

## Copyright and Cognition: Musical Practice and Music Perception

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# COPYRIGHT AND COGNITION: MUSICAL PRACTICE AND MUSIC PERCEPTION

OLUFUNMILAYO B. AREWA<sup>†</sup>

## INTRODUCTION

In December 2013, global superstar Beyoncé Knowles-Carter released a surprise album through the iTunes Store.<sup>1</sup> The album, *Beyoncé*, quickly became the fastest selling album in iTunes Store history at the time,<sup>2</sup> reaching the top spot on the iTunes charts in 104 countries, selling over 800,000 copies in the first three days of its release.<sup>3</sup> Beyoncé also became the first woman to have her first five albums debut at No. 1 on the Billboard 200 chart.<sup>4</sup> Beyoncé's album release and similar releases by a broad range of artists, including the late David Bowie, Drake, Jay-Z, Radiohead, and U2 are important data points from which to consider profound changes in the music industry in the digital era. The music industry was the first of the entertainment

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<sup>1</sup> Zack O'Malley Greenburg, *Breaking Down Beyoncé's Record-Breaking Album Launch*, FORBES (Dec. 17, 2013), <http://www.forbes.com/sites/zackomalleygreenburg/2013/12/17/breaking-down-beyonces-record-breaking-album-launch>.

<sup>2</sup> Keith Caulfield, *Beyoncé Breaks U.S. iTunes Sales Record, Sells 617,000 in Three Days*, BILLBOARD (Dec. 16, 2013), <http://www.billboard.com/biz/articles/news/chart-alert/5839819/beyonce-breaks-us-itunes-sales-record-sells-617000-in-three-days>.

<sup>3</sup> Greenburg, *supra* note 1 (“Beyoncé reached the top spot on the iTunes charts in 104 countries en route to selling 828,773 copies worldwide in its first three days—including 617,213 in the U.S. That’s more than the combined opening week sales of Katy Perry’s *PRISM* and Lady Gaga’s *ARTPOP*, and the numbers make Beyoncé’s latest effort the fastest-selling album in iTunes history.”).

<sup>4</sup> Keith Caulfield, *Beyoncé Makes Billboard 200 History with Fifth No. 1 Album*, BILLBOARD (Dec. 17, 2014), <http://www.billboard.com/biz/articles/news/5840087/beyonce-makes-billboard-200-history-with-fifth-no-1-album>.

industries to confront the digital era.<sup>5</sup> The digital era has had a particularly strong impact on the record industry, which has suffered declining sales during much of the digital era.<sup>6</sup> Although the record industry view of the causes and effects of digital era technologies are contested,<sup>7</sup> much discussion about the music industry in the digital era initially focused on the plight of the record industry that those within the industry typically attribute to “piracy” or peer-to-peer (“P2P”) file sharing with more recent attention to issues related to streaming.<sup>8</sup> File sharing received particular attention because it became widespread at a time of declining record industry sales.<sup>9</sup> Digital music uses also reflect types of collaboration and sharing that have long been characteristic of music, albeit on a scale and magnitude that was not possible, at least for individuals, prior to the digital era.<sup>10</sup>

The topography of music creation, dissemination, consumption, collaboration, and sharing has changed to a significant degree in the digital era. This changing landscape has significant implications for both consumers and creators. Beyoncé’s album release highlights implications of the digital era for both creators and consumers. Her release also highlights important music trends in the popular music sphere that have led to what musicologist Susan McClary has characterized as a

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<sup>5</sup> SIMON FRITH & LEE MARSHALL, *MUSIC AND COPYRIGHT 3* (Simon Frith & Lee Marshall eds., 2d ed. 2004) (noting that the music business was “the first sector of the entertainment industry to experience the ‘threat’ of digital technology”).

<sup>6</sup> See generally STEVE KNOPPER, *APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE* (2009); Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. TIMES (Feb. 26, 2013), <http://www.nytimes.com/2013/02/27/technology/music-industry-records-first-revenue-increase-since-1999.html> (noting that the music industry experienced an increase in sales in 2012 for the first time since 1999, largely due to digital music sales).

<sup>7</sup> Compare Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 2 (2007) (suggesting the effect of file sharing on record industry profit is ambiguous), with Stan J. Liebowitz, *File-Sharing: Creative Destruction or Just Plain Destruction?*, 49 J. L. & ECON. 1, 24 (2006) (suggesting that file sharing has significantly harmed record companies).

