NOTES

JAZZ HAS GOT COPYRIGHT LAW AND THAT AIN'T GOOD

Jazz is in trouble. Even if the music is not dead, "a lot of people think jazz is dying."[1] Efforts at diagnosis and attempts to revive the music are difficult because it faces a complicated predicament: the music is suffering both popularly and creatively. Jazz's fall from popularity has been well-documented.[2] Jazz now accounts for less than three percent of total record sales.[3] It does not dominate or dictate pop culture as it once did, and its primary outlet is the small jazz club. To make matters worse, the music seems to be attracting an older following: the median age of those attending jazz events in 1992 was thirty-seven, and by 2002 it had risen to forty-three.[4] Jazz musicians are no longer celebrities, lauded for their genius and inventiveness. Rather, they "are scarcely recognised by anyone outside the hard-core coterie of followers."[5]

The goal of this Note is to show that, while copyright law may not have caused the precipitous end of jazz as a commercially viable and ever-innovative music, it will not stop jazz's descent with its ill-fitting doctrines. This Note assumes that jazz is a "useful Art[]" worth protecting and promoting, and argues that those creating and deciding copyright law have failed to meet their constitutional charge "[t]o promote the Progress of . . . [this] useful Art[]."[6] The current copyright

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[1] Millané Kang, *April in Paris*, BILLBOARD, Apr. 24, 2004, at 51 (quoting Bruce Lundvall, president and CEO of EMI Jazz & Classics) (internal quotation marks omitted) (noting Lundvall's optimism about jazz's prospects while recognizing that there are many who do not share his optimism).

[2] *See, e.g.*, Richard Cook, *A Hundred-Year Mayfly: Jazz*, NEW STATESMAN, Dec. 20, 1999–Jan. 3, 2000, at 104 ("[M]any have been saying that jazz is passing away, . . . a hundred-year mayfly ready to cease the frantic beating of wings."); David Gates, *The Story of Jazz*, NEWSWEEK, Jan. 8, 2001, at 61 ("Hasn't jazz simply run its course? Hasn't it all been done to death?").

[3] *See* Gates, *supra* note 2, at 61. Some may point to so-called "smooth jazz" as evidence of jazz's marketability or commercial success. *See, e.g.*, Mary Battiata, *Playing for Keeps*, WASH. POST MAG., June 14, 1998, at W15 ("[R]ecord companies have watched the huge record sales of so-called smooth jazz (the homogenized jazzy pop of artists like Kenny G)."). But "smooth jazz[] makes money out of the fact that it is as unlike other jazz as it is possible to be." Cook, *supra* note 2, at 104. Arguing that smooth jazz is a sign of jazz's vitality is akin to arguing that the crabbing industry is stable because there is plenty of "Krab" available.

[4] Mark Dolliver, *Men vs. Culture: Maybe If Operas Had Cheerleaders*, ADWEEK, Aug. 11, 2003, at 29 (citing an unspecified report from the National Endowment for the Arts).

[5] Cook, *supra* note 2, at 104. In the past few years, Wynton Marsalis has led a slight resurgence of jazz while calling for a return to the fundamentals of the music. The most visible evidence of this uptick in popularity may be the new $128 million Frederick P. Rose Hall at Lincoln Center, "the world's first performing arts facility designed specifically for jazz performance, education, and broadcast." Jazz at Lincoln Center, Frederick P. Rose Hall Fact Sheet, http://www.jalc.org/press/5-12-04/factsheet.pdf (last visited Mar. 13, 2005).

[6] U.S. CONST. art. I, § 8, cl. 8.

scheme discourages jazz creation, provides scant protection for the improvised material and performances of jazz musicians, and diverts royalties and performance fees away from the musicians who deserve them. By privileging the composers of the simple underlying tunes that comprise the vocabulary of the jazz language, copyright discourages vital reinterpretation. Finally, through a strained conception of authorship and originality that diverts copyright protection and benefits away from deserving musicians, copyright discourages young musicians from pursuing jazz.

Copyright's inability to fully comprehend and incorporate its own sine qua non — originality — lies at the heart of all of these problems. The contributions and compositions created by jazz artists are not considered original because, technically, they occur within the parameters of an underlying work and are therefore considered "derivative." But the line between an original jazz composition, which necessarily entails borrowing and referencing earlier works, and an arrangement that lacks sufficient originality, is difficult to draw in the jazz context.

This Note analyzes the current copyright scheme as it relates to jazz musicians and music, and explores alternative ways of approaching doctrinal and statutory hurdles in an effort to better accommodate jazz musicians and spur the creation of new jazz.[7] Part I provides an explanation of jazz theory, technique, and form, and also explains the unique importance of revisitation in jazz; in particular, Part I examines the jazz musician's use of "standards." Part II illuminates some of the problems jazz musicians face because they are often not the composers of the standards that comprise a substantial portion of all jazz performances. Part III presents and evaluates two possible doctrinal solutions to these problems: (1) providing full copyright protection for jazz musicians' interpolations of standards, as militated by the application of the "idea/expression" dichotomy; and (2) constituting jazz musicians' use of standards as "transformative use" under fair use analysis. Part IV examines two possible statutory solutions: (1) narrowing the current definition of "derivative work" so that highly original musical ar-

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[7] A few other commentators have touched on the negative effects of copyright law on jazz and jazz musicians, and on how the music and its players remain grossly unprotected. Yet many of these commentators portray jazz unrealistically, saying that it is, for example, a wholly improvised music, or misrepresent jazz musicians' approach to song choice or improvisation. *See, e.g.*, Marshall J. Nelson, Note, *Jazz and Copyright: A Study in Improvised Protection*, 21 COPYRIGHT L. SYMP. (ASCAP) 35, 36 (1974) ("Jazz itself is moving away from its traditional form of theme-and-variations into areas of free form and pure improvisation . . . ."); Stephen R. Wilson, Note, *Rewarding Creativity: Transformative Use in the Jazz Idiom*, 6 U. PITT. J. TECH. L. & POL'Y 1, 19 (2003) ("[Miles] Davis may suggest that he selected a popular American Song, *Love for Sale*, so he may inject European influenced melodies, harmonies and rhythms with African American influenced musical elements."). In contrast, this Note seeks to address problems that exist because jazz is an art form very much reliant on traditional, copyrighted music.

rangements are not covered; and (2) creating a full performance right for sound recording copyright holders. Part V offers a brief conclusion.

