

If It Ain't Broke . . . Copyright's Fixation Requirement and Cultural Citizenship

*Larisa Mann**

Copyright subsists in creative works that are “fixed in any tangible medium of expression,” usually understood as making fixation a prerequisite for protection.¹ However, some argue that denying copyright to unfixed works unfairly denies protection to certain classes of artists or works, and that fairness, or concern for those classes of artists or genres, requires that they receive the benefit of copyright ownership for those unfixed works. These arguments generally assume the benefits of copyright protection to the artist, and often by unexamined extension to society. However, copyright ownership has social costs as well as social benefits. This Article examines the possible costs of applying copyright protection to unfixed works, in the context of the specific artists, traditions, genres and practices that rely mainly on unfixed works. It argues for a deeper, more empirically grounded understanding of the creative process and a broader definition of values that arise from culture making, and thus a broader understanding of the public policy implications in copyright law.

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* PhD Candidate, Jurisprudence and Social Policy, Berkeley Law, University of California at Berkeley; B.A. 1996, Oberlin College; M.Sc. 2000, London School of Economics. Thanks to my family for their unwavering encouragement, and to Professor Pamela Samuelson for her helpful advice and tireless efforts regarding copyright law reform and to the editorial staff of the Columbia Journal of Law & the Arts.

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INTRODUCTION

Copyright subsists in creative works that are “fixed in any tangible medium of expression.”² The American intellectual property tradition has usually read this to mean fixation is a prerequisite for protection.³ But over the years, some have argued that denying copyright to unfixed works unfairly denies protection to certain classes of artists or works, and that fairness, or concern for those classes of artists or genres, requires that they receive the benefit of copyright ownership for those unfixed works.⁴ These arguments generally assume the benefits of copyright protection to the artist, and often by unexamined extension to society. However,

2. *Id.*

3. See U.S. CONST. art. I, § 8, cl. 8 (authorizing federal copyright protection to apply to “writings”); *Goldstein v. California*, 412 U.S. 546, 561 (1973) (holding only “physical rendering[s]” of expression are protected); *Galoob v. Nintendo*, 564 F.2d 965, 968 (9th Cir. 1992) (finding derivative works must be fixed to be protected under Copyright Act); 1 DAVID NIMMER & MELVILLE NIMMER, NIMMER ON COPYRIGHT § 1.08[C][2], 1–49 (1991).

4. See Geoffrey Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363 (1997) (arguing that improvisational performers face obstacles seeking federal protection for their works, many of which are not fixed in permanent form); Jonathan Z. King, *The Anatomy of a Jazz Recording: Copyrighting America’s Classical Music*, 40 COPYRIGHT L. SYMP. (ASCAP) 277, 310 (1997) (noting that improvisational jazz is incompatible with copyright law and the incompatibility creates inequities); Joi Lakes, *A Pas de Deux for Choreography*, 80 N.Y.U. L. REV. 1829, 1859 (2005) (arguing that fixation requirement is constitutionally required but that choreographers should be given leeway because of difficulty of fixation); John R. Zoesch III, *Discontented Blues: Jazz Arrangements and the Case for Improvements in Copyright Law*, 55 CATH. U. L. REV. 867, 872 (2005) (advocating for a more flexible standard for derivative works to provide adequate protection to jazz arrangements). *But see* Steven Globberman & Mitchell Rothman, *Should Performers Have a Copyright?*, 8 CAN. PUB. POL’Y /ANALYSE DE POLITIQUES 165 (1982) (finding no compelling evidence of significant social benefits produced by performers’ right).

copyright ownership has social costs as well as social benefits.⁵ This Article examines the possible costs of applying copyright protection to unfixed works.

At the outset, such a project may seem redundant. A fixation requirement's practical advantage is clear cut: unless a work is in fixed form, it is difficult to prove whether it has been infringed, since the work itself is not available as evidence.⁶ Even in places where fixation is not a prerequisite for copyright protection, most disputes over unfixed works simply do not reach the courtroom, for these evidentiary reasons.⁷ That said, its evidentiary value has not prevented arguments against the fixation requirement.⁸ Unfortunately, although many arguments assert the unfixed works' value, they tend to assume that value (or enough of it to matter) depends on a proprietary attitude towards the works, thus framing the issue as a choice: Do we leave things unowned/unprotected or do we own/protect them? But walls and fences do more than protect; they also enclose, and their unchanging nature also "fixes" or regularizes and rigidifies the social relationships that generate works (among other things they generate). Therefore, when altering property law, we should examine the social relations surrounding those alterations and the effects of those alterations in their social context. If

5. See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 57 (2003) (summarizing the historical objections to intellectual property on antimonopoly grounds); Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1154 (2007) ("[Methodological commitments of conventional copyright analysis] produce both an inflated notion of copyright's role in stimulating creativity and an insufficiently keen appreciation of the harms that overly broad copyright can cause."); Rosemary Coombe, *Left Out on the Information Highway*, 75 OR. L. REV. 237 (1996) (emphasizing the importance of examining who and what "gets left out on the information highway . . ."); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1013 (1990) (explaining the importance of the public domain as both the price the public pays for copyright protection and a check on copyright's restrictions); Stacy F. McDonald, Note, *Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright Clause*, 50 HOW. L.J. 541, 542-43 (2007) (discussing the social bargain inherent in balancing the rights of copyright owners and the public); Neal Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996) (explaining that copyright law must always strike a "precarious balance" between providing incentives for authors and promoting "public education and creative exchange . . ."); Susan Sell & Christopher May, *Moments in Law: Contestation and Settlement in the History of Intellectual Property*, 8 REV. INT'L POL. ECONOMY 467, 468 (2001) ("[T]here has been a recurrent tension throughout the history of intellectual property between protection/exclusion and dissemination/competition."); Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257 (2006) (discussing the various social effects of intellectual property in relation to the weakness of its economic foundations); cf. Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007) (arguing that standard models of creativity under copyright are insufficient to describe the ways in which creators of fan fiction, etc. conceive of authors' rights).

6. See Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 718 (2003) ("[T]he main justification for the fixation requirement is that unfixed work would present considerable challenges with respect to proof.")

7. See Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 573 (2006) ("Fixation may theoretically be optional under French law, but it actually appears to be essential to performers in order to have evidence of their works.")

8. See Note, *Jazz Has Got Copyright Law—And That Ain't Good*, 118 HARV. L. REV. 1940, 1943 (2005) (arguing that unfixed, improvisational jazz is inadequately protected under the copyright law's definition of a derivative work, in part because improvisation is not always fixed); *supra* note 4.

copyright law depends primarily on music's value as a commodity and a finished product of individuals' labor (and there is much to suggest that it does), then collective and process-oriented practices will fit awkwardly within copyright law's "protection" and might suffer under its extension. I will discuss this possibility below.

Starting with a counter hypothesis, I examine whether there is social value in leaving unfixed works outside of copyright's scope. Rather than assuming that the unfixed works are valuable in the same way as fixed ones, or that value is a one dimensional characteristic, I ask: "What is particularly of value to society in unfixed works, and what relationship does that value have to copyright law?"

I focus on music improvisation particularly with respect to jazz improvisation, but discussion here may be applicable in other realms. My hope is that the social values identified here in improvisation, if identified in other artistic and social ventures, can be similarly examined with respect to the law's ability to facilitate or inhibit them. Creative practices that include many aspects common to improvisation (such as repetition or reference to existing works) should be examined in the context of the social values that those practices may create.

Parts I and II describe improvisatory music's basic elements and explore music scholars' and performers' accounts of improvisation: its nature, its effects, its contributions to musical society and society at large and its relationship to copyright law. Part III discusses the arguments for and against including improvisation within copyright protection. Part IV attends to the ways that applying copyright protection could limit or harm the values generated by improvisation.

I. DEFINITIONS AND DIFFICULTIES

A. WHAT IS IMPROVISATION?

"Improvisation enjoys the curious distinction of being both the most widely practised [*sic*] of all musical activities and the least acknowledged and understood."⁹ Improvisation is easy to name, but hard to describe. Although performance in all musical genres includes it, improvisation is particularly essential to jazz.¹⁰ This may help account for jazz scholarship's dominance of improvisation

9. DEREK BAILEY, *MUSICAL IMPROVISATION: ITS NATURE AND PRACTICE IN MUSIC 1* (1982).

10. *See id.* at 64 (asserting that the lesson of jazz for Western musicians is its focus on simultaneous performance and creation, i.e. improvisation); INGRID T. MONSON, *SAYING SOMETHING: JAZZ IMPROVISATION AND INTERACTION 2* (1996) (developing an "ethnomusicological perspective of jazz improvisation centered on interaction" of sounds, social networks and cultural meanings); Olafunmilayo Arewa, *From JC Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 599-613 (2006) (arguing that music borrowing and improvisation is a pervasive aspect of all musical genres, not only jazz); David Borgo, *Negotiating Freedom: Values and Practices in Contemporary Improvised Music*, BLACK MUSIC RES. J. 22, 165 (2002) (providing that freedom and improvisation have been crucial to jazz since its inception); King, *supra* note 4, at 279; Larry Solomon, *Improvisation II*, 24 PERSP. NEW MUSIC 224, 226 (1986); Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 483 (2005) (noting

studies. Many meticulous scholars of improvisation come from within the free jazz scene in particular. Free jazz may be an extreme case, arguably the *most* improvisatory music practice: there is often no single work providing a framework around which participating musicians improvise, and by all accounts, free jazz (sometimes also called “free improvisation”) is the least tied to any formal musical structures.¹¹ The functions and values described in free jazz are also present in jazz in general, in improvisation in other contexts and even to some extent in all music.¹² But we should see free improvisation not as an anomaly, but instead as the far end of the scale; this allows analysis of free improvisation to shed light across all music, if in differing degrees.¹³ Since improvisation exists across genres, issues that improvisation studies raise are relevant to every musical performance to some degree.¹⁴

In this Article, “improvisation” means creating music in the moment, where the act of performance is simultaneously an act of composition. This definition does not mean that all composition occurs in the performance moment, but instead that improvisation is the art of arranging spontaneous elements in conjunction with “precomposed” elements.¹⁵

This conjunction matters a great deal. It is vital to understand that improvisation includes complex interactions with precomposed works: “Improvisation involves reworking pre-composed material and designs in relation to unanticipated ideas conceived, shaped, and transformed under the special conditions of performance, thereby adding unique features to every creation.”¹⁶ Although unscripted, improvisation never exists in a cultural or musical vacuum.¹⁷ While decisions by the improviser occur in the moment, they occur in relation to precomposed material and the environment or context in which the act of improvising takes place.

