So far, I have talked about the root ideas of intellectual property. I have talked about its history, about the way it influences and is influenced by technology. I have talked about its effects on free speech and on competition. Until now, however, I have not described the way that it actually affects culture. This chapter aims to rectify the omission, looking at the way copyright law handles one specific form of cultural creation—music. It turns out that some of the problems identified in Chapters 4 and 5 are not simply the result of a mismatch between old law and new technology, or the difficulties posed in applying copyright to software, to machines made of words. The same issues appear at the heart of a much older cultural tradition.

This is the story of a song and of that song’s history. But it is also a story about property and race and art, about the way copyright law has shaped, encouraged, and prohibited music over the last hundred years, about the lines it draws, the boundaries it sets, and the art it forbids.

Music is hard for copyright law to handle. If one had to represent the image of creativity around which copyright law and patent law,
respectively, are built, patent law’s model of creativity would be a pyramid and copyright law’s a fountain, or even an explosion.

In patent law, the assumption is that technological development converges. Two engineers from two different countries tend to produce similar ways of catching mice or harnessing the power of steam. There are a limited number of good ways of accomplishing a technical task. In addition, technological progress is assumed to be incremental. Each development builds on the ones behind it. Based on this image, patent law makes a series of decisions about what gets covered by property rights, for how long, how to handle “subsequent improvements,” and so on. Patent rights last for a short time, not only to lower costs to consumers, but because we want to build on the technology inventors have created as soon as possible, without getting their permission. Even during the patent term, subsequent “improvers” get their own rights and can bargain with the original patent holder to share the profits.

Copyright’s assumptions are different. Copyright began with texts, with creative expression. Here the assumption is (generally) that there are infinite possibilities, that two writers will not converge on the same words, and that the next generation of storytellers does not need to take the actual “stuff” that copyright covers in order to make the next play or novel. (It may be because of this image that so few policy makers seem to worry that copyright now lasts for a very long time.) Subsequent “improvements” of copyrighted material are called derivative works, and without the rights holder’s permission, they are illegal. Again, the assumption seems to be that you can just write your own book. Do not claim you need to build on mine.

Of course, each of these pictures is a caricature. The reality is more complex. Copyright can make this assumption more easily because it does not cover ideas or facts—just their expression. “Boy meets girl, falls in love, girl dies” is not supposed to be owned. The novel *Love Story* is. It is assumed that I do not need Erich Segal’s copyrighted expression to write my own love story. Even if literary creativity does converge around standard genres, plots, and archetypes, it is assumed that those are in the public domain, leaving future creators free to build their own work without using material that is subject to copyright. We could debate the truth of that matter for literature: the expansion of copyright’s ambit to cover plotlines and characters makes it more questionable. Certainly many recognized forms of creativity, such as the pastiche, the collage, the literary biography, and the parody need extensive access to prior copyrighted work. But regardless of how well we think the image of individual creativity fits literature, it fits very poorly in music where so much
creativity is recognizably more collective and additive, and where much of the raw material used by subsequent creators is potentially covered by copyright.

So how does the accretive process of musical creativity fare in the modern law and culture of copyright? How would the great musical traditions of the twentieth century—jazz, soul, blues, rock—have developed under today’s copyright regime? Would they have developed at all? How does the law apply to the new musicians, remixers, and samplers who offer their work on the Internet? Do the lines it draws fit with our ethics, our traditions of free speech and commentary, our aesthetic judgments? It would take a shelf of books to answer such questions definitively. In this chapter, all I can do is suggest some possibilities—using the history of a single song as my case study.

On August 29th, 2005, a hurricane made landfall in Louisiana. The forecasters called it “Hurricane Katrina,” quickly shortened to “Katrina” as its story took over the news. The New Orleans levees failed. Soon the United States and then most of the world was watching pictures of a flooded New Orleans, seeing pleading citizens—mainly African-American—and a Keystone Cops response by the Federal Emergency Management Agency. The stories from New Orleans became more and more frightening. There were tales not only of natural disaster—drownings, elderly patients trapped in hospitals—but of a collapse of civilization: looting, murder and rape, stores being broken into with impunity, rescue helicopters fired upon, women and children sexually assaulted in the convention center where many of the refugees huddled. Later, it would turn out that many, perhaps most, of these reports were untrue, but one would not have guessed that from the news coverage.

The television played certain images over and over again. People—again, mainly African-Americans—were portrayed breaking into stores, pleading from rooftops, or later, when help still had not arrived, angrily gesturing and shouting obscenities at the camera.

As the disaster unfolded in slow motion, celebrities began appearing in televised appeals to raise money for those who had been affected by the storm. Kanye West, the hip hop musician, was one of them. Appearing on NBC on September 2, with the comedian Mike Myers, West started out seeming quietly upset. Finally, he exploded.

I hate the way they portray us in the media. You see a black family, it says, “They’re looting.” You see a white family, it says, “They’re looking for food.” And, you know, it’s been five days [waiting for federal help] because most of the people are black . . . . So anybody out there that wants to do anything that we can help—with
the way America is set up to help the poor, the black people, the less well-off, as slow as possible. I mean, the Red Cross is doing everything they can. We already realize a lot of people that could help are at war right now, fighting another way—and they’ve given them permission to go down and shoot us!

Myers, who, according to the Washington Post, “looked like a guy who stopped on the tarmac to tie his shoe and got hit in the back with the 8:30 to LaGuardia,” filled in with some comments about the possible effect of the storm on the willingness of Louisiana citizens to live in the area in the future. Then he turned back to West, who uttered the line that came to epitomize Katrina for many people around the world, and to infuriate a large number of others. “George Bush doesn’t care about black people!” Myers, the Post wrote, “now look[ed] like the 8:30 to LaGuardia turned around and caught him square between the eyes.”¹ In truth, he did appear even more stunned than before, something I would not have thought possible.

In Houston, Micah Nickerson and Damien Randle were volunteering to help New Orleans evacuees at the Astrodome and Houston Convention Center during the weekend of September 3. They, too, were incensed both by the slowness of the federal response to the disaster and by the portrayal of the evacuees in the media. But Mr. Nickerson and Mr. Randle were not just volunteers, they were also a hip-hop duo called “The Legendary K.O.” What better way to express their outrage than through their art? An article in the New York Times described their response.

“When they got to Houston, people were just seeing for the first time how they were portrayed in the media,” said Damien Randle, 31, a financial adviser and one half of the Legendary K.O. “It was so upsetting for them to be up on a roof for two days, with their kids in soiled diapers, and then see themselves portrayed as looters.” In response, Mr. Randle and his partner, Micah Nickerson, wrote a rap based on the stories of the people they were helping. On Sept. 6, Mr. Nickerson sent Mr. Randle an instant message containing a music file and one verse, recorded on his home computer. Mr. Randle recorded an additional verse and sent it back, and 15 minutes later it was up on their Web site: www.k-otix.com.²

The song was called “George Bush Doesn’t Care About Black People” (also referred to as “George Bush Doesn’t Like Black People”). Appropriately, given that Mr. West was the one to come up with the phrase, the song was built around Mr. West’s “Gold Digger.” Much of the melody was sampled directly from the recording of that song. Yet the words were very different. Where “Gold Digger” is about a predatory, sensual, and materialist woman who

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“take[s] my money when I’m in need” and is a “triflin’ friend indeed,” The Legendary K.O.’s song is a lyrical and profane condemnation of the response to Katrina by both the government and the media. Here is a sample:

Five days in this motherf__ attic
Can’t use the cellphone I keep getting static
Dying ’cause they lying instead of telling us the truth
Other day the helicopters got my neighbors off the roof
Screwed ’cause they say they coming back for us too
That was three days ago, I don’t see no rescue
See a man’s gotta do what a man’s gotta do
Since God made the path that I’m trying to walk through
Swam to the store, tryin’ to look for food
Corner store’s kinda flooded so I broke my way through
I got what I could but before I got through
News say the police shot a black man trying to loot
(Who?!) Don’t like black people
George Bush don’t like black people
George Bush don’t like black people

This chapter is the story of that song. “George Bush Doesn’t Care About Black People” is the end (for the moment) of a line of musical borrowing. That borrowing extends far beyond Kanye West’s song “Gold Digger.” “Gold Digger” is memorable largely because it in turn borrows from an even older song, a very famous one written half a century before and hailed by many as the birth of soul music. It is in the origins of that song that we will start the trail.

I GOT A WOMAN

In 1955, Ray Charles Robinson, better known as Ray Charles, released a song called “I Got a Woman.” It was a defining moment in Charles’s musical development. Early in his career he had unashamedly modeled himself on Nat King Cole.

I knew back then that Nat Cole was bigger than ever. Whites could relate to him because he dealt with material they understood, and he did so with great feeling. Funny thing, but during all these years I was imitating Nat Cole, I never thought twice about it, never felt bad about copying the cat’s licks. To me it was practically a science. I worked at it, I enjoyed it, I was proud of it, and I loved doing it. He was a guy everyone admired, and it just made sense to me, musical and commercial sense, to study his technique. It was something like when a young lawyer—just out of school—respects an older lawyer. He tries to get inside his mind, he studies to
see how he writes up all his cases, and he’s going to sound a whole lot like the older man—at least till he figures out how to get his own shit together. Today I hear some singers who I think sound like me. Joe Cocker, for instance. Man, I know that cat must sleep with my records. But I don’t mind. I’m flattered; I understand. After all, I did the same thing."

In the early 50s Charles decided that he needed to move away from Cole’s style and find his own sound, “sink, swim or die.” But as with any musician, “his own sound” was the product of a number of musical traditions—blues and gospel particularly. It is out of those traditions that “I Got a Woman” emerged; indeed it is that combination that causes it to be identified as one of the birthplaces of soul music.