I. JAZZ FORM AND THEORY

Many jazz performances are based on "standards." Jazz standards are those pieces "that a professional musician may be expected to know."[8] These standards, sometimes also referred to as "mainstream standards," were generally written in the 1930s, '40s, and '50s for film and Tin Pan Alley or Broadway musicals by non-jazz musicians such as George Gershwin, Cole Porter, and Harold Arlen.[9] Thus, jazz performers are typically not the copyright owners of the very pieces that undergird the jazz canon. This lack of ownership creates a host of problems for jazz musicians, as explained below. Of course, one could suggest that jazz musicians simply not play standards, or instead write their own, but these suggestions are implausible for several reasons. Unlike other musical forms, jazz "has remained uniquely in touch with the animating force of its origins."[10] Thus, a jazz musician simply "cannot avoid commenting, automatically and implicitly, . . . on the tradition that has laid this music at his feet."[11] Also, audience familiarity with the underlying work helps highlight the spontaneous composition of the jazz musician: "part of the impact of a performance based on a standard derives from its being familiar to the listeners, who are the better able to appreciate skillful arrangement and inventive improvisation because they know the original work."[12]

Generally speaking, jazz musicians use these standards as jumping-off points for their own spontaneous compositions, borrowing the harmonic skeleton and parts of the melody from the underlying standard. Developing and borrowing ideas from earlier works, however, do not render something per se unoriginal; after all, most artistic works build upon and borrow from earlier works.[13] Borrowing in music is especially prevalent because the range of available musical tones is quite

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[8] THE NEW GROVE DICTIONARY OF JAZZ 1155 (Barry Kernfeld ed., 1994) [hereinafter NEW GROVE].

[9] For one list of such standards, see the music book THE NEW REAL BOOK (Chuck Sher & Bob Bauer eds., 1988).

[10] GEOFF DYER, BUT BEAUTIFUL: A BOOK ABOUT JAZZ 185 (1996).

[11] *Id.*

[12] NEW GROVE, *supra* note 8, at 1155.

[13] Some commentators have gone so far as to say that "all artistic creativity is related and interdependent, continuous and cumulative." Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1216 n.17 (1997) (quoting ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY 273 (1952)).

limited: "There are only so many notes."[14] In deciding what constitutes originality and what constitutes infringement, courts must distinguish between borrowing that results from inspiration and borrowing that constitutes mere appropriation. To understand what jazz musicians borrow, one must have a grasp of jazz form and style.

Jazz musicians do not simply add improvisatory, unwritten creations to previously composed pieces. Rather, jazz is "a combination of stuff that's written down and stuff that's improvised."[15] Jazz musicians frequently add written-down alterations to an underlying work, creating an arrangement that better comports with the idiom. For example, a jazz arranger may formally adapt an original score for different instrumentation or a different rhythm, or even compose a new introduction or ending to the song. It is this resulting rearrangement of the standard that then becomes the basis for further improvisational creation.

In interpreting a standard, jazz musicians generally discard the verse of the original tune and instead treat the chorus as "the song." The chorus is usually sixteen or thirty-two measures long and consists of four- or eight-measure phrases that are described alphabetically in music theory (for example, AABA with A being the "head" and B being the "bridge"); the chorus is made up of the chord changes (the harmony) and the theme (the melody, to which lyrics are often originally set).[16] After an introduction, which is either composed by the jazz arranger or improvised by a single member of the ensemble, the lead instrument or instruments introduce the chorus (that is, AABA is played). Then, each instrument in the ensemble takes turn soloing while the chorus's chord changes are looped by the rhythm section (composed of the bass, piano, drum, and sometimes guitar). There is usually no prescribed limit as to the number of choruses a soloist may take,[17] whether the setting be informal (in a jazz club or other performance venue) or in the recording studio.[18] Thus, if each musician

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[14] Jones v. Supreme Music Corp., 101 F. Supp. 989, 992 (S.D.N.Y. 1951); *see also* Gaste v. Kaiserman, 863 F.2d 1061, 1068 (6th Cir. 1988) ("[W]e are mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions . . . .").

[15] *Live From Lincoln Center* (PBS television broadcast, July 1, 1998) (interviewing Michael Beckerman, Professor of Music at U.C. Santa Barbara), *transcript available at* http://www.pbs.org/lflc/backstage/july1/beckerman.htm.

[16] *See* NEW GROVE, *supra* note 8, at 396.

[17] *See, e.g.*, JOHN COLTRANE, *Giant Steps*, *on* GIANT STEPS (Atlantic Recording Corp. 1960). John Coltrane solos over thirteen choruses, compared to pianist Tommy Flanagan's three.

[18] This Note deals only with recorded jazz performances since live performances do not meet the fixation requirement under § 102(a) of the Copyright Act, 17 U.S.C. §§ 101–122 (2000). Still, it should be noted that this requirement also causes problems for the jazz musician. *See generally* Gregory S. Donat, Note, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363 (1997).

in a quartet were to solo over three choruses (which is not unusual), the underlying work would essentially make up only fourteen percent of the total work.[19] One could also conceive of this ratio by measuring the time the underlying composition takes up on the recording relative to the time the jazz musician spends improvising and creating new material on the recording. For example, John Coltrane's interpolation of George Gershwin's "Summertime" uses the recognizable theme for only sixty-four seconds out of the eleven minute, thirty-one second track.[20] Thus, while jazz musicians are often not the sole composers of the songs they play, their improvisational creations are their original contributions.

II. PROBLEMS FOR JAZZ MUSICIANS UNDER CURRENT COPYRIGHT LAW

The distinctive aspect of jazz itself — the partial use of prior works in the creation of new music — leads to negative consequences in terms of the copyright protections and reduced benefits afforded to jazz musicians and their creations. Copyright law recognizes the underlying composer as the sole owner of the composition,[21] despite the jazz musician's addition of substantial original material, both written and improvised, to the composition. Copyright protection and rights are based not on what the jazz musician has added, but what he has used. Under the Copyright Act,[22] the owner of the composition copyright has the exclusive right "to prepare derivative works based upon the copyrighted work."[23] A "derivative work" is defined as

> a work based upon one or more preexisting works, such as a translation, musical arrangement, . . . sound recording, . . . abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is [also] a "derivative work."[24]

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[19] This number is computed as follows: the chorus (consisting of both the harmony and the melody) is played once to introduce the piece and once to conclude the piece, and the solos take up twelve improvised choruses (thus, 2+12=14 and 2/14=14%). One could argue that the musicians, in soloing over the choruses, are actually playing the chorus fourteen times (once to introduce the piece, twelve times for each member of the quartet to solo, and once to end the piece). However, this Note argues that the chord progressions that underlie the solos should not be considered part of the underlying work because they are detachable and thus unprotected.