The aspect of improvisation that automatically sets it outside copyright law is that creation occurs without writing or other fixation. Absent recording, copyright currently does not much apply to performance (except for digital performance): performers do not retain rights in songs they did not write, arrangements cannot be copyrighted except as derivative works which require a license from the underlying

that the modern jazz style centers around improvisation); Note, *supra* note 8, at 2.

11. See PAUL BERLINER, THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION 172 (1994); Solomon, *supra* note 10, at 230–31.

12. See generally BAILEY, *supra* note 9, at 2; BRUNO NETTL ET AL., IN THE COURSE OF PERFORMANCE: STUDIES IN THE WORLD OF MUSICAL IMPROVISATION 6 (Bruno Nettl & Melinda Russell eds., 1998); Arewa, *supra* note 10, at 598; John P. Murphy, *Jazz Improvisation: The Joy of Influence*, 18 BLACK PERSP. MUSIC 7, 15, 17 (1990) (emphasizing importance of improvisation in analyzing jazz); Marshall J. Nelson, *Jazz and Copyright: A Study in Improvised Protection*, 21 COPYRIGHT L. SYMP. (ASCAP) 35, 35–37 (1974) (describing a rise, decline and re-emergence of improvisatory techniques in music).

13. Solomon, *supra* note 10, at 226.

14. *Id.*; see also BAILEY, *supra* note 9, at 3 (“[T]he main characteristics of improvisation could be discerned in all of its appearances and roles. What could be said about improvisation in one area could be said about it in another.”); Arewa, *supra* note 10, at 599.

15. NETTL ET AL., *supra* note 12, at 5; see also BERLINER, *supra* note 11, at 102–03, 222.

16. BERLINER, *supra* note 11, at 241.

17. *Id.* at 7; BAILEY, *supra* note 9, at 152; see also King, *supra* note 4, at 311–13.

work's author and unfixed works are not covered by copyright.¹⁸ Although all of these aspects—performing rights, derivative works rights and the fixation requirement—affect copyright law's application to improvisation, this Article addresses only the issue of fixation. My hope is that proposed alterations regarding the derivative works rights and performance rights will also take into account the points here regarding the practice and social value of jazz improvisation.

B. IMPROVISATION'S MESSY FIT WITH COPYRIGHT LAW

Arguments for reforming the fixation right vary in scope from focusing on particular genres of art or music to making broader arguments about improvisatory works. However, they generally agree on two main points. First, since improvisers cannot own copyrights in their creations if they are not recorded, copyright protection is not uniform across artists and genres and therefore unfair. Second, improvisatory creators' lack of copyright ownership hurts their ability to survive, or hurts the improvisatory genre's ability to flourish.¹⁹

Statements like “[j]azz improvisation has never commanded the rights and privileges that other, more conventional works have” imply that this situation (undoubtedly true) leaves jazz improvisers worse off than they otherwise would be.²⁰ But this argument does not well account for how improvisation is valued by improvisers, their communities and the larger society, or for the relationship between copyright law and creative practice.

Most simply, the focus on royalties obscures as much as it reveals, since lack of royalties does not mean that improvisers are unpaid. Many improvisers are paid in the moment, as performers, rather than after the fact through royalties.²¹ While some composers also perform, and thus get paid both for performance and royalties, some do not, so the basis for comparing composers and improvisers is more complicated. It may seem unfair, or even arbitrary, that someone who composes in the moment gets only the one payment, while those who compose ahead of time get a chance for a second payment, plus control over how others use the work. But might composers who write the music ahead of time lose out in some respects, compared to improvisers? The difference between precomposers and improvisers may be deeper than just differences between owners and nonowners of property.

18. Copyright Act, 17 U.S.C. § 101 (2006) (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a . . . musical arrangement.”); *see also* Zoesch, *supra* note 4, at 874.

19. *See, e.g.*, Donat, *supra* note 4, at 1364 (suggesting that lack of copyright protection has contributed to jazz's lack of economic success); King, *supra* note 4, at 277 (discussing the “fairly accurate suspicion that copyright law has somehow forgotten about Jazz and failed to protect . . . Miles Davis as comprehensively as Irving Berlin”); Note, *supra* note 8, at 1940 (“Jazz is in trouble . . . copyright law will not stop its descent, with its ill-fitting doctrines.”); Warren Shaw, Note, *Copyrighting Improvised Music*, 32 COPYRIGHT L. SYMP. 109, 110 (describing improvisation's “second-class treatment throughout the history of American copyright law”).

20. King, *supra* note 4, at 310.

21. Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 698 (2009).

Applying copyright law to improvisation could bring harms as well as benefits to improvisers. Most equity based arguments for granting ownership to improvisers do not account for any effects of copyright ownership on the creative process, and simply elide the steps from copyright protection to promoting creativity, and thus do not accurately address costs and benefits.²²

Misevaluating cost and benefit in this way arises from an overly narrow understanding of copyright law along several dimensions. First, uncopyrighted works may be valuable to society as a whole, and not just in terms of the possibility to contribute to future copyrighted, royalty-generating works. Second, existing copyrighted works may be important to creative practice, and thus to artists and to society, in ways that are not strictly economic, although they may trigger other public interest concerns. Lastly, evaluating benefit to the artist should account for the extent to which artists also use or consume other works, and should not conflate the interests of individual artists at one point in time with the interests of other artists, themselves in the future and society at large.²³ Improvisation as a social practice needs to be examined in a situated manner, in relation to specific people in specific relationships and social situations. We should look at what improvisation means to improvising musicians, to the communities they are part of and to the larger society they exist within. Only by incorporating this kind of information about music-making can copyright policy be meaningful and relevant to musicians and to society at large.

II. IMPROVISATION AS A PROCESS

To explore improvisation's social function and social value, we must primarily turn to the scholarship on music that exists outside the legal realm. This is because most legal scholarship on improvisation falls into the problems described above. Commentators see copyright attachment simply as a value-adding activity, or only examine improvisation in the ways that it diverges from copyright law, without spending much time on the meanings and functions of improvisation for improvisers, their communities and society at large.²⁴ However, systematically examining the meanings, functions and values of a musical practice has a well-developed history in ethnomusicology, and is found in cultural studies and other fields as well. Notably, some of the most determined legal advocates of increasing copyrights for jazz do not call on any of the monumental works about jazz and improvisation conducted by people who have dedicated their lives to the study of

22. See Donat, *supra* note 4, at 1381, 1384–1403 (treating the reconciliation of the federal copyright statute and improvisational performance mainly as a technical and administrative problem and not a creative one); Shaw, *supra* note 19, at 115 (asserting that the fair use doctrine will clear up any confusion around the creative process).

23. See, e.g., Kevin J. Greene, *Copynorms, Black Cultural Production and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008) (arguing that copyright regime failed to benefit black artists as a class).

24. *But see* Arewa, *supra* note 10, at 599–613; Hines, *supra* note 10, at 483 (“The modern jazz style, which centered on improvisation, greatly suffered because of its incompatibility with copyright protection.”).

(and in many cases performance of) jazz.

The remainder of this Article will examine the ways in which extending copyright protection to unfixed works could limit the specific social value of improvisation by interfering with these practices. Here, my goal is not to argue for a defining improvisation universally, but rather to argue that there are central tendencies we might call improvisatory, and beyond that those tendencies may have *desirable* byproducts, which copyright and other cultural policies should attempt to foster.

A. WHAT IS TO BE PROTECTED AND CAN COPYRIGHT ADEQUATELY PROTECT IT?

Although focusing particularly on the analysis and testimony on improvisation, it bears repeating that the aim of this Article is not to argue that improvisation is wholly different from creative practices. Instead, I suggest that the improvisation is an interesting case, a set of socially embedded musical practices that clash with copyright law, whose significance reveals what is at stake for artists and society when these clashes happen.

