Black Musical Traditions and Copyright Law: Historical Tensions

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BLACK MUSICAL TRADITIONS AND COPYRIGHT LAW: HISTORICAL TENSIONS

Candace G. Hines*

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INTRODUCTION

"We thought sampling was just another way of arranging sounds. Just like a musician would take the sounds off of an instrument and arrange them their own particular way... [W]e had to change our whole style."¹

In this quote, Chuck D expresses the frustrations he and his rap group, Public Enemy, experienced in the early 1990s when trying to create music for their new album. Public Enemy created a new sound on their previous records with the aid of music sampling, a fairly new practice in which musical artists incorporated "samples" of sound recordings from other musical works. This technique, in utilizing musical sounds of the past, created whole new works of musical collage. Public Enemy's creative process has been described as "a songcraft from chipped flecks of near forgotten soul gold. [A] guitar vamp from Funkadelic, a moan from Sly, a growl abducted from Bobby Byrd aren't rhythmically spliced in but melodically sequenced in colorful narratives. Think of Romare Bearden."² When major record companies became conscious of rap's musical sampling phenomenon, they began charging prohibitive prices for the use of sound recordings they owned.³ As a result, Public Enemy suffered artistically as their style of simultaneously sampling a multitude of different sound recordings finally became too expensive under this new regime. As a consequence, Public Enemy's later records utilized fewer samples.⁴

Public Enemy represents only one of the many Black performers and musicians that have been affected by a copyright law that is structurally incompatible with their creative process. The Black musical tradition works in a "trope of revision," that is, it is a highly creative tradition that builds and improves upon the music within its community.⁵ Copyright's confines do not reward this specific type of composition, however, since it


². NELSON GEORGE, HIP HOP AMERICA 94 (1998) (comparing Public Enemy’s work to that of Romare Bearden, an African American painter renowned for his use of color, texture, and collage). Speaking of Bearden and his practice of collage, jazz musician Branford Marsalis explains, “Collage is improvisation, because you’re taking known images and you’re putting them in a way that ordinarily they don’t belong together.” All Things Considered: The Art of Romare Bearden (National Public Radio broadcast, Sept. 14, 2003).

³. McLeod, supra note 1.

⁴. Id. (highlighting the marked difference Public Enemy had to make in their music by 1991 by comparing their earlier album, It Takes a Nation of Millions to Hold Us Back (Def Jam 1988), to their later release, Fear of a Black Planet (Def Jam 1994)).

rewards musical works of minimum creativity, minimum originality, and those works fixed in a "tangible medium of expression." Moreover, copyright acts to the detriment of those who create new works out of the old by granting the author of the original work a monopoly on the creation of such "derivative" works. Hence, the modern day Public Enemy resembles the frustrated blues singer of the 1930s who stopped performing because he could not earn a livable wage for his work, or the stymied early R&B singer who could not produce and promote his hits fast enough to compete with the rock 'n' roll imitation of his own work.

The body of copyright law, with its vast revisions and amendments, was originally intended to encourage creativity and protect creators' work. Yet the Black musical idiom has been and continues to be excluded from such benefits because it does not fit into copyright law's construction of ownership and composition. Copyright's requirements have stood in the way of Black musicians' integrity as artists and their economic reward, since copyright law has historically granted a limited ownership to those who can conform a musical work into standard musical notation. Copyright's notions of authorship and composition undermine the Black musical customs of (1) community composition, as exemplified by oral tradition and call-and-response; (2) rhythmic and musical complexity; and (3) improvisation. The combination of this cultural clash and America's history of racism has prevented Blacks from receiving recognition for their musical contributions or copyright's promises of compensation.

Additionally, by failing to incorporate the Black musical idiom, copyright law heightens Black musicians' vulnerability to exploitation in a social milieu already accustomed to exploiting Black labor. The stories of stolen song credits, unconscionable contracts, and unpaid royalties, though numerous, are not the primary focus of this Note. However, such circumstances added to the already burdensome plight of the Black musician who tried to maneuver in a copyright regime that was not adaptive to his cultural musical idiom. This Note contends that the American copyright regime's failure to incorporate the Black musical creative process has devastated the integrity and economic potential of generations of Black musicians.

This Note begins with a discussion of copyright law and then examines Black musical traditions and how they have conflicted with American copyright law through the years. Part I explains the history of American copyright law and its theoretical underpinnings. Part II relates common Black musical traditions in more detail. Part III illustrates how the foundations of Black musical traditions can be found in Negro Spirituals. Part IV outlines the notion of Black music as it evolved in ragtime.

Part V describes how copyright undermined the traditions of blues, jazz, and R&B. Part VI explains how rock 'n' roll's prominence embodied copyright's clash with the Black musical tradition. Part VII portrays the history of the hip-hop musical phenomenon and illustrates how copyright's negative treatment of digital sampling continues to denigrate the Black musical tradition. Part VIII discusses the need for a more culturally inclusive copyright regime. Part IX concludes the Note by discussing the importance and benefits of amending the current copyright laws.

I. The American Copyright Law Tradition: Origins and Application

A. Copyright Law Generally

Copyright law consists of a group of property rights for specific intangibles, or works of authorship. The first copyright law began in England in the eighteenth century and gave authors the exclusive right to make copies of their books. This law, the Statute of Anne, grew out of previous legislation that reflected the sovereigns' desire to censor the work being disseminated by publishers. The Statute of Anne expanded on that purpose by maintaining that it desired the "encouragement of learned men to compose and write useful work." The United States Constitution empowers Congress to legislate copyright statutes. It states, in pertinent part, that copyright is intended for the "progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The United States' copyright system developed via an economic incentive rationale intended to encourage artists to enhance society through their work. The Supreme Court approved this justification for copyright law in *Mazer v. Stein*, when it declared that "encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in science and the useful arts."

The first United States copyright statute was created in 1790; it was modeled after the Statute of Anne and granted copyright protection to books for a similar duration. Subsequent amendments between the 1790

8. 8 *Anne* ch. 19.
9. 8 *Anne* ch. 19, § 1.
11. *Id.*
statute and the next copyright act, the Copyright Act of 1909, included
the addition of musical compositions as copyrightable subject matter in
1831.\footnote{See Patry, \textit{supra} note 13, at 14–56 (1994) (discussing the history of copyright law in the United States).}

The copyright law of 1909 lasted until the Copyright Act of 1976
replaced it. Under the 1909 Act, federal copyright began at the moment
of publication rather than when the work was filed for registration.\footnote{Copyright Act of 1909, 17 U.S.C. § 24 (1973) (current version at 17 U.S.C. §§ 301–305).} It
did not cover unpublished works, which were covered by state common
law. It also included a compulsory license, allowing access to copyrighted
works on payment of the statutory fees in compliance with certain for-
malities. Relevant licenses include the mechanical recording license.\footnote{See 17 U.S.C. §§ 111, 115, 116, 118 (2000).}

The Copyright Act of 1976 got rid of the dual system of protection
for published and unpublished works, providing federal copyright protec-
tion for works upon their creation.\footnote{17 U.S.C. § 102(a) (2000).} The 1976 Act, in addition, eradicated
formalities provisions.\footnote{17 U.S.C. §§ 40(a), 405 (2000).} In § 106, the 1976 Act provides the copyright
owner of a work with exclusive rights: the rights to produce and adapt
the copyright work, and to distribute, perform, and display the work pub-
licly.\footnote{17 U.S.C. § 106 (2000).} Intrusion upon any of these rights constitutes copyright
infringement.\footnote{Copyright infringement claims must allege that a specific section of 17 U.S.C. § 106 has been violated. See \textit{Copyright in a Global Information Economy} 317–18 (Julie E. Cohen et al. eds., 2002). Additionally, the plaintiff must provide sufficient evidence of copyright ownership of a valid copyright. See \textit{id}.} Though ownership under the 1909 Act was not divisible, it is under the 1976 Act. Consequently, the copyright owner may then
license or assign parts of the copyright to third parties.\footnote{17 U.S.C. § 201(d) (2000).}

The 1976 Act also created specific categories for the subject matter
of federal copyright, which include, among other matters, "musical works"
and "sound recordings."\footnote{See 17 U.S.C. § 102.} Before a musical work or sound recording or
any other work of authorship is protected under copyright law, it must
first meet the copyright statute's general requirements. Generally, copy-
right requires: (1) fixation; (2) originality; (3) expression; and (4) the now
obsolete requirement of registration.\footnote{See 17 U.S.C. § 102(a).} The first requirement, fixation,
means that works must be fixed in a tangible medium of expression. This includes works that can be "perceived, reproduced, or otherwise communicated, either directly or with aid of a machine or device." The second requirement, originality, grants copyright protection to works that, in addition to meeting the other requirements, contain some minimal level of artistry. As to the third requirement, expression, copyright law will protect the expression of ideas, not the ideas themselves. For example, an author cannot protect a song in C minor, but a specific song with specific notes in that key would be protected. The last requirement, registration, is generally obsolete, but the former Copyright Act of 1909 did not provide federal copyright protection to a work until the work was either published with proper notice or registered.

