

RESOLVING COPYRIGHT'S DISTORTIONARY EFFECTS

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I. INTRODUCTION

“Culture is a source of the self.”¹ But does copyright policy embrace cultural difference? This Note argues that copyright law entrenches investment bias in favour of genres of cultural expression that are easier and less costly to legally exclude and appropriate returns from, and freezes out genres that are not.

Legal excludability (“excludability”)² refers to the ability to exclude others from using and accessing copyrighted works without authorization. It is similar to saying—*Do not enter!* Appropriability refers to the ability to use or leverage legal excludability to seek payment or license fees for access and use, and attain economic returns preventing free consumption, reproduction, and dissemination. It is similar to saying—*You can only enter if you pay up!* Cultural expressions stemming from compositional practice that is ontologically derivative or dialogic, or that inherently involves perceivable similarity with previous works because of cultural norms, are (1) *either* costlier to produce due to licensing costs, *or* (2) have relatively lower potential of appropriability. Thus, such expressions potentially lose out on effective market circulation.

In this piece, I analyze compositional norms prevalent in Indian Classical Musical practice, and its *Raga* system, to show how multiple compositions in this genre inherently: (1) involve desirable similarity that is easily perceivable for listeners and the performer; (2) follow strictly defined rules of phrasing, sequencing, and performing compositions in a particular *Raga*; and (3)

1. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 33 (2004).

2. Throughout this Note, the use of “excludability” refers only to the ability to exclude using exclusionary/property rights that are statutorily granted. This is not to be confused with the ability to exclude others using technology.

voluminously incorporate pre-existing expression as critical to any composition in a particular *Raga*. These characteristic traits do not curtail the ability of producing limitless compositions within the genre, or even within the same *Raga*. However, they do make substantial similarity in multiple expressions, as is currently understood by courts, inevitable. Thus, at the level of copyright protection that currently persists, these expressions, due to their cultural traits, either involve high licensing costs (in case copyright law continues to protect all elements of the works in spite of the *inherence* of similarity) or high amounts of *scenes a faire* elements (in case copyright law renders motivic phrases, arpeggios, sequences and intonations, that are essential to be followed in a *Raga*, as *scenes a faire*) that are important to any and every composition in a genre. They are thus *either* costlier to produce, or relatively less excludable and appropriable than expressions from other genres of music. It is a lose-lose.

Current copyright policy, therefore, asymmetrically shapes the extent to which one can internalize market demand—in favour of highly excludable expressions,³ which estranges cultural expressions from genres like Indian classical music that are relatively dissonant and less legally excludable. Due to its sole focus on producing efficiency based on internalizing market value, copyright, in its present scope, is biased against works that have a lower ability to internalize market demand due to their potential of excludability and appropriability but may have high normative and cultural value in fostering self-determination.

These are copyright's *distortionary effects* that arise out of copyright's specific scope of exclusionary rights.⁴ They draw hierarchies in cultural aspirations and experience, while contributing to conformity in cultural practice.

As a solution, this Note advocates to structurally limit the scope of copyright's exclusionary rights across genres of cultural composition, by (1) limiting the overall scope of the derivative right to only cover adaptations in different mediums of representation,⁵ and (2) curtailing the scope of the reproduction right (a) to only protect the work *as a whole*, as against its

3. See generally Amy Kapczynski & Talha Syed, *The Continuum of Excludability and the Limits of Patents*, 122 YALE L.J. 1900 (2013) (making a similar case in context of checklist interventions and natural medicines that might have higher net social benefits, but are estranged from circulation as they are relatively less excludable and appropriable using patent rights).

4. Glynn S. Lunney Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 582 (1996).

5. See generally Talha Syed & Oren Bracha, *Copyright Rebooted*, Presentation at the 2022 Stanford University Law School Intellectual Property Scholars Conference (Aug. 12, 2022) (unpublished manuscript on file with author) (proposing a similar prescription, although justified by other reasons).

fragments or elements, and (b) to limit infringement only to when there is potential of market substitutability of the *overall* aesthetic experience of the primary work in the minds of perceivers.⁶ I argue that lack of an overly broad derivative right—that includes expressions in the same form, medium of representation, and market as the primary work—would eradicate the overt licensing cost involved in cultural compositions that inherently require re-mixing or use of pre-existing expression. Further, cutting down the scope of an overly broad reproduction right, which currently even protects fragments of expressions, would eradicate any relative lack of appropriability that exists due to a high volume of *scenes a faire* elements, and will protect the primary market of the work equitably if there is potential of aesthetic substitution of the work.

These structural changes, applicable across all genres of cultural expression, may reduce the potential to appropriate the highest possible economic value from a single highly excludable expression. However, in parallel, they enlarge the cultural breadth or diversity of expressions that would potentially be invested upon. These changes push towards an egalitarian position or starting point for a cultural speaker irrespective of the kind of cultural composition that they practice.

Part II of this Note explores the role of copyright policy and its tools in *enabling* production of diverse cultural expressions. Section II.A expands on the goals of cultural policy, namely, to allow diverse participation and exposure to expressions for autonomous, yet social, self-determination. Section II.B sketches the role of copyright law as a policy tool in fulfilling these goals. Section II.C, first, highlights the tools that copyright policy employs towards its instrumental purpose—the rights to exclude. Second, it critiques the myopic focus of policy on broad exclusionary rights and social value appropriation, highlighting its pitfalls: the *price tag* effect, *privilege expanding* effect, and finally, the focus of this Note, its *distortionary* effect.

Part III illuminates the doctrine and scope of exclusionary rights that produce these pitfalls—(1) the right to exclude the making of a derivative work and (2) the right to exclude reproductions. Section III.A first explores the

6. *Id.*; see also Talha Syed & Oren Bracha, *Copyright's Atom: The Expressive Work as the Basic Unit of Analysis*, Presentation at Philosophical Methods in IP Colloquium (June 2021) (unpublished manuscript on file with author) (providing a similar prescription to structurally scale down the scope of work in copyright infringement analysis, although justified by other reasons); Carys J. Craig, *Transforming "Total Concept and Feel": Dialogic Creativity and Copyright's Substantial Similarity Doctrine*, 38 CARDOZO ARTS & ENT. L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691280 (laying out a novel three-step test focusing on a holistic analysis to identify substantial differences, dissective analysis, and comparison).

contours of the derivative right, and then analyses its application to music sampling cases, where courts have effectively deemed recognisable digital sampling to be infringement unless one licenses the samples used—which adds to costs of production. Section III.B first traces the contours of the reproduction right and its expansion over time. It further analyses the case of *Gray v. Hudson*, where the Ninth Circuit Court of Appeals extended protection of a work to its fragments and held that even similarity of elements of musical works are infringing, unless these elements are *scenes a faire*.⁷ It thus created a distinction in the appropriability of cultural expressions that include lesser or no *scenes a faire* elements as against those which include more—by extending protection to not just the whole work but also its fragments or elements.

Part IV shows how, in the current state of copyright law, every expression in Indian classical music will *either* be an infringement of the derivative right and the reproduction right, *or* would have an enormous volume of *scenes a faire* elements which would render a composition inherently less excludable or appropriable. Section IV.A expands on the *Raga* system followed by Indian classical music, showing its emphasis on strict rules of composition. Section IV.B shows implications of these rules and the inherence of perceivable similarity in expressions in the same *Raga*. Section IV.C lays out how these cultural norms run dissonant with current copyright policy.

Part V shows how this dissonance of law with cultural practice leads to distortion of investment decisions away from these works and is complicit to freezing their visibility in global cultural markets. Section V.A argues that such a system of ordering creation and dissemination of cultural expressions distorts investments away from expressions that, due to copyright's scope, enable relatively lesser internalization of market value, are costlier to produce and are less excludable and appropriable. Section V.B shows the impact of these distortionary effects on global cultural practice and cultural dissemination considering global enforcement of minimum copyright standards. I contextualize the relevance of the case study on Indian classical music to argue in favour of revamping U.S. copyright law by taking lessons for inherently derivative art forms like music sampling that are predominantly practiced in contemporary American culture.

Finally, Part VI lays down preliminary prescriptions to resolve these distortionary effects by fine-tuning the scope of rights. Section VI.A addresses the need to resist expansion of rights as a solution, as it further weakens and ignores cultural norms and practices. Section VI.B elaborates on the structural limits that I propose regarding the overall scope of the derivative and

7. 28 F.4th 87, 97 (9th Cir. 2022).

reproduction rights. These structural limits resolve copyright's distortionary effects, and further copyright's goal of enabling *performers* of diverse cultural diversity.

II. IN QUEST FOR CULTURAL DIVERSITY

Culture plays a significant role in shaping us as political beings. It constitutes the interactive processes that facilitate “forg[ing], communicat[ing], enact[ing], interpret[ing], adapt[ing], challeng[ing], revis[ing] and recomb[ing]” meanings.⁸ Copyright policy is globally supposed to play an important role in enabling diverse cultural production. Towards this end, it provides exclusionary rights to producers. These exclusionary rights, however, come with significant costs that antithetically constrain cultural diversity. This Part expands on copyright's purposive end and drawbacks of its dependence on broad exclusionary rights.

A. GOALS OF CULTURAL POLICY

Cultural interactions are shaped by “expressions,” which allow participation and exposure to a variety of narratives and meanings.⁹ These expressions contribute to underwriting the meaning of creativity.¹⁰ They are agents of participating in social interactions. Such agency is not merely a medium of self-determination¹¹ and free choice but is its essential precondition.¹²

Law and Culture scholars postulated cultural interaction to be representative of *semiotic* democracy,¹³ something equally essential as, if not

8. Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 255 (2014).

9. HENRY JENKINS, KATIE CLINTON, RAVI PURUSHOTMA, ALICE J. ROBISON & MARGARET WEIGEL, CONFRONTING THE CHALLENGES OF PARTICIPATORY CULTURE: MEDIA EDUCATION FOR THE 21ST CENTURY 5–6 (2009), https://www.macfound.org/media/article_pdfs/jenkins_white_paper.pdf.

10. Yong Shao, Chenchen Zhang, Jing Zhou, Ting Gu & Yuan Yuan, *How Does Culture Shape Creativity? A Mini-Review*, 10 FRONTIERS PSYCHOL. 1219, 1221 (2019).

11. Bracha & Syed, *supra* note 8, at 251, 252 n.64.

12. *See id.* at 252 n.64.

13. *See* JOHN FISKE, TELEVISION CULTURE 236–39 (2d ed. 1987). The concept of “semiotic democracy” originates in the writings of John Fiske; in context of copyright scholarship, see Madhavi Sunder & Anupam Chander, *Everyone's a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597, 624 (2007); Madhavi Sunder, *IP*³, 59 STAN. L. REV. 257, 279–80 (2006); William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 23 (Stephen R. Munzer ed., 2001); William Fisher, *When Should We Permit Differential Pricing of Information?*, 55 UCLA L. REV. 1, 34 (2007).

more essential than, political democracy.¹⁴ It reflects a commitment to decentralized meaning-making by ensuring an effective opportunity to participate in the shaping of social subjectivity and norms.¹⁵ People tend to internalize the narratives they are exposed to.¹⁶ Our preferences, habits, and thoughts are often shaped by the kind of cultural communication and exchange that we are exposed to.¹⁷ By participating in cultural exchange, we not only absorb or shape the culture around us but are also intrinsically shaped by our exposure.¹⁸

Participation is a source of voice and perspective. It directly and proportionally affects “choice” in forming collective will.¹⁹ For “choice” to be free, moreso than quantity of participants, meaningful diversity is necessary.²⁰ Being exposed to diverse lifestyles and cultural expressions significantly enables autonomous self-determination because it is informed by a more diverse and meaningful *range* of options.

The diversity I refer to here is twofold: (1) diverse participation and (2) diverse exposure through access. A diverse expressive environment free from control and manipulation offers opportunities for critical reflection and an arena of meaningful self-determination.²¹ However, systemic control over expression—that individuals can visibly access or use for downstream creation—tramples on autonomy of individuals and communities. Control, in the hands of privately coordinated entities, working in profit-enhancing bubbles, constrains and manipulates the process of forming cultural preferences.²² It could potentially curtail minority speech that private actors deem less or not profitable.²³

14. Sunder, *IP*³, *supra* note 13, at 325.

15. Bracha & Syed, *supra* note 8, at 256.

16. See Tania Zittoun & Alex Gillespie, *Internalization: How Culture Becomes the Mind*, 21 *CULTURE & PSYCHOL.* 477, 484 (2015).

17. See Balkin, *supra* note 1, at 36 (arguing that the “various processes of communication and cultural exchange are the sources of the self and its development over time,” and that we produce our ideas, habits, thoughts and selves through communication).

18. Bracha & Syed, *supra* note 8, at 254–55.

19. *Id.* at 253, 262.

