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Towards a Critical IP Theory: Copyright, Consecration, and Control

John Tehranian *

“All animals are equal, but some animals are more equal than others.”
—George Orwell, *Animal Farm*

I. INTRODUCTION

Intellectual-property jurisprudence increasingly informs the way in which social order is maintained in the twenty-first century. By regulating cultural production and patrolling the dissemination of knowledge, copyright law mediates the exercise of important social, political, and economic rights, thereby playing a critical role in the construction of our information society. In theory, ostensibly neutral ground rules guide the vesting, enforcement, and adjudication of rights pertaining to creative works in a way that best advances the constitutionally mandated purpose of the copyright regime: progress in the arts.¹ But, in reality, copyright law’s procedural and substantive doctrines do more than just advance “progress in the arts” and can serve as powerful tools for the regulation, control, and manipulation of meaning. This Article identifies and builds on an emerging literature²—one that it refers to as “critical intellectual-property” scholarship—to introduce a framework for studying just how copyright transcends its small corner of the legal universe by shaping social structures and regulating individual behavior as part of a larger hegemonic project.

As John Fiske writes, “Popular culture always is part of power relations; it always bears traces of constant struggle between domination and subordination, between power and various forms of resistance to it or evasions of it”³ Thus, it is not surprising that

* AB, Harvard University, JD, Yale Law School. Irwin R. Buchalter Professor of Law, Southwestern Law School. Portions of this Article are based on sections of my book, *Infringement Nation: Copyright 2.0 and You* (Oxford University Press, 2011). I would like to thank Rose Sélavy and R. Mutt for inspiring the themes in this Article and Joseph Ballstaedt, Sarah Swanson, and Michael Worth for their invaluable research and editorial assistance.

1. U.S. CONST., art. I, § 8, cl. 8.

2. See *infra* Part II.B.

3. JOHN FISKE, UNDERSTANDING POPULAR CULTURE 19 (Routledge 2d ed. 2010)

intellectual-property laws that control access to and use of popular culture are a function of power relations. In the early 1970s, sociologist Pierre Bourdieu introduced the concept of cultural reproduction to explain the processes through which the dominant class retained its power.⁴ Drawing on the example of schooling in modern society, he argued that educational institutions function largely to preserve hegemonic interests by perpetuating the reproduction of the cultural and social values of the dominant class.⁵

Bourdieu's work on cultural reproduction has inspired waves of scholarship in the social sciences,⁶ but it has not generated as much interest in the field of intellectual property. Yet the notion of cultural reproduction is instrumental to understanding the consequences of intellectual-property laws on knowledge-power systems. Bourdieu's work and the scholarship it has inspired suggest that the inviolate recitation of the cultural production of dominant social forces is a profound vehicle for the inculcation of a set of values and symbols that consolidate existing power structures.⁷ If that is the case, the act of imperfect reproduction, or of customization, of cultural production can translate into an act of subversion or reproduction of the existing social order in a particular form. These acts of differentiation and similitude, or the acts of imperfect reproduction and customization, are carefully regulated by intellectual-property laws.⁸ And the selective protection granted to cultural production under the guise of copyright reveals the role of intellectual-property law in molding identities, enforcing dominant values, and controlling expressive rights. In short, user and creator rights are determined by intellectual-property laws that can help both maintain and perpetuate existing social structures.⁹ Copyright's procedural and substantive

(1989).

4. PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY, AND CULTURE (Richard Nice trans., 2d ed. 1990) (1970).

5. *Id.* at 56 (referring to a diploma as a "juridically sanctioned validation of the results of inculcation").

6. *See, e.g.*, JEN WEBB ET AL., UNDERSTANDING BOURDIEU (2002) (presenting a primer on Bourdieu targeting students of sociology and cultural studies).

7. *See, e.g.*, PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE (Richard Nice trans., 1984) (analyzing the social meaning imbued in even the most trivial exertions of taste and the role of taste in the construction of identity and class differentiation); BOURDIEU & PASSERON, *supra* note 4, at 56 (analyzing the role of the formal educational system in inculcating values and symbols that perpetuate class differences).

8. *See*, for example, the expansive derivative-rights doctrine described *infra*, note 76 and accompanying text.

9. This is not to suggest that intellectual-property laws inevitably maintain and

rules therefore serve as a key vehicle for the discursive exertion of knowledge–power systems on individuals.

Part II of this Article examines the link between intellectual-property rights and knowledge–power systems. Specifically, it frames the theoretical underpinnings of this study of copyright law in cultural studies. A growing body of scholarship has begun to analyze the relationship between trademark, copyright, and patent doctrines and wider power struggles by assessing the myriad ways in which our intellectual-property regime reflects and even accentuates traditional race-, gender-, orientation-, and class-based divides. Although this literature has not received a collective appellation, it has made a vital contribution to understanding the broader implications of intellectual-property law from a perspective informed, at least implicitly, by critical theory. This Article therefore identifies this nascent scholarship as developing a ‘critical intellectual-property’ theory. This Article then situates this critical intellectual-property scholarship in relation to the extant literature in the more mature movements of critical legal studies and critical race theory.

Building on this critical intellectual-property scholarship, this Article turns its attention towards constructing a theoretical model for assessing the broader impact of intellectual-property protections on hegemonic practices. It does so both to elucidate the relationships among present contributions in the field and to provide a framework for future work. Specifically, this Article recognizes three primary moments of analytical interest for critical intellectual-property queries: (1) the vesting of rights, (2) the assertion of rights, and (3) the adjudication of rights. Decision-making in these three theaters of operation reveals the intricate way in which ostensibly neutral laws have combined to create hierarchies of informational and cultural rights that patrol relations between sovereigns and their subjects, corporations and individuals, and entrenched interests and surging parvenus.

Thus, Part III focuses on the genesis of rights and the way in which the vesting of copyright protection beatifies certain forms of cultural production. To illustrate this point and to provide a historical analysis of intellectual-property law as a hegemonic battleground, the Article examines the origins of the derivative-rights doctrine as a response to tensions over access to cultural content.

perpetuate existing social structures. They can also facilitate resistance and counter-hegemonic practices.

Specifically, the example of William Shakespeare and the opera—surprisingly populist works in the nineteenth century that transformed into the fodder of only the elite in the twentieth century—helps trace the development of cultural hierarchy and chart the interplay between norms and the law in the process of sacralizing creative content. Part III concludes by examining the works of The Beatles, as embodied in both the musical *Love* and Danger Mouse's *The Grey Album*, to demonstrate how modern copyright law patrols acts of cultural reproduction and semiotic disobedience.

Part IV turns its attention to the assertion of rights. Specifically, it examines the power dynamics at play in determining how and when rights are enforced and the resulting impact that selective enforcement has on the semiotic influence of cultural content. To illustrate this point, the Article considers the unauthorized use of sound recordings by the federal government at American detention facilities at Guantanamo Bay and the conspicuous silence about the practice by the music industry. Part IV contrasts this state of affairs to the aggressive, high-profile enforcement tactics that the music industry has used to fight the scourge of individual file sharing on the Internet. In the process, we witness how copyright, and its selective enforcement, can mediate the relationship between sovereigns and their subjects.

Finally, Part V focuses on how copyright interests are vindicated in the adjudicative process. Specifically, it charts how both the procedural and substantive aspects of copyright doctrine create hierarchies of protection and impact broader social, economic, and political rights. With respect to procedure, copyright's seemingly innocuous registration rules create a vast disparity in the effective protections from infringement enjoyed by sophisticated versus non-sophisticated creators. Thus, procedural niceties reflect and perpetuate a broader societal project establishing cultural hierarchy and the consecration of sacred texts. With respect to substantive adjudication, Part V builds on a body of literature that has highlighted the impact that aesthetic judgments have in courts' weighing of copyright claims. Specifically, aesthetic judgments reflect subtle, value-laden determinations about the place of creative content in our cultural hierarchy. To illustrate this point, an exegesis of two recent cases involving unauthorized send-ups of classic American novels—*Gone with the Wind* and *The Catcher in the Rye*—demonstrates how courts can abandon a rhetorical commitment to aesthetic neutrality in conducting their fair-use analyses and how

implicit, but powerful, judgments about a work's worth—in a sociopolitical context—can influence the outcomes of suits. To paraphrase George Orwell, while the law may tell us that all copyrighted works are created equal, it turns out that some are more equal than others.

II. ANALYZING IP AND POWER

A. IP as Hegemonic Battleground

Intellectual property has, for many years, served as a key battleground for the struggle between entrenched economic interests and emerging competitors. An examination of historical conflicts between intellectual-property maximalists and minimalists illustrates this point. As Lawrence Lessig has argued, many of the same industries that now lobby heavily for strong intellectual-property rights established themselves precisely because of their flagrant, unauthorized exploitation of the intellectual property of others.¹⁰ Thus, the very entrenched powers now advocating copyright maximalism benefitted from brazen infringement during their formative years.¹¹

For more than a century, the fledgling American publishing industry reaped handsome economic rewards from the ability to reproduce the works of foreign authors—especially those from Britain—without paying a penny in royalties.¹² Cable television blossomed because of retransmission of the signals (i.e., the copyrighted content) of the major networks without authorization or payment.¹³ Hollywood became the center of motion-picture

10. LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 53–64 (2006).

11. *See infra* notes 12–18.

12. By and large, works by foreign authors did not enjoy copyright protection in the United States from 1790 through 1891. *See* Seth M. Goldstein, *Hitchcock's "Rear Window" and International Copyright Law: An Examination of Stewart v. Abend & Its Effect on International Copyright Renewal and Exploitation*, 14 *CARDOZO J. INT'L & COMP. L.* 247, 258 (2006).

13. Niels B. Schaumann, Note, *Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption*, 51 *FORDHAM L. REV.* 637, 637–40 (1983). Without this exception, cable television would have had a much harder time gaining its foothold in the American living room. Imagine how cable would have fared without unauthorized retransmission of network signals: Cable companies could have offered consumers a panoply of untested alternatives—a crazy 24/7 news channel, a wacky station that played only music videos all day long, a network devoted to b-movies—but it would have come without regular networks. And, of course, the cable stations would have been hard

universe when Louis Mayer famously travelled to the West Coast to seek better weather and to reduce production costs.¹⁴ But, less famously, Mayer and his cronies were seeking to evade the watchful eye of Thomas Edison and his attorneys.¹⁵ Edison, it turned out, owned numerous patents for technology used by the burgeoning film industry, and filmmakers were eager to reduce their production costs by not having to license these patent rights.¹⁶ In short, Hollywood was born of infringement. Major studios such as Walt Disney have long profited by drawing upon the rich intellectual tradition of folk tales without compensating anyone for their exploitation.¹⁷ And the modern music industry saw much of its early success from the unauthorized exploitation of old blues riffs, many stolen directly from unacknowledged African American–folk artists.¹⁸

We continue to see this clash between prior creators and emerging innovators in action today. For example, leading Internet sites are pushing the line on copyright law as they challenge the

pressed to obtain licenses for retransmission from the major networks as they had no interest in fueling their own demise by making the transition to cable all the more palatable. The networks wanted cable to come at a cost: you either got the networks or you got the cable stations. However, when cable provides the cable stations plus crystal-clear feeds of network channels, the temptation of subscribing to cable becomes all the greater, if not irresistible.

14. SCOTT EYMAN, *LION OF HOLLYWOOD: THE LIFE AND LEGEND OF LOUIS B. MAYER* 53 (2005).

15. Peter Edidin, *La-La Land: The Origins*, N.Y. TIMES, Aug. 21, 2005, at C2 (noting that “Los Angeles’s distance from New York was also comforting to independent film producers, making it easier for them to avoid being harassed or sued by the Motion Picture Patents Company, aka the Trust, which Thomas Edison helped create in 1909”).

16. In 1908, Edison and nine other patentees formed the Motion Picture Patents Company to pool their intellectual-property rights and effectively control nearly all motion-picture technology. The MPCC rigorously enforced its patent rights against independent movie producers, bringing infringement claims against any producer not using properly licensed equipment. Alexandra Gil, *Breaking The Studios: Antitrust and the Motion Picture Industry*, 3 N.Y.U. J.L. & LIBERTY 83, 91–92 (2008).

17. LESSIG, *supra* note 10, at 23–24 (“The catalog of Disney work drawing upon the work of others is astonishing when set together: Snow White (1937), Fantasia (1940), Pinocchio (1940), Dumbo (1941), Bambi (1942), Song of the South (1946), Cinderella (1950), Alice in Wonderland (1951), Robin Hood (1952), Peter Pan (1953), Lady and the Tramp (1955), Mulan (1998), Sleeping Beauty (1959), 101 Dalmatians (1961), The Sword in the Stone (1963), and The Jungle Book (1967).”).

18. *See, e.g.*, Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1598–99 (1997) (“In the 1950’s, many white artists became superstars either by re-recording black music for white audiences, like Pat Boone, or by drawing more indirectly on African-American musical traditions, like Elvis Presley. Indeed, the phenomenon called ‘rock ‘n’ roll,’ now associated primarily with white artists and white audiences, emerged from the African-American blues tradition.”).

dominion of entrenched powers. Consider the ongoing showdown between Hollywood and Silicon Valley. Web 2.0 outfits such as YouTube, Wikipedia, WordPress and Blogger have thrived on the exploitation of “user-generated content”—much of which consists of either the copyrighted works of third parties or works by users that, without authorization, make use of the copyrighted works of third parties.¹⁹ These third parties are frequently the major movies studios and record labels. To date, Web 2.0 companies have shielded themselves from liability through the precarious provisions of the Digital Millennium Copyright Act (“DMCA”) safe harbor provision for Internet service providers who host user-generated content,²⁰ but those provisions are under attack by traditional-media conglomerates such as Viacom, who claim that YouTube illegitimately free rides on the backs of content creators whose works provide the value that makes YouTube a top online destination.²¹ The battle has also spilled outside of the judiciary and legislature and into the court of public opinion. In early 2012, as congressional support for the controversial Stop Online Piracy Act (“SOPA”) grew, Web 2.0 outfits successfully protested the legislation by either shutting down for a day (in the case of Wikipedia) or drawing attention to the arguments against

SOPA on their front page (in the case of Google).²² SOPA was soon dead.

The resolution of these intellectual-property struggles does not simply impact the distribution of private wealth between companies. Just as significantly, it also determines the future control of

19. ROBERT P. LATHAM, JEREMY T. BROWN & CARL C. BUTZER, LEGAL IMPLICATIONS OF USER GENERATED CONTENT: YOUTUBE, MYSPACE, FACEBOOK (2012), *available at* <http://images.jw.com/com/publications/892.pdf>

20. The DMCA immunizes qualifying Internet services providers from monetary liability on claims of contributory infringement when, at the direction of a user, they store material that resides on a system or network controlled or operated by them so long as, *inter alia*, they do not have actual knowledge of the infringement, are unaware of facts or circumstances from which infringing activity is apparent, and act expeditiously to disable access or remove once receiving such knowledge or awareness. 17 U.S.C. § 512(c) (2012).

21. *See, e.g.*, Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *vacated*, 676 F.3d 19 (2d Cir. 2012).

22. *See* Declan McCullagh, *Wikipedia, Google Blackout Sites to Protest SOPA*, CNET NEWS (Jan. 17, 2012, 9:43 PM), http://news.cnet.com/8301-31921_3-57360754-281/wikipedia-google-blackout-sites-to-protest-sopa.

informational and cultural content. In this way, the contours of intellectual-property law shape social structures, and jolts to the regime can produce fissures along significant fault lines such as race, class, gender, and sexual orientation.