[20] JOHN COLTRANE, *Summertime*, *on* MY FAVORITE THINGS (Atlantic Recording Corp. 1961).

[21] The jazz musician does own the sound recording copyright (as may anyone else who participates in the recording, including sound engineers), but this does not entitle him to the same rights and benefits accorded to the composer. *See infra* pp. 1946–47.

[22] 17 U.S.C. §§ 101–122 (2000).

[23] *Id.* § 106(2).

[24] *Id.* § 101.

Both the formal written jazz arrangement and the musician's improvised version of the song therefore fall within the statute's definition of derivative works.

Categorizing jazz interpolations as derivative works has practical consequences that do not favor the jazz musician. As an initial matter, there is the issue of how jazz musicians must go about obtaining the rights to even record the song. The Act creates a compulsory licensing scheme for copyrighted compositions, which allows musicians to use any musical composition without having to negotiate with the copyright owner for permission, so long as the musical work has been previously licensed to someone else for mechanical reproduction and the musician pays a statutory royalty.[25] Musicians thus have more immediate access to prior musical works than artists in other mediums seeking to use prior works. For example, if a sculptor wanted to turn an existing copyrighted photograph into a sculpture (which would be a "derivative work"), that sculptor would have to seek permission from the photographer (or other copyright holder).[26] That sculptor would face the significant cost of negotiating with the photographer without any guarantee that he will obtain such permission. The compulsory licensing scheme for musical derivative works thus alleviates some of the transaction costs of bargaining.[27] The problem, however, is that obtaining a compulsory license does not protect the original musical contributions added in the subsequent artist's rendition. That is, compulsory licensees convey only the right to record and distribute the underlying work — a separate copyright does not automatically attach to otherwise copyrightable derivative material. Thus, if a musician wishes to protect his additions, he must still seek permission from the underlying copyright holder in order to receive a derivative work copyright. Jazz musicians, however, almost never seek permission from the copyright holder to create a derivative work, and instead rely on the compulsory licensing scheme.[28] This scheme leaves those otherwise copyrightable aspects of the jazz musician's arrangement and solo improvisation vulnerable to unauthorized transcriptions and use.[29] For example, it is widespread practice in the sheet music industry to sell books containing transcribed jazz solos — sales from which the

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[25] *See id.* § 115. Often times, licenses are obtained through the Harry Fox Agency. For a more in-depth description of the licensing system, see Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 681–83 (2003).

[26] *See* Rogers v. Koons, 960 F.2d 301, 307–08 (2d Cir. 1992) (holding that the defendant's sculpture, which was intended to look like the plaintiff's copyrighted photograph, violated the plaintiff's exclusive right to create derivative works).

[27] Voegtli, *supra* note 13, at 1264.

[28] *See, e.g.*, Jonathan Z. King, Note, *The Anatomy of a Jazz Recording: Copyrighting America's Classical Music*, 40 COPYRIGHT L. SYMP. (ASCAP) 277, 294–96 (1997).

[29] *See id.*

jazz artist receives no royalties.[30] While a sheet music company would be required to pay the music publishers and owners of the composition copyright for use of Art Tatum's transcribed arrangement and solo of "Cherokee" by Ray Noble, it would not be required to pay Art Tatum — even for a book entitled *The Art Tatum Solo Book*.[31]

Even more troubling, classifying jazz pieces as derivative works deprives jazz musicians of valuable performance rights. The copyright owner of the musical composition (the author and/or publisher) and the copyright owner of the sound recording (the jazz artist and/or others involved in the production of the recording) possess certain identical rights, including the rights to prepare, reproduce, and distribute derivative versions of the respective work, or to authorize others to do so.[32] Yet only the copyright owner of the musical composition is entitled to a full public performance right for that work.[33] This disparity in public performance rights has serious economic implications, as it gives the composition copyright owner, but not the sound recording copyright holder — the jazz artist — the right to receive royalties when the work is performed publicly.[34] When the jazz rendition of a piece of music is played on the radio, the Act entitles the composition copyright holder to receive royalties, but the jazz musician receives nothing. The apparent rationale behind this rule is that the underlying composer should be compensated for his creativity but that the performer should not because his creative additions are considered de minimis. Yet the law requires no determination whether the performer's additions are in fact de minimis. Thus, jazz musicians, whose additions require a great deal of time, effort, and originality, are treated the same as those musicians who choose not to change the underlying song at all.

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[30] *See id.* A search for such books containing transcribed artist solos on the largest music print publisher's database turned up 106 results. *See* Hal Leonard, Search Results, *at* http://www.halleonard.com/search_items.jsp?keywords=Artist+Transcriptions&catcode=00&type=product (last visited Mar. 13, 2005).

[31] *See* THE ART TATUM SOLO BOOK 33–46 (Brent Edstrom transc., 1998). One needs only a passing familiarity with sheet music to recognize the amount of original contribution by Tatum in this example: the complexity of the solo is quite apparent from simply glancing at the music.

[32] *See* 17 U.S.C. § 114 (2000 & Supp. II 2002).

[33] The copyright owner of the sound recording has a limited public performance right that only applies to certain interactive digital transmissions. *See infra* pp. 1958–59.

[34] This inequity in U.S. copyright law also has international implications. While some countries provide for a sound recording performance right, "most [EU] countries only pay [performance] revenues to foreign copyright owners on a reciprocal basis." Gary M. McLaughlin, Note, *Digital Killed the Radio Star: The Future of the Sound Recording Performance Right*, 19 CARDOZO ARTS & ENT. L.J. 225, 227 (2001). Although the amount of money this involves is speculative, it is substantial. *See* Howard Siegel, *Makers of Sound Recordings Want a Piece of the Pie*, N.Y. L.J., Dec. 5, 1994, at S3 ("[I]t is estimated that [from 1990 to 1994,] American artists, producers and record companies have lost over $600 million [of] their share of foreign performance royalty pools.").

