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Social Justice and Copyright's Excess

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SOCIAL JUSTICE AND COPYRIGHT'S EXCESS

By: Elizabeth L. Rosenblatt¹

My life is real. So when I hear about an editor asking: What's up with my output? I'm like: What's up with you even commenting on my life? Niggas don't know my life. That's the bourgeoisie approach that I get offended by because this ain't no bubble. This ain't no vacuum we doing this music out of. That's why people connect to the pain in it. Because it's real. That's the part they should respect. These radio hits, these charts, they don't validate the truth and the message. That's when I start to be like, "Okay, you ain't got a record on radio. You ain't put an album out officially, so you're an underachiever."

That's where I get offended because let's restart this whole situation. The metrics and the gauge of success, and of impact on the culture. It don't got shit to do with Billboard, it don't got shit to do with SoundScan. It don't got shit to do with any of these platforms that the business created. This shit is a culture. This shit is our life. You understand? So in between my projects does it take a year or two, or another artist that live a real life? Does it take them a year to put a project out? Because he wants to retain ownership. He wants to do what they refuse to let you do and that's control his own destiny. He don't wanna be exploited by the music industry that been traditionally exploitive to our creators. Then he end up on lists like the Top 25 Underachievers.

-Rapper Nipsey Hussle, October 2013²

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I. INTRODUCTION

In October 2013, rapper Nipsey Hussle gave an interview to online pop-culture magazine *Complex* explaining why he was offended by the magazine labeling him as one of “10 Underachieving Rappers.”³ In the three years prior to the interview, Hussle had parted ways with Epic Records, founded his own record label, toured in Europe, and released some collaborative works, but it had been three years since he had released something of his own.⁴ In the years between the

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1. Visiting Professor of Law, U.C. Davis School of Law. Thanks to Saurabh Vishnubhakat, Glynn Lunney, and the participants at the February 2019 Texas A&M University School of Law Symposium.

2. Angel Diaz, *Interview: Nipsey Hussle Explains His Dispute with Complex, Going Indie, and “Crenshaw,”* COMPLEX (Oct. 15, 2013), <https://www.complex.com/music/2013/10/nipsey-hussle-interview>.

3. *Id.*

4. See Justin Tinsley, *It's Crunch Time for Nipsey Hussle*, LA WKLY, (Oct. 7, 2013), <https://www.laweekly.com/its-crunch-time-for-nipsey-hussle/> (Leaving Epic, founding All Money In, European touring); EmmelineKim, *Nipsey Hussle & Blanco “Raw” Cover Art, Download & Album Stream*, HIPHOPDX, (June 28, 2013, 2:45 PM),

Complex interview and his death in April 2019, Hussle established himself as an anti-gang activist, entrepreneur, and musician; but he only released one studio album, 2018's "Victory Lap."⁵ Days before the *Complex* interview, Hussle had released a mixtape entitled "Crenshaw," which he made available for free on mixtape hosting sites as well as selling hard copies on an independent, limited-edition (signed, numbered) basis for \$100 each.⁶ Hussle described the album as "a product made with no compromise or concession to the platforms (radio, A&R opinion, label bias)" and his release strategy as a "[r]ebbellion against an industry that has tricked us all into making products that have no soul for fear of not being heard if we don't."⁷ Hussle reportedly sold all of the mixtape's 1,000 copies in less than twenty-four hours.⁸ Reports that Hussle's limited-edition strategy earned him \$100,000 were surely overblown; it is more likely that Hussle lost money on the promotional event, considering not only the album's physical production cost but also its many producers and guest stars, brick and mortar store rental, and the fact that the hard copy acted as a ticket for a live concert. But whatever Hussle's material gain (or lack thereof) from the event, it gave him a platform from which to discuss the racial dynamics of copyright and the music industry.

Hussle's experience demonstrates some of the ways in which copyright law can exacerbate racial and distributive injustice. Through the lens of that experience, this Essay explores how copyright law tends to favor corporate interests at the expense of individuals, particularly individuals in often-racialized musical genres such as rap and hip hop. The Essay connects that favoritism to Glynn Lunney's research in *Copyright's Excess: Money and Music in the US Recording Industry*.

<https://hiphopdx.com/news/id.24490/title.nipsey-hussle-blanco-raw-cover-art-download-album-stream#> (June 2013 collaborative release).

5. *Nipsey Hussle*, AOTY, <https://www.albumoftheyear.org/artist/9788-nipsey-hussle/> (last visited Sept. 1, 2019); Ashley Lyle, *Nipsey Hussle Explains His Marathon Clothing 'Smart' Store on Crenshaw: 'The Goal Is to Be an Urban Sanrio'*, BILLBOARD (June 22, 2017), <https://www.billboard.com/articles/columns/hip-hop/7840863/nipsey-hussle-marathon-clothing-smart-store>; Allegra Frank, *Rapper Nipsey Hussle's Death Put an Inspiring Life in the Spotlight*, VOX, (Apr. 11, 2019, 7:49 PM), <https://www.vox.com/culture/2019/4/2/18290487/nipsey-hussle-death-rapper>; *Grammy-Nominated Rapper and Activist Nipsey Hussle Was Set To Attend Anti-Gang-Violence Meeting With LAPD*, BET, (Apr. 1, 2019), <https://www.bet.com/news/national/2019/04/01/grammy-nominated-rapper-and-activist-nipsey-hussle-was-set-to-at.html>.