20. Fisher, *Differential Pricing*, *supra* note 13, at 34 (citing JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 252–57 (5th ed. 1909); see also William Fisher, *Reconstructing the Fair Use Doctrine*, 101 *HARV. L. REV.* 1659, 1751–52, 1772 (1988) (harping on the importance of cultural diversity and the role of meaningful choice in accessing cultural expressions).

21. Bracha & Syed, *supra* note 8, at 252.

22. ASTRA TAYLOR, *THE PEOPLE'S PLATFORM: TAKING BACK POWER AND CULTURE IN THE DIGITAL AGE* 186 (2014).

23. Balkin, *supra* note 1, at 28; see also Elizabeth Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 *U.C. DAVIS L. REV.* 591, 618 (“Proprietary ownership of traditional creative processes can hardly be said to promote ‘progress.’”).

Here is where the law steps in. For a cultural dialogue to be fair, representative, diverse, and dialogic, it is imperative that the law substantively equalizes the position of cultural speakers, as well as the forms of expressions produced. The goal of cultural policy thus, as a legal matter, is *enablement* of those who wish to expressively produce for their own self-determination as well as the social meaning-making.

B. ROLE OF COPYRIGHT IN CULTURAL POLICY

Copyright policy is no bystander to cultural expressions and their engagement,²⁴ and significantly affects the shape and vision of culture.²⁵

Traditionally, copyright has been justified by the incentive-access paradigm.²⁶ As information is inexpensive to copy, to ensure creators can recoup costs of development, they receive exclusionary rights²⁷ that allow them to charge a price for using their works.²⁸ As information is arguably non-rival²⁹ (one person's use does not disable someone else's use), exclusion creates deadweight loss—often called copyright's static inefficiency on the consumption and use side, and dynamic inefficiency on the side of downstream creation.³⁰ However, this is often justified by claims of dynamic efficiency and a larger corpus of output that is supposedly produced through exclusion.³¹ Copyright thus is often a complex compromise that involves constant tradeoff between: (1) relative social costs, i.e., its static and dynamic inefficiencies; and (2) benefits, i.e., its dynamic efficiency.³² This traditional economic view, focused on recouping highest possible value as a means of inducing more creation, a view that spins out of methodological individualism, has pervaded copyright's purpose for more than five decades.³³

24. Sunder, *IP*³, *supra* note 13, at 322.

25. Fisher, *Reconstructing the Fair Use Doctrine*, *supra* note 20, at 1696.

26. See Talha Syed & Oren Bracha, *Beyond the Incentive-Access Paradigm? Product Differentiation and Copyright Revisited*, 92 TEX. L. REV. 1841, 1843 (2014); see also Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 975 (2012).

27. See Syed & Bracha, *supra* note 26, at 1843.

28. *Id.*

29. *Id.* at 1848–49; Kapczynski, *supra* note 26, at 974; Swaraj Paul Barooah, *Looking Beyond IP Internalism*, SPICY IP (Sept. 21, 2012), <https://spicyip.com/2012/09/looking-beyond-ip-internalism.html>.

30. Kapczynski, *supra* note 26, at 974.

31. *Id.*

32. Syed & Bracha, *supra* note 26, at 1844; see Fisher, *Reconstructing the Fair Use Doctrine*, *supra* note 20, at 1703.

33. Syed & Bracha, *supra* note 26, at 1844.

More recently, however, IP and social justice scholars have been arguing for a culturally conscious account of copyright.³⁴ They argue copyright policy's goal to be to foster cultural flourishing by inducing participation, production and dissemination of diverse cultural expressions,³⁵ especially ones that “talk back” to normative cultural conceptions.³⁶ Referring to it as copyright's new

34. See, e.g., Neil Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (arguing that copyright's fundamental purpose to underwrite speech competence to contribute to a democratic civil society, focusing on multiplicity of expressive outlets, is more conducive to market diversity than concentrated markets); Fisher, *Reconstructing the Fair Use Doctrine*, *supra* note 20 (arguing for a democratic and culturally conscious account of copyright's economic basis); see also Sunder, *IP*, *supra* note 13, at 269 (arguing for copyright law to be understood as a legal vehicle for facilitating recognition of diverse contributors to cultural discourse); Bracha & Syed, *supra* note 8 (arguing for copyright to be understood from a consequence-sensitive lens focusing on broadening its purpose to further autonomous self-determination and cultural democracy which comprise important determinants of efficiency, complementary to economic concerns); Julie Cohen, *Creativity and Culture in Copyright Law*, 40 U.C. DAVIS L. REV. 1151, 1197 (2007) (criticizing the standard economic account of copyright as being counterintuitive to advancing its goals of promoting a breathing room for autonomous creative practice); BJ Ard, *Taking Access Seriously*, 8 TEX. A&M L. REV. 225, 269 (2021) (arguing access of diverse perspectives to distribution markets as being instrumental to achieving copyright's goals of more democratic and participatory culture); James Boyle, *Cultural Environmentalism and Beyond*, 70 L. & CONTEMP. PROBS. 5, 10–14 (2007) (criticizing the solely economic account of copyright as being counter-intuitive to the intent of cultural policy, or what the author refers to as “cultural environmentalism”); LAWRENCE LESSIG, *FREE CULTURE* 8, 192–93 (2004) (arguing that copyright imposes a permission culture on the kinds of cultural expressions that are practiced); YOCHAI BENKLAR, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 285 (2006) (critiquing copyright exclusivities as denying opportunities to many for participating in cultural practice and instead arguing for a commons-based regime); Elizabeth Rosenblatt, *Social Justice and Copyright's Excess*, 6 TEX. A&M J. PROP. L. 5 (2020) (urging courts to consider impact on social justice while adjudicating copyright policy's scope and its promotion of progress); CARYS CRAIG, *COPYRIGHT COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW* 38–42 (2011) (discussing the purpose of copyright from the perspective of nature of creativity being inherently dialogic and cumulative); Rosemary Coombe & Susannah Chapman, *Ethnographic Explorations of Intellectual Property*, OXFORD RES. ENCYCLOPEDIA: ANTHROPOLOGY (2020), <https://doi.org/10.1093/acrefore/9780190854584.013.115> (suggesting that the purpose of copyright should be cognizant of the actual reality of how culture is practiced rather than molding cultures to fit in into a solely economic narrative); ANJALI VATS, *THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE AND THE MAKING OF AMERICANS* 204–08 (2020) (criticizing the economic account of copyright from a critical race lens and arguing that it is important to consider citizenship implications of copyright and to be cognizant of the participants it deems to be cultural citizens and those it ignores).

35. Sean A. Pager, *Does Copyright Help or Harm Cultural Diversity in a Digital Age?*, 32 KRITIKA KULTARA 397, 400–02 (2019), <https://ajol.ateneo.edu/kk/articles/83/1007>.

36. Rosenblatt, *supra* note 23, at 619 (citing Keith Aoki, *Adrift in the Intertext: Authorship and Audience “Recoding” Rights—Comment on Robert H. Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work,”* 69 CHI-KENT L. REV. 805, 836 (1992)).

enlightenment in a participation age,³⁷ this view postulates copyright law as a means to provide optimal control over creative expressions to recoup *fair* economic returns, so that one is not dis-incentivized from producing, or is enabled to produce, creative expressions and is not forced to shift to marginal sources of revenue. This furthers the *end* goal³⁸ of providing a wide variety of cultural expressions for people to access.³⁹ This is the presumptive goal of copyright that I base this Note on.⁴⁰

The theory that I postulate here, distinct from a theory of copyright as rewards or the law and economics justification of incentives, is that copyright, as a matter of legal policy, is a *historically specific*⁴¹ tool of *enablement* to allow for *human flourishing*. It is a tool meant to ensure that those who wish to expressively produce are free (or have the agency) to do so without worrying about fulfilling their basic economic needs in a modern market society. It is a tool to *affirmatively protect* those who wish to produce expressions from *involuntary subjection* to the logic of a *historically specific* market society⁴² where realization of basic needs, that constitute *human flourishing*,⁴³ is dependent on market

37. Sunder, *IP*³, *supra* note 13, at 264.

38. See MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 100 (2012) (discussing whether intellectual property is an end or the means).

39. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

40. Although I rely on this cultural justification of copyright policy, scholars continue to debate on the fundamental justifications of copyright policy. See, e.g., William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (Stephen Munzer ed., 2000). Even if we change the premise of analysis to copyright's labour justification or its justification focused on protecting the personality of the author, the distortionary effects of copyright policy continue to sustain.

41. Oren Bracha, *The History of Intellectual Property as The History of Capitalism*, 71 CASE W. RESV. L. REV. 547, 574–75 (2020) (tracing the history of IP to the process of commodification which is an output of an ensemble of social relations that constitute capitalism and found specific phenomenological presence only during the 17th Century, while also trying to denaturalize IP law).

42. ELLEN MEIKSINS WOOD, THE ORIGIN OF CAPITALISM: A LONGER VIEW 106 (1999).

43. What components constitute Human Flourishing can be widely debated, but the ones I specifically mean to refer to here are a combination of the spirit of the components endorsed in two texts—both of which specifically reject a notion of methodological individualism and endorse fulfillment of these basic components through the instrument of the law—one in context of real property law, and the other in context of copyright law. See Gregory S. Alexander, *Ownership and Obligations: The Human Flourishing Theory of Property* 2, 5, CORNELL LAW FACULTY PUBLICATIONS, PAPER 653 (2013), <https://scholarship.law.cornell.edu/facpub/653/> (emphasizing life, freedom, practical reasoning, and sociability as four essential capabilities of human flourishing); see also Bracha & Syed, *supra* note 8, at 256–57 (distilling three elements of human flourishing, which are self-determination, meaningful activity, and sociability).

competition.⁴⁴ As a matter of legal policy, it specifically aims to *enable* (as against incentivize) those who perform expressions to sustain economically (i.e., at the least fulfill basic needs), be recognized, as well as flourish (as distinguished from theories of individual welfare) in a market society. It is in consonance with this theory that I distill the relevant scope of copyright that adequately, optimally, and equitably enables a diverse set of performers without creating distortions based on the ability to internalize market value out of these expressions.

Using this premise, the central thesis of this Note is that current copyright policy, which is pervaded by neoliberal concepts of efficiency instituted by Coase-ian and Hayekian economics, creates asymmetrical demand in favour of highly excludable expressions, and therefore estranges cultural expressions from genres like classical music and hip hop that are relatively dissonant and less legally excludable. These are copyright's distorting effects that arise out of copyright's specific scope of exclusionary rights. They draw hierarchies in cultural aspirations and experience and contribute to conformity in creative cultural practice.

C. COPYRIGHT'S TOOLS

To fulfill its purpose, copyright policy confers “rights to exclude” to producers of original expression.⁴⁵ However, such exclusionary rights have significant adverse effects on the *nature* of expressions produced, the kind of participants who produce, as well as the exposure and access to expressions that are produced.

1. *Rights to Exclude*

Rights to exclude, or exclusionary rights, allow those who produce expressions to commodify their output—namely restrict unauthorized use and access and reap economic returns by selling the output in the market.⁴⁶ Its reasoning flows from Harold Demsetz's influential statement that exclusionary rights have a fundamental advantage in dictating efficient production, as production is guided by market signals which drive investment towards content in demand.⁴⁷ It reflects the philosophy that exclusionary rights best

44. See Talha Syed, *Capital as a Social Relation* (unpublished manuscript) (on file with author); see also Talha Syed, *The Horizontal and Vertical in Capitalism* (unpublished manuscript) (on file with author).

45. Kapczynski & Syed, *supra* note 3, at 1908.

46. *Id.*

47. See Kapczynski, *Cost of Price*, *supra* note 26, at 982 (citing Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 9 (1969)); see also PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 146 (rev. ed.

foster investment directed to valuable expressions⁴⁸ and they help creators internalise a substantial part of the social value.⁴⁹

Over time, these rights to exclude have become broader, deeper, and more severe⁵⁰ in their scope, duration, breadth of entitlements, as well as the remedies offered—they may impose even criminal punishments for those who hinder potential of appropriating economic value. The law's shift in focus from *enablement* towards extraction of surplus value has expanded the scope of exclusionary rights to cover fragments,⁵¹ as well as potential variations to the original work that the producer may not have originally conceived. Such expansion comes with at least three pitfalls: (1) the *price-tag* effect; (2) the *privilege-expanding* effect; and (3) the *distortionary* effect.

2. Pitfalls of Expanding the Right to Exclude

The first adverse consequence of expanding exclusionary rights in knowledge and culture is the *price-tag effect*. This *price-tag* effect reflects two key social concerns: (1) many consumers of cultural expressions are denied access to works that could potentially define their cultural selves, due to being priced out; (2) many downstream creators unable to pay licensing costs to access and use pre-existing works are denied that creative opportunity.⁵² Thus, welfare-maximising effects of expanding exclusionary rights ignore distributive realities and impair the stimulus of creativity, especially for those who structurally lack the ability to pay.