According to the overwhelming majority of sources, “I Got a Woman” stems from a fairly overt piece of musical borrowing—Charles reworded the hymn “Jesus Is All the World to Me”—sometimes referred to as “My Jesus Is All the World to Me.”

Musically, soul denotes styles performed by and for black audiences according to past musical practices reinterpreted and redefined. During its development, three performers played significant roles in shaping its sound, messages, and performance practice: Ray Charles, James Brown, and Aretha Franklin. If one can pinpoint a moment when gospel and blues began to merge into a secular version of gospel song, it was in 1954 when Ray Charles recorded “My Jesus Is All the World to Me,” changing its text to “I Got A Woman.”

That story is repeated in the biography on Charles’s Web site. “Charles reworded the gospel tune ‘Jesus Is All the World to Me’ adding deep church inflections to the secular rhythms of the nightclubs, and the world was never the same.” Michael Lydon, Charles’s most impressive biographer, simply reports that “Jesus Is All the World to Me” is described as the song’s origin in another published source, and this origin is cited repeatedly elsewhere in books, newspaper articles, and online, though the most detailed accounts also mention Renald Richard, Charles’s trumpeter, who is credited with co-writing the song.

To secular ears, “Jesus Is All the World to Me” is a plodding piece of music with a mechanical, up-and-down melodic structure. It conjures up a bored (and white) church audience, trudging through the verses, a semitone flat, while thinking about Sunday lunch rather than salvation. It is about as far removed as one could be from the syncopated beat and amorous subject matter of “I Got a Woman.” The hymn was the product of Will Lamartine
Thompson—a severe-looking fellow with a faint resemblance to an elderly Doc Holliday—who died in 1909 and is buried in the same place he was born, East Liverpool, Ohio. But the words have an earnestness to them that gives life to the otherwise uninspired verse.

Jesus is all the world to me, my life, my joy, my all;
He is my strength from day to day, without Him I would fall.
When I am sad, to Him I go, no other one can cheer me so;
When I am sad, He makes me glad, He’s my Friend.

Reading those words, one can understand the sincerity that made Mr. Thompson spurn commercial publishers for his devotional music, instead founding his own publishing house (also in East Liverpool) to make sure that his hymns reached the people. I can quote as much of the song as I want without worrying about legal consequences because the copyright on Mr. Thompson’s lyrics has expired. So has the copyright over the music. The song was published in 1904. Copyright had only been extended to musical compositions in 1881. Like all copyrights back then, copyright over music lasted for only twenty-eight years, with a possible extension for another fourteen. If Ray Charles did indeed reword it fifty years later, he was doing nothing illegal. It had been in the public domain for at least eight years, and probably for twenty. Now maybe Charles’s genius was to hear in this hymn, or in a syncopated gospel version of this hymn, the possibility of a fusion of traditions which would itself become a new tradition—soul. Or perhaps his genius was in knowing a good idea—Richard’s—when he heard it, and turning that idea into the beginnings of its own musical genre.

Soul is a fusion of gospel on the one hand and rhythm and blues on the other. From gospel, soul takes the call-and-response pattern of preacher and congregation and the wailing vocals of someone “testifying” to their faith. From rhythm and blues it takes the choice of instruments, some of the upbeat tempo, and the distinctly worldly and secular attitude to the (inevitable) troubles of life. Musicologists delight in parsing the patterns of influence further; R&B itself had roots in “jump music” and the vocal style of the “blues shouters” who performed with the big bands. It also has links to jazz. Gospel reaches back to spirituals and so on.

As with all music, those musical traditions can be traced back or forward in time, the net of influence and borrowing widening as one goes in either direction. In each, one can point to distinctive musical motifs—the chords of the twelve-bar blues, or the flattened fifth in bebop. But musical traditions are
also defined by performance styles and characteristic sounds: the warm guitar that came out of the valve amplifiers of early funk, the thrashing (and poorly miked) drums of ’80s punk, or the tinny piano of honky-tonk. Finally, styles are often built around “standards”—classic songs of the genre to which an almost obligatory reference is made. My colleague, the talented composer Anthony Kelley, uses Henry Louis Gates’s term “signifyin’” to describe the process of showing you are embedded in your musical tradition by referring back to its classics in your playing. In jazz, for example, one demonstrates one’s rootedness in the tradition by quoting a standard, but also one’s virtuosity in being able to trim it into a particular eight-bar solo, beginning and ending on the right note for the current moment in the chord progression. “I Got Rhythm” and “Round Midnight” are such songs for jazz. (The chord changes of “I Got Rhythm” are so standard, they are referred to as “the rhythm changes”—a standard basis for improvisation.) And to stretch the connections further, as Kelley points out, the haunting introduction to “Round Midnight” is itself remarkably similar to Sibelius’s Fifth Symphony.

Through all these layers of musical borrowing and reference, at least in the twentieth century in the United States, runs the seam of race. When white musicians “borrowed” from soul to make “blue-eyed soul,” when Elvis took songs and styles from rhythm and blues and turned them into rockabilly, a process of racial cleansing went on. Styles were adapted but were cleansed of those elements thought inappropriate for a larger white audience. Generally, this involved cutting some of the rawer sensuality, removing racially specific verbal and musical references, and, for much of the century, cutting the African-American artists out of the profits in the process.

There is another irony here. Styles formed by patterns of gleeful borrowing, formed as part of a musical commons—the blues of the Mississippi Delta, for example—were eventually commercialized and “frozen” into a particular form by white artists. Sometimes those styles were covered with intellectual property rights which denied the ability of the original community to “borrow back.” In the last thirty or forty years of the century, African-American artists got into the picture too, understandably embracing with considerable zeal the commercial opportunities and property rights that had previously been denied to them. But aside from the issue of racial injustice, one has to consider the question of sustainability.

In other work, I have tried to show how a vision of intellectual property rights built around a notion of the romantic author can sometimes operate as a one-way valve vis-à-vis traditional and collective creative work. There is a
danger that copyright will treat collectively created musical traditions as un-owned raw material, but will then prevent the commercialized versions of those traditions—now associated with an individual artist—from continuing to act as the basis for the next cycle of musical adaptation and development. One wonders whether jazz, blues, R&B, gospel, and soul would even have been possible as musical styles if, from their inception, they had been covered by the strong property rights we apply today. That is a question I want to return to at the end of this chapter.

Musical styles change over time and so do their techniques of appropriation. Sometimes musical generations find their successors are engaging in different *types* of borrowing than they themselves engaged in. They do not always find it congenial. It is striking how often musicians condemn a younger generation’s practice of musical appropriation as theft, while viewing their own musical development and indebtedness as benign and organic. James Brown attacked the use of his guitar licks or the drum patterns from his songs by hip-hop samplers, for example, but celebrated the process of borrowing from gospel standards and from rhythm and blues that created the “Hardest Working Man in Show Business”—both the song and the musical persona. To be sure, there are differences between the two practices. Samplers take a three-second segment off the actual recording of “Funky Drummer,” manipulate it, and turn it into a repeating rhythm loop for a hip-hop song. This is a different kind of borrowing than the adaptation of a chord pattern from a gospel standard to make an R&B hit. But which way does the difference cut as a matter of ethics, aesthetics, or law?

Charles himself came in for considerable criticism for his fusion of gospel intonations and melodic structures with the nightclub sound of rhythm and blues, but not because it was viewed as piracy. It was viewed as sacrilegious. Charles totally removed himself from the polite music he had made in the past. There was an unrestrained exuberance to the new Ray Charles, a fierce earthiness that, while it would not have been unfamiliar to any follower of gospel music, was almost revolutionary in the world of pop. Big Bill Broonzy was outraged: “He’s crying, sanctified. He’s mixing the blues with the spirituals. He should be singing in a church.”

Charles disagreed. “You can’t run away from yourself. . . . What you are inside is what you are inside. I was raised in the church and was around blues and would hear all these musicians on the jukeboxes and then I would go to revival meetings on Sunday morning. So I would get both sides of music. A
lot of people at the time thought it was sacrilegious but all I was doing was singing the way I felt.”

Why the charge of sacrilege? Because beyond the breach of stylistic barriers, the relationships Charles described did not seem to belong in church.

“I Got a Woman” tells of a woman, “way over town,” who is good to the singer—very good, in fact. She gives him money when he is in need, is a “kind of friend indeed,” even saves her “early morning loving” just for him (and it is tender loving at that). In the third verse we learn she does not grumble, fuss, or run in the streets, “knows a woman’s place is right there now in the home,” and in general is a paragon of femininity. Gender roles aside, it is a fabulous song, from the elongated “We-e-ell . . .” in Charles’s distinctive tones, to the momentary hesitation that heightens the tension, all the way through the driving beat of the main verses and the sense that a gospel choir would have fit right in on the choruses, testifying ecstatically to the virtues of Charles’s lady friend. Charles liked women—a lot of women, according to his biographers—and a lot of women liked him right back. That feeling comes through very clearly from this song.

I would like to quote the song lyrics for you, just as I did the words of the hymn, but that requires a little more thought. Charles’s song was released in 1955. By that time, the copyright term for a musical composition was twenty-eight years, renewable for another twenty-eight if the author wished. (Later, the twenty-eight-year second term would be increased to forty-seven years. Still later, the copyright term would be extended to life plus seventy years, or ninety-five years for a “work for hire.” Sound recordings themselves would not be protected by federal law until the early 1970s.) Anyone who wrote or distributed a song under the “28 + 28” system was, in effect, saying “this is a long enough protection for me,” enough incentive to create. Thus, we could have assumed that “I Got a Woman” would enter the public domain in either 1983 or, if renewed, 2011. Unfortunately for us, and for a latter-day Ray Charles, the copyright term has been extended several times since then, and each time it was also extended retrospectively. Artists, musicians, novelists, and filmmakers who had created their works on the understanding that they had twenty-eight or fifty-six or seventy-five years of protection now have considerably more. This was the point raised in Chapter 1. Most of the culture of the twentieth century, produced under a perfectly well-functioning system with much shorter copyright terms, is still locked up and will be for many years to come.