6. See Dessydigital, *Download Nipsey Hussle's New Mixtape 'Crenshaw'*, THE SOURCE (Oct. 8, 2013), <http://thesource.com/2013/10/08/download-nipsey-hussles-new-mixtape-crenshaw/>; Tinsley, *supra* note 4.

7. B.Dot, *Nipsey Hussle on Releasing \$100 Album*, RAP RADAR (Oct. 4, 2013, 12:00 PM), <http://rapradar.com/2013/10/04/nipsey-hussle-on-releasing-100-album/>.

8. See Dan Rys, *Nipsey Hussle Reportedly Makes \$100,000 in One Night by Charging \$100 for New Mixtape*, XXL (Oct. 8, 2013), <https://www.xxlmag.com/news/2013/10/nipsey-hussle-reportedly-makes-100000-in-one-night-by-charging-100-for-new-mixtape/>.

Lunney sets out to identify failures in copyright law's promotion of musical output. This Essay explores how copyright reinforces power dynamics that dictate who makes music and what music they make, and suggests that copyright's failures, particularly in the area of social justice, may have as much to do with its impact on musical *input*.

Back to Nipsey Hussle's story. In press surrounding his limited-edition promotional event, Hussle decried the music industry and its exploitation of African-American artists, describing major labels as "trying to do us like they did Africa . . . trying to extract all of our natural resources for their own exploited reasons." Although he did not use the word "copyright," it is clear that his objections were copyright-related. He described the music business as using copyright ownership to exploit artists, and African-American artists in particular: "Why would a nigga sign to a major label and give up the only thing you have? They be famous, but they don't own shit."⁹ Hussle had negotiated a possible deal with Maybach Music Group (a division of Warner Brothers), but decided not to sign with them because, in his words:

I realized that the structure of these companies aren't built to give me any type of ownership. They wanna give you a check. I told them keep the check, give me an asset and just market and distribute my shit. I don't need a check. They wanted to give me all this money up front but I'm like, keep the money. Let me be involved as a partner. And niggas couldn't do that. And it's not because the people at the label didn't want to help me. It's because the corporate structure of their companies would not allow ownership. And I'm offended by that. I called an audible and I withstood social pressure. I believed in my heart that I would be less of a man to not stand up for what I believed in. I felt like it was racist. Like, I don't deserve some shit I just built by myself? You want to give me some money? Oh, because you don't think I know what the asset is? You think I don't understand where the real value is? Well I'm offended by that and my goal changed.¹⁰

One of the core justifications for copyright is that it promotes authorship indirectly via publishers. The reasoning goes like this: while producing and distributing one's own works of authorship is risky for individual authors, publishers can diffuse that risk by obtaining the copyrights of multiple authors and can also take advantage of economies of scale. By relying on the promise of exclusivity for the copyrights they have acquired, publishers can afford to pay advances to authors, who in turn can afford to create.¹¹ While this narrative may be accurate in many cases, Hussle clearly found it a bad deal. Presum-

9. Diaz, *supra* note 2.

10. *Id.*

11. See, e.g., Pierre Leval, *An Assembly of Idiots?*, 34 CONN. L. REV. 1049, 1053-55 (2002).

ably, Hussle saw the copyright assignments of the music industry as trading short term gain (a cash advance and marketing support) for long term subjugation. Hussle's interviews are not specific about what future interest he wanted to preserve by retaining his copyrights, but whatever it is, it is beyond dispute that he wanted it. When he ultimately made a deal with Atlantic Records for the release of his 2017 album "Victory Lap," he ensured that his music roster was not exclusive to Atlantic.¹²

Why did Hussle care so much about copyright ownership? That is hard to say. Whatever his reasons, they could not have been rooted in copyright law's core justifying premise of allowing copyright owners to set high prices for distribution: Hussle distributed his music for free on mixtape sites. This is not to say that Hussle had no profit motive—only that record sales could not have been his priority. We can speculate about other possible profit motives connected to copyright exclusivity: Hussle may have wanted to retain the ability to deal individually with streaming sites; he may have wanted to profit from future synchronization of this work to audiovisual soundtracks; he may have wanted to profit from future sampling of his work.

However, Hussle also recognized that copyright law complicated those profit opportunities. Copyright provides special complexities for rap and hip-hop, where works often incorporate multiple layers of copyright ownership so that no single entity has unfettered ability to authorize uses of a particular work.¹³ Therefore, like many rap and hip-hop artists, Hussle was heavily constrained by copyright: to release his work commercially, Hussle had to "clear" his sampled source material by getting authorization from, and likely paying royalties to, those copyright holders.¹⁴ This task would have been especially chal-

12. See Gail Mitchell, *Nipsey Hussle's All Money In Label Teams with Atlantic Records for his 'Victory Lap' Debut: Exclusive*, BILLBOARD (Nov. 27, 2017), <https://www.billboard.com/articles/columns/hip-hop/8047021/atlantic-records-nipsey-hussle-all-money-in-label>.

