

BLUES LIVES:
PROMISE AND PERILS OF MUSICAL COPYRIGHT[♦]

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INTRODUCTION

The application of copyright law to music has long been fraught with complexities and continuing problems. Problems in the application of copyright to blues music have come to pass, in part, as a result of the peculiar ways in which copyright has been applied to nonvisual technologies of musical creation and reproduction. In the nineteenth century, music creation and reproduction reflected a live performance tradition, within a commercial context in which sheet music was the dominant form of fixed musical reproduction. Although copyright has been an inexact fit for music generally,¹ in a world in which sheet music was the primary form of fixed musical reproduction, this bad fit was discernible but far less devastating in impact. In the twentieth century, however, new forms of musical reproduction became broadly distributed commercially, including the player piano and recording technology in the earlier part of the century. These technologies and subsequent technological innovations have contributed to problems in the application of copyright to music.

Uncertainty about applications of copyright in contexts of new music technologies has contributed to complexity in the operation of music copyright and a general lack of clarity in the music copyright space.² This lack of clarity underscores the continuing debate over allocations of rights and distribution of benefits in the music copyright arena. Events surrounding blues exemplar Robert Johnson and blues music more generally represent an important early example of these continuing tensions. Blues first achieved prominence in the early twentieth century and was spread through sheet music, a visual form of musical reproduction, and live performance.³ Blues later flourished commercially

¹ Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 555-56 (2006) [hereinafter *Bach to Hip Hop*].

² Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 675 (2003) ("The layering of copyright ownership interests and the complexity of copyright law, particularly as it applies to music, has played a major role in the inability of the industry to respond to the changing nature of the ways in which digital works can be distributed and otherwise exploited.")

³ ELIJAH WALD, *ESCAPING THE DELTA: ROBERT JOHNSON AND THE INVENTION OF THE BLUES* 15-16 (2004) (noting that the first published blues song appeared in New Orleans in 1908,

as a genre distributed primarily in nonvisual form, which has significant business and legal implications. Rather than being based in the sheet music culture that had been predominant, early blues music soon came to be reproduced via sound recording technology, with the first blues recording appearing in 1914.⁴ The transition from sheet music to recorded music had significant business and cultural implications; it meant that live performance could be encoded, reproduced, and transmitted in nonvisual form. As a result, early blues recordings reflect an important transition point in the history of commercial dissemination of music and the application of copyright to nonvisual forms of music reproduction. Therefore, copyright treatment of early blues artists and the topography of incentive and reward for such artists have direct bearing on continuing debates in the music copyright arena today.

The impact of copyright on the lives of blues musicians and living blues traditions is of critical importance for copyright. Treatment of particular blues artists can illustrate the operation of copyright in blues contexts. The short life of early blues exemplar Robert Johnson demonstrates important considerations in the application of copyright to music. On the one hand, Johnson and his posthumous copyright rewards exemplify what many see as the proper operation of copyright. At the same time, outcomes for Johnson and other artists may belie assumptions made about incentive and reward in copyright. Robert Johnson's copyright successes may actually be more consistent with an incentive story that reflects copyright as a lottery, which has significant implications for our assumptions about investments in expressive works and the distribution of copyright rewards.

This Article discusses challenges that have arisen in the application of copyright to nonvisual forms of musical reproduction, with a particular emphasis on the contexts of musical creation, reproduction, and dissemination of early blues recordings. It further discusses how unresolved conflicts evident in copyright today became increasingly apparent in blues contexts and delineates some implications of such conflicts for assumptions typically made in copyright theory about creation, incentive, and reward. Part I of this article discusses creation and context in blues music, as well as rock and roll traditions that later emerged from the blues. Part II focuses on the business contexts of blues, particularly in its ear-

composed by an Italian American named Antonio Maggio, and that when blues became a musical term in the early teens, recording was still at its infancy and printed music remained the main way of distributing new compositions).

⁴ *Id.* at 17-18 (noting the first recording of a blues composition in 1914 by the Victor Military Band, which cut a version of W.C. Handy's "Memphis Blues" and the first sung blues on record in 1915 by Morton Harvey).

liest iterations, and draws attention to the ways in which pervasive segregation in the music industry diminished the creative role and compensation of a broad range of artists, including African American blues musicians. Part III discusses how pervasive borrowing has shaped blues in different contexts and the implications of borrowing for copyright, particularly with respect to incentive and reward. The final section of this paper highlights the significant implications of continuing tensions in music copyright that reflect competing assumptions in copyright theory about creation, risk, incentive, and reward.

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

In 2004, Eric Clapton released the DVD-CD *Sessions for Robert J* and the CD *Me and Mr. Johnson*,⁶ which paid homage to Robert Johnson, one of Clapton's greatest musical influences. Clapton's reverence for Johnson is also evident in live performances in which Clapton not infrequently plays songs with which Johnson is particularly associated.⁷ Clapton is not alone in his reverence of Robert Johnson. The ascension of Robert Johnson to the status of preeminent representative of early recorded blues traditions reflects broader trends in the creation and reception of blues music in the twentieth century. The prominence and influence of blues in later musical eras came to pass, in large part, as a result of widespread copying of blues. Blues came to form a key common underpinning of significant portions of twentieth century musical forms, thus providing an example of how copying can be a crucial aspect in the creation of vibrant and influential living musical forms. Although widely copied, blues artists of Johnson's era were, in many cases, compensated to a far less degree than they were copied.

Outcomes for Robert Johnson's estate, however, were different from others of his era. Johnson's success decades after his death at an early age is a startling contrast to the circumstances of his short life and the contexts within which he lived and performed.⁸ In many respects, Robert Johnson did not distinguish himself musically from his peers during his lifetime.⁹ The legend

⁵ ERIC CLAPTON, *SESSIONS FOR ROBERT J.* (Reprise/Wea 2004).

⁶ ERIC CLAPTON, *ME AND MR. JOHNSON* (Reprise/Wea 2004).

⁷ Clapton played Robert Johnson songs during a concert tour in 2008. See Concertaholics.com, <http://concertaholics.com/2008/05/28/eric-clapton-concert-review-montreal-centre-bell/> (last visited Oct. 28, 2009).

⁸ See *infra* notes 27-87 and accompanying text.

⁹ WALD, *supra* note 3, at 111, 117, 121 (noting that although all were impressed by John-

of Robert Johnson, however, far surpasses that of his musical contemporaries in that Robert Johnson is now the most well-known bluesman of his era.¹⁰ Further, Johnson “is the only prewar blues artist whose records are still widely owned and heard today.”¹¹ From his humble beginnings and obscure death,¹² Robert Johnson has emerged to become one of the biggest influences on rock and roll music, particularly through musicians in Great Britain, many of whom like Eric Clapton, count Robert Johnson as one of their greatest influences. Robert Johnson was one of the first sixteen inductees into the Rock and Roll Hall of Fame.¹³ Robert Johnson is far more famous in death than he could ever have envisaged during his lifetime. The life of Robert Johnson is thus an important one for the history of music, particularly in relation to the development of blues music traditions and the rock and roll traditions that emerged from blues.

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

The origins of blues remain steeped in mystery and shrouded in legend.¹⁴ Blues has roots in African music and African American folk and work songs,¹⁵ as well as in European musical traditions. Many commentators trace the first recognizable blues to the late nineteenth century to early twentieth century.¹⁶ By most accounts, by the early twentieth century, blues had emerged from African American communities in the American South.¹⁷ Within a short period of time after its emergence, blues had become a popular music form distributed largely through sound recordings made by African American musicians for African American audiences.¹⁸ Although blues sound recordings were based on a con-

son’s musical abilities, including a “powerful voice and uncanny facility on guitar,” Johnson’s debut did not “set the blues world on fire”). *Id.* at 117, 121.

¹⁰ *Id.* at 105 (“To many modern listeners he is all of early blues . . .”).

¹¹ *Id.* at xv.

¹² *Id.* at xiv-xv (noting that Johnson “died virtually unknown in a rural backwater, without making any appreciable dent on the blues world of his day.”).

¹³ See Inductee List, Rock and Roll Hall of Fame and Museum, <http://www.rockhall.com/inductees/inductee-list/> (last visited Oct. 28, 2009). See also Matthew Burt, *Hellohound on My Trail: Rock Hall of Fame Stages Fitting Tribute to Robert Johnson*, BLUES REVUE, JAN.-FEB. 1999, at 72.

¹⁴ PAUL OLIVER, SONGSTERS & SAINTS: VOCAL TRADITIONS ON RACE RECORDS 260 (1984) (“When, or indeed how, the blues emerged is a question which has provoked much speculation but, not surprisingly, no incontestable evidence.”).

¹⁵ See ROBERT PALMER, DEEP BLUES 25-37 (1982); see also William F. Danaher, *The Influence of Blues Queens, 1921 to 1929*, 48 AM. BEHAV. SCI. 1453, 1454 (2005).

¹⁶ PALMER, *supra* note 15, at 44 (noting that blues was so firmly rooted in earlier African American folk music that identifying when it became blues is difficult to say with certainty); see also Danaher, *supra* note 15, at 1454.

¹⁷ RICHARD J. RIPANI, THE NEW BLUE MUSIC: CHANGES IN RHYTHM & BLUES, 1950-1999, 4-9 (2006).

¹⁸ WALD, *supra* note 3, at xiii-xv (discussing blues as popular music).

tinuing live blues performance tradition, the types of recordings that were distributed by companies that distributed so-called “race” records, of which blues formed an important segment, were significantly influenced by cultural assumptions about, and hierarchies of, race and music. Uses of copyright by music industry representatives in their business dealings with early blues musicians reflected these hierarchical assumptions. The contexts of performance and reception of blues music have, however, not remained static. The blues genre has been reinvented in different times and contexts by a diverse range of performers for varied audiences. In the case of early recorded blues, later treatment of such music was also significantly influenced by blues collectors, who played an important role in shaping and preserving the legacy of recorded blues.¹⁹

Blues is a distinctively American musical form and one of the most important of such forms.²⁰ Blues music is an important element in a broad range of other musical forms, including jazz, country music, rhythm and blues, and rock and roll.²¹ Blues consists of a “definable body of musical elements or traits inherited from both African and European traditions, that forms the foundational language of much twentieth-century American musical style.”²² The musical characteristics of blues are typically identified as including a 4/4 syncopated or offbeat phrasing rhythmic structure, a unique musical mode that may incorporate flatted thirds and sevenths, and lyrics in a three line stanza in which the second line repeats the first (AAB).²³

Blues music, however, represents far more than the specific musical characteristics that might distinguish it. Blues music has

¹⁹ *Id.* at 236-42.

²⁰ RIPANI, *supra* note 17, at 3-5 (discussing the new blue music that originates in African American folk music in the mid-nineteenth century that was a blend of various combinations of inherited elements and that was “wholly new and totally American”).

²¹ EILEEN SOUTHERN, THE MUSIC OF BLACK AMERICANS: A HISTORY 361-65, 505 (3d ed. 1997) (noting the influence of blues on jazz and rock music); Paul Oliver, *Blues*, in 21 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 730-37 (Stanley Sadie ed., 2d ed. 2001) (noting the influence of blues on the Beatles, Rolling Stones, the Animals and the Who); Robert Walser, *Rock and Roll*, in 3 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 486-87 (Stanley Sadie ed., 2d ed. 2001) (noting the influence of blues on rock and roll); Peter Wicke, *Rock Music: A Musical-Aesthetic Study*, 2 POPULAR MUSIC 219, 222 (1982) (tracing the origin of rock and roll in various rhythm and blues playing styles as well as other musical genres).

²² RIPANI, *supra* note 17, at 16.

²³ *Id.* at 16-61 (describing characteristics of blues music); SOUTHERN, *supra* note 21, at 334-36 (noting three line stanzas, personal lyrics, duple rhythm with marked syncopated patterns, an entire song in twelve bars, and an altered scale with the third, fifth, seventh, and occasionally the sixth degrees being treated ambiguously and sometimes being lowered); JEFF TODD TITON, EARLY DOWNHOME BLUES: A MUSICAL AND CULTURAL ANALYSIS 137-74 (2d ed. 1994) (describing the musical characteristics of traditional country blues).

also been characterized as representing a view of experience.²⁴ Further, the blues musical system, including its lyrical, harmonic, and melodic conventions, has been characterized as serving “as a trope in much of twentieth-century black music history in America.”²⁵ Some commentators, however, have asserted that commentary emphasizing the blues as a key symbol of African American vernacular culture may fail to acknowledge the essentialist focus on authenticity contained within such discussions.²⁶ Pervasive discourses about authenticity permeate discussions of blues more generally.

Despite its widespread popularity over an extended period of time, blues has been a flexible category subject to many romanticized conceptions. Furthermore, what constitutes blues has meant different things to different people at different times. Although the origins of blues remain obscure,²⁷ what many refer to as blues had emerged by the turn of the century as a form of African American vernacular music.²⁸ Although blues music was produced throughout the American South,²⁹ the Mississippi Delta has produced a disproportionate share of great blues musicians and “was home to a unique strain of blues music, which has become extremely influential on the modern-day scene.”³⁰ The world from which blues derived was far from romantic.³¹ In the Mississippi Delta region, for example, blues took root amidst the abject poverty of players whose parents had in many instances been slaves or the children of slaves. Social conditions in Mississippi during that

²⁴ HOUSTON A. BAKER, JR., *BLUES, IDEOLOGY AND AFRO-AMERICAN LITERATURE: A VERNACULAR THEORY* 7 (1984) (suggesting that blues be considered as a “forceful matrix in cultural understanding . . . [whose] performers offer interpretations of the experiencing of experience”).

²⁵ GUTHRIE P. RAMSEY, JR., *RACE MUSIC: BLACK CULTURES FROM BEBOP TO HIP-HOP* 45 (2003); see SAMUEL A. FLOYD, JR., *THE POWER OF BLACK MUSIC: INTERPRETING ITS HISTORY FROM AFRICA TO THE UNITED STATES* (1995); LEROI JONES, *BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA* (1999).