In the case of “I Got a Woman,” it is now about fifty years since the song’s release—the same length of time as between Thompson’s hymn and Charles’s
alleged “rewording.” If the words and music were properly copyrighted at the
time of its publication, and renewed when appropriate, the copyright still has
forty-five years to run. No one will be able to “reword” “I Got a Woman” and
use it to found a new genre, or take substantial portions of its melody, until
the year 2050. The freedoms Ray Charles says he used to create his song are
denied to his successors until nearly a century after the song’s release. (As we
will see in a moment, this put certain constraints on Kanye West.)

Would it truly be a violation of copyright for me to quote the middle
stanza in a nonfiction book on copyright policy? Not at all. It is a classic “fair
use.” In a moment I will do so. But it is something that the publisher may
well fuss over, because copyright holders are extremely aggressive in asking for
payments for the slightest little segment. Copyright holders in music and
song lyrics are among the most aggressive of the lot. Year after year academics,
critics, and historians pay fairly substantial fees (by our standards) to license
tiny fragments of songs even though their incorporation is almost certainly
fair use. Many of them do not know the law. Others do, but want to avoid the
hassle, the threats, the nasty letters. It is simpler just to pay.

Unfortunately, these individual actions have a collective impact. One of the
factors used to consider whether something is a fair use is whether or not there
is a market for this particular use of a work. If there is, it is less likely to be a fair
use to quote or incorporate such a fragment. As several courts have pointed out,
there is a powerful element of circularity here. You claim you have a right to stop
me from doing x—quoting two lines of your three-verse song in an academic
book, say. I say you have no such right and it is a fair use. You say it is not a fair
use because it interferes with your market—the market for selling licenses for
two-sentence fragments. But when do you have such a market? When you have
a right to stop me quoting the two-sentence fragment unless I pay you. Do you
have such a right? But that is exactly what we are trying to decide! Is it a fair use
or not? The existence of the market depends on it not being a fair use for me to
quote it without permission. To say “I would have a market if I could stop you
doing it, so it cannot be a fair use, so I can stop you” is perfectly circular.

How do we get out of the circle? Often the court will look to customs and
patterns in the world outside. Do people accept this as a market? Do they tra-
titionally pay such fees? Thus, if a lot of people choose to pay for quotes that
actually should have been fair use, the “market” for short quotes will begin to
emerge. That will, in turn, affect the boundaries of fair use for the worse.
Slowly, fair use will constrict, will atrophy. The hypertrophied permissions
culture starts as myth, but it can become reality.
In any event, Ray Charles had no need of fair use to make “I Got a Woman” because the hymn his biography claims it is based on was in the public domain. But is that the real source? I can hear little resemblance. As I researched the origins of “I Got a Woman,” I found claims that there was a different source, a mysterious song by the Bailey Gospel Singers, or the Harold Bailey Gospel Singers, called “I’ve Got a Savior.”12 The Columbia Records gospel catalogue even provided a catalogue number.13 There was such a song, or so it seemed. But there the research stalled. The exemplary librarians at Duke University Music Library could find no trace. Catalogues of published records showed nothing. Inquiries to various music librarian listservs also produced no answer. There was a man called Harold Bailey, who sang with a group of gospel singers, but though several Internet postings suggested he was connected to the song, his biography revealed he would have been only thirteen at the time. The Library of Congress did not have it. Eventually, Jordi Weinstock—a great research assistant who demonstrated willingness to pester anyone in the world who might conceivably have access to the recording—hit gold. The Rodgers and Hammerstein Archives of Recorded Sound at the New York Public Library for the Performing Arts had a copy—a 78 rpm vinyl record by the Bailey Gospel Singers with “Jesus Is the Searchlight” on the B-side. Our library was able to obtain a copy on interlibrary loan from the helpful curator, Don McCormick.

It sounds like the same song. Not the same words, of course: the introduction is different and the Bailey Gospel Singers lack the boom-chicky-boom backing of Charles’s version, but the central melody is almost exactly the same. When the Bailey Gospel Singers sing “Keeps me up / Keeps me strong / Teach me right / When I doing wrong / Well, I’ve got a savior / Oh what a savior / yes I have,” the melody, and even the intonation, parallel Charles singing the equivalent lines: “She gimme money / when I’m in need / Yeah she’s a kind of / friend indeed / I’ve got a woman / way over town / who’s good to me.”

True, some of the lyrical and rhythmic patterns of “I’ve Got a Savior” are older still. They come from a spiritual called “Ain’t That Good News,” dating from 1940, which rehearses all the things the singer will have in the Kingdom of Heaven—a harp, a robe, slippers (!), and, finally, a savior. The author of “I’ve Got a Savior” was, like all the artists discussed here, taking a great deal from a prior musical tradition. Nevertheless, Charles’s borrowing is particularly overt and direct. The term “rewording” is appropriate. So far as I can see, whether or not he also relied on a fifty-year-old hymn, Ray Charles appears to...
have taken both the melody and lyrical pattern of his most famous hit from a
song that was made a mere three or four years earlier.

Like many 78 rpm records, this one was sold without liner notes. The cen-
ter of the record provides the only details. It gives the name of the track and
the band and a single word under the song title, “Ward”—presumably the
composer. “Ward” might be Clara Ward of the Ward Singers, a talented gospel
singer and songwriter who became Aretha Franklin’s mentor and who had her
own music publishing company.

There is a particular reason to think that she might have written the song:
Ray Charles clearly liked to adapt her music to secular ends. We know that he
“reworked” Ward’s gospel classic “This Little Light of Mine” into “This Little
Girl of Mine.” Ward reportedly was irritated by the practice. So far as we
know, the copying of the music did not annoy her because she viewed it as
theft, but because she viewed it as an offense against gospel music.

Charles is now starting to get criticism from some gospel music performers for sec-
cularizing gospel music and presenting it in usual R&B venues. Most adamant in
her misgivings is Clara Ward who complains about “This Little Girl Of Mine” be-
ing a reworking of “This Little Light Of Mine” (which it is), as a slap against the
gospel field.¹⁴

This stage of Charles’s career is described, rightly, as the moment when his
originality bursts forth, where he stops imitating the smooth sounds of Nat
King Cole and instead produces the earthy and sensual style that becomes his
trademark—his own sound. That is true enough; there had been nothing
quite like this before. Yet it was hardly original creation out of nothing. Both
Charles himself and the musicological literature point out that “his own
sound,” “his style,” is in reality a fusion of two prior genres—rhythm and
blues and gospel. But looking at the actual songs that created soul as a genre
shows us that the fusion goes far beyond merely a stylistic one. Charles makes
some of his most famous songs by taking existing gospel classics and rework-
ing or simply rewording them. “I’ve Got a Savior” becomes “I Got a
Woman.” “This Little Light of Mine” becomes “This Little Girl of Mine.”

The connection is striking: two very recent gospel songs, probably by the
same author, from which Charles copies the melody, structure, pattern of
verses, even most of the title—in each case substituting a beloved sensual
woman for the beloved deity. Many others have noticed just how closely
Charles based his songs on gospel tunes, although the prevalence of the story
that “I Got a Woman” is derived from an early-twentieth-century hymn
caused most to see only the second transposition, not the first. Borrowing from a fifty-year-old hymn and changing it substantially in the process seems a little different from the repeated process of “search and replace” musical collage that Charles performed on the contemporary works of Clara Ward.

If I am right, Charles’s “merger” of gospel and blues relied on a very direct process of transposition. The transposition was not just of themes: passion for woman substituted for passion for God. That is a familiar aspect of soul. It is what allows it to draw so easily from gospel’s fieriness and yet coat the religion with a distinctly more worldly passion. Sex, sin, and syncopation—what more could one ask? But Charles’s genius was to take particular songs that had already proved themselves in the church and on the radio, and to grab large chunks of the melody and structure. He was not just copying themes, or merging genres, he was copying the melodies and words from recent songs.

Was this mere musical plagiarism, then? Should we think less of Ray Charles’s genius because we find just how closely two of the canonical songs in the creation of soul were based on the work of his contemporaries? Hardly. “I Got a Woman” and “This Little Girl of Mine” are simply brilliant. Charles does in fact span the worlds of the nightclub at 3 A.M. on Sunday morning and the church later that day, of ecstatic testimony and good old-fashioned sexual infatuation. But the way he does so is a lot more like welding, or bricolage, than it is like designing out of nothing or creating anew while distantly tugged by mysterious musical forces called “themes” or “genres.” Charles takes bits that have been proven to work and combines them to make something new. When I tell engineers or software engineers this story, they nod. Of course that is how creation works. One does not reinvent the wheel, or the method of debugging, so why should one reinvent the hook, the riff, or the melody? And yet Charles’s creation does not have the degraded artistic quality that is associated with “mere” cut-and-paste or collage techniques. The combination is greater than the sum of its parts. If Charles’s songs do not fit our model of innovative artistic creativity, perhaps we need to revise the model—at least for music—rather than devaluing his work.

When I began this study, it seemed to me that the greatest challenge to copyright law in dealing with music was preventing rights from “creeping,” expanding from coverage of a single song or melody to cover essential elements of genre, style, and theme. In effect, we needed to apply the Jefferson Warning to music, to defeat the constant tendency to confuse intellectual property with real property, and to reject the attempts to make the right holder’s control total. My assumption was that all we needed to do was to keep open the
“common space” of genre and style, and let new artists create their new compositions out of the material in that commons and gain protection over them. In many ways, Charles’s work lies at the very core of the stuff copyright wishes to promote. It is not merely innovative and expressive itself, it also helped form a whole new genre in which other artists could express themselves. But to create this work, Charles needed to make use of a lot more than just genres and styles created by others. He needed their actual songs. If the reactions of Clara Ward and Big Bill Broonzy are anything to go by, they would not have given him permission. To them, soul was a stylistic violation, a mingling of the sacred with the profane. If given a copyright veto over his work, and a culture that accepts its use, Ward might well have exercised it. Like the disapproving heirs that Macaulay talked about, she could have denied us a vital part of the cultural record. Control has a price.