1. Improvisatory Authorship Confounds Ownership

However much you try, in a group situation what comes out is group music and some of what comes out was not your idea, but your response to somebody else's idea The mechanism of what is provocation and what is response—the music is based on such fast interplay, such fast reactions that it is arbitrary to say, “Did you do that because I did that? Or did I do that because you did that?” And anyway the whole thing seems to be operating at a level that involves . . . certainly intuition, and maybe faculties of more paranormal nature.²⁵

The above quotation represents a common account of improvisation: a story of interplay between the various performers, musical interplay between various preexisting musical forms and a reference to something ineffable, outside our usual understanding of how the world works.²⁶ Individual ownership of musical works is difficult to assign in the face of musicians' dense interplay and the presence of this ineffability.

Interplay is one key aspect of improvisation, evident in the jazz tradition despite the fact that we call a primary element in jazz a “solo.”²⁷ In a solo, one musician musically diverges from the precomposed aspect of a song, before rejoining at a chorus or other agreed upon theme. However, soloists often play alongside other musicians, especially the rhythm section: drums, bass and often piano. Soloists

25. Borgo, *supra* note 10, at 175 (quoting Evan Parker, saxophonist/improviser and seminal figure in the European Free Jazz scene).

26. See BAILEY *supra* note 9, at 126 (“Each player who comes along affects the common pool of language. When you hear a new player . . . then you have to go back and re-think everything.” (quoting Steve Lacy, jazz improviser)); MONSON, *supra* note 10, at 73.

27. King, *supra* note 4, at 316–17.

“rely on the rhythm section players to improvise appropriate rhythmic feels or grooves against which they can weave their improvised melodies.”²⁸ This common practice of multiple performers multiplies improvising, and makes assigning ownership rights complex and the basis questionable. Even in accounts of improvisation where one artist is playing without any others at a particular moment, musicians emphasize the creative input they feel from each other and the audience.²⁹ Lastly, the improvisation occurs at least partly in response to the song being improvised within, including previous solos by that performer or others, and in response to others’ memories of other performances or recordings of that song.³⁰

Improvisation is “a process-oriented model of performance that accents freedom, responsibility, risk-taking and mutual engagement between both practitioners and listeners” and a reference to something ineffable, outside our usual understanding of how the world works.³¹ Copyright law currently addresses the question of joint authorship by looking to a contract or, in the absence of a contract, to the musicians’ intent at the time of creation.³² Contracts are a theoretical solution to rights allocation, and on the surface quite appealing, for they appear to allow the participants most affected to negotiate their interests between each other.³³ However, contracts are a poor solution for community-oriented practices, perhaps especially related to creativity.³⁴ Individualistic interest in control over later use of a musical contribution could contradict the kind of creative interplay fundamental to improvisation. Intent may get at some of the performers’ interests, but still faces difficulties based in the fluidity of the relationships between specific performers, like “soloists” versus “backing musicians,” who often trade off within a song, and the fluid, dynamic relationships with the audience and preexisting music.

2. Process Not Product: No Closure = No Enclosure

Improvisation’s reliance on dynamic interplay also calls into question the usefulness of focusing on a “musical work.” As much as legal scholars have

28. MONSON, *supra* note 10, at 1.

29. Daniel Fischlin & Ajay Heble, *The Other Side of Nowhere: Jazz, Improvisation and Communities in Dialogue*, in *THE OTHER SIDE OF NOWHERE: JAZZ, IMPROVISATION AND COMMUNITIES IN DIALOGUE* 23 (Daniel Fischlin & Ajay Heble eds., 2004).

30. I will address this point of engaging with history and memory further *infra*, Part I-C-1.

31. Fischlin & Heble, *supra* note 29, at 22.

32. Copyright Act, 17 U.S.C. § 101 (2006) (defining “joint work” as “a work prepared by two or more authors with the intention that their contribution be merged into inseparable or interdependent parts of a unitary whole”).

33. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1825–26 (1990–91) (“[T]he adjudicator might think that free choice is good and agreements should be enforced because we value the discipline that it instills for people to think through their agreements, write them down, and stand by them.”).

34. See, e.g., Julie Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Right Management,”* 97 MICH. L. REV. 462, 538–59 (1998); Niva Elkin-Koren, *What Contracts Can’t Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 407–20 (2005).

challenged and historicized the concept of “author,” we ought to think carefully about the concept of a musical “work” as a unitary item with agreed-on boundaries and an identifiable author/owner.³⁵ This concept is historically contingent on particular attitudes of nineteenth century Europe and not necessarily applicable in all times and places.³⁶ Even in Europe, before the nineteenth century, music was more improvisatory and less associated with individual authors, with plenty of borrowing and room for performers to add their own ideas in performance.³⁷ The value of a piece rested as much in recognizing the performer’s contribution and the performer’s choices in performance.³⁸ It is only after the concept of a lone genius composer rose to prominence that the musical piece itself, frozen in time by written notation, was understood as the primary effect of genius.³⁹

Since copyright law developed, historically, alongside the development of the concept of musical works as singular, fixed works, it is possible that copyright law helped to create, or at least reinforced reliance on the concept of a musical work, through the particular form of its incentive and administrative structure.⁴⁰ This is precisely the problem with extending copyright law to cover new fields: such an act may alter the contours of cultural practice. While that alteration is not automatically bad, it goes beyond simply increasing or decreasing creativity or other social goods, and thus should be examined as a cultural policy decision (and not only trade policy) in whatever jurisdiction is considering an alteration to copyright law.

In improvisation, the process of doing is as much in improvisers’ minds as are

35. See, e.g., Peter Jaszi, *On The Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29, 29–32 (Martha Woodmansee & Peter Jaszi eds., 1994); MARTHA WOODMANSEE, *THE AUTHOR, ART AND THE MARKET* 35, 35–39, 52–53 (1994) (discussing origin of Romantic author concepts in literature); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993) (challenging and historicizing the concept of the author); JASON TOYNBEE, *CREATING PROBLEMS: SOCIAL AUTHORSHIP, COPYRIGHT AND THE PRODUCTION OF CULTURE* 1, 9 (2001), available at <http://www.open.ac.uk/socialsciences/pavis/papers.php> (putting forward the concept of a “field of works,” a more broadly conceived set of symbolic resources which creators draw on); see also King, *supra* note 4, at 314.

36. See LYDIA GOEHR, *THE IMAGINARY MUSEUM OF MUSICAL WORKS: AN ESSAY IN THE PHILOSOPHY OF MUSIC* 205–42 (1992); ROSE, *supra* note 35, at 1, 4 (noting the historically and culturally contingent nature of authorship and discussing the eighteenth century as the era of struggle towards that definition of authorship culminating in a contemporary form of copyright); see also Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 *STAN. L. REV.* 1293, 1324 (1996).

37. BAILEY, *supra* note 9, at 29–42 (providing history of Baroque improvisation in eighteenth century Europe); Arewa, *supra* note 10, at 550.

38. See GOEHR, *supra* note 36, at 152.

39. Anne Barron, *Introduction: Harmony Or Dissonance? Copyright Concepts and Musical Practice*, 15 *SOC. & LEGAL STUD.* 25, 41–42 (2006); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”* 1991 *DUKE L.J.* 455, 471 (“[A] tendency developed to define the ‘author’ reflexively, in terms of the ‘work’”), 472 (“The ‘authorship’ concept, with its roots in notions of individual self-proprietorship, provided the rationale for thinking of literary productions as personal property with various associated attributes including alienability.”).

40. Barron, *supra* note 39, at 42.

the musical sounds they generate.⁴¹ If we take seriously that idea, and understand improvisation as a practice, we must think more carefully about bestowing copyright protection on a “musical work” since that validates what might be called a byproduct, rather than the product, of improvisation. At the very least, assigning value and legal boundaries to the musical work may be inconsistent with the goals and interests of musical improvisers, and at worst it may create interference with the practice of improvising.

Although it would be difficult to measure the music’s overall value to society before and after the work concept’s dominance, relying on the category of “work” as marking inclusion in a legal system systematically devalues musical practices in favor of musical products.⁴² Focusing on “works” may make it particularly hard to measure social values:

[P]recisely to the extent that it has succeeded in circumscribing the boundaries around the intangible object in a tolerably clear and objective manner, this “physicalist” strategy [relying on the “work” concept] has also failed to identify what is of value in the object: what it is that makes it worth protecting in the first place.⁴³

Focusing on “works” may render the social forest invisible for the musical trees since one can pass the time counting, measuring and improving one’s methods for doing so, and miss how the social practices proliferate, social relationships change, and miss a social understanding of value. To understand creativity and what is necessary for it to flourish will require looking at more than creativity’s byproducts.⁴⁴

Due to its fluid nature, even absent the fixation requirement, improvisatory music might be characterized as exactly what the musical “work” concept leaves out. Indeed, many aspects of the work concept that make it incompatible with copyright law are improvisation’s defining characteristics: “The nature of work in improvisation, as I understand it, is not to create a finished product but rather to treat work itself as a process through which improvisations are worked out, worked over, or worked on, but *never* finished in the traditional sense . . . of ‘achieving closure.’”⁴⁵ The question of “closure” is an interesting one for copyright law. If improvisations are not closed (in the sense of being finished), they may in a way be “unenclosable” by a property system. Seeing improvisation as an ongoing process is particularly antithetical to the idea of exclusive protection, or at least pushes the

41. See generally Dana Reason, “Navigable Structures and Transforming Mirrors”: *Improvisation and Interactivity*, in *THE OTHER SIDE OF NOWHERE: JAZZ, IMPROVISATION AND COMMUNITIES IN DIALOGUE*, *supra* note 29, at 71.