The second adverse consequence is what I refer to as the *privilege-expanding* effect, drawing from the work of Amy Kapczynski.⁵³ Professor Kapczynski argues that the *kind* of expressions that are available often depend on the choices and preferences of those with the highest ability to pay.⁵⁴ This reinforces privilege and curates a homogenous bubble around culture.

2003) (presenting a commodity strategy of transacting with prices appropriate to drive investment in desirable directions, reflecting the social value of the information and expression).

48. Kapczynski, *Cost of Price*, *supra* note 26, at 983.

49. Syed & Bracha, *supra* note 26, at 1843.

50. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 821 (2008).

51. See Syed & Bracha, *Copyright's Atom*, *supra* note 6; see Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 238–46 (2008).

52. Syed & Bracha, *supra* note 26, at 1843–44.

53. Kapczynski, *Cost of Price*, *supra* note 26, at 978–79 (discussing how IP systems influence which goods are produced by prioritizing the needs of the wealthy).

54. See *id.*; see also Boyle, *supra* note 34, at 12 (explaining how a hair-loss drug could be more valuable than the cure for most tropical diseases, if value is defined as what current

The focus of this Note, however, is on the third adverse consequence—copyright's *distortionary* effect. Copyright systems overtly reliant on broad exclusionary rights systematically distort private investment decisions and resources towards expressions that are highly excludable and appropriable, allowing creators of such works to internalise a higher relative share of market value relative to other works. Thus, it portrays a perception of a relative lesser value of works that are relatively less excludable⁵⁵ due to their inherent cultural norms of practice, in spite of their normative significance. Consequently, this system fails to enable investment in expressions that potentially offer more or equal net social benefits because these investments are *either* costlier *or* have lower potential of extracting surplus value through the current scope of rights.⁵⁶

Before explaining these distortionary effects and contextualising them in the example of Indian classical music, I will analyse how courts in the United States have interpreted specific exclusionary rights granted under the Copyright Act, the scope of which significantly contributes to these distortions.

III. SCOPE OF RIGHTS

In this Part, I will explore contours of (1) the right to exclude making of a derivative work, meant to exclude works that impinge the original's secondary market, and (2) the right to exclude making of reproductions in the original's primary markets. Expansive doctrinal framings and misguided interpretations of both these rights produce copyright's *distortionary* effects.

A. RIGHT TO EXCLUDE MAKING OF A DERIVATIVE WORK

1. *Contours*

The concept of a derivative right⁵⁷ exists to extend exclusionary rights to the secondary market of the original work—where merely the “form” or medium of representing the primary work is altered.⁵⁸ However, courts have extended the scope of this right to allow the owner to exclude all utilizations

market participants would value the most, which depends on the existing distribution of wealth and of rights).

55. Kapczynski & Syed, *supra* note 3, at 1938 (recognizing similar distortion of investment decisions in case of those innovations that are highly excludable and appropriable using patent law, and those, due to social norms or the nature of the practice involved, are relatively less excludable and commodifiable).

56. *Id.* at 1942–48.

57. 17 U.S.C. §106 (2016).

58. *Id.* (providing definition of “derivative work”).

of their work that are even for the same medium, form, or purpose as the original.⁵⁹ Courts say that as long as there are “recognizable blocks of expression” from the primary work, there is no need for a change in medium of representation.⁶⁰ This expansion has adversely affected the ability of follow-on creators who use pre-existing works to reinterpret and provide alternate expressions through the same medium of representation.⁶¹ Consequently, the scopes of the reproduction right (supposed to cater to the primary market or the same medium of representation) and this derivative right often overlap, resulting in what Professors Talha Syed and Oren Bracha call a “freewheeling reproduction-derivative super right.”⁶²

The United States was the first country in the world to adopt an arguably open-ended derivative right, distinct from even the Berne Convention that restricts the right to exclude only to certain specific kinds of adaptations of works.⁶³ The logic is to expand exclusionary rights to all channels which expose even fragments of the primary work to the public.⁶⁴

2. *Get a License or Do Not Sample!*

Such broad reading of the derivative right has adversely impacted the practice of hip hop music producers who significantly rely upon use of pre-

59. See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 747–48 (2011) (observing that for most courts, the rule is that “new expressive content, even a fundamental reworking of the original, is generally insufficient for the use to be transformative absent a different expressive purpose”); see also R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 484–85 (2008) (explaining that courts focus on the transformativeness of the purpose in using the underlying work, instead of transformation of the content); Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 876 (2015) (arguing that courts have mostly required the allegedly infringing work to have a different purpose to not infringe the derivative right, opposing the idea of “content transformativeness”); Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 578 n.83 (2016) (collecting cases where courts have asked for a different purpose for use to not be infringement).

60. See, e.g., *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984); see also *Berkic v. Crichton*, 761 F.2d 1289, 1291 (9th Cir. 1985).

61. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021); Akshat Agrawal, *Andy Warhol Foundation v. Goldsmith: A Misnomer of a Debate*, PHIL IP & POL’Y (Oct. 22, 2022), <https://philipandpolicy.wordpress.com/2022/10/22/andy-warhol-foundation-v-goldsmith-a-misnomer-of-a-debate/> (providing a commentary of the Warhol case).

62. Syed & Bracha, *supra* note 5.

63. See Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 GEO. L.J. 1505, 1512–16, 1516 n.56 (2013); see also Berne Convention for the Protection of Literary and Artistic Works art. 12, Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1979) [hereinafter Berne Convention].

64. Zechariah Chafee, Jr., *Reflections on Copyright Law*, 45 COLUM. L. REV. 503, 505 (1945).

existing works to compose their expression.⁶⁵ Specifically, cuttin' and scratchin', digital sampling, looping, and mashing up—all of which are integral parts of the hip hop music aesthetic, have been delegitimized.⁶⁶

Digital sampling is one of the integral “minerals” of hip hop music production.⁶⁷ It is often referred to as the African and African American community's tapestry.⁶⁸ The process involves inserting a particular sound or audio segment from a pre-existing recording into a new segment, sometimes manipulating various elements like the pitch or tempo, to create new expressions with an alternate aesthetic. Its aesthetic purpose is to make the incorporated sound recognizable yet the output distinct. This practice is embedded in their musicking and compositional practices.⁶⁹

The way U.S. courts have treated music sampling infringement cases in respect of the derivative work right reveals the conceptual dissonance between cultural practice and copyright policy.⁷⁰ Until now, courts unanimously say sampling of recognizable music segments infringe the derivative right. In *Grand Upright Music Ltd. v. Warner Brother Records*, Judge Duffy held sampling clearance to be a norm, and indicated sampling to be theft unless licenses were sought.⁷¹ In *Bridgeport Music Inc. v. Dimension Films*,⁷² the court pronounced

65. See Rosenblatt, *supra* note 23, at 606, 626, 629; see also Tonya M. Evans, *Sampling, Looping, and Mashing... Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 857 (2011); Chris Johnstone, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 400 (2003); Jason H. Marcus, *Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767, 790 (1990); Josh Norek, *You Can't Sing Without the Bling: The Toll of Excessive Sample License Fees on Creativity in Hip-hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 102 (2004); Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 100 (2007).

66. Evans, *supra* note 65, at 2.

67. See SIVA VAIDYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT AFFECTS CREATIVITY 145 (2001); see also Marcus, *supra* note 65.

68. Evans, *supra* note 65, at 46.

69. See Rosenblatt, *supra* note 23, at 626; see also Larisa K. Mann, *Decolonizing Copyright Law: Learning from the Jamaican Street Dance* 6, 42–44 (Fall 2012) (Ph.D. dissertation, University of California, Berkeley), <https://escholarship.org/content/qt7h8449q6/qt7h8449q6.pdf> (exploring how recognizable sampling is specifically embedded as an essential part of the compositional practice, in the context of Jamaican music).

70. Rosenblatt, *supra* note 23, at 629; see also Brandes, *supra* note 65.

71. 780 F. Supp. 182, 183 (S.D.N.Y. 1991); see also Rosenblatt, *supra* note 23, at 616, 638 (critiquing use of “plagiarists” to condemn cultural expressions and participants who rely on cultural norms).

72. 383 F.3d 390 (6th Cir. 2005); see also Brandes, *supra* note 65; Ponte, *supra* note 65.

looping a two-second portion of a guitar riff from the sound recording of the song “*Get Off Your Ass and Jam*” for use in “*I Got the Hook-Up*” to be infringing the plaintiff’s copyright.⁷³ The Court used § 114(b)—read with § 106—of the Copyright Act to hold that using an actual copy of any element of a sound recording, however insignificant it may be to the whole work, is impermissible.⁷⁴ It said—“*Get a license or do not sample.*”⁷⁵

These decisions gutted the ability of hip hop artists to use samples for downstream creation without adding to their costs.⁷⁶ The cost was not just the licensing fee, but also transactional costs associated with getting a license.⁷⁷ There was a severe decrease in the use of samples post-1991, and many up-and-coming artists in the hip hop genre had to change creative directions, because they could not afford licensing fees to clear samples.⁷⁸ Investors were reluctant to invest in artists who were using samples due to added cost and risk.⁷⁹ Entire styles had to be changed, which left no breathing space for

73. *Bridgeport Music*, 383 F.3d at 401–02.

74. *Id.*

75. *Id.* at 398.

76. See KEMBREW MCLEOD & PETER DI COLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 27, 83, 105, 114–18, 137–44, 158–62 (2011); REBECCA GIBLIN & CORY DOCTOROW, CHOKEPOINT CAPITALISM 165–68 (2022); Evans, *supra* note 65, at 18–19; Rosenblatt, *supra* note 23, at 630–32; see generally Amanda Sewell, *How Copyright Affected the Musical Style and Critical Reception of Sample-based Hip-Hop*, 26 J. POPULAR MUSIC STUD. 295–320 (2014) (claiming that people other than the artists, such as producers or record labels, make financial decisions, requiring change or abandonment of music due to not being able to afford or clear the desired samples); Erik Nielson, *Did the Decline of Sampling Cause the Decline of Political Hip-Hop?*, ATLANTIC (Sept. 18, 2013), <https://www.theatlantic.com/entertainment/archive/2013/09/did-the-decline-of-sampling-cause-the-decline-of-political-hip-hop/279791/>; Mike Schuster, David Mitchel & Kenneth Brown, *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 200–01 (2019).

77. See GIBLIN & DOCTOROW, *supra* note 76, at 165–68; see also MCLEOD & DI COLA, *supra* note 76, at 158–62.

78. See Brandes, *supra* note 65, at 119 (citing VAIDYANATHAN, *supra* note 67, at 133, 140, 143); see also Rosenblatt, *supra* note 34, at 13 (citing KEMBREW MCLEOD, FREEDOM OF EXPRESSION 68 (1st ed. 2005)) (discussing how sampling-related copyright litigation led rap and hip hop creators to rely on fewer, more prominent samples rather than using a large number of less distinctive samples to create rich musical textures); see generally Cohen, *supra* note 34 (arguing copyright to substantially conform creativity and dictate what artists can and cannot do).

79. See KEMBREW MCLEOD, FREEDOM OF EXPRESSION 68 (1st ed. 2005); see also Brandes, *supra* note 65, at 123–25; Sewell, *supra* note 76, at 295–320.

creative self-determination.⁸⁰ The signifyin' rapper had lost its voice⁸¹ and was rather rendered a lazy thief.⁸²

3. *Is De Minimis Helpful? Dissonance with Compositional Logic*

In *VMG Salsoul, LLC v. Ciccone*, the Ninth Circuit minutely diverged from *Bridgeport Music*, and allowed copying sound recordings to the extent that the copied element is an unrecognizable trivial component of the original.⁸³ The court held that so long as a reasonable listener cannot identify appropriation, the use of a pre-existing sound recording would be *de minimis* and not infringe⁸⁴ (citing the Ninth's Circuit's logic in *Newton v. Diamond*,⁸⁵ which was in context of sampling musical compositions and not sound recordings).⁸⁶

This decision, however, is no victory for sampling and appropriation artists.⁸⁷ The *de minimis* threshold rejects *Bridgeport*, but as Oren Bracha shows, it provides an equally problematic maxim—"Get a license or never copy anything recognizable."⁸⁸ Any non-meager sample recognizable by ordinary members of the audience is not saved by this exception.⁸⁹

Rap artists often intentionally incorporate recognizable material to draw familiarity.⁹⁰ Sampling is a tool to talk-back to dense media portrayals that dominate the social environment.⁹¹ It is a discursive tactic to retell and recontextualize narratives.⁹² It is the very popularity of the sampled part of the song that makes it indulgent and provokes the impulse of recontextualizing or

80. See Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy's Chuck D and Hank Shocklee*, LITTLE VILLAGE (Oct. 17, 2011), <https://littlevillagemag.com/how-copyright-law-changed-hip-hop-an-interview-with-public-enemys-chuck-d-and-hank-shocklee/>.