²⁶ RAMSEY, *supra* note 25, at 45 (noting that some scholars “have recently questioned the status of the blues as a key symbol of black vernacular authenticity on grounds that stem from larger critiques of ‘authenticity’ and ‘essentialism.’”).

²⁷ SOUTHERN, *supra* note 21, at 332 (noting that “less [is] known about the origin of the blues than . . . the beginning of ragtime”).

²⁸ *Id.* at 332-33, 338 (noting that W.C. Handy, the first man to popularize the blues, published his first blues composition, “The Memphis Blues,” in 1912 and first thought about using it in a composition after hearing a singer in a Mississippi train station and also noting that Gertrude “Ma” Rainey, the earliest professional blues singer, remembered first hearing the blues in 1902); WALD, *supra* note 3, at xiii (noting that blues was “primarily black popular music” for the first fifty years of its existence).

²⁹ See WALD, *supra* note 3, at 83.

³⁰ *Id.* at 83; see Stephen A. King, *Blues Tourism in the Mississippi Delta: The Functions of Blues Festivals*, 27 *POPULAR MUSIC & SOC'Y* 455, 456 (2004) (noting that the Mississippi Delta has been called the “home of the blues”).

³¹ WALD, *supra* note 3, at 82. (“If there is one place and time outside of slavery that black Americans have no romanticism or nostalgia about, it is Depression-era Mississippi.”)

time period were characterized by a plantation-based sharecropping system that “at times seemed little different from slavery,”³² segregation, and pervasive oppression of African Americans.³³ Conditions in the Mississippi Delta today continue to echo these historical circumstances.³⁴

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

Since blues has meant different things to different people at different times, much confusion exists about blues as musical phenomenon and blues as a marketing phenomenon. Little is actually known about the early origins of blues music that came to be recorded and distributed to larger audiences by the 1920s.³⁵ Although blues derives from forms of African American music, clear lines do not always exist between folk culture and popular culture.³⁶

As was the case with later musicians who copied and borrowed from blues, the folklorists and record industry scouts who mined blues music from the Mississippi Delta were focused on finding “authentic” forms of musical production.³⁷ The activities of folklorists and record industry scouts gave aspiring and professional African American musicians during that time period significant incentives to produce the type of music that would more likely offer them the opportunity to be recorded.³⁸ This focus on authenticity reflects a historic emphasis in the folklore discipline.³⁹

³² *Id.* at 84.

³³ See King, *supra* note 30, at 459 (describing Mississippi as the “lynching capital of the U.S.”); see also Frantz Fanon, Racism and Culture, Speech Before the First Congress of Negro Writers and Artists in Paris (Sept. 1956), in TOWARD THE AFRICAN REVOLUTION 29, 37 (Haakon Chevalier trans., 1967) (“Thus the blues—‘the black slave lament’—was offered up for the admiration of the oppressors. This modicum of stylized oppression is the exploiter’s and the racist’s rightful due. Without oppression and without racism you have no blues. The end of racism would sound the knell of great Negro music.”).

³⁴ See King, *supra* note 30, at 460 (“The Mississippi Delta is still segregated and many of its citizens, especially African-Americans, still live in abject poverty. For example, in 1999, nearly 75 percent of the black households in the small Delta town of Shelby did not possess a car.”) (citation omitted).

³⁵ See SOUTHERN, *supra* note 21, at 332.

³⁶ HERBERT GANS, POPULAR CULTURE AND HIGH CULTURE: AN ANALYSIS AND EVALUATION OF TASTE 38 (1999) (discussing borrowings in high culture and popular culture from folk culture); JOHN STOREY, AN INTRODUCTORY GUIDE TO CULTURAL THEORY AND POPULAR CULTURE 17-18 (1993) (noting the definitional problems in distinguishing between popular culture and other forms of cultural production); DOMINIC STRINATI, AN INTRODUCTION TO THEORIES OF POPULAR CULTURE 38 (2004) (discussing the differences between folk, elite, and mass culture).

³⁷ BENJAMIN FILENE, ROMANCING THE FOLK: PUBLIC MEMORY AND AMERICAN ROOTS MUSIC 49 (2000) (discussing the cult of authenticity surrounding folk music created by John and Alan Lomax).

³⁸ See WALD, *supra* note 3, at 22 (“[B]lack performers were ghettoized, and their access to the recording world was dependent on their singing ‘black’ music . . .”).

³⁹ See REGINA BENDIX, IN SEARCH OF AUTHENTICITY: THE FORMATION OF FOLKLORE STUDIES

The British musicians who were influenced by blues traditions in the 1950s and 1960s, however, also tended to view blues through a particular lens that reinforced existing emphases on authenticity.⁴⁰ This focus on authenticity was also evident in the activities of the earliest critics and collectors of blues music,⁴¹ who played an important role in constructing the blues canon.⁴² This focus on authenticity by varied actors in the blues arena at different points in time has meant that the corpus of early blues recordings represents a biased sample.⁴³ The magnitude of this bias can only be estimated.⁴⁴ The other types of music that early blues recording artists could and did perform have consequently been largely lost.⁴⁵

This focus on authenticity in blues had two important consequences. First, it led many to consider blues a primitive form of folk music, rather than as a form of music that, like ballet, was derived from folk forms but that also came to be performed by pro-

198 (1997); Ron Eyerman & Scott Baretta, *From the 30s to the 60s: The Folk Music Revival in the United States*, 25 THEORY & SOC'Y 501, 512 (1996) (noting that the African American folk musician Leadbelly was coached by the Lomaxes as to his repertoire); Benjamin Filene, "Our Singing Country": John Lomax, Alan Lomax, Leadbelly and the Construction of an American Past, 43 AM. Q. 602, 613 (1991) (noting that the Lomaxes worked hard to preserve Leadbelly's authenticity and at times controlled his repertoire).

⁴⁰ WALD, *supra* note 3, at 46-48.

⁴¹ Eyerman & Baretta, *supra* note 39, at 503, 508, 510 (noting that American folk music was invented in the 1930s by an urban intellectual elite with a left political orientation and that early recording undertaken under the Federal Arts Project of the WPA led to the creation of an archive or even canon of folk music for future generations and movements).

⁴² See Mike Daley, "Why Do Whites Sing Black?": The Blues, Whiteness, and Early Histories of Rock, 26 POPULAR MUSIC & SOC'Y 161, 163 (2003) (noting that the idea of blues is a constructed one influenced by multiple sources, including collectors, critics, and the musicians who reinterpreted the blues for a wider audience); John Dougan, *Objects of Desire: Canon Formation and Blues Record Collecting*, 18 J. POPULAR MUSIC STUD. 40, 40 (2006).

⁴³ See WALD, *supra* note 3, at 57 ("[O]verall the recordings left to us by the folklorists and the commercial companies both tend to give a skewed view of the racial divide in the music of early rural performers, and reinforce the impression that such players were limited to a distinct 'country' repertoire."); Scott DeVeaux, *Bebop and the Recording Industry: The 1942 AFM Recording Ban Reconsidered*, 41 J. AM. MUSICOLOGICAL SOC'Y 126, 127 (1988) (noting the role of the recording industry in the selection process of the existing repertory of bebop recordings in the 1940s); Dougan, *supra* note 42, at 41 (noting the role of recording in the transition of blues music to mass art and the relationship of mostly African American consumers of blues recordings in the 1920s and 1930s and white, male record collectors of the post-World War II era who became self-appointed keepers of the canon); Filene, *supra* note 39, at 619 (discussing an episode in which the Lomaxes, who operated closely with prison officials, attempted to get a recording from a prisoner who was brought to the room at gunpoint and noting that the "Lomaxes did not reflect on whether going to such lengths to ferret out songs created a skewed portrait of America's folk music"); H. Bruce Franklin, *Songs of an Imprisoned People*, 6 MELUS 6, 15 (1979) (noting that John Lomax collected ten versions of the work song "Go Down Old Hannah" from Texas convicts).

⁴⁴ See WALD, *supra* note 3, at 47 (noting that record scouts discouraged black musicians from playing "hillbilly" music, which is why "all but a tiny sample of rural fiddle music" recorded during the 1920s come from white players); Dougan, *supra* note 42, at 43 (noting that talent scouts and label executives discouraged artists from recording popular non-blues songs that would have required that they pay mechanical royalties).

⁴⁵ WALD, *supra* note 3, at 57.

professional musicians.⁴⁶ Although the folk tradition existed alongside professional blues musicians, some of the rural blues musicians who were recorded in the 1920s were professional musicians.

⁴⁷ Second, the tendency to see blues music as a primitive form of collective folk production reflected widespread stereotypes about African Americans and was part of a conceptual framework of later borrowers that facilitated the free borrowing of such music, often without attribution, let alone compensation.⁴⁸ Later borrowers were, however, not the only ones to profit from early blues artists. Both folklorists and record industry participants in some instances claimed copyrights in the music that they “discovered.”⁴⁹

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

Robert Johnson was murdered at age twenty-seven. He died impoverished in obscurity under mysterious circumstances in 1938 at a country crossroads near Greenwood, Mississippi. The circumstances of Johnson’s death remained unknown, uncertain and a subject of much speculation for decades after his death.⁵⁰ Robert Johnson’s death remains a subject of discussion among blues fans, even more than half a century after his death.⁵¹

Although speculation about Johnson’s cause of death still exists, the best evidence suggests that Johnson, who had a reputation as a ladies’ man who enjoyed his liquor, appears to have been given a whiskey drink poisoned by the husband of one of his lov-

⁴⁶ *Id.* at 43; PETER GURALNICK, SEARCHING FOR ROBERT JOHNSON 48 (1989) (noting that Robert Johnson was a professional musician).

⁴⁷ WALD, *supra* note 3, at 43 (noting that the purveyors of blues recorded in the 1920s were people who played music for a living, some of whom had other jobs as well).

⁴⁸ See *infra* notes 174-189 and accompanying text.

⁴⁹ Ulrik Volgsten & Yngve Åkerberg, *Copyright, Music, and Morals: Artistic Expression and the Public Sphere*, in MUSIC AND MANIPULATION: ON THE SOCIAL USES AND SOCIAL CONTROL OF MUSIC 336, 337 (2006) (describing folk collector Alan Lomax’s copyright claims with respect to Leadbelly); David Marsh, Mr. Big Stuff: Alan Lomax: Great White Hunter, or Thief, Plagiarist, and Bigot, COUNTERPUNCH, July 21, 2002, <http://www.counterpunch.org/marsh0721.html> (criticizing Alan Lomax’s refusal to surrender income from copyright claims relating to Leadbelly’s music); see *infra* notes 174-189 and accompanying text.

⁵⁰ Blues researcher and collector, Gayle Dean Wardlow, found Johnson’s death certificate after years of rumors about where, when and how he died. Wardlow searched from 1965 to 1968 in Mississippi, Arkansas, and Texas and eventually found evidence of Johnson’s death. Gayle Dean Wardlow, *Searching for the Robert Johnson Death Certificate (1965-1968)*, in CHASIN’ THAT DEVIL MUSIC: SEARCHING FOR THE BLUES 86, 86-90 (1998). See also Harris v. Johnson (*In re Johnson*) (*Harris II*), 767 So.2d 181, 182 (Miss. 2000) (noting that Johnson died an apparent indigent).

⁵¹ David Connell, Retrospective Blues: Robert Johnson—An Open Letter to Eric Clapton, 333 BRIT. MED. J. 489, 489 (2006), available at <http://www.bmj.com/cgi/content/full/333/7566/489> (responding to Eric Clapton’s discussion about Robert Johnson and noting that Johnson’s death may have been caused by Marfan’s syndrome, which may be indicated by Johnson’s unnaturally long fingers as evident in his photographs).

ers.⁵² However, many different accounts have been given of his death over the years, including rumors that Johnson was shot or stabbed, died of syphilis (the actual cause of death listed on his death certificate), or died of pneumonia.⁵³ Mack McCormick, a researcher said to have interviewed actual witnesses to Johnson's death, corroborates the scenario of murder by poison. According to McCormick, "[t]he accounts agreed substantially as to the motive, the circumstances, and in naming the person responsible for the murder. It had been a casual killing that no one took very seriously. In their eyes Robert Johnson was a visiting guitar player who got murdered."⁵⁴ Johnson's death came at a pivotal time in his career – less than two years after he made his first recordings, which consist of two discs of twenty-nine recordings made in two separate recording sessions in 1936 and 1937.⁵⁵ Around the time of his murder, a leading jazz impresario, John Hammond, was trying to locate Johnson to invite him to appear in a groundbreaking concert entitled "From Spirituals to Swing" to take place in New York City's Carnegie Hall.⁵⁶

Johnson was one of a number of musicians who made their way through the Mississippi Delta during his lifetime. Although Johnson is now a cult idol, surprisingly little is known about his life. Further, as blues musician and Robert Johnson scholar Elijah Wald has noted, Johnson's "legend, combined with the many blank spaces in his story, have created a mass of exaggerations, confusion, legal cases, and secretiveness that make [any attempt to create a full biography of Johnson] both frustrating and futile."⁵⁷

Robert Johnson is now considered the most influential blues musician from the early period of blues recording.⁵⁸ This was not always the case, and Johnson was not among the most popular blues musicians of his time,⁵⁹ at least based on record sales of his recordings at the time of their initial release.⁶⁰ Nevertheless,

⁵² WALD, *supra* note 3, at 122-24.

⁵³ *Id.* at 124.

⁵⁴ GURALNICK, *supra* note 46, at 50.

⁵⁵ See *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 686 (9th Cir. 2000) (noting that Johnson recorded twenty-nine songs in two recording sessions in November 1936 and June 1937 before he was murdered in 1938); see also WALD, *supra* note 3, at 126-89 (listing and assessing all of the recordings made by Johnson in his two recording sessions).

⁵⁶ WALD, *supra* note 3, at 186-87.

⁵⁷ *Id.* at 105.

⁵⁸ Charles Ford, *Robert Johnson's Rhythms*, 17 *POPULAR MUSIC* 71, 71 (1998) (noting that Robert Johnson provides one of the few pre-war influences on rock and attributing his influence to his pitch and timbre and irregular, syncopated rhythms).