Did Ray Charles commit copyright infringement? Perhaps. We would have to find if the songs are substantially similar, once we had excluded standard forms, public domain elements, and so on. I would say that they are substantially similar, but was the material used copyright-protected expression? The Copyright Office database shows no entry for “I’ve Got a Savior.” This is not conclusive, but it seems to indicate that no copyright was ever registered in the work. In fact, it is quite possible that the song was first written without a copyright notice. Nowadays that omission would be irrelevant. Works are copyrighted as soon as they are fixed in material form, regardless of whether any copyright notice is attached. In 1951, however, a notice was required when the work was published, and if one was not put on the work, it passed immediately into the public domain. However, later legislation decreed that the relevant publication was not of the record, but of the notation. If the record were pressed and sold without a copyright notice, the error could be corrected. If a lead sheet or a sheet music version of “I’ve Got a Savior” had been published without notice or registration, it would enter the public domain. It is possible that this happened. Intellectual property rights simply played a lesser role in the 1950s music business than they do today, both for better and for worse. Large areas of creativity operated as copyright-free zones. Even where copyrights were properly registered, permission fees were not demanded for tiny samples. While bootlegged recordings or direct note-for-note copies might well draw legal action, borrowing and transformation were apparently viewed as a normal part of the creative process. In some cases, artists simply did not use copyright. They made money from performances. Their records might receive some kind of protection from state law. These protections sufficed.
But the lack of protection also had a less attractive and more racially skewed side. African-American artists were less likely to have the resources and knowledge necessary to navigate the system of copyright. For both black and white artists, whatever rights there were moved quickly away from the actual creators toward the agents, record companies, and distributors. They still do. But African-American musicians got an even worse deal than their white counterparts. True, the copyright system was only an infinitesimal part of that process. A much larger part was the economic consequences of segregation and racial apartheid. But copyright was one of the many levers of power that were more easily pulled by white hands. This is an important point because the need to end that palpable racial injustice is sometimes used to justify every aspect of our current highly legalized musical culture. About that conclusion, I am less convinced.

In any event, it is possible that the musical composition for “I’ve Got a Savior” went immediately into the public domain. If that were the case, Ray Charles could draw on it, could change it, could refine it without permission or fee. Certainly there is no mention of seeking permission or paying fees in any of the histories of “I Got a Woman.” Indeed, the only question of rectitude Charles was focused on was the stylistic one. Was it appropriate to mix gospel and R&B, devotional music and secular desire? Charles and Richard seemed to see the process of rewording and adapting as just a standard part of the musician’s creative process. The only question was whether these two styles were aesthetically or morally suited, not whether the borrowing itself was illegal or unethical. So, whether they drew on a hymn that had fallen into the public domain after the expiration of its copyright term, or a gospel song for which copyright had never been sought, or whether they simply took a copyrighted song and did to it something that no one at the time thought was legally inappropriate, Renald Richard and Ray Charles were able to create “I Got a Woman” and play a significant role in founding a new musical genre—soul.

One thing is clear. Much of what Charles and Richard did in creating their song would be illegal today. Copyright terms are longer. Copyright protection itself is automatic. Copyright policing is much more aggressive. The musical culture has changed into one in which every fragment must be licensed and paid for. The combination is fatal to the particular pattern of borrowing that created these seminal songs of soul.

That should give us pause. I return to the ideas of the Jefferson Warning from Chapter 2 and the Sony Axiom from Chapter 4. Copyright is not an end in itself. It has a goal: to promote the progress of cultural and scientific
creativity. That goal requires rights that are less than absolute. As Jessica Litman points out, building in the intellectual space is different from building in the physical space. We do not normally dismantle old houses to make new ones. This point is not confined to music. Earlier I quoted Northrop Frye: “Poetry can only be made out of other poems; novels out of other novels. All of this was much clearer before the assimilation of literature to private enterprise.” The question is, how big are the holes we need to leave in the private rights? How large a commons do we need to offer to future creators?

Ray Charles’s creation of “I Got a Woman” is only one case. By itself, it proves nothing. Yet, if we find that the seminal, genre-creating artworks of yesteryear would be illegal under the law and culture of today, we have to ask ourselves “is this really what we want?” What will the music of the future look like if the Clara Wards and Will Lamartine Thompsons of today can simply refuse to license on aesthetic grounds or demand payment for every tiny fragment? Tracing the line further back, it is fascinating to wonder whether gospel, blues, and jazz would have developed if musical motifs had been jealously guarded as private property rather than developed as a kind of melodic and rhythmic commons. Like most counterfactuals, that one has no clear answer, but there is substantial cause for skepticism. If copyright is supposed to be promoting innovation and development in culture, is it doing its job?

AN INDUSTRY OF GOLD DIGGERS?

Fifty years after “I Got a Woman” was written, Kanye West released “Gold Digger” on the album Late Registration. Mr. West is an interesting figure in rap. At first he was shunned because his clean-cut looks and preppy clothing ran against the gangster image that often dominates the music. It is just hard imagining Mr. West delivering a line like Rakim’s “I used to be a stick-up kid, so I think of all the devious things I did” with a straight face. (Still less “Stop smiling, ain’t nothin’ funny, nothing moves but the money.”) Perhaps partly as a result, his lyrics are oddly bipolar in their views about exaggerated masculinity and the misogyny that sometimes accompanies it.

For the song, Mr. West recruited Jamie Foxx, who had played Ray Charles in the movie Ray. Showing an impressive expanse of oiled chest, Mr. Foxx imitates Charles’s style and the melody of “I Got a Woman” to provide the lyrical chorus to “Gold Digger.” “I Got a Woman” anchors West’s song. It provides its melodic hook. It breaks up the rap with a burst of musical nostalgia. But Mr. West’s gold digger is very different from Ray Charles’s woman friend.
This woman does not give money when the singer is in need. She takes his money when he is in need and is a “triflin’ friend indeed.” Mr. Charles had a friend who gave him tender morning loving. Jamie Foxx sings of a mercenary gold digger who digs on him. When Mr. West adds the rap verses to the song, we get a perfect caricature of such a person, uninterested in any man who is broke, dragging around four kids and an entourage, insisting all of them be entertained at her boyfriend’s expense, and wielding unfounded paternity suits like a proprietary business method. Mr. West’s repeated disclaimer “I ain’t sayin’ she’s a gold digger” is unconvincing, because both the words of the introduction and the implicit message of the rap tell us she is. We even get the absurd image of a man who is playing on the winning side in the Super Bowl but driving a Hyundai, so financially demanding is his girlfriend. At several points the song descends into ludicrous—and perhaps conscious—self-mockery, as it explores the concerns of the rich African-American celebrity male. My favorite line is “If you ain’t no punk, holler ‘We want prenup!!’ ” The audience obliges. It sounds like assertiveness training for show business millionaires.

It would be hard to get a feminist role model out of either “I Got a Woman” or “Gold Digger.” One offers the feminine virtues of modesty and fidelity, but magically combines them with wantonness where the singer is concerned and an open checkbook. The other is a parody of the self-assertive economic actor, as rapacious as any multinational, who uses her sexuality for profit. Put them together and you have bookends—male fantasy and male nightmare. Was that Mr. West’s point? Perhaps. The song itself takes several sly turns. The gold digger dogging Mr. West is used as part of a homily to black women on how to treat their (noncelebrity) black men. They should stick with their man because his ambition is going to take him from mopping floors to the fryers, from a Datsun to a Benz. It seems that Mr. West is getting a little preachy, while slamming the actual social mobility available to black men. Moving from floor cleaning to frying chicken is not actually going to provide a Mercedes. But he immediately undercuts that tone twice, once by acknowledging the boyfriend’s likely infidelity and again by saying that even if the black woman follows his homily, “once you get on, he leave yo’ ass for a white girl.”

Mr. West has a tendency to make sudden turns like this in his lyrics—ironically upsetting the theme he has just set up. So it is not hard to imagine that he deliberately used a fragment of Charles’s song, not just because it sounded good but to contrast the image of the fantasy woman from Charles’s 1950s soul, who is faithful, sensual, and always willing to offer a loan, with an image from today’s rap—sexually predatory and emasculating women who
are uninterested in men except as a source of money. Even the retro cover of the single, with its 1950s-style pinup drawing of a white model, seems to draw the connection. Did he use Charles’s song precisely because of these clashing cultural snapshots? Perhaps, or perhaps he just liked the tune. In any event, the contrast is striking. When it was released, Charles’s song was seen as a sacrilegious depiction of sensuality and the woman was decried as a harlot. Compared to the woman in Mr. West’s song, she sounds like a Girl Scout. It is also a little depressing. Ray Charles was neither an egalitarian metrosexual nor a Prince Charming where women were concerned—anything but. But as I said before, you do get a sense that he liked women—however unrealistic or two-dimensional their portrayal. It is hard to get that sense from “Gold Digger.”

Was Mr. West legally required to ask permission—and pay, if necessary—to use a fragment of “I Got a Woman” for his chorus? The longest single piece of borrowing occurs in the introduction: twenty-six words and their accompanying music. “She takes my money, when I’m in need, oh she’s a triffin’ friend indeed. Oh she’s a gold digger, way over town, who digs on me.” As I pointed out, the lyrics from Charles’s song present a very different story. “She gimme money / when I’m in need / Yeah she’s a kind of / friend indeed / I’ve got a woman / way over town / who’s good to me.” But even if the message is the opposite, the musical borrowing is direct. It is also extensive. During Mr. West’s rap, the entire background melody is a loop of Jamie Foxx singing the Ray Charles-inspired melody in the background. During the song, Mr. Foxx returns to words that are closer to Charles’s original: “She gimme money, when I’m in need,” a refrain that is conspicuously at odds with the woman being described by Mr. West. That eight-bar loop of a Ray Charles melody runs throughout Kanye West’s song.