81. See VAIDYANATHAN, *supra* note 67, at 143.

82. ANJALI VATS, *THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE AND THE MAKING OF AMERICANS* (2020) (lamenting the racialization of human progress through labelling people of color as "lazy thieves" capable only of rote reproduction).

83. 824 F.3d 871, 881 (9th Cir. 2016).

84. *See id.*

85. *See id.* at 877; *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004).

86. 824 F.3d at 881; Oren Bracha, *Not De Minimis: (Improper) Appropriation in Copyright*, 68 AM. U. L. REV. 139, 156–57, 168 (2018).

87. Bracha, *supra* note 86, at 157, 183.

88. *Id.*

89. *See id.* at 165. These are still subject to the Fair Use exception which, however, is a cold comfort due to its unpredictability.

90. *See* Brandes, *supra* note 65, at 118; Wendy Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 L. & CONTEMPORARY PROBS. 93, 98 n.25 (1992).

91. Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights*, 68 CHI.-KENT. L. REV. 805, 836 (1993).

92. *See* Sundar & Chander, *supra* note 13, at 619–621; Rosenblatt, *supra* note 23, at 643, 646.

producing an distinct construction with an alternate meaning, message or structure⁹³ to reimagine cultural expression.⁹⁴ The whole point of this cultural practice is to foster a discursive and dialogic community or to engage with repositories of social memory to enhance collective experience.⁹⁵ The *de minimis* rationale continues to undermine this common cultural practice of *glomming on* to parts of recognizable works⁹⁶ and does nothing to save such expressions. It continues to disrespect hip hop artists who make conscious aesthetic choices to recognizably sample from pre-existing works⁹⁷ by increasing their costs.

These decisions reflect the ethnocentric focus on culture while framing and interpreting contours of the derivative right, ignorant of borrowing as a normal cultural tendency and practice.⁹⁸

B. THE RIGHT TO EXCLUDE REPRODUCTIONS

1. *Contours*

The right to exclude reproductions encompasses much of the content of the derivative right and goes even beyond.⁹⁹ With the aim of compensating creators for substitution in their primary markets,¹⁰⁰ the reproduction right initially focused on identical copying or colourable changes by the defendant to evading complete copying.¹⁰¹ However, as Oren Bracha shows,¹⁰² pressures in the 19th century, triggered by industries realising the enormous benefit that accrues through broad exclusionary rights, significantly expanded its scope¹⁰³

93. Rosenblatt, *supra* note 23, at 618.

94. See VAIDYANATHAN, *supra* note 67, at 135; Brandes, *supra* note 65, at 118.

95. VAIDYANATHAN, *supra* note 67, at 137–38.

96. Bracha, *supra* note 86, at 185.

97. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 577–78 (2006).

98. See Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 281, 332 (2006). Even U.S. courts have recognized borrowing to be essential to musical practice across genres. See, e.g., *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998) (stating that the derivative right is too broad because borrowing from known sources is all but necessary); *Gray v. Perry*, No. 2:15-CV-05642, 2018 WL 3954008 (C.D. Cal. Aug. 13, 2018) (stating that music “borrows and must necessarily borrow” from known and used works).

99. Michael Abramowicz, *A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 334 (2005).

100. Bracha & Syed, *Copyright Rebooted*, *supra* note 5.

101. *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853).

102. Bracha, *The Ideology of Authorship*, *supra* note 51.

103. *Id.* at 226.

to include copying even *elements of works* that have a similar “look and feel.”¹⁰⁴ Thus, over time, the scope of this right has bloated to cover “quite remote degrees of similarities under a very broad substantial similarity test.”¹⁰⁵

The baseline of copyright infringement in the primary market has changed from copying of the whole work or a large portion of it, to diminishing the value of *any part or element* of the original, and to free riding of “any” element from the labour of the original creator.¹⁰⁶ The judgment of similarity now rests upon a subjective and mystifying test where different circuits incorporate multiple different standards, focus on dissection of elements, and adjudicate upon the “similarity of feel” in the protectable elements of two works.¹⁰⁷ In other words, the scope of the protected “work” is now expanded to include its fragments, even when used or reproduced outside the context of the whole primary expression or its aesthetic appeal.¹⁰⁸

Due to more analysis of elemental similarity as against the overall expression, courts have, rightly, rendered certain building block elements of works as being *scenes a faire* and thus outside the scope of similarity analysis, given their use as stock inputs in multiple compositions. *Scenes a faire* is, thus, a limited saving grace. In *Skidmore v. Led Zeppelin*, the Ninth Circuit Court of Appeals held common or trite musical elements to not be subject to the substantial similarity analysis as no one person could claim ownership over them.¹⁰⁹ Recognizing arpeggios generally to be *scenes a faire* elements,¹¹⁰ the court refused to exclude or protect a combination of “a five-note descending chromatic scale in A minor; a sequence of half notes and whole notes in the

104. *See id.* at 227–28, 238–40; Craig, *Transforming “Total Concept and Feel,” supra* note 6, at 24.

105. Bracha & Syed, *Copyright Rebooted, supra* note 5.

106. Bracha, *The Ideology of Authorship, supra* note 51, at 228–32 (analyzing Justice Story’s contribution to dividing the “work” into “elements protectable” through *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) to the extent that as long as the value of the original work is diminished, or the author’s labor are substantially appropriated, there can be copyright infringement even if there was no copying of the whole work).

107. *See* Bracha & Syed, *Copyright Rebooted, supra* note 5; Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1823 (2013); Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1267–73 (2014); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 724–26 (2010).

108. *See* Bracha & Syed, *Copyright’s Atom, supra* note 6; *see also* Bracha, *The Ideology of Authorship, supra* note 51, at 234–35.

109. 952 F.3d 1051, 1069 (9th Cir. 2020).

110. *Id.* at 1070–71 (holding that “chromatic scales and arpeggios cannot be copyrighted by any particular composer”).

scale; a melody involving various arpeggios and note pairs; a rhythm of successive eighth notes; and a collection of pitches in distinct proportions.”¹¹¹

2. *Protection of Fragments: Joyful Noise?*

Gray v. Hudson is a recent case from the Ninth Circuit Court of Appeals that demonstrates how courts expand the scope of the reproduction right from the *overall work* itself, into its *fragments or elements*.¹¹²

In *Gray*, the plaintiff Marcus Gray (composer of the song “Joyful Noise”)¹¹³ alleged infringement over an eight-note ostinato against defendant-Katy Perry’s song¹¹⁴—“Dark Horse.”¹¹⁵ After consciously leaving “access” for the purposes of infringement unaddressed,¹¹⁶ the court analyzed substantial similarity through the two-part test of extrinsic and intrinsic similarity.¹¹⁷ While analyzing the extrinsic test, both the district court as well as the Ninth Circuit focused on figuring out whether any element of the plaintiff’s work was protected and objectively similar to any element of the defendant’s work.¹¹⁸ Both held the elements involved—for example chord progressions, tempos, recurring vocal phrases, repeating hook phrases, syncopation and arpeggios—to be common and trite elements that could not protectable.¹¹⁹ Rather than focusing on the overall aesthetic differences or similarities between the works, it broke compositions into parts and scrutinized protectability.¹²⁰

The court recognized that musical works generally do, and must, borrow from well-known elements used before.¹²¹ Importantly, the court reaffirmed the finding of the district court that elements ubiquitous in popular music and firmly rooted in a genre’s tradition, like chants, use of horns or glissando to

111. *Id.* at 1071–72.

112. *Gray v. Hudson*, 28 F.4th at 87 (affirming the district court’s decision in *Gray v. Perry*).

113. LilMeeker, *Joyful Noise-Flame ft. Lecrae*, YOUTUBE, (Feb. 15, 2009), https://www.youtube.com/watch?v=gWDutCdfS_s&ab_channel=LilMeeker.

114. Katy Perry (Official), *Dark Horse*, YOUTUBE (Feb. 20, 2014), https://www.youtube.com/watch?v=0KSOMA3QBU0&ab_channel=KatyPerryVEVO.

115. *Gray v. Hudson*, 28 F.4th at 92.

116. *Id.* at 96 (deciding not to address the access prong because the case may be resolved based on the “substantially similar” prong). The district court had already concluded the presence of access. *Gray v. Perry*, 2018 WL 3954008, at *5.

117. *Gray v. Hudson*, 28 F.4th at 96.

118. *Id.* at 96–98 (stating that the extrinsic test requires “breaking the works down into their constituent elements and comparing those elements for proof of copying as measured by substantial similarity” and emphasizing the importance of distinguishing between the protected and unprotected material in a plaintiff’s work).

119. *Id.* at 98–100.

120. *Id.* at 98 (holding that the elements plaintiff identified, instead of the whole work, were not copyrightable).

121. *Id.* at 99; *see also Gray v. Perry*, 2018 WL 3954008, at *6.

not be legally excludable because they are indispensable to cultural practice.¹²² Thus, the court rendered them *scenes a faire*, an idea that is not protected or excludable.¹²³ The court also held that sequences of notes, if commonplace to the genre, would not be protectable.¹²⁴ The rationale was that if the rules of the game only allow relatively few ways to express a combination of notes, given constraints of a particular musical convention and style, the same would not be excludable.¹²⁵ Further, while acknowledging combination of these unprotectable elements may be excludable when such combinations were original, the court recognized their excludability to be narrow and the protection thin—defined by the test of virtual identicality.¹²⁶

These observations, although pro-copying, limiting the scope of the work, and cognizant of cultural norms, stem out of a misplaced focus on breaking down compositions into elements while adjudicating similarity, as against one focusing on overall aesthetic appeal of the two works as perceived by consumers. When there is no meaningful scrutiny of sufficient similarity on the level of the overall work and the sole focus is on filtering out unprotectable fragments, the outcome is an unfortunate distortion. Even if we would ideally think any two musical works to be different in terms of their aesthetic sensation, if certain protected elements are similar, it would be enough for the latter work to be infringing.

Such a fragmentary approach of dissecting elements and comparing works creates hierarchies in musical practice. Certain genres or kinds of musical composition necessarily involve use of similar elements due to strict compositional rules of the genre. They will, in the prevailing copyright regime, *either* inevitably constitute copyright infringement and thus will involve added costs of composition or investment, or will be less appropriable using exclusionary rights if they are deemed to constitute voluminous *scenes a faire* elements. I do not propose to argue that elements deemed to be *scenes a faire* ought to be protected. To the contrary, what I argue is that there is a need to tighten scope at the overall level of the work, in substantial similarity analysis by de-fragmenting it, as against relying on *scenes a faire* because the latter elemental approach unfortunately produces distortionary effects for works that voluminously involve elements that are rendered *scenes a faire* in law by reducing their potential of legal excludability and appropriability.

122. *Gray v. Perry*, No. 2:15-CV-05642, 2020 WL 1275221, at *5 (C.D. Cal. Mar. 16, 2020).

123. *Gray v. Hudson*, 28 F.4th at 98–99.

124. *Id.*

125. *Id.*

126. *Id.* at 101–02.

IV. INDIAN CLASSICAL MUSIC—EXPRESSION OR THIEVERY?

Classical musical forms significantly rely upon borrowing as a tool—for innovation through transformative imitation.¹²⁷ Extensive borrowing, inherent similarity of elements in two compositions, and a focus on performative improvisation in this tradition demonstrate dissonance with contemporary views of musical composition and copyright law. In this Part, I analyze an Indian (*Hindustani*) classical form of music and its compositional as well as performative practices, to show this dissonance.

Indian musical tradition reflects enormous influence of the *Raga* in its compositional and expressive practice. It is often referred to as the soul of the Indian music system.¹²⁸ The rules of the *Raga* system and its practice, however, are dissonant with copyright law's focus on broad exclusionary rights as a mode of inducing creation and investment. In Indian classical music, every curated composition inherently (1) involves desirable similarity of elements with other compositions in the same *Raga*, which the listeners and the performer can easily discern, (2) follows defined and strict rules of phrasing, sequencing, and performing compositions in that particular *Raga*, and (3) voluminously incorporates pre-existing expression that is critical to any composition in a particular *Raga*. Thus, substantial similarity, as is currently understood by courts, is inevitable. At the scope of copyright protection that currently persists, these expressions, due to their cultural traits, involve *either* high licensing costs, in case copyright law continues to protect all elements of the works in spite of the *inherence* of similarity, *or* high volumes of *scenes a faire* elements—in the case where copyright law renders motivic phrases, arpeggios, sequences and intonations, which must be followed in a *Raga*, as *scenes a faire*. Thus, such compositions are *either* costlier to produce, *or* relatively less excludable and appropriable than expressions from other genres of music. It is a lose-lose.