⁵⁹ WALD, *supra* note 3, at xv (noting that Johnson's music excited little interest among black blues fans of his time); Ford, *supra* note 58, at 78 (stating that "Terraplane Blues" was the only Johnson recording to achieve substantial sales).

⁶⁰ WALD, *supra* note 3, at xv (noting the lack of popularity of Johnson's music in the re-

Robert Johnson's music is described as having emotional intensity and visceral appeal, as well as important aesthetic and musical qualities.⁶¹

Later commentators have typically placed Johnson on a pedestal far above those who played during his era,⁶² elevating his status by using language typically associated with Romantic author discourse that emphasizes the unique genius of Johnson's compositions. Romantic author discourse has generally played an important role in defining who constitutes an "author" for copyright purposes in part by emphasizing the unique and genius-like contributions of individual creators. Romantic author assumptions are a primary mechanism by which borrowing and collaboration in creation are minimized or even denied.⁶³ This vision of authorship has significant implications for the application of copyright to blues music. The collaborative nature of blues musical composition does not lend itself well to Romantic author characterizations. In blues practice, the combination of individual performers crafting material from a collaborative tradition has involved widespread copying, which is contrary to dominant assumptions about copying and creation in copyright. Later romanticization of his musical creations aside, Robert Johnson falls firmly within a blues tradition characterized at least in part by copying, including through repetition and reuse of existing music and lyrics as a core aesthetic.⁶⁴ The divergence between Robert Johnson's actual musical practice and later characterizations of both the nature and musical practices underlying his "musical genius" is thus significant.⁶⁵

The conceptual positioning of Robert Johnson and his talents are important for understanding how he became so prominent as compared with his peers. Robert Johnson is separated from the

cordings released before his death).

⁶¹ James Bennighof, *Some Ramblings on Robert Johnson's Mind: Critical Analysis and Aesthetic Value in Delta Blues*, 15 AM. MUSIC 137, 138 (1997).

⁶² WALD, *supra* note 3, at xv ("[Johnson's] music excited so little interest among the black blues fans of his time, and yet is now widely hailed as the greatest and most important blues ever recorded.")

⁶³ See Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 15, 21 (Martha Woodmansee & Peter Jaszi eds., 1994) (discussing the "modern myth that genuine authorship consists in individual acts of origination"); see also Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29, 40, 48 (Martha Woodmansee & Peter Jaszi eds., 1994) (noting that assumptions about cultural production in existing legal cases discourage artists who use existing materials).

⁶⁴ Ford, *supra* note 58, at 88 (noting that Johnson borrowed and pasted-in materials much like his predecessors and shaped his pieces into unique and autonomous forms).

⁶⁵ Questions concerning repetition and reuse are by no means limited to blues and are evident, for example, in contexts of software copyright. See Jacqueline Lipton, *IP's Problem Child*, 58 HASTINGS L.J. 205 (2006).

broader field of blues musicians by being characterized as a musical genius and creator of a unique corpus of music:

Robert Johnson became the personification of the existential blues singer, unencumbered by corporeality or history, a fiercely incandescent spirit who had escaped the bonds of tradition by the sheer thrust of genius.

....

Like Shakespeare, though, the man remains the mystery. How was one individual, unschooled and seemingly undifferentiated from his fellows by background or preparation, able to create an *oeuvre* so original, of such sweeping scope and power, however slender the actual body of work may have been in Johnson's case. The sources of his art will likewise remain a mystery. The parallels to Shakespeare are in many ways striking. The towering achievement. The shadowy presence I am not arguing that Robert Johnson's art has a Shakespearean scope . .

..

....

As a lyric poet, though, he occupies a unique position where he can very much stand on his own. His music remains equally unique. Not that it cannot be placed within a definable tradition.⁶⁶

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

Finally we came to Robert Johnson, the most famous Mississippian of all. My students had all heard of him, knew he was supposed to be the pinnacle of the Delta style, but most had never actually listened to his music. Now, as he sang and played, they looked at me blankly. What was so special about this? Compared to some of the earlier players, Johnson seemed rather sedate. Why would he be hailed as a musical revolutionary, towering above his elders and contemporaries?

I did my best to come up with answers, but I was caught off guard, and over the next months this experience forced me to rethink much of what I knew—or thought I knew—about blues. My student's reaction, far from being stupid or ill-informed, was closer to the reaction of most 1930s blues fans than mine was.⁶⁷

⁶⁶ GURALNICK, *supra* note 46, at 2, 6, 55-56.

⁶⁷ WALD, *supra* note 3, at 126-27.

Later characterizations of Johnson and his contributions were facilitated by the mystery of Robert Johnson,⁶⁸ including his fairly obscure life, mysterious death, and the lack of any visual representations or photos of him until some thirty-five years after his death.⁶⁹ Johnson's mystery was also enhanced by his alleged connections to Satanism. As the story is sometimes told, Johnson is said to have received his guitar-playing skills as the result of a deal with the Devil.⁷⁰ Elijah Wald, who attended the dedication of Johnson's grave marker in Mississippi in 1991, describes the scene, noting that the members of Mount Zion Missionary Baptist Church where Johnson is said to have been buried "had been a bit dubious, especially after learning that Robert Johnson was famous not only for his music but for being involved with satanic forces . . ."⁷¹

Given that an estimated 517 reported lynchings occurred in the Mississippi Delta (described as the "lynching capital of the U.S.") between 1892 and 1927,⁷² the mysterious death of a black male in the Mississippi Delta during this time period was likely neither unique nor unusual. The Mississippi Delta, which makes up one-sixth of the state's area,⁷³ accounted for more than one-third of the lynchings reported in Mississippi between 1900 and 1930,⁷⁴ and "was legendary for towns with signposts warning black people not to be caught within their borders after sundown."⁷⁵ Notably, the death of Johnson was to some extent extracted from its violent context and imbued with a mystery that only further contributed to Johnson's mystique. As a result, Johnson's death became a factor that distinguished him from other blues musicians and "has spawned more questions and controversies than any other event in

⁶⁸ SAMUEL CHARTERS, ROBERT JOHNSON 4 (1973) ("Until his sister was found recently in Washington, D.C. Robert Johnson's life was one of the elusive mysteries of the blues.")

⁶⁹ Anderson v. LaVere, 895 So. 2d 828, 831 (Miss. 2004) (noting that Robert Johnson's photographs were given to Steve LaVere, a music historian, in connection to a transaction in which Johnson's heirs assigned to LaVere the rights to photographs of Johnson and other memorabilia and copyright to Johnson's works in exchange for 50 percent of any royalties to be earned by LaVere for their use).

⁷⁰ WALD, *supra* note 3, at 265-67 (noting the cliché that connects Robert Johnson and the Devil); see also Gayle Dean Wardlow, *Stop, Look, and Listen at the Cross Road*, in CHASIN' THAT DEVIL MUSIC: SEARCHING FOR THE BLUES 196, 196, 203 (1998) (noting "the present-day myth that Robert Johnson sold his soul to the devil at a cross road in exchange for phenomenal guitar skills has no single source" and that record companies in the 1920s used the devil theme to "depict the dangers associated with playing the blues").

⁷¹ WALD, *supra* note 3, at xvii.

⁷² King, *supra* note 30, at 459.

⁷³ WALD, *supra* note 3, at 84.

⁷⁴ See JAMES C. COBB, THE MOST SOUTHERN PLACE ON EARTH: THE MISSISSIPPI DELTA AND THE ROOTS OF REGIONAL IDENTITY 114 (1992).

⁷⁵ WALD, *supra* note 3, at 84.

blues history.”⁷⁶ The lack of knowledge about Johnson also contributed to Johnson’s status as a blues cultural icon and meant that many later fans could use Johnson as “a screen on which [to project their] dream movie of the blues life.”⁷⁷

Conceptions of Robert Johnson’s work highlight the context-dependent nature of notions of originality. Originality is yet another characteristic of copyrightability that is not always easy to delineate in actual contexts of creation.⁷⁸ What might seem original to those in one context may not seem as original in other contexts. Consequently, within the context of African American audiences of the 1920s and 1930s, Johnson’s work probably did not seem startlingly original in the way that it did to British and other musicians and audiences listening to Johnson’s music, often in relative isolation, in the 1950s and 1960s. This later audience was largely removed from the original context of other music that was prevalent at the time Johnson produced his music, or was only able to listen to a limited, and likely biased, sample of such music.⁷⁹

For early African American blues listeners, what seemed original and interesting was very different from what seemed interesting and original to the largely white blues fans that were the major force behind the blues revival in the 1950s and 1960s.⁸⁰ For the latter, romantic conceptions about the blues were closely tied to notions of authenticity that are often unsuited to musical creation in living musical traditions.⁸¹ Changing patterns of reception of blues underscore that what is perceived as original may depend in significant part on contexts within which listeners hear music.⁸² For this reason, assessments of originality, particularly with respect to older music, are potentially quite difficult, in part because of selection bias that results in contemporary listeners only being ex-

⁷⁶ Gayle Dean Wardlow, *Robert Johnson: New Details on the Death of a Bluesman*, in CHASIN’ THAT DEVIL MUSIC: SEARCHING FOR THE BLUES 91, 91 (1998).

⁷⁷ WALD, *supra* note 3, at xvi; see also BARRY LEE PEARSON & BILL MCCULLOCH, ROBERT JOHNSON: LOST AND FOUND 1 (2003) (“Decades after his death this slightly built African American drifter named Robert Johnson rose from obscurity to become an all-American musical icon, the best-known although least understood exemplar of the Mississippi Delta blues tradition.”).

⁷⁸ *Back to Hip Hop*, *supra* note 1, at 565-69.

⁷⁹ Ford, *supra* note 58, at 86 (discussing the author’s introduction to blues as a member of the British substantial minority who had an interest in blues as a declining form of “negro music” and noting that rural blues were at that time “mistakenly . . . valued for their pre-commercial authenticity, an attitude which quickly degenerated into an atavistic idealisation of ‘primitive spontaneity’”).

⁸⁰ WALD, *supra* note 3, at xvi-xvii (noting the different reactions and responses to white and black audiences for blues).

⁸¹ See *Back to Hip Hop*, *supra* note 1, at 586-88 (discussing how notions of authenticity have contributed to the creation of the classical music canon since the nineteenth century).

⁸² Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation and Context* 41 U.C. DAVIS L. REV. 477, 489, 513, 515 (2007) [hereinafter *Freedom to Copy*].

posed to a portion of the broader music scene during the time such older music was produced.⁸³ Although Elijah Wald also describes Robert Johnson as a “unique genius,”⁸⁴ he notes that later users who listened to Johnson did not discover him “by way of the records that preceded and surrounded him” Wald continues

[Rather, they came] to him by traveling backward from the Rolling Stones via Chuck Berry and Muddy Waters—the path taken by virtually all modern listeners. Given this, their reactions made perfect sense. Not that I believe Johnson was in any way an ordinary talent, but what makes him great is by no means as obvious and clear-cut as it has often appeared to the generations of white rock and jazz fans who have heard him in a vacuum, cut off from the larger blues world of his time.⁸⁵

Determinations of originality are increasingly of concern today given the longer duration of copyright protection, which makes assessments of originality more difficult, particularly with respect to music of earlier generations.⁸⁶ Further, determining what is original is increasingly difficult in a world in which technology facilitates widespread preservation and ease of access to music of earlier eras.

Segmentation of the recording industry by race has further complicated assessments about originality in that music that may seem original in one context may actually be quite commonplace in another. Furthermore, industry practices may also shape determinations of what is considered original. In the early blues arena, concepts of originality derived from copyright law also influenced the types of blues music that were recorded because record company scouts required that any recorded songs be original so as to avoid copyright mechanical licensing fees.⁸⁷

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

The diffusion of blues music outside of its contexts of origin raises important issues about how copyright operates in particular arenas separated in time or space or both. In the case of blues,

⁸³ WALD, *supra* note 3, at 30-42 (discussing the ways in which blues scouts selected musicians to record and helped determine what type of music such musicians performed).

⁸⁴ *Id.* at 128.

⁸⁵ *Id.* at 127-28.

⁸⁶ *Bach to Hip Hop*, *supra* note 1, at 632-33 (noting potential difficulties that may result from an expansion on copyright duration).

⁸⁷ See Dougan, *supra* note 42, at 43 (“Originality was an aesthetic designation partly defined by copyright law and, to all those involved in the race record business, meant that a song could not show the influence of anything previously recorded or published.”) (citation omitted).

diffusion took place in a broader milieu characterized by significant inequalities and oppression, which has profound implications for copyright law that are often not sufficiently considered in copyright discussions. The diffusion of blues also raises questions about the boundaries between diffusion and exploitation. The diffusion of blues thus highlights the importance of copying as a critical and positive cultural force. At the same time the diffusion of blues forces consideration of when uses of existing material with limited or no compensation may be inappropriate given the contexts of such usage.

Blues diffused from the southern U.S. northward with the migration of significant numbers of African Americans north in the early twentieth century.⁸⁸ The diffusion of blues, involved widespread copying of both blues forms and blues musicians. The diffusion of blues was accompanied by the invention of new narratives about the blues. Such narratives included a recalibration of the legacy of early blues artists by early jazz critics, collectors, and others, including a reevaluation of the contributions of Robert Johnson. Foremost among those who have contributed to the deification of Robert Johnson are rock and roll musicians who came of age in Britain and who were significantly influenced by blues music in the 1950s and 1960s.⁸⁹ The names of those so influenced reads like a “who’s who” of the early rock and roll era and include the Beatles, the Rolling Stones, Eric Clapton, The Who, Cream, Jeff Beck, Led Zeppelin, Fleetwood Mac, the Yardbirds, the Kinks, and the Animals.⁹⁰ Ironically, even American rock and roll artists such as Bruce Springsteen also connected to American blues music through British bands of the 1960s and 1970s.⁹¹

These later blues aficionados and the reverence expressed for the blues by many of them had a tremendous impact on the reception of Robert Johnson during the rock era because “the language

⁸⁸ See CLYDE WOODS, DEVELOPMENT ARRESTED: THE BLUES AND PLANTATION POWER IN THE MISSISSIPPI DELTA 103-04, 115 (1998) (noting that in 1890 one in ten African Americans in the U.S. lived in Mississippi, that 60 percent of the Mississippi population, or 743,000 people, was African American and that more than 100,000 African Americans left Mississippi between 1915 and 1920 for factory and domestic work in Memphis, St. Louis, Detroit, and Chicago, with Chicago rapidly emerging as a Delta blues center).

