{320}\) where Gershwin Publishing sued Columbia Artists Management (CAMI) for contributory copyright infringement relating to performers managed by CAMI who

\(^{320}\) 443 F.2d 1159 (2d Cir. 1971).
performed the piece “Bess, You Is My Woman Now” from *Porgy and Bess* at a public for profit event without authorization from Gershwin Publishing. Under the proposal described in this Article, unless the use constitutes an Unfair Use, the Gershwins would be limited to seeking compensation for such uses to the extent that they were not already compensated as a Permitted Use.

Although 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.321

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

Current copyright standards are essentially a property rule that assumes that disfavors borrowing except in certain specified instances such as fair use and de minimis uses.322 Although this property rule may effectively operate as a statutory liability rule in certain respects,323 explicitly

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321 *Sony*, 464 U.S. at 429.
322 See *Arewa, Hip Hop*, supra note 1.
acknowledging the advantages of true liability rule structures in music copyright would be better suited to actual musical practice:

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 entitlement with ex post determination of appropriate compensation.324

A property rule potentially distorts the creation of music by virtue of the fact that borrowing is more difficult under a property rule.325 Incorporating conceptions of unfair use into copyright doctrine would mean moving from a standard of no borrowing except in cases such as fair use to a standard that permits borrowing other than in cases of unfair use. Unfair use doctrine could be developed through judicial application of unfair use standards, incorporation of unfair use concepts in statutes and the development of unfair use standard commercial practices.326

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

325 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.


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A liability rule based on unfair use could be used to refocus the nature of copyright as a *transmission* right rather than ownership right with respect to underlying knowledge. A transmission based approach would permit recognition of the original contributions of the creator as well as the collaborative and intertextual elements of the creator’s works. The transmission right could then attach to the specific combination that comprises the knowledge intangible underlying copyright as a whole without reaching on an individual basis the constituent elements that comprise that whole. A transmission based model is a good fit in the music area where borrowing is commonplace across time and musical genres. This would mean practically that transmissions or borrowings would in specified cases be presumed to not constitute infringement unless they damaged an existing work in specific identifiable ways.

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

Focusing on constitutive processes and transmissions rather than states of being with regard to property ownership may also shed light with respect

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

328 See David Lange, Reimagining the Public Domain, 66 L. & CONTEMP.
PROBS., 463, 467 (2003); Lemley, supra note 279, at 997-998; Chander &
Sunder, supra note 155, at 1351 (noting romanticization of the public domain).
329 See Trust Brief, supra note 27, at 30 (noting that petitioner’s assertions in
Eldred case would throw numerous transactions into doubt potentially rendering
copyright transactions insecure and uncertain).
creation. 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 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.

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 mirrored existing societal hierarchies that considered the cultural production of African Americans to be part of the public domain. Consequently, such material was seen as readily appropriable, particularly by white artists who were able to make cover

330 See Litman, supra note 284, 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.”).

331 Vaidhyanathan, supra note 2, at 117-148; Hall, supra note 2, at 31-51; Greene, supra note 2, at 354-383.
recordings and perform such works for white audiences.\textsuperscript{332} Such use of African American cultural production in a broader societal milieu in which African American performers were typically subject to significant restrictions on both their ability to perform publicly for non-African American audiences. These restrictions were reinforced by the structure and marketing practices of the recording industry, which mean that African American recording artists were identified by their race since most were placed in the category of “Race” records.\textsuperscript{333} These dynamics reflected the segregation in the broader society that was also a core part of how the recording industry categorized and marketed music.\textsuperscript{334} In fact, prior to [1949], the category now termed R&B or Rhythm and Blues was

\textsuperscript{332} Hall, \textit{supra} note 2, at 44 (noting Little Richard’s recounting in a Home Box Office television special that a version of his rock anthem “Tutti Frutti” that reached the number on the pop charts in a version recorded by Pat Boone).

\textsuperscript{333} GUTHRIE P. RAMSEY, JR., \textit{RACE MUSIC} 113 (University of California, 2003) (“In 1920, a recording by blues singer Mamie Smith helped to establish the race records institution in American popular culture.”); Hall, \textit{supra} note 2, at 38 (“Under the precepts of the recording industry’s segmented marketing systems, however, recordings of their [cornetist Louis Armstrong and pianist Ferdinand “Jelly Roll” Morton] music were distributed on ‘race record’ labels geared specifically to Blacks and remained invisible to most whites. By that time music recorded by white dance bands, led by Paul Whiteman’s was being introduced to mainstream as ‘jazz’ through record labels and performance venues specifically marketed to them.”) (citations omitted); David Brackett, \textit{What a Difference a Name Makes: Two Instances of African-American Popular Music, in THE CULTURAL STUDY OF MUSIC: A CRITICAL INTRODUCTION} 238, 241 (Martin Clayton, Trevor Herbert & Richard Middleton eds. 2003) (noting that in the 1920s the recording industry organized the popular music fields around the divisions of “popular,” “race,” and “hillbilly”); \textit{___________}, \textit{in RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC} \textit{___, ___} (Norman Kelley, ed. 2005).

\textsuperscript{334} Greene, \textit{supra} note 2, at 353, 362, 374-377, 384-389.
actually called Race music that was marketed primarily for an African American audience. As a result, the race of many African American performers could be readily discerned just by virtue of how their music was categorized. Works of white performers who made recordings of this same music were not classified as Race music.

This racial categorization of music had a profound influence on borrowings from African American cultural production and the compensation and recognition given for such borrowings. An Unfair Use standard is intended to address instances where borrowings become inequitable on account of the nature of the borrowings, the broader societal context within which such borrowings occur or other factors. At the same time, this standard gives proper recognition to the importance of borrowing in the creation of music. Under an Unfair Use standard, to the extent that Gershwin’s borrowings constituted unfair use, they could be enjoined or Gershwin might be required to pay compensation or give acknowledgment as to the sources of his material or both.

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

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335 Brackett, supra note 333, at 242 (“The years around 1947 prove instructive: while the music industry was in the process of slowing recognizing the importance of black popular music, it effectively excluded the representation of black music from the mainstream.”).

336 PAUL OLIVER, SONGSTERS AND SAINTS: VOCAL TRADITIONS ON RACE RECORDS (Cambridge 1984) (noting that Race records were marketed primarily for a black audience).
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. The view of creation expressed by Marc Gershwin would mean that the types of creation in which George Gershwin engaged would likely be disallowed since his musical practice involved meshing elements from disparate traditions.

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

338 Garon, supra note 13, at 595 (responding to the Marc Gershwin quotation and noting that given that “[t]he work of the Gershwin brothers drew on African-American musical traditions. What could be more appropriate?”).
the 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.