III. RETHINKING COPYRIGHT LAW AND JAZZ: DOCTRINAL POSSIBILITIES

A. Applying the Idea/Expression Dichotomy to Jazz

The first task of a court in an infringement suit is to identify whether the work or its elements are even copyrightable. In making such a determination, courts often rely on the "idea/expression dichotomy" established in *Baker v. Selden*,[35] which posited that an idea may not be copyrighted but a specific expression of that idea may.[36] In *Baker*, the plaintiff obtained a copyright for a book explaining and describing a system of double entry bookkeeping; the defendant authored a collection of books that described the same system but had a different arrangement of columns and headings.[37] The widespread reading of *Baker*'s holding is that the Court ruled for the defendant because copyright protected only the plaintiff's description of the accounting system — the expression — and did not extend to the system itself — the idea.[38] The idea/expression dichotomy was codified in the 1976 version of the Act. Section 102(b) of the Act states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[39]

The statute does not protect ideas because granting "property status to a mere idea would permit withdrawing the idea from the stock of materials that would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation."[40] This locking-up of ideas would obstruct "the progress of science and useful arts."[41] Thus, "[o]nly by vigorously policing the line between idea and expression can we ensure both that artists receive due reward for their original creations and that proper latitude is granted other artists to make use of ideas that properly belong to us all."[42]

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[35] 101 U.S. 99 (1880).

[36] *See id.* at 104–05.

[37] *Id.* at 99–100.

[38] *See, e.g.*, Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 703–05 (2d Cir. 1992). *But cf.* Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1171–76 (1998) (noting that this common interpretation owes more to Professor Melville Nimmer's reconstruction of the Court's opinion than to the opinion itself).

[39] 17 U.S.C. § 102(b) (2000).

[40] 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][2][a], at 13-70 (2004).

[41] *Id.* at 13-71 (internal quotation marks ommitted).

[42] *Id.* at 13-71 to 13-72 (quoting *Satava v. Lowry*, 323 F.3d 805, 813 (9th Cir. 2003)) (internal quotation mark omitted).

One major source of tension between copyright law and jazz is the law's insistence on characterizing the underlying composition as an expression rather than an idea. The law essentially values the initial creativity and originality more highly than the subsequent work created by the jazz artist. This skewed valuation results in the mistaken treatment of the jazz standard as a creative work that is merely interpreted by the jazz musician. But the standards, while independent, creative works at one time, take on a different role when employed by the jazz musician. In jazz, the underlying composition is simply raw material — it is not intended to be the end product that reaches the listener or consumer, but is simply the *idea* from which the predominantly improvisatory expression flows.

The chord progressions of many standards have become so essential to jazz that claiming the exclusive right to use them "secure[s] the exclusive right to the use of the system or method"[43] of jazz itself. In the same way that copyright does not apply to the basic musical notes because they are limited in number, it should be withheld from the limited number of harmonic progressions that constitute jazz. Jazz has developed out of the virtuosity of musicians interpreting and reinterpreting simple chord changes such as those found in "I Got Rhythm," "Tea for Two," and "Autumn Leaves." Many jazz conventions have developed from playing these same chord changes, and these conventions make up the language of jazz. Thus, it is impossible to play jazz without playing many of the protected jazz standards. These songs may be protectable in Broadway shows or cabaret acts, for example, but they simply cannot be in jazz. Instead, jazz standards "must necessarily be used as incident to"[44] the idea, system, or process that the work describes.

Indeed, a further examination of jazz theory reveals that a jazz interpolation should be protectable under the idea/expression dichotomy because the musician sufficiently changes the protected expression in the underlying composer's creation. Under *Baker*, ideas are copyrightable "only in their statement."[45] Thus, the question whether there is unlawful appropriation turns on the degree of variability between the first and subsequent artists' performance. As mentioned in Part I, an underlying composition's structure is made up of a basic harmonic progression,[46] often referred to as the composition's "changes."[47] Within this progression, the piece is made up of many "chord patterns," which are "progression[s] of two bars which begin[] on and pre-

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[43] *Baker v. Selden*, 101 U.S. 99, 101 (1880).
[44] *Id.* at 104.
[45] *Id.*
[46] *See supra* p. 1943.
[47] NEW GROVE, *supra* note 8, at 490.

pare[] for a return to the tonic."[48] Instead of strictly adhering to the composition's changes and chord patterns, however, jazz musicians engage in "chord substitution" — some made out of personal preference and others made because they are demanded by the idiom.[49] Although the chord substitutions preserve the original harmonic plan, the jazz musician uses a large number of available substitutions that vary the sound of the original song and transform it into jazz. For example, when jazz musicians encounter a dominant-seventh chord, they change that single chord to a "ii-V progression" because that progression is fundamental to the idiom.[50] These changes highlight the variability between the performance of standards by non-jazz and jazz musicians.

The application of the idea/expression dichotomy is not simply theoretical. It turns out that jazz standards' harmonic progressions are only given a "thin" copyright.[51] So long as the jazz musician changes the melody, the new piece is considered original. For example, many new jazz songs are merely new melodies played over existing chord patterns.[52] There are literally hundreds of jazz compositions considered original that are in fact based on the chord progressions in "I Got Rhythm."[53] While no case explicitly holds that this is permissible, the failure of any court to find it impermissible squares with the above analysis. That is, the thin copyright of jazz chord changes may be the product of an idea/expression analysis showing that the simple compositions used by jazz musicians are ideas rather than expressions. Likewise, the simple melody of a jazz standard (as opposed to its harmonic chord progressions) should also be granted only a thin copyright in the jazz idiom, since it is akin to the underlying idea upon which the jazz musician's expression depends.

It may be unlikely that a court in an infringement suit would consider a jazz standard as a whole to be a noncopyrightable idea. But this does not mean that the above analysis is futile. To the contrary, the analysis still undermines a basic assumption of copyright law: that the underlying composition is the true source of originality and deserves more protection than the subsequent piece. The fact that copy-

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48 *Id.*

49 *See id.*

50 Jazz improvisation historically has centered on interpretations of the ii-V progression. *See id.* at 490–91.

51 *See* 4 NIMMER & NIMMER, *supra* note 40, § 13.03[A], at 13-35 (describing thin copyrights as those "reflect[ing] only scant creativity").

52 *See, e.g.*, ROSS RUSSELL, THE SOUND (1962), *reprinted in part in* RIFFS & CHORUSES: A NEW JAZZ ANTHOLOGY 126, 126 (Andrew Clark ed., 2001) ("Of course, practically everybody knew the chords to I Got Rhythm. Bernie Rich knew them. Bleakly, they flashed through his mind's eye — B-flat, C-minor seventh, F seventh, B-flat, C-minor seventh, and so on. Except that he had not the faintest notion of the new riff based on these chords.").