⁸⁹ PEARSON & MCCULLOCH, *supra* note 77, at 108-09 (discussing why Johnson was singled out for special veneration); ROBERT FREUND SCHWARTZ, HOW BRITAIN GOT THE BLUES: THE TRANSMISSION AND RECEPTION OF AMERICAN BLUES STYLE IN THE UNITED KINGDOM ix (2007).

⁹⁰ STEPHEN DAVIS, HAMMER OF THE GODS: THE LED ZEPPELIN SAGA 5 (1997) (“In fact all the young English musicians to flood America in the wake of the Beatles—the Rolling Stones, Animals, Yardbirds, and Kinks in the first wave; Cream, Fleetwood Mac, Jeff Beck, and Led Zeppelin in the second—considered themselves blues scholars.”); PALMER, *supra* note 15, at 235–36 (noting the influence of blues artists on musicians in Britain).

⁹¹ SCHWARTZ, *supra* note 89, at ix.

of Robert Johnson entered into the common vocabulary of rock . . . [p]rimarily through the Rolling Stones and Eric Clapton and their versions of Johnson's 'Love in Vain' and 'Crossroads' in particular."⁹² Robert Johnson is thus different from many other early blues musicians in his transition from a little known blues musician who died young to his status as a cultural icon of later eras. Johnson's status is also reflected in the accolades accorded him by later rock musicians. For example, Eric Clapton has stated, "Robert Johnson to me is the most important blues musician who ever lived I have never found anything more deeply soulful than Robert Johnson. His music remains the most powerful cry that I think you can find in the human voice."⁹³

The current status of Robert Johnson today illustrates the fact that cultural icons and cultural branding are increasingly important aspects of the broader entertainment industry.⁹⁴ Cultural icons represent exemplary "symbols that people accept as a shorthand to represent important ideas."⁹⁵ Robert Johnson has come to represent the idea of the early blues musical tradition. The increasing importance of cultural icons such as Robert Johnson has also accentuated the influence of models of copyright exploitation based on valuable asset conceptions of culture.⁹⁶ Such valuable asset models that focus on the exploitation of cultural material as assets have contributed to the rise of industries based on cultural icons.⁹⁷ Further, the distribution of copyright rewards reflects the business implications of cultural icons reflected in the "enormous incomes of top producers of intellectual property."⁹⁸ This distribution of reward has implications for assumptions about copyright incentives and rewards that merit further examination. The Robert Johnson story also demonstrates some ways in which copyright may in some instances operate as a lottery with respect to investment decisions in expressive works.

The emergence of Robert Johnson as a blues cultural icon

⁹² GURALNICK, *supra* note 46, at 5.

⁹³ WALD, *supra* note 3, at 247.

⁹⁴ DOUGLAS B. HOLT, HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING 1-2 (2004) (noting that cultural icons "dominate our world" and that the use of cultural icons has changed in modern times in that the circulation of cultural icons has become a central economic activity, including through cultural icons such as James Dean "take on such intensive and pervasive meaning . . .").

⁹⁵ Holt, *supra* note 94, at 1.

⁹⁶ Olufunmilayo B. Arewa, *All Work and No Play . . . : Intellectual Property as Serious Business* 2-4 (2009) (manuscript on file with author) [hereinafter *All Work and No Play*].

⁹⁷ David Wall, *Reconstructing the Soul of Elvis: The Social Development and Legal Maintenance of Elvis Presley as Intellectual Property*, 24 INT'L J. SOC. L. 117, 119 (1996) (noting the development of the Elvis industry within hours of his death).

⁹⁸ WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 54 (2003).

marks an important transition from conception of blues as an innovative living tradition to that of blues as a valuable asset and important source of proceeds for eminent blues artists. The implications of valuable asset models are all the more pertinent given that copyright frameworks have, to date, not sufficiently grappled with the reality of borrowing as a norm and the ways in which sharing and collaboration are inherent aspects of many living cultural traditions.⁹⁹ Rather, in parallel with the increasing importance of cultural icons, copyright has increasingly come to accept models based on cultural production as a valuable asset to be used only by true creators and authorized users.¹⁰⁰ This view of copyright has tremendous implications for copying by later creators who use existing works in their creations that is even more magnified in contexts of living artistic traditions.

In large part due to his status as a cultural icon and his influence on British rock and roll artists, Robert Johnson has come to symbolize early and authentic blues. Robert Johnson is thus distinguished in many respects in the blues arena by the ways in which later blues fans identify with his persona and music. The mystery and enigma surrounding both his life and death have undoubtedly made his appeal all the more intense for his fans. Although Robert Johnson represents an earlier artist who became eminent in a later era, his status as a cultural icon reflects general trends in the entertainment industry. Cultural icons have in particular become an inseparable part of the music industry because, in part, “commercial imperatives of the music industry necessarily lead to the promotion of a star system”¹⁰¹ Cultural icons have copyright implications because such icons are often imbued with characteristics that parallel features used to describe artistic production within Romantic author conceptions.

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

⁹⁹ *All Work and No Play*, *supra* note 96, at 6.

¹⁰⁰ *Id.*; Michael J. Madison, *IP and Americana, or Why Intellectual Property Gets the Blues*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L. J.* 677, 688-703 (2008) (noting ways in which copyright law may have maintained or enabled changes in blues musical practice).

¹⁰¹ Reebee Garofalo, *How Autonomous is Relative: Popular Music, the Social Formation and Cultural Struggle*, 6 *POPULAR MUSIC* 77, 81 (1987) [hereinafter *Autonomous is Relative*].

death.¹⁰²

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

II. RACE MUSIC: BLUES AND THE RECORDING INDUSTRY

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

Music and musical genre have often been conceptualized in racial terms.¹⁰³ As a result, certain types of music may be categorized as connected to particular racial or ethnic groups. Contemporary genre categories reflect in part the historical legacy of racial categories that have been an integral part of the marketing of records since the earliest days of the recording industry.¹⁰⁴ Although genres are frequently taken for granted today, we often do not appreciate the ways in which the recording industry has shaped not only genres but also the types of music that different musicians could record.¹⁰⁵ Consequently, the fact that black hill-

¹⁰² GURALNICK, *supra* note 46, at 2, 6, 55-56.

¹⁰³ WALD, *supra* note 3, at 28 (noting that views of music history are steeped in race); William G. Roy, "Race Records" and "Hillbilly Music": *Institutional Origins of Racial Categories in the American Commercial Recording Industry*, 32 *POETICS* 265, 277 (2004) (noting that recording industry marketing categories eventually became musical genres, which served as aesthetic guides to performance).

¹⁰⁴ Roy, *supra* note 103, at 266 (noting that in the 1920s recording firms adopted blatantly racial categorical schemes for their catalogs and marketing that consisted of the category of "race records" to describe African American music and "hillbilly" or "old time" music to describe the music of rural whites).

¹⁰⁵ See Keith Negus, *Cultural Production and the Corporation: Musical Genres and the Strategic Management of Creativity in the US Recording Industry*, 20 *MEDIA, CULT & SOC'Y* 359, 360 (1998) (considering the ways in which recording companies divide operations according to socio-cultural identity labels and the ways in which this industry organization can be used as a "direct intervention into and contribution towards the way in which social life is rationalized and fragmented and through which different experiences are separated and treated unequally."); Damon J. Phillips & David A. Owens, *Incumbents, Innovation and Competence: The Emergence of Recorded Jazz, 1920 to 1929*, 32 *POETICS* 281, 292-93 (2004) (discussing the ways in which recording industry behaviors, including those with respect to the race, shaped musical innovation in jazz in the 1920s). See generally CHRISTOPHER SMALL, *MUSIC OF THE COMMON TONGUE: SURVIVAL AND CELEBRATION IN AFRICAN AMERICAN*

billy singers existed in significant number and that musicians often classified within the blues genre could create and play a broad range of music from hoedown music to hillbilly music has been written out of or minimized in much music history.¹⁰⁶ Further, the role of white musicians, particularly in early blues traditions, is often ignored.¹⁰⁷ The influence of blues on the country music tradition is also typically diminished,¹⁰⁸ despite the fact that a significant African American hoedown tradition profoundly influenced country music.¹⁰⁹ Also minimized today is the extent to which musicians and music, both tunes and styles, crossed racial categories. For example, “several interracial string bands recorded in the 1920s” and “across the South, if one bothers to ask, one finds reports of black and white musicians working together.”¹¹⁰

Also often forgotten is how genres and categories of music were in large part invented as a means of filing and marketing records.¹¹¹ Prior to the advent and dissemination of records and recording technology, entertainment was largely live, much more diverse, and less amenable to classifications and hierarchies of musical production, although such hierarchies were increasingly evident even in live performance traditions of the nineteenth century.¹¹² Further, prior to the dissemination of records, musicians had to be versatile performers who could play a broad variety of music.¹¹³ Genre distinctions were thus much less part of the musical lives of most people prior to the advent of recorded music.¹¹⁴ Prior to the recording age, African American musicians, for example, typically played a broad range of music. In Colonial Amer-

MUSIC 395 (1987) (noting the profound influence of records and the recording industry on Western musical performance in the twentieth century).

¹⁰⁶ WALD, *supra* note 3, at 44.

¹⁰⁷ *See id.* at 18 (noting that little attention has been devoted to early white blues pioneers such as Morton Harvey, Al Brenard, and Marion Harris).

¹⁰⁸ *See* Rebecca Thomas, *There's a Whole Lot O'Color in the "White Man's" Blues: Country Music's Selective Memory and the Challenge of Identity*, 38 *MIDWEST Q.* 73, 81 (1996) (noting that DeFord Bailey, an African American country music artist, performed in the Grand Ole Opry on radio shows but was fired as new technology brought the Opry into people's homes).

¹⁰⁹ WALD, *supra* note 3, at 47 (noting that “[m]ost experts agree that between a third and a half of the standard Southern fiddle repertoire is drawn from the black tradition”); Thomas, *supra* note 108.

¹¹⁰ WALD, *supra* note 3, at 27, 48 (noting that as “for white performers like Bernard and Harris, there has not been even the most cursory study of their work” and that little evidence supports the assertion of some scholars that interracial musical groupings were a rarity).

¹¹¹ *Id.* at 44.

¹¹² LAWRENCE W. LEVINE, *HIGH BROW/LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* 3-9, 56-104 (1988) (describing sacralization in the establishment of hierarchies of forms of cultural production in nineteenth century U.S. expressive culture and the diversity of types of works performed in single performance settings prior to such sacralization).

¹¹³ WALD, *supra* note 3, at 44.

¹¹⁴ *Id.* at 56.

ica, “black musicians provided much of the dance music for the colonists of all classes” in the North and South and played for country dances, balls, and dancing schools.¹¹⁵ The contributions of such musicians were evident in a broad range of musical traditions. For example, “the most sophisticated American guitarist of the nineteenth century was a black man from Virginia, Justin Holland, who introduced the European techniques of [Fernando] Sor and [Matteo] Carcassi to the United States.”¹¹⁶

This variety in musical contexts led to the development of African American musicians who were comfortable playing a diverse range of music of many genres and styles.¹¹⁷ Accomplished black banjo and fiddle players were, for example, not at all atypical in the era before the recording age. Recording industry business and marketing practices, however, created incentives that tended to diminish this diversity of musical styles and performers: “[the choices of recording industry scouts] left black string bands in a double bind: They were banned from the hillbilly catalogs because they were black, and from the Race catalogs because they played hillbilly music.”¹¹⁸

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

With the recording industry came the establishment of categories such as “race music,” “plantation music,” or “coon songs,”¹¹⁹ which meant that the vast majority of African American musicians were marketed playing music that was deemed to be appropriate for the limited African American consumer market rather than the broader public.¹²⁰ The establishment of the recording industry and recording industry marketing practices helped define the types of music that were thought to constitute “black music.” As Elijah Wald notes, “[t]he record companies not only prevented

¹¹⁵ SOUTHERN, *supra* note 21, at 43.

¹¹⁶ WALD, *supra* note 3, at 46.

¹¹⁷ *Id.* at 44.

¹¹⁸ *Id.* at 52; *see also* SOUTHERN, *supra* note 21, at 43 (noting that one of the best known fiddle players in New England was a slave named Samson, owned by Colonel Archelaus Moore).

¹¹⁹ Thomas, *supra* note 108, at 74.

¹²⁰ Perry A. Hall, *African-American Music: Dynamics of Appropriation and Innovation*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 31, 38 (Bruce Ziff & Pratima V. Rao eds., 1997) (“Under the precepts of the recording industry’s segmented marketing systems, however, recordings of [cornetist Louis Armstrong’s and pianist Ferdinand “Jelly Roll” Morton’s] 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 whites as ‘jazz’ through record labels and performance venues specifically marketed to them.” (footnote omitted)).

black bands from playing what was perceived as ‘white’ music, but limited both white and black musicians in all sorts of important ways.”¹²¹

The term “race music” came to be used by the recording industry to describe music performed by African American musicians and marketed to an African American audience.¹²² The U.S. recording industry began targeting this market in the 1920s.¹²³ This market was targeted, at least in part, because of innovation in the recording industry, particularly from the emergence of smaller, independent companies.¹²⁴

The commercial success of initial “race” records led to the release of numerous other “race” recordings by both small and large recording companies.¹²⁵ The selection of material to be recorded and the marketing of such recordings had, in many cases, a discernible impact on the popularization of recorded music.¹²⁶ In 1949, the “race music” category was changed by the recording industry to rhythm and blues or R&B.¹²⁷ The term “rhythm and

¹²¹ WALD, *supra* note 3, at 52.