42. A similar concern about the “freezing” of a practice or tradition into a work arises for folklore, which is “continuously utilized and developed within the indigenous community.” Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 *CONN. L. REV.* 1, 9 (1997).

43. See Barron, *supra* note 39, at 43.

44. See Julie E. Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 121, 166 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006).

45. Reason, *supra* note 41, at 78.

concept of exclusivity into rather broad territory—since at any point an ongoing process might include more content, there would never be a definable site of protection.⁴⁶ Moreover, focusing on protection at any chosen time may reduce an improvisation's value as a dynamic process. Challenging creators of later versions to seek permissions from owners of earlier versions encourages a focus on a finished product that contradicts what many see as important about improvisation: as Eddie Prévost, jazz drummer and founder of free improvisation group AMM notes, “[I]mprovisation is fragile. Its transience leads to a vast number of evolutionary prospects.”⁴⁷ Prévost emphasizes that transience and fragility are not weaknesses requiring copyright protection, but valuable sites for creative expansion. Allowing that transience may be the best way to preserve the value of improvisatory work. In fact, some improvisers go so far as to suggest that an over-reliance on the score (or fixed work) leads to it being a “dictator of musical thought and performance.”⁴⁸ This critique suggests that it is antidemocratic to rely too much on the fixed, bounded aspects of music, a suggestion I will take up further below.

3. The Potential Economic Values of Flexible and Collaborative Practices

Focusing on individual products like “works” may also prevent us from recognizing how these flexible and collaborative practices may also be productive economically, if one refines one's view of an economic system away from one based on excludable property rights. Beyond missing that productivity, focusing on encouraging “works” rather than “communities of creativity” might even hinder creativity. This suggests we should carefully examine examples of creativity that diverge from copyright law.

One example of a musical community with a different dynamic in relation to copyright law is the Grateful Dead and “jamband” scenes, which have succeeded in creating and maintaining alternate social norms that are based less on excludability than on access to (and creation of) musical recordings by fans.⁴⁹ The absence of particular aspects of copyright enforcement in that scene does not mean that there are no rules, but rather that the community has its own socially enforced rules. A similar case may exist in many improvisation scenes: social practices may already be enforcing the kinds of rights that most feel are appropriate.

In addition, the different dynamic has benefited the jambands enormously:

I think it is probably the single most important reason that we have the popularity that we have . . . [T]he proliferation of tapes [of live performances] . . . formed the basis of a culture and something weirdly like a religion A lot of what we are selling is

46. See generally Lee B. Brown, “Feeling My Way”: *Jazz Improvisation and its Vicissitudes—A Plea for Imperfection*, 58 J. AESTHETICS & ART CRITICISM 113 (2000) (describing jazz music's constantly changing and spontaneous nature).

47. Reason, *supra* note 41, at 76 (quoting AMM associate Eddie Prévost).

48. Solomon, *supra* note 10, at 229.

49. See Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 668–72 (2006).

community. That is our main product, it's not music.⁵⁰

It's possible that improvisatory communities have also benefited from their divergence from traditional copyright law, rather than suffered. As will be discussed below, many improvisation scholars posit a causal relationship between a strong community based in reciprocity and improvisational practices.⁵¹ If "community" is the product, or at least a valuable effect that society might have an interest in, then we should concern ourselves with copyright law's impact on the ability to generate or support community.

B. THE SOCIAL VALUE OF IMPROVISATION: MUSIC MAKING COMMUNITY

1. Community-Building Between Artists

"A moment of community, whether temporary or enduring, can be established in such moments through the simultaneous interaction of musical sounds, people, and their musical and cultural histories."⁵² Improvisation scholars and practitioners broadly agree that improvised music exists within and flourishes because of the communities in which it occurs, and also contributes to the maintenance of those communities through its dialogic practices. Many social theorists and jazz theorists/performers explicitly argue that improvising encourages a kind of social engagement that some political theorists would likely find desirable. In this section, I outline how copyright law may conflict with improvisation's practices that reinforce and build community, and democratic participation in discourse. Indeed, "jazz improvisation and creative improvised music have always . . . been about community building (rather than individual self-expression), about fostering new ways of thinking about, and participating in, human relationships."⁵³

For many performers, improvisation's success appears to be in the act of communicating musical ideas. Communication requires shared understanding. Harold Budd, a member of several free improvisation ensembles and noted performer in other genres as well, says that improvisation fails when improvisers are "not really basing their language on anything that means very much to other people, including their compadres in the ensemble."⁵⁴

Those discussing improvisation commonly emphasize language and communication. For example, the improvising-as-conversation metaphor comes from the musicians themselves.⁵⁵ It also comes from scholarship that is intimately

50. *Id.* at 670 (quoting Grateful Dead lyricist John Perry Barlow).

51. See, e.g., Bjørn Alterhaug, *Improvisation on a Triple Theme: Creativity, Jazz Improvisation and Communication*, 30 *STUDIA MUSICOLOGICA NORVEGICA* 97, 114 (2004); Fischlin & Heble, *supra* note 29, at 23.

52. MONSON, *supra* note 10, at 2.

53. Fischlin & Heble, *supra* note 29, at 23.

54. Forum, *Improvisation*, 21 *PERSP. NEW MUSIC* 26, 53 (1982–83) (quoting Harold Budd).

55. See, e.g., MONSON, *supra* note 10, at 8 ("Like Berliner, I found that the metaphor of conversation occurred frequently in musicians' discussions.").

acquainted with the practices and arguments of actual improvisers, particularly ethnographic research on jazz musicians.⁵⁶ As Richard Davis notes, “That happens a lot in jazz, that it’s like a conversation and one guy will . . . create a melodic motif or a rhythmic motif and the band picks it up. It’s like sayin’ that you all are talking about the same thing.”⁵⁷

Conversation is not simply the trading back and forth of whole statements. As mentioned above, musical conversation relies on improvisers leaving things unfinished so others can finish them.

[A] lot of times when you get into a musical conversation one person in the group will state an idea or the beginning of an idea and another person will *complete* the idea or their interpretation of the same idea, how they hear it. So the conversation happens in fragments and comes from different parts, different voices.⁵⁸

This testimony highlights the act of conversation as the event’s essence, with no one person’s contribution necessarily being in itself a complete work.

Conversation also happens across time, with ideas, forms, phrases and voices from people and conversations not physically present. Ingrid Monson provides a particularly rich example when describing an episode in which she and drummer Ralph Peterson respond to a recording of a particular performance:

After one rhythmic exchange I remarked, “Salt Peanuts!” since Geri Allen’s piano figure . . . reminded me of Gillespie’s famous riff. . . . Peterson commented: “Yeah!” “Salt Peanuts” and “Looney Toons”—kind of a combination of the two. Art Blakey has a thing he plays. It’s like: [he sings measures . . . of a musical example]. And Geri played: [he sings measures . . . of another musical example.] So I played the second half of the Art Blakey phrase: [sings another phrase].⁵⁹

Note the layers of reference here, and their overlapping significance: Peterson, one of the performers in the recording, describes his reference and mental association, his response to the pianist’s reference and affirms Monson’s reference as well. Each participant (including Monson the listener) identifies some meaning in the piece, and the performer affirms all of them. These are references to works and people who were not physically present, but who are evoked by their re-use: that moment in performance was a conversation with and by means of musical and

56. See, e.g., BERLINER, *supra* note 11, at 497 (discussing how musicians favor the “conversation” metaphor for improvisation and enact it on many levels, and describing how players’ and performers’ musical acts comprise a conversation with themselves, their predecessor in the jazz tradition, their instruments and each other); MONSON, *supra* note 10, at 73 (discussing “improvisation as conversation;” also, the book is titled and premised on the idea that jazz improvisation is an act of “saying something,” i.e., that it is a kind of communication). See generally R. Keith Sawyer, *The Semiotics of Improvisation: The Pragmatics of Musical and Verbal Performance*, 108 SEMIOTICA 269 (1996) (defining the act of improvisation as “musical conversation” that parallels the collaborative practices involved in talking).

57. MONSON, *supra* note 10, at 32 (quoting Richard Davis, musician and Professor of Bass (European Classical and Jazz), Jazz History and combo improvisation at the University of Wisconsin—Madison).

58. *Id.* at 78 (quoting Ralph Peterson, an American jazz drummer and band leader).

59. *Id.* at 77 (quoting Ingrid Monson & Ralph Peterson).

cultural expressions as well as with the musicians and listeners who share knowledge of those expressions. It is a conversation between the musicians and each other, but also their memories, their histories and listeners' memories and histories as well.