<sup>8</sup> See Liebowitz, *supra* note 7, at 3.

<sup>9</sup> Olufunmilayo B. Arewa, *YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431, 440 (2010).

<sup>10</sup> *Id.* at 434.

“displacement of European by African-based musics in Western culture.”<sup>11</sup> This displacement has significant implications for assumptions about musical copyright.

Beyoncé’s release raises questions concerning the adequacy of common narratives about the music industry, consumers, and creators in the digital era, as well as dominant assumptions about musical practice. Changing music industry digital era landscapes also have implications for intellectual property frameworks, which touch upon many aspects of industry practice in addition to consumer and creator access. Many have emphasized the threat of unauthorized uses to argue for stronger intellectual property protection.<sup>12</sup> This Essay uses current digital era debates about music creation and consumption as a starting point to consider underlying dominant assumptions about musical practice and the implications of actual processes of music perception and cognition for such ongoing debates.

#### I. MUSIC CREATIVITY AND MUSIC DISTRIBUTION: CONTESTED DIGITAL ERA NARRATIVES AND USES

The record industry has experienced significant difficulties in the digital era.<sup>13</sup> Changing technologies, particularly the “introduction of compressed digital music files” and the Internet, have enabled “widespread dissemination of digital music” and many “uncompensated and unauthorized uses of digital music content.”<sup>14</sup> Although the recent shift to streaming as the dominant form of music consumption has changed things, contested narratives have emerged from different players in the digital era. These contested narratives reflect significant differences in assumptions about uses of and access to cultural content, as well as how music should be shared. All of these assumptions continue to play a particular role in shaping digital era intellectual property approaches.

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<sup>11</sup> Susan McClary, *Rap, Minimalism, and Structures of Time in Late Twentieth-Century Culture*, in AUDIO CULTURE: READINGS IN MODERN MUSIC 289, 294 (Christoph Cox & Daniel Warner eds., 2004).

<sup>12</sup> Arewa, *supra* note 9, at 462–63.

<sup>13</sup> *Id.* at 433.

<sup>14</sup> *Id.* at 439.

Cultural industry businesses in the United States have also long played a role in the development of intellectual property laws and enforcement strategies.<sup>15</sup> “The intellectual property frameworks advanced in the pre-digital era by cultural industry players within United States have been stressed significantly in the digital era, particularly with respect to unauthorized distribution of digital content.”<sup>16</sup> Although such unauthorized distribution is often referred to as “piracy,” the topography of unauthorized uses may be both complex and multifaceted. How content should be accessed, consumed, shared, and used in the digital era is the focal point of a major digital era divide. The creative industries, which are all too often on one side of this digital era divide, have continued to attempt to operate using assumptions underlying predigital era business models in the digital era, albeit not very successfully.<sup>17</sup> This digital era divide, however, is not always clearly demarcated or uniformly experienced. As a result, an array of methods for accessing, consuming, sharing, and using content has become increasingly evident. These methods are likely more united in their divergence from creative industry desired practices, rather than forming a coherent set of practices in clear opposition to dominant industry practices.

This digital era divide draws attention to the complexities of copyright in ways that merit further attention. As the business fortunes of some participants in the creative industries have changed, some industry players have increasingly sought to bolster their business fortunes through reliance on copyright law enforcement. This increased focus on copyright law has influenced legislative activity and led to stronger copyright enforcement practices.

Recent events highlight continuing conflicts about how creative works should be produced, consumed, shared, and disseminated in varied contexts and geographic locations. These events also underscore changing cultural and business norms and practices that underlie the pervasive contestation that has

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<sup>15</sup> See generally JESSICA LITMAN, *DIGITAL COPYRIGHT* (2006).

<sup>16</sup> Olufunmilayo B. Arewa, *Nollywood and African Cinema: Cultural Diversity and the Global Entertainment Industry*, in *DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS* 367, 382 (Irene Calboli & Srividhya Ragavan eds., 2015).

<sup>17</sup> See Arewa, *supra* note 9, at 439–40.

come to characterize significant portions of digital life. Full understanding of such disputes requires bottom-up understanding of changing cultural and business practices and how such changes relate to dominant assumptions about copyright.