B. Copyright and Music

With regard to music, United States copyright law currently protects musical works and sound recordings. Although the Copyright Act of 1976 does not define "musical works," it clarifies that the protection given to a musical work encompasses both the song lyrics and the instrumental component of a song. Consequently, in order to complete registration under copyright law, registrants have to file either their complete musical work in musical notation or a recording of their musical work with the Federal Copyright Office.

The Sound Recording Act of 1971 provided copyrights for sound recordings. Under this Act, sound recordings, like musical works, must be original. The owner of a sound recording, however, does not retain the performance right, which is generally provided to authors or owners

1989, the United States eliminated such conditional requirements, as they were prohibited by the Convention. See id.
25. Id.
26. The Copyright Acts of 1909 and 1976 have not clearly defined originality; however, the case law has established that to garner copyright protection, the creator or author of an original work must provide more than a trivial amount of creativity. See, e.g., Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).
28. Id.
29. While registration is generally obsolete, it is still required before an author/owner of a work may sue for copyright infringement. 17 U.S.C. § 508(a) (2000).
34. Id.
of musical works. Furthermore, only sound recordings created after 1972 are given federal protection under the Act. Therefore owners or authors of pre-1972 works must rely on the availability of state common law for copyright protection.

II. THE BLACK MUSICAL TRADITION

Before copyright law was even codified, Black music was evolving and being shaped by America's history of racial segregation, classification, and hegemony. These forces created a Black music that has its own traditions. Specifically, Black music is inextricably linked with America's history of slavery:

One effect of slavery had been to create discrete and separate Black communities within the larger White communities of the nation, and the emancipation of the slaves did nothing to change this situation. Blacks lived, for the most part, in their own world and developed their own institutions and culture. Of particular relevance here is the fact that Black music makers developed a distinctive style of entertainment music, fitted to their own personal needs and expressive of their own individuality. It was not intended to be analyzed or even understood by Whites.

Up to the present, Black music has continued to be created in segregated spaces, exemplifying similar characteristics throughout: (1) community composition exemplified via oral tradition and call-and-response; (2) rhythmic and musical complexity; and (3) improvisation.

A. Community Composition

Black music is “conceptualized as a derivative of African music tempered by the American experience.” Hence, Black music can be seen as a hybrid of both cultures. The oral tradition of the Black musical idiom reflects general prohibitions on slave literacy as well as the African oral

35. See id.
36. Id.
39. Walton, supra note 7, at viii.
40. See, e.g., Slave Codes of the State of Georgia, 1848 Art. III, § VI, No. 59 (prohibiting Blacks or Whites from teaching any person of color to read or write).
tradition of orally composing and transmitting music. Because the Black musical idiom is oral, enslaved Blacks learned, composed, and transmitted music via its performance. This oral tradition created through the hybrid of African oral culture and the confines of American slavery continued throughout the Black experience and with respect to different Black musical genres.

The African emphasis on oral traditions and the circumstances of Black American life often helped shape the Black emphasis on oral transmission of Black music. For example, because of the difficulty in sustaining employment, itinerant Black laborers spread the blues' musical tradition throughout the Black community. Born of culture and circumstance, the lack of emphasis on written forms in Black culture directly conflicts with the American copyright law regime, since copyright is based on the written tradition of musical notation. Musical performance in oral cultures greatly differs from copyright's notions of ownership and the confines of formulaic musical notation. Rap music scholar Tricia Rose maintains this by observing how oral cultures perform folk tales: "In oral cultures, authorship is not essential to ... performance." Rose emphasizes her point by quoting Walter Ong, an author who has explored oral and writing cultures, who said, "[I]n managing a particular interaction with this audience at this time—at every telling the story has to be introduced uniquely into a unique situation ... formulas and themes are reshuffled rather than supplanted with new materials." Undoubtedly, with copyright's early emphasis on written musical notation and identifiable and individual authorship, the emphasis on oral tradition within the Black community of musicians hindered this group's success in the copyright regime.

Besides oral tradition, call-and-response is another aspect of community composition. "Whenever a musical phrase, sung or played by a soloist, is afterwards repeated or answered by an instrumental or vocal chorus or group, [call-and-response] takes place." This Black musical tradition also stems from Africa, "owing to the [African] cultural demand for

42. DAPHNE HARRISON, BLACK PEARLS: BLUES QUEENS OF THE 1920S, at 18 (1988) (describing the migration of Blacks from rural areas to cities).
43. See TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 64 (1994) (discussing oral tradition).
44. Id. at 86.
45. Id. (citing WALTER ONG, ORALITY AND TECHNOLOGY: THE TECHNOLOGIZING OF THE WORD 42 (1982)).
46. See WALTON, supra note 7, at 10. Eileen Southern speaks of the African tradition in spirituals, maintaining that it places "its emphasis on communal activity. A successful celebration was one in which there was general participation by all, in which the interaction among the dancers, musicians, and onlookers contributed to the perfect whole." EILEEN SOUTHERN, THE MUSIC OF BLACK AMERICANS: A HISTORY 12 (1st ed. 1971). For discussion of the spiritual's musical elements, see SOUTHERN, supra note 38, at 184–89.
collective, participatory music." Often such elements are improvised, resulting in a communal composition. In contrast to this tradition, copyright law's requirement of attributing a work to one or a small number of authors proves incongruous with the community contributions that occur in the call-and-response tradition of Black music."

B. Rhythmic and Musical Complexity

Another constant element in the Black musical tradition is rhythmic complexity. In Africa, emphasis on rhythm and complicated syncopation was a "necessary and vital part of the musical structure." It also applied to everyday African speech, which was rooted in differences in tonality, accents, and rhythm. As a result, rhythm can be seen to permeate every aspect of African daily life. This emphasis endured during American slavery via the music of Negro spirituals, despite slavery's effect of repressing slaves' African culture and identity. Rhythmic complexity began with clapping and the stomping of feet; it now can be heard in jazz and the bass in today's rap music.

Musical complexity often accompanies rhythmic complexity. African music is marked by "diverse" scales that "var[y] in range and number." Musical complexity can take the form of multiple vocal harmonies, dissonant tones, or blue notes sung or played by blues performers. Jazz music exemplifies the prominence of musical complexity, since it often incorporates all of the aforementioned practices. Additionally, the musical complexity showcased by instruments is often repeated by jazz singers in their "scat" singing. Copyright law has historically undermined the musical and rhythmic complexity of the Black musical idiom, since an emphasis on such musical characteristics frustrates the task of placing such music into musical notation.

47. WALTON, supra note 7, at 10.
48. See, e.g., 17 U.S.C. § 101 (2000) (governing joint works of authorship and insisting that all joint authors have copyrightable contributions).
49. See WALTON, supra note 7, at 12.
50. Id.
52. WALTON, supra note 7, at 8.
53. See discussion infra Section V.A.1.
54. See WALTON, supra note 7, at 9 (discussing the difficulty of recording the complexity of Black vocal music).
55. Scat is a form of jazz singing that is marked by a singer's use of nonsensical lyrics and a vocal style that, via onomatopoeia, imitates various musical instruments. STARR & WATERMAN, supra note 37, at 466.
C. Improvisation: Performer as Author

“The African soloist, unlike the Western hymnist, was in a position to vary stanza and melody, the basic ingredients of improvisation.” From spirituals to rap, Blacks have used the African tradition of improvisation to create music for generations. Black music’s tradition began and endured not through written records, but via innovative performers who built upon what they heard before. The Black musical tradition’s conflict with copyright in this regard is twofold. First, musical improvisation exists in a constant state of revision; copyright’s requirement of works of authorship being fixed in a tangible medium of expression frustrates this tradition. Second, improvisation often includes allusions to other works. Given that copyright typically defines such a work of authorship as a derivative work rather than an original work, and that copyright grants the exclusive right to make derivative works to the original work’s author, the entire nature of improvisational performance contrasts with this tenet of copyright law.