A. THE RAGA SYSTEM: RULES OF COMPOSITION

Every composition in Indian classical music is in a *Raga* or involves a perceivable amalgamation of multiple *Ragas*. A *Raga* is conceptualized as a “melodic mode/form or tonal matrix possessing a rigid and specific individual identity yet bearing immense potential for infinite improvisatory

127. Arewa, *supra* note 97, at 610.

128. See generally Santosh Kumar Pudaruth, *A Reflection on the Aesthetics of Indian Music, With Special Reference to Hindustani Raga-Sangita*, 6 SAGE OPEN 1 (2016), <https://journals.sagepub.com/doi/full/10.1177/2158244016674512>.

possibilities.”¹²⁹ It serves as a basic framework or a superstructure for composition and improvisation in Indian music (which is essentially melodic and monodic in nature).¹³⁰ Every *Raga* has strict compositional rules which play the role of an imaginary domain beyond which no composer can move.¹³¹

A *Raga* comprises defined note selection, confined to a single octave.¹³² Every *Raga* is distinct not just in the notes contained but also in the frequency of certain notes, volume of use, sequencing of ascending and descending segments, as well as signifiers.¹³³ These strict compositional subtleties permit intricate emotions to be expressed through the *Raga*'s perceptive individuality, represented in phrasings of its compositions.¹³⁴

Every *Raga* requires a certain minimum number of pitches, namely at least five notes out of the twelve recognized notes (“S”, “R”, “Rm” “G”, “Gm” “M”, “Mt”, “P”, “D”, “Dm”, “N”, “Nm”) within the Indian music tradition.¹³⁵ Various pitches can be expressly forbidden in particular *Raga* structures.¹³⁶ Incorrectly including impermissible notes alters the *Raga*, destroying its individuality.¹³⁷

The rules of composition in a *Raga* are strictly prescribed. Every *Raga* encapsulates an *aroha* and an *avroha*, the former signifying the notes and their sequence generally used in ascending parts of the composition, and the latter doing the same for descending parts.¹³⁸ These rules of note transition are mandatory while composing, phrasing, and performing expressions.¹³⁹ Phrasing requires specific focus on the peculiarities and rules of the *Raga*, including strict emphases on particular notes and intonation on specific

129. Sanchit Alekh, *Automatic Raga Recognition in Indian Classical Music* 1, ARXIV (Aug. 7, 2017), <https://arxiv.org/abs/1708.02322>.

130. Pudaruth, *supra* note 128.

131. MRIGANKA SEKHAR CHAKRABORTY, *INDIAN MUSICOLOGY: MELODIC STRUCTURE* 104 (1st ed. 1992).

132. NARENDRA KUMAR BOSE, *MELODIC TYPES OF HINDUSTAN: A SCIENTIFIC INTERPRETATION OF THE RAGA SYSTEM* 452 (1960).

133. *Id.*

134. Jeffrey M. Valla, Jacob A. Alapatt, Avantika Mathur & Nandini C. Singh, *Music and Emotion—A Case for North Indian Classical Music*, 8 *FRONT. PSYCHOL.* 2115 (2017).

135. *See id.*; *see generally* Christian Watson, *How Musicians Develop the Ability to Improvise: A Cross-cultural Comparison of Skill Development in the Egyptian, Hindustani Classical, and Jazz Traditions* (2012) (M.A. thesis, School of the Arts and Media University of New South Wales) (on file with the University of New South Wales Library).

136. *See* Watson, *supra* note 135.

137. *Id.*

138. *See* Suvarnalata Rao & Preeti Rao, *An Overview of Hindustani Music in the Context of Computational Musicology*, 43 *J. NEW MUSIC RES.* 24, 24–33 (2014); *see also* Pudaruth, *supra* note 128.

139. Pudaruth, *supra* note 128.

portions of the composition.¹⁴⁰ Every *Raga* involves a note that is supposed to be struck most frequently in all its phrasings—known as the king note, the *vadi swar*. The second most important and frequent note is the queen note, the *samvadi swar*. Finally, the third most prominent note is the *anuvadi swar*. These notes are supposed to predominate every composition in a particular *Raga*.¹⁴¹ The location of the king note illustrates whether the focus of compositions in the *Raga* has to be on ascending movements or descending movements.¹⁴² Most compositions or phrases conclude on the *nyasa* note of the *Raga*, which is its final prominent and resting note.¹⁴³ They are essential to evoke the mood and emotion associated with that individual *Raga*¹⁴⁴ and are also helpful in differentiating other *Ragas* which might involve similar notes but altered frequencies, or alternate gestures of performance¹⁴⁵ of the same notes.¹⁴⁶

Every composition in a *Raga* includes one or more motivic phrases, known as *pakad* or *vishistha taana*.¹⁴⁷ The *pakad* encapsulates the individuality of a *Raga* and is in fact the recognizable face of every composition.¹⁴⁸ These phrases help both the performer and audience grip the *Raga* and are considered crucial for conveying the peculiar feeling of the *Raga*. They are often present in the beginning of the compositions and repeated, as they are main clues and signifiers for the listeners to identify the *Raga* and distinguish it from other *Ragas*.¹⁴⁹ This characteristic phrase aims to stand out among other phrases drawing the mind to it over and over again, leaving a deep impression of the peculiarity of the *Raga* which is supposed to linger in memory even after the melody stops.¹⁵⁰ The *pakad* is crystallized in all compositions in the same *Raga* resulting in inevitable similarity across expressions.¹⁵¹

140. See Rao & Rao, *supra* note 138; see also BIMALAKANTA ROY CHAUDHARI, AESTHETICS OF NORTH INDIAN CLASSICAL MUSIC 25 (1st ed. 1993).

141. See CHAUDHARI, *supra* note 140.

142. ASHOK RANADE, KEYWORDS AND CONCEPTS IN HINDUSTANI CLASSICAL MUSIC 75 (1990).

143. See Rao & Rao, *supra* note 138; see also BOSE, *supra* note 132, at 455–56.

144. See Kunjal Gajjar & Mukesh Patel, *Computational Musicology for Raga Analysis in Indian Classical Music: A Critical Review*, 172 INT'L J. COMPUT. APPLICATIONS 42 (2017); see also BOSE, *supra* note 132, at 427.

145. CHAUDHARI, *supra* note 140.

146. Valla, Alapapatt, Mathur & Singh, *supra* note 134.

147. Gajjar & Patel, *supra* note 144; Rao and Rao, *supra* note 138.

148. BOSE, *supra* note 132, at 456.

149. See Pudaruth, *supra* note 128; see also Christian Watson, *supra* note 135.

150. BOSE, *supra* note 132, at 466.

151. Telephone Interview with Abhishek Mishra, Professor, Lalit Narayan Mithila University, Darbhanga (Nov. 16, 2022) (transcript on file with author).

B. IMPLICATIONS OF THESE RULES ON PHRASING

Due to these rigid rules of phrasing in *Ragas*, a certain level of perceivable aesthetic similarity in the minds of the lay listener is inherent to the multiple compositions produced within this same superstructure. This is, in fact, desirable, as every *Raga* embodies a unique musical idea or emotion known as *Ragabhava*.¹⁵² Compositions in a *Raga* are supposed to enable ready recognition due to them essentially consisting of these familiar recognizable patterns.¹⁵³ The song composed never overshadows the individuality and familiarity of the *Raga*.¹⁵⁴ Thus, each *Raga* has a distinct perceptible character of its own, perceived through compositions framed within its strict rules.¹⁵⁵

Sometimes multiple *Ragas* are mixed to produce a combination.¹⁵⁶ In the final expression, compositional rules of each *Raga* may be complied with or not, but either way, it will be easy to identify whether the expression is a combination of multiple *Ragas*.

Make no mistake, a *Raga* can be the basis of any number of compositions.¹⁵⁷ However, the melodic framework of each of these compositions represents a degree of similarity, easily discernable by the listener.¹⁵⁸ The difference between *Raga* music and non-*Raga*-based music is the strict loyalty associated with the definite structural arrangement of notes in the former.¹⁵⁹ The untrammelled freedom of both composers and vocalists is circumscribed within the four corners of the *Raga*.¹⁶⁰ This does not dismiss the possibility of limitless compositions within a *Raga*, but just makes a level of similarity of elements or fragments inevitable.¹⁶¹ The individuality of the *Raga* is marked to the extent that provokes identifiable similarity in its compositions.¹⁶²

152. *See id.*; *see also* Telephone Interview with Pt. Ashok Kumar Prasad, PhD. & M.A., Musicology (Indian Classical), Prayag Sangit Samiti, Allahabad (Nov. 17, 2022) (transcript on file with author).

153. BOSE, *supra* note 132, at 466.

154. *Id.*

155. PUDARUTH, *supra* note 128.

156. RANADE, *supra* note 142, at 75.

157. BOSE, *supra* note 132; Telephone Interview with Pt. Ashok Kumar Prasad, *supra* note 152.

158. MANJUSREE TYAGI, SIGNIFICANCE OF COMPOSITIONAL FORMS OF INDIAN CLASSICAL MUSIC, 185–86 (1997).

159. BOSE, *supra* note 132, at 377.

160. *See id.*; *see also* Telephone Interview with Pt. Ashok Kumar Prasad, *supra* note 152.

161. VIJAYA CHONDORKAR, COMPOSITIONAL FORMS OF HINDUSTANI MUSIC: A JOURNEY 1–2 (2012).

162. BOSE, *supra* note 132, at 455–56.

A *Raga* can be recognized through the compositions even if it appears in different rhythms or with different embellishments and styles of expressing its strict notational elements.¹⁶³ Creativity is in fact displayed by introducing variations and embellishments through pleasant ornamentations without disrupting the tone pattern of the *Raga*.¹⁶⁴

Importantly, compositions and performance of *Raga* music significantly involve voluminous use of *alankars* and *taans*, a concept similar to the idea of an arpeggio in western music.¹⁶⁵ *Alankars* and *taans* are rapid sequences of notes logically composed to create a meaningful melodic structure within rules of the *Raga*.¹⁶⁶ A song without an *alankar* is often referred to as a night without a moon, a river without water, and a creeper without a flower.¹⁶⁷ Various compositions involve similar *taans* which serve both as embellishments as well as ornamental essentials to convey the intended emotion of the *Raga*.¹⁶⁸ Only some of the varieties of *taans* can be used in a *Raga* due to its strict rule framework.¹⁶⁹ Allowing to exclude or monopolize any of these *alankars* or *taans*—which are essential elements of composition and performance in Indian classical music, can further limit the possibilities of expression over and above the limiting rules of the *Raga*. These are what can be referred to as *scenes a faire* elements, used voluminously while composing songs, thus making the composition less excludable and appropriable.

Indian classical music composition and performance uniquely focuses on oral transmission of knowledge through what is known as the *guru-shishya parampara*, where vocalists learn specific modalities of the notes through imitation.¹⁷⁰ This is significant as Indian classical music emphasizes intonation and performativeness, which cannot be transmitted through textual or visual modes.¹⁷¹ Performance fluency is often acquired through imitative vocalization and further internalized through memorization.¹⁷² Typically, the student observes (visually as well as auditorily) the teacher's performance and then attempts to emulate the phrase exactly as it sounded.¹⁷³ The idea is to

163. *Id.* at 346, 378.

164. ANUPAM MAHAJAN, RAGAS IN HINDUSTANI MUSIC: CONCEPTUAL ASPECTS 50 (2001).

165. Rao & Rao, *supra* note 138.

166. RANADE, *supra* note 142.

167. DR. SWATANTRA SHARMA, FUNDAMENTALS OF INDIAN MUSIC 9 (1996).

168. Rao & Rao, *supra* note 138.

169. MAHAJAN, *supra* note 164, at 48.

170. Watson, *supra* note 135.

171. *Id.*

172. *Id.*

173. Shyamal "Sony" Tiwari, *Oral Tradition and Musical Knowledge in Indian Composition Pedagogy* (May 2011) (M.A. thesis, New York University) (on file with author).

imitatively learn volumes of compositions in a particular *Raga* to get a grip of its character and be able to improvise and embellish during performance.¹⁷⁴ Excluding access and use of pre-existing material or composition is antithetical to this practice. Thus, this genre of music is relatively less excludable, as compared to those which rely less on voluminous exposure and use in downstream creations.