The experiences of the recording industry have tended to draw particular attention to digital era disruption on the distribution side. In the past, copyright was a rather arcane subject that involved significant discussions among a community with a high degree of shared experiences and assumptions.<sup>18</sup> Copyright in this era did not overtly touch on, to a significant degree, everyday practices and ordinary people.<sup>19</sup> Although the terrain of unauthorized uses was pervasive, such uses were separated from formal creative industry businesses in a number of ways. Technology and commercialization are two important factors that distinguished such predigital era practices. Although copyright has long served as a gatekeeper for determining availability and access to cultural material, technological realities meant that dominant predigital era business models rested, to a significant degree, on control of access to technologies or reproduction and dissemination. As a consequence, ordinary users' access and use of materials was circumscribed to a significant degree. Thus, if an average user wanted to make a copy of a record album, available technologies meant that the user's copy would likely be of a significantly lesser quality than the original. This also made such copies not readily commercially exploitable, at least on a level that could really compete with the original.

The best analogy here might be a cassette recording of a record album or in the movies, where someone shot a copy of a movie from the back of a movie theater. Although some market might have existed for such products, this market is not likely one that would create serious competition with the original, prior to the digital era. The fabric of meaning of such copying has changed in the digital era, largely as a result of the convergence of technological change, including digital technologies that enable copying, as well as the Internet.

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<sup>18</sup> Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008).

<sup>19</sup> *Id.* at 618.

In 2012, an online debate about music underscored the extent to which digital era uses are contested, particularly on the distribution side. In June 2012, an intern at National Public Radio in the United States made a blog posting entitled, "I Never Owned Any Music to Begin With."<sup>20</sup> A musician then responded to the intern's posting,<sup>21</sup> and a viral online debate ensued, which touched on core areas of controversy about music distribution in the digital era.<sup>22</sup> This online debate reflects a common digital era narrative that assumes that consumers will not pay for content that is otherwise free.

Digital era and predigital era realities are also relevant to the application of copyright on the creation side. Copyright is also based on implicit yet often incomplete and at times even incorrect assumptions about human behavior, cultural transmission, and music cognition. On the creation side, the typical copyright incentive story that copyright promotes creativity is at best incomplete in depicting creative practices in varied contexts of actual musical practice, particularly as such practices relate to sharing and collaboration.<sup>23</sup> As a result, how people create, why people create, and the factors that motivate creation are not well understood. By providing widespread access to technologies that enable creation, reproduction, and dissemination of professional quality content, the digital era has contributed to disruption in creative activities that even prior to the digital era did not exactly conform to dominant copyright assumptions about creativity.

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<sup>20</sup> Emily White, *I Never Owned Any Music To Begin With*, NAT'L PUB. RADIO: ALL SONGS CONSIDERED (June 16, 2012, 6:13 AM), <http://www.npr.org/blogs/all-songs/2012/06/16/154863819/i-never-owned-any-music-to-begin-with>.

<sup>21</sup> David Lowery, *Letter to Emily White at NPR All Songs Considered*, THE TRICHORDIST (June 18, 2012), <http://thetrichordist.wordpress.com/2012/06/18/letter-to-emily-white-at-npr-all-songs-considered>.

<sup>22</sup> Sanette Tanaka, *A WSJ Intern Replies to an NPR Intern's Viral Post on Music Piracy*, WALL ST. J. (June 27, 2012), <http://blogs.wsj.com/speakeasy/2012/06/27/a-wsj-intern-replies-to-an-npr-interns-controversial-post-on-music-piracy>.

<sup>23</sup> Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 631 (2006).

## II. MUSICAL PRACTICE, COGNITION, AND THE CONSTRUCTION OF COPYRIGHT

A key ongoing question in the copyright sphere relates to the implications of actual musical practice for copyright discourse and disputes. Actual musical practice has significant implications for copyright that are often not sufficiently taken into account. For example, the implications of pervasive musical borrowing, sharing, and collaboration are often recognized at best in theory, but often not truly understood in practice within copyright discourse and disputes. Similarly, music perception and cognition have significant implications for copyright theory and practice. How people perceive and process music may be fundamentally at odds in important ways with copyright's construction of music, which is particularly relevant in copyright infringement cases.

Copyright treatment of repetition and creativity underscores elements of the tension between copyright conceptualizations and human perception of music. Copyright discourse typically focuses on an undifferentiated conceptualization of copying that contrasts significantly with how copying is conceptualized in musicology, which has a much more nuanced, complex, and rich vocabulary for discussing copying.<sup>24</sup> Dominant copyright conceptualizations of creativity tend to stigmatize acts of copying, notwithstanding the fact that copying is a key element of creativity in many contexts of musical and other artistic practices, as well as a critical element in musical collaboration.<sup>25</sup> Attitudes towards copying in musical copyright, which emerged in full force in the era after the creation of the European art music canon, reflect important elements of the disdain for repetition that has come to characterize postcanon European art music.<sup>26</sup> This is evident in courts' discussions of repetition in copyright infringement cases and applications of tests of substantial similarity in such cases.<sup>27</sup> In contrast, Elizabeth

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<sup>24</sup> Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 523–524 (2007).