B. Critical Legal Studies, Critical Race Theory, and Critical IP Theory

In assessing the broader impact of intellectual-property law on social structures and issues of race, class, gender, and sexual orientation, we draw inspiration from a body of literature in critical legal studies and critical race theory. Building on the work of such social theorists as Antonio Gramsci,²³ Max Weber,²⁴ and Michel Foucault,²⁵ the critical-legal-studies movement has explored the link between power relationships in society and the development of legal doctrine and the structure of legal practice.²⁶ In particular, critical

23. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 12, 161, 170, 416–17 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971). Gramsci's concept of hegemony, grounded in both the consent of the masses and the coercive apparatus of the state, has been used by critical legal studies scholars to analyze legal rights and legal reasoning. See, e.g., Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 32 (1982); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1351–52 (“Law . . . embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable.”); Robert Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 286 (David Kairys ed., 1982) (“[T]he most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are.” (citing GRAMSCI, *supra*, at 195–96, 246–47)).

24. See, e.g., Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031 (2004) (positing the strong affiliation between Weber's sociology of law and the tenets of the critical legal studies movement); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 563 n.1 (1983) (noting the particular influence of the social and historical analyses of Marx and Weber on many critical legal theorists).

25. Foucault's deconstruction of social discourses, legal or otherwise, in light of discursive power relationships has been tremendously influential on critical legal scholarship. See, e.g., Duncan Kennedy, *The Stakes of Law or Hale and Foucault!*, in SEXY DRESSING, ETC. 83 (1993); William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 946 (1986) (“The work of Habermas and Foucault, for example, has attracted a following among American legal scholars, particularly in and around the critical legal studies movement”).

26. See, e.g., CRITICAL LEGAL STUDIES (James Boyle ed., 1992); CRITICAL LEGAL STUDIES (Allan C. Hutchinson ed., 1989); CRITICAL LEGAL STUDIES (Peter Fitzpatrick & Alan Hunt eds., 1987); CRITICAL LEGAL STUDIES: ARTICLES, NOTES, AND BOOK REVIEWS SELECTED FROM THE PAGES OF THE HARVARD REVIEW (1986); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL

legal theory has questioned claims over the naturalness, objectivity, and neutrality of certain legal discourses, including formalism, essentialism, and law and economics.²⁷ In so doing, critical legal theorists have deconstructed “the role that the myth of ‘neutral law’ plays in legitimating legal discourse” and have examined “the way that the legal system translates a politically loaded social reality into a world of depoliticized operational signs or ideological chimeras.”²⁸

Critical race theory, which began as a subset of,²⁹ and even reaction to,³⁰ the critical legal studies movement, has focused on the particular role that law and its institutions have played in both maintaining and perpetuating racial subordination.³¹ In particular,

STUDIES MOVEMENT (1986); Symposium, *Critical Legal Studies*, 36 STAN. L. REV. 674 (1984); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

27. See James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 689–90 (1985).

28. *Id.* at 706.

29. See, e.g., Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994) (“CRT [Critical Race Theory] is the heir to both CLS [Critical Legal Studies] and traditional civil rights scholarship.”).

30. Among other things, critical race theorists have critiqued the traditional critical legal studies movement for not doing enough to focus on systemic issues of race discrimination and non-intentional, but nevertheless significant, forms of racial subordination not easily remedied by legislation such as the Civil Rights Act of 1964. See Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899–901 (1995).

31. See, e.g., STEVEN BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* (2003); ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* (1999); *CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS* (Dorothy A. Brown ed., 2003); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberle Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001); *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (Juan Perea, Richard Delgado, Angela Harris & Stephanie Wildman eds., 2000); JOHN TEHRANIAN, *WHITWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* (2009); *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 1998); FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002); Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241 (1993); Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writings About Race*, 82 TEX. L. REV. 121 (2003); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215 (2002); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Tanya Kateri Hernandez, *“Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

critical race theorists have explored the ways in which the trope of colorblindness and ostensibly neutral ordering rules have “not only allowed law to ignore the social and institutional structures of oppression created historically and recreated presently in law and practice” but also have “blunted efforts to dismantle the racial caste system.”³² Take the debate over the regulation of hate speech, for example. Channeling the provocative arguments of Charles Lawrence and Mari Matsuda, Derrick Bell has noted that

being committed to “free speech” may seem like a neutral principle, but it is not. Thus, proclaiming that “I am committed equally to allowing free speech for the KKK and 2LiveCrew” is a non-neutral value judgment, one that asserts that the freedom to say hateful things is more important than the freedom to be free from the victimization, stigma, and humiliation that hate speech entails.³³

Critical race theorists have therefore identified and critiqued systemic features of our legal system that may contribute to the disenfranchisement of communities of color.³⁴

In recent years, a new body of intellectual-property literature has emerged, imbued with the spirit of critical legal studies and critical race theory. Scholars have begun to explore the relationship between gender and intellectual property,³⁵ examining such issues as the gendered aspects of copyright’s fair-use doctrine,³⁶ the tension

32. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory*, 84 DENV. U. L. REV. 329, 336 (2006).

33. Bell, *supra* note 30, at 902 (citing Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989)).

34. *Id.* at 900.

35. See, e.g., Dan L. Burk, *Feminism and Dualism in Intellectual Property*, 15 AM. U. J. GENDER SOC. POL’Y & L. 183, 185 (2006) (highlighting the role that feminist theory can play in revealing how “the dualism of mind and body that pervades both patent and copyright law” can “determine[] and maintain[] a pervasive set of power relationships in society”); Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 70 (2000).

36. Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL’Y & L. 551, 552, 559–64 (2006) (“Many of the professionally prominent, active legal scholars in the intellectual-property subject areas, those whose publications obtain high numbers of citations and receive the most numerous and prestigious speaking engagements (citations and conference invitations being important metrics for gauging reputation and prestige), do not explicitly address issues of gender, race, or economic class in their scholarship very frequently”).

between feminism and the expansive scope of copyrightable and patentable subject matter,³⁷ and the role of copyright law in dissuading “non-hierarchical, associative webs” critical to feminist discourse.³⁸ Similarly, scholars have examined the complex interface between intellectual-property laws and race in assessing, for example, the role of copyright rules in legitimating the unacknowledged and uncompensated usurpation of traditional African American–folk and blues in the development of the modern music industry.³⁹ More broadly, research within the field has addressed the relationship between intellectual property and sexual orientation⁴⁰ and the impact of intellectual-property regimes on global inequalities.⁴¹

While this particular body of intellectual-property research has not acquired a collective appellation, it shares a common methodology and inquisitive approach. For lack of a better term and in recognition of its philosophical roots, I refer to this body of work

37. Malla Pollack, *Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter*, 12 WM. & MARY J. WOMEN & L. 603, 605 (2006) (“This article’s core claim is that the public domain is inherently feminist, especially for those who recognize that ‘both women and men are oppressed by the “sex role system” of western capitalism. By enlarging and protecting the public domain, society would move towards a more feminine, and therefore more humanist, culture.” (quoting ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 8 (1983)).

38. Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER SOC. POL’Y & L. 519, 519 (2006) (addressing the conflict between our existing copyright law and feminist conceptions of hypertext).

39. See, e.g., SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 117–48 (2001) (tracing the appropriation of blues by rock ‘n’ roll artists over time); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 550–51 (2006); K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1193 (2008) (“The fleecing of Black artists was the basis of the success of the American music industry”); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 358–59 (1999); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL’Y & L. 365, 371–74 (2008).

40. Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 223 (2005) (documenting and challenging how existing “neutral” trademark rules have been utilized to deny intellectual-property protection to “queer marks”).

41. Keith Aoki, *Considering Multiple and Overlapping Sovereignities: Liberalism, Libertarianism, National Sovereignty, “Global” Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443, 461–64 (1998) (discussing how the seemingly neutral harmonization of intellectual-property standards has profound North-South implications); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1354 (2004) (cautioning that the trope of a “romantic public domain” can relegate forms of traditional knowledge to the commons and thereby exacerbate global inequities).

as “critical IP theory,” which I loosely define as the deconstruction of trademark, copyright, and patent laws and norms in light of existing power relationships to better understand the role of intellectual property in both maintaining and perpetuating social hierarchy and subordination. Drawing on this growing body of critical IP literature, this Article assesses the role of copyright law in creating hierarchies of work entitled to differing levels of protection and the hegemonic consequences of these hierarchies on societal knowledge–power systems.

Copyright law represents a key battleground in power relations, especially in the twenty-first century, as various societal actors struggle for the rights to control, regulate, or manipulate cultural content. Old industries use intellectual-property enforcement to resist competition from start-ups.⁴² Sovereigns benefit from intellectual-property exemptions (both *de facto* and *de jure*) that enable their free use and reinterpretation of cultural content.⁴³ And corporations rely on intellectual-property rights to attempt to consecrate their cultural content.⁴⁴ However, not all cultural content is treated the same way, and the particular structure of copyright law in doling out differing levels of protection to creative works represents a key aspect of broader domination and subordination practices. Under our copyright regime, some works become beautified as sacred texts while others remain subject to unadulterated manipulation and reinterpretation. And as we shall

42. See *supra* note 21 and accompanying text (discussing the dynamics of the litigation between traditional media conglomerate Viacom and Web 2.0 outfit YouTube).

43. See *infra* Part IV.A (noting the absence of copyright enforcement against the federal government for its unauthorized public performance of musical compositions at the military base at Guantanamo Bay and the resulting recoding of songs such as “Born in the U.S.A.”). On the *de jure* side of the equation, consider the sovereign immunity granted to states on claims of copyright infringement. See, e.g., *Chavez v. Arte Publico Press*, 204 F.3d 601, 607–08 (5th Cir. 2000) (rejecting, as unconstitutional, Congress’s Copyright Remedy Clarification Act (“CRCA”), which sought to hold states liable for acts of copyright infringement); *Romero v. Cal. Dep’t of Transp.*, 2009 U.S. Dist. LEXIS 23193, at *13 (C.D. Cal. Mar. 12, 2009) (same); *Mktg. Info. Masters, Inc. v. Bd. of Trs. of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1094–95 (S.D. Cal. 2008) (same).

44. Mattel, for example, is notorious for its aggressive attempts to use intellectual-property litigation to prevent unauthorized artistic reinterpretations of Barbie. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 816 (9th Cir. 2003) (rejecting Mattel’s claims of copyright, trademark, and trade dress infringement against artist Thomas Forsythe for his photographs portraying a sexualized, naked Barbie in absurd positions with vintage household appliances); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906–07 (9th Cir. 2002) (rejecting Mattel’s claims that Aqua’s pop hit *Barbie Girl*—which lampooned the famous doll— infringed and diluted the “Barbie” trademark).

see, this process occurs in at least three primary moments of analytical interest: (1) the vesting of rights, (2) the assertion of rights, and (3) the adjudication of rights.

III. THE VESTING OF RIGHTS

A. Derivative-Rights Protection and the Emergence of Cultural Distinction: Highbrow/Lowbrow Norms and the Remix of Art

The process of creating rights represents an instrumental part of a wider historical project driving the protection of elite culture and the regulation of social boundaries. To illustrate this process, we contemplate the interaction of norms and law in the vesting of derivative-rights protection to copyright owners. In the early years of the Republic, copyright law simply forbade the literal reproduction of protected works, in toto, without authorization.⁴⁵ The subject matter of copyright was limited to books, charts, and maps.⁴⁶ And, quite notably, transformative (derivative) uses of copyrighted works were deemed to be, per se, non-infringing.⁴⁷ As a result, even the unauthorized act of abridgement or translation of a copyrighted work was considered permissible.⁴⁸ The limited nature of the copyright monopoly enabled the types of activities that characterized American cultural scene in the early- and mid-nineteenth century: the frequent reinterpretation, remixing, transformation, parody, embellishment, abridgement, adaptation, and alteration of a panoply of works that now form the inviolable canon.⁴⁹ Over time, this

45. See, e.g., John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 466 (2005) (“[E]arly copyright laws prohibited slavish copying of a protected work . . .”).

46. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

47. Tehranian, *supra* note 45, at 474–80.

48. See, e.g., *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 652 (1834) (“An abridgement fairly done, is itself authorship, requires mind; and is not an infringement, no more than another work on the same subject.”); *Stowe v. Thomas*, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514) (“To make a good translation of a work, often requires more learning, talent and judgment, than was required to write the original. Many can transfer from one language to another, but few can translate. To call the translations of an author’s ideas and conceptions into another language, a copy of his book, would be an abuse of terms, and arbitrary judicial legislation.”); *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497) (“A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment”).

49. See *infra* notes 51–68 and accompanying text (discussing the widespread remixing and reinterpretation of Shakespeare, opera, and symphonic music in nineteenth century America).

changed with the introduction of the derivative-rights protection.⁵⁰ The establishment of this right as part of the firmament of modern copyright law illuminates the copyright's role in preserving elite culture and regulating social boundaries.

We begin our analysis by focusing on the works of William Shakespeare—a man whose works never enjoyed copyright protection but whose oeuvre is firmly entrenched at the pinnacle of our cultural hierarchy. And we start with a simple observation about his poetry and prose: although it has long been part of the firmament of a sacred Western canon, this was not always the case. As much as it may surprise contemporary observers, the bard's works enjoyed a radically different cultural standing during the nineteenth century, when his plays were widely disseminated and enjoyed by a wide swath of American society.⁵¹

In his book, *Highbrow/Lowbrow*, Lawrence Levine documents the ubiquity of Shakespeare in the early popular culture of the Republic and charts the evolving position of Shakespearean works in American life over the course of the past century.⁵² As it turns out, during the nineteenth century, the bard's works were the very definition of popular, not elite, entertainment.⁵³ Shakespeare's plays were not only performed in venues throughout our country but his characters and plotlines were frequently the subject of minstrel parodies, abridgements, and re-interpretations, intermingled with popular songs, farces, novelty acts, and dances.⁵⁴ In the absence of any consecrating ethos,⁵⁵ his works were free to be manipulated and altered so that they might appeal to audiences of all stripes, playing in venues ranging from working-class burlesque and vaudeville shows along the frontier to the Brahman's East Coast theater.⁵⁶ Therefore, Shakespeare played a central role in entertaining the American masses. As a German observer from the era put it, one could always

50. Tehranian, *supra* note 45, at 489–91 (documenting the historical emergence of the derivative-rights doctrine as an outcome of natural-law copyright sensibilities and noting its role in controlling the remix and reinterpretation of creative works).

51. LAWRENCE W. LEVINE, *HIGHBROW/LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* 16–17 (1988) (discussing how, during the nineteenth century, Shakespeare was “presented and recognized almost everywhere in the country”).

52. *See generally id.*

53. *Id.* at 31.

54. *Id.* at 14–16.

55. Of course, it was not just norms that supported such uses of Shakespeare. An absence of legal prohibitions also encouraged remixing activities.

56. *See generally* LEVINE, *supra* note 51, at 17–20.

count on Shakespeare taking his rightful place alongside the Bible in the American home:

There is, assuredly, no other country on earth in which Shakespeare and the Bible are held in such general high esteem as in America, the very country so much decried for its lust for money. If you were to enter an isolated log cabin in the Far West and even if its inhabitant were to exhibit many of the traces of backwoods living, he will most likely have one small room nicely furnished in which to spend his few leisure hours and in which you will certainly find the Bible and in most cases also some cheap edition of the works of the poet Shakespeare.⁵⁷

Near the *fin de siècle*, however, views changed dramatically, and the works of Shakespeare increasingly came under the exclusive dominion of the elite and formally educated.⁵⁸ Although a number of demographic, gustatory, linguistic, and social trends partly explain this transformation,⁵⁹ Levine identifies another key driving force: the emergence of two distinct and mutually exclusive categories of cultural content—highbrow and lowbrow.⁶⁰ The bifurcation between these two types of works was policed through a sacralization process that separated the populist from the patriciate. Specifically, a beatifying ethos emerged, permeating works at the top of the hierarchy with an air of untouchability.⁶¹ Works were consecrated into a single “authentic” form, which could not be modified or reinterpreted.⁶² Notes Levine, “By the turn of the century Shakespeare has been converted from a popular playwright whose dramas were the property of those who flocked to see them, into a sacred author who had to be protected from ignorant audiences and overbearing actors threatening the integrity of his creations.”⁶³ For example, unlike the days of yore when transformations, abridgements, and adaptations were encouraged, “actors were admonished not to take liberties with the text of a Shakespearean play.”⁶⁴ The malleable, populist Shakespeare gave way to an embalmed, sacred version characterized by inviolability.