Mr. West is very successful, so the fragment of the song was “cleared”—payment was made to Charles’s estate. It is fascinating to think of what might have happened if Charles’s heirs had refused. After all, one could see West’s song as a crude desecration of Charles’s earlier work, rather than a good-humored homage. Since this is not a “cover version” of the song—one which does not change its nature and thus operates under the statutory licensing scheme—Charles’s heirs would have the right to refuse a licensing request. Unlike Clara Ward, it is clear that Charles’s heirs have the legal power to say no, to prevent reuse of which they disapprove.

Was West legally required to license? Would all this amount to a copyright violation? It is worth running through the analysis because it gives a beautiful snapshot of the rules with which current law surrounds musical creation.
Today, a song is generally covered by at least two copyrights. One covers the musical composition—the sheet music and the lyrics—and the other the particular sound recording of that composition. Just as there are two kinds of copyrights, so there are at least two kinds of borrowings that copyright might be concerned with. First, one musical composition might infringe another. Thus, for example, a court found that George Harrison “subconsciously” based his song “My Sweet Lord” on the melody of “He’s So Fine” by the Chiffons.

How much does it take to infringe? That is a difficult question. The law’s standard is “substantial similarity,” but not every kind of similarity counts. Minimal or *de minimis* copying of tiny fragments is ignored. Certain styles or forms have become standards; for example, the basic chord structure of the twelve-bar blues or the habit of introducing instruments one at a time, from quietest to loudest. There are only so many notes—and so many ways to rearrange them; inevitably any song will be similar to some other. Yet that cannot mean that all songs infringe copyright. Finally, even where there is substantial similarity of a kind that copyright is concerned with, the second artist may claim “fair use”—for parody or criticism, say. Copyright law, in other words, has tried to solve the problem with which I began the chapter. Because much of musical creativity is organic and collective and additive, because it does use prior musical expression, some copyright decisions have tried to carve out a realm of freedom for that creativity, using doctrines with names such as *scènes à faire*, merger, and fair use. This is yet another example of judges trying to achieve the balance that this book is all about—between the realm of the protected and the public domain—recognizing that it is the balance, not the property side alone, that allows for new creativity.

The second type of potential infringement comes when someone uses a fragment of the earlier recording as part of the later one, actually copying a portion of the recording itself and using it in a new song. One might imagine the same rules would be applied—*de minimis* copying irrelevant, certain standard forms unprotected, and so on. And one would be wrong. In a case called *Bridgeport Music*, which I will discuss in a moment, the Court of Appeals ruled that taking even two notes of a musical recording counts as potentially actionable copying. Where recordings are concerned, in other words, there is almost no class of copying so minimal that the law would ignore it. This is a terrible decision, at least in my opinion, likely to be rejected by other Circuits and perhaps even eventually by the Supreme Court. But for the moment, it is a case that samplers have to deal with.
How does Kanye West fare under these rules? He may sample from the actual recording of Mr. Charles’s song. It is hard to tell. He certainly copies portions of the melody. That means we have to look at the copyright in the musical composition—the words and the music of “I Got a Woman.” For a copyright infringement, one needs a valid copyright and evidence of copying, the amount copied needs to be more than an insignificant fragment, substantial similarity is required, and the similarity has to be between the new work and the elements of the original that are actually protected by copyright. Elements taken from the public domain, standard introductions, musical clichés, and so forth, do not get included in the calculation of similarity. Finally, the copier can claim “fair use”—that his borrowing is legally privileged because it is commentary, criticism, parody, and so on.

Does Charles, or his record company, have a valid copyright in the musical composition? One huge problem in copyright law is that it is remarkably hard to find this out. Even with the best will in the world, it is hard for an artist, musician, or teacher to know what is covered by copyright and what is not. Nowadays, all works are copyrighted as soon as they are fixed, but at the time “I Got a Woman” was written one had to include a copyright notice or the song went immediately into the public domain. The Copyright Office database shows no copyright over the words and music of “I Got a Woman.” There are copyrights over a variety of recordings of the song. If Mr. West is using a fragment of the recording, these would affect him. But the melody? It is possible that the underlying musical composition is in the public domain. Finding out whether it is or is not would probably cost one a lot of money.

Suppose that Mr. Charles has complied with all the formalities. The words and music were published with a copyright notice. A copyright registration was filed and renewed. Does Mr. West infringe this copyright? That is where the discovery of the Bailey Gospel Singers recording is potentially so important. Charles only gets a copyright in his original creation. Those elements taken from the public domain (if “I’ve Got a Savior” was indeed in the public domain) or from other copyrighted songs do not count. The irony here is that the elements that Kanye West borrows from Ray Charles are almost exactly the same ones Ray Charles borrows from the Bailey Gospel Singers. “I’ve got a savior, Oh what a savior” becomes “I got a woman, way over town” becomes “There’s a Gold Digger, way over town.” And of course, the music behind those words is even more similar. When The Legendary K.O. reached for Kanye West’s song in order to criticize Mr. Bush, they found themselves sampling Jamie Foxx, who was copying Ray Charles, who was copying the Bailey...
Gospel Singers, who themselves may have borrowed their theme from an older spiritual.

**GEORGE BUSH DOESN’T CARE . . .**

Five damn days, five long days
And at the end of the fifth he walking in like “Hey!”
Chilling on his vacation, sitting patiently
Them black folks gotta hope, gotta wait and see
If FEMA really comes through in an emergency
But nobody seem to have a sense of urgency
Now the mayor’s been reduced to crying
I guess Bush said, “N———’s been used to dying!”
He said, “I know it looks bad, just have to wait”
Forgetting folks was too broke to evacuate
N———’s starving and they dying of thirst
I bet he had to go and check on them refineries first
Making a killing off the price of gas
He would have been up in Connecticut twice as fast . . .
After all that we’ve been through nothing’s changed
You can call Red Cross but the fact remains that . . .
George Bush ain’t a gold digger,
but he ain’t f—ing with no broke n———s

“George Bush Doesn’t Care About Black People,” The Legendary K.O.

The song “George Bush Doesn’t Care About Black People” was an immediate sensation. Hundreds of thousands of people downloaded it. Within days two different video versions had been made, one by Franklin Lopez and another by a filmmaker called “The Black Lantern.” Both synchronized the lyrics of the song with news clips of the disaster and unsympathetic footage of President Bush apparently ignoring what was going on. The effect was both hilarious and tragic. The videos were even more popular than the song alone. The blogosphere was fascinated—entries were posted, e-mails circulated to friends with the usual “you have to see this!” taglines. In fact, the song was so popular that it received the ultimate recognition of an Internet fad: the *New York Times* wrote a story on it, setting the practice in historical context.

In the 18th century, songwriters responded to current events by writing new lyrics to existing melodies. “Benjamin Franklin used to write broadside ballads every time a disaster struck,” said Elijah Wald, a music historian, and sell the printed lyrics in
the street that afternoon. This tradition of responding culturally to terrible events had almost been forgotten, Mr. Wald said, but in the wake of Hurricane Katrina, it may be making a comeback, with the obvious difference that, where Franklin would have sold a few song sheets to his fellow Philadelphians, the Internet allows artists today to reach the whole world.18

Mr. Nickerson’s and Mr. Randle’s song started with Kanye West’s words—taken from the fundraiser with Mike Myers. “George Bush doesn’t care about black people.” From there it launched into the song. The background melody comes almost entirely from a looped, or infinitely repeated, version of the hook that Kanye West and Jamie Foxx had in turn taken from Ray Charles: “She gimme money, when I’m in need. I gotta leave.” Against that background, The Legendary K.O. provide their profane and angry commentary, part of which is excerpted above, with a chorus of “George Bush don’t like black people,” in case anyone had missed the point.

The videos differ in the issues they stress. Franklin Lopez’s movie is, rather pointedly given its theme, just black and white. He uses ornate captions pages, reminiscent of silent film from the 1920s, to make political points against the background of the song and the news footage. As the captions read “Katrina Rapidly Approaches,” we cut to a shot of the hurricane. “The President Ponders on What to Do.” We have a shot of Mr. Bush playing golf. “I Think I’ll Ride This One Out.” Mr. Bush is shown relaxing on a golf cart, juxtaposed against pictures of African-Americans wading through the floods. The captions add, as an afterthought, “And Keep Dealing with the Brown People.” (Pictures of soldiers shooting.) When FEMA’s Michael Brown is shown—at the moment when Bush said “Brownie, you are doing a hell of a job”—the captions comment mockingly, “The Horse Judge to the Rescue.”

Mr. Lopez’s video obviously tries to use The Legendary K.O.’s song to make larger political arguments about the country. For example, it asserts that “in 2004 Bush diverted most of the funds for the levees to the war in Iraq.” Scenes reminiscent of a Michael Moore documentary are shown. There are pictures of the Iraq war, Halliburton signs, and shots of the president with a member of the Saudi royal family. The captions accuse the president of showing insensitivity and disdain to racial minorities. One summarizes the general theme: “Since he was elected president, George Bush’s policies have been less than kind toward Africans and Hispanics.” Issues ranging from the response to the Darfur massacres, No Child Left Behind, and the attempted privatization of Social Security also make their appearance. The video concludes by giving the donation information for the Red Cross and saying that we are
“onto” Bush. A picture of a Klansman removing his hood is shown, with the image manipulated so that the face revealed is Mr. Bush’s.