53 A few of the more well-known songs include Charlie Parker's "Anthropology," Duke Ellington's "Cottontail," Lester Young's "Lester Leaps In," and Dizzy Gillespie's "Salt Peanuts."

right law here implicitly acknowledges that a substantial part of the underlying composition (the harmonic progression) is simply an idea or springboard for expression undercuts the superior protection granted to the underlying composer elsewhere in the Act.

B. Jazz Works as "Transformative"

Ever since "the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose: '[t]o promote the Progress of . . . useful Arts.'"[54] Whether the use of a work should be classified as a "fair use" depends on: "the purpose and character of the use . . . ; the nature of the copyrighted work; the amount and substantiality of the portion used . . . ; and the effect of the use upon the potential market for or value of the copyrighted work."[55] The so-called "transformative use" defense is an outgrowth of the first prong. In analyzing the "purpose and character of the use," courts examine the extent to which the challenged use transforms the underlying work to create a new piece that does not violate the original copyright.[56] A transformative work must do more than simply "repackage[] or republish[] the original."[57]

If a jazz musician can successfully claim that his use of a standard to create a jazz work constitutes a fair use, then many of the problems otherwise imposed by copyright law may be alleviated. For example, a fair use determination would not only "adequately defend against a copyright infringement allegation," but would also "save jazz musicians the cost associated with paying a compulsory license or negotiated fee."[58] But arguing a fair use defense for jazz works is not a simple task. First, although the genre relies on transforming standards, courts have consistently held that, "it is no defense to claim that one practices a style of art that, by its definition, requires appropriation."[59] Second, in general, "courts are less appreciative of the amount of labor and creativity exhibited by an appropriator, while they willingly find creativity and expression in what was appropriated."[60]

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[54] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (alterations in original) (quoting U.S. CONST. art I, § 8, cl. 8).

[55] 17 U.S.C. § 107 (2000).

[56] *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111–16 (1990).

[57] *Id.* at 1111.

[58] Wilson, *supra* note 7, at 2.

[59] Voegtli, *supra* note 13, at 1232; *see, e.g.*, Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) (refusing to take Koons's artistic style into account in its fair use analysis).

[60] Voegtli, *supra* note 13, at 1232; *see, e.g.*, Jarvis v. A & M Records, 827 F. Supp. 282, 291–92 (D.N.J. 1993) (focusing on the originality found in the sampled sounds and phrases "ooh," "move," and "free your body," while largely ignoring the contributions made by the subsequent artist).

In *Campbell v. Acuff-Rose Music, Inc.*,[61] the petitioners, members of the rap group 2 Live Crew, successfully argued that their version of Roy Orbison's "Oh, Pretty Woman" was sufficiently transformative because it constituted a parody of the original song.[62] The *Campbell* Court noted that the central task in analyzing the purpose and character prong is to decide "whether the new work merely 'supersede[s] the objects' of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[63] The Court stated further that "the more transformative the new work, the less will be the significance of [the] other [fair use] factors."[64]

Using Miles Davis's rendition of Cole Porter's "Love for Sale" as an example, one commentator has argued that jazz covers of standards generally satisfy these transformative use requirements.[65] Under this view, jazz "adds new meaning" because of its often instrumental quality;[66] the absence of the original lyrics strips the standard of its original Tin Pan Alley or Broadway context, function, and charm.[67] For example, while Porter intended his song to tell a story of prostitution, "Davis effectively changed the message of the song" by omitting any vocals or references to the oldest profession.[68] In addition, differences in instrumentation and duration of the song weigh heavily in determining that the work is transformative.[69] Thus, while Porter's arrangement calls for strings and a trio of female voices, Davis's instrumentation includes brass, woodwinds, his trumpet, and the rhythm section, altering the expression of the Porter arrangement.[70] Further-

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[61] 510 U.S. 569 (1994).

[62] *See id.* at 594.

[63] *Id.* at 579 (alteration in original) (citations omitted) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)) (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985)).

[64] *Id.*; *see also* Jeremy Kudon, Note, *Form over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 611 (2000) ("[I]n thirty-seven of the thirty-eight post-*Campbell* decisions, the courts' transformative use determinations [have] matched their overall decisions regarding the applicability of fair use."). The other three prongs are not as helpful in the analysis. As for the second prong, few would (successfully) argue that the original works created by composers such as Gershwin, Kern, and Carmichael do not fall within the core of copyright's protective purposes. As for the third, jazz musicians often use the entire copyrighted work. And as for the fourth, when "the second[] use is transformative, . . . market harm may not be so readily inferred" and is not accorded presumptive weight. *Id.* at 594 (quoting *Campbell*, 510 U.S. at 591) (internal quotation marks omitted).

[65] *See* Wilson, *supra* note 7, at 16–20.

[66] *Id.* at 27.

[67] *See id.* at 18 (noting that the lyrics of Cole Porter's "Love for Sale" were "absolutely critical to the message of the song" and that the message of Miles Davis's instrumental version bares "little, if any, relation to the original").

[68] *Id.*

[69] *See id.* at 17.

[70] *See id.*

more, the jazz cover "serves a 'different purpose' because the expression occurs at the performance level."[71] And above all, the improvisation inherent in jazz creates a transformative work; "[t]he only familiar relation to the original song, for most non-musician listeners, is the instrumentalist playing the melody."[72]

The above arguments, however, fall short of successfully making the case that jazz is a transformative use generally. First of all, it simply cannot be the case that Davis's omission of the lyrics rises to the level of transformation envisioned by the *Campbell* Court. Such a determination could only result from one of two rules: either *any* song that omits lyrics (or adds lyrics to an instrumental work) is deemed transformative, or Davis's particular omission changed the message of Porter's song *enough* to be deemed transformative. The first rule is surely overbroad and does not provide adequate protection to the original work. The second rule would require courts to engage in an impossibly subjective inquiry as to the severability of the lyrics and music in question: How important are these particular lyrics to the message of the song? What does this song "mean" without lyrics? With either rule, the assessment assumes a far too shallow interpretation of "meaning"; if the mere omission of lyrics changes the meaning, then surely changing the lyrics themselves (that is, writing new lyrics) changes the meaning as well. *Campbell* shows, however, that changing the lyrics is not sufficient for transformation since its holding relied on the further determination that the song in question was also a parody.[73]

Nor can changes to the key signature (transposition), tempo, or instrumentation cause transformation. Transposition simply shifts the piece either up or down the scale; the piece remains otherwise identical, and only the highly trained ear can recognize the difference. Considering changes in tempo or instrumentation to create transformation would also be inappropriately arbitrary: When is a piece sped up or slowed down enough to constitute meaningful alteration? When are enough instruments added or removed to create new expression?