57. *Id.* at 18.

58. *Id.* at 72.

59. *Id.* at 49.

60. *See generally id.*

61. *Id.* at 72.

62. *Id.* at 138.

63. *Id.* at 72.

64. *Id.* at 138.

The transformation in Shakespeare during the era was not unique. Similar changes occurred in opera, symphonic music, and the fine arts as they joined the ranks of elite culture.⁶⁵ As Katherine Preston's research on nineteenth-century opera reveals, troupes performed extensively in both English and Italian to large audiences throughout antebellum America.⁶⁶ Explains Levine, "Opera in America, like Shakespeare in America, was not presented as a sacred text; it was performed by artists who felt free to embellish and alter, add and subtract."⁶⁷ However, opera's sacralization placed the genre in the exclusive province of the elite.⁶⁸ An unrepentant attack against adulteration of canonized works is, of course, a key hallmark of the consecration process. The remixing of Shakespeare, opera, and symphonic music—accepted practice in the nineteenth century—had become verboten.

*B. Sacralization in the Late Nineteenth Century: Towards a
Derivative-Rights Doctrine*

There is no mention of copyright law in Levine's seminal study, and, in this respect, Levine is not alone. Broadly speaking, and probably due to the phenomenon of academic Balkanization, the question of intellectual-property rights is widely underappreciated in the literature of cultural studies. However, copyright protection lies at the heart of the discursive struggle to police cultural hierarchy, to beatify sacred texts, and to proscribe their unwanted embellishment, abridgement, transformation, manipulation, and alteration. For example, and not coincidentally, at the very moment when Levine documents the emergence of a cultural rift between highbrow and lowbrow content, copyright protections expanded in an especially salient manner. Specifically, copyright holders began to enjoy a power previously denied them: the exclusive right to prepare

65. For example, as symphonic music made the transition from mainstream to highbrow, "the masterworks of the classic composers were to be performed in their entirety by highly trained musicians on programs free from the contamination of lesser works or lesser genres, free from the interference of audience or performer, free from the distractions of the mundane; audiences were to approach the masters and their works with proper respect and proper seriousness, for aesthetic and spiritual elevation rather than mere entertainment." *Id.* at 146.

66. KATHERINE K. PRESTON, *OPERA ON THE ROAD: TRAVELLING OPERA TROUPES IN THE UNITED STATES, 1825–60*, at 59, 116, 141 (1993); *see also* LEVINE, *supra* note 51, at 88.

67. LEVINE, *supra* note 51, at 89–90.

68. *Id.* at 101.

derivative versions of their copyrighted works.

Under the 1831 Copyright Act (as with the 1790 Copyright Act and the Statute of Anne before it), a copyright holder only possessed “the sole right and liberty of printing, reprinting, publishing, and vending” a work.⁶⁹ In short, there was no derivative-rights protection extended to copyright holders. As a result, the sacred text—outside of religion, where norms demanded it—did not exist as we know it. Celebrated works remained dynamic, ever-changing, and responsive to the particular needs of diverse audiences. In the nineteenth century, the elite cultural pursuits of modern times—such as Shakespeare, opera, fine art, and symphonic music—were equally as popular with the proletariat and the patriciate.⁷⁰

As Levine documents, the emerging fetishization of sacred texts in the late nineteenth century played an instrumental role in the creation and crystallization of cultural hierarchy.⁷¹ Simultaneously, copyright doctrine transformed, thereby both reflecting and reifying these changing cultural attitudes and giving legal bite to the hallowing process. When norms depressed efforts to bastardize the “authentic” language, plots, characters, and themes of Shakespeare’s works, copyright provided juridical force to the protection of works from rampant popular manipulation and reinterpretation.⁷² In 1870, Congress overturned existing case law and amended the Copyright Act of 1831 to secure for copyright holders the exclusive rights to translate and dramatize their works.⁷³ The 1909 Copyright Act went even further, granting such derivative rights as novelization and musicalization exclusively to copyright holders.⁷⁴ Finally, the 1976

69. Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436 (1831) (current version at 17 U.S.C. § 101 (2012)).

70. LEVINE, *supra* note 51, at 4, 21, 34, 85 & 100.

71. *Id.* at 72–74 (“The human Shakespeare who existed for most of the nineteenth century could be parodied with pleasure and impunity; the sacred Shakespeare who displaced him at its close posed greater problems.”); *id.* at 104 (“[T]he operate house [became] less a center of entertainment than a sacred source of cultural enlightenment.”).

72. Of course, with Shakespeare in the public domain, anyone can make use of his works and bastardize the language, plots, characters, and themes in any way one wants. But norms depressed such activity, thereby leading to Shakespeare’s eventual transition from the peoples’ playwright to a leading symbol of highbrow culture. Copyright law achieves the same function as those prior norms by interdicting the mongrelization of protected works.

73. Copyright Act of 1870, ch. 230, § 86, 16 Stat. 198 (1870) (current version at 17 U.S.C. § 101 (2012)) (“[A]uthors may reserve the right to dramatize or to translate their own works”).

74. *See* Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075 (1909) (current version at 17 U.S.C. § 101 (2012)). The Act gave authors the exclusive right to “translate the

Copyright Act explicitly gave authors the exclusive right to prepare all derivatives of their copyrighted works⁷⁵ and provided an expansive definition of what constituted a derivative work.⁷⁶ Though motivated by a variety of factors, including changing social norms, rather than a singular congressional commitment to sacralization, the emergence

of the modern derivative-rights doctrine in the late nineteenth and early twentieth centuries secured the Benjaminian “aura”⁷⁷ of works.

With the sacralization process in full force, it is not surprising that this era witnessed the counteractive rise of several subversive art movements. Cultural hierarchy spawned its discontents in the form of fine art movements such as Dadaism, futurism, fauvism, and surrealism,⁷⁸ with the various art schools launching a broadside attack against the very notion of sacred texts, undermining existing perceptions of high art with ready-mades, collage, photomontage, assemblage, and automatic drawing.⁷⁹ For example, Marcel Duchamp’s infamous *L.H.O.O.Q.* seemingly performed the ultimate sacrilege by mutilating Leonardo da Vinci’s hallowed *Mona Lisa* with

copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art.” *See id.* § 1(b).

75. *See* 17 U.S.C. § 106(2) (2012).

76. Under the current 1976 Copyright Act, a derivative work is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

17 U.S.C. § 101 (2012).

77. *See* Walter Benjamin, *The Work of Art in the Age of Mechanical Reproductions*, in ILLUMINATIONS 224 (Hannah Arendt ed., Harry Zohn trans., 1968) (arguing that, in an age of mechanical reproduction, the ease of replicating creative works threatens art’s aura—its perceived authenticity and ritualistic value); *see also* John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399, 1401–02 (2009) (discussing the role of copyright law in preserving and creating cultural hierarchy and, therefore, protecting the Benjaminian aura of certain cultural production).

78. This is not to say that the movements themselves were not highly elitist in their own way.

79. *See, e.g.*, ANDRÉ BRETON, MANIFESTOS OF SURREALISM (1969); Tristan Tzara, *Dadaist Manifesto*, in SEVEN DADA MANIFESTOS AND LAMPISTERIES (Barbara Wright trans., Calder Publications ed. 1977) (1919).

a moustache, goatee, and a tawdry new title to boot.⁸⁰ Duchamp's own masterpiece, the ready-made *Fountain*, annihilated the distinction between highbrow and lowbrow by bringing the urinal to the museum.⁸¹

Though the Dadaists and surrealists rarely discussed copyright per se, their core ideas were imbued with their relationship to the concept of intellectual property. Specifically, they rejected notions of originality and authorial genius and challenged the rights of exclusion that might go with such constructs. As the enigmatic and self-styled Comte de Lautréamont, a leading influence on the surrealists, argued, "Plagiarism is necessary. It is implied in the idea of progress. It clasps the author's sentence tight, uses his expressions, eliminates a false idea, and replaces it with the right idea."⁸² On this basis, Lautréamont freely "borrowed" from the works of Pascal, Kant, La Fontaine, and others in making his own.⁸³ As Anna Nimus observes, Lautréamont's view "subverted the myth of individual creativity, which was used to justify property relations in the name of progress when it actually impeded progress by privatizing culture. The natural response was to reappropriate culture as a sphere of collective production without acknowledging artificial enclosures of authorship."⁸⁴ Thus, Lautréamont's mantra "became a benchmark for the 20th century avant-gardes. Dada rejected originality and portrayed all artistic production as recycling and reassembling—from Duchamp's ready-mades, to Tzara's rule for making poems from cut-up newspapers, to the photomontages of Hoech, Hausmann and Heartfield."⁸⁵ In short, Dadaists, surrealists, and others members of the avant-garde fervently challenged the sanctity of sacred texts, freely creating unauthorized derivative works in defiance of the new social norms and laws that gave such rights exclusively to copyright holders.

During the intervening decades, the Dadaists and surrealists have

80. See Marcel Duchamp, *L.H.O.O.Q.* (altered reproduction) (1919), available at <http://www.marcel Duchamp.net/L.H.O.O.Q.php>.

81. See Marcel Duchamp (as R. Mutt), *Fountain* (readymade) (1917), available at <http://www.tate.org.uk/art/artworks/duchamp-fountain-t07573>.

82. ISIDORE DUCASSE, POÉSIES 15 (1870), available at www.gutenberg.net.

83. JULIA KRISTEVA, THE SENSE AND NON-SENSE OF REVOLT: THE POWERS AND LIMITS OF PSYCHOANALYSIS 110-11 (Jeanine Herman trans., 2001).

84. Anna Nimus, *Copyright, Copyleft and the Creative Anticommons*, SUBSOL, http://subsol.c3.hu/subsol_2/contributors0/nimustext.html (last visited July 26, 2012).

85. *Id.*

been recaptured by the elite (if they were ever outside of the elite in the first place). Their works feature prominently in museum exhibitions worldwide and enjoy renown among the cognoscenti. But they were not co-opted. Their revolutionary influence continues to be felt, as they have forced a pronounced change in elite culture: their attack on the highbrow/lowbrow distinction has gained traction, and our modern notion of cultural literacy has grown more inclusive and pluralistic as a result. For example, E.D. Hirsch's 1987 bestseller, *Cultural Literacy*, does not simply include knowledge of Shakespeare, Dante, Mozart, and Longfellow as required elements of cultural literacy; Disney, The Beatles, the Marx Brothers, and King Kong all find a place on his list as well.⁸⁶ Yet this changing perception of cultural literacy has also supported the sacralization of a wider swath of cultural production—specifically, popular works with significant economic value.

Copyright law continues to reify cultural stratification by supporting the notion of sacred texts. Although such texts may now come from The Beatles instead of Shakespeare, hierarchy remains in place, albeit with different content. Take the example of John Lennon, Paul McCartney, George Harrison, and Ringo Starr's musical compositions. Their works are consecrated and untouchable. However, this inviolability is not driven by norms (as it may have been in the late nineteenth and early twentieth centuries) but, rather, by copyright law. And just as avant-garde artists challenged norms of inviolability in the late nineteenth and early twentieth century, their intellectual heirs today challenge the growing scope of copyright protection.

C. Love and Law: A Modern Example

Changing copyright protections therefore served evolving cultural norms and the sacralization project, a process that continues to take place when rights holders and users of creative content clash. Take, for example, the *Love* project, released by The Beatles in 2006.⁸⁷ A Grammy Award-winning soundtrack compilation album and a Cirque du Soleil show playing exclusively in Las Vegas, *Love* featured an innovative remixing and reinterpretation of

86. E.D. HIRSCH, *CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* 146 (1987); LEVINE, *supra* note 51, at 248.

87. THE BEATLES, *LOVE* (Apple Records 2006).

approximately 130 different recordings by the band.⁸⁸ Yet it was not without its critics. While giving the soundtrack an “A,” *Entertainment Weekly* commented that the album “flirts with heresy by remixing and remodeling the most sacrosanct pop canon of the 20th century” but that “[y]ou could figure it as a sop to today’s interactive mash-up culture.”⁸⁹

In *All Together Now*, the documentary that follows the creation of the *Love* show and soundtrack, Paul McCartney waxes eloquent about the majestic and transformative nature of the remixes in *Love* and how they allow listeners to experience The Beatles in an entirely new manner.⁹⁰ In an ostensible nod to musical democracy, he rejects calls of heresy, noting that audiences can always play the group’s old albums if they want to hear the original songs in their unadulterated form.⁹¹ McCartney’s view of *Love* is entirely laudatory, as he takes pains to convey that the project allows audiences to re-examine and reinterpret The Beatles in a provocative and meaningful way.

Notwithstanding McCartney’s words, however, one cannot help but question the depths of his sentiments. After all, he does not appear ready to open the marketplace to others who might be capable of taking The Beatles oeuvre in innovative and expressive directions—far from it, in fact, as only two people in the world, trusted producer George Martin and his son Giles, were given the sole right to engage in such a remarkable reinterpretive journey with the works of The Beatles.⁹² And while the project had no direct involvement from either of the surviving Beatles, Paul and Ringo,⁹³ it did require a smidgeon of vital input: approval. Because of the exclusive rights secured under the Copyright Act, the ability to conduct a remix depended entirely on receiving permission from Paul McCartney, Ringo Starr, Yoko Ono, and Olivia Harrison.⁹⁴ Moreover, if anyone besides the Martins had attempted the feat, he or she would have faced a multimillion-dollar lawsuit for the

88. ALL TOGETHER NOW (Apple Corps Ltd./Cirque du Soleil, 2008) (documentary about the making of the *Love* project).

89. Chris Willman, *Peace*, ENTERTAINMENT WEEKLY (Nov. 17, 2006) (review of *Love*), <http://www.ew.com/ew/article/0,,1560886,00.html>.

90. ALL TOGETHER NOW, *supra* note 88.

91. *Id.*

92. *Id.*

93. *Id.*

94. See 17 U.S.C. § 106(2) (2012) (granting copyright holders the exclusive right to authorize derivatives based on their protected work(s)).

unauthorized creation of a derivative work.

Witness the response to the wildly popular *The Grey Album*, which preceded *Love* by two years. A mash-up by Danger Mouse that remixed Jay-Z's *The Black Album* with numerous samples from *The White Album* by The Beatles, *The Grey Album* was motivated by the same creative and artistic spirit purportedly fueling *Love*. According to many observers, it succeeded brilliantly. Among other things, the work was named by *Entertainment Weekly* as the Top Album of 2004.⁹⁵ However, unlike *Love*, *The Grey Album*'s very existence was illegal,⁹⁶ if not criminal.⁹⁷ Music label EMI, acting with the apparent blessing of The Beatles, responded not with *love*, but rather with *law*. Attorneys attempted to wipe the recording out of existence by serving online distributors with the usual stream of cease-and-desist letters threatening infringement litigation.⁹⁸ And although there are pockets of the Internet where you can still download copies of *The Grey Album*, you will never find it mass distributed at retail stores.

With the tools of copyright law put to use, sacred works can remain relatively inviolable, subject only to reinterpretation when the masters themselves deem a project worthy (artistically, monetarily, or otherwise). In other words, the sacred work is shielded from the open marketplace through the derivative-rights doctrine that forbids mongrelization in all forms.⁹⁹ As Max Weber once noted, stratification or status order comes to being when certain ideals, material goods, or opportunities are "directly withh[e]ld from free exchange by monopolization, which may be effected either legally or conventionally."¹⁰⁰ This observation applies with force to the state-granted monopoly that is intellectual property. Comments Levine,

95. Cory Doctorow, *EW Picks Grey Album for Best of 2004*, BOINGBOING.NET (Dec. 28, 2004, 11:23 PM), <http://boingboing.net/2004/12/28/ew-picks-grey-album-.html>.