The Black Lantern’s video is just as angry, and it uses some of the same footage, but the themes it picks up are different. It starts with a logo that parodies the FBI copyright warning shown at the beginning of movies: “WARNING: Artist supports filesharing. Please distribute freely.” That dissolves into a picture of Kanye West and Mike Myers. West is speaking, somewhat awkwardly as he goes “off script,” and at first Mr. Myers is nodding, though he starts to look increasingly worried. West says, “I hate the way they portray us in the media. You see a black family it says they are looting. You see a white family, it says they are looking for food.” Finally, West says “George Bush doesn’t care about black people” and the camera catches Myers’s mute, appalled reaction. Then the song begins. The film cuts repeatedly between a music video of Mr. Foxx as he sang the lines for “Gold Digger” and the news coverage of the debacle in New Orleans. At one point the music pauses and a news anchor says, “You simply get chills when you look at these people. They are so poor. And so black.” The song resumes. Here the message is simpler. The media coverage is biased and governmental attention slowed because of negative racial stereotypes and lack of concern about black people.

Some readers will find that this song and these videos capture their own political perspectives perfectly. They will love the bitterly ironic and obscene outrage at the government’s failure, the double standards of the press, and the disproportionate and callously disregarded impact on the poor and black. Others will find both song and films to be stupid, insulting, and reductionist—an attempt to find racial prejudice in a situation that, at worst, was an example of good old-fashioned governmental incompetence. Still others will find the language just too off-putting to even think about the message. Whatever your feelings about the content, I urge you to set them aside for a moment. For better or worse, Mr. Bush just happened to be president at the moment when the Internet was coming into its own as a method of distributing digitally remixed political commentary, which itself has recently become something that amateurs can do for pennies rather than an expensive activity reserved to professionals. The point is that whatever rules we apply to deal with “George Bush Doesn’t Care About Black People” will also apply to the next video that alleges corruption in a Democratic administration or that attacks the sacred cows of the left rather than the right. How should we think about this kind of activity, this taking the songs and films and photos of others and remixing them to express political, satirical, parodic, or simply funny points of view?
Sampling

Let us begin with the music. Unlike the other songs I have discussed here, with the possible exception of Mr. West’s, “George Bush Doesn’t Care About Black People” makes use of digital samples of the work of others. In other words, this is not merely about copying the tune or the lyrics. The reason that Mr. Nickerson and Mr. Randle could make and distribute this song so fast (and so cheaply) is that they took fragments from the recording of “Gold Digger” and looped them to form the background to their own rap. That was also part of the reason for the positive public reaction. Kanye West (and Ray Charles and Clara Ward) are very talented musicians. West’s song was already all over the airwaves. The Legendary K.O. capitalized on that, just as Benjamin Franklin capitalized on the familiarity of the songs he reworded. But where Franklin could only take the tune, The Legendary K.O. could take the actual ones and zeros of the digital sound file.

As I mentioned earlier, there are two types of copyright protection over music. There is the copyright over the musical composition and, a much more recent phenomenon, the copyright over the actual recording. This song potentially infringes both of them.

Readers who came of age in the 1980s might remember the music of Public Enemy and N.W.A.—a dense wall of sound on which rap lyrics were overlaid. That wall of sound was in fact made up of samples, sometimes hundreds of tiny samples in a single track. Rap and hip-hop musicians proceeded under the assumption that taking a fragment of someone else’s recording was as acceptable legally (and aesthetically) as a jazz musician quoting a fragment of another tune during a solo. In both cases, the use of “quotation” is a defining part of the genre, a harmless or even complimentary homage. Or so they thought.

In a 1991 case called Grand Upright, that idea was squashed.19 The rap artist Biz Markie had extensively sampled Gilbert O’Sullivan’s song “Alone Again (Naturally)” for his own song “Alone Again.” The court could have applied the rules described earlier in this chapter, decided whether or not this was a large enough usage to make the second song substantially similar to the original, discussed whether or not it counted as a fair use, whether Markie’s use was transformative or parodic, whether it was going to have a negative impact on the market for the original, weighed the issues, and ruled either way. In doing so, there would have been some nice points to discuss about whether or not the breadth of fair use depends in part on the practice in the relevant artistic community, how to understand parodic reference, or the relevant markets.
for the work. (Biz Markie’s lawyers had asked for permission to use the sample, but the Supreme Court has made clear that seeking permission does not weigh against a defense of fair use.) There were also some tricky issues about the breadth of legal rights over recordings—the right was of relatively recent creation and had some interesting limitations. Underlying it all was a more fundamental question: how do we interpret the rules of copyright so as to encourage musical creativity? After all, as this chapter has shown, borrowing and reference are a fundamental part of musical practice. We ought to think twice before concluding they are illegal. Are we to criminalize jazz? Condemn Charles Ives? And if not, what is the carefully crafted line we draw that allows some of those uses but condemns this one?

Judge Duffy, however, was uninterested in any of these subtleties.

“Thou shalt not steal” has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.

If this were a law school exam, it would get a “D.” (Maybe a C given grade inflation.) Duffy makes all of the errors Jefferson warned us against. Tangible property is the same as intellectual property. Songs are the same as sheep and the same rules can apply to both. Theft is theft. The prior injunctions of the framers and the courts notwithstanding, we do not need to think carefully about the precise boundaries of intellectual property rights or worry that interpreting them too broadly is as bad as making them too narrow. So far as Judge Duffy is concerned, the tablets on Mount Sinai were inscribed with an absolute injunction against digital sampling. (The font must have been small.) But to say all this is merely to scratch the surface of how regrettable a decision it is. In the narrowest and most formalistic legal terms it is also very poor.

Judge Duffy gives not a single citation to the provisions of the Copyright Act. He ignores issues of de minimis copying, substantial similarity, fair use, and the differences between the right over the recording and that over the composition. In fact, he quotes the Bible more, and more accurately, than he does Title 17 of the U.S. Code—the Copyright Act. The one mention he makes of actual copyright law is at the end of the opinion, when he refers the case for criminal prosecution! When I first read this case, I seriously wondered for a
moment if it were a crude parody of a legal opinion written by someone who had never been to law school.

Is the result in this case wrong? Personally, I do not think so. It is possible, even probable, that a conscientious judge who bothered to read the law could go through a careful analysis and find that Markie’s use went beyond *de minimis* copying, that it was neither creative, parodic, nor short enough to count as a fair use. The judge might have presumed a negative effect on the market for Mr. O’Sullivan’s song and thus could have ruled that it was a copyright infringement. In doing so, the judge would have to give some guidance to future courts about digital sampling. The most likely guidance would be “the sample here is so extensive and so unchanged, that this case says little about the wider musical practice of sampling.” Judge Duffy’s opinion was poor not because of the result he reached, but because he reached it in an overly broad and judicially inappropriate way that became a guideline for future cultural creation. Worse still, the industry listened to him.

In excellent books on this issue, Kembrew McLeod and Siva Vaidhyanathan each argue that *Grand Upright* was a disaster for rap music. The industry’s practice turned full circle almost overnight. Now every sample, no matter how tiny, had to be “cleared”—licensed from the owners of the recording. As they tell the story, this “legal” change caused an aesthetic change. The number of samples in an average song dropped precipitously. The engaging complexity of the Public Enemy “wall of sound” gave way to the simplistic thumping beat and unimaginative synthesizer lines of modern rap. I must admit to sharing McLeod’s and Vaidhyanathan’s musical prejudices. The causal claim is harder to substantiate, but industry lawyers and musicians both agree that changes in the industry’s understanding of the law had a major role in transforming the practice of sampling.

If we disregard the Jefferson Warning and assume the recording artist has absolute property rights over his work, then we could ignore the idea that forcing people to pay for stuff they take might have a negative effect on future art and culture. Theft is theft. I might be able to make art much more easily if I did not have to pay for the paint and canvas, but that is not commonly held to excuse shoplifting from art stores. But if we take the Jefferson Warning seriously, then intellectual property’s job is to balance the need to provide incentives for production and distribution with the need to leave future creators free to build upon the past. Reasonable minds will differ on where this line is to be drawn, but the process of drawing it is very different from the process Judge Duffy had in mind.
For fifteen years, critics of the decision waited for an appeals court to fix the law in this area. When the case of Bridgeport Music, Inc. v. Dimension Films came up, they thought they had what they wanted. The band NWA had used a tiny fragment (less than two seconds) consisting of three notes of a guitar solo from the George Clinton song “Get Off Your Ass and Jam.” The fragment was an arpeggiated chord, which simply means that you strike the notes of the chord individually and in sequence. It was, in fact, a pretty standard “deedly” sound, familiar from many guitar solos. NWA then heavily distorted this fragment and looped it so that it played in the background of one part of the song—so faintly that it is almost impossible to hear and completely impossible to recognize. (With the distortion it sounds like a very faint and distant police siren.) A company called Bridgeport Music owned the sound recording copyright over the Clinton song. They sued. NWA’s response was predictable—this was classic de minimis copying, which the law did not touch. One did not even have to get to the issue of fair use (though this surely would be one).

The appeals court did not waste any time attempting to dignify Judge Duffy’s decision in Grand Upright.

Although Grand Upright applied a bright-line test in a sampling case, we have not cited it as precedent for several reasons. First, it is a district court opinion and as such has no binding precedential value. Second, although it appears to have involved claims for both sound recording and musical composition copyright infringement, the trial judge does not distinguish which he is talking about in his ruling, and appears to be addressing primarily the musical composition copyright. Third, and perhaps most important, there is no analysis set forth to indicate how the judge arrived at his ruling, which has resulted in the case being criticized by commentators. They did like one thing about the decision, however: its bright-line rule, “Thou Shalt Not Steal.” (Lawyers use the term “bright-line rule” to refer to a rule that is very easy to apply to the facts. A 55 mph speed limit is a bright-line rule.) The Bridgeport court rejected the idea that sound recording copyrights and music composition copyrights should be analyzed in the same way. They wanted to set a clear rule defining how much of a sound recording one could use without permission. How much? Nothing. To be precise, the court suggests in a footnote that taking a single note might be acceptable since the copyright protection only covers a “series.” Anything more, however, is clearly off limits.