Improvisation scholars often describe improvisation practices as particularly open, flexible and dynamic, in a way that can foster more inclusive visions of community: "[T]he flexible, multiply mediated nature of navigable structure [the basis of improvisation] makes it possible for individuals to perform with many kinds of musicians, encouraging exchanges, dialogues and collaborations [and] encourages multiple readings of improvised potentialities."⁶⁰ This flexibility and multiplicity evokes a vibrant musical discourse that echoes concepts like "democratic discourse" discussed in other legal analyses of the limiting values on copyright law.⁶¹ Neal Netanel champions a different goal for copyright than economic policy: "democratic pluralism," saying "A democratic order depends upon a domain in which citizens develop the independent spirit, self-direction, social responsibility, discursive skill, political awareness, and mutual recognition."⁶² Netanel suggests that copyright policy should be informed by a state interest in open and diverse participation in public discourse. Music, as an important part of our cultural landscape, can be seen as an aspect of democratic pluralism: shared language and collaborative practices cement communities through reinforcing shared values. Netanel makes the case for popular culture in this very regard: "as both a resource and a playing field for the exercise of democratic culture and civic association."⁶³ Copyright law relies on creating values generated by exclusion and permission, which could limit this resource and narrow or tilt the playing field through a "permission culture."⁶⁴ This "permission culture" encourages attitudes about music that can hinder our ability to draw on or play in musical discourse.⁶⁵ At the very least, any changes to a legal regime that

60. Reason, *supra* note 41, at 75.

61. Balkin, 79 N.Y.U. L. REV. 1, 27 n.46 (2004) (arguing that "the free speech principle is the key battleground for the legal protection of capital in the information economy" and critiquing the U.S. Supreme Court's *Eldred v. Ashcroft* decision as a "cavalier dismissal of the important free speech interests in limited copyright terms"); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 16–17 (2001) (arguing that "autonomy interests" of free speech "are also served when a person chooses to copy what someone else has said, endorsing it as her own" and that "[t]he extension of protection to every speaker . . . can be justified by reference to general democratic theory").

62. Netanel, *supra* note 5, at 359–62.

63. *Id.* at 351.

64. Cohen, *supra* note 5, at 1193.

65. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 (11th Cir. 2001) (Marcus, J., concurring) (describing restrictions faced by an author seeking to make a sequel to *GONE WITH THE WIND*, from Margaret Mitchell's estate); PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* 29, 35 (2004), available at <http://www.acsil.org/resources/rights-clearances-1/nps240.tmp.pdf>. See generally MARJORIE HEINS & TRICIA BECKLES, *WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL* (2005), available at <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf> (discussing how "clearance culture" has harmed the free exchange of ideas as

has the potential to introduce new sets of permissions and restrictions should be analyzed in the context of its effect on interactivity and play since copyright law has the potential to limit the lively flourishing of culture.⁶⁶ Taking seriously the value of less restricted interactions should encourage us to recognize the modest role that copyright law plays in the creative process.⁶⁷

2. Community-Building with Audiences

“Acting in concert, improvisers and audiences deploy the interactive technologies of improvisation to establish the potential of alternative creative identities, new relational structures that configure community.”⁶⁸

As discussed above, an audience’s role, as well as other performers, is often considered vitally important to the creative process of improvisation.⁶⁹ This could complicate copyright assignment, if it was ever believed to be a significant creative contribution. It seems unlikely that audiences—usually cast as passive consumers—would be granted exclusive rights. However, despite the traditional image of a lone soloist emoting purely from an inner, individual self into a crowd who can be either “receptive” or “unreceptive,” much improvisation involves a more dynamic relationship, which makes space for audiences to be contributors to the creative act, and for them to be future as well as current improvisers in that tradition. Thus, improvisation may actually alter and break audience passivity, requiring more engagement and giving back more reciprocal responses from performers.⁷⁰ In this view, improvisation invites the audience into the process of music-making in a way that also models a more dynamic and engaged kind of human social interaction. Indeed, as Lee Kaplan, avant-garde jazz series curator and musician, says: “[o]ne of the really important factors in improvisation, when you’re playing for people, is the fact that there is an audience, and they can change the music entirely That’s what makes the music interesting. In that way it’s a living music; it’s different each time.”⁷¹

It would be radical indeed to suggest that audiences should get ownership or other control over musical works they participate in creating (although taking audiences more seriously might have implications for other rights such as the right to make derivative works).⁷² However, a middle ground might be to not deny

embodied in the principle of “fair use”); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004) (containing a discussion of how copyright law enforcement leads to overemphasis on permission and licenses to the detriment of creativity and culture).

66. See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1866 (1991).

67. Cohen, *supra* note 5, at 1193 (suggesting a “more modest conception of the role that copyright plays in stimulating creative processes and practices”).

68. Reason, *supra* note 41, at 82.

69. BERLINER, *supra* note 11, at 468 (describing how audience members participate in the musical conversation of live improvisation).

70. *Id.*, at 455–56.

71. Forum, *supra* note 54, at 66–67.

72. See Tushnet, *supra* note 5, at 164 (discussing fan-made unauthorized derivative works).

audiences the kinds of access that they enjoy. There is more going on between musicians and audiences than a duel over exclusive rights—focusing on access rather than exclusion might be more consistent with the dynamic in the moment of improvisation. Equity-based arguments that rely on musicians' rights to exclusive control over performances tend to ignore the audience's importance as well as other contextual factors in the creative process.⁷³ When considering equity, we should account for the collaborative nature of creation, and when discussing incentives we must account for incentives related to social relationships including the audiences as creative partners as well as consumers.

3. Improvisation and Resistance

While there is no reason to assume that every instance of improvisation is in its *content* resistant or critical, some improvisers and scholars point to an "identifiable and radical form of improvisational practices," which consciously opposes itself to mainstream culture, resisting majority cultural and political forces.⁷⁴ Because democratic participation in society requires and values dissent, we should carefully examine legal changes that could raise the cost of dissent. Those altering the legal context in which improvisation occurs should address whether this form of improvisation is especially threatened by increased commodification or propertization.⁷⁵

There does exist plenty of testimony to people's experience of improvisation "encourag[ing them] to see beyond the chord changes of consensus reality," as Ron Sakolsky says about his political awakening through listening to John Coltrane.⁷⁶ Jazz improvisation also has the potential to help us "use the transformative powers of our imagination as the basis for reclaiming our creativity in a world of miserabilist compromises."⁷⁷ If improvisatory music can be both criticism and a means of awakening critical faculties, when proposing alterations to copyright, we should ask how attaching property rights and permissions would affect this process.

Lastly, many improvisation scholars in the jazz community emphasize that community practices should be supported in order to resist outside pressures or racism and economic exploitation.⁷⁸ If the social cohesion arising out of

73. See Cohen, *supra* note 5, at 1190 (noting that "creative play" is an important aspect of creative practice).

74. Fischlin & Heble, *supra* note 29, at 2.

75. See Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387 (2003) (arguing for the need to "deprivatize" copyright in order to realize the public good of cultural production); HOWARD BESSER, *COMMERCIALIZATION OF CULTURE HARMS CREATORS* (2001), available at <http://besser.tsoa.nyu.edu/howard/Copyright/ala-commons.html> (arguing that the commodification of cultural heritage will have negative implications for artists and creators).

76. Ron Sakolsky, *Hangin' Out at the Corner of Music and Resistance*, in *REBEL MUSICS: HUMAN RIGHTS, RESISTANT SOUNDS, AND THE POLITICS OF MUSIC MAKING* 46 (Ajay Heble & Daniel Fischlin eds., 2003).

77. *Id.* at 51.

78. Daniel Fischlin, *Human Rights, Resistant Sounds, and the Politics of Music Making*, in *REBEL MUSICS: HUMAN RIGHTS, RESISTANT SOUNDS, AND THE POLITICS OF MUSIC MAKING*, *supra* note 76, at 30.

improvisatory practices is especially important to endangered, exploited and threatened communities, then it is especially important to understand how those communities maintain themselves and the role that cultural practices like improvisation play in that maintenance.

4. Improvisation and Cultural Citizenship

As outlined above, the values most prevalent in improvisation tend towards a vision of human interaction that some call “cultural citizenship,” a concept from popular music scholarship defined as “the process of bonding and community building, and reflection on that bonding, that is implied in partaking of the text-related practices of reading, consuming, celebrating, and criticizing”⁷⁹ Neal Netanel’s “the exercise of democratic culture and civic association” is a good parallel term, and he specifically argues that such practices are evident and possible in “the realm of popular culture”:

[T]he autonomous creation, critical interpretation, and transformation even of works of pure aesthetics or entertainment helps to support a *participatory* culture. Citizens who engage in these activities gain a measure of expressive vitality and independence of thought that may carry over into matters of more unequivocal public import as well.⁸⁰

By any stretch, this seems a desirable outcome for cultural policy, and legal institutions that can shape human interaction should be sensitive to this possibility, as well as to the more easily measurable outcome of royalties.

Consider Derek Borgo’s comment that “[f]ree improvisation, it appears, is best envisioned as a forum in which to explore various cooperative and conflicting interactive strategies”; or the statement that “improvisation is . . . about reinvigorating public life with the spirit of dialogue and difference that improvisatory practices consistently gesture toward.”⁸¹ Even if this is not true for all improvisation, cultural policy makers should be excited about the possibility to facilitate such a dynamic.

III. WHO, WHAT AND WHY PROTECT?

A. ARE IMPROVISERS THE SAME AS OTHER ARTISTS?

The main argument for copyright ownership in improvisation is that improvisers are just like other artists, and what they make is analogous to other kinds of music. In other cases the arguments describe improvisers’ vast contributions to musical

79. Jean Burgess, Marcus Foth & Helen Klæbe, *Everyday Creativity as Civic Engagement: A Cultural Citizenship View of New Media*, 2006 PROC. COMM. POL’Y & RES. F. 4, available at http://eprints.qut.edu.au/5056/1/5056_1.pdf (quoting JOKE HERMES, RE-READING POPULAR CULTURE (2005)).