Further, Indian classical music resists the concept of romantic or individualistic authorship.¹⁷⁵ Most *Ragas* find their birth in social settings, often known as *gharanas*, which help group members perform compositions associated with these *Ragas* and ensure continuity of fundamental characteristics of the *Raga* system.¹⁷⁶ These *gharanas* are generally defined by locations of these social settings and is a metaphor representing the familial¹⁷⁷ collectivist tradition of performing arts.¹⁷⁸ Each *gharana*, as against an individual in the *gharana*, has developed distinctive performative features in various *Ragas*, deeply rooted in their common underlying tradition. *Ragas* and traditional compositions in Indian classical music have evolved in these social settings through long centuries of characteristic exhibition.¹⁷⁹

C. DISSONANCE WITH THE SCOPE OF RIGHTS

The peculiarities of the Indian classical music tradition show their clear dissonance with broad exclusionary rights prevalent in copyright policy.¹⁸⁰ My central claim is that compositions and elements of this form of music are inherently less excludable and appropriable, as well as relatively costlier due to the presence of a broad derivative right, due to (1) perceivable similarity in compositions, (2) defined and strict rules of composing and performing, (3) aural nature of transmission of knowledge through the *guru shishya parampara* relying on characteristically transforming voluminous pre-existing expression in an identical medium for an identical purpose, as well as (4) its inherent rejection of individuality of compositions.

174. TYAGI, *supra* note 158 at 40–41, 187.

175. Shyamal “Sony” Tiwari, *supra* note 173.

176. *Id.*

177. TYAGI, *supra* note 158, at 41.

178. *See* RANADE, *supra* note 142, at 62; *see also* Tiwari, *supra* note 173.

179. BOSE, *supra* note 132.

180. *See generally* Rajalakshmi Nadadur Kannan, *Performing Religious Music: Interrogating Karnatic Music Within a Postcolonial Setting* (Aug. 2013) (Ph.D. dissertation, School of Arts and Humanities, University of Stirling) (on file with author); *see also* Rajalakshmi Nadadur Kannan, *Copyright, Capitalism and a Postcolonial Critique of Karnatic Music*, FOCAALBLOG (Apr. 16, 2015), <https://www.focaalblog.com/2015/04/16/rajalakshmi-nadadur-kannan-copyright-capitalism-and-a-postcolonial-critique-of-karnatic-music/>. This is in context of a sub-genre of Indian music—Karnatic classical music.

Acknowledging this dissonance between law and cultural practice is important as cases asserting copyright infringement begin to come up. A recent example is the case of *Thaikkudam Bridge v. Hombale Films*, which was filed before the District Court of Kozhikode, Kerala, in India.¹⁸¹ Seeking a temporary as well a permanent injunction, the plaintiff, composer of the song “*Navarasam*,” asserted that the song “*Varaha Roopam*,” incorporated in the defendant’s film *Kantara*, infringed upon its copyright.¹⁸² The court granted the plaintiff’s application for preliminary injunction on the basis of there being a *prima facie* case, without analyzing any of the peculiarities of the songs involved and without any substantial reasoning.¹⁸³ Both *Navarasam* and *Varaha Roopam* are songs composed as a mixture of two *Ragas*—*Raga Panturavali* and *Raga Abir Bhairav*.¹⁸⁴ Most similarities in these songs are the result of characteristic phrases and compliance with *Raga* rules.¹⁸⁵ Upon filtering these characteristic phrases, it is clearly visible that the overall expressive characteristic and aesthetic appeal of the two songs can by no measure be *unmistakably* similar. There are significant lyrical and expressive differences as well as a difference in sequencing elements of *Raga* portrayal. Further, common *taans* and *alankars*, similar to arpeggios, are used in the pieces framed within the rules of these *Ragas*, evoking similarity that is in fact desirable in this form of music. By finding a *prima facie* case of infringement, the court has ignored these cultural elements peculiar to the form of music involved.¹⁸⁶

This instance clearly shows why the framings of global copyright law need to be altered to equally accommodate alternate cultural realities, that are often being estranged due to dissonant global norms. I claim that it would be dangerous to issue such injunctions as they could significantly limit expressions possible within classical Indian cultural practice.

This dissonance between the law and cultural practice furthers copyright law’s distortionary effects. It discourages investment in dissemination and

181. *Thaikkudam Bridge v. Hombale Films*, Unreported Judgment, Original Suit No. 14/2022, Principal District and Sessions Judge, Kozhikode District Court, Kerala.

182. *Thaikkudam Bridge v. Hombale Films*, Unreported Judgment, Order dt. Oct. 28, 2022 in IA No. 1/2022 in OS No. 14/2022. Order vacated on the date of writing this note by Kerala High Court on procedural grounds. *See Hombale Films v. Thaikkudam Bridge*, Unreported Judgment, FAO 147/2022, Order dt. Dec. 2, 2022.

183. *Id.*

184. *See* Telephone Interview with Abhishek Mishra, *supra* note 151; Karthik, *Navarasam (Music Review)*—Thaikkudam Bridge, MILLIBLOG (Nov. 1, 2015), <https://milliblog.com/2015/11/01/navarasam-music-review-thaikkudam-bridge/>.

185. *See* Akshat Agrawal, *Copyright and Classical Music: Not the Best Fusion*, SPICY IP (Nov. 25, 2022), <https://spicyip.com/2022/11/copyright-and-classical-music-not-the-best-fusion.html>.

186. *See id.* (providing a detailed analysis on this case and the order granting injunction).

circulation of such works due to involvement of relatively higher licensing costs *or* due to low relative potential of surplus appropriability as a result of inherent similarity between compositions, and voluminous use of elements that are *scenes a faire*.¹⁸⁷ It shows a perception of lower relative market value, in spite of the normative significance of these works in Indian culture.

The next part of this Note explains these distortionary effects.

V. DISSONANCE LEADS TO DISTORTION

Copyright's overt reliance on broad exclusionary rights exhibits a predictable bias for goods and expressions that generate the highest appropriable social value.¹⁸⁸ Conventional economic actors will only invest in distributing a work if they are able to sufficiently recoup social value by commodifying or selling them.¹⁸⁹ When presented with relative choices, most investors would invest in expressions that involve lower costs and offer high appropriability through exclusionary rights to fetch out the highest social and economic market value possible.¹⁹⁰ Thus, the current copyright system exerts enormous influence on the *kind* and content of expressions that receive enough investment to come into visible circulation.¹⁹¹ If probability of the highest possible return is diminished on a relative scale, investment and disseminative decisions are often *distorted away*, redirected to places with relatively higher return potential.¹⁹² Due to market liberalization of global cultural flows, these distortions have adverse ramifications on the *kind* of cultural expression that is globally visible and curated.

A. DISTORTIONARY EFFECTS

All information goods, Professors Kapczynski and Syed argue, exist on an excludability continuum.¹⁹³ Goods or expressions that are relatively non-

187. See Bracha & Syed, *supra* note 8, at 243–44.

188. Kapczynski & Syed, *supra* note 3, at 1905 (citing BRETT FRISCHMANN, *INFRASTRUCTURE* 109 (2012)).

189. See Kapczynski & Syed, *supra* note 3, at 1908; see also GIBLIN & DOCTOROW, *supra* note 76, at 258.

190. *Id.* at 1905–06, 1938; Lunney Jr., *supra* note 4, at 582 (discussing how investors consider risk and return of investment in deciding which works to financially support). Even if the work is highly popular, the possibility of appropriating value only through direct dissemination, as against direct dissemination as well as a licensing market, could potentially drive conventional investors away.

191. See Julie E Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 22 (2011).

192. See Kapczynski & Syed, *supra* note 3, at 1960; see also Lunney Jr., *supra* note 4, at 494–95.

193. Kapczynski & Syed, *supra* note 3, at 1920.

excludable in the continuum offer a diminished ratio of social value that is privately appropriable through copyrights. On the other hand, goods or expressions that are relatively easy to commodify and exclude, are on the higher end of the continuum of excludability and represent a larger ratio of privately appropriable social value.¹⁹⁴ In other words, the conventional investor considers works that are less easily copied, or more protected from copying, to be more economically valuable.¹⁹⁵

Contextualizing this analysis, works that inherently involve perceivable similarity of elements, *or* incorporate more *scenes a faire* elements, like compositions in Indian classical music,¹⁹⁶ would be relatively less excludable and hence potentially less appropriable through exclusionary rights. Thus, presumably, investing in the production of such content will offer relatively less social value. This significantly distorts investment decisions away from such cultural expressions weakening their cultural visibility and capability to shape tastes and preferences for autonomous, yet social, self-determination.¹⁹⁷

The cost of investment also plays a role in distorting away investments. Professors Kapczynski and Syed argue, under a given state of technology, norms, and institutions, some information will be more or less costly to exclude others from.¹⁹⁸ This is specifically due to the higher need to use pre-existing elements. Compositions in genres which ontologically rely on using pre-existing works would, in the current state of legal rules, involve higher licensing costs for production. This makes them less likely to attract investor interest. The fee demanded for licensing, as well as transactional costs involved, directly correlates to an increase in investment cost. For instance, record label representatives of sampled artists would require more and more of their works to be cleared through licenses under the current legal norms, increasing costs of investors in sampling artists. This exacerbates the already limited potential of appropriability from such expressions, driving and distorting investment away.¹⁹⁹

194. *Id.*

195. Lunney Jr., *supra* note 4, at 589 (explaining investment modelling results that suggest the investor will receive greater returns if investing in products more difficult to copy).

196. *See* discussion *supra* Section IV.C.

197. *See* Kapczynski & Syed, *supra* note 3, at 1947; *see generally* Fisher, *Reconstructing the Fair Use Doctrine*, *supra* note 20, at 1733–88.

198. Kapczynski & Syed, *supra* note 3, at 1919.

199. Talha Syed and Amy Kapczynski make a similar argument in context of patents and this distortion due to relative non-excludability of certain kinds of treatments like natural medication and checklist interventions which may be socially more valuable than modern medicine. *Id.* (“[P]atents will drive innovative effort and investments away from an optimally efficient allocation providing the greatest net social value and instead toward information goods that may provide lower net social value but higher private value owing to lower costs

Therefore, when norms of cultural practice relatively burden commodification or incorporate a cost that reduces the potential of appropriability through broad exclusionary rights, resources are often driven away from development of such expressions.²⁰⁰

Copyright law in its current state is complicit in undersupplying certain valuable expressions that either involve relatively higher costs of investment due to prevalent legal norms, or are relatively less excludable and appropriable due to cultural ontologies.²⁰¹ As a result, it does not prioritize enablement or development of these relatively less excludable expressions and instead actively works against them,²⁰² irrespective of their benefits of exposure. Works of equal or even higher social value may produce lower *enablement* for performers when copyright rules increase their cost of production, and the small share of their market value is capable of being internalized.

Depleting stock and visibility of such expressions diminishes their popular desire through what William Fisher calls the *sour grapes effect*, where aficionados of cultural expressions begin to persuade themselves that they did not really want to see the expressions they are unable to view, due to its purportedly lower value.²⁰³

Such distortion of resources entrenches an element of bias²⁰⁴ for intellectual expressions that generate the most appropriable value in consumer markets.²⁰⁵ Works which input pre-existing expressions to provide an alternate narrative, sometimes referred to as *heterodox* works, which normatively are essential to self-determination as they provide *meaningful variety* and are different from mainstream conceptions of works which have market value, often incorporate less control on secondary markets or are less consequential to recouping investment through derivative markets.²⁰⁶

or barriers to effective excludability.”); see also Arewa, *From J.C. Bach to Hip Hop*, *supra* note 97, at 639 (suggesting that a property rule implicitly assumes borrowing is not the norm, imposing extra costs because there needs to be consent to borrow, distorting the creation of music).

200. Cf. Kapczynski & Syed, *supra* note 3, at 1920 (arguing that investors have a limited ability to change social norms). I extend this argument to include cultural norms of practice embedded to a genre.

201. See Kapczynski & Syed, *supra* note 3, at 1938; see also Lunney Jr., *supra* note 4, at 483, 599, 655 (stating that the market will undersupply products that are more easily copied, while oversupplying products that are less easily copied).

202. Kapczynski & Syed, *supra* note 3, at 1941.

203. Fisher, *Reconstructing the Fair Use Doctrine*, *supra* note 20, at 1735–36, 1736 n.325, 326.

204. Kapczynski & Syed, *supra* note 3, at 1946.

205. *Id.* at 1946–47.

206. See Bracha & Syed, *supra* note 8, at 270–74 (discussing heterodox works).

On the other side, these works also involve a licensing cost due to their innate use of pre-existing output.²⁰⁷ For investors, due to the inherent focus on internalizing market value, they appear unattractive in spite of their significance to self-determination and need for equitable *enablement* of their creators. They also prove to incorporate an additional cost of production and provoke less income through derivative markets in the same medium. Thus, given wide derivative markets for other works, these works are disproportionately prejudiced as they provide less overall profits and involve a higher cost.²⁰⁸ The tendency of investors to minimize risk and earn maximum profit through derivative markets would thus crowd such works out. This is how the legal entitlement becomes systematically biased against such works.²⁰⁹ In a similar vein, expressions composed in Indian classical music tradition that inherently have similar elements as previous compositions are possibly deemed less profitable expressions deserving to be crowded out. Risk-averse creators and investors tend to get scared of investing in such works as the boundaries of protection in such works (and their elements) are often vague and uncertain.