96. As scholar Jonathan Zittrain observed, As a matter of pure legal doctrine, the Grey Tuesday protest is breaking the law, end of story. But copyright law was written with a particular form of industry in mind. The flourishing of information technology gives amateurs and homerecording artists powerful tools to build and share interesting, transformative, and socially valuable art drawn from pieces of popular cultures. There's no place to plug such an important cultural sea change into the current legal regime.

MATTHEW RIMMER, *DIGITAL COPYRIGHT AND CONSUMER REVOLUTION* 134 (2007).

97. See 17 U.S.C. § 506(a)(1) (2012) (providing for criminal penalties for certain forms of willful copyright infringement).

98. See Noah Shachtman, *Copyright Enters a Gray Area*, WIRED (Feb. 14, 2004), <http://www.wired.com/entertainment/music/news/2004/02/62276>.

99. See 17 U.S.C. § 106(2) (2012); see also *supra* note 76 and accompanying text.

100. MAX WEBER, *ESSAYS IN ECONOMIC SOCIOLOGY* 93 (Richard Swedberg ed., 1999).

When Shakespeare, opera, art, and music were subject to free exchange, as they had been for much of the nineteenth century, they became the property of many groups, the companion of a wide spectrum of other cultural genres, and thus their power to bestow distinction was diminished, as was their power to please those who insisted on enjoying them in privileged circumstances, free from the interference of other cultural groups and the dilution of other cultural forms.¹⁰¹

But when taboos emerge—whether based on the emergence of a new set of norms or the expanding scope of copyright law—works remain intentionally unadulterated, consecrated in a static state that perpetuates their elite status.

The power of The Beatles and their business partners to control the destiny (and maintain the “aura”) of their musical compositions for a lifetime plus seventy years is, of course, a product of the copyright system.¹⁰² In the context of sampling sound recordings, courts have been especially enthusiastic about protecting rights holders against unauthorized users. In so doing, they have chosen to deny any semblance of a fair-use defense to litigants using sound recordings without authorization, no matter how trivial or transformative the use. For example, the first reported decision to consider the legality of sampling elected to resolve the issue by quoting Exodus and sophistically equating the Seventh Commandment with the law of copyright.¹⁰³ “Thou shalt not steal,” the court tersely warned.¹⁰⁴ More recently, a federal circuit court addressing the same question left God out of the equation but remained equally blunt when it cautioned: “Get a license or do not sample.”¹⁰⁵ In the process, the court held that any unauthorized sample of a sound recording, no matter how small, constituted copyright infringement, regardless of any fair-use defense.¹⁰⁶

101. LEVINE, *supra* note 51, at 230.

102. Works created after January 1, 1978 enjoy copyright protection for the lifetime of the last surviving author plus seventy years. 17 U.S.C. § 302(a)–(b). Of course, however, musical compositions by The Beatles were written before January 1, 1978. As a result, they are protected for 95 years from their date of creation under American law. 17 U.S.C. § 304(a)(2) (2012) (granting an additional 67 year term to works in their first term (of 28 years of protection) as of January 1, 1978).

103. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

104. *Id.* (quoting Exodus 20:15).

105. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004).

106. *Id.* at 398–99.

Thus, if you try to pull a stunt like *Love*, no matter how much it may constitute a labor of love, the potential consequences could be severe. First, under existing law, you will almost certainly be liable for infringement.¹⁰⁷ Second, the penalties could be devastating. The Beatles works are, quite naturally, timely registered and eligible for enhanced remedies in the event of infringement: statutory damages of up to \$150,000 per act of willful infringement¹⁰⁸ (of which there would be at least 130 if one replicates the *Love* project) and recovery of reasonable attorneys' fees.¹⁰⁹ Consequently, even without causing any cognizable actual damage or making any actual profits from the unauthorized exploitation of The Beatles works, an individual trying to make her own version of *Love* could face damages in excess of \$20 million—\$19,500,000¹¹⁰ plus fees and costs. Progress, even in the arts, has a price; but it needn't be that high.

The Beatles, of course, are not alone in dangling copyright's Sword of Damocles over the heads of would-be appropriationists creating derivative works. Almost any book, periodical, recording, movie, television show, or computer program put out by a large press, magazine publisher, music label, film studio, broadcast network, or software developer enjoys similar protection, even though many such works may lack continued economic value.¹¹¹

107. *See supra* notes 103–106 and accompanying text.

108. 17 U.S.C. § 504(c)(2) (2012) (“In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.”).

109. *Id.* § 505 (providing that a court may “award a reasonable attorney’s fee to the prevailing party” in an infringement suit).

110. \$150,000 per act of infringement multiplied by 130 acts of infringement. *See id.* § 504 (enabling copyright holders to seek recovery of statutory damages in the amount of up to \$150,000 per willful act of infringement of a copyrighted work).

111. Courts possess wide, if not entirely unfettered, discretion in deciding where in the statute’s range a statutory damages award should fall and they need only be guided by their sense of justice. *See, e.g.*, *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952) (citing *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106–07 (1919)) (noting that, for awarding statutory damages, “the court’s discretion and sense of justice are controlling”). Indeed, some circuits have suggested there need not be any relationship to actual harm in the assessment of statutory damages. *See Capital Records, Inc. v. Thomas-Rasset*, Nos. 11–2820, 11–2858, 2012 WL 3930988, at *7 (8th Cir. Sept. 11, 2012) (“It makes no sense to consider the disparity between ‘actual harm’ and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate.”).

IV. THE ASSERTION OF RIGHTS

It is not just in the vesting of rights where copyright's regulatory regime exerts its broader social influence. Indeed, the process of rights assertion—which includes how and when rights are asserted and against whom they are enforceable—both reflects and impacts dominant discourses, social relationships, and struggles over cultural and political meaning.

A. Guantanamo's Greatest Hits: Music, Torture, and Copyright Law

Consider the curious case of the use of music by the federal government at the American military base at Guantanamo Bay and the subsequent response by the recording industry, especially in light of its aggressive long-term campaign against unauthorized file sharing on the Internet. Shortly after taking office in 2009, President Barack Obama stated that he would bring to an end the use of Guantanamo Bay as a detention camp for enemy combatants in the war on terrorism.¹¹² With the eventual close of the facility, a number of rather controversial policies would presumably come to an end. Of those policies, one of the more unusual was the military's arguably infringing use of music on the prisoners.¹¹³ The soundtrack to Guantanamo Bay, it turns out, was replete with copyrighted songs meant to addle and unnerve, especially on repeat, but to which the government apparently possessed no rights to perform.¹¹⁴

As a preliminary matter, the playlist at Guantanamo was filled with interesting choices. For example, it included "Fuck Your

112. See Memorandum from President Barack Obama to the Sec'y of Def. and the Att'y Gen. (Dec. 15, 2009) (Presidential Memorandum – Closure of Detention Facilities at the Guantanamo Bay Naval Base), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-closure-dentention-facilities-guantanamo-bay-naval-base>; see also Ed Henry, *Obama to Order Guantanamo Bay Prison Closed*, CNN.COM (Jan. 12, 2009), <http://www.cnn.com/2009/POLITICS/01/12/obama.gitmo/>.

113. See David Alexander, *Performers Angry Their Music Used in Guantanamo Interrogations*, REUTERS, Oct. 22, 2009, <http://blogs.reuters.com/frontrow/2009/10/22/performers-angry-their-music-used-in-guantanamo-interrogations/>.

114. Cahal Milmo, *Pop Stars Demand Details of Guantanamo Music 'Torture'*, INDEPENDENT, Oct. 22, 2009, <http://www.independent.co.uk/news/world/americas/pop-stars-demand-details-of-guantanamo-music-torture-1807255.html> ("Campaigners say there is evidence that music played repeatedly at ear-splitting levels was used to 'humiliate, terrify, punish, disorient and deprive detainees of sleep' as part of efforts to break detainees during interrogation. Former inmates at Guantanamo have previously testified that songs from AC/DC, Britney Spears, the Bee Gees and Sesame Street were played as part of a psychological onslaught.").

God”¹¹⁵—a particularly bizarre selection considering the Bush Administration’s religiosity and the federal government’s position, through the Federal Communications Commission, on the use of indecent language in other contexts.¹¹⁶ Guantanamo Bay’s Top Ten List—the songs most frequently played to interrogate prisoners—featured a perverse smorgasbord of heavy metal, noxious children’s music, and (seemingly) patriotic stadium rock:

1. “Enter Sandman” – Metallica
2. “Bodies” – Drowning Pool
3. “Shoot to Thrill” – AC/DC
4. “Hell’s Bells” – AC/DC
5. “I Love You” (from the *Barney and Friends* children’s television show)
6. “Born In The USA” – Bruce Springsteen
7. “We Are The Champions” – Queen
8. “Babylon” – David Gray
9. “White America” – Eminem
10. “Sesame Street” (theme from eponymous children’s television show)¹¹⁷

Thankfully, the Cure’s “Killing an Arab” (no matter what its existentialist, Camusian roots) was not on the list.

The music policy is, of course, not entirely new. In 1989, General Manuel Noriega, a reputed opera lover,¹¹⁸ was holed up in a Papal nunciature in Panama City, seeking refuge with the Vatican after American forces had invaded his country. In response, American military officials bombarded him incessantly with loud rock and pop, including such songs as “Nowhere to Run” and “Smugglers Blues.”¹¹⁹ In 1993, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) and the FBI famously blared

115. Andy Worthington, *A History of Music Torture in the “War on Terror”*, HUFFINGTON POST (Dec. 12, 2008, 12:12 PM), http://www.huffingtonpost.com/andy-worthington/a-history-of-music-tortur_b_151109.html.

116. See, e.g., Brief for the Petitioners at 17, Fed. Comm’n v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (No. 07-582), 2008 WL 2308909, at *17 (arguing that the FCC has broad authority to enforce the statutory prohibition on the broadcast of “any obscene, indecent or profane” language over the public airwaves).

117. Martyn McLaughlin, *Rock Legends Want to Silence Guantanamo’s Torture Tunes*, SCOTSMAN (Dec. 10, 2008, 9:05 PM), <http://news.scotsman.com/topstories/Rock-legends-want—to.4782083.jp>.

118. George J. Church et al., *Panama No Place to Run*, TIME, Jan. 8, 1990, at 38.

119. Roberto Suro, *Vatican Is Blaming U.S. for Impasse on Noriega’s Fate*, N.Y. TIMES, Dec. 30, 1989, at 1.

heavily distorted music and recordings of rabbits being slaughtered during the infamous stand-off with the Branch Davidians in Waco, Texas.¹²⁰ The origins may go even further back than 1989 in Panama City. One military official, retired United States Air Force Lieutenant Colonel Dan Kuehl, located the policy's spiritual genesis in the Bible: "Joshua's army used horns to strike fear into the hearts of the people of Jericho. . . . His men might not have been able to break down literal walls with their trumpets, but the noise eroded the enemy's courage," he commented.¹²¹

Politics aside and whatever its origins, the government's music policy in Guantanamo raised a key copyright issue: It appeared that the government was not paying the appropriate public performance licenses needed to play the music.¹²² But, the response from artists concerning government use of copyrighted material overseas and without permission is mixed. For example, James Hetfield of Metallica appears to condone the military's public performance use of his work in Fallujah: "If the Iraqis aren't used to freedom, then I'm glad to be part of their exposure."¹²³ Hetfield did mention, however, that the government had neither asked his permission nor paid him royalties.¹²⁴ Ironically, in other contexts, Metallica has claimed that the unauthorized use of a copyright holder's works constitutes an inexcusable act of thievery.¹²⁵ For example, the band has led the fight against unauthorized downloading of its music on the Internet.¹²⁶

Not all artists were so enthusiastic about the military's unauthorized use of their music, however. As Trent Reznor of Nine Inch Nails wrote, "It's difficult for me to imagine anything more profoundly insulting, demeaning and enraging than discovering

120. Michael Isikoff & Pierre Thomas *Reno, FBI Took Fatal Gamble; Officials Believed Suicides Unlikely*, WASH. POST, Apr. 21, 1993, at A1.

121. Clive Stafford Smith, *Welcome to "the Disco,"* GUARDIAN, (June 19, 2008), <http://www.guardian.co.uk/world/2008/jun/19/usa.guantanamo>.

122. 17 U.S.C. § 106(4) (2012) (granting copyright holders to musical compositions the exclusive right "to perform the copyrighted work publicly" with "perform" being defined as "not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public").

123. Lane DeGregory, *Iraq 'n' Roll*, TAMPA BAY TIMES, (Nov. 21, 2004), http://www.sptimes.com/2004/11/21/Floridian/Iraq__n__roll.shtml.

124. *Id.*

125. *Metallica v. Napster*, No. C 00-4068 MHP, 2001 WL 777005 (N.D. Cal. Mar. 5, 2001) *aff'd sub nom.* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

126. *Id.*

music you've put your heart and soul into creating has been used for purposes of torture."¹²⁷ Reznor also threatened legal action: "If there are any legal options that can be realistically taken they will be aggressively pursued, with any potential monetary gains donated to human rights charities."¹²⁸ However, it appears that Reznor never followed up on this threat. In contraposition to Metallica, Reznor has served as a powerful voice opposing the Recording Industry Association of America ("RIAA") lawsuits against unauthorized Internet downloading.¹²⁹

While a few individual artists have raised concerns about the apparent infringement, the industry itself has remained relatively silent. Although the RIAA appears to have no qualms about suing children and grandmothers for engaging in peer-to-peer file sharing,¹³⁰ it does not seem as enthusiastic about pursuing infringement charges against the federal government, despite the brazen unauthorized public performance of the songs.¹³¹

Admittedly, the infringement issue at Guantanamo does raise some complexities. The most immediate question that comes to mind is whether and how U.S. copyright law might apply in Guantanamo in the first place. After all, it is an axiomatic principal of American copyright law that it has no extraterritorial application.¹³² And, as the Bush Administration maintained in constitutional challenges to its Guantanamo detention policy, the territory was not considered United States soil in any sense of the word.¹³³ Specifically, the government claimed that it did not exert sovereignty over Guantanamo Bay, and, therefore, United States law did not apply there.¹³⁴ Ultimately, however, the Supreme Court rejected this

127. Nine Inch Nails Official Website, *Regarding NIN Music Used at Guantanamo Bay for Torture*, Forums (last visited Dec. 11, 2008), <http://forum.nin.com/bb/read.php?9,302470>.

128. *Id.*

129. Greg Sandoval, *Take My Music, Please*, CNET NEWS (Oct. 30, 2007, 4:12 PM), http://news.cnet.com/8301-10784_3-9807934-7.html.

130. See Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTEL. PROP. 133, 146 (2006) (documenting the music industry's peer-to-peer litigation campaign).

131. See Smith, *supra* note 121.

132. Phanesh Koneru, *The Right "To Authorize" in U.S. Copyright Law: Questions of Contributory Infringement and Extraterritoriality*, 37 IDEA 87, 89 (1996) ("The Copyright Act is presumed to have no extraterritorial application, which means that infringement occurring outside the United States is not actionable under the Act.").

133. *Boumediene v. Bush*, 553 U.S. 723, 753 (2008).

134. *Id.* at 765 ("[T]he Government's view is that the Constitution ha[s] no effect there,

argument in *Boumediene v. Bush*, finding that the United States had exerted de facto sovereignty through its “complete and

uninterrupted” exercise of “absolute and indefinite” control over Guantanamo for almost a century.¹³⁵

Arguably, the federal Copyright Act applies in any territory over which the United States exerts sovereignty.¹³⁶ However, to avoid any issue of ambiguity, most United States territories have an express statute that enables application of federal copyright laws.¹³⁷ For example, the Copyright Act applies in the Panama Canal Zone through operation of section 391 of the Panama Canal Code, which provides that “[t]he patent, trade-mark, and copyright laws of the United States shall have the same force and effect in the Canal Zone as in continental United States, and the district court is given the same jurisdiction in actions arising under such laws as is exercised by United States district courts.”¹³⁸ Guantanamo Bay does not appear to have such a provision in place. Thus, post-*Boumediene*, there is still some question about the application of American copyright protection in Guantanamo.