III. Negro Spirituals

As discussed previously, the first Black musical genre in the United States emerged from slavery, despite the prevalence of slave codes, which prohibited social gatherings, literacy, and the playing of instruments in many slave states. Usually religious in nature, spirituals developed via an oral tradition in the racially isolated milieu of everyday life, such as the Black church and the slave plantation. Though the genre ranged from reworkings of religious hymns to secular work songs to freedom songs, Negro spirituals consistently demonstrated the three African musical traditions described earlier that can be found throughout the lexicon of Black music: (1) community composition; (2) rhythmical and musical

56. Walton, supra note 7, at 10.
58. See 17 U.S.C. §§ 101, 103 (2000). Section 101 defines a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement ... sound recording ... or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101. Furthermore, making a derivative work when one is not the original work’s author requires the author’s consent. See 17 U.S.C. § 103(a) (1976).
59. See, e.g., Slave Codes of the State of Georgia, 1848 Art. III, § VI, No. 59 (detailing punishment for teaching slaves to read and write).
60. See Walton, supra note 7, at 20, 23.
61. Southern, supra note 38, at 180.
62. Freedom songs often served as anti-slavery protest songs, but other spirituals, such as Follow the Drinking Gourd, were sung in a code language that geographically led runaway slaves to freedom. For lyrics and a discussion of these “map” spirituals, see id. at 144–45.
complexity; and (3) improvisation. This tradition starkly contrasts with the traditional Western notions of written music composition and the presence of a small number of creators.

The slave community as a whole composed the Negro spiritual, since a "genuine spiritual is always a folk composition, or a group product, spontaneously composed as a choral expression of religious feeling." Live, chorally improvised performances in the slave community created new works as slaves generated these "congregational outbursts under the pressure of great religious emotion," varying the music from themes that were already "familiar to all the participants." Performance was the essential creative tool for developing Negro spirituals. Oral tradition provided for vast creativity and improvisation, as performers reworked and subsequently composed new spirituals contemporaneously with each performance. Requiring community participation, the performance of spirituals used the call-and-response tradition. Musical historian Eileen Southern defines this African and Black tradition as a "favorite performance practice [that] involved a lead singer supported by one or two others, or by a group, functioning as a chorus to sing refrains" which entailed "alternating solo vs. solo, or solo and small ensemble, or solo and group."

The intricate nature of the spirituals' music hindered its early transposition into musical notation. Particularly, its rhythmic complexity, consisting of free moving melodies that worked in conjunction with fixed rhythm to produce cross-rhythm, hindered the Negro spirituals' publication in full musical notation. Although Richard Allen, a Black minister of the era, published a book of hymns in 1801 for his congregation, he recalled the difficulty posed by the spirituals' rhythmic intricacy:

What makes it all harder to unravel a thread of melody out of this strange network is that, like birds they [that is, the [B]lack singers] seem not infrequently to strike sounds that cannot be precisely represented by the gamut... There are also apparent irregularities in the time [that is, rhythm] which it is no less difficult to express accurately.

Though the spiritual tradition subsisted orally for some time, spirituals eventually enjoyed general publication in anthologies during the late

63. See Gioia, supra note 51, at 9-10; supra Part II. Scholar Alain Locke maintains that Negro spirituals are "the most characteristic product of Negro genius to date." See ALAIN LOCKE, THE NEGRO AND HIS MUSIC 18 (1936).
64. Locke, supra note 63, at 21.
65. See id. at 22.
66. Southern, supra note 38, at 201.
67. Id. at 453.
68. Id. at 15.
69. Id. at 195.
70. Id. (first and third alterations in original).
nineteenth century. National tour performances of the Fiske Jubilee Singers and other musical groups at Black universities further disseminated and popularized the genre in the United States and Europe.

IV. BLACK MUSICAL TRADITIONS IN THE FIRST ERA OF FREEDOM: RAGTIME

Ragtime is an evolved piano musical style that was chiefly popular from 1895 to 1918. However, despite the existence of copyright law, few Black musicians, ragtime's earliest innovators, profited from their creations under contemporary commercial musical regimes: the stage performance customs of minstrelsy, Black vaudeville, and sheet music.

A. Precursors to Ragtime: Minstrelsy and Black Vaudeville

Though the Black community had been creating music during slavery, enslaved Blacks could not capitalize on their creative efforts in the way that Whites could. Emancipation finally brought former slaves the opportunity to explore careers in music and entertainment. The first opportunities in these fields included minstrel shows and vaudeville shows as early as 1850. Minstrelsy's performance tradition emerged from a custom during slavery where masters required their slaves to perform musical works for their guests. The tradition evolved into a derogatory form of comedy entertainment whereby Whites in black face paint—called blackface—would consciously imitate Black songs, dances, and behavior. After Emancipation, Blacks began replacing Whites and performing stereotypical images on the concert stage. Though minstrelsy had the effect of stereotyping Black men as "shiftless, irresponsible, thieving, happy-go-lucky ... darkies," it was popular among many talented Blacks,

71. See id. at 152–53.
72. See id.
73. See LOCKE, supra note 63, at 11.
74. See id. at 11.
75. See SOUTHERN, supra note 38, at 175.
76. Blackface refers to the way in which White performers would paint their faces black, using burnt cork, to imitate Black Americans. Id. at 89. When Blacks began performing minstrel shows, they too would wear blackface. STARR & WATERMAN, supra note 37, at 22.
77. SOUTHERN, supra note 38, at 89.
78. Id. at 96.
79. Id. Titles such as All Coons Look Alike to Me exemplify the genre. Id. at 317–20 (discussing minstrel songs).
who saw it as a route to relative financial security and stardom in the entertainment industry.\(^{40}\)

Vaudeville shows, which incorporated a variety of entertainment acts on a concert stage, soon became the popular entertainment of the day. Minstrel songs were often included in vaudeville's stage entertainment, which consisted of performing comedians, dancers, magicians, and singers.\(^{81}\) Blacks were permitted careers in racially segregated Black vaudeville shows, but they endured hazardous performing conditions and the financial exploitation of White theatre owners and booking agents.\(^{82}\) Moreover, those below top billing—the majority of the performers—endured below-poverty wages.\(^{83}\) Despite the negative circumstances, vaudeville shows soon showcased the new Black music of the day: ragtime.

**B. A Syncopated Piano Style: Ragtime**

Ragtime resulted from free Blacks' new access to the piano and the evolution of Black dance music from slavery times.\(^{84}\) In the antebellum era, slaves danced to music where fiddles and banjos provided melodies.\(^{85}\) Foot stomping usually provided the percussion of the song.\(^{86}\) The emphasis on complex and improvised rhythms from these songs migrated to the piano as Black musicians used their left hands to create the beat and their right hands to perform syncopated melodies. Hence, both hands playing together created the "jig" or "rag" played in ragtime.\(^{87}\)

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80. Comparatively, a job in the entertainment field was a good financial alternative to domestic work; a Black woman could possibly make five times her domestic servant salary by working in entertainment. **Harrison, supra** note 42, at 21. However, only a few would ever reach that level. *Id.* at 20–21.

81. **Starr & Waterman, supra** note 37, at 29 (describing the evolution of Black entertainment from minstrelsy to vaudeville).

82. **Harrison, supra** note 42, at 20–23.

83. *Id.* at 21, 23. The Theatre Owners' Booking Association ("TOBA") controlled the infrastructure of Black vaudeville, setting the salaries that were paid to the performers. *Id.* at 22. Everyone below top billing for Black vaudeville shows were treated poorly and were routinely not compensated enough to cover their traveling, food, or housing expenses. *Id.*

84. Previously, slaves had been limited to instruments that they could salvage or make. **Southern, supra** note 38, at 49. With newfound freedom, however, Blacks could purchase pianos with the little money they had. *Id.* at 315.

85. *Id.* at 171–72.