13. For example, Hussle understood that when he incorporated a sample of Jay-Z's "Hard Knock Life (Ghetto Anthem)" in his song "Hussle & Motivate," he would have had to obtain permission not only from Jay-Z, but also from the copyright holders of the underlying song from the musical *Annie*, had Jay-Z not obtained prospective permission for other rappers to use the work. *Nipsey Hussle Talks New Album, West Side Protocols, Cardi B, Diddy + More*, Breakfast Club Power 105.1 FM, Feb. 21, 2018, 20:20, <https://www.youtube.com/watch?v=FGCMcu2iei0> ("Charlemagne: You sampled "Hard Knock Life" . . . who'd you have to clear that with? Hussle: Jay-Z. . . This is what I learned when we was goin' through the process, the paperwork. When Jay-Z got *Annie* to clear the record, I guess when he paid them, he said, 'Y'all gotta let every other rap artist after me use this.' . . . So we benefitted off his negotiation in 1998. We just had to get Jay-Z to clear it. 'Cause when he cleared it with the owners of the copyright, he made it to where any hip hop artist after him could use the record . . . [anyone who wants to use Hard Knock Life] just need the Jay-Z clearance. The *Annie* clearance is good, so long as they a hip hop artist.").

14. Although copyright law applies to both commercial and non-commercial releases, the creators of non-commercial rap and hip hop works (such as independently released mixtapes) often do not obtain licenses for their samples, and must seek li-

lenging for Hussle as an independent artist without the licensing and negotiation resources of a major label. This copyright layering would cut into Hussle's ability to profit from his own work because (depending on the terms of the permissions he received) anyone who wanted to synchronize or sample Hussle's work would need to get permissions not only from Hussle but also from those whose work is embedded in Hussle's.

Hussle's story highlights some of the complicated relationships between copyright law and the music industry, as well as some of the ways those relationships might have different impacts on different kinds of creators. Music publishers and record companies (which I will refer to collectively as music corporations) provide important promotional resources for musicians and maintain power over those musicians through copyright ownership and creative direction. This power dynamic is particularly heightened for hip-hop and rap musicians, whose music relies on using and reusing materials owned by these same corporations. As technological developments have made production and distribution of music easier, it has become more difficult for music corporations to profit from music distribution, but this difficulty does not seem to have dampened music production. Can we draw any conclusions about copyright law from this turn of events?

In his book, *Copyright's Excess: Money and Music in the US Recording Industry*, Glynn Lunney conducts a statistical study of popular music spanning the period before and after the growth of widespread file-sharing and digital music distribution, comparing what were effectively "high-copyright" and "low-copyright" periods for music to see whether and how effectively copyright protection actually promotes the creation and distribution of popular music. He finds, perhaps counter-intuitively, that periods of higher copyright effectiveness correspond with periods of lower (and lower-popularity) musical output, and periods of lower copyright effectiveness correspond with periods of higher (and higher-popularity) musical output. In other words, far

censes if and when they decide to shift those works to commercial release. See, e.g., Kyle Neubeck, *Chance the Rapper Hit with Lawsuit Over Sample Clearance Issue for '10 Day' Mixtape*, COMPLEX (Sept. 13, 2017), <https://www.complex.com/music/2017/09/chance-the-rapper-lawsuit-10-day-mixtape-song-windows>. Presumably, artists believe they are unlikely to get sued for making non-commercial use of the underlying works, and on the basis that non-commercial use is more likely to qualify as non-infringing fair use. See 17 U.S.C. § 107 (2012) (identifying non-commerciality as a factor in assessing fair use). Although even commercial sampling may qualify as non-infringing, *de minimis*, or fair use, major record companies and streaming services require samples to be cleared prior to a work's commercial release, which can act as a serious impediment to release. See Carl Lamarre, *Why Does Drake Need Kanye West's Permission to Clear 'Say What's Real'? An Explainer*, BILLBOARD (Dec. 13, 2018), <https://www.billboard.com/articles/columns/hip-hop/8490249/drake-kanye-west-say-whats-real-so-far-gone-say-you-will-sample-explainer>.

from promoting musical production, strong copyright protections seem to depress it.¹⁵

Lunney's research is an important contribution to copyright literature. But what, if anything, does it tell us about the complicated, class-influenced and racially-charged scenario that Hussle describes above? Lunney does not set out to discuss questions of social justice, but perhaps his research can shed a little bit of light on them.