By focusing on the surface changes made, the existing analysis frames the jazz musician's contributions as embellishments and mistakenly "cast[s] the [jazz] musician entirely in the role of performer and interpreter — not an original creator."[74] Instead, a transformative use defense should focus on proving that the "quoted matter is used as raw material, transformed in the creation of new information, new aesthet-

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[71] *Id.*

[72] *Id.*

[73] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588–89 (1994).

[74] Nelson, *supra* note 7, at 60.

ics, new insights and understandings."[75] Jazz musicians and aficionados rarely care what actual piece is being played — they care how it is played and by whom. The underlying song is simply a vehicle for showcasing the musician's true ideas and spontaneous compositions. The appropriate inquiry is not how much longer Davis's version of "Love for Sale" is, but why it is longer — it is longer because the musicians are eschewing the dictates of the underlying composition and merely using its skeleton. Thus, the jazz musician's adaptation of a standard does not become transformative when it adds *x* number of notes, *y* number of instruments, and so forth. Instead, the standard becomes transformed when it is merely the template for creation, rather than the creation itself.

Even given this analysis, it is unclear whether a court would be willing to draw such a broad transformative use defense from *Campbell*. Though the *Campbell* Court emphasized the transformative nature of parody, the extent to which the parody determination contributed to a finding of transformativeness is unclear. The Court did state that "parody has an obvious claim to transformative value," but it also sought to square parody with § 107's fair use exceptions, such as "criticism" and "comment."[76] Jazz does not seem to fit within *Campbell*'s holding if *Campbell* is interpreted as simply adding parody to the list of exceptions in § 107. Further, it is difficult to gauge the viability of a transformative use defense for jazz musicians since courts have failed to articulate a formulation of what qualifies as "transformative" following *Campbell*.[77]

IV. RETHINKING COPYRIGHT LAW AND JAZZ: POSSIBLE STATUTORY SOLUTIONS

A. Toward a Narrower Definition of Derivative Work

The current definition of derivative work is ill-fitting in its application to jazz works because it treats all musical arrangements as equal. If a musician were simply to add a walking bass line or make other simple changes, that would constitute a musical arrangement and qualify as a derivative work as much as an adaptation of a song that incorporated substantial new and original music. Additionally, this broad conception of arrangement assumes there is even one generally

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[75] Leval, *supra* note 56, at 1111.

[76] *Campbell*, 510 U.S. at 579 ("We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.").

[77] *See* Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After* Campbell, 7 COMM. L. & POL'Y 1, 9–16 (2002) (discussing subsequent lower court cases that illustrate both the "confusion as to what, exactly, constitutes a transformative use" and an "absence of serious analysis [that] is often striking").

accepted definition within the musical world. But "[t]he term 'arrangement' has acquired a special meaning in jazz within the concept of arrangement as it is applied . . . in the broader field of music in general."[78]

In jazz, the arrangement can refer to any jazz performance that jazz musicians improvise and renew; these kinds of arrangements generally fall into one of several forms described in Part I.[79] Many times, "a new version of an old song is virtually a recomposition."[80] Other times, a jazz arrangement refers to the "written-down, fixed, often printed and published version of a composition" arranged for an ensemble of varying size and instrumentation.[81] These arrangements are also "highly creative recompositions, which transform the basic material in a specific style or manner, in itself marked by a striking originality which may even surpass the quality of the original material."[82] Often, the harmonic innovations by the arranger or performer dictate the final product even more than the underlying piece on which the arrangement is based.[83] In instances when the contribution and originality in the underlying piece are superseded by the contribution and originality in the recomposition, awarding exclusive rights to the composer of the underlying song on the basis of this overly broad categorization of "musical arrangement" is inconsistent with the fundamental purpose of copyright — to promote artistic progress[84] — because it grants monopoly power over musical ideas.

In fact, in § 115(a)(2) of the Copyright Act, Congress recognizes that there can be different kinds of arrangements. The Act provides:

> A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but *the arrangement shall not change the basic melody or fundamental character of the work*, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.[85]

On the one hand, the provision seems to be a straightforward protection of the underlying composer's moral rights, granting the licensee a limited adaptation right in connection with his recording of the li-

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[78] NEW GROVE, *supra* note 8, at 32.

[79] For a detailed description of jazz treatment of forms outside of standards, see *id.* at 396–400.

[80] DYER, *supra* note 10, at 186.

[81] NEW GROVE, *supra* note 8, at 33.

[82] *Id.*

[83] *See id.*

[84] *See* Shubha Ghosh, *The Merits of Ownership; Or, How I Learned To Stop Worrying and Love Intellectual Property*, 15 HARV. J.L. & TECH. 453, 490 (2002).

[85] 17 U.S.C. § 115(a)(2) (2000) (emphasis added).

censed musical piece.[86] Yet on the other hand, it shows an implicit recognition that a musical arrangement, although based on an underlying composition, can sufficiently depart from and transform the underlying composition. Creating an arrangement that changes "the basic melody or fundamental character of the work" would certainly require originality and creativity. Thus, in a case in which § 115(a)(2) suggests that there may be a good deal of originality — or even a completely new composition — in a subsequent musical arrangement, why should the underlying composer benefit from § 101's broad conception that *any* musical arrangement is a derivative work? The argument would be that § 115(a)(2) does not speak to originality in the way described above, but aims only to protect the integrity of the underlying composition. Yet this is problematic. Neither the Act's legislative history nor the courts' interpretation provide much guidance as to what it means to protect the integrity of a musical work; aside from the limitation itself, the arrangement must "be reasonable and not distort, pervert or make a travesty of the work."[87] But it is difficult to see how an instrumental version of a song could be said to "distort, pervert or make a travesty" of a composition. It is even more difficult to see how such a transformative and original musical arrangement would not contain the requisite originality to be considered a composition deserving full copyright protection in its own right.