86. *Id.* at 168.

87. *Id.* at 315.
C. Sheet Music and Publishing

Despite the sporadic success of a few Black ragtime musicians who successfully published their own music, such as Scott Joplin and Jelly Roll Morton, the majority of ragtime musicians earned money through their live performances rather than the sale of their published work.\(^8^8\) Ragtime had a complicated musical style, but few of the early rag pianists could read music.\(^8^9\) This fact severely limited a Black musician's ability to compete in the copyright regime of the day, which required that music be submitted for registration in written notation.\(^9^0\)

The 1909 Copyright Act governed this copyright regime. As noted earlier, the Act protected musical works after registration, proper notice, and publication.\(^9^1\) Moreover, at this time, a standard written musical notation of the work had to be included for a proper copyright filing.\(^9^2\) Thus, in its own way, literacy was a requirement that often stood in the way of a Black rag musician's profit. Consequently, it is unsurprising that few rag players published their music; rather, they continued performing in bars and clubs.\(^9^3\)

Given the popularity of ragtime music, there was great demand for published versions, or sheet music, of ragtime songs. Sheet music was in high demand due to the rise of household piano purchases during this era.\(^9^4\) Families sought published versions of ragtime music so they could attempt the complicated musical style at home.\(^9^5\) Publishing companies sought out Black musicians, the originators of the rhythmically and musically complicated style, in order to publish their works. Black musicians were greatly exploited during this era of ragtime piano, partly due to the fact that Black ragtime musicians were often illiterate and could not transpose their works into musical notation themselves. Therefore, they had to rely upon publishing companies or other representatives to provide this function for them.

Often, White musical arrangers would ask illiterate Black musicians to play for them, under the pretense of obtaining publishing rights for their work.\(^9^6\) More often than not, a Black musician never again heard

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\(^8^8\) Id. at 319.

\(^8^9\) Id.


\(^9^3\) Even Scott Joplin, though he successfully published his works—most notably *The Maple Leaf Rag*—was only paid "out right" payments from his publisher. See Walton, supra note 7, at 42-43.

\(^9^4\) See Gioia, supra note 51, at 22.

\(^9^5\) Id.

\(^9^6\) See Southern, supra note 38, at 319.
from the arrangers or the publishing company. However, his song would very likely appear in the company's next book of sheet music. Given the futility in a Black musician's attempt to publish his work and then obtain and profit from a copyright, a Black musician's time was probably better spent performing. Though the musician often performed for a low wage, the ten or fifteen dollars he might receive were more readily obtainable than profits from the use of a copyrighted song. Subsequently, Whites popularized a simplified ragtime genre, which became known as Tin Pan Alley.

Because "[i]t was an unwritten law in the [music] industry that the first to publish a piece owned all the rights on it," White publishers who were quick to publish had the opportunity to greatly exploit the efforts of Black ragtime musicians. Many ragtime songs were subsequently published, not by their Black originators but by Whites who appropriated and diluted the music. As a result, White audiences became familiar with ragtime, but the popularity of ragtime increased via the diluted rag style of White performers rather than through the talented and renowned Black musicians who started the genre and played the music in its more complicated form.

V. BLACK MUSICAL TRADITIONS IN EARLY SOUND RECORDINGS: BLUES, JAZZ, R&B

A. The Blues

The blues is a folk music marked by immensity of vocal expression and emotional lyrics. Popular during the 1920s to 1940s, it was performed in the Black community long before it received commercial attention. The blues originally traversed the country via itinerant Black

98. Id. at 51 (discussing exploitation by music publishers).
99. See SOUTHERN, supra note 38, at 326. Moreover, ragtime was a competitive musical style. Rag pianists would often convene in the back of clubs to see who could play the most complicated rag. Id. at 317. The winner would then be awarded a cash prize. Id.
100. Tin Pan Alley refers to the music industry's center in 1910, during the ragtime and early jazz eras, located in the area of 28th Street in lower Manhattan. STARR & WATERMAN, supra note 37, at 29. This area consisted of new music publishing firms, and the term refers to the sound of pianos simultaneously playing music. Id.
101. WALLER & CALABRESE, supra note 97, at 51.
102. See SOUTHERN, supra note 38, at 331–32.
103. See id. at 331.
104. "Whatever the theme, whether it be the sob or the laugh, the plea or the threat, despair or revenge, defeat or triumph, the mood [of the blues] is registered in pithy phrases and vivid imagery having the elemental force of life itself." LOCKE, supra note 63, at 29.
105. See id. at 28–35.
musicians. As Black Americans struggled to obtain employment in the early 1900s, their search to acquire and maintain employment often required a mobile lifestyle. Blacks subsequently passed the blues tradition throughout the Black community from the Southern cotton fields to the saloons of the Midwest. As the blues traversed the country orally, Black musicians frequently reworked blues songs until eventually the works' origins could no longer be discerned.

The blues exemplifies the Black musical idiom in its use of musical complexity, call-and-response, and improvisation. As noted before, with regard to spirituals and ragtime, many of the characteristics within the Black musical idiom make it difficult to transpose into standard musical notation. The blues idiom is no exception to this, primarily since the elements of blues performance are fluid and improvised. This secular folk music "take[s] on [its] shape and style during performance." The blues utilizes the Black musical traditions of musical complexity and community composition. The musical notes of the blues are complex, as they are not sung or played according to a traditional musical scale. Rather, blue notes are often referred to as "bent tones." That is, notes of the musical scale are "treated ambiguously," such that a singer or instrumentalist may "slur" the notes of such a scale rather than playing each distinctly. As seen with Negro spirituals, the blues also utilizes call-and-response, an element of community composition. For example, blues rhythms pause at the end of each vocal line, allowing for improvised instrumental or verbal utterances. Hence, the pause provides for a response to the vocal lines.

Blues lyrics were sung with such expression that it is difficult to convey the expression in written form. Like spirituals, blues lyrics told personal tales of human suffering, love's heartache, and the drudgery of rural working-class Black life. The song lyrics from "Nobody Knows You

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106. Blacks’ migration also was in part fleeing from the Southern violence of lynching. See Harrison, supra note 42, at 18.
107. See Roach, supra note 41, at 46 (discussing the spread of blues associated with Black migration across the country).
108. W.C. Handy, a Black blues composer, publisher, and artist, maintains: "Each one of my blues is based on some old Negro song of the South, some old song that is part of the memories of my childhood and my race." Peter Guralnick, Feel Like Going Home: Portraits in Blues & Rock 'N' Roll 21 (1971).
109. Southern, supra note 38, at 333.
110. See id. at 333–36 (discussing characteristic qualities of the blues).
111. Id. at 336.
112. Id.
113. See Albert Murray, Stomping the Blues 98–99 (1976).
When You're Down and Out," recorded by Bessie Smith in 1929, exemplify the classic blues lyric:

Nobody knows you when you down and out/
In my pocket not one penny/
And my friends I haven't any/
But If I ever get on my feet again/
Then I'll meet my long lost friend/
It's mighty strange, without a doubt/
Nobody knows you when you down and out/
I mean when you down and out.115

Such emotional performances came alive on stage and became more than what sheet music of musical notes and lyrics could encompass. In contrast to ragtime music, where consumers desired sheet music, the essence of the blues was difficult to capture into standard musical notation. Therefore, these emotional performances became popular on the live stage of Black vaudeville and on sound recordings. The emergence of commercial sound recording not only allowed the listener another means by which to enjoy blues performance, but it also created a new commercial market for Black musical talent.

2. Commercial Sound Recordings

In 1920, the Black community was fairly familiar with the first commercially successful sound recording by a Black artist. The song, "Crazy Blues," and the artist, Mamie Smith, were both regularly featured in Black vaudeville performances.116 "Crazy Blues" created a commercial excitement that far surpassed that generated by the scant gospel recordings that predated the work. This recording came only after many pleas to several different record labels to record a Black singer.117 Initially, most record labels refused to record Black voices, arguing that Black singers' voices were "unsuitable" or that their diction was "different" from that of Whites.118 When Mamie's records sold in unprecedented numbers, record labels were finally convinced of the marketability of such music.119 Subsequently, the labels created a segregated music market with

115. Id.
117. See HARRISON, supra note 42, at 46–47.
118. Id. at 45.
119. Id.
120. Id. at 46–48.
separate advertising and radio shows.121 "Race records" were the products of the racially segregated music market in which Blacks recorded music on record labels that marketed and sold the music only to Blacks.122

Due to the success of Mamie's record, race records were primarily dedicated to the blues.123 From 1930 to 1945, the blues transitioned from a rural to an urban music. Urban blues was notable for its use of electricity that amplified voices and instruments.124 Blues artists did not all find success on race record labels, however. This was partly due to the fact that Black musicians working as blues artists signed contracts that did not recognize them as authors of their works.