80. Netanel, *supra* note 5, at 351.

81. Borgo, *supra* note 10, at 184; Fischlin & Heble, *supra* note 29, at 17.

genres and products over time and argue that copyright's absence de facto harms improvisers.⁸²

These arguments do not attend so much to the improvisation as a specific practice engaged with by particular communities, but instead rely on two generalizations. One is that art making can be understood as a generic practice, regardless of the social context in which specific kinds of art develop. But how generically can we discuss art making and still have a meaningful discussion? It might be better to examine art making in the context of both artists' self-identified goals and functions and also broader social goals and functions, rather than just to take all art as fundamentally a product-making enterprise.

The second generalization underpinning the "improvisers are just like other artists" argument relies on broad based and abstract conceptions of rights. This idea of rights that can be implemented across the board with similar meaning, no matter which people or social practices are involved, at the very least ignores the fact that improvisation differs in important respects from precomposition practices, and those differences may be incompatible with copyright law.⁸³ At worst, this broad idea of rights also ignores the specific power relations that different people may have in that it can affect their ability to define and enforce rights.

B. IMPROVISERS ARE DIFFERENT AND DESERVE PROTECTION

There is also an argument for improvisers' copyrights based on difference rather than sameness. We must not ignore the racial underpinnings of improvisatory music and debates around it. For instance, a racially conscious analysis of improvisation could support an argument that improvisers should be protected, not due to their similarity to other artists, but rather due to their being members of a social group deserving of special attention. White dominated legal, economic and cultural institutions have regularly and systematically excluded jazz (historically black music) and black artists from the ability to benefit financially from their works.⁸⁴ Copyright law and institutions have undeniably rejected black artists and their traditions, both explicitly, as with ASCAP not allowing black members, or implicitly in the contours of copyright that leave out many aspects of musical traditions mainly dominated by people of African descent.⁸⁵

In this context, it does not make sense to weigh the value to society as a whole of stripping black artists of the ability to pay their bills (although doing so is

82. See Hines, *supra* note 10, at 483 ("The modern jazz style . . . greatly suffered because of its incompatibility with copyright protection."). Hines suggests that there was a shortage of musical recordings of this kind of jazz, but doesn't elaborate on how this can be interpreted as the style suffering.

83. See *id.* at 472 ("The entire nature of improvisational performance contrasts with . . . copyright law."); Kurt Blaukopf, *Westernisation, Modernisation, and the Mediamorphosis of Music*, 20 INT'L REV. AESTHETICS & SOC. MUSIC 183, 190 (1989) ("The concept of copyright, as developed in Europe and, by now, also applied in many non-European countries, does not take into consideration the specificity of musics that are partly or totally independent of notational efforts.").

84. Greene, *supra* note 23, at 1180–81.

85. *Id.*, at 1189; Hines, *supra* note 10, at 465.

enlightening in the context of reparations).⁸⁶ The characteristics of music associated with people of African descent, like that of so many other exploited groups, cannot simply be the result of their exclusion from legal protection.⁸⁷ Indeed, there is a long history of scholarship from outside and within black communities on aspects of music that are argued to connect to African traditions, or to traditions of resistance, which specifically should not be “integrated” into market transactions or whose significance comes from subverting the meaning of market transactions.⁸⁸ Without taking an explicit stand on some of the more essentialist arguments about black traditions and black music, it is arguably true that many practices contribute value to the communities who engage in them, and that value cannot be measured in direct economic terms. The flourishing of those communities depends partly on those values, and their flourishing contributes to a healthy society. Therefore, society must not neglect these noncommodity values in its copyright policy.⁸⁹

From a market-based perspective, communities of noncopyright owners are truly at a disadvantage and have been historically disadvantaged in relation to copyright owners. However, at least some of that advantage is based in the differing social positions of, in this case, black artists and white artists/entrepreneurs. The United States in the 1930s, 40s and 50s was a white supremacist society: white artists and entrepreneurs had better access to and representation in nearly all institutions for profit making and to legal institutions as well.⁹⁰ A great many of the artists who were never paid royalties or other copyright related rights were and are in this situation legally, due to work for hire contracts and other supposedly voluntary arrangements.⁹¹ The imbalances between white institutions and black artists is not created by copyright law, and thus shifting rules of copyright would have changed some of the pieces on the board, but not necessarily the rules of the game.

This is not to undermine the real deprivation that black artists (among others)

86. See Greene, *supra* note 23, at 1208–22.

87. See generally HILDRED ROACH, *BLACK AMERICAN MUSIC* (1973) (a history of the many influences and institutions that shape black musical practices, including many more motivations than copyright ownership alone); TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* (1994) (describing black musical culture as arising out of the situation of Black American’s systematic oppression far beyond simply the lack of copyright ownership and exclusion from systems of power, but also in relation to historical traditions including some stretching back to Africa and to autonomously defined concepts of identity and community that enable survival and resistance in the face of racist institutions).

88. See PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* 105 (1993); Hines, *supra* note 10, at 469–73.

89. See Netanel, *supra* note 5, at 321.

90. See Robert C. Kloosterman & Chris Quispel, *Not Just the Same Old Show on My Radio: An Analysis of the Role of Radio in the Diffusion of Black Music Among Whites in the South of the United States of America, 1920 to 1960*, 9 *POPULAR MUSIC* 151, 159 (1990) (arguing that ASCAP systematically discriminated against “race music” written and performed by black artists, until challenged by BMI); see also Timothy Dowd, *Production Perspectives in the Sociology of Music*, 32 *POETICS* 235, 243 (2004) (positing that dominant actors in the recording, performance rights and radio industries did not view “race” music as a category of music with broad appeal).

91. See Hines, *supra* note 10, at 485 (arguing that unconscionable contracts divested black musicians of copyrights to their works).

suffer, but instead to suggest that intellectual property rights as usually defined are a problematic solution to that deprivation. This is true both because musical practices are socially embedded, and thus altering their legal context could alter the context of that social system, and also because the noncommodity value of so-called intellectual property can in fact be altered or destroyed by inclusion in a marketplace.⁹²

For those who are still concerned with historic exclusion from the market, there is yet another angle on this if we view the marketplace as a dynamic system. As changing methods of production, marketing and distribution have encouraged many in the music industry to shift away from marketing specific commodities in the digital era, noncommodity understandings of music performance and circulation may be well suited to the new digital music economy. Meanwhile, the companies leading the fight to preserve commodified music are to some extent the companies that constructed the legal system that legally bargained away many black artists' rights (as well as many other artists in poor bargaining positions). Arguments for artists' rights ought to be informed by a clearer understanding of what actually are artists' needs and practices with respect to copyright.

C. THE COSTS OF COPYRIGHT CALCULATION

For those who argue that copyright law should protect improvisation through altering or eliminating the fixation requirement, the next logical step is to analyze how that protection would work—dissecting improvisation into its elements in order to analyze how they fall into or outside of the scope of copyright.

As discussed above, most scholarship on improvisatory music emphasizes that it is not “pure, spontaneous creation,” but is in fact composition in real time, drawing on an array of musical choices including pre-existing musical ideas, genres, styles and musical phrases.⁹³ In this, the same three basic elements constitute improvisatory music and also comprise any musical work: original contributions, elements drawn from copyrighted works and elements drawn from the public domain (consisting of uncopyrightable elements and works whose copyright has expired).⁹⁴ The analysis of improvisation could proceed along similar lines as any musical work—assessing and evaluating various components' contribution to the whole. In the traditional analysis, the question for improvisation would only be whether the balance of original contributions versus the other contributions is high enough to warrant copyright protection.

There is much agreement both within and without the legal field that improvisatory practices would make calculation particularly difficult.⁹⁵ While the

92. See McDonald, *supra* note 5, at 554 (positing that commodification of information no longer produces the desired outcome of educating, and instead is motivated by producing profit).

93. See *supra* Part I-A.

94. See TOYNBEE, *supra* note 35 (arguing that authors are better understood as combining historically common work to create an output rather than being solely responsible for their work).

95. See King, *supra* note 4, at 314–15 (arguing that improvisations and musical techniques in jazz music frustrate an easy application of existing law); Hines, *supra* note 10, at 472 (positing that improvisatory copyright practices disadvantaged early progenitors of Black music).

difficulty is perhaps not insurmountable in theory, the question of how the law and jazz musicians would administer rights leads one into a thicket of competing and overlapping claims that musicians as well as judges may feel disinclined to enter. The amount of time and energy spent figuring out the basis on which to claim ownership might well outweigh the benefit of doing so.