Though they come to a conclusion that, if anything, is more stringent than Judge Duffy’s, they do so very differently. In their words, “Get a license or do
Effectively, the court concludes that the sound recording copyright is different enough from the composition copyright that a court could reasonably conclude that a different analysis is required. The judges are fully aware that copyright must balance encouraging current creators and leaving raw material to future creators—the Jefferson Warning holds no novelty for them. But they conclude that a clear “one-note rule” will do, because if the costs of licenses are too high, samplers can simply recreate the riff themselves, and this will tend to keep prices reasonable.

This is an interesting idea. Why does this not happen more often? Why do samplers not simply recreate James Brown’s drumbeat from “Funky Drummer,” or George Clinton’s solo from “Get Off Your Ass and Jam”? Musicians offer lots of different answers. They do not understand the distinction the court is drawing, so the market never develops. The samples themselves cannot be replicated, because the music has all kinds of overtones from the historical equipment used and even the methods of recording. Fundamentally, though, the answer seems to be one of authenticity, ironically enough. The original beats have a totemic significance—like the great standard chord sequences in jazz. One cannot substitute replicas for James Brown’s funkiness. It just would not be the same. As Walter Benjamin pointed out long ago in “The Work of Art in the Age of Mechanical Reproduction,” cheap copying actually increases the demand for authenticity. The court’s economic analysis—which imagines a world of fungible beats produced for music as a consumer good—deals poorly with such motivations.

When the court first released its decision, it was greeted with concern even by recording industry representatives who might have been expected to favor it, because it appeared to do away with not only the de minimis limitation on copyright (some portions are just too small to count as “copying”) but the fair use provisions as well. The court took the very unusual step of rehearing the case and amending the opinion, changing it in a number of places and adding a paragraph that stated that when the case went back to the district court, the judge there was free to consider the fair use defense. Of course, if one takes this seriously—and, for the constitutional reasons given in Chapter 5, I agree that the court has no power to write fair use out of the statute—it undermines the supposedly clear rule. If the factors of fair use are seriously applied, how can a three-note excerpt ever fail to be fair use? And if we always have to do a conventional fair use analysis, then the apparent clarity of the one-note rule is an illusion.

The Bridgeport decision is a bad one, I believe. Among other things, it fails
to take seriously the constitutional limitations on copyright—including the originality requirement and the First Amendment. (A three-note sample is not original enough to be protected under copyright law, in my view. There are also more speech-related issues in sampling than the court seems to realize.) The competitive licensing market the court imagines seems more like economic fantasy than reality. I think the ruling sets unnecessary barriers on musical creation and ends up with a rule that is just as blurry as the one it criticizes. I think the court’s reading of the statute and legislative history is wrong—though I have not bored you with the full details of that argument. But I want to be clear that it is a very different kind of bad decision from Judge Duffy’s.

The court in Bridgeport does see copyright as a balance. It does understand the need for future creators to build on the past, but it also shows that a simple willingness to look upon intellectual property protections in a utilitarian way does not solve all problems. It certainly does not proceed from Jefferson’s presumption that intellectual property protections should be interpreted narrowly. Though it claims to have a “literal” reading of the statute, the real driving force in the analysis is an un consummated desire for bright-line rules and a belief that the market will solve these problems by itself. The court also suggests that “[i]f this is not what Congress intended or is not what they would intend now, it is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law.” Note the assumption that “the record industry” is the most reliable guide to Congress’s intentions or that it is the only entity affected by such a rule. This is truly the image of copyright law as a contract among affected industries. Of course, digital artists such as The Legendary K.O. hardly fit within such a model.

Under the rule in Bridgeport—“Get a license or do not sample”—Mr. Randle and Mr. Nickerson appear to be breaking the law. They did not get a license and they most definitely did sample. What about fair use?

Under fair use, copyright allows a very specific (and possibly lengthy) use of another’s material when the purpose is parody of that prior work itself. The Supreme Court gave parody a unique status in the Acuff-Rose case. The (extremely profane) rap group 2 Live Crew had asked for permission to produce a version of Roy Orbison’s “Pretty Woman.” But where Orbison sang about the pretty woman walking down the street whom he would like to meet, 2 Live Crew wrote about a “big hairy woman” (“with hair that ain’t legit, ’cause you look like Cousin It”). They sang about a “bald headed” woman with a “teeny weeny afro.” They sang about group sex with both women. Finally, they told a
“two timin’ woman,” “now I know the baby ain’t mine.” Justice Souter showed the characteristic sangfroid of a Supreme Court justice faced with raunchy rap music.

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author’s choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.24 [emphasis added]

Truly, the law can confront and master all cultural forms. The heart of parody as the Supreme Court described it is that one is taking aim at the original. Because 2 Live Crew could be seen as directing their song at Orbison’s original, rather than using Orbison’s song to make some other political or social point, the court was willing to give it the favorable consideration that parody receives as a fair use.

Does “George Bush Doesn’t Care About Black People” fit that model? The Legendary K.O. were not “taking aim” at “Gold Digger.” True, they quoted West’s actual words from the television broadcast (also copyrighted). They even used them as their title. But they were not taking aim at his song. (Ironically, Kanye West has a better claim that he was taking aim at Ray Charles’s picture of womanhood, in just the way described in the 2 Live Crew case.) Rather, The Legendary K.O. were using the sample of the song as the backing to an entirely different rap that expressed, in familiar and popular musical form, a more expansive version of his condemnation of both press and president. That does not end the inquiry. Parody is not the only form of protected criticism or commentary. But it makes it much harder for them to succeed, particularly in light of the hostility toward sampling betrayed by both Grand Upright and Bridgeport.

The videos made by The Black Lantern and Franklin Lopez present an even more complex set of questions. On top of the music copyright issues, we also have fair use claims for the extensive news footage and footage of Mr. Foxx. The Black Lantern also used some fragments of a popular video by JibJab, which had a cartoon Bush and Kerry singing dueling parodied versions of Woody Guthrie’s “This Land.” When JibJab’s video first came out, the
Guthrie estate claimed copyright infringement over the song. Assisted by a number of public interest legal groups, JibJab claimed fair use. (It eventually came out that the copyright over the song was no longer valid.) What did JibJab do when The Black Lantern sampled them in their turn? In a move that both wins the prize for hypocrisy and serves to sum up the intersection of law and culture I have been describing, they sent him a cease and desist letter. The video was taken down for a week and he was eventually forced to remove the segment of their video from his work. Fair use for me, but not for thee.

CONCLUSION

The Legendary K.O. samples Kanye West, who uses a fragment from Ray Charles, who may have taken material from Will Lamartine Thompson or, more likely, from Clara Ward (who herself borrowed from a gospel standard). The chain of borrowing I describe here has one end in the hymns and spirituals of the early 1900s and the other in the twenty-first century’s chaotic stew of digital sampling, remix, and mashup. Along the way, we have the synthesis of old and the invention of new musical genres—often against the wishes of those whose work is serving as the raw material. One way of viewing this story is that each of these musicians (except for some imaginary original artist, the musical source of the Nile) is a plagiarist and a pirate. If they are licensing their material or getting it from the public domain, then they may not be lawbreakers but they are still unoriginal slavish imitators. If one’s image of creativity is that of the romantic, iconoclastic creator who invents the world anew with each creation, those conclusions seem entirely appropriate. The borrowing here is rampant. Far from building everything anew, these musicians seem quite deliberately to base their work on fragments taken from others.

It is important to remember that copyright does not subscribe completely to the idea of romantic creation where music is concerned. As I pointed out earlier, musical genres develop out of other genres: soul from gospel and rhythm and blues; gospel from spirituals; rhythm and blues from jazz, jump music, and Delta blues; and so on. When it comes to genres, we can play the game of musicological “six degrees of separation” all day long. Copyright is supposed to leave “holes” in its coverage so that the genre is not covered, only the specific form of creativity within the genre. I mentioned before the need to keep the lines of genre and form open, to keep them free from private property rights in order to allow musicians to develop the form by using them as common property, the “highways” of musical progress. So, for example, the
twelve-bar blues uses the first, fourth, and fifth chords in a scale. That sequence cannot be owned, unless blues is to become impossible or illegal. Bebop is characterized by copious use of the flattened fifth—a sound which was jarring to audiences when it was first introduced and which marked the break with the more accessible jazz of swing and the big bands. The flattened fifth is not owned. These characteristic genre-creating sequences or sounds are supposed to be left in the public domain, though increasingly some scholars—including me—are coming to believe that we have managed to make the copyright holder’s control so complete and so granular as to close those common areas and impede the development of future musical forms. The Bridgeport court might extend its logic and imagine that the entire musical commons could be licensed, of course. The presence of other chord sequences would keep the price down! But up to now, we have not gone that far. In theory at least, copyright is not supposed to stop the next Ray Charles, the person who wants to fuse two older forms of music to create a third.

Yet the chain of borrowing that links The Legendary K.O., Kanye West, Ray Charles, and the Bailey Gospel Singers is of a different kind. This borrowing involves taking chunks of prior musicians’ melodies, their words, their lyrical patterns. This is not just copying the genre. It is copying the lines of the song within the genre. This is the kind of stuff copyright is supposed to regulate even when it is working well. And yet, listening to the sequence, it is hard to deny that at each stage something artistic and innovative, something remarkable, has been created. In fact, the story of this song is the striking ability of each set of artists to impose their own sound, temperament, spirituality, humor, vision of women, or, in the case of The Legendary K.O., their intense and profane political anger, onto the musical phrases they have in common.