3. Copyright's Exploitation of Black Blues Musicians

During the Blues era, Black music labor was greatly exploited. Only a handful of blues singers profited much from their work.125 Many Black artists in the Blues era from 1920 to 1930 were subject to work-for-hire contracts, where an artist would be paid for his work but would subsequently assign his copyright to his employer.126 The copyright owner or constructive "author" of a song has an exclusive right to reproduce and distribute the song and therefore has the exclusive right (absent a license agreement) to profits from a song;127 thus, the employer in a work-for-hire situation gained the rights to future profits from the musical work.128 Black musicians were hired for such work in disproportionately large numbers, yet they were paid less money than their White counterparts.129 Not only did such contracts hinder Black artists' ability to truly profit from their compositions, but they also symbolized general discrimination against Blacks.

121. Starr & Waterman, supra note 37, at 87-88.
122. The term was not necessarily derogatory but stood as a representation of the significant American practice of racial segregation and subrogation. Id. at 88; see also Harrison, supra note 42, at 46.
123. See Harrison, supra note 42, at 48 (discussing record companies' search for more women blues singers).
125. Harrison, supra note 42, at 220.
128. That is, a copyright owner has legal rights to profits of a work's use until a work is injected into the public domain via copyright's duration requirements. See 17 U.S.C. § 24 (1909); 17 U.S.C. § 302(a) (1976) (discussing duration of the copyright).
Hence, blues musicians may have recorded many of their original works of authorship, but under a work-for-hire contract, Black blues musicians were paid for their musical labor and never saw any monetary rewards for records that were released. One example of this is Eddie "Son" House, who was paid only thirty dollars for his numerous compositions and suffered from these contractual arrangements.\textsuperscript{130} "Mississippi" John Hurt is another example of this circumstance, as he recorded twenty songs for Okeh Records and received twenty dollars per song; without any other economic return from his recordings, he retired to his farm.\textsuperscript{131}

In addition to the famous blues stars, the blues tradition has also subsisted on a large number of artists who have for various reasons remained anonymous. Few blues artists were recorded, and very few were financially successful regardless of whatever recordings they made. Despite their lack of financial success, blues musicians, immersed in the Black musical tradition, have strongly influenced several musical genres and artists through time. For example, blues musicians such as Muddy Waters, Bo Diddley, and Elmore James informed the earthy performance styles of the Rolling Stones.\textsuperscript{132}

### B. Jazz and the Improvisation Tradition

Jazz emerged between 1890 and 1910 in New Orleans\textsuperscript{133} and was creatively inspired by the blues and ragtime.\textsuperscript{134} It also shares some of the same elements of the Black musical tradition, such as improvisation, rhythmic and musical complexity, and call-and-response. Jazz music utilizes the musically complex "blue notes" and also focuses on the improvising performer as composer.\textsuperscript{135} The jazz performer creates as he performs, improvising notes and deliberately deviating from traditional notions of musical pitch.\textsuperscript{136} Consequently, a written score represents the

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\begin{itemize}
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{132} Sanjek, \textit{supra} note 129, at 383--84.
  \item \textsuperscript{133} See Walton, \textit{supra} note 7, at 49.
  \item \textsuperscript{134} See Starr & Waterman, \textit{supra} note 37, at 50 (stating that besides blues and ragtime, jazz also has other roots in music). "Jazz music resounds with the echoes of its past sources in [B]lack folk songs, blues, and ragtime, even as it incorporates Latin and other cultural styles. The African American cultural identity is likewise a fluid construction of past and present elements of experience." \textit{The Triumph of the Soul: Cultural and Psychological Aspects of African American Music} 147 (Ferdinand Jones & Arthur C. Jones eds., 2001) (discussing how jazz can be seen as a metaphor for the African American psychological condition and experience).
  \item \textsuperscript{135} See Southern, \textit{supra} note 38, at 367--68.
  \item \textsuperscript{136} For example, jazz musician Louis Armstrong "was instrumental in providing extended compositional skills, ranges and idioms for the trumpet which were uncommon at one time." See Roach, \textit{supra} note 41, at 86--87.
\end{itemize}
“skeleton” of a jazz performance.137 Jazz also introduced new instruments to popular musical performance, such as the saxophone.138 Such instruments added rhythmic complexity as their musicians enhanced blue notes via their syncopated and polyphonic playing.139 Jazz music also utilizes the call-and-response framework whereby a song consists of a series of melodies and counter melodies played by different sections of the jazz band.140

Perhaps due to its rhythmic complexity, jazz became popular music for dancing, and White musicians soon began to imitate the music, often called swing. Popular dance bands consisted primarily of White musicians, who were more successful than the Black dance bands of the era.141 White bands sterilized swing, making it overly formulaic.142 Hence, Black jazz musicians embraced a new musical form.143

The new musical form, modern jazz, provided a respite from the formulaic big band sound. Also called be-bop, during the 1940s modern jazz “transformed jazz into a modern art form.”144 Younger generations of jazz musicians, such as Dizzy Gillespie, Thelonious Monk, Charlie Parker, John Coltrane, and Miles Davis, began to experiment with a new style of jazz improvisation, in which musicians played a greater range and combination of notes with complex rhythms and harmonies and irregular phrasing, all of which distinguished the music from standard jazz arrangements.145 Dizzy Gillespie explained the be-bop composition style, revealing a method of composition not unlike the spirituals before it or hip-hop music that followed, by saying:

We’d take the chord structures of various standard and pop tunes and create new chords, melodies, and songs from them. We . . . added substitute chords to songs like Night and Day, How High the Moon. When we borrowed from a standard, we added and substituted so many chords that most people didn’t know what song we really were playing.146

The bop style migrated from instruments to vocals. “Scat” singers, such as Ella Fitzgerald and Betty Carter, improvised solos in a style reminiscent of musical instruments.147

137. SOUTHERN, supra note 38, at 368.
138. See GIOIA, supra note 51, at 109.
139. See STARR & WATERMAN, supra note 37, at 50.
140. Id. at 51.
141. See id. at 55.
142. See GIOIA, supra note 51, at 156.
143. BARLOW & FINELY, supra note 124, at 70.
144. Id. at 7.
145. Id. at 71.
146. SOUTHERN, supra note 38, at 491.
147. For further discussion of “scat” music, see STARR & WATERMAN, supra note 37, at 466.
The modern jazz style, which centered on improvisation, greatly suffered because of its incompatibility with copyright protection. Improvisation, or simultaneous composition and performance, was not protected due to the fact that such jazz improvisations were not written down in musical notation—nor were they prevalently recorded. This lack of copyright protection contributed to the dearth of jazz recordings. Copyright law did not protect this art form because it did not provide for the fact that jazz improvisation is essentially a live musical phenomenon that is difficult to convert to standard musical notation. Regardless of this difficulty, under the 1909 Act, filing a valid copyright with the Copyright Office required a copy of a musical work in standard musical notation.

C. Rhythm and Blues (R&B)

Today R&B is a general term for Black music, as evidenced by the variance of Black artists on Billboard’s R&B charts. However, the term originally referred to a specific style of music. When Billboard introduced the term in 1949, it was replacing the old race record term “race music.” R&B consisted of a hybrid of several Black musical genres, including jazz,

148. This was partly due to the two-year ban on commercial recording beginning in 1942 by the American Federation of Musicians. See Barlow & Finley, supra note 124, at 69; see also Starr & Waterman, supra note 37, at 145 (discussing the music ban).

Protection of improvised works somewhat changed with the 1976 Copyright Act, when musical works gained protection upon the moment the work was fixed. See Brett I. Kaplicer, Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples, 18 CARDOZO ARTS & ENT. L.J. 227, 234 (2000). However, defense of a copyright infringement claim for an improvised work still requires copyright registration. 17 U.S.C. § 508(a) (2000).