Copyright law thus not only fails to enable investments in some socially beneficial expressions but can also affirmatively jeopardize the creation of such expressions.²¹⁰ It shapes deeper understandings and orientations of participants in the field evoking ideas around what kinds of expression are more desirable for drawing resources.²¹¹ It intimidates those composing expressions that inherently rely on borrowing, thus chilling cultural practices and next generation creativity in such genres of expression.²¹²

These distortions run directly contrary to its instrumental purpose of enabling or incentivizing multifarious lifestyles and ideas on public display for people to be able to develop their own mental and moral faculties.²¹³ The state

207. *Id.*

208. *Id.*

209. *Id.*; Kapczynski & Syed, *supra* note 3, at 1946–47.

210. See Kapczynski & Syed, *supra* note 3, at 1945; see also Fisher, *Reconstructing the Fair Use Doctrine*, *supra* note 20, at 1734–37; see generally Kapczynski, *The Cost of Price*, *supra* note 26.

211. Kapczynski & Syed, *supra* note 3, at 1947 (stating that the process of nonexcludable approaches repeatedly losing out to excludable ones may shape the understandings and orientations of various actors); see also Fisher, *Reconstructing the Fair Use Doctrine*, *supra* note 20, at 1736.

212. See Kapczynski & Syed, *supra* note 3, at 1945; see also Arewa, *From J.C. Bach to Hip Hop*, *supra* note 97, at 639–40 (“Even if legal standards do not impose absolute restrictions on borrowing, the current property rule standard has potential to create a chilling effect because many will be hesitant to borrow from existing material. Any such chilling effect is magnified by current practices of copyright holders that often focus on the strategic use of copyright to expand the scope of such rights. Such strategic uses often involve the use of threats of legal action or actual lawsuits, which may further intensify any chilling effect.”)

213. See discussion *supra* Sections II.A, II.B.

ought not to penalize expressive activity crucial to the preservation of diversity. Diversity must be nourished and rewarded. It is thus important to change the law and its interpretation to facilitate development of a diverse vocabulary of art, as against its creating asymmetrical market demand for, and enabling supply of, some highly excludable and appropriable expressions.²¹⁴

B. RELEVANCE IN THE GLOBAL POLITICAL ECONOMY

Why is this relevant for the United States? In the wake of global intellectual property systems which impose minimum standards of exclusionary rights, media industries selectively endorse highly commodifiable cultural identities, and thus distort cultural visibility, practice, indulgence, and exposure away from expressions that are less excludable. This shows a skew in the reality of the global political economy of cultural practice and is specifically influenced by prevalent understandings of copyright law in the United States, based on concepts underlying romantic creatorship that are central to Western philosophy and dissonant with other cultural practices.²¹⁵ Instruments like TRIPS and the American ideology of organizations like WIPO insert countries into what Amy Kapczynski refers to as a “transnational circuit.”²¹⁶ These are disciplined through use of politico-economic tools like the Special 301 United States Trade Representative reports which punish those refusing to comply with expansive exclusionary regimes.²¹⁷ Some have referred this as *neo-colonialism*²¹⁸ as it privileges a single objective reality of cultural consciousness

214. See Kapczynski & Syed, *supra* note 3, at 1905, 1947, 1950.

215. See Linda M.G. Zerill, *This Universalism Which Is Not One*, 28 *DIACRITICS* 2 (1998).

216. See Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 *CALIF. L. REV.* 1571, 1645 (2009);

217. See Kapczynski, *supra* note 216, at 1636, 1645; see also Ewa Hemmungs Wirten, *Life, Liberty, and the Relentless Pursuit of Ownership: the “Americanization” of Intellectual Property Rights*, 35 *AM. STUD. SCANDINAVIA* 85, 85–93 (2003). Special 301 is a unilateral, abusive tactic through which the United States imposes maximalist IP norms at the behest of its industrial interests. See *USTR, SPICY IP*, <https://spicyip.com/tag/ustr> (last visited Mar. 31, 2023) (collecting a series of blog posts highlighting the unilateral nature of USTR Section 301 Special Reports); Christopher May, *Cosmopolitan Legalism Meets ‘Thin Community’: Problems in the Global Governance of Intellectual Property*, 39 *GOV'T & OPPOSITION* 393, 393–422; Ruth L. Okediji, *Legal Innovation In International Intellectual Property Relations: Revisiting Twenty-One Years of the TRIPS Agreement*, 36 *U. PA. J. INT'L L.* 191 (2014); CARLOS M. CORREA, *SPECIAL SECTION 301: US INTERFERENCE WITH THE DESIGN AND IMPLEMENTATION OF NATIONAL PATENT LAWS* (South Centre, Geneva, Research Paper No. 115, 2020), <https://www.econstor.eu/bitstream/10419/232238/1/south-centre-rp-115.pdf>.

218. See Andreas Rahmatian, *Neo-Colonial Aspects of Global Intellectual Property Protection*, 12 *J. WORLD INTELL. PROP.* 40, 74 (2009).

and reflects “a colonial imaginary that culturally impoverishes the self and orientalizes the other.”²¹⁹

Copyright’s standards are instruments of financing and organizing cultural production by global media and entertainment industries, driving the industries’ investment choices. These industries are mostly based out of the United States and have been strengthened by a series of mergers around the world from the late 1970s till today.²²⁰ Major players in global entertainment and media industries—which all develop, produce and distribute a plethora of disparate cultural products in many countries through countless corporate entities—influence the nature of cultural products that are disseminated based on potential of appropriating net surplus value through exclusionary rights.²²¹

Neoliberal conceptions of broad exclusionary rights—those protecting fragments of works and including wide derivative markets—do not accommodate alternate cultural expressions that resist these conceptions and are difficult to turn into equally excludable and appropriable commodity.²²² It affects the content of the cultural expression disseminated as well as the opportunity of people to participate in and access cultural discourse.²²³ Not only does this estrange indigenous cultural practices abroad from global visible circulation, but it also estranges contemporary cultural practices in the United States, like music sampling, that inherently re-work, derive, transform, or rely upon voluminous use of non-excludable expressions.

Thus, change in the United States is central as most (although not all) of the world’s biggest traders in culture are based here. If left unchecked, they pose a serious problem of cultural and expressive bias.

219. Rosemary J. Coombe, *Cultural and Intellectual Properties: Occupying the Colonial Imagination*, 16 POL. & LEGAL ANTHROPOLOGY REV. 8, 12 (1993); see also Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1860 (1991).

220. Rahmatian, *supra* note 218, at 59.

221. Natalie Fenton, *Bridging the Mythical Divide: Political Economy and Cultural Studies Approaches to the Analysis of the Media*, in MEDIA STUDIES: KEY ISSUES AND DEBATES 7, 12 (Eoin Devereux ed. 2007).

222. See Chakkri Chaipinit & Christopher May, *The Polanyian Perspective in the Era of Neoliberalism: The Protection of Global Intellectual Property Rights*, 19 J. POPULATION & SOC. STUD. 99, 111–12 (2010); see Alexander Peukert, *Fictitious Commodities: A Theory of Intellectual Property Inspired by Karl Polanyi’s “Great Transformation,”* 29 FORD. INTELL. PROP. MEDIA & ENT. L.J. 1151, 1184–88 (2019).

223. Fenton, *supra* note 221, at 12, 14–15 (arguing that cultural goods shifting from being public services to private commodities means that the groups able to access them are starkly different, because the “corporate machine” appropriates discourse that challenges the status quo).

VI. POLICY SIGNIFICANCE AND PRESCRIPTIONS

This Part prescribes preliminary structural revisions to copyright law and its interpretations in the United States to reduce these distortions. Before proceeding to prescriptions, however, I clarify the need to *resist* an expansionary impulse that may appear to be a solution for these distortionary effects.

A. RESIST EXPANSIONARY IMPULSE

An impulsive prescription to resolve distortions would be expanding the scope of exclusionary rights to increase appropriability of dissonant works. However, this solution ignores and, in fact, weakens cultural ontologies.²²⁴

Exclusionary rights themselves send distorted signals. Expanding their scope does not help get rid of these distortions.²²⁵ Let us imagine a world where the scope of copyright law was expanded to include *scenes a faire* elements voluminously used in certain cultural expressions. First, due to the scope of the derivative right as it currently stands, license fees for using pre-existing inputs would continue to exist. For example, if we increase the scope of copyright to protect *arpeggios* or *pakad* (the characteristic phrase of a *Raga*) to increase its appropriability, any other composition within the same *Raga* would further incur an additional licensing cost, significantly impacting the number of expressions that can be curated in a *Raga*. This increases distortion, apart from corrosively weakening cultural norms.²²⁶ Similar implications are visible in the *Thaikuddam Bridge* case discussed above, where the injunction effectively allowed exclusionary rights over signifiers and arpeggios inherent to the practice and performance of compositions in a *Raga*.²²⁷

Thus, expansion of exclusionary rights is corrosive and does nothing to remedy the underlying issue—bias and distortion of social value and resources, specifically due to the fundamentally irreconcilable nature of broad exclusionary rights and certain expressive practices. It would ameliorate one source of the balance, i.e., a lower internalization rate, only by exacerbating the other, i.e., creating high barriers in the form of costs of creation.²²⁸

B. STRUCTURALLY SCALE BACK EXCLUSIONARY RIGHTS

As a solution to copyright's *distortionary* effects, I suggest structurally scaling back exclusionary rights to a level where, for a particular kind of work that is

224. Kapczynski & Syed, *supra* note 3, at 1960.

225. *See id.* at 1943, 1960.

226. *See id.*

227. *See supra* notes 182–188 and accompanying text.

228. I am deeply grateful to Prof. Oren Bracha for this expositional framing.

protectable (such as a musical work), there is no distinction in the thickness of the right to exclude across different expressions. If, within the same superset of works, two kinds of expressions have distinct levels of excludability because of cultural norms, the work with lower levels of excludability or thinner protection would receive much less investment, resulting in much less supply.²²⁹ However if rights are optimally limited across the board to eradicate this fundamental distinction, these distortionary effects would potentially subside without demeaning cultural norms. When defining uniform contours of rights, the focus has to be on less legally excludable creative expressions,²³⁰ as against the highly excludable ones.

Although such an approach reduces the overall value that an owner can externalize out of a single highly excludable work, in parallel, it also expands the *kinds* of expressions that do not require investors to incur significant costs. It potentially increases the *breadth* or range of investment in, and dissemination of, cultural expressions. It also ensures that the social cost of freezing out expressions from various genres is well balanced with copyright's enablement function. The author or investor still gets exclusionary rights, however only to an extent that does not compromise diversity of cultural expressions.²³¹ It also enables a relatively egalitarian starting point for cultural speakers.

The concrete prescriptions I offer are nothing new. In fact, I use the analysis of copyright's *distortionary* effects to further bolster the case of some reformatory prescriptions that legal scholars have already offered. These prescriptions are (1) limiting the right to exclude derivative works only to adaptations in a *different form or medium of expression*²³² and (2) limiting the right to exclude reproductions to "works" (and not elements of works) that involve *unmistakable* overall similarity, or a similar overall aesthetic appeal, and will most probably substitute the original expression's primary market.²³³ Lack of

229. Fisher, *Reconstructing the Fair Use Doctrine*, *supra* note 20, at 1735.

230. See Alpana Roy, *Copyright: A Colonial Doctrine in a Post-colonial Age*, 26 COPYRIGHT REP. 112 (2008) (arguing for focusing law-making from the lens of cultural practices of those long subject to colonialism).

231. The concern that structurally scaling down rights would affect the autonomy of authors and reduce their contractual bargaining power with investors is a vertical issue that this paper does not address. The vertical issue subsists irrespective of these horizontal changes, and the vertical argument is in fact a distraction to weaken claims of structurally limiting exclusionary rights. The vertical issue of bargaining power has to be tackled on its own by providing contractual safeguards and is outside the scope of this Note.

232. Syed & Bracha, *Copyright Rebooted*, *supra* note 5.

233. See *id.*; see also Bracha & Syed, *Copyright's Atom*, *supra* note 6; cf. Craig, *supra* note 6 (providing proposal on similar lines, but minutely distinct on the kind of precedents they rely on and on the intricate filtering of unprotectable elements); Ann Bartow, *Copyright and Creative Copying*, 1 UNIV. OTTAWA L. & TECH. J. 75, 91 (2004).

an overly broad derivative right—one that includes expressions in the same *form*, market and medium as the primary work—would eradicate overt licensing costs in cultural compositions that inherently require re-mixing or use of pre-existing expression. Moreover, reducing the scope of an overly broad reproduction right—one that currently even protects elemental fragments—would eradicate any relative lack of appropriability that exists due to high volume of *scenes a faire* elements, so long as there is potential of aesthetic substitution of the primary market of the work.