From the other side of the calculation—measuring the benefit to society—we can see that if improvised works were copyrightable, that would reduce the number of works in the public domain and limit the accessibility of those works to others even in the context of improvisation. Whether this would harm the social benefits from improvisation is a calculation that most often is made in terms of the numbers of works in question, but that also requires attention to the increasing complexity of legal calculation.⁹⁶ While a problem faced by any change in legal parameters, increasing complexity is a cost in itself by requiring a calculation of ownership rights while improvising.⁹⁷ Removing or altering the fixation requirement would increase uncertainty about copyrighted works that exist, regarding what is available to draw on as an improviser. Since improvisations would be copyrighted, every improvisation would no longer be automatic fodder for other improvisations. Extending copyright to other works would not only shrink the pool improvisers draw on, but also add a different kind of calculation to the process of improvisation—calculating the ownership of different pieces of music, or the known attitudes of different copyright owners towards use of their works. This calculation has little to do with the aesthetic and social kinds of creative decision making involved in improvisation, and arguably could interfere with or complicate that process, thus harming the flexibility of improvisation.

Since unfixed works will be difficult to argue in court, lacking (by definition) material evidence of their existence, it is unlikely that many cases could be brought at all. Calculations of procedural costs are also difficult to weigh, particularly given the longstanding evidence from sociolegal studies that few disputes in *any* realm of law make it into the courtroom at all.⁹⁸ A compelling way out of this calculative and speculative thicket is to examine more closely the process of improvisation beyond just the choices of what to include or not and to examine the specifics of improvisatory music practices, rather than products/works, and how they would be affected by being subject to copyright control.

96. See generally Lichtman, *supra* note 6 (finding that social costs of litigation regarding evidentially complex copyright cases tend to exclude them from copyright regime).

97. See Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 *LOY. L.A. L. REV.* 159, 191 (2002) (arguing that the calculating process stifles the creative process).

98. See generally Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983) (stating that a small number of disputants bring claims to court); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC'Y REV.* 525 (1980) (finding that few disputes are taken to court).

IV. HOW COPYRIGHTING UNFIXED WORKS COULD DIMINISH SOCIAL VALUE

As described above, the social values arising from, embodied in and possibly inculcated by improvisation may not be compatible with copyright enforcement. Harms to these values could arise in a number of different ways.

A. REDUCING PLAY

If flexibility and play are essential for cultural progress, a system that requires permission before playing with existing works, if possible, is lower in flexibility than one that does not.⁹⁹ As discussed above, improvisatory music is likely at the far end of the spectrum of music practices in terms of a high reliance on flexibility and play, and thus would be most likely affected by copyright law's restrictive effects.¹⁰⁰

B. INCREASED COMMODIFICATION

Scholars of improvisation have argued that "the social force of improvised music resides, at least in part, in its capacity to disrupt institutionally sanctioned economies of production, to trouble the assumptions and expectations of fixity fostered by dominant systems of knowledge production."¹⁰¹ This argument echoes some First Amendment concerns about how and when people can participate in culture making (for which I reinterpret the term "knowledge production"), although it is grounded in a more radical critique of the economics of culture making. To focus more closely on that critique, the implication for music is that supporting a profit oriented musical practice is not the best or at least the only way to maximize music's social contribution.¹⁰² Such an assertion renders problematic the argument that participation in the commercial music industry is liberatory.

However, anticommercial arguments can run the danger of minimizing the harm to people who have been systematically excluded from the chance to profit from one's work.¹⁰³ Even so, some proponents of liberating systematically excluded peoples have pushed back against the "property rights as power" argument,

99. See Cohen, *supra* note 5, at 1192–94 (arguing that decentering creativity from copyright law emphasizes the importance of play in the cultural landscape).

100. Barron, *supra* note 39, at 48 (positing that "ascribing individual ownership rights to aspects of a shared tradition would undoubtedly obstruct the 'flow' of collective musical creativity").

101. Fischlin & Heble, *supra* note 29, at 22.

102. See Mark Anthony Neal, ". . . A Way Out of No Way": *Jazz, Hip-Hop, and Black Social Improvisation*, in *THE OTHER SIDE OF NOWHERE: JAZZ, IMPROVISATION AND COMMUNITIES IN DIALOGUE*, *supra* note 29, at 202, 208 (arguing that improvisation's value was at least partly in the production and reproduction of viable and meaningful personal and group identities, which are in tension with "global market forces where 'authenticity' is styled to meet the demands of global consumers").

103. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1334–35 (2004) (arguing that "differing circumstances—including knowledge, wealth, power, access, and ability—render some better able than others to exploit a commons").

asserting instead that “the expressive modalities of black culture have repeatedly had to struggle against processes of reduction and commodification, processes” that, as Paul Gilroy has noted, have first and foremost had the effect of turning black music into “forms . . . in which [it could be] fast frozen and sold.”¹⁰⁴ Gilroy emphasizes the harm such commodification does to a living tradition of resistance and regeneration.¹⁰⁵ Thus, commodification can work against even the very social goals that copyright law is supposedly aimed at, due to its focus on the “myopic outlook that copyrighted work is a good in and of itself.”¹⁰⁶

And then there is the question, unpopular among legal scholars but vital to musicians, of music’s value to musicians, i.e., its quality, using the term “creative” as a measure of quality. Jazz musician Harold Budd goes so far as to argue that the process of recording itself with its attendant freezing and commodification is at least irrelevant to creativity: “[T]here is really very, very little creative happening in a recording. Jazz recording is a very uncreative affair because the recording is documenting a performance—it may be a mediocre one, or it may be an excellent one, it doesn’t make any difference”¹⁰⁷ Implicitly rejecting a market valuation of music, his statement assumes that music quality is known before it goes on sale, and suggests that recording encourages a commodity mentality, where value is based on sales figures.¹⁰⁸ This commodification, which brings our decisions about creativity into a market process, changes the meaning and content of those creations and influences the nature of creative decision making.¹⁰⁹

However, property ownership does confer some power in the marketplace, which is necessary for survival and perhaps resistance to exploitation as well. As discussed above and in scholarship on jazz, in blues and black music, as well as in international contexts, the debate of market power versus commodification rages on.¹¹⁰ Property ownership can confer power, but also exacts the price of commodifying the propertized resource, making the resource intelligible to the legal system that one used to protect it, but perhaps less intelligible to the people who made it or possibly altering the way they judge intelligibility.¹¹¹ This argument has also been made with respect to propertizing biological resources and knowledge about those resources where a people can risk both restructuring that

104. See GILROY, *supra* note 88, at 105.

105. *Id.*

106. McDonald, *supra* note 5 at 544; see also Mark Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005) (arguing for a shift away from property-based rhetoric when discussing copyrights, patents and trademarks).

107. Forum, *supra* note 54, at 54 (quoting Harold Budd).

108. Elkin-Koren, *supra* note 34, at 399 (“Once we realize that everything we write, draw, or play could be licensed, we start conceiving of our own self-expressions as commodities.”).

109. See *id.*

110. See generally Chander & Sunder, *supra* note 103, at 1335 (arguing that the public domain has been a source of exploiting the works of disempowered groups); Greene, *supra* note 23, (arguing that black artists historically were denied the benefits of their intellectual property).

111. See Marc Perlman, *Global Regulation of Intangible Cultural Heritage: Between Stewardship and Ownership*, in MAKING AND UNMAKING INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE (Mario Biagioli et al. eds., forthcoming March 2011) (calling this “the paradox of empowerment”).

knowledge through applying a legal framework to it, or increasing exploitation of heritage if it is left outside of legal protection.¹¹² Granting property rights to those who wish to resist exploitation could be the answer, or at least a way to prevent all profits from accruing to the most powerful. Even so, encouraging a property or commodity relation to dominate the meaning of a cultural product may have undesired effects. Harm to cultural practices and cultural identity may be hard to measure, but may be irrevocable, which should at least inspire caution to those who could increase commodification.¹¹³

Scholars of folklore and others concerned with cultural survival make similar arguments: while “poaching” and imitation do real harm to the community, some wonder if the “cure” of propertization is worse than the disease.¹¹⁴ Legal scholars have warned us that “[r]eliance on property rights may weaken the dialogic virtue of information that is a key to individuals’ participation in the creation of culture.”¹¹⁵ If this argument is remotely true for information as a dialogic entity, it is much more so for improvisation, which is, according to many accounts, as dialogic as it gets.¹¹⁶

C. OPTING OUT OF THE COMMUNITY

The aspects of improvisation that foster the most inclusive and collaborative practices are the ones which least fit copyright law. From incompleteness to collaborativity to the need for and ability to encourage audience contributions through repetition, reference and familiarity, these elements are not likely to be

112. See Chander & Sunder, *supra* note 103, at 1341, 1343 (“[L]aw turns a blind eye to the fact that . . . the public domain has been a source for exploiting . . . people of color, the poor, women, and people from the global South.”).

113. See generally Margaret Jane Radin & Madhavi Sunder, *The Subject and Object of Commodification, Introduction* to RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW & CULTURE 8 (Martha M. Ertman & Joan C. Williams eds., 2005).

114. See James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 95–99 (1997) (discussing the tendency in intellectual property to “over” protect, resulting in the extreme privatization of the public domain); Shane Greene, *Indigenous People Incorporated? Culture as Politics, Culture as Property in Pharmaceutical Bioprospecting*, 45 CURRENT ANTHROPOLOGY 211, 220–21 (2004) (analyzing the impact of pharmaceutical bioprospecting on “indigenous forms of representation” and “the ramifications of the incorporation of indigenous groups in claiming culture as property”). See generally Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997) (arguing that indigenous art presents many difficulties that do not square with the western intellectual property regime); Caroline Humphrey & Katherine Verdery, *Raising Questions About Property, Introduction* to PROPERTY IN QUESTION: VALUE TRANSFORMATION IN THE GLOBAL ECONOMY 1 (Katherine Verdery & Caroline Humphrey eds., 2004); Bradford S. Simon, *Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law*, 20 BERKELEY TECH. L.J. 1613 (2005) (critiquing the approach of the intellectual property regime with respect to the “traditional knowledge” that undergirds many communities in the developing world).