However, one can potentially circumvent this problem in two ways. First, if a part of the infringing activity occurs in the United States (e.g., perhaps the recordings are selected in the United States for unauthorized public performance in Guantanamo Bay), parties in the United States who contributed to the infringing activity can be held liable under American copyright law.¹³⁹ Second, if one

at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term” in its 1903 lease with Cuba.).

135. *Id.* at 727.

136. *See, e.g.*, *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1167 (9th Cir. 1996) (“United States copyright law applies to what takes place in the United States, [though] not to what takes place in Italy, Germany, or any other foreign places”).

137. *See* Borge Varmer, *Study No. 34 Copyright in Territories and Possessions of the United States*, in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY (Comm. Print 1961) (noting how the U.S. Virgin Islands and Puerto Rico, among other territories, have such enabling acts).

138. C.Z. CODE tit. 3, § 391 (1934).

139. As Nimmer writes, “[I]f, and to the extent, a part of an ‘act’ of infringement occurs within the United States, then, although such act is completed in a foreign jurisdiction, those parties who contributed to the act within the United States may be rendered liable under American copyright law.” MELVILLE NIMMER & DAVID NIMMER, 4-17 NIMMER ON COPYRIGHT § 17.02 (citing, *inter alia*, *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24

distinguishes *Boumediene* and argues that the terms of the lease for Guantanamo between Cuba and the United States determine the issue, Cuba is the territorial sovereign and unauthorized performance would represent a violation of Cuban law.¹⁴⁰ Given these facts, it is surprising that not a single one of the myriad “rockers” with a penchant for all things Che Guevara has reveled at the prospect of suing the United States government for infringement under Cuban copyright law.

The lack of action by composers and record labels has effectively granted the federal government unfettered rights to take the works of various recording artists and cast them in unfamiliar lights and contexts, thereby lending some of these compositions’ meanings entirely at odds with the intentions of their authors. Consider Bruce Springsteen’s “Born in the U.S.A.”¹⁴¹ Through its bleak portrait of a Vietnam veteran forgotten by his own country, the song presents a poignant critique of societal inequities and our tragic failure to properly honor our most courageous individuals for their sacrifices.¹⁴² Played at Guantanamo Bay, however, the song takes on an entirely different significance—at least to its intended audience of soldiers and detainees.¹⁴³ With the imprimatur of DJ Uncle Sam, the song’s seemingly jingoistic, anthemic chorus takes center stage. In the process, the tune transforms into a patriotic paean rather than a biting attack on the false promises of the American dream and it serves as an effective aural device to demarcate the insider-outsider (or American/non-terrorist versus non-American/terrorist) divide separating the soldiers and detainees. Indeed, a central distinction between detainees taken to Guantanamo Bay and held indefinitely without charges and those brought to the United States and entitled to full due process rights was initially based on a detainee’s

F.3d 1088, 1094 n.9 (9th Cir. 1994) (*en banc*).

140. Cuban Copyright Law art. 4 (Act No. 14/1977), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=174839.

141. BRUCE SPRINGSTEEN, *Born in the U.S.A.*, on BORN IN THE U.S.A. (Columbia Records 1984).

142. *Id.* (Columbia Records 1984) (“Come back home to the refinery/Hiring man says ‘son if it was up to me’/Went down to see my V.A. man/He said ‘son don’t you understand now’ . . . Down in the shadow of penitentiary/Out by the gas fires of the refinery/I’m ten years burning down the road/Nowhere to run ain’t got nowhere to go/Born in the U.S.A./I was born in the U.S.A./Born in the U.S.A./I’m a long gone daddy in the U.S.A.”).

143. Considering that some of the detainees may not speak English, one could argue that the message targets the soldiers as much as the detainees.

citizenship/birth status.¹⁴⁴ If you were, indeed, lucky enough to be born in the U.S.A., you were entitled to fundamentally different rights than those who were not.¹⁴⁵ Thus, besides setting a patriotic tone and asserting the base's status as a distinctly American space, the blaring of the song over the Guantanamo loudspeakers also serves as a stark reminder to the detainees of how much the accidents of birth can affect one's fate.

All told, the unauthorized use of Springsteen's "Born in the U.S.A." allows the government to re-engineer the meaning of the song almost entirely, transforming it from an ironic and caustic critique of our societal failures to a bold assertion of national pride and prowess. And it is the absence of infringement litigation that enables this radical semiotic recasting of the work to take place. Indeed, at a time when the recording industry is suing individual users for millions of dollars for unauthorized peer-to-peer downloading—an effort supported by the federal government with legislation that has provided heightened statutory damages and increased criminal enforcement of copyright laws¹⁴⁶—the recording industry has remained quiet about the federal government's use of copyrighted recordings at Guantanamo Bay. And the federal government has shown no compunction about making such uses, regardless of the potential infringement.¹⁴⁷

B. The RIAA's Litigation Campaign Against Online File Sharing

The lack of enforcement against the federal government's activities in Guantanamo stands in sharp contrast to the recording industry's massive campaign against ordinary individuals who have

144. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding, *inter alia*, that detainees who are American citizens are entitled to challenge their detention before an impartial judge).

145. *See, e.g., id.*

146. *See, e.g.*, Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. 106-160, 113 Stat. 1774 (providing for a sharp increase in the range for statutory damages awards under the Copyright Act); *Examining U.S. Governmental Enforcement of Intellectual Property Rights: Hearing Before the Committee on the Judiciary*, 110th Cong. 10-11 (2007) (statement of Kevin J. O'Connor, Chairman of the Department of Justice Task Force on Intellectual Property) (noting the federal government's increasing commitment to enforcement of the criminal provisions of the Copyright Act).

147. The United States government has waived its sovereign immunity with respect to copyright infringement claims. *See* 28 U.S.C. § 1498(b) (giving copyright holders the right to bring claims against the federal government in the Court of Federal Claims for acts of copyright infringement).

engaged in online file sharing. Individuals unlucky enough to come under the gaze of the content-creation industries have faced devastating monetary penalties and even jail time for their actions.¹⁴⁸ Doctoral candidate Joel Tenenbaum was famously on the receiving end of a bankrupting judgment in the amount of \$645,000 in statutory damages for making thirty songs available for downloading on a peer-to-peer network.¹⁴⁹ Jammie Thomas-Rasset, a single mother of four who earned her living working as a natural-resources coordinator for a Native American tribe in Minnesota, suffered a \$1.92 million judgment after being found liable for making twenty-four songs available for online file sharing.¹⁵⁰

Although such judgments seem staggering, Tenenbaum and Thomas-Rasset enjoyed relatively lenient treatment when compared to some others. Jack Yates, a twenty-eight-year-old who worked for a duplication company charged with making promotional copies of the Michael Myers movie *The Love Guru*, made the mistake of burning an unauthorized copy of the movie.¹⁵¹ This copy eventually made its way onto the Internet, where it was allegedly downloaded more than 85,000 times.¹⁵² For his actions, the government charged Yates with criminal copyright infringement and sentenced him to six months in a federal prison.¹⁵³ Kevin Cogill, a blogger who posted nine tracks from Guns N' Roses's long-awaited album, *Chinese Democracy*, on

148. For timely-registered works, infringers face statutory damages in the amount of up to \$150,000 per willful act. 17 U.S.C. § 504(c)(2) ("In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000."). In the digital age, these numbers can add up quickly. The Copyright Act also provides for criminal penalties, including up to five years imprisonment, for certain types of first offenses. 17 U.S.C. § 506(a)(1); 18 U.S.C. § 2319.

149. Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 490 (1st Cir. 2011).

150. See Chandra Steele, *8 Ways Tech Could Throw You in Jail, Or Worse*, PCMAG.COM (Mar. 2, 2012), <http://www.pcmag.com/slideshow/story/294889/8-ways-tech-could-throw-you-in-jail-or-worse/5>; Chris Williams, *Big Fine Could Be Big Trouble in Downloading Case*, PHYSORG.COM (June 19, 2009), <http://www.physorg.com/news164653697.html> (noting that Tom Sydnor, the director of the Progress & Freedom Foundation's Center for the Study of Digital Property, defended the verdict by arguing that "[l]egally acquiring a license to give copies of a song to potentially millions of Kazaa users might well have cost \$80,000 per song" (internal quotation marks omitted)).

151. See Richard Lawson, *How The Love Guru Could Cost You Half a Year of Your Life*, GAWKER (June 19, 2009, 12:09 PM), <http://gawker.com/5296843/how-the-love-guru-could-cost-you-half-a-year-of-your-life>.

152. See *'Love Guru' Costs Dumbass 6 Months of Freedom*, TMZ (June 19, 2009, 9:15 AM), <http://www.tMZ.com/2009/06/19/love-guru-costs-dumbass-6-months-of-freedom>.

153. *Id.*

his website shortly before the songs' release in 2008, saw police arrest him at gunpoint, for violating federal copyright law.¹⁵⁴ Facing a potential five-year prison term and a \$250,000 fine under federal law, he pled guilty to the charges and prosecutors sought a six-month sentence.¹⁵⁵

So, while individuals have suffered back-breaking litigation for acts of online file sharing, the federal government has been fortunate enough to avoid enforcement for its unauthorized uses of music at Guantanamo. Meanwhile, state governments enjoy absolute immunity for copyright infringement.¹⁵⁶ Indeed, despite attempts by Congress to dictate otherwise, states can make unauthorized use and abuse of copyrighted works with impunity and suffer no adverse legal consequences.¹⁵⁷

In short, the very acts from which the federal government has evaded enforcement and state governments continue to possess sovereign immunity can, and have, resulted in the economic destruction of individual lives. At the very least, the vast disparity in treatment for similar acts raises fundamental questions of equity. More pointedly, it reveals a broader and more systematic structuring of copyright law to support entrenched social, political, and economic interests, either at the expense of or in contraposition to treatment of the unsophisticated or less powerful.

To be sure, patterns of enforcement have much to do with strategic considerations in achieving long-term profit maximization. For example, a movie studio may turn a blind eye to unauthorized fan fiction since suing one's consumers can create bad press and developing an active fan fiction pool might ultimately inure to the benefit of the studio by generating increased interest in its franchise. But these decisions do not just have consequences for the potential litigants involved. In the aggregate, choices about the prosecution of intellectual-property rights may also have a broader impact on society. Take the enforcement decisions of the United States Olympic Committee ("USOC") with respect to their most valuable piece of intellectual property—the term "Olympic." While the USOC has no problem with an international, quadrennial

154. See David Kravets, *Feds Demand Prison for Guns N' Roses Uploader*, WIRED (Mar. 13, 2009, 4:37 PM), <http://blog.wired.com/27bstroke6/2009/03/feds-demand-6-m.html>.

155. *Id.*

156. See *supra* note 43.

157. *Id.*

competition for athletes with disabilities (i.e., the Special Olympics) using the “Olympic” mark, it fought tooth and nail, and even won a Supreme Court victory, to prevent such a use by an international, quadrennial competition for athletes who are gay.¹⁵⁸ This enforcement position does not simply impact the USOC, the Special Olympics and the Gay Games. Instead, it sends a powerful message about athletic competition and sexual orientation and effectively patrols which social groups enjoy semiotic access to our cultural heritage and which ones do not.¹⁵⁹

To explore these themes further, scholarship in other fields can provide inspiration and guidance. For example, First Amendment scholars have analyzed how the inherent subjectivity of obscenity law and its selective enforcement can lead to viewpoint discrimination and the silencing of subversive voices coming from marginalized groups.¹⁶⁰ Criminal law theorists have analyzed the serious class and race implications of mass incarceration, the war on drugs, and the enforcement of narcotics law.¹⁶¹ Similarly, by examining patterns of

158. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 547–48 (1987) (affirming the right of the USOC to prevent the use of the term “Olympic” by an international, quadrennial competition for gay athletes); John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 46–47 (2011) (describing the enforcement efforts of the USOC).

159. John Tehranian, *supra* note 158, at 51. (“But, when intellectual property laws begin to control the use of our language[,] . . . we risk creating a class of linguistic haves and have-nots. . . . To see and consume the word ‘Olympic’ in association with a gay event helps attenuate residual prejudices about sport and sexual preference. It can imbue individuals with the sense that one’s sexual orientation is immaterial to one’s ability to attain athletic excellence, thereby impacting identity formation. At the same time, the ability to use the word ‘Olympics’ in association with a gay event sends a powerful expressive message about a particular community’s relationship with a broader international tradition. By restricting the use of linguistic tools such as basic words imbued with cultural meaning, we ultimately limit self-definition and expression, the very hallmarks of personhood development. Intellectual-property laws therefore patrol insider-outsider boundaries within mainstream society, and perpetuate social hierarchy by artificially limiting the use of language by non-preferred groups.”).

160. See, e.g., Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1565 (1988) (“[T]he suppression of pornography [enables] the state [to] certify and enforce a moral code that reinforces and justifies the political status quo.”); John Tehranian, *Sanitizing Cyberspace: Obscenity, Miller, and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. L. 16–21 (2003) (arguing that, in practice, obscenity law has served “as a means to suppress ideas and prevent challenges to the dominant social and racial paradigm. . . . It is hardly a coincidence that ethnic and sexual minorities have been the most prominent targets of obscenity law enforcement in the United States over the past several years.”).

161. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (2010) (arguing that the mass incarceration facilitated by our criminal justice system, including its drug laws, constitutes “a stunningly comprehensive

rights assertion in the aggregate, intellectual-property scholars can analyze the ways in which the regulation of cultural production and reproduction might cut along and against racial, gender, sexual orientation, class, and other social fault lines.

V. THE ADJUDICATION OF RIGHTS: THE MODERN HIERARCHIES OF PROTECTION

Finally, besides exerting its influence through the creation and assertion of rights, copyright law shapes societal structures and regulates individual behavior as part of a larger hegemonic project during the process of adjudicating rights. Privileging certain forms of cultural content creates a hierarchy of protection with broad social import. The hierarchies of protection effectively afforded in the adjudication of federal copyright law are constructed, *inter alia*, through seemingly innocuous procedures—such as the registration requirement¹⁶²—and the ostensibly aesthetically neutral application of substantive rules—such as the fair-use doctrine or the idea-expression dichotomy. The registration requirement can profoundly determine the rights given to a work. Meanwhile, the rhetoric of aesthetic neutrality is belied by aesthetic judgments that are imbued with cultural and political biases that inevitably determine the level of protection granted to copyright works. Thus, while the use (or lack thereof) of intellectual property can have a profound impact on personhood interests, access to intellectual property represents a tool for both the maintenance and perpetuation of hierarchy. Control of personhood is achieved through the control of intellectual property, as intellectual property becomes a key and instrumental force in any hegemonic identity project.

First, consider how creative works are given differing levels of protection based on the formalities of our registration regime, which by its nature creates two classes of works: those by sophisticated

and well-disguised system of racialized social control”); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22 (2012) (noting that “[w]hile scholars have long analyzed the connection between race and America’s criminal justice system, an emerging group of scholars and advocates has highlighted the issue with a provocative claim: They argue that our growing penal system, with its black tinge, constitutes nothing less than a new form of Jim Crow”); Roseanne Scotti & Steven Kronenberg, Foreword, *Symposium: U.S. Drug Laws: The New Jim Crow?*, 10 TEMP. POL. & CIV. RTS. L. REV. 303, 303 (2001) (noting the emerging literature examining the “disparate impact and enforcement of [drug] laws and policies on minority communities”).