I explain these prescriptions here.

1. *Limiting Derivative Markets to Alternate “Forms” of Representation*

The right to exclude derivative works must only cover those adaptations that are in a different medium **or** instrument of expression and perception. An instance of this is the adaptation of a book to a movie, as against another book. The former, **an** adaptation in a different medium of representation, constitutes part of the secondary market of the work which maps onto the derivative right. The latter, a version based on the previous work in the same medium of representation, constitutes part of the primary market which maps onto the reproduction right. Another example is that of a translation, where the content of the work is the same, but the work is presented in an alternate medium or form—a different language.²³⁴ Under this prescription, sequels or prequels, in the same form or medium of representation, are not part of the secondary market of the work.

This prescription can either be employed overtly by clarifying the limited scope of this right in the statute, or by interpreting the current framing properly.

The derivative right under § 106(2) is not supposed to allow excluding transformed uses of any kind, but only *transformed forms* of the original expression, where the same context is represented in a different medium of expression. The interpretation of ‘form’ ought to be limited to mean an alternate or different medium of representation—in other words, an alternate physical embodiment, alternate language, alternate way of presenting the same content, distinct from the medium of the original expression. Any other interpretation, pitting the scope of the derivative right against the

234. *But see* Samuelson, *supra* note 63, at 14–15. Prof. Samuelson argues translation, art reproduction, abridgement, condensation to be in the same medium of representation. However, I conceptualize them to be in a different medium of expression, as the market of a version that is an abridgement, condensation, translation, or art reproduction does not compete with the primary work in the same market. These represent the same content in an alternate medium.

transformative purpose and character exemption under the Copyright Act, seriously undermines First Amendment values that copyright aims to foster, not constrain.²³⁵ It also makes the co-existence of the derivative works right, reproduction right, and the purpose and character of use exemption to copyright infringement—which are all present in the same statute—completely incoherent. All the illustrations provided in the statute: *abridgement, translation, arrangement, condensation, etc.*,²³⁶ which are meant to guide the meaning of what the right is said to encompass,²³⁷ clearly point towards an alternate medium of representation of the same content, rather than an alternate and distinct work presented in the same medium. It also ensures that exclusionary rights do not extend beyond the content of the original work.

Clarifying this position allows expressive forms like digital sampling, Indian classical music, post-modern art, heterodox works and the like, which inherently rely on borrowing for expression, to be equally enabled, not inhibited, works. Looking at investment, it appears that limiting the derivative right ensures that access or licensing costs do not take a disproportionate toll on expressions which inherently involve borrowing pre-existing material or a level of perceptible similarity with another composition. Further, as these expressions are part of genres where similarity and borrowing are cultural norms, any control of a broad derivative market becomes less consequential to the recoupment of investment.²³⁸ Thus, limiting the derivative market of highly excludable works also brings relatively less excludable works on par with the potential of appropriability through exclusionary rights. It also allows ontological borrowing, which as a corollary helps advertise and enable a positive ripple effect on the distribution market of the primary work.²³⁹

An intuitive response to this prescription would be that it significantly reduces foreseeable incentives in broad derivative markets of highly excludable works. However, the incentives rationale justifying broad derivative rights is

235. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 555–60 (2004).

236. 17 U.S.C. § 101 (2016). Apart from musical arrangements and art reproduction which incorporate similar compositions presented in a different genre, no other supplementary works find place in the definition. Musical arrangements and art reproductions in a different genre often incorporate significantly distinct content which make them an imperfect adaptation, and hence whether techno versions of a rock song would be a part of this right is a proposition left open for further exploration.

237. See Samuelson, *supra* note 63, at 10.

238. Bracha & Syed, *supra* note 8, at 270–74 (discussing heterodox works).

239. See Schuster et al., *supra* note 76, at 219; see also Arewa, *supra* note 97.

highly overstated²⁴⁰ and subject to immense skepticism,²⁴¹ especially when pit against First Amendment concerns of downstream creation, self-determination, and cultural democracy. As Talha Syed and Oren Bracha argue, in cases of works that are highly successful in primary markets, the additional value that a broad derivative right provides is likely unnecessary to recoup investments or is beyond the optimal enablement that copyright should provide.²⁴² On the other hand, for relatively less successful works, the earning potential through a derivative market is highly unlikely to generate any additional enablement.²⁴³ Thus, the incentive “bang” earned for the access “buck” is unjustified in context of such broad rights that significantly hurt the diversity of downstream expression.²⁴⁴

This prescription, however, is incomplete and needs to be complemented by a second change that limits the scope of the right to exclude reproductions.

2. *De-Fragmenting the Work and Its Primary Market*

The reproduction right protects the primary market of the original work. While analyzing contours of this right, courts use the test of substantial similarity with an inward fragmentation approach²⁴⁵ that provokes a finding of infringement of this right even if merely some elements of the works are similar, despite the whole of the work being aesthetically different.²⁴⁶ Secondly, the test of substantial similarity is extremely vague, which constrains downstream creators who wish to use similar elements from pre-existing works.²⁴⁷ This is what we need to get rid of.

First, the right to exclude reproductions ought to be limited to what Talha Syed and Oren Bracha argue to be copyright’s “Atom”—the perception of the overall work, not its fragments.²⁴⁸ When analyzing substantial similarity courts

240. See Samuelson, *supra* note 63, at 22; see also Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 8 (2008); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 526–27 (2009); Syed & Bracha, *supra* note 26, at 1884–86.

241. Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 30–31 (2011).

242. See Syed & Bracha, *supra* note 26, at 1843.

243. *Id.* at 1907.

244. *Id.*

245. Syed & Bracha, *Copyright’s Atom*, *supra* note 6.

246. Samuelson, *supra* note 107.

247. *But see id.* at 1840–42 (analyzing all the different tests of substantial similarity that prevail in various circuits and showing how circuits mix up dissecting and a holistic comparison of the work, suggesting that dissecting elements ought to precede holistic comparison). This Note argues to the contrary.

248. Syed & Bracha, *Copyright’s Atom*, *supra* note 6.

ought to avoid disintegrating the whole of the work to figure out whether any of its elements have been copied and whether the allegedly infringing work incorporates similar elements.²⁴⁹ This elemental focus significantly expands the meaning of the “work” in the primary market of the original owner to include even independent parts of it.²⁵⁰ The author’s originality is the whole work in context—and does not extend to its parts when they are employed out of the context of the whole expression. Extending protection to such fragments precludes downstream creators from utilizing such fragments as building blocks to re-contextualize and portray an alternate aesthetic vision.

Secondly, the scope of the substantial similarity test ought to be tightened by asking whether the allegedly infringing work potentially substitutes²⁵¹ the overall aesthetic perception of the original work,²⁵² provoking consumers to buy it to have the same aesthetic experience. This is the stage of holistic comparison. If yes, then the court ought to figure out whether parts of the asserted original work are even original or involve volumes of *scenes a faire* elements. If they involve voluminous *scenes a faire* elements, the test of virtual identity replaces the test of substantial similarity.²⁵³ However, if substantial differences are discernable on a holistic comparison, the enquiry must stop right there.²⁵⁴

While analyzing holistic similarity, the court ought to ask whether the defendant’s work is a transparent rephrasing of the original or whether the defendant’s work comes so near the plaintiff’s overall expression to suggest it to be the same to the mind of almost every person seeing it. The question ought to be whether a reasonable spectator or viewer would have the *unmistakable* impression of the subsequent work to be a copy of the original.²⁵⁵

249. *Id.*

250. Bracha, *The Ideology of Authorship*, *supra* note 51, at 238–46.

251. Bracha & Syed, *Copyright Rebooted*, *supra* note 5; To clarify, by substitution, I do not mean market substitution from an antitrust law sense, which focusses more on the economics of a broader market. What I mean is perceptive substitution, where a reasonable consumer of cultural goods would rather buy the alternate representation of the work, because it does not change its aesthetic perception.

252. Rosenblatt, *supra* note 23, at 654–58.

253. *See* Craig, *supra* note 6, at 36–40 (proposing a similar test where the focus of infringement analysis is first on holistically comparing works for total similarity, and only if the works are holistically similar, without substantial differences, then dissect to filter unprotectable elements while comparing works); *see also* Lemley, *Our Bizarre System for Proving Copyright Infringement*, *supra* note 107, at 740 (arguing that the extrinsic-intrinsic test is backwards and in fact should be applied in the opposite order).

254. *See* Craig, *supra* note 6, at 36–40; *see* Rosenblatt, *supra* note 23, at 658.

255. A similar approach of focusing on *unmistakable* similarity as a whole, as against similarity of elements has been adopted by the Supreme Court of India in *R.G. Anand v. Deluxe Films*, (1978) 4 SCC 118, 140–41 (India) (“One of the surest and the safest test to

If there are broad dissimilarities which negate this, it shall not be infringement.²⁵⁶

How does this remedy copyright's *distortionary* effects? First, it avoids inward fragmentation and second, it focuses on overall aesthetic substitutability of the work, which ensures that cultural expressions which inevitably involve perceptive levels of fragmentary similarity due to cultural norms are not burdened *either* by licensing costs or by relative lack of appropriability. If the unit of protection is only the whole of the work, works which inherently contain perceivably similar elements, like compositions in Indian classical music, get the same amount of excludability as other works based on aesthetic substitutability of the whole—significantly erasing distortions that exist due to relatively lower potential of appropriability. This is because the excludability is structurally lowered across all works in that particular category—for instance, musical works. Removing protection of elements or fragments of works ensures that in spite of a work having *scènes a faire* elements, the focus of the inquiry is always on the substitution of its creative aesthetic appeal, *as a whole*.

An additional benefit of limiting the contours of excludability to the levels proposed is that it reduces not only internal distortions but also structural external distortions provoked by an expanding copyright regime. It is undisputed that copyright law has pervasively expanded over time.²⁵⁷ Jessica Litman has referred to this tendency as being similar to the “billowing white goo” which attempts to cover everything possible within its scope.²⁵⁸ Limiting the scope of rights in the way proposed could ensure that resources that are overtly employed into production of homogenous and highly excludable copyrightable works are better put into use where they would otherwise be more socially and economically valuable.²⁵⁹ In other words, resources invested in copyrighted works sometimes might produce greater social returns if invested elsewhere in the economy.²⁶⁰ Limiting the scope of rights could potentially contribute to remedying these external distortions as well.

determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an *unmistakable* impression that the subsequent work appears to be a copy of the original.”)

256. *Id.* at 141.

257. Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law 1900-2000*, 88 CALIF L. REV. 2187, 2188 (2000).

258. Jessica D. Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587 (2008).

259. Lunney Jr., *supra* note 4, at 655.

260. Abramowicz, *supra* note 99, at 320.

VII. CONCLUSION

The neoliberal discourse around expansive copyrights, through its dissonance with and ignorance of diverse cultural practices, proves its inelasticity in accommodating forms of alterity that are less marketable.²⁶¹ Forms of cultural expression that are ontologically dissonant have a choice to comply and de-legitimize their cultural norms, or be distorted from a distributional space that chooses on the basis of legal excludability and appropriability. Appreciating these distortionary effects justifies fine-tuning copyright doctrine to better enable production and dissemination of diverse cultural expressions. It shows how the law is not a neutral conduit when it comes to enabling social value that can be derived from expressive output.

Musical practices explored above—digital sampling in hip hop musical tradition, perceivable similarity in compositions in the *Raga* system of Indian classical music, and many similar cultural norms that are prevalent across mediums of expression—embrace downstream use and similarity while dismissing exclusion. Either by imposing dissonant legal norms on these practices or by ignoring them while making the law, the market around culture has globally been disembedded from many social and cultural practices.²⁶² This creates inequality in opportunity to participate in cultural discourse and hurts autonomous self-determination—an important purposive end goal of copyright policy.

Thus, limiting the scope of exclusionary rights under the U.S. Copyright Act through statutory and interpretive proposals offered could significantly ensure that copyright, as a legal tool, continues to equitably remain a means to the end of participation and optimal enablement of diverse expressions. By eliminating these distortionary effects, such reform can help ensure that we do not disenfranchise humans by subordinating the cultural consciousness of society to the rules of the market and interests of marketers.²⁶³

261. Rosemary Coombe, *Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference*, 1 L., CULTURE & HUMANITIES 35, 37–40 (2005).

262. Kannan, *supra* note 180.

263. Timothy Macneill, *The End of Transformation? Culture as the Final Fictitious Commodity*, 12 PROBLÉMATIQUE 17 (2010).