Though jazz musicians have traditionally quoted parts of popular song melodies while playing improvised solos, this practice was slightly impeded in 1941 when “ASCAP began to take note of melodic phrases from licensed songs appearing the solos of musicians and to charge for their use. This meant that all ‘improvised’ solos had to be written out and approved by the radio networks before they could be played on the air.” See Starr & Waterman, supra note 37, at 145.

Black musicians of the jazz era were also affected by bad contracts. “Without realizing what I was doing, I had agreed to record twelve records a year for $750 a year outright, no royalties! I didn’t know anything about royalties.... I guess I just had to learn some things the hard way.” Id. at 137 (quoting Count Basie, legendary jazz composer).

149. 37 C.F.R. § 202.8 (1975). Furthermore, the 1976 Act, though it did permit the copyrightability of sound recordings, still granted greater rights, such as the public performance right, to musical works fixed in standard notation. See 17 U.S.C. § 114 (1976). Therefore, a jazz musician may “fix” his improvisation onto a sound recording, but without the public performance right, any musician may legally publicly perform that same improvisation. For a discussion of this issue, see Stanley Turk, Copyrights and Jazz Improvisation: Creativity Unprotected, 1 U. Balt. Intell. Prop. L.J. 66 (1992).

blues, and gospel, in its use of melodic, rhythmic, and textual improvisation and the call-and-response between soloists and groups.\textsuperscript{151}

Structurally, R&B built upon the traditions of traveling gospel groups by evolving from the close harmony singing of gospel quartets to groups that centered on a lead singer.\textsuperscript{152} Musically, early R&B built upon saxophone sounds from jazz bands and emphasized the electric guitar’s bass from the blues.\textsuperscript{153} Bandleader Louis Jordan fused gospel sounds with blues and jazz instruments, thereby creating a music that was more “bold . . . uninhibited, and raw” than musical styles before it.\textsuperscript{154}

As seen with blues-era Black artists, R&B artists also suffered due to work-for-hire contracts. Black R&B artists were hired under such contracts in disproportionately large numbers because “two R&B artists could be had for the price of a single White performer.”\textsuperscript{155} This exploitation of Black artists continued into the rock ‘n’ roll era.

VI. AN ERA OF IMITATION: ROCK ‘N’ ROLL AND THE PROMINENCE OF THE COVER RECORD

Originally, the term “rock ‘n’ roll” appeared in Black music lyrics as a euphemism for sexual intercourse.\textsuperscript{156} Then Alan Freed, a New York dee jay (“DJ”), introduced the term on his radio show in reference to Black music as an attempt to “[dull] the racial identification” of the Black R&B moniker.\textsuperscript{157} Hence, rather than denoting a new genre of music, early rock ‘n’ roll music generally differed only in name from R&B.

A popular phenomenon of the rock ‘n’ roll era, the practice of “covering” a song usually involved recurring circumstances: an R&B group, relatively unknown outside Black communities, released a best selling record, and established White pop singers would cover the song by recording the same lyrics and music. More often than not, the cover outsold the original, aided by the powerful promotion and distribution facilities of the music industry.\textsuperscript{158} Upon finding a highly marketable music form that appealed to youth, musicians reworked R&B music to create rock ‘n’ roll,
which was then mostly marketed to White teens. The detrimental effect that the practice of covering had on Black artists was immense and has been referred to as "legitimized piracy."5

The first rock 'n' roll song, "Sh-Boom," not only introduced a musical style to a hungry public, but it also introduced the discriminatory practice of the cover record. Recorded in 1954 by The Chords, a Black male R&B group, "Sh-Boom" quickly climbed the pop charts, an unusual accomplishment for a song by Black performers. "Sh-Boom's" popularity resulted in an almost immediate release of imitations or cover versions of the song.

As the cover record formula proved financially lucrative, it was used exhaustively during this period, with White artists disproportionately copying Black music. Under the 1909 Copyright Act, one could permissibly cover a record after obtaining a compulsory license. Anyone who wished to cover a record had to obtain permission from the copyright owners of the musical composition and lyrics before receiving a compulsory license. Yet due to the fact that many Black musicians signed unconscionable contracts that divested them of the copyrights to their works, a Black musician's record label was most likely the entity that profited from this licensing regime. Though on its face such a licensing regime seems relatively neutral, this practice often prevented the financial success of the Black musician's original recording. Hence, Black R&B artists and blues artists were at the disposal of this unfortunate facet of the copyright regime.

Elvis Presley, an admitted imitator of Black blues and R&B singers, is a prime example of the prevalence of this practice. In many cases, a work-for-hire contract existed, so the Black artist of the original song not only did not own the copyright but was not even paid for the

159. Soul music exemplified the Black popular music of America in the 1960s and 1970s, as R&B became more commercial and appropriated by a rock 'n' roll audience. See Rip It Up, supra note 154, at 157.
160. SANJEK, supra note 129, at 340.
161. The Chords, Sh-Boom (Cat Records 1954).
162. CALDWELL, supra note 131, at 232.
163. The best selling cover was made by a Canadian group, the Crew Cuts. Id. Quickly it outsold the original and finished the year as one of the top five songs of 1954. Id.
164. See SOUTHERN, supra note 38, at 506.
165. See 17 U.S.C. § 115 (1976) (discussing the use of compulsory licenses in the 1909 Act, which are covered by mechanical licenses).
167. SANJEK, supra note 129, at 340.
168. See Rip It Up, supra note 154, at 160–61.
169. Pat Boone also famously covered several songs by Fats Domino (Ain't That a Shame) and Little Richard (Tutti Frutti). SOUTHERN, supra note 38, at 519. For a general discussion of covers, see STARR & WATERMAN, supra note 37, at 96–203.
use of the original musical work.\textsuperscript{170} One of Elvis' hit records, "That's All Right Mama," was actually originally written and recorded by bluesman Arthur "Big Boy" Crudup, who was paid so little for his recordings that he balanced his work as a rural laborer—sometimes selling sweet potatoes—with his recording sessions throughout his career.\textsuperscript{171} Elvis was not the only one to record his music. Other musicians who recorded Crudup's music include Elton John, Creedence Clearwater Revival, and Rod Stewart.\textsuperscript{172} Crudup finally quit the music industry because he "was making everybody rich and [he] was poor."\textsuperscript{173} Blues scholar David Dicaire maintains that such circumstances were not individual occurrences, stating that "[o]ne of the saddest recurring stories in blues history is how many of the greatest stylists—men and women who had a profound influence on the course of popular music—remained neglected before they were 'discovered' through the music of [W]hite blues bands."\textsuperscript{174}

White appropriation of rock 'n' roll via cover songs had more than just direct economic effects on Black musicians; it also formed the minds of the listening public who learned to have a narrow understanding about who could perform the music.\textsuperscript{175} "Rock 'n' roll has been so successfully appropriated . . . that the episodic appearance of a [B]lack rocker (for example, Hendrix, Prince, or Living Color) shocks by its singularity."\textsuperscript{176}

VII. THE HIP-HOP REVOLUTION: RAPPERS ARE IN DANGER

"Punk rock, new wave and soul
Pop music, salsa, rock & roll
Calypso, reggae, rhythm & blues
Master mix those number one tunes."\textsuperscript{177}

A. Origins

According to rap scholar David Toop, "Hip hop was the new music by virtue of its finding a way to absorb all other music."\textsuperscript{178} Rap, also called

\textsuperscript{170} See supra text accompanying notes 94–100.
\textsuperscript{171} ARNOLD SHAW, BLACK POPULAR MUSIC IN AMERICA: THE SINGERS, SONGWRITERS AND MUSICIANS WHO PIONEERED THE SOUNDS OF AMERICAN MUSIC 172 (1986).
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} DAVID DICAIRE, BLUES SINGERS: BIOGRAPHIES OF 50 LEGENDARY ARTISTS OF THE EARLY 20TH CENTURY 16 (1999).
\textsuperscript{175} See Rip It Up, supra note 154, at 160.
\textsuperscript{176} THE TRIUMPH OF THE SOUL, supra note 134, at 37.
\textsuperscript{178} Id.
Black Musical Traditions

hip-hop emerged from disco and funk music of the 1970s and was influenced by the spoken word poetry of The Last Poets and Gil Scott Heron. This new art form fusing poetry and music grew out of the New York ghettos and perhaps served as a respite from the Black social reality of the 1970s and 1980s, which included racial isolation of the ghetto, economic disintegration, high unemployment, high crack cocaine use in the ghettos, and the increase of American's prison population.