II. WHY SOCIAL JUSTICE?

At first glance, it may not seem that social justice (the promotion of equality across class, race, gender, sexuality, and other lines) is among the core objectives of copyright law. Indeed, as Lunney explains at the outset, the Supreme Court has interpreted the sole constitutional justification for copyright law to “encompass two legitimate ends: (i) encouraging the creation of new works of authorship and (ii) ensuring the broader dissemination of existing works of authorship.”¹⁶

Copyright's objectives need not be defined so narrowly. One could envision many alternative concepts of the “Progress of Science and useful Arts.”¹⁷ One might, for example, say that “progress” is achieved when authors feel a sense of belonging, receive due recognition for their effort, experience personal satisfaction, or any number of other things.¹⁸ It is also undeniable that, as a practical matter, copyright law extends beyond mere promotion of creation and dissemination to reflect additional priorities.¹⁹ A system based solely on increasing creation and dissemination of new works would, for example, be unable to justify the retroactive extensions of copyright terms that have occurred in recent decades, which both encumber creation of new derivative works and increase the costs of disseminating old works.²⁰ However, even if these broader policy objectives exist, they are not central to the American copyright story. Lunney's identified

15. GLYNN LUNNEY, *COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY* 9–10 (2018).

16. *Id.* at 1–2.

17. U.S. CONST. art. I, § 8.

18. *E.g.*, see generally Betsy Rosenblatt, *Belonging as Intellectual Creation*, 82 MO. L. REV. 91 (2017) (identifying belonging as a potential independent objective of intellectual property law); Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U.L. REV. 441, 453–58 (2013) (discussing non-utilitarian justifications for intellectual property law).

19. *See e.g.*, ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 150–53 (2011) (arguing that “efficiency is not capable of serving as a stand-alone foundation for IP rights”); John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 488–92 (2005) (describing areas of copyright law that are more consistent with natural-law justifications than utilitarian incentive theory).

20. John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 13–16 (2011) (discussing how the extension of copyright term signals a non-utilitarian justification for protection).

policy objectives conform not only to precedent but also to much of the conventional wisdom regarding copyright. According to that wisdom, copyright “progress” is about promoting authorship, as opposed to (for example) providing morally appropriate compensation for labor, vindicating the personal connections between authors and their works, or promoting broad social justice.

Lunney presumes that copyright’s core policy objectives are best satisfied in the music context when the industry generates more hits and more popular hits. This is an appealing starting point. One can say that “more hits” equates to “encouraging the creation of new works of authorship” and that “more popular hits” equates to “broader dissemination of existing works of authorship.” It is even reasonable to assert that a statistical analysis of hit quantity and comparative popularity can provide some insight into whether copyright enforceability correlates with more hits and more popular hits.

But are these metrics the best ones when it comes to determining when and whether copyright law promotes progress, even in the instrumentalist sense of promoting the creation and dissemination of works? Lunney’s measures seem too complex—wouldn’t a straightforward measure of how many songs are written or recorded and distributed to the public, without reference to those songs’ popularity, be a better measure of whether copyright encourages the creation and dissemination of songs? And at the same time, they seem too simple, ignoring all concepts of “promoting authorship” other than number and popularity. Questions of popularity are too dependent on popular opinion and too susceptible to irrelevant forces like advertising and trends. They also seem to be a poor substitute for broader concepts of copyright progress: wouldn’t a complete vision of musical progress also consider, for example, how widespread its benefits are? Who is creating and releasing music? Who has access to the music that gets created? Whose tastes are being served by the music being created? How music creation and distribution affect society more broadly?

One might argue that many of these considerations fall outside copyright’s explicit priorities. But even if copyright only exists to promote the creation and dissemination of works, it is worth asking what that means—what is it to promote the creation and dissemination of works, and what constitutes progress within that framework? I suggest that even within the narrow instrumentalist vision of copyright, a more complex definition of “progress” that takes into account authors’ well-being and diversity reflects a more complete version of the “progress” that copyright should (but may not) serve.

In other words, I contend that promoting social justice among potential authors also promotes the creation and dissemination of works. We cannot be sure this is true, but it is hard to imagine otherwise: Authors need to be able to afford to create, and making authorship

economically feasible for a more diverse array of authors is likely to promote creation of more works and more appealing works. Moreover, although copyright is premised on the principle that authors need resources to create, who is to say that those resources must be limited to finances? Advancing potential authors' sociocultural, personal, emotional, and mental well-being is a way of making it feasible for them to create. Promoting diversity in authorship—that is, promoting the creation of works by the widest possible array of authors—doubtless promotes the creation of more works, not to mention more diverse works. And perhaps more importantly, if we think that promoting well-being and diversity among authors would not promote progress, we should rethink our concept of progress: A system that maximizes creation and dissemination of works by diminishing the well-being and diversity of those who might make them is hardly “progress.”

Lunney's research, while it provides a convincing case for its own premise, tells us very little about the social-justice aspects of progress. I do not mean to suggest that Lunney tried and failed to incorporate social justice considerations into his analysis. Nor do I mean to suggest that a statistical analysis of the type Lunney set out to do could easily (or even reasonably) incorporate such considerations. But I do suggest that any analysis of copyright's instrumentalist successes or failures that ignores these factors is, in some sense, incomplete. In other words, while Lunney's analysis is valuable as far as it goes, it cannot provide a complete picture of copyright's strengths and weaknesses, even in the popular music context.

III. DEFINING MORE AND BETTER

Although Lunney's findings run counter to much of the conventional wisdom about copyright and the music industry, they make sense in the complicated creative environment that surrounds artists like Nipsey Hussle, where personal branding, collaborative and self-expressive impulses, and patronage seem to facilitate and promote music creation at least as much as copyright does. In this sense, Lunney's findings are no surprise. Indeed, if we remove social justice from the equation and consider only the sorts of release and popularity measures on which Lunney relies, copyright's exclusivity mechanism seems both over- and under-powered even without recourse to detailed statistical analysis.