<sup>25</sup> *Id.* at 481.

<sup>26</sup> Olufunmilayo B. Arewa, *A Musical Work Is a Set of Instructions*, 52 HOUS. L. REV. 467, 517 (2014).

<sup>27</sup> See, e.g., *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 178 (S.D.N.Y. 1976), *aff'd sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 999 (2d Cir. 1983).

Hellmuth Margulis, Professor and Director the Music Cognition Lab at the University of Arkansas, describes music as “the canonical domain of repetition,” noting “a stubborn repeatability to music at every turn that philosophers, ethnomusicologists, cultural historians, semioticians, theorists, and composers have banged their heads against . . . and then abandoned the pursuit.”<sup>28</sup> Professor Margulis describes a tension—and at times, inattention—to the relationship between repetition and cognition.<sup>29</sup> Legal discourse about copying is similarly in tension with endemic acts of repetition that characterize music. Such discourse often does not take sufficient account of the reality that actual practices involve collaboration and sharing in musical creation. Repetition is “an important component of music’s shareability, of its social and biological role in the creation of interpersonal cohesion.”<sup>30</sup>

As Professor Margulis notes, conceptions about and treatment of repetition are shaped to a significant degree by how we think about language.<sup>31</sup> An often unstated but influential comparison to language, particularly written language, often underlies copyright discussions of music.<sup>32</sup> As a result of its origins in protecting literary work, copyright considerations of music tend to reflect a privilege of sight that may lead to an undervaluation of performance as compared to written musical notation, which has had a profound impact on a broad range of musical forms.<sup>33</sup> This privilege of sight leads to a systematic disfavoring of performance as a result of two likely factors. First, copyright law seems to exhibit a visual bias toward perceptible music notation, such as written sheet music, which superficially resembles books, maps, and charts, the first objects of U.S. copyright protection. Second, the successful movement beginning in the nineteenth century to “sacralize” older music forms and freeze in place canonical classical works has contributed to visual-textual bias and reinforced an existing privilege of sight.<sup>34</sup>

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<sup>28</sup> ELIZABETH HELLMUTH MARGULIS, ON REPEAT 4 (2014).

<sup>29</sup> *Id.* at 3–4.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> Arewa, *supra* note 26, at 489–93.

<sup>33</sup> *Id.*

<sup>34</sup> Olufunmilayo B. Arewa, *Writing Rights: Copyright’s Visual Bias and African American Music* 32 (Univ. of Cal., Irvine Sch. of Law, Legal Studies Research Paper

Visual bias and sacralization have disadvantaged creative practices based in performance, particularly in light of the fixation requirement under current U.S. copyright law. This emphasis on writings has disfavored some plaintiffs who have sought greater protection for their own performance practice; at the same time, it has disfavored some defendants whose creative, non-notated performance practice should allow a greater scope for their borrowing. The privileging of the visual over the aural has significant implications for copyright infringement cases. Notation, by its nature, is a necessarily incomplete and shorthand representation of musical expression.<sup>35</sup> The incomplete nature of musical notation has significant implications for varied copyright considerations, including in determinations of originality and court cases of infringement where an inconsistent and even haphazard mix of written and aural materials may be presented to finders of fact to consider in determinations of infringement.<sup>36</sup> As a result, aspects of musical expression that are not easily amenable to being notated, which includes characteristics such as rhythm and timbre, may receive different treatment in copyright infringement considerations than other musical features, particularly melody, which is typically favored in copyright considerations of music. Relying on notational representations may also level musical differences, which is a significant issue for copyright determinations of originality and infringement.<sup>37</sup>

Repetition is a “fundamental characteristic of what we experience as music” and is “a feature of the music of all known cultures.”<sup>38</sup> The disfavored treatment of repetition in copyright as compared with its critical importance to actual music practice generally underscores a broader tension at the core of copyright treatment of music. A common lack of consideration for the

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Ser. No. 2012-9, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2010024](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010024).

<sup>35</sup> Arewa, *supra* note 26, at 484.