115. Elkin-Koren, *supra* note 34, at 399.

116. John P. Murphy, *Jazz Improvisation: The Joy of Influence*, 18 BLACK PERSP. MUSIC 7, 15 (1990) (quoting jazz performer Joe Henderson: “You know how you quote people as a player. You use semicolons, hyphens, paragraphs, parentheses, stuff like this. I’m thinking like this when I’m playing. I’m having a conversation with *somebody*.”).

furthered through copyright ownership. However, they are argued by many to be the very building blocks of community.¹¹⁷

Musicians and music scholars are not the only ones that express concern over propertization's social effects. Shubha Ghosh's concept of copyright as "privatization" raises similar concerns.¹¹⁸ Characterizing privatization as "a shift from the centrality of the political and civic spheres to the centrality of the market and individual experience," Ghosh emphasizes the possibility of a public interest in fostering political and civic spheres, which might encourage limits on copyright's scope in exactly the way suggested here.¹¹⁹

Suggesting that giving people a choice to opt out or cash in affects their social relationships sounds paternalistic, and the idea that we might deny people choices rather than have them make a bad choice is illiberal indeed. But the emphasis on choice is in itself a social norm; we can see this most clearly with respect to commodification, which is, in the United States, one place where laws have prevented us from making a choice with respect to our children and our bodies (to some extent), and where many find it acceptable to deny that choice on other grounds.¹²⁰ While clearly music is already highly commodified, in the case of improvisation it is particularly embedded in social relationships that might make that choice more of a break with community norms, and socially destructive as well.

Changing copyright rules can affect musical practice. For example, making it possible to own a property interest in a formerly collective enterprise means the cost of breaking away from a collaborative community goes down. Add in the facts that a definition of authorship may favor particular groups or traditions, and that the ability to use law on one's behalf is not evenly distributed, and we can see how the ability to commodify processes might encourage fragmentation of the communities from which those processes originate.¹²¹

V. CONCLUSION: PLAY, NON-MARKET MECHANISMS AND DEMOCRATIC DISCOURSE

Improvisation emphasizes process over product creativity, an engendered sense of freedom and discovery, the dialogical nature of real-time interaction, the sensual aspects of performance over abstract intellectual concerns, and a participatory aesthetic over passive reception. Its inherent transience and expressive immediacy even challenge the dominant modes of consumption that have arisen in modern, mass-market economies and the sociopolitical and spiritual efficacy of art in general.¹²²

117. *Id.* at 9 ("By invoking and reworking music that is familiar to the audience, the jazz performer involves the audience in the process and makes it meaningful for those who recognize the sources.").

118. Ghosh, *supra* note 75, at 387.

119. *Id.* at 395.

120. See, e.g., MARGARET JANE RADIN, CONTESTED COMMODITIES 131–53 (1996).

121. Ghosh, *supra* note 75, at 417 (describing several examples of how copyright owners' interests are set against users who are part of communities of expression).

122. Borgo, *supra* note 10, at 184–85.

As above, many involved in improvisation and the study of improvisation assert its value in terms that directly contradict a commodified and individualistic view of music making. The social values embodied and reproduced by improvisatory practice help creativity flourish: the concept of “play” or “purposive creative experimentation . . . serendipitous access to cultural resources and . . . unexpected juxtapositions of those resources” is a crucial element of creativity, including the atmosphere that fosters it.¹²³ Play also has a broader social effect, as it “increases the likelihood that someone will see, hear or think the world differently.”¹²⁴ Furthermore, “[w]ithin the realm of creative practice, the play of culture is the to-and-fro in flows of artistic and cultural goods and in cultural practices of representation. Play in this sense is an essential enabling condition of cultural progress.”¹²⁵ This reciprocity is also a crucial element of creative practice: “creativity thrives not only on the ability to cash in on one’s ideas—an ability that one gets from property—but also on a kind of free-wheeling give and take.”¹²⁶

Reciprocity, as discussed by scholars of law and of music, is quite different from economic exchange—note that the previous quote explicitly sets it against commodification. Commodification encourages us to evaluate creative works based on their price, which leaves out important social values, and may even diminish their actual effects.¹²⁷ But those social values have importance for democracy, fairness and social cohesion.

Neal Netanel has made a project of identifying those noncommodity social values, contextualizing them with a democratic vision of society:

In addition, the autonomous creation, critical interpretation, and transformation even of works of pure aesthetics or entertainment help to support a *participatory* culture. Citizens who engage in these activities gain a measure of expressive vitality and independence of thought that may carry over into matters of more unequivocal public import as well.¹²⁸

Although the fixation requirement can be analyzed in terms of its effect on individual creators, doing so ignores the full spectrum of their practices, their interrelationships in communities and the value those interrelationships generate for themselves and broader society. The concept of “cultural citizenship” captures some of the values that copyright law in its usual configuration does not always directly contribute to. So, for example, if we see improvisation as “a fertile space for the enactment and articulation of the divergent narratives of both individuals and cultures,” we must look at how those practices, which sound very much like democratic participation in public discourse, would be affected by copyright

123. Cohen, *supra* note 5, at 1190.

124. *Id.*

125. *Id.* at 1191.

126. Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1998).

127. See Elkin-Koren, *supra* note 34, at 386 (“[C]ontent created through nonmarket mechanisms is a valuable form of self-expression and community building.”).

128. Netanel, *supra* note 5, at 351.

law.¹²⁹ Copyright law is cultural policy, that is, law affecting how culture is made and engaged with, and it should take into account the prospective effects on cultural citizenship.

The fixation requirement, excluding some works and practices from copyright, promotes cultural citizenship in several ways. One way may seem contradictory to my argument: by providing financial incentive to record or otherwise get a work into fixed form, it provides the possibility to control certain later uses of the works. The value of doing so includes the possibility of future material reward for the copyright owner of that form, the kind of artistic control that is possible through relying on the legal system. Incentivizing recording also has a social value akin to that of disclosure in patent law because fixed works, written and recorded, have the possibility to last over time and to be transmitted or copied in ways that ultimately contribute to culture at large and ultimately to the public domain.¹³⁰ But although attaching copyright provides a certain amount of good—one that some economists suggest has been historically overvalued—this does not mean that broadening copyright's scope will provide more good.¹³¹ As discussed above, the fixation requirement serves several valuable social purposes through allowing dynamic flexibility and room for play that would be more difficult if legal ownership were ascribed.

My argument is necessarily limited in its direct legal applicability since in fact it deals with only some musical practices—since many improvisatory works are recorded, some rights reside at least in that sound recording.¹³² But taking these concerns seriously has implications for many musical genres and communities. For example, I am not the first to argue that many practices of cultural interactivity, community building and resistance that are associated here with jazz are also associated with the practice of sampling in hip hop.¹³³ Therefore, it would be worth analyzing hip hop musical practices through some of the lenses provided here.

Current suggestions for altering copyright law include, for example, introducing a performer's right in sound recordings (which would go a long way towards remunerating jazz musicians), and altering the derivative works right (in some cases to allow arrangers, as well as performers, to own some copyrights).¹³⁴ These

129. Jason Stanyek, *Articulating Intercultural Improvisation*, 7 *RESONANCE* 44, 47 (1999), quoted in Borgo, *supra* note 10, at 167.

130. See Aaron K. Perzanowski, *The Penumbral Public Domain: Constitutional Limits on Quasi-Copyright Legislation*, 10 *U. PA. J. CONST. L.* 1081, 1133–34 (2008).

131. Martin Kretschmer, *Artists' Earnings and Copyright: A Review of British and German Music Industry Data in the Context of Digital Technologies*, 10 *FIRST MONDAY* 1 (Jan. 2005), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1200/1120> (arguing that copyright no longer provides financial support for creative elements of society).

132. Copyright Act, 17 U.S.C. § 102 (2006).

133. See, e.g., Arewa, *supra* note 10, at 619–23; Hines, *supra* note 10, at 487–88.

134. See Globberman & Rothman, *supra* note 4, at 165 (focusing on Canadian economic issues that may arise with the provision of a performer's copyright); Hector L. MacQueen & Alan Peacock, *Implementing Performing Rights*, 19 *J. CULTURAL ECON.* 157, 161 (1995) (discussing the increased international recognition of performers' rights); see also Zoesch, *supra* note 4, at 900 (discussing the merits of expanding copyright law to offer better protection for jazz arrangements, which are

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raise important questions for those concerned with the fair functioning of copyright law. However, some recommendations rely more on an individualist and commodified approach to music making, while others focus on allowing more flexibility, interplay and participation. While material advantages can make some musicians or institutions better able to profit from flexibility than others, we must not lose sight of the drawbacks of protective commodification. Copyright, or the control of access to music, is not the only method of generating value, and we must recognize a broad definition of social value to include dynamic and socially embedded practices of music making. We should examine their implications for copyright law as cultural policy.

characterized as derivative works).