162. 17 U.S.C. § 408 (2012).

creators and those by unsophisticated creators. Works by sophisticated creators, which are timely-registered, are virtually inviolable. Their sacralization is ensured through a combination of potentially draconian penalties, including sizable statutory damages,¹⁶³ the awarding of attorneys' fees,¹⁶⁴ and even criminal sanctions¹⁶⁵—as the examples above recount. But, contrary to conventional wisdom, works by unsophisticated creators, which are usually not timely registered, enjoy little protection and infringed creators are left with little practical means to vindicate their rights through litigation.¹⁶⁶ As it turns out, because their works can often be used without authorization and with impunity with few adverse consequences, unsophisticated creators in the United States are surprisingly far worse off than equivalent creators in many countries in the world.

Second, besides the formalities of registration, hierarchies of protection are effectuated through judicial decision-making. Specifically, in applying copyright doctrine, courts regularly make decisions based on implicit, and even explicit, aesthetic judgments—judgments that are inevitably imbued with cultural and political biases, thereby impacting user rights and personhood interests and maintaining and perpetuating social order and existing hierarchies.

A. Highbrow/Lowbrow Redux: Copyright Registration and the Sacralization of Cultural Production

Despite our rhetoric of strong authorial protection, the formalities of our copyright regime and enforcement reveal a more complex system at operation. Not every author or copyright holder enjoys extensive protection. Just as late nineteenth century America witnessed the emergence of cultural hierarchy with the development of the highbrow/lowbrow divide and concomitant norms to ensure preservation of the distinction,¹⁶⁷ late twentieth century America has witnessed the emergence of cultural hierarchy from the development of two types of works—the privileged and the poorly protected. The social loci of these two types of works are mediated by copyright law and its technicalities. In short, the rise of mass consumer culture has

163. *Id.* § 504(c).

164. *Id.* § 505.

165. *Id.* § 506.

166. *See infra*, Part V.A.

167. *See supra* Part III.B.

diminished the importance of the highbrow/lowbrow norms that governed the sanctity of work in the late nineteenth century. However, the stratification of cultural property continues. The divide between high and low culture—a hierarchy of creative works—has re-emerged. But, instead of being driven by norms, it is now patrolled by law. Specifically, in the late twentieth century and beyond, levels of protection are governed by the status of creators and a single, unique feature of American copyright law: the timely registration requirement.¹⁶⁸

Under the reigning 1976 Copyright Act, recovery of statutory damages and attorneys' fees are only available to a certain class of copyright holders: those who register their works with the United States Copyright Office in a timely manner in relation to the infringement.¹⁶⁹ As 17 U.S.C. § 412 provides,

no award of statutory damages or of attorney's fees . . . shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.¹⁷⁰

Registration, especially timely registration, therefore represents a pivotal feature on the copyright landscape. Without it, a plaintiff's remedies are limited to nothing more than actual damages—a potential recovery that typically renders infringement litigation quixotic.¹⁷¹

Thus, with the use of formalities, the 1976 Copyright Act has

168. 17 U.S.C. §§ 411, 412 (2012).

169. This makes the United States different than any other major country. Elsewhere, full legal vindication of one's exclusive rights does not require the added procedure of registration, let alone timely registration. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.03 (Matthew Bender rev. ed., 2012) (“[U]nlike the United States copyright law, under virtually all foreign copyright laws there are no administrative formalities that must be satisfied in order to create or to perfect a copyright.”).

170. 17 U.S.C. § 412(2) (2012).

171. Without statutory damages or attorneys' fees, recovery is limited to lost sales or disgorgement of the infringer's profits. Not surprisingly, the amount of these damages is often riddled with ambiguity. Moreover, unless the infringed work is world-renowned, the damages claim will rarely amount to more than a few thousand dollars. But pursuing an infringement suit will cost a plaintiff several hundred thousand dollars in attorneys' fees. And although the plaintiff might receive an injunction to prevent further infringement, it will be costly to obtain, especially given that the significant fees the plaintiff would have to incur are not recoupable. Thus, even under the most optimistic scenario, legal action will infrequently be worth pursuing, unless a plaintiff has a desire to fight for principal at his or her own peril. For a more detailed discussion, see Tehrani, *supra* note 77, at 1416–21.

actually created two distinct tiers of effective protection for copyrighted works. Sophisticated, regular creators (generally corporations in the content-creation industries) timely register their works. They therefore enjoy generous remedies against infringers, including the recovery of reasonable attorneys' fees and the assessment of statutory damages—which can rise to the draconian rate of up to \$150,000 per willful act of infringement.¹⁷² Absent any proof of actual damages, such plaintiffs can elect statutory damages that quickly create the possibility of a multimillion-dollar judgment in their favor.¹⁷³ By sharp contrast, unsophisticated creators (generally individual creators and artists) rarely timely register their works. As a result, they are often left with little except moral force to enforce their intellectual-property rights. By operation of copyright law's technicalities, they are denied the ability to recover attorneys' fees or statutory damages,¹⁷⁴ even if the defendants' infringing conduct continues after registration.¹⁷⁵ They can collect only actual damages, which are both difficult to prove and often of limited value.¹⁷⁶ In short, they are left without adequate mechanisms to vindicate the exclusive rights purportedly granted through the Copyright Act. The dichotomy between sophisticated and

unsophisticated creators has replaced the highbrow/lowbrow divide in patrolling the sanctity of copyrighted works.

Of course, the idea that access to legal counsel and adherence to certain legal formalities can improve the effective scope of one's

172. 17 U.S.C. § 504(c)(2) (2012).

173. See *supra* notes 148–155 and accompanying text.

174. 17 U.S.C. § 412(2) (2012).

175. Under Section 412 of the Copyright Act, statutory damages and attorneys' fees are not generally available if the registration occurs after the infringement. Further, for the purposes of determining the availability of statutory damages and fees, courts have almost uniformly determined that the date of infringement is the date of the first infringement by the defendant. See *Johnson v. Jones*, 149 F.3d 494, 506 (6th Cir. 1998) (“[I]nfringement ‘commences’ for the purposes of § 412 when the first act in a series of acts constituting continuing infringement occurs.”); accord *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 701 (9th Cir. 2008) (holding that “*the first act of infringement* in a series of ongoing infringements of the same kind marks the commencement of one continuing infringement under [§] 412”); *Bouchat v. Bon-Ton Dep’t Stores, Inc.*, 506 F.3d 315, 330 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 2054 (2008); *Troll Co. v. Uneda Doll Co.*, 483 F.3d 150, 158 (2d Cir. 2007); *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 142–44 (5th Cir. 1992). As one disgruntled copyright claimant put it, this judicial interpretation grants infringers a veritable “license to steal.” *Teevee Toons, Inc. v. Overture Records*, 501 F. Supp. 2d 964, 966 (E.D. Mich. 2007).

176. See *supra* note 171.

rights is certainly not novel or surprising. But, the consequences in copyright law are particularly dramatic, virtually determining the rights to and in cultural production. Sophisticated, economically powerful interests receive full protection for their creative works, essentially making their cultural production sacred and inviolable. The act of cultural reproduction that Bourdieu found so essential to the hegemonic project¹⁷⁷ is, therefore, controlled and patrolled by copyright law—with the hallowed works of elites subject to use and re-use only with proper authorization and payment. Meanwhile, the output of the rest of society does not receive such beatification. For unsophisticated players, their production becomes fodder for remix, reinterpretation, and re-commercialization, all without authorization or payment. Thus, while the law purports to grant copyright protection to any work of authorship with minimal creativity fixed in a tangible medium, whether made by Manet or the Man on the Street, that is not the case. All works and creators are not treated alike, and the formalities of the registration requirement establish a hierarchy of more protected and less protected works, the untouchable and the readily malleable. The resulting gestalt enables dominant social forces to usurp freely (both metaphorically and literally) the creative content of the masses for their own use while simultaneously enjoying the ability to prevent any unauthorized use of their privileged creative content. Within the confines of this regime, it is the underclass that typically ends up with minimal protection: an obscure blues musician whose riffs and melodies are appropriated by a major music label's next big thing; a graffiti artist from the urban corridors whose renderings eventually make their way into the works of the modern art world's latest sensation; an unheralded rural landscape painter whose evocative depictions of nature are used without authorization or payment by a major retailer to set the mood for their western-themed sales catalog; and a struggling dance choreographer, whose uniquely sequenced moves land in the new music video for a leading pop star. In the absence of timely registration, none of these individuals qualify for the recovery of statutory damages or attorneys' fees if they should sue and prevail in a claim of copyright infringement.¹⁷⁸ Since there are also no

177. *See supra* notes 4–9 and accompanying text.

178. *See* 17 U.S.C. § 412 (2012). In fact, plaintiffs that have not timely registered their copyrights can never receive their attorneys' fees, even if they easily prevail in litigation. *See id.* Ironically, defendants can always recover their fees in a copyright suit, a scenario that creates a one-way risk of attorneys' fees recovery for a plaintiff seeking to vindicate its rights without a

punitive damages available in copyright law, would-be infringers have little to no disincentive to make unauthorized and uncompensated use of creative works not timely registered.¹⁷⁹ In the end, therefore, these relatively ‘unsophisticated’ copyright holders will find themselves holding what one court has aptly characterized as “a right without a remedy.”¹⁸⁰

All the while, bankrupting penalties face those who would touch the copyrighted works of the modern music industry, the major Hollywood studios, the elite art world, or the fashion industry without permission, even when these are built on the unprotected works of others. Thus, the registration system plays a critical role in perpetuating a sacralization process that began with the development of highbrow/lowbrow norms in the late nineteenth century and eventually became embodied in the law through the expansion of the copyright monopoly and the development of the derivative rights doctrine. While the emergence of mass reproduction and digital dissemination has threatened the consecration of privileged works, our registration regime has rekindled the aura. What technology has undermined, our two-tiered copyright hierarchy has reinstated, at least in part. Consequently, by controlling the manipulation and transformation of cultural content through its hierarchical system of protection, copyright law’s registration requirement plays a significant role in mediating identity formation, regulating social networks, and controlling expressive rights as it determines the ways in which we can and cannot interact with the seminal semiotic signposts of our civilization.

B. Aesthetic Judgment as Hegemonic Project

1. The myth of aesthetic neutrality

Besides copyright’s procedural rules, its seemingly innocuous and neutral substantive provisions also regulate the bodily integrity of sacred and privileged texts, patrol cultural reproduction, and impact

timely registration. See Tehranian, *supra* note 77, at 1414–15.

179. As Judge Posner has noted, “there is no basis in the law for requiring the infringer to give up more than his gain when it exceeds the copyright owners’ loss. Such a requirement would add a punitive as distinct from a restitutionary element to copyright damages, and . . . the statute contains no provision for punitive damages.” *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 931–32 (7th Cir. 2003).

180. See *Bus. Trends Analysts, Inc. v. Freedonia Group, Inc.*, 887 F.2d 399, 406 (2d Cir. 1989) (citing 3 NIMMER § 14.02[A] at 14-14) (depicting such a circumstance).

identity development in the service of dominant social forces. At a rhetorical level, courts have historically maintained a steadfast commitment to aesthetic neutrality in their copyright jurisprudence. Consider Justice Oliver Wendell Holmes's enduring and foundational admonition enunciated in the 1903 *Bleistein* case.¹⁸¹ Cautioning judges to expurgate aesthetic judgments from the courtroom, Holmes, writing for the majority of a divided Supreme Court, found no reason to deny copyright protection to an advertisement featuring renderings of circus performers, despite its prosaic commerciality.¹⁸² Rejecting the view of the defendants and the lower courts, Holmes asserted that the perceived aesthetic value of a work could not and should not determine its copyrightability.¹⁸³ In theory, therefore, a commercial copy would receive the same protection as high art. Reasoned Holmes in his most classic formulation: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."¹⁸⁴

On the surface, judges have heeded Holmes's advice, and the rhetoric of aesthetic neutrality is a dominant trope in modern copyright jurisprudence. Notes Robert Gorman, "It is indeed the rare judge who purports to assess, in explicit terms, whether the art, literature or music before it is good or bad."¹⁸⁵ One need look no further than the emphatic language of the Seventh Circuit: "[J]udges can make fools of themselves pronouncing on aesthetic matters."¹⁸⁶

Yet for all this rhetorical solicitude, courts inevitably make aesthetic judgments when approaching copyright cases. In his groundbreaking work on the subject, Alfred Yen argues that the palaver of aesthetic neutrality has belied the common judicial practice of assessing aesthetic factors in deciding fundamental issues of copyright law.¹⁸⁷ To illustrate this point, Yen examines seminal

181. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

182. *Id.* at 251.

183. As Holmes argued, "That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights." *Id.* at 252.

184. *Id.* at 251.

185. Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 2 (2001).

186. *Gracen v. Bradford Exch.*, 698 F.2d 300, 304 (7th Cir. 1983).

187. Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 266-97 (1998).

jurisprudence on issues of originality, the useful arts doctrine, and substantial similarity.¹⁸⁸ At a certain level, copyright hermeneutics necessarily implicate aesthetic considerations. For example, the Constitution's Copyright Clause—which appears to limit copyright protection to the extent that it promotes “the Progress of Science and useful Arts”¹⁸⁹—virtually demands such “aesthetic determinations.”¹⁹⁰ In addition, judges have introduced aesthetic considerations into the copyright calculus by determining what types of unauthorized uses (e.g., parody versus satire) are productive or transformative for the purposes of the first factor of the fair-use defense.¹⁹¹ Construing conceptual severability for the purposes of distinguishing between works of applied art, which receive copyright protection, and works of industrial design, which do not, also inevitably involves aesthetic judgments about what constitutes art and what defines the proper relationship between form and function needed to secure legal protection. All told, as Robert Gorman comments, “it is not at all rare to find courts addressing the question, ‘what is art?’ And it is quite common to find copyright courts assessing—sometimes covertly, sometimes openly—whether a work has merit, worth or social value.”¹⁹²

The consequences of such aesthetic adjudications are far reaching. As Yen argues, they inextricably affect the type of works we, as a society, receive from our artists.¹⁹³ After all, economically motivated artists might “prefer creating works that meet the aesthetic preference of judges because other works would either not get the benefits of copyright protection or wind up being suppressed.”¹⁹⁴ Even more fundamentally, however, aesthetic

188. *Id.*

189. U.S. CONST., art. I, § 8, cl. 8.

190. Gorman, *supra* note 185, at 2.

191. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1559 n.137 (2004) (“Whether ‘productive’ or ‘transformative’ use guides the first fair use factor, either inquiry threatens to trap courts and litigants into making the kinds of aesthetic judgments that the copyright system expressly disclaims.”); Gorman, *supra* note 185, at 14–16; *see also* Henley v. DeVore, 733 F. Supp. 2d 1144, 1156–58, 1163 (holding that a politician’s unauthorized use of musical compositions during a campaign constituted “satire,” rather than “parody,” and, therefore, did not qualify for a fair-use defense as it did not adequately comment upon or criticize the direct content of songs).

192. Gorman, *supra* note 185, at 2.

193. Yen, *supra* note 187, at 248–49.

194. *Id.*

judgments can serve to both maintain and preserve existing power structures. The seemingly neutral laws of copyright, therefore, have the potential to create a hierarchy of culture that serves hegemonic interests.

Consider the way in which application of the fair-use doctrine, in combination with other copyright principles, has violated ostensible norms of aesthetic neutrality in deciding which works will remain consecrated and hallowed and which works will not. With a narrow reading of fair use, a court can protect a work from remix, reinterpretation, and unauthorized mutilation. In short, it can preserve a work's aura, inviolability, and canonic status and promote its economic value to its rights holder. With a broader reading of fair use, a court can open the floodgates for the work's use and abuse. Indeed, if the time has come for a work to be metaphorically rejected from the modern canon, there is perhaps no more defining moment than when that work loses its strong copyright protection in court. A careful exegesis of copyright jurisprudence reveals that aesthetic decisions, driven by implicit cultural and political considerations, can dramatically affect the fair-use calculus, making fair use a determination on which cultural works are the "fairest of them all."