¹²² See OLIVER, *supra* note 14, at 1-17 (noting that race records were marketed primarily for a black audience); RAMSEY, *supra* note 25, at 113 (noting that a recording by blues singer Mamie Smith in 1920 helped to establish the race records institution); David Brackett, *What a Difference a Name Makes: Two Instances of African-American Popular Music*, in THE CULTURAL STUDY OF MUSIC: A CRITICAL INTRODUCTION 238, 241 (Martin Clayton, Trevor Herbert & Richard Middleton eds., 2003) (noting that in the 1920s the recording industry organized the popular music fields around the divisions of “popular,” “race,” and “hill-billy”); Stephen Calt, *The Anatomy of a “Race” Music Label: Mayo Williams and Paramount Records*, in RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC 86, 87 (Norman Kelley ed., 2002) (explaining that race music “became a fixture” of the 1920s “because recording policies . . . were increasingly dictated by a new breed of salesmen who were willing to set aside their own musical tastes in the interests of commerce that ‘race’ music became a fixture of the decade”).

¹²³ See Timothy J. Dowd, *Production Perspectives in the Sociology of Music*, 32 POETICS 235, 242-43 (2004) (discussing the ways in which legal struggles in the recording performance rights and radio industries contributed to marketing of “race” music by the recording industry).

¹²⁴ RICK KENNEDY & RANDY MCNUTT, *LITTLE LABELS—BIG SOUND: SMALL RECORD COMPANIES AND THE RISE OF AMERICAN MUSIC* xiv (1999) (noting that in the early 1920s, competition increased in the recording industry that was facilitation by the expiration of key recording technology patents and that some companies created business models pursued rural and black urban audiences that had been neglected by major record companies) Peter J. Alexander, *New Technology and Market Structure: Evidence from the Music Recording Industry*, 18 J. CULTURAL ECON. 113, 118 (1994) (noting that Swan Records, a small, independent company, signed the first popular black female singer to be recorded in 1920); David Davis & Ivo De Loo, *Black Swan Records – 1921-1924: From Swanky Swan to a Dead Duck*, 8 ACCT. HIST. 35, 37 (2003) (discussing the rise and fall of Black Swan Records, a small independent record label that was at one time the most successful African American owned business of the 1920s).

¹²⁵ Alexander, *supra* note 124, at 118.

¹²⁶ See, e.g., Tim Brooks, “*Might Take One Disk of this Trash as a Novelty*”: *Early Recordings by the Fisk Jubilee Singers and the Popularization of “Negro Folk Music*,” 18 AM. MUSIC 278 (2000) (discussing the impact of recordings of the Fisk Jubilee singers on the popularization of “Negro Folk Music”).

¹²⁷ Brackett, *supra* note 122, at 242; see also RIPANI, *supra* note 17, at 5 (noting that the term

blues” then became a marketing term that was applied to a broad range of music whose most significant commonality was the race of its performers and targeted market.¹²⁸ Rhythm and blues thus encompassed blues shouting, jump blues, blues ballads, country blues, vocal groups, and gospel music.¹²⁹ “Race” records and recording industry marketing and business practices are important background factors in considering copyright treatment of blues.

III. COPYRIGHT AND BLUES

A. Copying, Creativity, and Creation in Blues

Blues music has traditionally reflected an aesthetic based on borrowing and other types of copying, which has significantly contributed to the dynamism and widespread reach of blues as a musical form.¹³⁰ The importance of borrowing is by no means unique to blues as a musical form.¹³¹ However, blues compositional practice, particularly in the days of early recorded blues, also reflected significant nonvisual elements in that composition and performance were in many instances not rooted in a visual sheet music tradition. This compositional practice was also closely related to a living performance tradition in which hearing music was likely far more important than seeing it,¹³² and musical transmission between artists involved significant use of shared musical phrases and lyrics.¹³³

Compositional practice and borrowing in the blues tradition is evident in many ways, including through use of common lyrics, music, and musical forms. Borrowing is thus an inherent aspect of the creation and performance of blues music.¹³⁴ Early pre-war

“rhythm & blues” was first used by *Billboard* magazine in its June 25, 1949 issue when the company switched its terms of reference from “Best Selling Race Records” to “Best Selling Retail Rhythm & Blues Records”).

¹²⁸ RIPANI, *supra* note 17, at 6 (noting that “rhythm & blues is a conglomerate of many different musical styles”).

¹²⁹ Thomas, *supra* note 108, at 74; *see also* RIPANI, *supra* note 17, at 6 (noting that acceptance of the characterization of rhythm and blues as a trade category makes explanation of the songs included within the category easier).

¹³⁰ Bruno Nettl, *World Music in the Twentieth Century: A Survey of Research on Western Influence*, 58 *ACTA MUSICOLOGICA* 360, 360-61 (1986) (noting that cultural mixture is a major prevailing force in musical innovation).

¹³¹ *Freedom to Copy*, *supra* note 82, at 484-85.

¹³² WALD, *supra* note 3, at 66, 118 (noting that some blues musicians used lyric sheets, with illiterate ones having lyrics read to them, and that, in addition to creating his own material, Robert Johnson learned songs from recordings and other players).

¹³³ *See infra* notes 134-150 and accompanying text.

¹³⁴ *See* J. Peter Burkholder, *Borrowing*, in 4 *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS* 1, 2 (Stanley Sadie ed., 2d ed. 2001) (noting that “[b]lues and jazz involved improvisation and composition based on existing harmonies, melodies and bass patterns, and similar practices continued into popular music derived from black American traditions, including rhythm and blues and rock and roll.”).

blues performers frequently swapped tunes and lyrics. Willie Dixon's "Hoochie Coochie Man" has the same melody as John Brim's "Tough Times;" Chuck Berry took the talking verse of Bo Diddley's "I'm a Man" for his own piece "No Money Down."¹³⁵ The two Robert Johnson recording sessions, which have been discussed and analyzed in detail,¹³⁶ reflect borrowing from a number of sources, including Leroy Carr,¹³⁷ Kokomo Arnold,¹³⁸ Skip James,¹³⁹ and Son House.¹⁴⁰ When folklorist Alan Lomax first recorded Muddy Waters, Muddy Waters sang his version of a song that was well-known in the Mississippi Delta.¹⁴¹ Muddy Waters called his version "Country Blues."¹⁴² This same song had been recorded by Son House as "My Black Mama" and Robert Johnson as "Walkin' Blues,"¹⁴³ which reflects a creative tradition in blues composition of rearranging existing music and adding new verses.¹⁴⁴

Rock and roll artists in the post-war era also borrowed significantly from the blues tradition. Chuck Berry had deep roots in the blues. Berry "introduced a level of lyrical analysis and comment to rock'n'roll that was firmly rooted in the blues tradition."¹⁴⁵ Similarly, varied British rock and roll artists, including the Beatles, Rolling Stones, Led Zeppelin, Cream, Eric Clapton, The Who, Fleetwood Mac, and others, borrowed and otherwise copied extensively from blues traditions.¹⁴⁶ Given the socio-cultural contexts within which blues arose in the U.S. and the role of racial categories in the recording industry and American life generally, extensive borrowings by British musicians are not surprising. Although

¹³⁵ Paul H. Fryer, "Brown-Eyed Handsome Man": *Chuck Berry and the Blues Tradition*, 42 *PHYLON* 60, 63 (1981).

¹³⁶ See, e.g., WALD, *supra* note 3, at 126-89; CHARTERS, *supra* note 68, at 25-87.

¹³⁷ WALD, *supra* note 3, at 131.

¹³⁸ *Id.* at 133.

¹³⁹ *Id.* at 142.

¹⁴⁰ *Id.* at 150.

¹⁴¹ PALMER, *supra* note 15, at 4 (discussing the first recordings of Muddy Waters).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ WALD, *supra* note 3, at xx (noting that introducing songs as one's own composition meant that a performer had rearranged the compositions and added some new verses); John Cowley, *Really the "Walking Blues": Son House, Muddy Waters, Robert Johnson and the Development of a Traditional Blues*, 1 *POPULAR MUSIC* 57, 58 (1981) (discussing the questions Alan Lomax asked Muddy Waters in August 1941 during interviews in which Muddy Waters noted that his song "Country Blues" used the same tune as Robert Johnson's "Walkin' Blues").

¹⁴⁵ Fryer, *supra* note 135, at 62, 71.

¹⁴⁶ See Wicke & Deveson, *supra* note 21, at 222 (noting that rhythm and blues playing styles were based in part on rhythm and blues playing styles); see also PALMER, *supra* note 141, at 235-36; Charles Gower Price, *Sources of American Styles in the Music of the Beatles*, 15 *AM. MUSIC* 208, 210 (1997); Bruce Tucker, "Tell Tchaikovsky the News": *Postmodernism, Popular Culture, and the Emergence of Rock 'N' Roll*, 9 *BLACK MUSIC RES. J.* 271, 282 (1989).

not without racial issues,¹⁴⁷ British musicians were more removed from American contexts of racial oppression and perhaps more open to overt use of a musical form that ranked at the bottom of American cultural and racial hierarchies.¹⁴⁸

How later artists borrowed from existing blues works reflects important issues connected to copyright and borrowing. In the blues, as is the case with other musical forms based on certain African American aesthetic practices, repetition, revision, and synthesis of varied musical influences is a core aspect of creation and innovation.¹⁴⁹ The varied ways in which new works may be created is often in significant tension with copyright assumptions about the mechanisms and means of transmission used to create new works. Varied aesthetics of creation evident in music and other fields demonstrate that musical innovation and creativity may occur in a broad range of ways.¹⁵⁰

Prevailing views of borrowing in copyright discourse are closely connected to at times vague and mystical representations of creativity that assume that copying of existing texts reflects a lack of creativity or originality.¹⁵¹ The structure of copyright as a property rule and the notion of derivative works are closely tied to assumptions about the ways in which new works should be created.¹⁵² These assumptions about creation are often quite contrary to how creation actually occurs, which presents tremendous problems for a broad range of cultural texts, including those that reflect an African American aesthetic of repetition and revision.¹⁵³ Treatment

¹⁴⁷ COLIN MACINNES, *ABSOLUTE BEGINNERS* 16, 54 (1985).

¹⁴⁸ BAKER, *supra* note 24, at 11 (noting that “Afro-Americans [are] at the bottom even of the vernacular ladder in America . . .”); SMALL, *supra* note 105, at 350 (discussing the “attitude of classical musicians towards the Afro-American tradition” as ranging from “at best incomprehension and condescension” to “at worst [] violent antagonism”).

¹⁴⁹ See BAKER, *supra* note 24, at 172 (describing blues as involving “performers [who] offer interpretations of the experience of experience”); HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM* xxiv (1988) (“Repetition and revision are fundamental to black artistic forms, from painting and sculpture to music and language use.”); David Evans, *Musical Innovation in the Blues of Blind Lemon Jefferson*, 20 *BLACK MUSIC RES. J.* 83, 98 (2000) (noting that Blind Lemon Jefferson’s musical innovation was based on synthesis of existing works and styles); James A. Snead, *On Repetition in Black Culture*, 15 *BLACK AM. LIT. F.* 146, 149–50 (1981) (noting that “[b]lack culture highlights the observance of . . . repetition” and “[r]epetition in black culture finds its most characteristic shape in performance: rhythm in music and dance and language”).

¹⁵⁰ *Bach to Hip Hop*, *supra* note 1, at 627–28.

¹⁵¹ *Id.* at 564–68 (discussing the problematic application of generally accepted conceptions about creativity in copyright to hip hop music); Negus, *supra* note 105, at 362 (discussing writings about creativity and noting that “creativity is often treated in a vague and mystical manner, with many writers assuming that we all know and recognize ‘creativity’ when we meet it.”).

¹⁵² *Bach to Hip Hop*, *supra* note 1, at 570–72.

¹⁵³ *Id.* at 567.

of blues music and blues musicians within copyright frameworks also illustrates some ways in which copyright actually operates in specific contexts that reflect existing inequalities and the influence of factors such as race and fame. Such factors continue to shape applications of copyright in ways that are not always sufficiently analyzed in copyright discourse.

B. *Copyright, Blues, and Hierarchies*

In addition to assumptions about the nature of creation and the use of existing works in new creation and compositional practices, hierarchies of culture and power have played an important role in shaping both copyright and musical industry structures through which copyright is often applied. In the blues context, hierarchies relating to race were inextricably intertwined with copyright treatment of blues artists. Such hierarchies were by no means limited to race; hierarchies relating to gender were evident, for example, in the treatment of blues queens, whose role in the early commercial successes of blues was diminished as a consequence of their gender.¹⁵⁴ Similarly, status hierarchies contributed to the treatment of musicians categorized within the “hillbilly” music genre, which was a corresponding category to “race” records for rural white performers.¹⁵⁵ Treatment of performers by the music industry varied based on performers’ assigned trade categories.

Music publishers allied with the radio and film business were the dominant power in the music industry prior to the rock and roll era.¹⁵⁶ Prior to the Second World War, songs were a primary source of revenues in a market dominated by writers and publishers who exercised power through collective rights organizations such as the American Society of Authors, Composers and Publishers (ASCAP).¹⁵⁷ ASCAP, however, reflected societal hierarchies in excluding black and country and western writers.¹⁵⁸ Broadcast Music Incorporated (BMI) was formed in 1939 in part because of

¹⁵⁴ WALD, *supra* note 3, at 26-27 (“Relatively few CDs attest to the dominance of the blues queens, while there are hundreds of overlapping reissues of their male contemporaries.”); Danaher, *supra* note 15 at 1455; *see also* K.J. Greene, *Blues Women of the 1920s* (2008) (unpublished manuscript, on file with author) [hereinafter *Blues Women*].

¹⁵⁵ Roy, *supra* note 103, at 266 (noting use of the terms “hillbilly” or “old time” music to describe the music of rural whites).