Given the benefit structures of the music industry, there is little reason to think that the availability of copyright, in and of itself, would lead to the creation of “more” music. If anything, there is considerable logic to the opposite proposition: that by giving copyright holders exclusive access to markets, copyright provides mechanisms for owners to derive greater quantities of profit from lower quantities of music production. In addition, copyright's direct benefits flow to music

corporations. While those benefits surely create positive trickle-down benefits for many composers and recording artists, they also give those corporations enormous power and make music creation—especially the sort of cumulative, iterative music creation that dominates rap and hip-hop—expensive and risky.²¹ Even outside rap and hip-hop, copyright makes it more expensive and riskier to base new works on existing works, thus fencing off certain creative avenues. We can see the direct impact of copyright's expressive cost in litigation over the basic tropes and patterns of popular music such as chord progressions and stylistic vibes.²² These copyright side-effects have not necessarily inhibited music creation—even in the face of litigation, there is no shortage of new music—but they establish that copyright benefits come with costs.

On the other side of the same coin, there are vast swaths of creation for which copyright exclusivity is virtually irrelevant. Scholars have documented myriad communities where creation thrives in the absence of copyright protection.²³ In these communities, creators may be motivated by any number of things—such as creative compulsion, desire for a sense of belonging, craving for attention, or attempts to build reputation.²⁴ For authors motivated by such factors, the promise of market exclusivity is extraneous or even counterproductive. Such authors may receive intrinsic benefits from creating, such as the joy and self-actualization that comes from creating and being heard; by interfering with their priorities or making their source materials more expensive, copyright may hinder them as much as it helps.²⁵ For these authors, too, Lunney's findings are no surprise.

21. See KEMBREW MCLEOD, *FREEDOM OF EXPRESSION* 68 (1st ed. 2005) (discussing how sampling-related copyright litigation led rap and hip-hop creators to rely on fewer, more prominent samples rather than using a large number of less distinctive samples to create rich musical textures).

22. See, e.g., *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018) (litigation over arpeggiated chord progression); *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (continued litigation over same arpeggiated chord progression); *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (litigation over similarities between two songs relying on similar musical tropes); *Gray v. Perry*, 2018 WL 3954008 (C.D. Cal. Aug. 13, 2018) (litigation over songs' use of allegedly similar "descending ostinato" figure).

23. See generally Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011); Elizabeth L. Rosenblatt, *What's Law Got To Do With It?*, 30 INTELL. PROP. L.J. 407 (2017).

24. See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) (discussing impact of creative compulsion); Rosenblatt, *supra* note 18 (discussing desire for belonging as a creative motivator); Rosenblatt, *supra* note 23 (discussing fame and reputation as creative motivators).

25. See Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA ST. U.L. REV. 623, 624 (2012) (explaining how, for creators with intrinsic motivation, copyright may be counterproductive to creative incentives); Tushnet, *supra* note 24 (explaining how "a copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote").

If copyright is an awkward fit for “more,” what does it do for “better”? Here, too, Lunney’s findings buck some conventional wisdom but seem unsurprising in context, particularly in light of Lunney’s definitions. On its face, there is intuitive appeal to the idea that copyright might promote the creation of “better” works, especially if one associates quality with novelty. The reasoning goes like this: by allowing authors to capture the full market value of their creations, copyright allows authors to make a better living from creating, and thus allows them to devote themselves more fully to creative endeavors. In effect, copyright indirectly affords authors cognitive space they can use to generate works through invention rather than imitation. Moreover, although copyright law has long resisted overt appeals to “quality” since 1903’s *Bleisten v. Donaldson Lithographing*,²⁶ a quality paradigm could justify some of the trade-offs that seem irrational as part of a quantity paradigm. For example, if one’s goal was simply to encourage creation of *more* works, it seems irrational to adopt a regime that, like copyright, encumbers makers of derivative or highly-influenced works. If one’s goal is to encourage creation of *better* works, and one interprets “better” as incorporating some notion of novelty, then encouraging creators to “invent around” existing works makes some sense.²⁷

Yet while copyright might promote novelty, that seems unconnected to the popularity measure that Lunney espouses. Lunney maps quality to popularity on the basis that popularity may reflect listener satisfaction. But psychological research shows that popularity depends as much on familiarity and repetition as it does on freshness.²⁸ Therefore, it is possible that while the encumbrances of copyright could encourage more *novel* music, they would not create *more popular* music. Additionally, while there may be a connection between listener satisfaction and popularity, popularity also surely reflects a host of unrelated considerations such as availability, promotion, and network effects. A system designed to generate more popular music (as opposed to more music, or better music by some other measure) might not operate by making music more expensive

26. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

27. See generally Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333 (2015) (discussing benefits and drawbacks of various types of copyright constraints). Associating quality with novelty also explains a copyright system that makes no allowance for effort. If copyright law were concerned only with allowing authors the time and mental energy to create, one would think it would want to encourage authors to expend that time, but copyright doctrine does not do so. Doctrinally, a work that was trivially easy to create receives as much protection as a work that is difficult or time-consuming to create, and copyright grants no protection based on an author’s “sweat of the brow” in the absence of adequate originality. A system concerned with novelty would, presumably, not only want to provide authors time to create, but would want to discourage them from creating non-novel works.