To illustrate this point, it is instructive to compare the results of two recent high-profile copyright infringement suits involving canonical literary works, unauthorized derivatives, and claims of fair use. The first suit involved Alice Randall's *The Wind Done Gone*, an unauthorized follow-up to Margaret Mitchell's *Gone with the Wind*. The second suit involved John David California's *60 Years Later*, an unauthorized send-up of J.D. Salinger's *Catcher in the Rye*.

2. *The consecration done gone: The de-canonization of Gone with the Wind and the battle to depict the antebellum South.*

In the first suit, *Suntrust v. Houghton Mifflin Co.*, the Estate of Margaret Mitchell sued to enjoin publication of Alice Randall's *The Wind Done Gone*, on the grounds that it constituted an unauthorized derivative work based on *Gone with the Wind*.¹⁹⁵ The main conceit of Randall's novel was its recasting of the *Gone with the Wind* story and world from the point of view of the African American slaves and mulattos rather than the white aristocrats. In

195. *Suntrust Bank v. Houghton Mifflin Co.* (*Suntrust I*), 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *vacated*, 252 F.3d 1165 (11th Cir. 2001), *rev'd and remanded*, 268 F.3d 1257 (11th Cir. 2001).

Randall's work, Ashley Wilkes is gay, interracial sexual relationships are discussed, and the travails of daily life for the victims of the South's rigid and racist social hierarchy are vividly depicted.¹⁹⁶

A district court initially enjoined publication of *The Wind Done Gone*, accepting the Mitchell Estate's contention that it constituted an infringing work and rejecting Randall's fair-use defense.¹⁹⁷ Specifically, the trial judge found that *The Wind Done Gone* was a sequel and not a parody, and therefore not the type of transformative use granted fair-use protection.¹⁹⁸ The tenor of the judge's opinion is particularly revealing. It begins by immediately emphasizing *Gone with the Wind's* place in the cultural canon and its commercial significance—both noting its “widespread acclaim” and its impressive sales in the “tens of millions.”¹⁹⁹ These facts are, of course, largely irrelevant to any aesthetically neutral analysis of infringement and fair use. But, they set the tone for the court's opinion, which reflects a strong deference to the work's favored aesthetic status—its presumed import and cultural and economic value.²⁰⁰

The existing body of fair-use precedent supports the proposition that parodic works can generally enjoy exemption from infringement liability.²⁰¹ The key portion of the trial court's decision therefore comes when it characterizes *The Wind Done Gone* as not primarily a parody but, rather, a sequel or some other form of unauthorized derivative work.²⁰² While acknowledging that the book has numerous parodic elements, the court somehow divines that “the book's overall purpose is to create a sequel to the older work and provide Ms. Randall's social commentary on the antebellum South.”²⁰³ The court's attempt to segregate the parodic elements of the work from the sequel-like elements is difficult to understand when the two concepts are not at all mutually exclusive and, quite often, intertwined. For example, Mel Brooks's classic *Spaceballs* is, in some senses, both an unauthorized sequel to and parody of *Star Wars*. Indeed, the dialectic that casts parody in opposition to sequel

196. See generally ALICE RANDALL, *THE WIND DONE GONE* (2001).

197. *Suntrust I*, 136 F. Supp. 2d at 1385–86.

198. *Id.*

199. *Id.* at 1363.

200. *Id.*

201. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding “that parody, like other comment or criticism, may claim fair use”).

202. *Suntrust I*, 136 F. Supp. 2d at 1385.

203. *Id.* at 1378.

is, at its core, an aesthetic judgment. As a parody, the work is presumed to be transformative and, consequently, entitled to fair use protection for its contribution to progress in the arts.²⁰⁴ As a sequel, the work is seen as nothing more than an effort to free ride on the copyrighted work of another. In this sense, the *Suntrust* court ends up conflating its analysis of commercialism with its analysis of transformative use, later concluding that “the purpose of putting the key characters of *Gone with the Wind* in new settings is to entertain and sell books to an active and ready-made market for the next *Gone with the Wind* sequel.”²⁰⁵ To the court, Randall is nothing more than a leech sucking economic value away from Mitchell’s genius. But, at some level, all parodies can be portrayed as such. After all, they all rely upon the original and its status as a recognized work to a certain audience.

As it turns out, a careful parsing of the court’s decision reveals that this conclusion stems from aesthetic judgments about the inviolability of *Gone with the Wind*. As the court tautologically posits, “If the defendant is permitted to publish *The Wind Done Gone*, an unauthorized derivative work, then anyone could tell the love story of *Gone with the Wind* from another point of view and/or create sequels or prequels populated by Ms. Mitchell’s copyrighted characters without compensation to the Mitchell Trusts.”²⁰⁶ With these words, the court presupposes that the latter result simply cannot occur (despite the existence of the fair-use doctrine that plainly creates no such hard-and-fast rule). Put another way, the court assumes, and thereby ensures, that the work must remain inviolate. As a sacred text, *Gone with the Wind* should be protected from unauthorized individuals telling the story from a different point of view.

Consecration is at the heart of the court’s concern because a world where the sacred text has been defiled is unimaginable: “[B]y killing two core characters from *Gone with the Wind* and marrying off

204. See *Campbell*, 510 U.S. at 575 (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and Useful Arts’” (alteration in original) (quoting U.S. CONST., art. I, § 8, cl. 8)).

205. *Suntrust I*, 136 F. Supp. 2d at 1373; *id.* at 1379 (“The court finds that *The Wind Done Gone* is unquestionably a fictional work that has an overarching economic purpose. . . . [T]he commercial purpose of *The Wind Done Gone* weighs strongly in favor of the plaintiff on the first factor”).

206. *Id.* at 1382.

another, *The Wind Done Gone* has the immediate effect of damaging or even precluding the Mitchell Trusts' ability to continue to tell the love story of Scarlett and Rhett."²⁰⁷ Read literally, the court's admonition fails to distinguish between real life—where an individual's death typically precludes the possibility of resurrection—and fiction—where no such limitations exist. The statement not only reflects a startling failure of imagination by the court—doubtlessly provoked by the inability to envision the bastardization of the consecrated work—but also does not hold weight empirically. For example, the *Star Trek* franchise has continued to thrive in telling the stories of Captain Kirk, Mr. Spock, and the U.S.S. Enterprise, despite the fact that both Kirk²⁰⁸ and Spock²⁰⁹ were killed at various points during the *authorized* movies. Moreover, audiences can readily discern between authorized and unauthorized sequels of a franchise and, if they cannot, that is something that the federal Lanham Act could help police through its prohibition of unfair competition and false advertising.

Of course, the Scarlett and Rhett characters do not die just because Randall says they do. But, what the court really fears is that *The Wind Done Gone* will sound not the literal death knell for the characters, but for *Gone with the Wind's* untouchability. Stripped of unadulterated idealization, the work and its characters can no longer survive in the exact form they once possessed. Thus, it is not whether the work is parody or sequel that truly appears to drive the court's decision; it is destruction of the work's romanticism—a romanticism that is grounded in a distinctly whitewashed vision of the antebellum South that painfully ignores the harsh realities of life for that society's underclass. Thus, the court's read on copyright law, driven by aesthetic judgments, has an impact on the discourse about what is perhaps the most famous and popular vision of Southern life during the years of slavery. With the district court's opinion, copyright law is used to preserve a hegemonic vision of the South that has historically prevailed in the American consciousness.

By sharp contrast, the Eleventh Circuit found that *The Wind*

207. *Id.*

208. WILLIAM SHATNER & DAVID FISHER, UP TILL NOW 287 (2008) (“Well. Kirk may have been dead in the movies, but there was no reason he had to be dead in the publishing industry. I sold my treatment to Simon & Schuster and *Star Trek: The Return* became a best-selling novel.”).

209. ROSS S. KRAEMER, WILLIAM CASSIDY & SUSAN L. SCHWARTZ, RELIGIONS OF STAR TREK 161 (2003).

Done Gone could enjoy fair-use and First Amendment protection and reversed the district court's injunction.²¹⁰ Despite its differing logic, however, the Eleventh Circuit's opinion was similarly influenced by aesthetic judgments.²¹¹ To the Eleventh Circuit, criticism, ridicule, and even scorn for a work serves as a social good that trumps any harm it may do to a copyright holder's economic rights.²¹² Citing the Ninth Circuit's *Fisher* case that immunized *When Sonny Sniffs Glue* from liability as a parody of *When Sunny Gets Blue*, the court's concurring opinion by Judge Marcus asserts that "[d]estructive parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author."²¹³ Works are not to be treated as sacred cows and the preservation of immutability does not serve public interests. "Because the social good is served by increasing the supply of criticism—and thus, potentially, of truth," posits the court, "creators of original works cannot be given the power to block the dissemination of critical derivative works."²¹⁴

In particular, the Eleventh Circuit found *Gone with the Wind* especially ripe for deconstruction. And this becomes a critical point when considering identity interests and how the copyright holders may draw on intellectual-property rights as a means to preserve and maintain existing power structures, visions of inclusion and exclusion, and critical historical narratives. The Eleventh Circuit specifically singles out the Mitchell Estate's control of prior authorized derivative works and its desire to limit certain themes as a basis *for*, rather than *against*, its ruling.²¹⁵ By sharp contrast to the district court, which sought to retain the aesthetic integrity of Mitchell's saccharine depiction of Dixie and protect it from unwanted mutilation,²¹⁶ the appeals court viewed Mitchell's work as one ripe for, if not outright in need of, deconstruction.²¹⁷ In the

210. *Suntrust Bank v. Houghton Mifflin Co. (Suntrust II)*, 268 F.3d 1257, 1276–77 (11th Cir. 2001).

211. *See id.* at 1271.

212. *Id.* at 1276–77.

213. *Id.* at 1283 (Marcus, J., concurring) (citing *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

214. *Id.* (quoting *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115 n.3 (2d Cir. 1998)).

215. *Id.* at 1274–75 (majority opinion).

216. *Suntrust I*, 136 F. Supp. 2d at 1386.

217. *See Suntrust II*, 268 F.3d at 1270, 1276–77 (stating that Randall's work

majority decision, the court points out that the Mitchell Estate was particularly horrified at the idea that the *Gone with the Wind* milieu might be adulterated with references to homosexuality.²¹⁸ The concurrence goes even further, taking pains to reference the Mitchell Estate's particular concern with the depiction of interracial and same-sex relationships.²¹⁹ Indeed, the concurring opinion quotes the Mitchell Estate as having told a potential writer for the authorized sequel for *Gone with the Wind*, "You're not going to like this, but the estate will require you to sign a pledge that says you will under no circumstances write anything about miscegenation or homosexuality."²²⁰ Ultimately, therefore, Randall's right to transform "Ashley Wilkes into a homosexual" and to "depict[] . . . interracial sex, and . . . multiple mulatto characters"²²¹ strongly informed the court's decision to strike the injunction preventing publication of *The Wind Done Gone*.

All told, the struggle over the scope of the *Gone with the Wind* copyright becomes a struggle over the right to present an alternate vision of Old Dixie, using the familiar terrain of the romanticized antebellum South to bring long-suppressed issues of race, class, and even sexual orientation to the forefront of the story. In the end, the Eleventh Circuit found that the preliminary injunction enjoining publication of *The Wind Done Gone* constituted "an unconstitutional prior restraint"²²²—not just of free speech broadly speaking, but of the right to challenge the idealized notions of the Old South that have historically resided in the national subconscious precisely because of such works as *Gone with the Wind*. To the Eleventh Circuit, the time had come to de-canonize *Gone with the Wind* and end its inviolability.²²³ And the decision to do so stemmed from

"explode[s] the romantic, idealized portrait of the antebellum South during and after the Civil War" in *Gone with the Wind*, including the novel's suggestion that "blacks and whites were purportedly better off in the days of slavery").

218. *Id.* at 1270 n.26 (noting "special relevance" in the fact that Suntrust, the trustee of the Mitchell Trust, "makes a practice of requiring authors of its licensed derivatives to make no references to homosexuality").

219. *Id.* at 1282 (Marcus, J., concurring).

220. *Id.*

221. *Id.*

222. *Id.* at 1259 (majority opinion).

223. *Id.* at 1283 (Marcus, J., concurring) ("The law grants copyright holders a powerful monopoly in their expressive works. It should not also afford them windfall damages for the publication of the sorts of works that they themselves would never publish, or worse, grant

aesthetic judgments supporting the subversive power of Randall's broadside in novel form.²²⁴ Painfully out of sync with more modern views, *Gone with the Wind* had to face the fact that the time to lose its consecrated status had come.

3. 60 Years Later: *J.D. Salinger and the Preservation of the Canon*

Indeed, a revealing contrast emerges when one considers the ultimate outcome of *The Wind Done Gone* suit—which effectively excommunicated *Gone with the Wind* from the category of sacred text—to the more recent controversy involving an unauthorized send-up of *The Catcher in the Rye*. Entitled *60 Years Later: Coming Through the Rye* and purportedly authored by one John David California,²²⁵ the fanciful reverse postmodern bildungsroman features Holden Caulfield, now a seventy-six-year-old on the run from a nursing home, confronting his creator, J.D. Salinger himself.²²⁶ In 2009, J.D. Salinger came out of hiding, at least legally speaking, to seek an injunction restraining publication of *60 Years Later* on the grounds that it constituted a blatant infringement of his copyright.²²⁷ The defendant objected, claiming fair-use and First Amendment protection.²²⁸

The district court issued an injunction to enjoin the publication and distribution of *60 Years Later* after finding Salinger was likely to prevail on the merits of the case.²²⁹ On appeal, the Second Circuit affirmed that part of the holding.²³⁰ A central part of the decision

them a power of indirect censorship.”).

224. The Eleventh Circuit's decision is also significant in another light. What the district court saw as property—an interest in the preservation and consecration of something over which the Mitchell Trusts was said to possess dominion—the appeal court saw as speech. This is an aesthetic judgment as to the nature of a copyrighted work—whether it is simply a piece of private property, outside of the scope of the First Amendment, or whether it constitutes a form of speech, subject to First Amendment protection.

225. John David California is the pseudonym of author Fredrik Colting. *Salinger v. Colting* (*Salinger I*), 641 F. Supp. 2d 250, 253 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

226. *See id.* at 254 (granting injunction enjoining the sale of *60 Years After* as an unauthorized derivative work based on *Catcher in the Rye*, regardless of the originality of contributions by the author of *60 Years After*).

227. *Id.* at 253–54.

228. *Id.* at 254–55.

229. *Id.* at 254.

230. *Salinger v. Colting* (*Salinger II*), 607 F.3d 68 (2d Cir. 2010) (affirming the district court's finding that Salinger was likely to prevail on the merits of the case but remanding the case for full consideration of the factors from *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S.

came when the court distinguished the suit involving *The Wind Done Gone*.²³¹ Specifically, the court explained that, while the *Suntrust* case determined that *The Wind Done Gone* was a parody entitled to a likely fair-use defense, *60 Years Later* was more characteristic of a sequel than a parody.²³² Yet *The Wind Done Gone*'s purported status as a parody, sequel, or both is wrought with complexity. And, at a minimum, it was a close call—with the United States District Court for the Northern District of Georgia ruling one way and the Eleventh Circuit ruling the other.²³³

Moreover, there were several key facts that actually should have given *60 Years Later* a *better* fair-use defense than *The Wind Done Gone*. First, with respect to the fourth (and most important, according to some courts) fair-use factor—market harm—*The Wind Done Gone* was certainly more damaging to the Mitchell Estate's *economic* interests than *60 Years Later* was to Salinger's. Specifically, the Mitchell Estate had actually demonstrated a clear interest in entering the market to create derivative works based on *Gone with the Wind*.²³⁴ In 1991, they authorized publication of a sequel entitled *Scarlett: The Sequel to Margaret Mitchell's Gone with the Wind*.²³⁵ And, at the time of the *Suntrust* case, they had entered into a contract authorizing a possible second sequel.²³⁶ Indeed, St. Martin's Press had paid dearly for the privilege of publishing the latter—to the tune of seven figures.²³⁷ By sharp contrast, whatever the moral offense to Salinger, the publication of *60 Years Later* did not raise the same specter of economic harm as did the publication of *The Wind Done Gone*.²³⁸ After all, Salinger was a notorious recluse who had refused to publish anything for the past half century.²³⁹ He never betrayed any interest in publishing a sequel to *Catcher in the Rye*. *60 Years Later* is therefore highly unlikely to dilute a derivative

388 (2006) before the injunction issues).