Rap consists of rhyming lyrics spoken rhythmically over musical instruments, with a musical backdrop consisting of samples of old disco, funk, and punk records. DJs originally changed the sound or the tempo of records by manually moving vinyl records back and forth, a practice referred to as “scratching.” This phenomenon took shape at nightclubs and parties in the Bronx, where rappers improvised rhymes over DJ-created beats. Early rap rhymes often consisted of a series of boasts, brags, “playing the dozens,” or other verbal attempts to upstage other rappers, frequently called MCs (short for Master of Ceremonies). This verbal type of competition hearkens to the Black community tradition of signifying.

179. Though used as interchangeable terms, hip-hop is also a cultural phenomenon that, in addition to rap, consists of several other cultural art forms, such as graffiti and DJing. STARR & WATERMAN, supra note 37, at 408.
180. For a discussion of The Last Poets’ influence on rap, see Toop, supra note 177, at 116–19.
182. See SOUTHERN, supra note 38, at 600; see also STARR & WATERMAN, supra note 37, at 408–10 (describing rap music).
183. STARR & WATERMAN, supra note 37, at 410.
184. Id.
185. Id. at 411.
186. Representative examples of such lyrics are:

Check it out, I'm the c-a-s-a-n-the-o-v-a/and the rest is f-l-y/ya see I go by the code of the doctor of the mix/and these reasons I'll tell ya why/ya see I'm six foot one and I'm tons of fun/and I dress to a t/ya see I got more clothes than Muhammad Ali and I dress so viciously/I got bodyguards, I got two big cars/that definitely ain't the wack/I got a Lincoln Continental and a sunroof Cadillac/so after school, I take a dip in the pool/which really is on the wall/I got a color tv so I can see/the Knicks play basketball.

Sugar Hill Gang, Rapper's Delight (Sugar Hill Records 1979).

I'm not a musical maniac or b-boy fanatic/I simply made use of what was upstairs in the attic/I've listened to these MC's back when I was a kid/But I bust more shots than they ever did/I mean this is not the best of KRS, it's just a section/But how many times must I point you in the right direction/You need protection, when I'm on the mic/Because my mouth is like a 9 millimeter windpipe.
An improvised and musically complicated musical art form, rap's technique strongly reflects the influence of the Black musical idiom in its improvisation, musical and rhythmic complexity, and its practice of call-and-response. DJs improvise as they create impromptu lyrics in their raps at nightclubs.\(^{187}\) Also, like be-bop before it, rap's sampling tradition frequently creates a musically complex montage of many different sounds from various songs, ultimately resulting in completely new sounds.\(^{188}\) In addition, rap, a rhythmically intense music like the R&B music that pre-dated it, brings the beat or bass to the forefront of the song. Though the bass remains central to most rap songs, rappers, like the be-bop scat singers before them, bring a beat of their own into a song with the performance of their lyrics.\(^{189}\) Furthermore, the DJ's rap is often a call for audience participation, which embodies modern call-and-response.

Rap enjoyed local popularity in the Black community for several years before it was recorded for mass consumption. Though the first rap record was 1979's "King Tim III (Personality Jock)"\(^{190}\) by the Fatback Band, the Sugarhill Gang released "Rapper's Delight"\(^{191}\) that same year, and it subsequently became rap's first commercial success with the help of Chic's often sampled disco song "Good Times."\(^{192}\) Stemming from its origins at New York clubs and parties, early rap music had a light-hearted feel, epitomized by early stars such as Run-DMC, LL Cool J, and Slick Rick.\(^{193}\) In the mid-1980s, rap became increasingly politicized through the works of Public Enemy and KRS One, who tended to chronicle and critique the Black urban experience.\(^{194}\) Gangsta rappers also spoke of such experiences, albeit in a more explicit manner. Such graphic tales of violence and sex made NWA, Ice-T, Tupac Shakur, Snoop Dogg, and Dr. Dre rap stars in the early- and mid-1990s.\(^{195}\)

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Boogie Down Productions, Criminal Minded, on CRIMINAL MINDED (M.I.L. Multimedia 1987).


188. TOOP, supra note 177, at 118.
190. Fatback Band, *King Tim III (Personality Jock)*, on *You're My Candy Sweet* (Spring Records 1979).
192. Chic, *Good Times*, on *Risqué* (Atlantic 1979); see STARR & WATERMAN, supra note 37, at 411 (discussing the success of Rapper's Delight).
194. STARR & WATERMAN, supra note 37, at 413.
195. Id. at 421.
From its conception, rap has not always been a well-regarded musical genre by the music community, society, or the legal community. Some from the musical community degrade the music by claiming that it lacks creativity or real musical integrity. Members of society disparage rap because of its use of profanity. The legal community also denounced rap music's use of explicit lyrics in the early 1990s when a Florida judge deemed a rap CD by 2 Live Crew obscene, making it illegal for purchase by minors. Individuals were arrested due to this ruling, and 2 Live Crew concerts were shut down for violating obscenity laws. The latest legal battle over rap involves the practice of sampling records, which has evolved into a highly technological practice now referred to as digital sampling.

In 1982, artists began to use computer-generated sounds from synthesizers and programmable drum machines in their songs in addition to snippets from preexisting recordings. Digital technology streamlined the process of extracting such snippets. Now called digital sampling, the technological phenomenon began to replace the turntable style of "cutting" and "mixing." DJs changed the sound of music either by utilizing a large number of digital samples or by placing the digital sounds on top of each

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196. In a discussion of the genre, jazz musician Wynton Marsalis denigrates rap music, maintaining that "[a]ll this profanity and that one beat over and over and calling everybody nigger is just some more blaxploitation minstrelsy .... Primarily, [rap music is] ... an expression of some people's willingness to degrade themselves on record, to make money pimping poor [B]lack folks' lives." WYNTON MARSALIS & CARL VIGELAND, JAZZ IN THE BITTERSWEET BLUES OF LIFE 37-38 (2001).

197. C. Delores Tucker, a lifelong civil rights activist, alarmed many when her crusade against violent rap lyrics in 1995 led her to buy ten shares of stock in Time Warner, which was then part owner of Interscope Records, a large gangsta rap label. She subsequently delivered an attack against rap at Time's annual shareholder's meeting, accusing rap of contributing to the "denigration and destruction of the [B]lack community." See C. Delores Tucker: Alarmed by What Gangsta Rap Was Doing to African American Children, She Declared War on a Corporate Media Giant—and Prevailed, PEOPLE WEEKLY, Dec. 25, 1995, at 71.


199. Id.

200. Id., supra note 177, at 105.

201. Digital technology permits the transformation of a musical work into a binary form that can be stored as data on a computer. See Kaplicer, supra note 148, at 228.

202. For a discussion of these terms, see STARR & WATERMAN, supra note 37, at 409. Mixing, explains the authors, consists of "isolating the breaks of certain popular records ... and mixing them into the middle of other dance records. These rhythmic sound collages came to be known as 'breakbeat' music." Id.
other, thus reconstructing digital sound bites into new sound patterns.\textsuperscript{203} Sampling became legally problematic as its use became more prevalent. In rap’s early stages, most artists did not ask permission to use parts of sound recordings.\textsuperscript{204} By the early 1990s, however, most artists, pursuant to copyright law, requested permission and negotiated compensation for the use of samples.\textsuperscript{205} By the late 1990s, however, licensing samples had become a procedural, creative, and financial burden for rap artists. The process was lengthy; on the eve of his album release, an artist might still be awaiting permission to use a sample.\textsuperscript{206} Since gaining permission for use of a sound recording is permissive, not compulsory, rap artists’ use of a sample need not rely on the copyright owner’s approval of the sampling.\textsuperscript{207} Furthermore, cost considerations provide even less incentive to request approval, since the more prominent the artist being sampled, the higher the price required for the sampling clearance.\textsuperscript{208}

A series of court decisions halted the practice of using samples without permission,\textsuperscript{209} though it was still legally permissible to use musical snippets as long as they were not identifiable.\textsuperscript{210} In response, many rappers began to create their own sounds in order to obviate the vague legal standards created by the courts.\textsuperscript{211} The one exception to copyright

\textsuperscript{203.} For example, Public Enemy’s producer, Hank Shocklee, was an innovator of this style, as he mixed sirens, guitar sounds, and other digital sounds into Public Enemy’s songs. On their song \textit{Fight the Power}, nine barely decipherable samples were used, including samples of Eric Clapton’s \textit{I Shot the Sheriff}, Bobby Byrd’s \textit{I Know You Got Soul} and James Brown’s \textit{Funky Drummer}. \textit{See Artist: Public Enemy, Second Hand Songs: A Cover Songs Database, at http://www.secondhandsongs.com/artist/596.htm (last visited May 22, 2005).}

\textsuperscript{204.} McLeod, \textit{supra} note 1.