28. See generally DEREK THOMPSON, *HIT MAKERS: THE SCIENCE OF POPULARITY IN AN AGE OF DISTRACTION* (2017).

and professionalizing authors—it might be just as likely to operate by making music as inexpensive as possible and professionalizing music promoters.

Therefore, asking in isolation whether copyright law promotes the creation of more and more popular hit songs is probably setting copyright up to fail. This is no indictment of Lunney's project: many have advanced the notion as conventional wisdom that copyright is necessary to promote the creation of more and more popular hit songs, and Lunney's work provides an empirical basis for resisting that orthodoxy. But it still leaves one to wonder whether there is a version of instrumentalist "progress" that copyright *does* promote—and specifically, whether it serves the social justice interests articulated above.

As a theoretical matter, one can see how it might. Even though, as discussed above, authors are frequently intrinsically motivated to create and do not "need" copyright as inspiration, copyright may still provide material benefits to intrinsically motivated creators by allowing them the means to create as a profession rather than an avocation. Copyright exclusivity may provide opportunities for creative professionalization to a wider cross-section of prospective authors than other incentive mechanisms. Professionalization opportunities may make creation possible across class lines: Without opportunities for professionalization, we run the risk that authorship becomes a "hobby" for all, meaning that the only people who create are those wealthy enough to find time for their hobbies. In contrast, copyright can, theoretically, provide opportunities for less-resourced creators who seek to make works with high market value to stand on equal footing, or at least more equal footing, with their better-resourced counterparts. Other avenues to professionalization, such as patronage, are susceptible to sociocultural bias because they favor those who already enjoy the privileges of knowing the right systems and the right people. Patronage also comes with creative strings attached: one must make works that one's patron approves of. As an alternative to patronage, copyright thus has the potential to enable some creative freedom by allowing authors to appeal to a wide array of consumers rather than a particular wealthy one.

But does this theory correspond to practice? Is there anything in Lunney's work to suggest that copyright promotes social justice? Or, for that matter, that it undermines it?

IV. CONNECTING SOCIAL JUSTICE AND MUSIC COPYRIGHT

Some scholars have suggested that copyright can be an effective tool for promoting social justice.²⁹ Further examination suggests they

29. See K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 J. GENDER, SOC. POL. & L. 365 (2008) (explaining that copyright can act as a tool for minority creators to benefit when their creative output is

are wrong. Although there is evidence for the premise that copyright may occasionally afford great benefits to individuals in otherwise-disadvantaged groups—many of the wealthiest African-American individuals have made their money in sports and entertainment industries, which rely on copyright for some of their profits³⁰—that does not necessarily signal that copyright is innately beneficial for social justice. In fact, that statistic may say more about racially oppressive conditions in *other* industries than it does about racially beneficial impacts of copyright. Nipsey Hussle’s attitude points toward a more likely story: while copyrights may be a valuable asset to own, and minority authors may benefit from owning copyrights, wealthy minority entertainers have thrived *despite* systemic copyright-based exploitation of artists of color in entertainment industries, rather than because of any advantages copyright may provide.

This is particularly true in music industries where scholars have documented how exploitive business practices have deprived artists of color of copyright ownership and worked systemic harm to rap and hip-hop artists.³¹ As Kembrew McLeod has stated, copyright law “has existed primarily to protect companies that control the means of production, and in most cases, copyright law facilitates a transferal of artistic property from artists to larger entities.”³² There is nothing inherently racially biased about corporate control, and as minority participants gain prominence and wealth in creative industries, there are more and more opportunities for corporate control of those industries to be more racially balanced. But contractual arrangements concerning ownership of copyrights have systematically relied on copyright to exploit individuals and particularly individuals of color, and are unlikely to change.

With regard to music sampling, for example, music corporations often use licensing fees as a way of depriving rap and hip-hop artists of profits: the companies extract licensing fees from a sampling artist’s royalties, only to pay them to another department of the same corpo-

appropriated); Justin Hughes & Robert P. Merges, *Copyright & Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2017) (observing that copyright has benefited wealthy minority entertainers).

30. Hughes & Merges, *supra* note 29, at 549–61.

31. K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZA ARTS & ENT. L.J. 1179, 1193–1207 (2008); Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZA ARTS & ENT. L.J. 573, 603 (2010) (“Blues musicians were typically bound by ‘race’ recording contracts that were in many instances exploitative . . .”); Stephen Calt, *The Anatomy of a “Race” Music Label: Mayo Williams and Paramount Records*, in R&B (RHYTHM AND BUSINESS): THE POLITICAL ECONOMY OF BLACK MUSIC 90, 102–03 (Norman Kelley ed., 2005) (describing how contracts with early ‘race’ record label Paramount “cheated” artists such that “[n]ine out of ten [African-American] Paramount artists. . . received no royalty, regardless of their record sales”); Hughes & Merges, *supra* note 29, at 557 (and sources cited therein).