The most effective way to reward the creative contribution of jazz musicians would be to change the definition of "derivative work." One commentator has suggested the following redefinition in an effort to alleviate the effects of the broadness of "derivative work" in the general postmodern art context:

> A "derivative work" is either (1) a work based significantly upon one or more pre-existing works, such that it exhibits little originality of its own or that it unduly diminishes economic prospects of the works used; or (2) a translation, sound recording, art reproduction, abridgement, and condensation.[88]

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[86] *See* 2 NIMMER & NIMMER, *supra* note 40, § 8.04[F], at 8-67. However, including a reference to moral rights at all is far from straightforward in U.S. copyright law. *See, e.g.*, Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 17 (1985) ("Despite the well-entrenched, if not perfectly uniform, position that the moral right enjoys in many European and Third World nations, creators in the United States are unable to benefit from express applications of the [moral rights] doctrine." (footnote omitted)). Indeed, § 115(a)(2) was "the sole explicit recognition of moral rights in the entire Copyright Act until passage of the Visual Artists Rights Act of 1990." 2 NIMMER & NIMMER, *supra*, § 8.04[F], at 8-67 (footnotes omitted).

[87] Theresa M. Bevilacqua, Note, Time To Say Good-bye *to Madonna's* American Pie*: Why Mechanical Compulsory Licensing Should Be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285, 305 (2001) (citing H.R. REP. NO. 94-1476, at 109 (1976)).

[88] Voegtli, *supra* note 13, at 1267. Another commentator has suggested that "if Congress cannot provide a more narrow definition of derivative work, then Congress should include in the

The above redefinition is actually a move toward older notions of derivative works. Prior to the mid-nineteenth century, "[c]ourts inquired into the nature of second authorship and the values that a new work conferred to the society," valuing the "expense, skill, labor, or money that a second comer devoted in creating a new work."[89] So long as the subsequent creator did "not merely copy that of another, [he was] entitled to a copy-right . . . if the variations [were] not merely formal and shadowy, from existing works."[90] This proposal is attractive because it recognizes that contributions to an underlying work by subsequent artists are not all alike. While there would still have to be a subjective inquiry into whether the jazz musician's arrangement was sufficiently original, the focus would be on the additions made by the jazz musician, rather than on what was "taken" from the underlying work; this would more accurately cast the jazz musician as an original creator rather than as a mere "performer and interpreter."[91] Because jazz arrangements are more accurately characterized as recompositions containing original material — both written and improvised — they would rarely, if ever, be found to be derivative works under this proposed definition.

B. Creating a Performance Royalty for Sound Recordings

The previous Parts have sought to show that copyright law undervalues the contributions made by jazz musicians. But jazz is obviously not the only musical genre, and a rule that rewards composers may be better overall for a musical landscape in which creative interpolation is not the norm. For example, "[e]ach of two symphony orchestras recording a Beethoven symphony infuses its own creativity; each plays the same written notes, but approaches the score differently."[92] Yet no one really believes that the orchestra should be considered to have added as much originality and creativity as Beethoven.[93] While this Note has shown that jazz musicians do add as much (and often more) original and creative material as the underlying composer, the courts may not ultimately have the ability to account for

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Copyright Act the equivalent of a working requirement as it exists in patent law in many countries, other than the United States." Ghosh, *supra* note 84, at 491. Although the details of the suggestion are beyond the scope of this Note, under such a scheme, individuals other than the copyright owner would be allowed to use and improve the work if the copyright owner does not exploit the copyright within a reasonable time. *See id.*

89 Voegtli, *supra* note 13, at 1234.

90 *Id.* (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436)) (internal quotation marks omitted).

91 Nelson, *supra* note 7, at 60.

92 Linda Benjamin, Note, *Tuning Up the Copyright Act: Substantial Similarity and Sound Recording Protections*, 73 MINN. L. REV. 1175, 1197 (1989).

93 *See id.*

these differing levels of creative contributions. Similarly, it would be very difficult to create statutory carve-outs or even broad rules that account for differing levels of subsequent creative contributions.

But copyright can reward musicians without upsetting the rest of the current copyright scheme by creating a public performance right in the sound recording, thereby enabling the sound recording copyright holder to collect royalties for use of that recording. The attendant royalties are "one of the most significant sources of income from a musical composition and potentially one of the most lucrative from the sound recording."[94] But as the former president of Capitol Records, Alan W. Livingston, observed:

> [A] glaring example of inequity involves the highly talented jazz musician whose . . . skilled performance and creative improvisations on what may be an extremely simple theme go unpaid when the jazz musician's record is broadcast; only the writer and publisher of the original theme receive payment when the record is performed.[95]

The suggestion that owners of the sound recording copyright should receive an exclusive right to perform the copyrighted recording of their performances has been around for quite some time. The original version of the 1976 Copyright Act included such a provision, whereby Congress would have created "mandatory statutory payments to those recording artists whose musical performances were publicly broadcast for commercial purposes."[96] Additionally, radio stations and others who exploited the sound recordings would have been "required to make annual flat fee royalty payments based on their gross advertising revenues."[97] Copyright owners of the sound recordings (in practice, often the record companies) and performers who created the sound recordings would have been entitled to a royalty.[98]

Broadcasters argued that granting such a right to a performer would be prohibitively expensive because broadcasters already pay royalties to the composer for every performance of his work.[99] How-

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[94] John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization — And the Need for Congress To Get in Step with a Full Public Performance Right for Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041, 1046 (2002) (footnote omitted). For a description of the collection of royalties through performing rights societies such as ASCAP, see *id.* at 1046–49.

[95] Nelson, *supra* note 7, at 60 (quoting *Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 498 (1967)).

[96] William H. O'Dowd, Note, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 253 (1993) (citing *Performance Royalty: Hearings on S. 1111 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 94th Cong. 1–4 (1975) (statement of Sen. Hugh Scott)).

[97] *Id.*

[98] *Id.*

[99] *See* Nelson, *supra* note 7, at 63.

ever, broadcasters seem to be simply arguing for the impossibility of the "re" in any redistributive proposal: "[t]hat someone must pay[] does not justify denying protection where it is otherwise merited."[100] Broadcasters also argued that radio and television exposure encourage record sales. Yet it would surely be possible to take into account the promotional value of such airplay when determining the appropriate statutory licensing fee,[101] thus enabling jazz musicians to participate in the exploitation of their recordings.