¹⁵⁶ *Autonomous is Relative*, *supra* note 101, at 78; Frank Geels, *Reconfiguring the American Music Industry and the Breakthrough of Rock ‘n’ Roll (1930-1970): A Multi-Level Analysis of the Production, Distribution and Consumption of Music* 6, Paper for the Fourth European Meeting on Applied Evolutionary Economics, May 21, 2005 (connecting the power of music publishers to the Copyright Act of 1909).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

problems with ASCAP.¹⁵⁹ BMI extended the “protection of copyright to the ‘hillbillies’ and the ‘bluesmen.’”¹⁶⁰

The power of music publishers declined as the recording industry became more powerful.¹⁶¹ By the early 1950s, records had replaced sheet music as the primary source of music industry revenue.¹⁶² The shift to recordings as a dominant source of revenue reinforced existing hierarchies, particularly as they related to race. Under the recording industry’s race-based genre categorization system (the names of which have shifted over time from “race” to “rhythm and blues” to “soul” to “black” music), a performer whose music is classified as “black” must first have success in the “black” market before being able to cross over to the pop charts.¹⁶³ On the other hand, white performers such as Bruce Springsteen, start out on the pop charts.¹⁶⁴ These race-based genre distinctions continue to pervade the music industry and influence choices about marketing, booking, and other aspects of the music industry.¹⁶⁵

These types of categorizations have also influenced the ways in which blues music has been borrowed because the original performers of blues and other music categorized as “black” were often not permitted to record that music for “pop” and other market segments that were categorized as “white.”¹⁶⁶ In addition, conventions existed that resulted in African American artists being excluded from various arenas at different points in time, including live radio, because “[i]n the music system, there was a normative convention, shared by radio stations, not to broadcast black performers.”¹⁶⁷

Similarly, copyright law provisions that permit cover re-

¹⁵⁹ Lucia S. Schultz, *Performing-Rights Societies in the United States*, 35 NOTES 511, 516–22 (1979) (noting that radio broadcasters formed BMI in response to alleged excessive pricing, price-fixing, and other practices by ASCAP).

¹⁶⁰ *Autonomous is Relative*, *supra* note 101, at 78.

¹⁶¹ Reebee Garofalo, *From Music Publishing to MP3: Music and Industry in the Twentieth Century*, 17 AM. MUSIC 318, 336 (1999) [hereinafter *Music Publishing to MP3*] (noting that publishing houses became displaced as records became a staple of radio programming instead of performances by live performers).

¹⁶² *Autonomous is Relative*, *supra* note 101, at 78.

¹⁶³ *Id.* at 81.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Geels, *supra* note 156, at 9; see William Barlow, *Black Music on Radio During the Jazz Age*, 29 AFR. AM. REV. 325, 326 (1995) (noting that African American dance bands were seldom heard on radio in the 1920s; instead, “it was the commercial successful white dance bands of the era . . . that were regularly featured on the airways, giving their popularity an added boost.”); Derek W. Vaillant, *Sounds of Whiteness: Local Radio, Racial Formation, and Public Culture in Chicago, 1921-1935*, 54 AM. Q. 25, 29 (2002) (noting total exclusion of African Americans from Chicago radio airwaves in the 1920s and early 1930s with the exception of one radio program).

cordings have, particularly in the past, been used in a way that reinforces existing racial hierarchies. Songs recorded by African American rhythm and blues artists were typically re-recorded in “cover versions” “by another artist in a style thought to be more appropriate for the mainstream market Most of the performers whose songs were covered were black.”¹⁶⁸ Consequently, the sources of such material were often seen as readily appropriable for uses in “white” markets.¹⁶⁹ The industry structures within which blues was created and marketed were shaped by existing socio-cultural hierarchies that, in turn, influenced the application of copyright to the blues and other musical traditions that involved significant numbers of African American performers.

C. *Visual Perceptions of Music and Nonvisual Musical Reproduction*

As a result of musical industry business structures, the application of copyright to music categorized as “black,” which includes but is not limited to the blues, has been historically problematic, contested, and criticized as exploitative.¹⁷⁰ Consideration of the treatment of blues under copyright frameworks also raises significant questions of context. The experience of many blues musicians also highlights fundamental tensions in the application of copyright in varied contexts.

How blues musical production and creativity are conceptualized has significant copyright implications, especially since copyright discourse about creation often emphasizes independent creation by those deemed authors.¹⁷¹ The depictions of Robert Johnson’s contributions to blues music by later musicians and musical commentators highlight the curious ways in which blues creativity may be conceptualized. The elevation of Robert Johnson as blues exemplar has involved significant diminution of the role of shared and collaborative aspects of blues creation and performance in Johnson’s works. Robert Johnson’s status has, in turn,

¹⁶⁸ Reebee Garofalo, *Crossing Over: From Rhythm & Blues to Rock ‘n’ Roll*, in RHYTHM AND BUSINESS: THE POLITICAL ECONOMY OF BLACK MUSIC 116, 128-29 (Norman Kelley ed., 2005) [hereinafter *Crossing Over*]; see Hall, *supra* note 120, at 44 (noting Little Richard’s recounting in a Home Box Office (“HBO”) television special that a version of his rock anthem “Tutti Frutti” had reached number one on the pop charts in a version recorded by Pat Boone).

¹⁶⁹ Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 Rutgers L.J. 277, 351 (2006) [hereinafter *Catfish Row*].

¹⁷⁰ See generally SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 117-48 (2001) (discussing copyright and African American music); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 361-83 (1999) [hereinafter *Copyright Culture & Black Music*] (commenting on the use of copyright to appropriate African American music); Hall, *supra* note 120, at 37-58.

¹⁷¹ See *Freedom to Copy*, *supra* note 82, at 533.

been accompanied by more favorable outcomes for his estate from a copyright perspective. For this reason, copyright treatment of Robert Johnson and other blues musicians over time reveals something of copyright's underlying assumptions about creation, as well as the ways in which creators in living musical traditions may not be well-served by such assumptions.

Copyright has in many respects provided an inexact fit for musical creations, particularly musical forms based on nonvisual technologies of musical reproduction.¹⁷² This reflects, in part, the formation of copyright originally in relation to literary works,¹⁷³ and its later extension to other types of cultural production such as music.¹⁷⁴ The application of existing copyright doctrine to music has, not surprisingly, been easier in questions relating to printed sheet music,¹⁷⁵ which is visual in nature.

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

¹⁷² *Bach to Hip Hop*, *supra* note 1, at 555-58 (discussing the inexact fit of copyright for music).

¹⁷³ *Id.* at 555.

¹⁷⁴ *Id.* at 556-58 (noting that *Bach v. Longman*, (1777) 2 Cowper 623 (K.B.), clearly established that the Statute of Anne applied to music and that U.S. copyright law was applied to music with the Copyright Act of 1831).

¹⁷⁵ *Id.* at 577-78 (discussing the use of the fair use doctrine as applied to musical text as compared with the difficulty of applying the fair use doctrine to musical notes, which are nonrepresentational).

IV. CONTEXTS OF THE BLUES: CREATION AND REWARD

A. *Robert Johnson and Copyright*

1. Copyright and the Business of Blues

Robert Johnson is a seminal figure among pre-war blues musicians, by virtue of both his transcendent popularity and the ways his estate has exploited copyrights in his work. Additionally, by distinguishing Johnson's musical practice in many respects from those of his temporal peers, Johnson commentators have laid the groundwork for exceptionalism in the application of copyright to Johnson's works. The world in which Robert Johnson came of age was one in which his identity as an African American had significant implications for his likely ability to hold and exploit copyrights. As was the case with most country blues players who cut records in the pre-war era, Robert Johnson did not hold copyrights in his compositions. Blues musicians were typically bound by "race" recording contracts that were in many instances exploitative because

[m]ost artists were paid according to the custom of the day, receiving a flat recording fee and waiving the rights to their compositions The chief means by which dishonest recording officials of the era cheated artists was by filching composer credits for their songs in order to draw a publishing royalty.¹⁷⁶

Very few blues singers received much compensation for their work.¹⁷⁷ In the 1920s and 1930s, many African American musicians assigned their copyrights to recording companies.¹⁷⁸ Moreover, black artists were generally paid less for these assignments than white musicians.¹⁷⁹

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

¹⁷⁶ Calt, *supra* note 122, at 103.

¹⁷⁷ See K.J. Greene, "Copynorms," *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008) [hereinafter *Copynorms*] (discussing the generally inequitable contractual terms and lack of compensation of African American blues artists).

¹⁷⁸ Candace Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 480 (2005).

¹⁷⁹ *Id.*; *Copynorms*, *supra* note 177, at 1204-07 (discussing the fact that Bessie Smith received little compensation during her life and detailing the failure of a court case seeking remedies for this lack of compensation).

“[a]n arresting voice, virtuoso guitar playing, indecipherable words, suggestions of psychic anguish, death at an early age, the touching anecdotes promulgated as part of the initial liner-note mythology—it all seemed to support the Faustian tragedy that was eventually constructed to explain Johnson’s art.”¹⁸⁰ Johnson’s continuing popularity has also meant that he is one of the few pre-war blues musicians to have earned significant royalties from his work. The royalties earned by the Johnson estate from Johnson’s recordings also reflect the ways in which blues music may interact with copyright frameworks. A number of commentators highlight the appropriation of blues music by later artists and point out that the broader context of such uses reflected societal conditions in which African Americans were exploited in artistic production and other circumstances.¹⁸¹ The exploitation of African American artists, which is fairly well documented, occurred in a complex environment in which African American businesses also prospered based on uses of African American cultural production.¹⁸² Further, in some instances, certain “renowned” blues artists or their representatives, including the Robert Johnson estate and bluesman Willie Dixon, have been able to sue and receive compensation for uses of their works.¹⁸³ The Willie Dixon case, which involved a suit by blues great Willie Dixon against Led Zeppelin, settled out of court, while the Robert Johnson case ended with a decision in favor of Johnson’s representatives.¹⁸⁴

The Johnson and Dixon cases suggest that renowned blues artists can and did receive compensation for uses of their works. These cases, however, do not substantially alter or improve circumstances that have led to a general lack of compensation for blues artists at the hands of “race” record companies and later musicians who use blues material. The patterns of rewards in the blues cases do suggest though that copyright rewards can reflect

¹⁸⁰ PEARSON & MCCULLOCH, *supra* note 77, at 109.

¹⁸¹ See VAIDHYANATHAN, *supra* note 170, at 117-48; *Copynorms*, *supra* note 177, at 1194-98 (2008); *Copyright Culture & Black Music*, *supra* note 170, at 356-59 (1999); Hall, *supra* note 120, at 37-51; Hines, *supra* note 178, at 492.

¹⁸² See Calt, *supra* note 122, (discussing the activities of Mayo Williams, an African American, who played an important role in the Paramount race record business); Davis & De Loo, *supra* note 124, at 37 (noting that Black Swan Records was a small independent race record label that was at one time the most successful African American owned business of its time).

¹⁸³ *Dixon v. Atlantic Recording Corp.*, 1985 U.S. Dist LEXIS 15291 (S.D.N.Y. 1985) (denying the licensing agent’s motion for summary judgment in a suit by Willie Dixon, the renowned blues artist, against members of the legendary rock group Led Zeppelin that alleged that the Led Zeppelin composition “Whole Lotta Love” infringed on Dixon’s composition “I Need Love”).

¹⁸⁴ VAIDHYANATHAN, *supra* note 170, at 117-18 (noting that the Dixon case ended in a settlement).

factors, including elements more akin to investment in a lottery, that are not adequately considered in existing incentive models of copyright.¹⁸⁵

The existence of cases in which blues artists received compensation should also not obscure the difficulties inherent in making copyright infringement claims in blues cases. Current copyright assumptions about creation make it difficult to allocate copyright ownership rights to musical compositions in forms such as the blues that may involve extensive borrowing or copying or that are based in nonvisual forms of musical reproduction.¹⁸⁶ Further, few blues artists had renewed copyrights for blues musical compositions.¹⁸⁷ As a result, under the Copyright Act of 1909, which prior to the adoption of the Copyright Act of 1976, provided for a term of twenty-eight years, plus twenty-eight more with renewal,¹⁸⁸ blues standards that appeared in sheet music form would typically no longer be protected today.¹⁸⁹ However, since much blues music appeared primarily in sound recordings, the copyright status of sound recordings under the 1909 Act will depend, in many cases, upon whether the distribution of the sound recording is deemed a “publication” under the 1909 Act, which is not always easy to determine. Under the 1909 Act, “an unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the federal copyright scheme.”¹⁹⁰

2. Copyright and Blues Recordings

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

¹⁸⁵ Frederic Scherer has made a similar point with respect to patent. See F.M. Scherer, *The Innovation Lottery*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 3, 14 (Rochelle Cooper Dreyfuss et al. eds., 2001).

¹⁸⁶ Jennifer L. Hall, *Blues and the Public Domain—No More Dues to Pay?*, 42 J. COPYRIGHT SOC'Y U.S.A. 215, 215 (1995) (quoting an archivist from the Smithsonian Institution as stating that “[f]olk and blues are really problematic because you have these verses and classical instrumental licks that float all over the place and appear again and again”).

¹⁸⁷ *Id.* at 224 (noting that early blues musicians such as Robert Johnson did not register for copyrights and were paid upfront, not in royalties); Hines, *supra* note 178, at 480-81.

¹⁸⁸ See Copyright Act of 1909, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 (1909) (current version at 17 U.S.C. § 304 (2006)).

¹⁸⁹ Hall, *supra* note 186, at 216.

¹⁹⁰ *Id.*

framework that added a level of complexity to existing copyright frameworks that initially covered only musical compositions, which became protected under the 1831 Copyright Act.¹⁹¹ Protection of performance rights for music was added in 1897.¹⁹² The addition of a sound recording copyright in the 1970s has resulted in a potentially complex and, at times, ambiguous copyright status for pre-1978 sound recordings.