32. KEMBREW McLEOD, *OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW* 98 (2d ed. 2001).

ration. This essentially consolidates profit for the corporation at the expense of the sampler with small payments eventually flowing to the artists whose works were sampled (if their contracts provide for sampling royalties).³³ Copyright practices surrounding sampling have also influenced the message of rap and hip-hop lyrics.³⁴ Whereas sampling in the 1980s often took a political bent—empowering speakers of color to talk back to inequality by incorporating references to earlier musical works—litigation over sampling transformed business practices, so that samplers were more likely to use samples as attention-grabbing “hooks” and tell stories about what the sampler could afford to license.³⁵ Furthermore, because some owners simply refuse to license their works for uses that will involve controversial topics, incorporating preexisting works for political purposes is riskier than doing so commercially.³⁶

Presumably, these exploitations are what Hussle was referring to when he described major labels as “trying to do us like they did Africa.” They are largely matters of business practice rather than copyright law. Although they are not inherent to copyright, copyright is what makes them possible. Therefore, to the extent that copyright could be a tool for social justice, it is apparent from these practices that copyright can also be a tool against it.

The distinction between artists and music corporations, which is so central to Hussle’s story and (it would appear) to disjunctions between copyright and social justice in the music industry, does not figure prominently in Lunney’s research. Lunney’s analysis generally presumes that artists are the ones who make decisions about when, whether, and how to make music, and that artists are the ones who profit (or do not) from making and distributing music. But we may be able to shed some light on the complicated relationship between music copyright and social justice by reasserting into the discussion the dominant role of music corporations in decision- and profit-making.

Although Lunney’s research demonstrates a correlation between rising music sales and declining music production and popularity, the numbers tell us little about why this is. Lunney attributes the correlation to artists’ rational decisions not to produce as ardently when they are making massive profits per song, but it seems just as likely that production decisions lie with music corporations rather than musicians. In moments of high profitability, music corporations coast. In moments of low profitability, perhaps to overcome profitability dips, music corporations release more songs and engage in more promotion

33. McLEOD, *supra* note 21, at 98 (discussing sampling royalties).

34. See SIVA VAIDHYANATHAN, *COPYRIGHTS & COPYWRONGS* 143 (2001) (discussing history of rap and hip hop in context of copyright litigation).

35. See JOANNA DEMERS, *STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY* 90 (2006).

36. *Id.*

of those songs. These higher release and promotion rates would, in turn, correlate with the increased production and popularity in lower-profitability times.

One reason to blame music corporations, as opposed to artists, for the decision-making behind the inverse relationship between profits and output, is that it is impossible to deduce from Lunney's data how much of the profits from corporate music production are being passed along to composers and performers. However, other studies have established that the chief beneficiaries of music profitability are music corporations and that artists—particularly, minority artists—often see relatively little of the monetary benefit from a hit.³⁷ Of course, there are rich musicians, and many of those rich musicians come from financially humble or racial-minority backgrounds. But as Lunney points out, the existence of some wealthy minority artists does not itself equate to social justice, unless the cost of making those artists rich is borne by a wide cross-section of society (as opposed to being borne predominantly by minority consumers). And the existence of some wealthy minority artists is not necessarily evidence that copyright promotes widespread and diverse creation and dissemination of music, without evidence that copyright is encouraging minority creators and that minority creators are reaping copyright's benefits to the same extent as their majority counterparts.³⁸ And that does not seem to be the case. In many cases, artists' financial arrangements with music corporations undermine social justice.

One might theorize that strong copyright could benefit artists in a trickle-down sense by making music corporations profitable. Under this theory, because music corporations depend on copyright for profits, reduced copyright effectiveness may lead to more and more exploitive deals. There is some evidence to support this idea. The rise of file sharing corresponds with the rise of the so-called "360° deal," under which music corporations agree to provide financial, marketing, touring, and other support for an artist in exchange for not only music royalties but also royalties based on the artist's other income streams, such as live performances, merchandising, and appearance fees.³⁹

That said, nothing about the music industry or copyright doctrine indicates that increased copyright effectiveness would make record deals any less exploitive. Quite the contrary: Lunney's work implies that copyright may influence artist exploitation in the same way it influences the quality and popularity of music releases. The same factors that create a negative correlation between profits and music releases would create a positive correlation between profits and artist

37. Greene, *supra* note 31; Arewa, *supra* note 31; Calt, *supra* note 31; Hughes & Merges, *supra* note 29, at 557.

38. LUNNEY, *supra* note 15, at 56–57.

39. See Lee Marshall, *The 360 Deal and the 'New' Music Industry*, 16 EUR. J. CULTURAL STUD. 77, 84 (2013).

exploitation. Just as periods of lower sales would rationally spur music corporations to release more works, those same periods would also rationally spur music corporations to try to consolidate their own profits, rather than passing those profits on to artists. In periods of high music sales, popular artists would be able to negotiate better deals for themselves, knowing not only that the corporations could afford to pay them more, but also that the artists would have negotiating power: their fans would follow them to other music companies, attend their live events, and buy their merchandise. In periods of low music sales, artists would lose that leverage, as the importance of the music corporation would rise—artists would need the promotional services and distribution networks that music corporations provide, and the corporations would negotiate more favorable deals accordingly. This would be particularly true for early-career and poorly-funded artists who would be willing to enter into less-favorable deals in leaner times.