231. *Salinger I*, 641 F. Supp. 2d at 257–58.

232. *Id.* at 257–58, 260 n.3.

233. *Suntrust I*, 136 F. Supp. 2d 1357, 1386 (N.D. Ga. 2001) *vacated*, 252 F.3d 1165 (11th Cir. 2001) and *rev'd and remanded*, 268 F.3d 1257 (11th Cir. 2001).

234. *Id.* at 1363.

235. *Id.*

236. *Id.*

237. *Id.* at 1374 n.12.

238. *Salinger I*, 641 F. Supp. 2d at 268 (noting that Salinger “has not demonstrated any interest in publishing a sequel or other derivative work of *Catcher*”).

239. See PAUL ALEXANDER, SALINGER: A BIOGRAPHY 26 (2000) (explaining that Salinger became and was famously a recluse).

market in which Salinger had no desire whatsoever to participate. Admittedly, the jurisprudence applying the market harm test has suggested that harm to potential markets is enough for a plaintiff to prevail on this element of the fair-use test.²⁴⁰ The *Salinger* court noted as much:

[A]lthough Salinger has not demonstrated any interest in publishing a sequel or other derivative work of *Catcher*, the Second Circuit has previously emphasized that it is the “potential market” for the copyrighted work and its derivatives that must be examined, even if the “author has disavowed any intention to publish them during his lifetime,” given that an author “has the right to change his mind” and is “entitled to protect his *opportunity* to sell his [derivative works].”²⁴¹

But, potential must at least be plausible and, at the end of the day, it is utterly disingenuous to read Salinger’s suit as an attempt to preserve his right to change his mind should he decide to enter the market for derivative works.

Secondly, large parts of *The Wind Done Gone* actually retold the story from *Gone with the Wind*,²⁴² thereby engaging in more actual borrowing, both literal and structural, than *60 Years Later* did from the *Catcher in the Rye*. *The Wind Done Gone* even appropriated entire sentence structures from the original work. As an example, the first page of *The Wind Done Gone* states, “She was not beautiful, but men seldom recognized this, caught up in the cloud of commotion and scent in which she moved,” while *Gone with the Wind* begins, “Scarlett O’Hara was not beautiful, but men seldom realized it when caught by her charm”²⁴³ *60 Years Later* certainly used the Holden Caulfield of *Catcher in the Rye*, but its literal borrowing was largely limited to the use of certain (common and non-protectable) catchphrases or idioms related to the Caulfield character.²⁴⁴ In fact,

240. See *Castle Rock Entm’t, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 145–146 (2d Cir. 1998) (finding that the fourth factor of fair use favors the plaintiff even where it has “evidenced little if any interest in exploiting this market for derivative works”); *J.D. Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987).

241. *Salinger I*, 641 F. Supp. 2d at 268 (internal citation omitted) (quoting *J.D. Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987)).

242. See Richard Schur, *The Wind Done Gone Controversy: American Studies, Copyright Law, and the Imaginary Domain*, 44 AM. STUD. 5, 6 (2003).

243. *Suntrust I*, 136 F. Supp. 2d at 1369 (quoting ALICE RANDALL, *THE WIND DONE GONE* 1 (Houghton Mifflin) (2001); MARGARET MITCHELL, *GONE WITH THE WIND* 1 (Macmillan) (1936)).

244. *Salinger I*, 641 F. Supp. 2d at 264 (noting *60 Years Later*’s use of such Caulfield

the *Salinger* ruling was notable as it represented the first time that a court in the Second Circuit had found that copyright protection extended to a single character who had appeared in a single novel.²⁴⁵

Nevertheless, while *The Wind Done Gone* ultimately received a favorable finding on fair use, *60 Years Later* was enjoined from publication.²⁴⁶ And aesthetic judgments on the relative value of unauthorized derivative works appear to have made a key difference in court's decision to issue the injunction. Consider the only mention that the *Salinger* court makes of the overarching goals of the copyright system. Seeking to reconcile its ruling with copyright's role in promoting progress in the arts, the *Salinger* court reasoned that "some artists may be further incentivized to create original works due to the availability of the right *not* to produce any sequels."²⁴⁷ As a first matter, the court's speculation on this point strains all credulity. But regardless of how one feels about the bizarre conjecture that the right not to produce sequels can incentivize creation, it is clear that the court's statement rests on a tacit aesthetic judgment: that it is better to preserve (ex post) the incentive to create *The Catcher in the Rye* than it is to stimulate the creation of unauthorized sequels. The calculus here is fairly remarkable: the court chooses to enjoin *definitely* the publication of unauthorized derivatives—works that could contribute to progress in the arts—on the *chance*, based at least in part on idle speculation, that some artists may create more because they can rest secure in the knowledge that no one can create sequels of their works. The hierarchy at play is simple: the original work implicitly trumps the sequel(s) and/or derivatives, especially those of the unauthorized variety. Certainly, for every *Godfather II* and *Return of the Jedi*, there are dozens of *Blues Brothers 2000*'s. But in deciding the fate of *The Wind Done Gone*, the Eleventh Circuit certainly did not seem bothered by this possibility, as it adopted a radically different aesthetic judgment of the unauthorized derivative. At a more subconscious level, in the context of our times, it perhaps feels less wrong to allow someone to

catchphrases as "‘phony,’ ‘crumby,’ ‘lousy,’ ‘hell,’ and ‘bastard’").

245. Of course, while Holden Caulfield appeared in only one book, his character did appear in two published short stories, see J.D. Salinger, *I'm Crazy*, COLLIERS MAGAZINE (Dec. 22, 1945); J.D. Salinger, *Slight Rebellion Off Madison*, THE NEW YORKER (Dec. 21, 1946), and his family appeared in at least one other, see J.D. Salinger, *Last Day of the Last Furlough*, SATURDAY EVENING POST (July 15, 1944).

246. *Salinger I*, 641 F. Supp. 2d at 254.

247. *Id.* at 268.

skewer the dated artistic vision of Margaret Mitchell than to permit the bastardization of the revered masterworks of *The Beatles* or the adulteration of J.D. Salinger's beloved Holden Caulfield.

In the end, the decision to open up *Gone with the Wind* to *The Wind Done Gone* effectively freed the literary property—and, more generally, the popular interpretation of a critical era in our nation's history—to different narratives and perspectives. Thus, the battle over copyright protection can often become a clash between the hegemonic power of cultural reproduction and subversive effects of semiotic disobedience.²⁴⁸ Through both procedural rules and substantive doctrines, our intellectual-property laws can use registration requirements and aesthetic judgments to achieve something much broader than merely “progress of the arts.” Instead, by consecrating meaning and value, patrolling cultural hierarchy, and regulating the signposts of our society, intellectual property transcends its small corner of the legal universe and plays a fundamental role in shaping social structures and regulating individual behavior as part of a broader hegemonic project.

C. Private Intellectual-Property Regimes and the Control of the Public Domain

The ability to control meaning and interpretation of significant cultural content is not solely a function of copyright as a public law. As we saw earlier with our example of the emergence of the highbrow/lowbrow dichotomy in the late nineteenth century,²⁴⁹ social norms grounded in quasi-copyright can play a central role in this process. In addition, adjudication through private ordering regimes, existing wholly outside of (or even in circumvention of) the federal copyright regime, can also enable the exercise of such control.

Take the private intellectual-property regime that governs movie titles in Hollywood. Historically, public law has provided few protections to film titles. Titles are not registered by the Copyright Office and courts have repeatedly refused to grant them copyright

248. Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 493–96 (2007) (Borrowing terminology from John Fiske, Sonia Katyal refers to “semiotic disobedience” as the act of “alter[ing] existing intellectual property by interrupting, appropriating, and then replacing the passage of information from creator to consumer.” But, by making certain symbols immune from remix or alteration, “propertization offers a subsidy to particular types of expression over others”).

249. *See supra*, Part III.B.

protection on the grounds that they inherently lack sufficient originality to warrant protection.²⁵⁰ Meanwhile, the United States Patent and Trademark Office and the courts have generally limited to franchises trademark protection for titles.²⁵¹ In response, Hollywood has established a private law regime—the Title Registration Bureau—to fill this apparent gap. Operating relatively unchanged since its establishment in 1925, the Bureau functions under the auspices of the Motion Picture Association of America (“MPAA”) (originally known as the Motion Picture Producers and Distributors of America) and seeks to prevent unnecessary confusion in the marketplace between similarly titled movies.²⁵² But the system has a powerful secondary effect: it entitles the holders of certain titles to privileged positions for the dissemination of their particular takes on famous works. This is particularly troubling when those works are in the public domain under federal copyright law and, in theory, useable by anyone.

Although subscription to the Title Registration system is ostensibly voluntary, all six major studios are members, as are hundreds of independent studios.²⁵³ In addition, any subsidiaries of subscribing companies are also bound by the terms of the Title Registration Agreement.²⁵⁴ Under the Title Registration system, signatories to the Agreement are allowed, among other things, to reserve scores of titles to non-original works—even those in the public domain—on a first-come, first-serve basis.²⁵⁵ As such, various

250. See, e.g., *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989) (“[O]verextension of Lanham Act restrictions in the area of titles might intrude on First Amendment values . . .”). It should be noted, however, that post-*Feist*, with the minimal level of creativity requirement blessed by the Supreme Court, one could imagine certain titles possessing sufficient minimum creativity so as to qualify for copyright protection.

251. 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10:4 (4th ed.1999).

252. TITLE REGISTRATION BUREAU, MOTION PICTURE ASS’N OF AM., INC., RULES FOR REGISTRATION OF AND DISPUTES RELATING TO UNITED STATES THEATRICAL MOTION PICTURE TITLES (2005).

253. See *Frequently Asked Questions*, MOTION PICTURE ASS’N OF AM., <http://www.mpa.org/faq> (last visited, Sept. 5, 2012).

254. TITLE REGISTRATION BUREAU, *supra* note 252, § 2.2.2.

255. *Id.* at § 4.4.3.1 (“The duration of protection for titles in the Public Domain Work Release category of the Released Film Index shall be . . . the same as a Permanent Original Release, if a Subscriber decides to claim permanent protection During the applicable period of protection, no identical Original Work Title or Public Domain Work Title shall be registered.”); *Id.* at § 4.4.1.1. (“The duration of protection for all titles in the Permanent Copyright Release category of the Released Index shall be permanent, unless the title is withdrawn but subject to the registration of an identical Copyrighted Work Title or an identical Public Domain Work Title as may be provided for in these Rules. Permanent

studios have long-term exclusionary rights to the titles of virtually every work in our cultural canon—even though many such works were published prior to 1923 and no longer enjoy copyright protection. If someone else uses a title that is even confusingly similar to a registered public domain work during the relevant time period, the studio that has reserved the title can challenge the use, and the issue is decided by arbitration through the MPAA.²⁵⁶ Under the system, therefore, the particular studio that has reserved the name “Hamlet” can ensure that it is the only major studio that can release a feature film under that title for either a twenty-five or twelve year window.²⁵⁷ While anyone is free to make a movie version of Shakespeare’s play *Hamlet*, only one studio can effectively release a movie entitled *Hamlet* or, in practical terms, gain widespread distribution of a movie entitled *Hamlet* for an entire generation of viewers. Of course, another studio might be able to release their interpretation of *Hamlet* under the name *The Prince of Denmark*, but this version will always be at inherent disadvantage to the studio that can actually use the real title of the (public domain) work.

Since the MPAA’s Title Registration system is a private ordering regime, it is presumably immune from the constitutional and doctrinal limitations on copyright law that protect the public interest. But it impacts the public by playing a role in whose vision of *Hamlet*, or any other famous work, makes it to the big screen at theaters across the country. To do the definitive *Romeo and Juliet* or *20,000 Leagues Under the Sea* in movie form, one must obtain permission from, or work through, the studio that holds the right to the title. While these works technically remain in the public domain, they retain protection under Hollywood’s internal Title Registration system. Thus, the exertion of control over cultural content is not simply a function of federal copyright law, but also of private ordering regimes that create quasi-intellectual-property rights and do so with broader societal implications.

protection means indefinite protection rather than for the term of copyright protection under applicable federal or state law.”) Although the system originally gave each studio the right to a maximum of 250 reserved names, the creation of subsidiaries has rendered this limitation moot and, in effect, each major has reserved thousands of titles.

256. *Id.*

257. The twenty-year window applies to original films released before September 1, 2000 and the twelve-year window applies to original films released after September 1, 2000. See E-mail from Mitch Schwartz, Vice President & Dir., Title Registration Bureau, Motion Picture Ass’n of Am. (Aug. 2, 2012) (on file with editors).

VI. CONCLUSION

Norms, public laws, and private ordering regimes that regulate the use of intellectual property control the reproduction and manipulation of cultural content in ways that can both serve and subvert knowledge–power systems. A developing field of inquiry, which this Article refers to as critical intellectual-property scholarship, has begun to analyze this process in action. This Article has examined the common origins of this body of literature and built upon the extant scholarship by identifying three critical moments—the vesting of rights, the assertion of rights and the adjudication of rights—where the broader social consequences of intellectual property are felt.

Focusing specifically on copyright law, we first examined how the vesting of rights can interface with Pierre Bourdieu’s concept of cultural reproduction. We traced the gradual ascent of Shakespeare and opera from the realm of popular entertainment to elite culture in the late nineteenth century. In the process, we witnessed how changing norms and the creation of the derivative-rights doctrine within copyright law have aided the consecration and preservation of cultural production, a mechanism illustrated in the modern context through a comparison of the *Love* project to the *Grey Album*.

We then turned our attention to the assertion of rights and saw how decisions in the enforcement of copyright have broader semiotic and social consequences. We examined the federal government’s unauthorized use of music, such as Bruce Springsteen’s “Born in the U.S.A.,” at the American detention facilities at Guantanamo Bay and the RIAA’s high profile litigation campaign against illicit, online file sharing. In the process, we illustrated how enforcement efforts (or the lack thereof) can service the hegemonic recasting of cultural meaning and how disparate assertion techniques can support entrenched social, political, or economic interests.

Finally, we examined how the implementation of copyright’s procedural and substantive doctrines in the adjudicative process can maintain and perpetuate cultural hierarchy. Copyright’s seemingly innocuous registration requirement dramatically illustrates this point by privileging certain forms of creative production in a manner that cuts along class lines. Meanwhile, the use of aesthetic considerations in juridical responses to send-ups of two American classics—*Gone with the Wind* and *The Catcher in the Rye*—demonstrates how doctrinal interpretation can turn on implicit value judgments about broader cultural, social, and political issues.

All told, copyright law represents a key situs in the battle for social control among sovereigns and their subjects, corporations and individuals, and entrenched interest groups and young upstarts. And, in the course of analyzing the ways in which authorial rights are vested, asserted, and adjudicated, we have explored how the contours of our copyright regime influence subordination practices by manufacturing cultural hierarchy and regulating acts of semiotic disobedience. Lying at the heart of discursive struggles over inculcation and meaning, copyright law has dramatic consequences for the shaping of social structures and the regulation of individual behavior. This Article ideally represents a helpful step in the development of a critical literature that examines the broader impact of intellectual-property rights on social relations and knowledge-power systems in the twenty-first century.