<sup>36</sup> Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137, 139, 149 (2011); M. Fletcher Reynolds, *Music Analysis for Expert Testimony in Copyright Infringement Litigation*, xiv (May 19, 1991) (unpublished Ph.D. dissertation, University of Kansas) (on file with author); *see also* M. Fletcher Reynolds, *Selle v. Gibb and the Forensic Analysis of Plagiarism*, 32 C. MUSIC SYMP. 55, 64 (1992).

<sup>37</sup> *See* Arewa, *supra* note 26, at 496.

<sup>38</sup> MARGULIS, *supra* note 28, at 5.

actual ways that human beings experience music ties together copyright's emphasis of the visual-textual and disdain for repetition. Consequently, the ways we conceptualize music creation and reception in copyright may be significantly at odds with how human beings understand and process music. Copyright considerations of music would benefit from looking beyond the visual to take better account of how music is actually perceived, applying insights of the cognitive sciences.

Human perception of music is complex. Copyright tends to focus on easily notated aspects of music, particularly melody, and, to a lesser extent, harmony and rhythm.<sup>39</sup> In contrast, timbre is typically ignored in copyright considerations of music, largely because timbre is difficult to notate.<sup>40</sup> Timbre refers to sound quality or color and enables those listening to music to distinguish different instruments in an orchestra, for example.<sup>41</sup> Although timbre is typically explicitly ignored in musical copyright considerations, it still may come into play because of its importance as a critical feature of musical expression and as a result of how musical evidence is presented to juries,<sup>42</sup> which is potentially problematic. Psychologist Aniruddh D. Patel cites organized systems of pitch contrasts—evident, for example, in a song melody—and the importance of musical timbre as two common properties of human musical systems.<sup>43</sup> Professor Patel suggests that timbre is “arguably as important as pitch as a perceptual feature of music.”<sup>44</sup> Timbre, which has become increasingly important in Western music over the last two centuries, is one of the most distinguished characteristics by

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<sup>39</sup> See Michael R. Graif & Jason Gottlieb, *Substantial Similarity in the Age of Electronic Music*, N.Y. L.J. (Jan. 6, 2014), <http://www.newyorklawjournal.com/id=1202633987081/Substantial-Similarity-in-the-Age-of-Electronic-Music>.

<sup>40</sup> See, e.g., Jean-Charles Francois, *Writing Without Representation, and Unreadable Notation*, in 30 PERSP. NEW MUSIC 6, 15 (1992) (“Timbre cannot be easily notated.”); HUGO COLE, *SOUND AND SIGNS: ASPECTS OF MUSICAL NOTATION* 128 (1974).

<sup>41</sup> Jean-Claude Risset & David L. Wessel, *Exploration of Timbre by Analysis and Synthesis*, in *THE PSYCHOLOGY OF MUSIC* 113, 113 (Diana Deutsch ed., 2d ed. 1999).

<sup>42</sup> Arewa, *supra* note 26, at 499–500; Lund, *supra* note 36, at 139, 149–50.

<sup>43</sup> ANIRUDDH D. PATEL, *MUSIC, LANGUAGE, AND THE BRAIN* 12 (2010).

<sup>44</sup> *Id.* at 28.

which listeners distinguish music.<sup>45</sup> The differential copyright treatment of melody and timbre, two key features of music, is problematic in light of the importance of timbre as a key feature of popular music. The potential impact of differential copyright treatment of pitch and timbre is particularly noteworthy given the increasing dominance over the course of the twentieth century in the popular music sphere of African American influenced musical forms, in which timbre is often a defining feature.<sup>46</sup> Complexities and differential treatment of varied musical features may have significant implications for music copyright cases. In particular, greater attention should be given to questions of perception and reception in musical evidence presented in music copyright cases.

### III. INTERPRETING INFRINGEMENT IN MUSIC CASES

Treatment of written music—musical notation—in court cases highlights ways in which determinations of infringement involve acts of interpretation. Music copyright cases would benefit from analyses that incorporate a broader understanding of approaches to composition and account for the significant variations in musical creativity. As a result, analysis of notation in music infringement cases should be supplemented by greater consideration of a broader range of musical features, such as timbre, as well as a better understanding of musical contexts. For example, courts could take more account of musical genre and dominant musical practices within musical genres and the role of oral and written traditions in music.