The postmodern conclusion here is “there is nothing new under the sun”—that all creation is re-creation, that there is no such thing as originality, merely endless imitation. If this is meant to be a comment about how things get created, at least in music, I think there is some truth to it. But if it is a claim about aesthetic worth, a denial that there are more and less creative individuals in the arts, I find it as facile and unconvincing as its romantic authorial opposite.

What is fascinating about the artists I describe here is that, while they do not fit neatly into either the aesthetic ideal of independent creation or the legal model for how creative expression gets made, they each have a remarkable, palpable creativity. Each leaves us with something new, even if formed partly from the fragments of the past. One could describe Ray Charles as the merest
plagiarist—making “search and replace” songs by substituting a woman for the deity in already-established hits. But if that is our conclusion, it merely proves that our theories of aesthetics are poorer than the creativity they seek to describe. So much the worse for the theories.

As Jefferson pointed out, the lines surrounding intellectual property are hard to draw—something the Bridgeport court got right. When we draw them, whether legally or as a matter of aesthetic morality, we do so partly with standard instances in mind. “Well, that can’t be wrong,” we think to ourselves, and reason by analogy accordingly. Yet the process of analogy fails us sometimes, because the types of borrowing change over time.

Ray Charles was frank about the way he copied the style and licks of Nat King Cole like an apprentice learning from a lawyer. But he and his estate assiduously guarded his copyrights against more modern borrowing they found to be inappropriate. Judge Duffy thunderously denounces Biz Markie. It is harder to imagine him leveling the same condemnation at Dizzy Gillespie, Charles Ives, Oscar Peterson, or, for that matter, Beethoven, though all of them made copious use of the works of others in their own. It is bizarre to imagine a Bridgeport-like rule being extended to composition copyrights and applied to music such as jazz. “Get a license or do not solo”? I think not. Does it make any more sense for sampling?

If there is a single reason I told the story of these songs it is this: to most of us, certainly to me, the idea that copyright encourages creativity and discourages the reuse of material created by others seems reasonable. Of course, I would want to apply the correctives implied by the Jefferson Warning—to make sure the rights were as short and as narrow as possible. But at least when it comes to copying chunks of expression still covered by copyright, our intuitions are to encourage people to create “their own work,” rather than to rely on remix. What does that mean in the world of music? As the story I have told here seems to illustrate, even musicians of unquestioned “originality,” even those who can make a claim to having created a new musical genre, sometimes did so by a process rather more like collage than creation out of nothing, taking chunks of existing work that were proven to work well and setting them in a new context or frame.

Imagine Ray Charles trying to create “I Got a Woman” today. Both of his possible sources would be strongly and automatically protected by copyright. The industries in which those works were produced would be much more legalistic and infinitely more litigious. The owners of those copyrights could use them to stop him from “desecrating their work”—which is literally what
he is doing. We know Clara Ward objected to Charles’s other borrowings from gospel. I cannot imagine Will Lamartine Thompson or his worthy neighbors in East Liverpool looking kindly on the sweet “early morning loving” outside of wedlock described in “I Got a Woman,” still less the use of sacred music to glorify it. And copyright gives them the power to say no. Remember Macaulay’s description of how Richardson’s novels might have been censored by a moralistic heir? Even if the objections were not vetoes, but simple demands for payment, would we get “I Got a Woman” and “This Little Girl of Mine”? Given the extent of the borrowing that jump-started this particular genre-bridging effort, would we be likely to see the birth of soul music?

Congress assures us that the many increases in copyright protection have been in the name of encouraging creativity. The music industry says the same thing when its pettifogging clearance procedures and permission culture are criticized. But do we really think we are more likely to get a twenty-first-century Ray Charles, or a fusion of styles to create a new genre, in the world we have made? Do we really think that the formalist ignorance of Judge Duffy or the market optimism of the Bridgeport court, in which thick markets offer fungible sets of samples to be traded like commodities, are good guides for the future of music? Are we in fact killing musical creativity with the rules that are supposed to defend it?

An Internet optimist would tell us that is precisely the point. True, because of the errors described in the chapter on the Jefferson Warning, and the mistakes catalogued in the chapters on the Internet Threat and the Farmers’ Tale, we have dramatically expanded the scope, length, and power of the rights that are supposed to shape our creative culture. But technology cures all. Look at The Legendary K.O., The Black Lantern, or Franklin Lopez. They are all probably breaking the law as it is currently interpreted by the courts. But their work can be created for pennies and distributed to millions. The technology allows people to circumvent the law. Admittedly, some of the copyright holders will police their rights assiduously—think of JibJab’s newfound dislike of fair use and their power to alter The Black Lantern’s video. But others either cannot or will not. Kanye West’s representatives in particular are unlikely to be stupid enough to sue The Legendary K.O. in the first place. Internet distribution becomes a demimonde in which the rules of the rest of the society either cannot or will not be enforced. Art gets its breathing room, not from legal exceptions, but from technological enforcement difficulties. Finally, as more and more people can create and distribute digital culture, they are less likely to understand, believe in, or accept rules that are strongly at variance with their aesthetic and moral assumptions.
There is a lot to these points. The technology does transform the conditions of creativity, and sometimes it runs right over the law in the process. Thousands, even millions, can be reached outside of conventional distribution channels with work that is technically illegal. And attitudes toward creative propriety do not track legal rules. When I wrote to Mr. Randle and Mr. Nickerson, I found that they realized Mr. West probably had a legal right to get their work taken down, but they felt he would not use it, and they had a very commonsensical conception of what they ought to be allowed to do. They were not making any money from this. They were making a political point, drawing attention to a political and human problem. That made it okay. They would have liked more formal permission so that they could actually distribute CDs through conventional for-profit channels, perhaps with some portion of the proceeds going to disaster relief, but they understood they were unlikely to get it.

Despite all this, I am uncomfortable with the argument “do not worry, technology will allow us to evade the rules where they are stupid.” A system that can only function well through repeated lawbreaking is an unstable and dangerous one. It breeds a lack of respect for the law in those who should be its greatest supporters and beneficiaries. It blurs civil disobedience and plain old lawbreaking. Sitting in on the segregated lunch counter and being willing to face the consequences is very different from parking in the disabled space and hoping you can get away with it. It also blurs our judgment of conduct. Whatever one thinks of them, The Legendary K.O. are doing something very different than a college student who just does not want to pay for music and downloads thousands of tracks for free from file sharing networks.

The problem is not simply one of blurring. Technology-based “freedoms” are not reliable (though legal ones, too, may fail). In a pinch, the technology may not save you, as thousands of those same downloaders have found out when sued by the RIAA and forced to pay thousands of dollars for an activity they thought to be private and anonymous. The Internet “solution” also leaves certain types of artistic creation dependent on the vagaries of the current technology, which may well change, eliminating some of the zone of freedom we currently rely on. But more worrisome is the fact that this “solution” actually confines certain types of art to the world of the Internet.

The video of “George Bush Doesn’t Care About Black People” could be seen by many, but only if they were wired to the right technological and social network. (After all, someone has to tell you to watch.) It was a searing intervention in the national debate on Katrina. But it appeared on no television
Like most of the mashups created online, the fact that the rights could never be cleared keeps it off mass media. Copyright acts as the barbed wire around mass media outlets. That is a shame, I think. Not because that video is so good—you may love it or hate it. But because this kind of artwork has something important to contribute to our national culture. Imagine a world in which Ray Charles could create “I Got a Woman,” but could only circulate it to a narrow group of the file-sharing digerati because of a flagrant violation of Clara Ward’s copyright. Do we still get soul? The blues? Jazz? Or do we just get a precious and insular digital subculture, whose cultural experiments never reach the mainstream?

Throughout his life, Charles described an intimate relationship with his audience, with the public. He described their tastes as a check, as a corrective; he thought they would actually be “ahead” of the artists. He wanted to make songs that would be listened to by tens of millions of people. And he wanted to make art and lots of money. I am all for the person who wants to create as an “amateur-professional” and distribute outside the chains of commerce. I have worked with organizations that make it easier to do this. But I also believe in the power and creativity of commercial culture and political speech carried on mass media. Ironically, our current copyright system serves it poorly.

What is the solution to all of this? The music business runs on compulsory licenses, a legally granted ability to use music in certain ways without permission, though with a fee. The system seems to function pretty well. One solution is to extend that system to the world of mashups and derivative works. If you merely copy the whole of my work and circulate it on file sharing networks or on CDs, we apply the current rules and penalties. If, on the other hand, you make a “derivative” work, mixing your work with mine, then there are two alternatives. If you stay in the world of non-profit exchange, you get a heightened presumption in favor of fair use (perhaps administered through a quicker and cheaper system of arbitration). If you move into the for-profit world, then you must pay a flat licensing fee or percentage of profits to the copyright holder.

A second solution would be to curtail the hypertrophy of protectionism that made all this happen in the first place. The copyright term could be shortened or we could require renewal every twenty-eight years. (There are international treaties that currently forbid the latter alternative.) We could cut back on excesses like the *Bridgeport* decision, create incentives to make the music industry less legalistically insistent on policing the most atomic level of
creation. We could exempt samples shorter than five seconds from copyright liability, clarify the boundaries of fair use, and extend it beyond parody to other genre-smashing forms such as satire and collage.

There are enormous obstacles to all these proposals. In particular, while artists fare very poorly under the current clearance culture—paying but not receiving the benefits of payments—the middlemen who profit from transaction costs are not keen on abolishing them. Certainly if, as the Bridgeport court assumed, the recording industry is the party responsible for fine-tuning copyright law, we are hardly likely to see any reforms that threaten current modes of doing business. Yet there is a ray of hope. It is getting harder and harder to pretend that the rules ostensibly designed to encourage creativity are actually working. At the same time, more and more people are creating and distributing cultural objects—becoming “subjects” of intellectual property law in the process, often to their dismay and irritation. It is in that conjunction—a far cry from the industry contract envisioned by the Bridgeport court—that hope for the future of copyright law’s treatment of culture might lie.