The 1971 Sound Recording Act, which was later superseded by the Copyright Act of 1976, established a separate copyright for sound recordings that is in addition to any copyrights for any underlying musical compositions. Section 303 of the Copyright Act provides a statutory framework for pre-1978 phonorecordings.¹⁹³ Under § 303, copyrights in works created before 1978 but not theretofore in the public domain or copyrighted began on January 1, 1978 and had a duration for the term provided in § 302 of the Copyright Act, provided that in no event can such term expire before December 31, 2002.¹⁹⁴ Further, the term of works published on or before December 31, 2002, would expire at the earliest on December 31, 2047.¹⁹⁵ However, under § 303(b), which was amended in 1997,¹⁹⁶ “[t]he distribution of phonorecords prior to January 1, 1978 does not constitute a publication of the musical work embodied in the phonorecord.”¹⁹⁷ When a work was published, it lost state common law protection; as a result, if the owner did not wish for the work to enter the public domain, the owner had to obtain federal protection by complying with the 1909 Act’s requirements.¹⁹⁸ Recent court cases have interpreted the implications of § 303(b) for blues recordings. These recent blues cases are instructive in outlining the business terms to which blues musicians have been subject and the ways in which courts have treated claims of copyright infringement in blues contexts.

¹⁹¹ See Copyright Act of 1790, ch. 15, §§ 1-7, 1 Stat. 124 (1790) (current version in scattered sections of 17 U.S.C.) (providing copyright protection to books, maps and charts); Copyright Act of 1831, ch. 16, §§ 1-16, 4 Stat. 436, 436-37 (1831) (current version in scattered sections of 17 U.S.C.) (providing copyright protection to musical compositions, prints, cuts and engravings to the list of copyright protected materials); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 201 (1968) (noting that musical compositions became protected under the 1831 Copyright Act).

¹⁹² See Act of January 6, 1897, 44th Cong., 2d Sess., 29 Stat. 694; PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 54 (2003) (noting that the protections added by Congress in 1897 were difficult to enforce).

¹⁹³ 17 U.S.C. § 303 (2006).

¹⁹⁴ *Id.* § 303(a).

¹⁹⁵ *Id.*

¹⁹⁶ Jonathan C. Stewart & Daniel E. Wanat, *Entertainment and Copyright Law: Section 303 of the Copyright Act is Amended and a Pre-78 Phonorecord Distribution of a Musical Work is Not a Divestitive Publication*, 19 LOY. L.A. ENT. L.J. 23, 23 (1998).

¹⁹⁷ 17 U.S.C. § 303(b).

¹⁹⁸ *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 952-53 (9th Cir. 1995).

La Cienega v. ZZ Top involved a claim by blues legend John Lee Hooker and Bernard Besman, to whom Hooker's copyrights in his musical composition "Boogie Chillen" had been assigned.¹⁹⁹ Hooker and Besman alleged that the song "La Grange" by the Texas blue-rock band ZZ Top infringed their musical composition "Boogie Chillen."²⁰⁰ Hooker and Besman became aware that the ZZ Top song "La Grange" was similar to the three versions of "Boogie Chillen" that had been written by Hooker and Besman in 1948, 1950, and 1970.²⁰¹ Besman had registered all versions of "Boogie Chillen" in the Copyright Office.²⁰² After realizing the similarity, Hooker and Besman notified the publisher of "La Grange," alleging that the ZZ Top song "La Grange" was similar to "Boogie Chillen."²⁰³ The publisher of "La Grange" filed a declaratory judgment action in Texas to resolve the dispute, leading Besman to file suit in the Central District of California on behalf of La Cienega, in which Besman was the sole proprietor.²⁰⁴

In the *La Cienega* decision, the Ninth Circuit assessed whether the sale of an unregistered recording constituted a "publication" for copyright purposes.²⁰⁵ Whether a distribution of a recording constitutes a "publication" is a significant question that can determine whether the copyright for a sound recording is still valid. The Ninth Circuit found that such a sale did constitute a "publication" under the Copyright Act of 1909 and that the Hooker/Besman publications were published in 1948, 1950, and 1970, respectively.²⁰⁶ As a result, the court remanded the claims with respect to the 1970 "Boogie Chillen" version. It decided that the earlier "Boogie Chillen" compositions entered the public domain in 1976 and 1978, by which time the statutory copyrights had expired without renewal.²⁰⁷

In reaching its decision, the *La Cienega* court touches directly on the issue of what constitutes a "copy" of a musical composition, which has also been at issue in a number of copyright cases, including the seminal 1908 *White-Smith v. Apollo* case.²⁰⁸ The *White-*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 952.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 953 (noting that the court is adopting the majority rule, which is contrary to the minority rule evident in the Second Circuit case *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff'd per curiam*, 546 F.2d 461 (2d Cir. 1976)).

²⁰⁷ *Id.*

²⁰⁸ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 17–18 (1908) (holding that perforated player piano music rolls were not copies within the meaning of the applicable

Smith decision led to a split between the circuits as to what constitutes a copy of a musical work. Some courts followed the minority rule established in *Rosette v. Rainbo Record Mfg. Corp.*,²⁰⁹ which held that the sale of a phonograph record does not constitute a “publication” under the 1909 Act.²¹⁰ The *Rosette* rule, which was noted in a dissenting opinion in *La Cienega*,²¹¹ reflects the conflict evident in *White-Smith* with respect to how to interpret the legal implications of nonvisual representations of music, including player piano rolls and sound recordings, and the extent to which such nonvisual representations represent a copy of an underlying work or constitute a composition or musical performance. The *Rosette* court, recognizing this longstanding conflict, noted that “it is difficult to rationalize accepted principles of copyright law to make performance of a composition a publication of the composition itself.”²¹²

The determination of whether a distribution of a phonorecord constitutes a “publication” has significant business implications. As recordings surpassed sheet music as the primary source of revenue for the music industry, record companies often did not register sheet music versions of records they released.²¹³ As David Nimmer notes, industry practice was to not obtain statutory copyright of musical compositions prior to sale of phonorecords of the compositions, an often “deliberate omission on advice of counsel, who concluded . . . that sale of a phonorecord would not constitute a surrender of common law rights in the recorded work.”²¹⁴ The failure to register copyrights for sound recordings also reflected an industry gaming strategy that sought to avoid compulsory license provisions of the Copyright Act.²¹⁵ In contrast to *Rosette*, the majority rule after *White-Smith* reflected the view that a “publication” did occur upon the sale of a phonorecord.²¹⁶

In response to *La Cienega*, songwriters lobbied Congress to

copyright statute).

²⁰⁹ *Rosette*, 354 F. Supp. at 1183 (adopting the rule that a sound recording does not constitute a “publication” of an underlying musical composition under the 1909 Act).

²¹⁰ *Id.* at 1191-92.

²¹¹ *La Cienega Music Co. v. ZZ TOP*, 53 F.3d 950, 953 (9th Cir. 1995).

²¹² *Rosette*, 354 F. Supp. at 1191.

²¹³ 1 MELVILLE B. NIMMER, *Nimmer on Copyright* § 4.05[B][4] (2009) (“[I]t is a common practice to market records of a musical work without publishing the work in sheet music form.”).

²¹⁴ *Id.* (footnote omitted).

²¹⁵ *Id.* (“Second, as a strategic matters, musical proprietors were reluctant to secure statutory copyright in their musical compositions, even as a precautionary measure against the increasing number of decisions holding sale of phonorecords to be a publication. Underlying such an imprudent course of conduct was apparently the desire to avoid subjecting the recorded composition to the compulsory license provisions of Section 1(e) of the 1909 Act. In the last particular, the subject course of conduct amounted to an attempt to exploit a medium regulated by statute without submitting to that regulation.”) (Citation Omitted).

²¹⁶ *Id.*

change the Copyright Act.²¹⁷ Congress responded by adopting § 303(b), which provides that the distribution of a phonorecord before January 1, 1978, does not constitute a publication of the underlying musical work.²¹⁸ Although this statutory provision now protects songwriters from failure to include the copyright notice on a phonorecord,²¹⁹ it does little to address the visual/nonvisual or composition/performance dichotomies that have long proved troublesome in the music copyright arena.

As a result of the post-*La Cienega* amendment to the Copyright Act, the case involving Robert Johnson's works followed the *Rosette* minority rule and thus reached a different outcome from *La Cienega*. Eleven of the songs recorded by Robert Johnson were released within a year of being recorded.²²⁰ Twenty-two of the twenty-nine songs recorded by Robert Johnson were re-released well after his death.²²¹ Columbia Records re-released Johnson's recordings in the early 1960s and released a two-CD boxed set of Johnson's recordings in 1990.²²²

Two songs recorded by Johnson, "Stop Breakin' Down" and "Love in Vain," were re-recorded by the Rolling Stones.²²³ No copyright registrations were filed by Johnson for either of these songs.²²⁴ The Rolling Stones albums that included the Johnson songs have both been ranked by *Rolling Stone* magazine as among the "greatest albums of all time."²²⁵ Copyright registrations for the Rolling Stone adaptations were filed in May 1970 for "Love in Vain" and in 1972 for "Stop Breakin' Down."²²⁶ Unlike Columbia Records and others who adapted Johnson's work, however, ABKCO, the Rolling Stones' label, did not recognize Johnson's common law copyrights.²²⁷ Steve LaVere had reached an agreement in 1974 with Johnson's then sole surviving heir, Carrie Thompson, in which he received fifty percent of all royalties in ex-

²¹⁷ *Id.* § 4.05[B][7].

²¹⁸ 17 U.S.C. § 303(b) (2006).

²¹⁹ *Id.*

²²⁰ *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 685 (9th Cir. 2000).

²²¹ Johnson—Early Influence, Rock and Roll Hall of Fame and Museum, <http://www.rockhall.com/hof/inductee.asp?id=134> (last visited Oct. 28, 2009) (noting that twenty-two of Johnson's twenty-nine recordings appeared on 78 rpm singles released on the Vocalion label).

²²² *ABKCO*, 217 F.3d at 687.

²²³ *Id.* at 686-87 (noting that an adapted version of "Love in Vain" was included on the Rolling Stones album *Let It Bleed*, while "Stop Breaking Down" was included on the album *Exile on Main Street*).

²²⁴ *Id.* at 687.

²²⁵ W. Russell Taber, Note, *Copyright Déjà Vu: A New Definition of "Publication" under the Copyright Act of 1909*, 58 VAND. L. REV. 857, 895 (2005).

²²⁶ *ABKCO*, 217 F.3d at 686.

²²⁷ *Id.*

change for her assignment to him of all of her copyright interests in Johnson's works.²²⁸ LaVere filed copyright registrations for the 1990 Columbia release and demanded that ABKCO cease and desist from unlicensed uses of the Johnson song.²²⁹ After unsuccessful negotiations, ABKCO filed an action for declaratory relief.²³⁰

In analyzing the application of § 303(b) of the Copyright Act to *ABKCO*, the Ninth Circuit noted that under *White-Smith*, the piano rolls at issue constituted a performance rather than a publication of a musical composition,²³¹ which reinforces the visual/nonvisual dichotomy evident in *White-Smith* and other music copyright cases. The publication/performance distinction noted by the *ABKCO* court again highlights the difficulty many legal commentators have in grappling with a musical universe where nonvisual technologies such as sound recordings may have taken on attributes with respect to musical creation formerly ascribed to visual, written musical compositions.²³² This is particularly notable in certain musical genres, including the blues. At issue in *ABKCO* was the retroactive application of § 303(b) of the Copyright Act.²³³ More specifically, the court considered whether the Johnson songs were published in 1938 and 1939, when they were released on phonorecord, as *La Cienega* dictates. This would mean that the Johnson copyrights would have expired in 1967 and 1968, twenty-eight years after their initial publication (i.e., release of the phonorecord),²³⁴ since the copyrights were not renewed prior to the expiration of the initial copyright term. In contrast, if § 303(b), as amended in 1997, applied retroactively, the Johnson songs would not have been published until the 1990 Columbia release was copyrighted because, distribution before 1978 would not constitute a publication.²³⁵

In contrast to *La Cienega*, the *ABKCO* court held that § 303(b) controlled and interpreted the 1997 amendment as simply clarifying the meaning of the 1909 Act, thus correcting the outcome in *La Cienega*.²³⁶ The *ABKCO* holding means that the Johnson songs recorded by the Rolling Stones "had not entered the public domain and were thus not freely available for use by the Rolling

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 688.

²³² *Freedom to Copy*, *supra* note 82, at 535-37.

²³³ *ABKCO*, 217 F.3d at 689.

²³⁴ *Id.*

²³⁵ *Id.* at 690-92.

²³⁶ *Id.* at 686.

Stones in the late 1960s and early 1970s.”²³⁷ As a result of *ABKCO*, Johnson’s works will effectively receive more than 100 years of copyright protection, since the copyrights will not expire until 2047 or later under the provisions of § 303(b).²³⁸ Section 303(b) reflects an expansion in the rights of copyright owners that in some instances benefited a class of potential owners whose members have typically not benefited from copyright frameworks. *ABKCO* does, however, reflect the continuing confusion as to what constitutes a “publication” of underlying works under the 1909 Act.²³⁹ The *ABKCO* decision also underscores the continuing power and confusion that emanate from the visual/nonvisual and composition/performance distinctions in copyright.

3. Copyright Royalties and the Johnson Estate

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

The uses of copyright by Johnson estate copyright assignee Steve LaVere, contributed to the accumulation of significant royalties in the Johnson estate and Steve LaVere’s wallet. After a series of at times colorful cases spanning some fifteen years in Mississippi state courts, Claude L. Johnson, a gravel truck driver from Crystal Springs, Mississippi,²⁴⁰ was found to be the illegitimate son of Robert Johnson.²⁴¹ The recognition of Claude L. Johnson entitled him to receive an estate worth more than \$1 million.²⁴² The size of

²³⁷ Benjamin Gemperle, Note, *Can’t Get No Satisfaction: How ABKCO v. LaVere Bowed to Pressure from the Music Industry*, 22 LOY. L.A. ENT. L. REV. 85, 97 (2001).