The right was eventually left out of the Act after the "[f]urious lobbying efforts by broadcasters against this provision threatened passage of the entire Copyright Act."[102] But the issue did not disappear. In 1978, the Register of Copyrights concluded that a performance right should be granted:

> Broadcasters and other users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a "tax." However, any economic burden on the users of recordings for public performance is heavily outweighed . . . by the commercial benefits accruing directly from the use of copyrighted sound recordings . . . . Sound recordings are creative and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.[103]

Despite these conclusions and suggestions, Congress still did not create a full performance right. In 1995, Congress did pass the Digital Performance Right in Sound Recordings Act (DPRA),[104] granting a limited performance right to public performances "by means of a digital audio transmission."[105] Yet the history and language of the Act make clear that "its primary purpose was to bolster . . . rights to reproduce and distribute by protecting against the loss of sales from digital piracy and new digital delivery services, rather than to recognize

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[100] *Id.* (quoting Paul Frederick Helfer, *Copyright Revision and the Unauthorized Duplication of Phonograph Records — A New Statute and the Old Problems: A Job Half Done*, 14 BULL. COPYRIGHT SOC'Y U.S.A. 137, 164 (1966)).

[101] *See* McLaughlin, *supra* note 34, at 226.

[102] O'Dowd, *supra* note 96, at 253. The lack of a full public performance right owes more to lobbying and economics than legal arguments about how to best achieve the goals of copyright. Indeed, were it not for the "vehement opposition and lobbying of groups such as the National Association of Broadcasters . . . and performance rights societies who did not want to have to pay a fee for the use of recordings, or felt their own fees would be diminished," there very well might be such a right. McLaughlin, *supra* note 34, at 226 (footnote omitted).

[103] O'Dowd, *supra* note 96, at 254 (omissions in original) (quoting SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 59TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS 1063 (Comm. Print 1978)).

[104] Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106, 114–15 (2000)).

[105] 17 U.S.C. § 106(6) (2000).

the intrinsic fairness of a performance right."[106] The DPRA also contains numerous exemptions that make it possible for radio and television broadcasters and others to play records for free, whether their signal is analog or digital.[107]

The argument for a performance copyright in sound recordings is particularly salient in the jazz context. In conventional jazz, unlike other forms of music, the underlying song itself is of secondary importance because of the highly improvisational nature of the music. Rather, it is the musician's performance that is most important. Realizing the difficulty of improvising an extended solo and that the solo is particular to the performing artist, the listener cares less about what the underlying composer wrote than what the jazz musician is playing. Jazz listeners do not pay simply to hear "I Got It Bad and That Ain't Good"; they pay to hear Keith Jarrett playing the song.[108] Often, the song choice is also of secondary importance to the jazz musicians themselves. Rather than choosing a song because they like it or want to interpret it, as is the case in other musical genres, jazz musicians often select songs as the result of an "agreement on some tune wherein they can improvise comfortably."[109] Once the song is selected, the only recognizable aspect of the song — the chorus — is accorded little attention. The first chorus, which typically includes the song's melody, "is a chance to flex the muscles, correct faulty intonation, listen to the chord changes, and get ready for the forthcoming improvisations."[110] Thus, the value of the song lies in the jazz musician's interpretations of the song and improvisations.

To be sure, performance matters in many musical genres: "in the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a 'composition' as an 'arrangement' or 'adaptation' of the score itself."[111] Yet the performer's "choice" is not simply cabined by "his gifts" — it is also constrained by the particular genre. Very few other genres even *allow for* the kind of improvisation and originality jazz *requires*: "To have a sound and style that are unmistakably your own is a prerequisite of greatness in jazz."[112] Whereas the originality and

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106 McLaughlin, *supra* note 34, at 227–28 (footnote omitted).

107 Still, some commentators argue that the further technological evolution of the music industry will increase the effectiveness and power of the DPRA. *See, e.g.*, *id.* at 230–32.

108 *See* KEITH JARRETT, *I Got It Bad and That Ain't Good*, *on* THE MELODY AT NIGHT, WITH YOU (ECM Records 1999).

109 Bruce Lippincott, *Aspects of the Jam Session*, *in* JAM SESSION: AN ANTHOLOGY OF JAZZ 209, 211 (Ralph J. Gleason ed., 1958).

110 *Id.* at 213.

111 Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 664 (2d Cir. 1955) (Hand, J., dissenting).

112 DYER, *supra* note 10, at 187.

creativity in musical interpretations outside of jazz are often restricted to "phrasings and timbral effects on a predetermined set of notes[,] . . . jazz [musicians have] . . . far greater freedom to choose new melodies, harmonies, and rhythms."[113] The outcome is that the performance is "necessarily more compositional and . . . original . . . [and] should be compensated accordingly."[114] In failing to recognize the compositional aspect inherent in the jazz musician's performance, copyright law denies jazz musicians recognition as authors.

V. CONCLUSION

Interestingly, for a genre so rooted in history and acoustic creation, the greatest hope for jazz music and jazz musicians may lie in the burgeoning digital music age and how the courts face the challenges posed by the increase of digital sampling.[115] First, because there is a limited performance right granted for digital transmissions, jazz musicians whose sound recordings are transmitted digitally can receive royalties in the same manner as the underlying composer. Even though this right is limited by numerous exceptions, the jazz musician may benefit as the music shifts to a digital format. That is, it is possible that "as traditional broadcasters expand into more advanced digital services . . . [a]lmost by default, the effect will be the solidification of the currently weak digital performance right into a strong one that allows sound recordings to enjoy first-class treatment as copyrights, and the full bundle of rights they deserve."[116] Second, the increased use of digital samples might lead to scrutiny of copyright's originality requirement, as it surely fails to capture the kind of originality involved in creating music based on sampling. The originality of composition in digital music is twofold. It comes from manipulating the underlying sound or compiling the sounds in a new way, creating a kind of aural collage. Additionally, digital musicians lay claim to underlying works much in the same way as jazz musicians do: both are "intermediate users" whose art requires a degree of appropriation. To the extent that the digital era advances these intermediate user rights arguments, jazz musicians will benefit.

Still, it is unclear why jazz music's fate and the deserved copyright protections and benefits for jazz musicians should be tied to tenuous theories that a digital future might bring change. While "the type of attention our society has paid to jazz reveals a great deal about our

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113 King, *supra* note 28, at 325.

114 *Id.*

115 Digital sampling is the manipulation or combination of a digitized form of a recorded sound using a digital data processing machine such as a synthesizer. *See* Voegtli, *supra* note 13, at 1225 n.62.

116 McLaughlin, *supra* note 34, at 231–32.

culture,"[117] the type of attention U.S. copyright law has paid to jazz may reveal a great deal about our commitment to promoting the progress of the useful arts.

[117] Lawrence W. Levine, *Jazz and American Culture*, 102 J. AM. FOLKLORE 6, 6 (1989).