Furthermore, Lunney's research does provide some support—albeit too statistically small to be meaningful—for the premise that more copyright exclusivity does not promote racial diversity among recording artists. A tally of the Recording Industry of America's top 250 selling artists (included as an appendix in Lunney's book) indicates a gradual rise from 1960 through 2003 in the percentage of artists of color or mixed-race groups among the top artists who debuted in a given year.⁴⁰ The percentage peaked in 1998–1999 but on average continued to rise thereafter rather than declining. I hesitate to draw any conclusions from this tiny sample, especially since there are only three artists on the list who debuted after 2004 (and all of them are white women). Yet, it does seem like the rise of file-sharing at least did not discourage artists of color from entering the music business and becoming very successful.

It is impossible to draw conclusions from Lunney's study about whether copyright promotes well-being and diversity among musicians. It was not a question he sought to explore. But his analysis can point to why copyright may not act as the tool for social justice that some might hope it could. After all, the public choice effects that Lunney describes, under which copyright law will naturally develop to benefit copyright owners over consumers because copyright owners are a more consolidated interest group,⁴¹ are equally applicable to copyright's social justice questions. By the same reasoning, copyright law will naturally develop to benefit music corporations over artists, and especially over minority artists, because music corporations represent a more consolidated interest group.

40. See LUNNEY, *supra* note 15, at 227–34.

41. *Id.* at 40–44.

V. WHAT CAN WE LEARN?

Although Lunney ends his analysis with some possible explanation for the trends he identifies and some proposals for preventing copyright from undermining its own objectives in the U.S. music industry, he cannot do more than speculate about why music sales are negatively correlated with the quantity and popularity of music releases. Likewise, I can only speculate about why copyright may not be satisfying social justice policy objectives. However, I would suggest that both Lunney's and my speculation should consider not only music *outputs*—the songs that get released—but also music *inputs*. Surely, the costs of making and promoting music are significant factors in guiding an artist's or music corporation's decisions about what music to release and when to release it.

Copyright is as intensely intertwined with music inputs as it is with music outputs. Copyright can alleviate barriers to creation by making it affordable for artists to make and release music; or it can create barriers by making it more expensive and riskier for artists to create music that contains samples or reflects strong musical influences. In recent decades, technology has taken on the role that copyright may previously have promised: by making music production and distribution less expensive, technology has made professional-quality music production a possibility for a much wider array of creators, just as recording contracts with copyright holders may have done in the past. Although production costs have gone down, promotion costs have risen. In the era of social media and information overload, seizing consumer attention requires time and money. Where copyright once allowed artists to recoup the cost of production, it now allows them to recoup the cost of promotion. So we still must ask: is copyright promoting social justice with regard to music inputs?

My own research suggests that it is not.⁴² As an expressive form, all music relies heavily on influence, imitation, and allusion,⁴³ but as a subject of copyright, different kinds of musical influence, imitation, and allusion are treated differently. Musical appropriation by “haves” receive more favorable legal treatment than an equivalent appropriation by “have-nots.” Sampling, a predominantly African-American musical technique, faces greater legal challenge and encumbrance than equivalent remix techniques carried out by the predominantly

42. See generally, Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591 (2019).

43. See ROSEMARY COOMBE, INTRODUCTION: MAKING MUSIC IN THE SOUNDSCAPE OF THE LAW, in DEMERS, *supra* note 35, at ix (“perhaps no area of human creativity relies more heavily upon appropriation and allusion, borrowing and imitation, sampling and intertextual commentary than music, nor any area where the mythic figure of the creative genius composing in the absence of all external influence is more absurd.”).

white creators of mashups and electronic dance music.⁴⁴ The fact that sample licensing demands labor and expense and often consolidates profits in the hands of music corporations gives music corporations greater leverage over minority creators than majority creators. If copyright is making minority creators bear heavier input costs than majority creators, copyright is failing to promote social justice.

This brings us back to Nipsey Hussle. Hussle strove to upturn the exploitive pro-corporate power dynamic that copyright law promotes. To release his music independently, Hussle bore what were surely substantial sample licensing costs and promotion costs. In exchange, he retained his copyrights and his profits from other activities, such as performing and merchandising, that could easily have been swept into a 360° deal with a music corporation. His music was beloved, but he was not particularly prolific. If he had not borne those costs—if the labor and expense of obtaining samples were lower or if music corporations' copyright-based leverage over artists were less imposing—would he have produced more music? We will never know.

44. See generally “*In Court ‘Cause I Stole a Beat’*: *The Digital Music Sampling Debate’s Discourse on Race and Culture, and the Need for Test Case Litigation*, 2012 U. ILL. J.L. TECH. & POL’Y 141, 158–60 (2012).