²³⁸ *Id.*

²³⁹ Michael Landau, “Publication,” *Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years*, 2 VAND. J. ENT. L. & PRAC. 29, 31 (2000).

²⁴⁰ Reed Branson, *Robert Johnson’s Blues – Property Rights Law Suit Starts*, THE COMMERCIAL APPEAL Oct. 13, 1998, available at <http://www.blues.co.nz/news/article.php?%20id=55>.

²⁴¹ *Anderson v. LaVere*, 895 So.2d 828, 830 (Miss. 2004) (discussing the status of pictures of Robert Johnson with respect to his estate); *Harris v. Johnson (In re Johnson) (Harris II)*, 767 So.2d 181, 187 (Miss. 2000) (affirming the judgment of Leflore County Chancery Court in finding Claude L. Johnson to be the biological son of Robert Johnson); *Harris v. Johnson (In re Johnson) (Harris I)*, 705 So.2d 819 (Miss. 1997) (reversing and remanding dismissal of claim of Claude L. Johnson as being time barred).

²⁴² Branson, *supra* note 240.

the Johnson estate reflects a translation of his cultural icon status to the economic and business arena and thus underscores in financial terms ways in which Robert Johnson can be distinguished from his peers.

B. *Copyright, Lotteries, and Reward*

The Robert Johnson story is a paradoxical one from the perspective of copyright rewards. On the one hand, copyright rewards in Johnson's case can reinforce existing narratives about copyright incentives. From this perspective, Robert Johnson's story exemplifies how copyright can reward meritorious creators.²⁴³ However, at the same time, copyright treatment of Robert Johnson reflects a cautionary tale of the implications of copyright in contexts of collaborative cultural traditions that are later commercialized. From this perspective, as has long been recognized, copyright often reflects decisions about the allocation of property rights to individuals in broader contexts permeated by collaboration and other practices that may involve significant copying. This is not unique in the blues context, but is also evident, for example, in contemporary discussions about traditional knowledge. Copyright treatment of Robert Johnson also draws attention to copyright assumptions about risk, reward, and return.

1. Robert Johnson as Copyright Success Story

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

²⁴³ The Patry Copyright Blog, <http://williampatry.blogspot.com/2008/05/blues-and-copyright.html> (May 29, 2008, 09:32 EST).

jected benefits.

Copyright is assumed to foster authorship and encourage creation by rewarding creators for their works.²⁴⁴ Yet, virtually no empirical evidence exists to corroborate this view.²⁴⁵ Discussions about copyright, creation, and compensation often make implicit assumptions about the nature of creators' investments in new works. However, what is often not recognized is that underlying discussions about risk, incentive, and reward are implicit assumptions about the nature of creators' investments in their creative "portfolio."²⁴⁶ Typical visions of copyright and compensation assume that creators assemble an investment portfolio of creative works that reflects some reasoned assessment of cost and benefit. Consequently, creation decisions are assumed to be to some extent responsive to changing costs of expression and potential rewards from the creation and dissemination of copyrighted works. However, in a world in which the creation of expressive works is increasingly driven by forces such as celebrity and fame, prediction of copyright benefits seems at best tenuous.

2. Robert Johnson as Copyright Lottery Winner

Another way to potentially read the Robert Johnson success story is as an example of a copyright lottery winner. In an entertainment arena increasingly driven by fame and factors that may not reflect clear distinctions in artistic output, at least as considered from the time a creator makes her initial investment in creating a new work, outcomes are potentially difficult to predict with any degree of certitude. Consequently, for a creator making a decision about whether to produce a new work (i.e., invest in her

²⁴⁴ Jane Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1468 (1995) (noting that a primary goal of copyright law is fostering authorship).

²⁴⁵ See, e.g., RUTH TOWSE, CREATIVITY, INCENTIVE, AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE 21 (2001) (Towse notes, "We still cannot say with any conviction that intellectual property law in general, and copyright law in particular, stimulates creativity. That is no argument for not having it but it should sound loud notes of caution about increasing it. And we still know very little about its empirical effects."); Julie E. Cohen, Lochner in *Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 505 n.160 (1998) (noting that the exact role of copyright in the production of cultural texts remains an unanswered empirical question); Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 789 (2004) (noting that economic justification for copyright prohibition against unauthorized copying is not necessary to stimulate an optimal level of new creations and in fact appears to have a net negative effect on creative output).

²⁴⁶ LANDES & POSNER, *supra* note 98, at 38 (noting that certain copyright laws "reduce the incentive to create intellectual property by preventing the author or artist from shifting risk to the publisher or dealer" and discussing author incentives and rewards with respect to royalty contracts).

creative portfolio), a lottery model may provide a more instructive picture of the creator's investment decision. This model may have particular explanatory power in the context of creative activities in corporate contexts.

Robert Johnson's outcome relative to his peers at the time he created his music was highly unpredictable. Further, much less distinguished him from his peers at the time he created his works than was the case when later commentators and musicians reconsidered his musical contributions. This tendency to continuing reassessment of creative contributions is not unique to Robert Johnson and is reflected in the reception of other musicians, including Johann Sebastian Bach, for example. Although Bach was famous as an organ virtuoso during his lifetime, he was not as famous during his life as composers such as Telemann.²⁴⁷ His reputation as a composer was restricted to a small circle, and many regarded his work as old-fashioned.²⁴⁸ Although Bach became better known with the issuance of the *Well-Tempered Clavier* in 1801, more than fifty years after his death, the revival of interest in his music dates from the Berlin performance in 1829 of the "St. Matthew Passion," with Felix Mendelssohn conducting.²⁴⁹

The unpredictability of potential rewards reflects and reinforces the star system now widespread in the music industry. This star system underscores the skewed distribution of rewards that are evident in the musical arena. Further, as is the case with lotteries more generally, seeing copyright as a lottery suggests that existing copyright frameworks, together with the business reality of the entertainment industry, may foster overinvestment in creative portfolios by some creators and companies.²⁵⁰ In the case of lotteries, those who see lottery winning as reflective of skill and who believe that they can overcome bad odds by smart betting tend to overinvest in lottery investments.²⁵¹ Robert Johnson and his success may support or belie assumptions about creation, incentive, and reward in copyright, depending on what assumptions one makes about the nature of creative investment portfolios assembled by creators, both individuals and corporate entities.

²⁴⁷ Oxford Music Online, The Oxford Dictionary of Music, Bach, Johann Sebastian, <http://www.oxfordmusiconline.com/subscriber/article/opr/t237/e715> (last visited Nov. 24, 2009) (on file with author).

²⁴⁸ *Id.*

²⁴⁹ *Id.*; Oxford Music Online, The Oxford Dictionary of Music, Bach Revival, <http://www.oxfordmusiconline.com/subscriber/article/opr/t237/e727> (last visited Nov. 24, 2009) (on file with author).

²⁵⁰ Elizabeth A. Freund & Irwin L. Morris, *The Lottery and Income Inequality in the States*, 86 SOC. SCI. Q. 996, 1001 (2006).

²⁵¹ *Id.*

C. *Copyright Lotteries and Fairness*

Pervasive borrowing is an inherent part of creation processes for many musicians. At the same time, however, borrowing may have different significance depending upon the socio-cultural context within which acts of borrowing occur. In the contexts of the blues, borrowing within blues traditions in the Mississippi Delta in the 1930s and 1940s may have a fundamentally different meaning than the borrowing that occurred from blues traditions to rock and roll traditions in later eras. The potentially divergent meanings of similar acts of appropriation reflect nuances of context and the ways in which socio-cultural hierarchies may play out in different circumstances. Consequently, musical practices in musical traditions, styles, or genres that incorporate extensive borrowing within the tradition may have different implications when new practitioners from outside of the first context of borrowing in time or space or both also begin to use creative forms from that same tradition. These later uses may be particularly sensitive in instances where new practitioners derive significant commercial returns from their uses. In the case of blues, many such new practitioners by the 1960s were white while the original practitioners were primarily black. Although many of the new practitioners were not American, their copying played out in an American context that was highly racialized. Further, pervasive racial distinctions in the recording industry operated in the context of a broader socio-cultural environment characterized by significant racial inequalities that raise questions of fairness and distributive values of fundamental importance for copyright.²⁵²

The questions that have arisen in the U.S. over uses of blues music are not unique, but rather reflect continuing issues of concern in the copyright arena more generally. Similar questions arise today, for example, in the context of debates about traditional knowledge, which has typically been treated as public domain knowledge that is free to be appropriated in the international intellectual property arena.²⁵³ How copyright frameworks should treat borrowing in such contexts is not at all clear. It does, however, militate in favor of giving greater consideration in adjudications about copyright to questions of equity and fairness.²⁵⁴

²⁵² *Copynorms*, *supra* note 177, at 1189-90.

²⁵³ See Anupam Chander & Madhavi Sunder, *Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1351 (2004) (noting that TRIPS has left traditional knowledge in the global commons while protecting intellectual products of the developed world).

²⁵⁴ See, e.g., Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006) (discussing the application of doctrines of substantive equality to intellectual property considerations in the global arena).

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

Outcomes in instances such as Robert Johnson are potentially troubling because the copyright property rule accompanies narratives and representations about creation and creativity that discount or even ignore the importance of copying and uses of existing texts in the creation of new ones.²⁵⁵ Further, even if doctrines intended to enable future uses, such as fair use, are taken into account, such property rules have thus far not facilitated a clear delineation between the scope of acceptable and unacceptable uses of existing material, particularly in contexts of living music traditions.

Historical consideration of popular music in the American context suggests that the operation of copyright as a property rule can also lead to outcomes that belie assumptions typically made about copyright rewards and that may be manifestly unfair. Although this is recognized to some extent in discussions of distributive values in copyright, the ways in which copyright has influenced African American artists in particular are often largely ignored except in specific discussions of copyright and African American artists.²⁵⁶ One of several notable exceptions is the work of Keith Aoki, which has drawn attention to distributive implications in copyright generally and blues music specifically.²⁵⁷

General discussions of copyright largely assume a uniform

²⁵⁵ See *Bach to Hip Hop*, *supra* note 1, at 638-41 (discussing property and liability rules in intellectual property); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655 (1994) (noting that a property rule can be infringed only after bargaining with the entitlement holder).

²⁵⁶ See VAIDHYANATHAN, *supra* note 170, at 117-48; *Copyright Culture & Black Music*, *supra* note 170, at *passim*; Hall, *supra* note 120, at 37-58.

²⁵⁷ See Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 738-45, 755-72 (2007).

application of copyright law without attending to the implications of various socio-cultural hierarchies that might influence and differentiate copyright.²⁵⁸ When inequality is considered, it often includes an unsupported assumption that poorer creators benefit more from copyright than wealthier ones do. Such assumptions do not take sufficient account of the hierarchies that have significantly influenced the operation of copyright in ways that need to be better appreciated in current discussions of copyright and recommendations for copyright reform.

Hierarchy has shaped copyright in many ways, particularly with respect to which participants in markets for cultural products have greater permission to borrow. In many instances, existing legal structures may facilitate particular patterns of borrowing that often disadvantage market participants with less power, including African American musicians, who historically have been at the bottom of most societal hierarchies of status and power.²⁵⁹ Hierarchies have facilitated the development of extractive and at times exploitative patterns with respect to African American music, particularly prior to the first half of the twentieth century. As a result of such patterns, borrowings from African American cultural sources have been widely permitted. This is not necessarily a bad thing given that borrowings are endemic and necessary parts of living cultures.

Borrowings from African American music, however, raise troubling questions about when borrowing becomes exploitation. Further, African American musical forms have historically been an important source of musical innovation,²⁶⁰ which has contributed to perceptions of exploitation given tendencies with respect to borrowings from African American culture in commercial contexts. Ironically, creators who base their works on borrowings from disempowered groups may then be able to use copyright to block borrowings from their works, despite the fact that their own works borrow extensively.²⁶¹

²⁵⁸ See, e.g., Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1538 (2005) (“Thus copyright seems, historically at least, to have benefited poorly financed creators more than it has burdened them.”).

²⁵⁹ See *Catfish Row*, *supra* note 169, at 311-13 (discussing borrowings from African American music by George Gershwin).

²⁶⁰ Susan McClary, *Rap, Minimalism, and Structures of Time in Late Twentieth-Century Culture*, in *AUDIO CULTURE: READINGS IN MODERN MUSIC* 289, 289 (Christoph Cox & Daniel Warner, ed. 2004) (noting that a succession of African American musical genres, from ragtime to rap, have “stamped themselves indelibly on the lives of generation after generation . . . [as] the most important tributary flowing into today’s music,” which is a function of “the exceptional vitality, creativity, and power of musicians working within these idioms.”).

²⁶¹ *Id.* at 331.

Contexts of borrowing highlight ways in which copyright may be under-inclusive and fail to adequately protect forms of cultural production that perhaps should be protected. While copyright has been characterized by some as under-inclusive, inadequate protection for some types of cultural production exists in a broader cultural milieu where many assert that copyright is over-inclusive. The key to resolving this seemingly paradoxical situation rests in better identification of the scope of acceptable copying in varied contexts with simultaneous reassessment of the assumptions about cultural production that have led to the current state of affairs. The need for better demarcation of the zone of acceptable copying is further underscored by the existence of varied models of cultural production, including valuable asset models that are one important reason that some assert that copyright is over-inclusive and that may impede the diffusion and dissemination that are important aspects of living cultural traditions.

The need to both encourage and police diffusion suggests that music, in the end, may be better suited to the operation of liability rules, which would begin with an assumption of borrowing as a norm and require compensation when works are borrowed. Although not without problems, including questions relating to determination of appropriate levels of payment, such liability rule frameworks have the potential to address the ways that copyright's operation in particular contexts may reflect and even magnify existing inequalities. Liability rules will also underscore the reality of borrowing as an important aspect of the aesthetics of many artists, from classical composers to blues and hip hop artists.²⁶² Such rules have the potential to promote vibrant forms of cultural production such as the blues, while ameliorating some of the more negative aspects of the operation of copyright law.

CONCLUSION

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

²⁶² See *Bach to Hip Hop*, *supra* note 1, at 629-44.

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

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