\textsuperscript{206.} McLeod, \textit{supra} note 1.

\textsuperscript{207.} \textit{See Campbell v. Acuff-Rose Music,} 510 U.S. 569 (1994), where the copyright holders objected to the sampling of \textit{Pretty Woman.}

\textsuperscript{208.} McLeod, \textit{supra} note 1.

\textsuperscript{209.} \textit{See Grand Upright Music Ltd. v. Warner Brothers Records, Inc.,} 780 F. Supp. 182 (1991), where Biz Markie was held liable for copyright infringement for releasing his album, \textit{I Need a Haircut,} while the clearance for a sample of three words from the song \textit{Alone Again (Naturally)} was pending. In the past, similar cases were settled out of court, but in this case, the Court labeled Biz Markie’s creative efforts as stealing (quoting the \textsc{Bible,} the Court warned, “Thou shalt not steal”) and stopped Biz’s CD release. \textit{Id. at 183.}

\textsuperscript{210.} Such use has been referred to as de minimis use. \textit{See Ringgold v. Black Entertainment Television, Inc.,} 126 F.3d 70, 74–75 (1997) (discussing de minimis use).

\textsuperscript{211.} A three-judge panel of the Sixth Circuit Court of Appeals in Cincinnati debunked what has come to be known as the de minimis defense to sampling. \textit{See Bridgeport Music, Inc. v. Dimension Films,} 230 F. Supp. 2d 830, 839 (6th Cir. 2004), rev’d, 383 F.3d 390, 393 (2004). The case centers on the NWA song \textit{100 Miles and Runnin,} which samples a three-note guitar riff from \textit{Get Off Your Ass and Jam} by 1970s funk musicians George Clinton and Funkadelic. In the two-second sample, the guitar pitch has been
infringement suits based on sampling seems to be musical parody. For example, in Campbell v Acuff-Rose Music, the Supreme Court held that the commercial character of song parody did not create a presumption against fair use.\(^{212}\)

The legal attack on digital sampling has impeded the creativity of rap artists, particularly artists who cannot afford the exorbitant sampling fees. The current costs affiliated with the use of digital sampling have destroyed the creative sampling styles of rap groups such as Public Enemy, who distinguished themselves as a rap group via their clever use of hundreds of indecipherable samples in their songs.\(^{213}\) As a further consequence of the legal attack on digital sampling, there has been an artistic shift in rap music where many current rap songs utilize only one sample.\(^{214}\)

VIII. A Culturally Inclusive Copyright Regime

A. Creative Reference

At their best, highly innovative artists utilize or refer to the best elements of different musical traditions in order to create totally new musical genres and sounds. Blues scholar Peter Guralnick expresses this sentiment about bluesman Robert Johnson: "What made his work unique ... was an uncommon ability to synthesize these influences and a poetic sensibility which drew its inspiration from highly disparate sources and transformed them into a startling new blend."\(^{215}\) At their worst, artists rehash what has come before, they do not add any innovative elements, and they dilute the original creative work. Copyright law, as befitting its history of rewarding abusive imitators,\(^{216}\) has failed to accommodate innovative improvisers and users of digital samples—which, in essence, represents a lack of regard for the Black musical idiom. Black musicians' creative processes have been undermined by a regime that rewards limited

lowered, and the copied piece is "looped" and extended to sixteen beats. Id. The sample appears five times in the new song. This case is one of approximately 800 lawsuits filed in Nashville regarding the sampling of small portions of music from older recordings. Id.

This lawsuit is ironic, since George Clinton, the creator of the music and a commonly sampled musician, had previously released compact discs containing dozens of sound bites specifically to facilitate sampling, charging musicians a fee based on the number of records sold. See Rose, supra note 43, at 92. The compact disc entitled SAMPLE SOME OF DISC, SAMPLE SOME OF D.A.T. includes a how-to guide on getting sample clearance. Id.

213. McLeod, supra note 1.
214. "It's easier to sample a groove than it is to create a whole new collage. That entire collage element is out the window." Id. (quoting Chuck D).
216. See supra Part VI.
creativity and punishes those who push musical artistry to new levels. Consequently, many Black artists have either left the music industry for another occupation or entirely altered their method of creativity due to lack of financial reward and legal marginalization.

B. Incorporation of Moral Rights

In contrast to American copyright law, many European countries broadened their copyright law to include moral rights as well as economic ones. Moral rights still recognize an author's work as an economic interest, but they also treat an author's work as a natural right and extension of her personality. Such moral rights may include the rights of paternity, attribution, and integrity. The incorporation of moral theory into American copyright law may help create a copyright regime more harmonious with the Black musical tradition. Due to the restrictive copyright regime, Black musicians have historically struggled to reap the rewards of their labor, to contribute to society, and to protect the integrity of their creations as extensions of their personalities.

Other regions of the world, such as Western Europe, Africa, and Asia, respect moral theory. Moral law incorporates notions of paternity, attribution, and integrity. Perhaps paternity and attribution, which protect the right to be known as an author and the right to prevent others from being named the author of a work, respectively, would have assisted Black musicians who created music in the blues, ragtime, and rock 'n' roll eras and whose creative efforts were frustrated by the rampant imitation and appropriation of their works by White artists, record labels, and pub-

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218. "Why'd I quit? I was so disappointed. Wouldn't you be disappointed, man? I cut twenty-six sides for Paramount in Grafton, Wisconsin. I didn't get paid but forty dollars. That's not doing very good." GURALNICK, supra note 215, at 87 (quoting blues musician Skip James discussing his recording career in the 1930s before he sank into obscurity and was rediscovered in the 1960s).


220. See MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8D.01 (1978) (discussing moral rights).

221. See infra text accompanying notes 224–25.

222. See Kwall, supra note 219, at 91–96 (discussing what would be protected if moral rights were part of copyright law).

223. Id. at 91–100.

224. Id. at 5.

225. See id. at 5–10 (providing a hypothetical to define the components of moral rights).
lishers. Legislators are best able to consider these ideological concepts and then evaluate issues of effective administration and feasibility of execution. However, embracing these concepts generally would certainly provide recognition for previously marginalized creative processes.

CONCLUSION

Though copyright law has greatly differed throughout the generations, the tensions between the Black musical idiom and copyright law are still intact. Blacks working in the Black musical tradition still struggle to comply with the current copyright regimes' requirements while maintaining their artistic integrity. Current copyright law is detrimental to creativity as well as to society. By limiting musicians' ability to create music, copyright law also deprives society of the benefits that would be gained from appreciating this music. Furthermore, copyright law's inability to address Black musical traditions also negatively impacts society because it hearkens back to the United States' history of racism and lasting paradigms of Black inferiority.

Copyright has historically failed to preserve or acknowledge the integrity of important cultural creative processes, and legislators should consider expanding the framework. Though incorporating the Black musical idiom into copyright law cannot compensate Black musicians of the past, such incorporation would benefit Black musicians currently working in the Black musical tradition. Additionally, a broader copyright regime would benefit other marginalized communities, such as poorer or new musicians, who may otherwise be unable to afford the expense of sampling under current copyright law, or who may be unable to effectively fight costly litigation that could result from claims of illegal sampling.

It is imperative to amend copyright law, possibly through the incorporation of moral considerations, not only so that artists can be fully compensated for their work, but also so that society can fully benefit from their music and the knowledge that our legal system is more inclusive. Legislators must begin to recognize the extent to which the law shapes an artist's experience and the impact that it has on the rest of society.