Copyright analysis would also benefit from approaches that embrace the complexity of music as both a written and oral artistic endeavor. Doing so would require interpretations that take greater account of nonvisual musical features such as timbre, as well as musical features that are more difficult to

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<sup>45</sup> DANIEL J. LEVITIN, *THIS IS YOUR BRAIN ON MUSIC* 52 (2008); Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 431–32 n.51 (1988).

<sup>46</sup> Learthen Dorsey, “*And All That Jazz*” *Has African Roots!*, in *AFRICAN AMERICAN JAZZ AND RAP* 35, 51 (James L. Conyers, Jr. ed., 2000) (“Moreover the unique sound associated with both African and African American music results from the manipulation of timbre, texture, and shading in ways that are uncommon to western practice.”).

notate, including rhythm. Such approaches should also incorporate greater understanding of musical cognition in infringement cases.

The need for music copyright approaches that incorporate perception based analysis is supported by studies in musicology of music perception, which suggest that people listening to music rely to a far greater extent on timbre to recognize music than features, such as melody or rhythm.<sup>47</sup> Given this, current approaches to music infringement analysis must develop more consistent and systematic ways for considering music sounds and visual images of music in notation. Further, what constitutes infringement in our ears may be quite different than what constitutes infringement on paper. This potential divergence underscores the ways that visual bias has potential to skew outcomes in infringement cases, potentially in significant ways.

Greater consideration of the nonvisual and oral could thus fundamentally reshape approaches to infringement in music cases. The insights of neuroscience may be useful in determining how understandings of music cognition in other fields could best inform considerations of oral and written music features in copyright infringement cases.<sup>48</sup> At a minimum, greater clarification of the relationship between the written and oral is needed, as well as more systematic approaches for dealing with musical variations.

Approaches that incorporate a better understanding of music cognition in music copyright require reassessment of existing approaches and the biases embedded in such approaches. European art music has come to reflect many of the attributes that copyright considerations of music implicitly or explicitly assume represent appropriate music creation practices. This conceptualization of creativity in the European art music tradition is at best incomplete. As a result of sacralization, the European art music canon has moved from being a living musical tradition to a museum tradition with a significant focus on works of dead composers.

The displacement of European art music by African-based musics in popular music is a core element of the tensions present in the application of copyright to music. To the extent that

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<sup>47</sup> LEVITIN, *supra* note 45, at 155–57.

<sup>48</sup> See Arewa, *supra* note 23, at 628.

African American and other African based musics embody significant elements of an oral tradition in music, how copyright treats oral aspects of musical tradition matters. For example, in traditions with dominant or significant oral aspects, the conceptualization of performance as the embodiment of a composition is unlikely to constitute an adequate depiction of how music is actually created within the tradition. Further, a performance, as might be evident today in a recording, may actually reflect a continuum of music practices. One side of this continuum might reflect dominant copyright assumptions and would conceptualize performance as purely a repetition of an underlying musical composition. On the opposite side of this spectrum, a performance that might be embodied in a sound recording could be thought of as a composition to the same extent as a composition reflected in written notation.<sup>49</sup>

Visions of performance and composition in copyright should be shaped by context and consideration of music genres. Embedding the full spectrum of performance activities into copyright requires that copyright discussions recognize that in some genres, performance may be merely duplicative of an underlying written composition, but that other genres may have different norms with respect to performance and composition. This is particularly true given the core goals of copyright to stimulate creativity. A view of performance as duplicative and derivative of an underlying musical composition is not likely to promote greater creativity in many contemporary musical genres. Furthermore, conceptions of creativity that do not effectively recognize types of borrowing and repetition can make it far more difficult to identify acceptable forms of borrowing and repetition in actual contexts of musical creation.<sup>50</sup> Rather, as was the case with European art music in the late nineteenth century, such assumptions may in fact contribute to the dimming of living, vibrant creative forms. A more comprehensive copyright vision of creativity should thus extend beyond the

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<sup>49</sup> Jason Toynbee, *Copyright, the Work and Phonographic Orality in Music*, 15 SOC. LEG. STUD. 77, 93 (2006) (“[R]ecording is a form of fixation too, and therefore could be said to embody the composition as much as a manuscript does.”); see Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829, 1846 (2011).

<sup>50</sup> These issues were relevant in the recent *Blurred Lines* case. See generally *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773 (C.D. Cal. Oct. 13, 2014).

visual and be shaped to a far greater extent by actual contexts of creation, not assumed creative norms in museum traditions. This broader vision could also incorporate greater scrutiny of the topography of creativity, including in niche creative segments.